

Scotland's Future: from the Referendum to Independence and a Written Constitution

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Foreword by the Deputy First Minister



The Scottish Government has an ambitious vision of the kind of nation Scotland should be - a thriving and successful European country, reflecting Scottish values of fairness and opportunity, and promoting prosperity and social cohesion. A Scotland with a new place in the world as an independent nation, participating fully in Europe and the community of nations, on the basis of equality, responsibility and friendship.

The Government is clear that this vision must be realised to allow our ancient nation to fulfil its potential. In the autumn of 2014 the people of Scotland will have the opportunity to gain the powers that independent nations throughout the world take for granted: powers to create jobs, encourage sustainable economic growth, secure social justice, tackle inequality and promote fairness.

This paper shows how an independent Scotland can seize this opportunity by putting in place a modern written constitution that embodies the values of the nation, secures the rights of citizens, provides a clear distinction between the state and the government of the day, and guarantees a relationship of respect and trust between the institutions of the nation and its people.

In developing a new written constitution, Scotland will be able to learn from the innovative and participative approaches of other countries. The process of creating a written constitution in Scotland should be energising and include parties from across the political spectrum and, even more significantly, wider society. Most importantly however, the process should ensure that the sovereign people of Scotland can be centrally involved in designing and determining a written constitution as the blueprint for our country's future.

A 'yes' vote for independence in 2014 is a vote for the transfer of sovereignty from Westminster to the people of Scotland. While some legal and practical changes will be needed to make sure the Parliament can exercise its new authority, wider constitutional and policy changes will be the responsibility of the first elected Parliament and Government of an independent Scotland, following the election in May 2016.

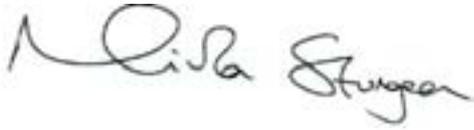
The Government's intention is that a constitutional platform will be put in place for Scotland becoming independent in March 2016, immediately prior to the 2016 election campaign. That will ensure that the new Parliament and Government elected in May 2016 have the full range of powers they need to get on with the work of building a better and more socially just Scotland. This paper describes the essential features of that platform - principally the completion of the powers of the Scottish Parliament, the consolidation of existing rights of citizens, and continuity in relation to key issues such as the monarchy and Scots law. The constitutional platform will be put in place following negotiations between the Scottish and UK Governments. The historic Edinburgh Agreement between the governments in October 2012, along with the recent passage by the Scottish and UK Parliaments of a section 30 order clarifying the Scottish Parliament's powers to hold the referendum, are a template for a post-referendum transfer of powers from Westminster to Scotland. In the spirit of the Edinburgh Agreement, negotiations on the completion of the Scottish Parliament's powers after a 'yes' vote will be concluded constructively and co-operatively in the best interests of the people of Scotland and of the rest of the United Kingdom.

This paper is a first contribution to implementing the recommendation of the Electoral Commission that the two governments clarify the process that will follow the referendum. We agree with the Commission's view that the Scottish and UK Governments should agree a joint position, and have proposed to the UK Government that we now engage in discussions on the process of the transition to independence in advance of the vote.

This initial paper will be followed in the coming months by papers outlining how responsibility in key reserved areas, for example welfare and pensions, will transfer to the Scottish Parliament.

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This paper will also support discussion with organisations across Scottish society, academic experts and, most importantly, the Scottish people. The Government will continue to listen and discuss these important issues through open debate in advance of publication of the White Paper on independence in the autumn of this year.

A handwritten signature in black ink, reading "Nicola Sturgeon". The signature is written in a cursive, flowing style.

Nicola Sturgeon MSP

Deputy First Minister of Scotland

1. A Written Constitution for Scotland

Summary

Scotland should have a written constitution which reflects the values of the people of Scotland. The preparation of a written constitution should commence after independence under the auspices of the independent Scottish Parliament. It should be for the newly independent Parliament to devise the process and timetable for the drafting of the constitution. The Government's view is that the process of shaping the new constitution should be participative and command the support of the whole of Scotland. When the process of determining the constitution gets underway, the Scottish Government will be just one of many voices. However, the Scottish Government will propose provisions that encapsulate the collective expression of values that we hold dear in Scotland, as well as protect individual rights. These will include provisions to strengthen individual rights in areas such as homelessness and education; prevent weapons of mass destruction being based in Scotland; and prevent the government from engaging in illegal wars.

Independence for Scotland

1.1 An independent Scotland will ensure that decisions about Scotland are taken by the people who care most about it – those who live and work here. The Scottish Parliament is already responsible for important issues such as the health service, education and the protection of the environment. Independence will complete the powers of the Parliament, making it fully responsible for the economy, welfare and international relations.

