

HOUSE OF LORDS

Select Committee on the Constitution

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10th Report of Session 2014–15

# Proposals for the devolution of further powers to Scotland

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Ordered to be printed 18 March 2015 and published 24 March 2015

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Published by the Authority of the House of Lords

*London* : The Stationery Office Limited  
£price

HL Paper 145

### *Select Committee on the Constitution*

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### *Committee staff*

The current staff of the committee are Antony Willott (Clerk), Dr Stuart Hallifax (Policy Analyst) and Hadia Garwell and Philippa Mole (Committee Assistants). Professor Stephen Tierney acted as Specialist Adviser to the committee for this inquiry.

### *Contact details*

All correspondence should be addressed to the Constitution Committee, Committee Office, House of Lords, London SW1A 0PW. Telephone 020 7219 5960. Email [constitution@parliament.uk](mailto:constitution@parliament.uk)

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## SUMMARY

The Smith Commission's recommendations for the further devolution of powers to Scotland would significantly change Scotland's devolution settlement, adding greater complexity to the relationship between the UK and Scottish Governments. This report considers the Government's proposals for implementing the Smith Commission's recommendations, set out in the Command Paper *Scotland in the United Kingdom: An enduring settlement*. We consider the process by which these proposals were produced, and then examine their implications for the constitution of the UK as a whole.

The Smith Commission was given only two months to produce its recommendations, and took less than four weeks to produce its proposals once the closing date for public submissions was reached on 31 October 2014. This is not to criticise Lord Smith of Kelvin, nor the members of the Smith Commission, who worked effectively to a tight timetable. Its recommendations are, however, necessarily the result of a short process, with minimal time for consultation and for engagement with the UK and Scottish parliaments. Yet the leaders of the three main UK-wide political parties agreed to implement the recommendations of the Smith Commission in advance of its first meeting. We are deeply concerned that this agreement has pre-empted any possibility of meaningful consultation and discussion on the merits of the proposals with either the Scottish or UK Parliament, or indeed with citizens and civil society both in Scotland and across the UK. In particular, it restricts the capacity of the UK Parliament to contribute to the development of these proposals. Nor does the Smith Commission process meet the standards expected for the production of proposals for significant constitutional change.

We are also concerned that the UK Government does not appear to have considered the wider implications for the United Kingdom of the proposals set out in *Scotland in the United Kingdom*. We recognise the political imperatives behind these proposals, but they continue a pattern of ad hoc, piecemeal change to the devolution settlements which could well destabilise the Union as a whole in the longer term. We question how any process that does not consider the future of the Union as a whole could provide for an "enduring" settlement.

The major UK-wide political parties need to formulate a coherent vision for the future shape of the UK as a whole, without which there cannot be constitutional stability.

Draft Clause 1 in *Scotland in the United Kingdom* would insert into legislation a statement of the permanence of the Scottish Parliament and Government. It is a fundamental principle of the UK constitution that no Parliament may bind its successors, and thus whilst Draft Clause 1 might be a political and symbolic affirmation of that permanence it would impose no legal or constitutional restriction on the power of the UK Parliament. It might, however, create the potential for misunderstanding or conflict in the courts over the legal status of the Scottish Parliament.

Draft Clause 2 attempts to place the Sewel convention (which states that the UK Parliament will not normally legislate on devolved matters without the consent of the Scottish Parliament) in statute. It similarly seems unlikely to have any legal effect and is purely a declaratory statement of intent, restating the existing

convention rather than attempting to make it enforceable.

Taken together, however, the two Draft Clauses appear to be moving the United Kingdom in a federal direction, attempting to crystallise by way of statute, if not a written constitution, the status and powers of the devolved administrations in a way that has hitherto not been the case.

Further measures give the Scottish Parliament greater powers over its composition and elections, as well as for local government elections in Scotland. We are concerned that in relation to an important element of this—control of the franchise—the implications of the Scottish Parliament's competence limits in the area of human rights have not been fully considered. The UK Government should explain how this power will be effectively devolved.

On these and other proposals we draw attention to points of detail, the formation of new governance structures and other issues that the Government must address in bringing forward a bill based on these draft clauses.

# Proposals for the devolution of further powers to Scotland

## CHAPTER 1: INTRODUCTION

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1. The Command Paper *Scotland in the United Kingdom: An enduring settlement*, hereafter referred to as *Scotland in the United Kingdom*, was published by the United Kingdom Government on 22 January 2015.<sup>1</sup> It contains as an Annex the Draft Scotland Clauses 2015 (‘the Draft Clauses’). It is intended that these clauses will form the basis of a new Scotland Bill to be introduced to Parliament by a new government after the General Election in May.
2. 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”. The Draft Clauses are not a public bill but, in light of their potential constitutional implications and the clear intention on the part of the Government to give them legislative effect, we have examined them as legislative proposals.

