Draft Scotland Act 1998
(Modification of Schedules 4 and 5 and Transfer of Functions to the Scottish Ministers etc.) Order 2015

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Draft Scotland Act 1998
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1. The Constitution Committee is appointed “to examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution”. As part of the second limb of this remit we are currently conducting pre-legislative scrutiny of the Command Paper Scotland in the United Kingdom: An enduring settlement, which contains as an Annex draft clauses that are intended to form the basis of a new Scotland Bill to be introduced to Parliament by a new government after the general election in May. As part of that scrutiny we wish to draw the attention of the House to a related statutory instrument: the Draft Scotland Act 1998 (Modification of Schedules 4 and 5 and Transfer of Functions to the Scottish Ministers etc.) Order 2015 (‘the Order’). The Order devolves to the Scottish Parliament the power to lower the voting age to 16 in both Scottish Parliament and Scottish local government elections.

Background

2. The Order, along with the Command Paper and accompanying draft clauses, is a response by the UK Government to the report of the Smith Commission inquiry, chaired by Lord Smith of Kelvin, into further powers for the Scottish Parliament. The Smith Commission was appointed following the referendum on independence held in Scotland in September 2014. On 18 September a majority of Scottish voters voted ‘No’ to the question: “Should Scotland be an independent country?”. Immediately before the vote, on 16 September, the UK leaders of the main unionist parties (Conservative, Labour and Liberal Democrat) issued ‘the Vow’: an undertaking that in the event of a majority ‘No’ vote they would produce agreed proposals on additional powers for the Scottish Parliament, setting out a short timeframe within which these powers would be agreed.

3. On 19 September, the Prime Minister announced that Lord Smith of Kelvin had agreed to oversee the process to take forward this commitment to further devolution for the Scottish Parliament. The five main parties in Scotland (Conservative, Greens, Labour, Liberal Democrats and the Scottish National

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Party) each appointed two members to a Commission chaired by Lord Smith of Kelvin. On 27 November the Smith Commission published its report detailing Heads of Agreement on further devolution of powers to the Scottish Parliament. Among these was the following: “The parties call on the UK Parliament to devolve the relevant powers in sufficient time to allow the Scottish Parliament to extend the franchise to 16 and 17 year olds for the 2016 Scottish Parliamentary elections, should the Scottish Parliament wish to do so.”


4 The Draft Scotland Act 1998 (Modification of Schedules 4 and 5 and Transfer of Functions to the Scottish Ministers etc.) Order 2015 is the UK Government’s vehicle for implementing that recommendation. It was laid before both Houses of Parliament on 21 January.

**The process**

5. This Committee, in its 2011 report *The Process of Constitutional Change*, recommended that the Government, before introducing proposals for significant constitutional change, should “consider the impact of the proposals upon the existing constitutional arrangements”. We also stressed the importance of effective parliamentary scrutiny.

*The impact on existing constitutional arrangements*

6. The Smith Commission’s remit was to address only the question of additional powers for the Scottish Parliament. Indeed, the Smith Commission noted in its report that one of the principles that guided its work was that its proposals should “not be conditional on the conclusion of other political negotiations elsewhere in the UK”. The Smith Commission gave no assessment, therefore, of the impact of its proposals on the rest of the United Kingdom.

7. Of more concern is the failure of the UK Government directly to address the implications of this proposal for the United Kingdom as a whole, either in the Command Paper responding to the Smith Commission’s proposals or in the draft explanatory memorandum for the Order.

8. The changes do not directly affect the franchise for UK general elections, European Parliamentary elections, or local government elections beyond Scotland, and therefore the Order has no immediate constitutional implications for the rest of the UK. However, it seems likely that the Scottish Parliament will legislate for a reduction in the voting age for all future Scottish Parliament and Scottish local government elections and this may lead to pressure for similar changes to the franchise in the other devolved territories.

9. The reduced voting age for the Scottish referendum has already been followed by provision in the Wales Act 2014 for the National Assembly for Wales.
Wales to reduce the voting age to 16 in any referendum held on tax-raising powers for the Assembly.\textsuperscript{7} This may in turn lead to pressure to extend the franchise similarly for UK parliamentary elections, European Parliament elections and other elections in England, Wales and Northern Ireland. Speaking to this Committee on 11 February 2015, the Secretary of State for Scotland, the Rt Hon. Alistair Carmichael MP, repeated his statement to the House of Commons that he thought it “unthinkable that franchise for the 2020 [general] election will not include 16 and 17-year-olds.”\textsuperscript{8}

10. This potentially piecemeal and incremental approach to changing the voting age stands in contrast to the process whereby the voting age was lowered from 21 to 18 in the late 1960s. On that occasion, legislation followed the reports of two Commissions, one into electoral law and the other into the age of majority,\textsuperscript{9} after which the Government opted to make the voting age the same as the age of majority. There is also a marked contrast with the recent process in the Republic of Ireland, where a Constitutional Convention discussed the issue in 2013 and a referendum is to be held on reducing the voting age to 16.\textsuperscript{10}

11. We also note that a voting age of 16 remains very uncommon around the world, and is not a change which any of the UK’s main European neighbours has adopted. Nor is it known to be UK Government policy that the voting age should be lowered.