1.2 The Scottish Government advocates independence not as an end in itself, but as a means of creating a better Scotland, now and for future generations. An independent Scottish Government will be better able to sustain a stable economy that works for the many not the few; create wealth to support strong public services; manage the country's vast resources more responsibly; and ensure that all of the people of Scotland have the chance to reach their full potential.

1.3 Independence is the natural state of affairs for countries across the world. Following a 'yes' vote in the referendum, Scotland will make its own transition to independence, becoming an independent state in the international community and having, from independence day onwards, the powers we need to build the kind of country we want to

be, while continuing the strong social union which will always bind Scotland to the rest of the United Kingdom.

A written constitution

1.4 The Scottish Government's proposal is that an independent Scotland should have a written constitution which expresses our values, embeds the rights of its citizens and sets out clearly how institutions of state interact with each other and serve the people. This will contrast with the UK's largely unwritten constitution in which the Westminster Parliament can do anything except bind its successors. The Westminster system has sometimes led to major decisions being taken by the government without the possibility of challenge (for example, the decision to go to war in Iraq in 2003). There has long been a distinct Scottish constitutional tradition, affirmed by the Scottish Parliament as recently as January 2012 - the sovereignty of the Scottish people and their right to choose the form of government best suited to their needs.

1.5 The creation of Scotland's written constitution should engage all the people of Scotland in the process of nation-building and allow them a say in defining how our country will work. Once in place, a written constitution will be accessible and comprehensible - improving transparency about the workings of the state, enabling the creation of a good society and a fully functioning democracy, embodying the values of the people of Scotland and giving citizens rights that cannot be taken away by a decision of Parliament.

"All honor to Jefferson - to the man who, in the concrete pressure of a struggle for national independence by a single people, had the coolness, forecast, and capacity to introduce into a merely revolutionary document, an abstract truth, applicable to all men and all times, and so to embalm it there, that to-day, and in all coming days, it shall be a rebuke and a stumbling-block to the very harbingers of re-appearing tyranny and oppression." - Abraham Lincoln¹

1.6 A written constitution should be prepared in a spirit of national unity. The right time for a written constitution to be drafted is therefore after independence, not before. At that point the people of Scotland, whatever their views in the referendum, will be able to engage fully in the process of planning for our country's future.

¹ Letter to Henry L. Pierce and others, Springfield, Illinois, April 6, 1859 (www.nps.gov)

1.7 The process by which Scotland adopts a written constitution is almost as important as its content. The process of agreeing and enacting the constitution should ensure that it reflects the fundamental constitutional truth - that the people, rather than politicians or state institutions, are the sovereign authority in Scotland. The Scottish Government proposes that a newly elected independent Scottish Parliament should convene a constitutional convention to draft the written constitution. In taking this path, Scotland will be following in the footsteps of many other countries, not least the United States of America, whose constitutional convention in 1787 drafted the Constitution of the United States.

The Constitutional Convention of the United States of America

- 55 delegates from the several states met over four months in 1787 in Philadelphia to frame a Constitution for a federal republic.
- General George Washington was unanimously elected president of the convention.
- Draft constitution signed on 17 September 1787.
- The preamble to the constitution states: "We the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

1.8 As the post-independence Scottish constitutional convention will convene under the auspices of the Scottish Parliament, the remit and membership of the convention should be a matter for the Parliament to determine. The Parliament should also determine the process by which the constitution produced by the convention will become the constitution of Scotland.

1.9 The Scottish Government believes a constitutional convention should ensure a participative and inclusive process where the people of Scotland, as well as politicians, civic society organisations, business interests, trade unions and others, will have a direct role in shaping the constitution. We therefore propose that international best practice and the practical experience of other countries and territories should be considered and taken

into account in advance of the determination of the process for the constitutional convention. In the last decade, citizen-led assemblies and constitutional conventions have been convened in British Columbia (2004), the Netherlands (2006), Ontario (2007) and Iceland (2010). In 2012, Ireland announced it will hold a citizen-led constitutional convention to review various constitutional issues. The Irish convention met for the first time in December 2012.

The Icelandic Constitutional Convention

- The purpose was to review the constitution following banking collapse.
- A National Forum (deliberative and participatory one-day forum of 950 Icelandic citizens) was held in November 2010.
- An Act of Icelandic Parliament was used to convene Icelandic Constitutional Assembly in 2010.
- 25 non-politician delegates were directly elected in 2010.
- The assembly spent almost 4 months drafting constitution (April to July 2011).
- A draft constitution was available online in April 2011 and citizens could comment on a social media site.
- The assembly posted status updates on social media sites.
- A final draft presented to Parliament in July 2011.
- A referendum on draft proposals held in October 2012 (which was approved).
- The constitution is expected to be passed by the Icelandic Parliament in the spring of 2013.