### Background

3. The Draft Clauses are a response by the UK Government to the report of the Commission into further powers for the Scottish Parliament chaired by Lord Smith of Kelvin. 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) made 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. This then appeared on the front page of the *Daily Record* under the headline ‘The Vow’: the name by which it has subsequently become known.<sup>2</sup>
4. On 19 September, the Prime Minister announced that Lord Smith of Kelvin had agreed to oversee the process to take forward this commitment to the devolution of further powers to the Scottish Parliament.<sup>3</sup> The five main parties in Scotland (Conservative, Green, Labour, Liberal Democrat and the

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<sup>1</sup> HM Government, *Scotland in the United Kingdom: An enduring settlement*, Cm 8890, 22 January 2015: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/397079/Scotland\\_EnduringSettlement\\_acc.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/397079/Scotland_EnduringSettlement_acc.pdf) [accessed 10 March 2015]

<sup>2</sup> ‘David Cameron, Ed Miliband and Nick Clegg sign joint historic promise which guarantees more devolved powers for Scotland and protection of NHS if we vote No’, *Daily Record*, 15 September 2014 [and 16 September print edition]: <http://www.dailyrecord.co.uk/news/politics/david-cameron-ed-miliband-nick-4265992> [accessed 25 February 2015]

<sup>3</sup> Scottish Independence Referendum: statement by the Prime Minister, 19 September 2014: <https://www.gov.uk/government/news/scottish-independence-referendum-statement-by-the-prime-minister> [accessed 25 February 2015]

Scottish National Party) each appointed two members to the Commission.<sup>4</sup> The Terms of Reference of the Smith Commission were:

“To convene cross-party talks and facilitate an inclusive engagement process across Scotland to produce, by 30 November 2014, Heads of Agreement with recommendations for further devolution of powers to the Scottish Parliament. This ... will result in the publication of draft clauses by 25 January. The recommendations will deliver more financial, welfare and taxation powers, strengthening the Scottish Parliament within the United Kingdom.”<sup>5</sup>

5. On 27 November, the Smith Commission published its report detailing Heads of Agreement on the further devolution of powers to the Scottish Parliament. The Heads of Agreement in the Commission’s report are divided into three pillars:
  - Pillar 1: Providing for a durable but responsive constitutional settlement for the governance of Scotland;
  - Pillar 2: Delivering prosperity, a healthy economy, jobs, and social justice;
  - Pillar 3: Strengthening the financial responsibility of the Scottish Parliament.<sup>6</sup>
6. The party leaders’ pre-referendum commitment placed an obligation on whichever of the pro-union parties were in government after the general election in May 2015 to introduce legislation giving effect to the Smith Commission proposals. The Prime Minister and Deputy Prime Minister state in their Preface to *Scotland in the United Kingdom* that “The UK Government is committed to working with the Scottish Government to ensure these new powers are delivered in full.”<sup>7</sup> The foreword by the Rt Hon Alistair Carmichael MP, Secretary of State for Scotland, clarifies that “The clauses published in the paper will make it possible to quickly translate the Agreement into law at the beginning of the next Parliament and transfer powers to Scotland.”<sup>8</sup>
7. The other signatory to the pre-referendum commitment, the Labour Party, was not involved in the development of the Draft Clauses or *Scotland in the United Kingdom* in general. They have announced that they will introduce a “Home Rule Bill” for Scotland within 100 days of forming a government, incorporating, but going further than, the recommendations of the Smith

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<sup>4</sup> This Committee’s Legal Adviser, Professor Adam Tomkins, was a member of the Smith Commission and has, in consequence, had no involvement in any of the Committee’s work on this report.

<sup>5</sup> Smith Commission, ‘About’: <https://www.smith-commission.scot/about> [accessed 25 February 2015]

<sup>6</sup> Smith Commission, *Report of the Smith Commission for further devolution of powers to the Scottish Parliament*, 27 November 2014: [http://www.smith-commission.scot/wp-content/uploads/2014/11/The\\_Smith\\_Commission\\_Report-1.pdf](http://www.smith-commission.scot/wp-content/uploads/2014/11/The_Smith_Commission_Report-1.pdf) [accessed 10 March 2015]

<sup>7</sup> *Scotland in the United Kingdom*, preface

<sup>8</sup> *Scotland in the United Kingdom*, foreword

Commission.<sup>9</sup> Thus all of the parties whose leaders made the pre-referendum commitment to devolving further powers to the Scottish Parliament remain committed to introducing a bill embodying at least the changes proposed by the Smith Commission early in the 2015 Parliament.