12. **The House may wish to consider whether sufficient consideration has been given to the effect of this proposal on the United Kingdom constitution as a whole.**

*Parliamentary scrutiny*

13. Implementing this constitutional change by means of secondary legislation significantly curtails the ability of Parliament to scrutinise this proposal effectively. The UK Parliament had no means of contributing to the Smith Commission, from whose recommendations this proposal arises, and although the Order has been debated in the House of Commons\textsuperscript{11} and will be debated in the House of Lords, neither House is able to amend the Order.

14. This is not the first time that constitutional legislation has been enacted by secondary legislation. The power for the Scottish Parliament to extend the franchise to 16 and 17 year-olds for the Scottish independence referendum was granted by way of a section 30 Order under the Scotland Act 1998. In our report on that section 30 Order, we noted that “despite the constitutional significance of the draft section 30 Order, the procedure makes it impossible to ensure fully effective scrutiny”.\textsuperscript{12}

\textsuperscript{7} Wales Act 2014, section 13(2)
\textsuperscript{8} HC Deb, 2 Feb 2015, col 97
\textsuperscript{11} HC Deb, 2 Feb 2015, cols 82-98
\textsuperscript{12} House of Lords Constitution Committee, *The Agreement on a referendum on independence for Scotland* (7th Report, Session 2012–13, HL Paper 62), para 21
15. We repeat this concern now. The use of secondary legislation makes it impossible for Parliament to scrutinise this proposal effectively. This is not an appropriate way to proceed with significant constitutional change.

**Other areas of consideration**

16. In addition to our concerns about the process, we wish to draw three other issues to the attention of the House.

**Scope**

17. In addition to allowing an extension of the franchise for Scottish Parliament elections, the Order also allows for the Scottish Parliament to lower the voting age to 16 for Scottish local government elections in time for the May 2017 local elections. This goes beyond the Smith Commission’s proposal, which only dealt with elections to the Scottish Parliament.

18. Mr Carmichael explained in the House of Commons that the local government franchise was included in this Order to allow a change to be made in time for that poll and to avoid the “unnecessary complication” that would have resulted from having different franchises for Scottish Parliament and local government elections (which currently use the same register). The draft explanatory memorandum for the Order states that this change has been agreed by UK Government departments and the Scottish Government. Given that the measure goes beyond the recommendation of the Smith Commission and is being brought forward in an unamendable statutory instrument, wider consultation on this expansion of scope should have been undertaken.

**Consistency with the draft Scotland Clauses**

19. The draft clauses published alongside *Scotland in the United Kingdom: An enduring settlement* propose to devolve powers over electoral law, including the franchise, to the Scottish Parliament. Draft Clause 4 provides that any change to the law will require the support of “not less than two thirds of the total number of seats for members of the Scottish Parliament”. The power to be devolved by way of this Order, however, will enable the Scottish Parliament to change the voting age for the 2016 and 2017 elections by way of the regular Scottish parliamentary process. If the Government considers that, as a point of principle, important changes to electoral law require a specific super-majority procedure in the Scottish Parliament, it might be asked whether it is justified to pass an Order which will dispense with this procedural requirement.

**Data protection**

20. In our report on the extension of the franchise to 16 and 17 year-olds for the Scottish independence referendum we drew attention to the data protection implications of including the details of minors in a public document such as the electoral register. The same issue arises with respect to this proposal, but

13 HC Deb, 2 Feb 2015, col 85
14 Draft Explanatory Memorandum, on the draft Scotland Act 1998 (Modification of Schedules 4 and 5 and Transfer of Functions to the Scottish Ministers etc.) Order 2015, para 7.3
with the additional consideration that the information provided by young people applying to join the register is likely to be retained for longer than was the case for the one-off register of young voters compiled for the referendum.

21. The introduction of individual electoral registration (IER), which took place in Scotland immediately after the September 2014 referendum, adds further complications to the handling of personal data. More personal data will be collected and held by registration officers than was the case under the previous household registration system. Moreover, as the National Insurance Number is the primary means by which an applicant’s identity is verified under IER and is issued “just before” a person’s 16th birthday, many young people applying to register as ‘attainers’ (i.e. those currently under voting age but who will become eligible to vote during the lifetime of the upcoming electoral register) will not have one. The handling of personal data, including which documents are to be accepted as an alternative proof of identity and how individuals’ data will be processed and stored, will need to be dealt with particularly carefully given the age of the individuals concerned.

22. Data protection is particularly important when dealing with individuals under the age of majority. We draw this matter to the attention of the House.

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