1.10 The Scottish Government will be just one of many voices which will contribute to the debate and help to shape the content of Scotland's written constitution. However, there are certain provisions that we believe should be included. In particular:

- Everyone in Scotland should be entitled to equality of opportunity and to live free of discrimination and prejudice. Everyone should be entitled to public services and to a standard of living that, as a minimum, secures dignity and self-respect and provides the opportunity for them to realise their full potential both as individuals and as members of wider society. The Scottish Parliament has promoted equality and given rights to vulnerable citizens (for example, by putting in place the most progressive homelessness legislation in Europe). Equally, the Scottish Government has taken steps to protect the principles of free education and health care. The

constitution should therefore provide a collective expression of the positive values that the people share and a constitutional convention should consider how to further embed equality and human rights within the constitution and the extent to which the people of Scotland should have constitutional rights in relation to issues such as welfare, pensions, health care and education.

- Scotland's natural resources are vital to the future success of an independent Scotland. We believe a constitutional convention should examine how principles on climate change, the environment and the sustainable use of Scotland's natural resources should be constitutionally protected to embed Scotland's commitment to sustainable development and responsible and sustained economic growth.
- We believe that nuclear weapons have no place in Scotland. We will therefore advocate that a written constitution should include a constitutional ban on nuclear weapons being based in Scotland.
- Many countries around the world place constitutional controls on the use of military power. We believe that a constitutional convention should examine the war powers of an independent Scottish Government and ensure a role for an independent Scottish Parliament in monitoring the use of those powers.

"The goal of a 'free Scotland' in the favoured sense must be taken as prescribing the freedom and equality of all citizens regardless of creed, class or ethnic origins, and the free participation of them all as equals in the process of self-government. In a word, democracy. It must also, however be understood as requiring what our forebears such as George Buchanan and David Hume used to call a 'free government', that is a government which is not only freely chosen by the people but which conducts the business of government with respect to the freedom under law of each citizen and of all of them in such associations as they pursue. In a word, constitutionalism." – Professor Sir Neil MacCormick

2. A Constitutional Platform for Independence

Summary

As indicated in the previous section, the process of developing a written constitution will be a matter for the newly independent Scottish Parliament. However, a strong constitutional platform will require to be in place from the moment Scotland becomes independent until the adoption of a written constitution. The Scottish Government's intention is that after a 'yes' vote in 2014, arrangements will be made, in the spirit of the Edinburgh Agreement, for the transfer of sovereignty to the people of Scotland in time for the 2016 Scottish Parliamentary elections and for a constitutional platform to be put in place that will provide the basis on which our independent Parliament and Government will operate. That platform would comprise the legal, financial and other arrangements necessary to ensure that Scotland is able to function effectively and its Government and Parliament are able to work on behalf of the people of Scotland across the full range of national issues. Under the Edinburgh Agreement the referendum will be made in Scotland. That principle should apply equally to Scotland's constitutional platform. Accordingly, during the transition, the Scottish Parliament should have the leading role in passing legislation to give effect to independence and bring into force the platform that will deliver the secure basis for the government of an independent Scotland, elected in 2016, to take forward its priorities from day one.

A smooth and co-operative transition

2.1 Historical examples such as the reunification of Germany in 1990 and independence for the Czech Republic and Slovakia in 1993 show that after a democratically agreed and accepted expression of political will, countries can make significant constitutional changes happen in months rather than years. Of new states which have become UN members since 1945, 30 became independent following a referendum on independent statehood with the average length of time between the referendum and independence day being approximately 15 months.

Transition to independence for Czech Republic and Slovakia

- On 5-6 June 1992 general elections were held across Czechoslovakia.
- The Slovakian National Council passed a declaration of sovereignty on 17 July 1992.
- Czech/Slovak talks to achieve the legitimacy of ending the Federation took place in July 1992. Agreement was also reached to abolish some bodies, split others and transform others into joint-stock companies.
- Further talks were held in August 1992 which agreed an independence day of 1 January 1993 and set a timetable for a controlled transition to two separate states.
- On 1 September 1992, the Slovakian National Council adopted a constitution for Slovakia (some clauses coming into force on 1 October 1992 and others only on independence).
- Independence for both states took place on 1 January 1993.
- Treaties between Czech and Slovak republics were agreed both before and after independence.