### **The purpose of this report**

8. This Report begins by reviewing the process by which *Scotland in the United Kingdom* and the Draft Clauses were arrived at, and then offers a brief preliminary analysis of the main constitutional implications of the Draft Clauses. Given that we have been considering draft clauses rather than a draft bill, and that some of the issues in *Scotland in the United Kingdom* remain the subject of further consultation and deliberation, the Committee's views are, to a degree, provisional.
9. The Draft Clauses, taken as a whole, will realign significantly the balance of competences currently set out in the Scotland Acts of 1998 and 2012 ('the 1998 Act' and 'the 2012 Act'). The Scottish Parliament will assume a range of new powers in policy areas such as taxation, welfare, employment, transport, energy efficiency, fuel poverty, and onshore oil and gas extraction. These proposals will require significant amendments in particular to Schedules 4 and 5 to the 1998 Act, which set out the extent of the Scottish Parliament's powers by listing, respectively, those enactments of Parliament which cannot be modified by the Scottish Parliament and the specific powers reserved to the UK Parliament. Professor Nicola McEwen, Professor of Territorial Politics at the University of Edinburgh, described the Draft Clauses as "setting out a bewildering array of exceptions to the reservations" in the 1998 Act.<sup>10</sup>
10. The Committee is currently undertaking a separate but linked inquiry into inter-governmental relations in the UK.<sup>11</sup> The evidence we received on that inquiry has made clear that the changes in the Draft Clauses would be likely to make inter-governmental relations both more complex and more important, particularly in light of a range of concurrent or shared powers which the changes would bring.<sup>12</sup>
11. In addition to the evidence taken as part of our inquiry into inter-governmental relations, we held a one-off evidence session on the Draft Clauses with Professor Michael Keating, Chair in Scottish Politics at the University of Aberdeen, and Dr Mark Elliott, Reader in Public Law at the University of Cambridge, the transcript of which is reproduced at the back of this report (Appendix 2). We heard evidence from the UK Government on both subjects.

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<sup>9</sup> 'Ed Miliband promises Scotland home rule bill if Labour win the election' *The Guardian*, 29 January 2015: <http://www.theguardian.com/politics/2015/jan/29/ed-miliband-scotland-jim-murphy-home-rule-devolution-work-programme> [accessed 13 February 2015]; **Q 1** (Professor Michael Keating)

<sup>10</sup> Written evidence on inter-governmental relations from Professor Nicola McEwen (**IGR0010**)

<sup>11</sup> Constitution Committee, *Inter-governmental relations in the United Kingdom* (11th Report, Session 2014–15, HL Paper 146)

<sup>12</sup> Written evidence on inter-governmental relations from Professor Nicola McEwen (**IGR0010**)

## CHAPTER 2: FROM THE REFERENDUM TO THE DRAFT CLAUSES: AN APPROPRIATE PROCESS FOR CONSTITUTIONAL CHANGE?

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12. This Committee, in our 2011 report *The Process of Constitutional Change*, listed steps that we regard as essential for the Government to undertake prior to the introduction of legislation implementing significant constitutional change. These were:
- considering the impact of the proposals upon the existing constitutional arrangements,
  - subjecting the proposals to detailed scrutiny in the Cabinet and its committees,
  - consulting widely, and
  - publishing green and white papers and subjecting the bill to pre-legislative scrutiny.

These should, we stated, be treated as a package that should be departed from only in exceptional circumstances.<sup>13</sup>

### The impact upon existing constitutional arrangements

13. The Smith Commission's remit was to address only the question of additional powers for the Scottish Parliament. Its report notes 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 therefore made no assessment of the impact of its proposals on the rest of the United Kingdom. It did, however, frame its proposals with the intent that they should "not cause detriment to the UK as a whole nor to any of its constituent parts".<sup>14</sup>
14. Of more concern is the failure of the UK Government directly to address the implications of these proposals for the United Kingdom as a whole. Alistair Carmichael MP, Secretary of State for Scotland, was asked by the Scottish Parliament's Devolution (Further Powers) Committee in December 2014 whether wider considerations for the UK constitution had been discussed in Cabinet. He stated that, other than the 'English Votes for English Laws' work announced by the Prime Minister on 19 September:

"In the Cabinet, the conversations surrounding the Smith Commission report have been pretty brief, along the lines of, 'we committed to implementing the conclusions of the Lord Smith's inquiries and

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<sup>13</sup> Constitution Committee, *The Process of Constitutional Change* (15th Report, Session 2010–12, HL Paper 177), paras 72–73

<sup>14</sup> Smith Commission, *Report*, para 7(4)

deliberations; we now have those and we will implement them.’ I do not think that a great deal more conversation is necessary.”<sup>15</sup>

15. In evidence to us on 11 February 2015, Mr Carmichael asserted that the wider implications were “part of the assessment that we make all the time”. However, his description of the Government’s approach to devolution did not suggest that these considerations and the general shape of the constitutional settlement were given active consideration: “it is now for other parts of the United Kingdom to decide what they want by way of a constitutional settlement. It is worth making the point that since we started the process of devolution, we ... have never been faced with a coherent request from any part of the United Kingdom that has not been met and honoured in full.” Asked whether the proposals were an ‘enduring settlement’ and what the end point of devolution might be, Mr Carmichael told us that “we will be able to say that we have achieved that enduring settlement ... once the people of England have decided what they want and have been given it.”<sup>16</sup>
16. We assume that the Secretary of State’s views are those of the UK Government, in which case we find their approach surprising and disappointing. They suggest an intent to continue the piecemeal process of devolution seen thus far. This is precisely the pattern criticised by the First Minister for Wales, the Rt Hon Carwyn Jones AM, who told us that:
 

“It is absolutely right to say that devolution of powers has been done in a piecemeal fashion, and I do not think that will do in the future. For example, the Smith Commission’s recommendations for Scotland, which I have no quibble with, has an effect on Wales. I know that the view that is taken by some in the UK Government is that that is a wholly separate process with no effect at all on the other devolved administrations. That is naive. There is inevitably an effect; people in Wales will see what is proposed for Scotland and say, “If Scotland is having, for example, air passenger duty, why is Wales not?”. The effect will be there, but I do not think with the Smith Commission process that thought was given to what the effect would be on the rest of the UK. It was purely seen through a Scottish prism.”<sup>17</sup>
17. The First Minister concluded that “Much more thought needs to be given to all four administrations being part of a process that leads to greater constitutional stability than we have at the moment”.<sup>18</sup> Similarly, the Institute for Government noted that further devolution was delivered in response to pressures from each territory “without much consideration of the implications for the rest of the country.”<sup>19</sup>
18. Professor Michael Keating noted that constitutional change is politically driven rather than being done according to an ordered plan:

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<sup>15</sup> Oral evidence taken before the Devolution (Further Powers) Committee of the Scottish Parliament, [4 December 2014](#)

<sup>16</sup> Oral evidence taken on 11 February 2015 (Session 2014–15), [Q 84](#)

<sup>17</sup> Oral evidence taken on 21 January 2015 (Session 2014–15), [Q 53](#)

<sup>18</sup> Oral evidence taken on 21 January 2015 (Session 2014–15), [Q 45](#)

<sup>19</sup> Written evidence on inter-governmental relations from the Institute for Government ([IGR0011](#))

“Constitutional change takes place when the political circumstances are right ... politically we have to be realistic. But at least when we are proceeding in one direction, we should be aware of the consequences for other parts of the United Kingdom—that is what is missing here—and not just the consequences for Scotland or Northern Ireland but for the centre of the things that you are doing in the devolved territories.”<sup>20</sup>

19. The Draft Clauses mark yet another stage in the incremental and ad hoc development of devolution within the United Kingdom. The Scotland Act 1998, the Government of Wales Act 1998 and the Northern Ireland Act 1998 were understood by many to be constitutional settlements that would provide a period of constitutional stability for the United Kingdom. Instead, the statement by the Rt Hon Ron Davies MP, Secretary of State for Wales in 1997–98, that devolution was “a process not an event”<sup>21</sup> has been borne out by the steady devolution of further powers, particularly for Scotland and Wales. In addition to the two Acts relating to Welsh devolution,<sup>22</sup> the Scotland Act 2012 and proposed new Scotland Bill, further powers have now been proposed for Wales.<sup>23</sup>
20. The system has, accordingly, become ever more asymmetrical and there has been no serious effort either to co-ordinate the devolution of power across the devolved territories or to link the cession of power to a reorganisation of the central organs of the state. A significant change which will be brought about by way of the Draft Clauses is that the hitherto fairly straightforward demarcation between reserved powers and those devolved to the Scottish Parliament will become considerably less clear.<sup>24</sup> A number of significant areas of government, for example in relation to tax and welfare powers, will be shared concurrently by the UK and Scottish Governments.<sup>25</sup> This will breach the hitherto unitary structure of taxation throughout the UK.<sup>26</sup> It will also have knock-on implications for inter-governmental relations and increase the risk that political and legal disputes will become a far more significant feature of these relations.
21. Dr Mark Elliott told us that:
- “these proposals are indicative of the fact that for the last 15 years now we have been in a state of permanent constitutional upheaval, and that seems to me to be quite unprecedented in a mature democracy. Many, many countries have constitutional moments when they decide to make

