

ROUTES AND OBSTACLES TO A SECOND SCOTTISH INDEPENDENCE REFERENDUM

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Legal Briefings - By **Paul Butcher**

At the time, the 2014 referendum was seen as a “once-in-a-generation opportunity” to settle the question: “*Should Scotland be an independent country*”. The No-vote won by 55% to 45%. However, following the results of the Scottish Parliament election on 6 May, the debate around a second referendum is firmly back on the political agenda.

This briefing looks at recent developments and some of the legal and constitutional issues in play to assess the possible routes and obstacles to a second Scottish independence referendum. In doing so, it reviews the Scottish National Party (**SNP**) roadmap which they proposed to follow if a pro-independence majority was secured at the election. In parallel, we have published a series of briefings on the implications of Scottish independence for business, which are available at our new [hub](#) here.

THE SCOTTISH NATIONAL PARTY’S ROADMAP TO A SECOND REFERENDUM

In 2016, shortly prior to the UK’s referendum on EU membership, the SNP manifesto claimed that “significant and material changes in circumstances that prevailed in 2014” would justify a second referendum and that “Scotland being taken out of the EU against our will” would constitute such change. However, notwithstanding the SNP’s continued dominance of Scottish electoral politics during the period since, opinion polls generally indicated a continued majority in Scotland against independence. During 2020 this changed. For the first time, polls showed a sustained majority in favour of independence throughout 2020. In 2021 so far, polls have been mixed and much tighter.

On 24 January 2021, the SNP Scottish Government released a [roadmap](#) titled “the road to a referendum that is beyond legal challenge”.

Winning a majority

The SNP roadmap depended, as its first hurdle, on gaining a majority of Members of the Scottish Parliament (**MSPs**) in favour of independence at the 2021 elections. While the SNP were one seat short of winning a majority on their own (with 64 out of 129 seats), with the pro-independence Scottish Greens' 8 seats the pro-independence majority hurdle is cleared.

Seeking a Section 30 order from the UK Government to allow a second referendum

On 28 March 2017, the day before the UK made its Article 50 notification of its intention to leave the EU, the SNP, with Scottish Green Party Support won a Scottish Parliament vote to formally request and negotiate a section 30 order with the UK Government that would allow a second referendum following approval from both Houses of the UK Parliament and the Scottish Parliament. However, this was rejected, albeit informally, by Prime Minister Theresa May stating “now is not the time”.

Given that a pro-independence majority is now in place, the roadmap's next step is for the Scottish Government to again formally request a section 30 order from the UK Government to allow a second referendum.

Section 30 orders and the first Scottish independence referendum

Section 29 of the Scotland Act 1998 provides that an Act of the Scottish Parliament is “not law so far as any provision of the Act is outside the legislative competence of the Parliament”. Amongst other things, any provision which “relates to” matters “reserved” to the UK Parliament, which includes “the Union of the Kingdoms of Scotland and England” is outside that competence. It has generally been understood, albeit not accepted by the SNP, that legislation for any referendum on Scottish independence would fall within this category. Aside from questions of statutory interpretation, other constitutional debates could become relevant including, ultimately, between concepts of popular sovereignty, parliamentary sovereignty and the nature of the Union.

Section 30 of the Scotland Act 1998 provides a mechanism to temporarily or permanently grant legislative powers to the Scottish Parliament. A section 30 order can be initiated either by the Scottish or UK Governments, but requires approval by the UK and Scottish parliaments before becoming law.

Scotland’s first independence referendum was able to be held on this basis. In 2012, following the SNP's outright majority at the 2011 Scottish Parliament election, the Scottish and UK Governments signed the [Edinburgh Agreement](#), which contained a draft section 30 order that allowed a single question referendum provided that it was held by the end of 2014. The UK and Scottish Parliaments subsequently approved the order and the legality of the referendum was settled. The Scottish Parliament was granted control over key aspects of the referendum including the date, question wording and applicable franchise.

Proceeding with a Scottish Independence Referendum Bill in any event

In contrast to the SNP's tacit acceptance of Theresa May's rebuttal of a second referendum back in 2017, the SNP's proposed roadmap makes clear that even if the UK Government refuses the section 30 notice request then, provided there is a majority of independence supporting MSPs, they would seek to pass a Scottish Independence Referendum Bill.

The Scottish Government published a draft [Scottish Independence Referendum Bill](#) on 22 March 2021, just before the election campaign started on the 25 March. The SNP's view is that the second independence referendum should be held in the "early part" of the Scottish Government's new term, albeit nonetheless "after the pandemic". This approach has been confirmed by Nicola Sturgeon, the SNP leader, following the election result.

The Scottish Parliament has already passed two bills, the Referendums (Scotland) Bill of 29 January 2020 and the Scottish Elections (Franchise & Representation) Bill of 1 April 2020, which set out the general rules for any referendum and franchise held in Scotland, including any second referendum held further to the proposed Scottish Independence Referendum Bill. The draft Bill proposes that the question remains the same as in the first referendum: "Should Scotland be an independent country?". The independent Electoral Commission will nevertheless re-review the intelligibility of the question if and when the draft Bill is formally tabled, as it did for the first referendum.

Nicola Sturgeon has accepted that a section 30 order would be required in order to put any independence referendum "beyond doubt or challenge" and the SNP's roadmap is described as a "road to a referendum that is beyond legal challenge". So, in the face of opposition from the UK Government, the SNP's plan is essentially to invite the UK Government again to enter into negotiations about making a section 30 order or else to challenge the validity of their Scottish Independence Referendum Bill without such an order and thereby settle the legality one way or the other .

Ultimately, assuming that the Scottish Government passed a version of their Scottish Independence Referendum Bill without having first secured a section 30 order, the UK Government could refer the question of whether the bill was within the Scottish Parliament's legislative competence to the UK's Supreme Court for a decision (under section 33 of the Scotland Act 1998).

OTHER POSSIBLE RESPONSES FROM THE UK GOVERNMENT

One alternative to simply refusing to agree a section 30 order would be for the UK Government to agree to negotiate a section 30 order, but only on the basis that certain conditions applied to the referendum. This is what happened in relation to the first referendum - with the main UK Government priority at the time thought to have been to secure the end of 2014 cut-off point for the referendum.

Examples of the types of condition that the UK Government might propose in combination or on their own include:

- that the referendum would contain a third option of greater devolution for Scotland or an overall new federal government settlement for the UK as a whole as might be proposed by the UK Government (for example, following a Royal Commission);
- that following any vote in favour of independence:
 - there would have to be a further (and final) referendum to decide between remaining in the UK and having independence based on the actual exit and future relationship deal negotiated between the Scottish and UK Governments;
 - pre-determined binding principles would apply to:
 - any exit and future relationship deal negotiated by the Scottish and UK Governments (for example, in relation to share of debts and assets, the approach to defence, currency and citizens' rights and agreeing a common travel area);
 - the process by which any exit and future relationship deal would have to be negotiated and ratified by the Scottish and UK Governments (for example, in relation to timing and sequencing and the role of the UK and Scottish

parliaments in scrutiny and ratification).

SO WHAT NEXT?

For the initial few steps at least, as discussed, we have on record the SNP's current proposed plans to hold a second independence referendum given they have secured a pro-independence majority. For the UK Government, we will have to wait to see how it proposes to respond and how matters then play out. Ultimately at least, politics is likely to play a greater role than the law.

[More on Scottish independence](#)

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



PAUL BUTCHER
DIRECTOR OF PUBLIC
POLICY, LONDON
+44 20 7466 2844
paul.butcher@hsf.com

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