2.2 In the Edinburgh Agreement, the Scottish and UK Governments have committed to work together constructively in light of the outcome of the referendum in the best interests of the people of Scotland and the rest of the United Kingdom. Following a vote for independence in 2014, agreements will be reached between the Scottish and UK Governments, in the spirit of the Agreement, setting the parameters for Scotland's transition to independence. These agreements would establish:

- the timetable towards independence day – which the Scottish Government would intend to be in March 2016, just before the start of the 2016 election campaign;
- the key requirements and characteristics of the constitutional platform for an independent Scotland that will require to be in place for the new Parliament and Government elected in 2016, to fulfil their functions; and
- the process and timetable for the negotiation and conclusion of the agreements which will form the final independence settlement. Issues to be resolved would include the division of financial and other assets and liabilities (including oil revenues and assignation of other tax revenues, military bases and overseas assets), the transfer to the Scottish Parliament and Government of political authority over institutions previously controlled at Westminster, the ongoing co-operative arrangements that the peoples of Scotland, England, Wales and Northern Ireland would share, and the timetable for the speediest safe removal of weapons of mass

destruction from Scotland. Of course, some matters may continue to be discussed after independence (as was the case, for example, with the Czech Republic and Slovakia).

2.3 In addition to discussions with the UK, negotiations will be required in advance of independence with the European Union to agree the terms of an independent Scotland's continuing membership. The Scottish Government believes that Scotland should continue to be a member of the EU. Scotland benefits from EU membership and the EU benefits from having Scotland as a member. An independent Scotland with its own membership of the EU would work closely and constructively with partners across these islands and across the EU to advance our shared interests.

2.4 Scotland would continue to be part of the UK – and, therefore, an integral part of the EU – during these negotiations. Scotland is a nation that benefits from being part of the EU, and has extensive assets - fishing, oil and gas and renewables - as well as being an export market for other member states and having an education system used by over 16,000 EU students. The economic, social and political interests of the EU will be best served by Scotland remaining in continuous membership. The UK and Scottish Governments, along with the EU institutions and member states, will therefore have a shared interest in working together to conclude these negotiations to transfer Scotland's EU membership from membership as part of the UK to membership as an independent member state.

Timeline of German reunification and East German entry to EU

- 9 November 1989 - Berlin wall falls.
- January 1990 - EEC Commission President Jacques Delors announces route to East German membership under unification.
- 18 May 1990 - East and West German governments sign Treaty on the Creation of an Economic, Currency and Social Union.
- 1 July 1990 - East Germany adopts large parts of the economic and legal order of the Federal Republic, including 80% of EEC laws.
- 31 August 1990 – West and East Germany sign Treaty on the Establishment of the Unity of Germany.
- 3 October 1990 – German reunification comes into effect and former East Germany becomes part of EEC.

2.5 In addition to negotiations with the UK and EU, pre-independence negotiations will be pursued with other international organisations that Scotland is already a member of as part of the UK. This will ensure that Scotland will become an independent member of these organisations as quickly as possible, in accordance with the particular rules of each organisation. Scotland will be a good global citizen, representing its interests and reflecting the values of our people within the forums of the world.

Preparations for the transition

2.6 Following an expression of popular will in the referendum, it will be right that preparations for independence move ahead swiftly. It is therefore in the interests of the peoples of Scotland and the rest of the UK for the Scottish and UK Governments to prepare for the outcome of the referendum. Both governments have a duty, in advance of the referendum, to engage in preparatory discussions to exchange the factual information that will be required to underpin the post-referendum negotiations and develop an understanding of the issues that will require to be agreed after a 'yes' vote and the approaches that will be taken to concluding those agreements. The Electoral Commission has recommended that the Scottish and UK Governments should engage in such discussions to agree the process that will follow a yes vote. The Scottish Government agrees and looks to the UK Government to work with it to that end.

The Transition

2.7 Following a 'yes' vote in the referendum, the Scottish Government will invite representatives from the other parties in the Scottish Parliament, together with representatives of Scottish civic society, to join the Government in negotiating the independence settlement and in ensuring the continuity of those public services which are in reserved areas.

2.8 For centuries, it has been acknowledged that the people of Scotland have the sovereign right to determine the form of government best suited to their needs. Independence day will mark the point at which the full exercise of that sovereignty is restored to the Scottish people. It is the intention of the Scottish Government that, following a 'yes' vote, independence for Scotland would immediately precede the Scottish

Parliamentary elections in 2016. The newly elected Parliament will then be the Parliament of an independent Scotland.