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<sup>20</sup> [Q 5](#)

<sup>21</sup> See HC Deb 8 December 1997, [col 677](#). The phrase became the title of Mr Davies’s book *Devolution: A Process Not An Event* (Cardiff: Institute for Welsh Affairs, 1999)

<sup>22</sup> The [Government of Wales Act 2006](#) and the [Wales Act 2014](#).

<sup>23</sup> Welsh devolution: more powers for Wales, 27 February 2015: <https://www.gov.uk/government/news/welsh-devolution-more-powers-for-wales> [accessed 2 March 2015]

<sup>24</sup> By contrast the current complexity of the ‘conferred powers’ devolution settlement in Wales has led to calls, and the recent agreement of the UK Government, for a move to the reserved powers model used in Scotland. See HM Government, *Powers for a purpose: Towards a lasting devolution settlement for Wales*, Cm 9020, February 2015: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/408587/47683\\_CM9020\\_ENGLISH.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/408587/47683_CM9020_ENGLISH.pdf) [accessed 17 March 2015].

<sup>25</sup> [Q 5](#) (Professor Michael Keating)

<sup>26</sup> Taxation powers given by the Scotland Act 1998 have never been used, and the modest fiscal competences contained in the Scotland 2012 Act are only now coming into effect.

changes and then live with those changes and try to make them work. To see devolution or any other aspect of constitutional change as a process almost without end is to misunderstand what a constitution is about.”<sup>27</sup>

22. **We are astonished that the UK Government do not appear to have considered the wider implications for the United Kingdom of the proposals set out in *Scotland in the United Kingdom*. We do not consider that it is appropriate, or sustainable, to address the issue of additional powers for Scotland alone without also considering the knock-on consequences for the wider UK constitution.**
23. **We recommend that the Government give urgent consideration to the consequences of the Draft Clauses for the constitution of the United Kingdom as a whole. This should happen before they are passed into law. We recognise the political imperatives behind these changes but piecemeal, ad hoc changes to the Scottish devolution settlement without wider consideration of their impact could well destabilise the Union as a whole in the longer term. We question how any process that does not consider the future of the Union as a whole could provide for an ‘enduring’ settlement.**
24. **The UK Government and the major UK-wide political parties need urgently to devise and articulate a coherent vision for the shape and structure of the United Kingdom, without which there cannot be constitutional stability.**

### Consultation

25. The Smith Commission produced its Heads of Agreement very rapidly. This has left little time for full consultation with Parliament, with the Scottish Parliament and other devolved legislatures, or with the citizens of the Scotland or the wider United Kingdom. This is not to criticise the work of Lord Smith, which was to deliver a consensus within the timescale set by the UK Government. Nor is it to disparage the ways in which the Smith Commission members approached their task and deliberated together, or the conclusions they came to in their report. Rather, it is a reflection of the remit that the Commission was set and the speed with which it was required to conduct its work.
26. It is perhaps worth noting that the role of the Smith Commission was an unusual one. The leaders of the main UK-wide parties agreed in advance to implement the recommendations of the Smith Commission—it is clear therefore that the purpose of the Smith Commission was not to develop proposals for further consideration by the parties and the electorate; it was instead to decide on policy on behalf of the main UK political parties. Yet the Commission was expected to produce these proposals within an extremely short timescale, and it did so from behind closed doors.
27. Following the Prime Minister’s announcement that the Smith Commission was to be established, the details of how it would be composed and how it would operate were announced by Lord Smith only four days later, on 23

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<sup>27</sup> [Q 11](#)

September. It should be noted that the timetable was set by the UK Government in its terms of reference and not by the Smith Commission itself.

28. The composition of the Commission was restricted to the Scottish political parties, although the commitment to further devolution had been made by the UK leaders of the pro-union parties. The five main parties in Scotland (Conservative, Green, Labour, Liberal Democrat and SNP) each appointed two members to the Committee and they rapidly formulated their individual submissions to it, presenting their views by 10 October; the submissions by the three pro-union parties were based on previously published internal work on further devolution. On 3 October the public and civil society were invited to offer submissions to the Commission. This process was not insignificant: *Scotland in the United Kingdom* confirms that the Smith Commission received over 18,000 submissions from the public and more than 400 from civic groups.<sup>28</sup>
29. Nonetheless, the closing date for consultation was 31 October, leaving the public and wider civil society only four weeks to think about the issues and submit views. The Commission then took three and a half further weeks to consider all of this material and to produce cross-party Heads of Agreement by late November. There was thereafter a drafting period of less than two months for both *Scotland in the United Kingdom* and the Draft Clauses it contains. The Smith Commission's deliberations were conducted in private with no interaction with Parliament or the public between the closure of the consultation period and publication of the report itself. This expedited process stands in contrast to the development of the Scotland Act 2012: the Calman Commission was set up by the UK Government and the Scottish Parliament in 2007, its final report published in June 2009 and the Scotland Bill introduced by the new Government in November 2010.<sup>29</sup>
30. The speed of progress on the Smith Commission's work and the subsequent development of the Draft Clauses does not inspire confidence in the proposed legislation. Professor Keating told us that "There was no time for a proper discussion with representatives of civil society, and there was no time to do a lot of the technical work needed to make sure that the details of the proposals were right."<sup>30</sup> He added that:

"While it is entirely politically understandable why 'the Vow' was made and why this timetable is felt to have been imposed, it is constitutionally quite extraordinary to be contemplating really quite significant changes of this nature and to be trying to hurry them through in this way."<sup>31</sup>

31. Similarly, Professor Nicola McEwen told us that she was:

"very concerned about the way that the process has unfolded now, post-referendum, which is very quick. It is very rapid. There is not

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<sup>28</sup> *Scotland in the United Kingdom*, Executive Summary, p.12

<sup>29</sup> Calman Commission, *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century*, 2009; [Explanatory Notes](#) to the Scotland Act 2012

<sup>30</sup> [Q 1](#)

<sup>31</sup> [Q 1](#)

enough time for reflection by anybody. It is moving away from that clarity that we had with the original [1998 Act] devolution settlement, and making something much more complicated and messy, without thinking through the consequences of what that will be. I am sure there will be lots of unintended consequences that emerge as a result.”<sup>32</sup>

32. **We do not consider that the Smith Commission process, its conclusions, and this Command Paper represent sufficient engagement and consultation with the public for these significant constitutional changes. Given that the leaders of the main UK-wide political parties had agreed in advance to implement the recommendations of the Smith Commission, which could be characterised as an abrogation of their responsibility to set policy, we are particularly concerned at the speed with which these proposals were formulated and with the fact that there was no meaningful interaction with either the Scottish or UK Parliament, or indeed with citizens and civil society both in Scotland and across the UK.**

33. The UK Government stressed the extent of engagement in Scotland in developing the Draft Clauses:

“During the preparation of the draft clauses, the UK Government set up a stakeholder group of representative bodies from across Scotland to help inform preparation of the draft clauses and to clarify the devolution settlement, raising awareness around the division of powers between Holyrood and Westminster.”<sup>33</sup>

34. They added that “engagement should continue after the publication of the draft clauses” and promised “a series of events and activities across Scotland to ensure that everyone has the opportunity to have their say and to enhance their understanding of the enduring devolution settlement as we move forward to delivery of further devolution for Scotland.”<sup>34</sup> They also confirm that the Scottish Government were consulted during the process of drafting the Draft Clauses.<sup>35</sup> The Smith Commission’s work, and the Government’s consultation and wider engagement, have been explicitly focused on Scotland. This is understandable, but risks continuing the compartmentalised approach whereby devolution is treated as a series of separate issues for each devolved region in turn, rather than an issue that should have UK-wide interest and engagement. **The Government should consider how ongoing public engagement and consultation, so far conducted only in Scotland, could now be extended throughout the United Kingdom.**

### **Parliamentary scrutiny**

35. Scrutinising and legislating for constitutional change is one of the highest responsibilities of a Parliament. The Committee’s recommended process for constitutional change calls for proposals for constitutional change to be

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<sup>32</sup> Oral evidence taken on 7 January 2015 (Session 2014–15), [Q 16](#)

<sup>33</sup> *Scotland in the United Kingdom*, Executive Summary, p.13

<sup>34</sup> *Scotland in the United Kingdom*, Executive Summary, p.13

<sup>35</sup> *Scotland in the United Kingdom*, Executive Summary, p.11

subjected to pre-legislative scrutiny.<sup>36</sup> As noted above, the Draft Clauses published in January 2015 are not a draft bill. They have not been specifically committed to a committee of either House, or a joint committee, for pre-legislative scrutiny.