2.9 The transition to independence in advance of the 2016 election will enable the independent Scottish Government elected in 2016 to move ahead with building a more prosperous and socially just Scotland. It will also demonstrate to Scotland's overseas partners, to business and to other stakeholders that the process to achieve political independence will be an orderly and collaborative one, and reinforce the reputation of Scotland and rest of the UK as places where democratic choices are respected and decisive and where constitutional change can be carried forward in a stable and orderly way.

A constitutional platform for independence made in Scotland

2.10 As set out in chapter 1, the process and timetable for establishing a written constitution should be a matter for the new independent Scottish Parliament elected in 2016. However, until that constitution is drafted and comes into force, arrangements will be in place from independence day to consolidate the existing rights of citizens and give the Scottish Parliament and Government the legal, financial and other powers necessary to govern Scotland effectively across the full range of national issues. These arrangements will form Scotland's constitutional platform.

2.11 Scotland already has many of the institutions that a modern independent state needs: a modern parliament elected by proportional representation, a government, civil service, independent judiciary and legal system. The constitutional platform will give Scotland the remaining institutions it needs to function as an independent country.

2.12 Since devolution, the democratic voice of Scotland and locus of constitutional change for Scotland has been the Scottish Parliament. The Sewel Convention and the forthcoming Referendum Bill are representations of the modern constitutional reality that constitutional change is no longer designed on Scotland's behalf by Westminster, but made by the sovereign people of Scotland themselves through their democratically elected Scottish Government and Scottish Parliament. Therefore, just as with the Edinburgh Agreement, the Scottish people will expect the Scottish Government and Parliament to

have the leading role in legislating for the creation of a constitutional platform for an independent Scotland.

2.13 While the leading part of the constitutional platform should be made in Scotland, part of the platform will involve Westminster passing legislation, for example to acknowledge the end of its power to legislate for Scotland. Westminster has taken equivalent steps before, for example, under the Malta Independence Act 1964 and the 1931 Statute of Westminster.

Constitutional Platform: Content

2.14 The constitutional platform will enable the transfer of sovereignty from Westminster to Scotland. In particular, it will:

- give the Scottish Parliament powers to declare independent statehood for Scotland in the name of the sovereign people of Scotland;
- remove the central effects of the 1707 Treaty of Union and acknowledge the end of the power of Westminster to make laws for Scotland;
- provide in law for the sovereign right of the Scottish people to determine the form of government best suited to their needs;
- extend the powers of the Scottish Parliament and Scottish Government into all policy areas whilst retaining the separation of powers between executive and legislature;
- provide for the transition of Scotland's status in the EU from membership as part of the UK to independent membership;
- consolidate the protection of human rights in Scotland so that all ECHR human rights are protected as they are for devolved matters under the Scotland Act 1998, bringing Scotland fully into the European mainstream of human rights protection;
- provide for the continuity of the monarchy in Scotland;
- implement agreements between the Scottish and UK Governments;
- provide for Scots law, including laws in all currently reserved areas, to continue after independence unless specifically amended;
- establish a Scottish Treasury function to enable the Scottish Government to control and manage Scotland's public finances. This would build on the work already underway to establish Revenue Scotland. A Scottish Treasury function would also ensure that an appropriate macroeconomic framework for an independent Scotland

is in place and ready to operate effectively from independence day, in line with advice from Scotland's Fiscal Commission Working Group;

- define entitlement to Scottish citizenship on independence day and subsequently;
- enable Scotland to fully participate in the international community and take its place on the world stage and provide for the continuing application to Scotland of international arrangements with other countries and international organisations;
- enable Scotland to join international organisations and give the Scottish Parliament powers to ratify international treaties;
- provide for the Supreme Court of Scotland; and
- ensure that the Scotland Act 1998 is updated to apply in the context of independence so that the Scottish Government and Parliament adapt smoothly to independence.

After independence

2.15 After Scotland becomes independent, the first elections to an independent Scottish Parliament will be held in May 2016. The Scottish Government will preserve continuity between independence day and the election, as it does now during Scottish Parliamentary elections. It will be for the Scottish Government and Parliament elected in 2016 to decide how to take an independent Scotland forward. While many things will initially be unaffected on independence, over time changes will be made by Parliament in order to serve the citizens of an independent Scotland in the best way possible.

2.16 When the Scottish Parliament was reconvened in 1999, Scotland embarked on an historic journey. That journey will continue after a 'yes' vote in 2014. Independence will complete the powers of the Scottish Parliament and equip it to build a thriving, self-confident, democratic independent European country in the years to follow. Independence will allow the people of Scotland to elect a government and a Parliament that reflects their views and values, and allow our government and Parliament to make the best decisions for Scotland. Scotland's journey is not an event, but a process that continues, and independence will enable the sovereign people of Scotland to choose their future for themselves.



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