36. With the major UK parties committed to introducing a bill reflecting the Smith Commission's recommendations early in the next Parliament, it seems unlikely that a full draft bill will be published in advance of its introduction. Given the absence of a draft bill, it is encouraging to see that—in addition to this Committee—three Committees in the House of Commons (Scottish Affairs,<sup>37</sup> Treasury,<sup>38</sup> and Political and Constitutional Reform committees<sup>39</sup>) and one in the Scottish Parliament (the Devolution (Further Powers) Committee<sup>40</sup>) are subjecting the proposals and the Draft Clauses to detailed scrutiny.
37. Although we trust that both Houses will give any bill implementing the recommendations of the Smith Commission proper scrutiny in the next parliament, the extent to which Parliament could realistically amend that legislation is unclear. It could be argued that the pre-referendum commitment, obliging whichever of the main three pro-union parties forms a Government after the next election to implement the Smith Commission proposals, presents Parliament with a *fait accompli* by the leaders of the major parties—leaving Parliament with the political reality that it may not be possible to amend these proposals significantly.
38. We heard contrasting views on whether this was likely to be the case after the 2015 general election. Professor Keating stressed the uncertainty that the election would bring, particularly if no majority government can be formed, and the lack of public consensus in Scotland, let alone the UK as a whole. He suspected “that this whole package will be reopened again and renegotiated”.<sup>41</sup>
39. The UK Government are committed to the Draft Clauses forming the basis of a new bill and stressed the settled nature of the body of proposals. The Secretary of State for Scotland told us that:

“What we are talking about is a proposition that will have been, in terms, in the manifestos of all three parties. ... this issue will have been front and centre of the debate during the election campaign, and

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<sup>36</sup> See also Constitution Committee, *Parliament and the legislative process* (14th Report, Session 2003–04: HL Paper 173), para 48

<sup>37</sup> Scottish Affairs Committee, *The Implementation of the Smith Agreement* (4th Report, Session 2014–15; HC 835)

<sup>38</sup> Proposals for further Fiscal and Economic Devolution to Scotland: <http://www.parliament.uk/business/committees/committees-a-z/commons-select/treasury-committee/inquiries1/parliament-2010/proposals-for-further-fiscal-and-economic-devolution-to-scotland/> [accessed 25 February 2015]

<sup>39</sup> Constitutional implications of draft Scotland clauses: <http://www.parliament.uk/business/committees/committees-a-z/commons-select/political-and-constitutional-reform-committee/inquiries/parliament-2010/draft-scotland-clauses-inquiry/> [accessed 25 February 2015]

<sup>40</sup> Call for written evidence—Have your say on the UK Government's Draft Legislative Clauses and Received Submissions: <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/86132.aspx> [accessed 25 February 2015]

<sup>41</sup> [Q 1](#)

certainly has been during the last two or three years, so woe betide anybody, be they unionist or nationalist, who for any reason wants to thwart the will of the people.”<sup>42</sup>

40. The Advocate General for Scotland noted that there would still be a role for Parliament: the electoral mandate “does not mean that when we get down to the fine detail, Parliament does not have an important role to play in ensuring that what is delivered is what people were presented with, and that it works.”<sup>43</sup>
41. Whether a political agreement between the three major UK-wide parties and offered at a general election by all three represents a public consensus is questionable. Indeed, it could be argued that a common manifesto pledge by all the major political parties offers the electorate no realistic choice at all. Dr Mark Elliott stressed that Parliament should feel able to amend the eventual Scotland Bill. He contrasted the process since the referendum with the political agreement and consensus-building that led to the Northern Ireland Act 1998:

“The Good Friday agreement represented the culmination of a long, thorough and at least in some respects transparent process, and one that ultimately received the assent of a large proportion of the people of Northern Ireland and the Republic of Ireland. When Parliament is presented with a Bill like the Northern Ireland Bill that implements that kind of settled constitutional view, its hands are tied to an extent, and rightly so. The Smith agreement is not in that league.”<sup>44</sup>

42. Dr Elliott did “not think that Parliament constitutionally should feel that it has been presented with a *fait accompli* [in a new Scotland Bill], whatever the politics of it might be. It should bear that distinction in mind.” He acknowledged, however, that “the politics may well override and overwhelm the constitutionality. This raises wider questions...of how we do constitutional reform and whether this is an appropriate way to do this. It perhaps demonstrates that it is not.”<sup>45</sup>
43. **We are concerned that Parliament has been, in effect, excluded from the decision-making process in light of the cross-party agreement already in place among the leaders of the main UK-wide political parties. This significantly restricts its capacity to contribute to the development of these proposals. Parliament is expected to pass these proposals into law without significant amendment, even though it is not clear whether vital considerations such as the impact of these proposals on the UK as a whole will have been taken into account.**

### **An appropriate process?**

44. The Draft Clauses promise the most extensive reorganisation of territorial government in the United Kingdom since 1999. In the light of the significance of the changes it portends, the brevity, exclusiveness and lack of

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<sup>42</sup> Oral evidence taken on 11 February 2015 (Session 2014–15), [Q 83](#)

<sup>43</sup> Oral evidence taken on 11 February 2015 (Session 2014–15), [Q 83](#)

<sup>44</sup> [Q 1](#)

<sup>45</sup> [QQ 1 and 3](#)

transparency in the process so far runs counter to the previous recommendations of this Committee in relation to constitutional reform, while the party leaders' promise to implement the conclusions of the Smith Commission may prevent significant changes being made following further scrutiny now and after the bill is introduced.

45. Regardless of how sensible or popular constitutional changes prove to be or how well they work in practice, the health of a democratic system depends upon the propriety and legitimacy of the process by which constitutional changes within it are effected. As this Committee stated in our report on the Fixed-term Parliaments Bill:

“Process is critical in terms of upholding, and being seen to uphold, constitutional values: particularly those of democratic involvement and transparency in the policymaking process. Moreover, we believe that a proper process is the foundation upon which successful policy is built: the lack of a proper process makes an ineffective outcome more likely.”<sup>46</sup>

46. This Committee's recommendations about the appropriate process for constitutional change, set out at the start of this chapter, were “intended to form a comprehensive package from which the government should depart only in exceptional circumstances and where there are clearly justifiable reasons for so doing.”<sup>47</sup>

47. **We do not believe that the referendum and subsequent events constitute a “clearly justifiable” reason for adopting such an unusual process for initiating significant constitutional change. The undue haste with which the process was conducted, including the use of arbitrary deadlines based on significant dates in the Scottish calendar, undermines confidence in the outcome.**

48. **Moreover, we are deeply concerned that an agreement by the leaders of the three main UK-wide political parties to implement the recommendations of Smith Commission, made before that Commission had even met, appears to have pre-empted any possibility of meaningful consultation and discussion on the merits of the proposals, including with the parliaments of Scotland and the United Kingdom.**

49. **This is not the first time that we have expressed concerns about the process by which constitutional reforms have been implemented. As we have previously noted, “The constitution is the foundation upon which law and government are built. The fundamental nature of the constitution means that it should be changed only with due care and consideration.”<sup>48</sup> We do not believe that the process by which these proposals have been brought forward meets this standard.**

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<sup>46</sup> Constitution Committee, *Fixed-term Parliaments Bill* (8th Report, Session 2010–2012, HL Paper 69), para 160

<sup>47</sup> Constitution Committee, *The Process of Constitutional Change*, para 73

<sup>48</sup> Constitution Committee, *The Process of Constitutional Change*, para 1

### CHAPTER 3: CONSTITUTIONAL PROVISIONS IN THE DRAFT CLAUSES

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50. In this chapter, we address the explicitly constitutional proposals of the Smith Commission and how they are reflected in *Scotland in the United Kingdom* and Part 1 of the Draft Clauses.

#### *Specific issues not covered in the Government's proposals*

51. We note as an initial observation that the Command Paper has little to say about the ‘Barnett Formula’ system of allocating funding or the ‘West Lothian Question’/‘English Votes for English Laws’ issue.<sup>49</sup> The party leaders’ pre-referendum agreement committed the pro-union parties to the continuation of the Barnett Formula, a position also reflected in the Smith Commission’s Report.<sup>50</sup> **There have been many criticisms of the Barnett Formula. This report is not the place to rehearse those arguments, but we are concerned by the failure to address that element of the funding of devolved administrations while significant changes are being made to other elements of the funding arrangements for Scotland. What is clear is that the changes to income tax in Scotland will reduce significantly the size of the block grant to Scotland and therefore the impact of the Barnett formula.**
52. In December 2014, the UK Government published a Command Paper on *The Implications of Devolution for England*.<sup>51</sup> That paper addresses some of the issues for England of the current devolution settlements and sets out the views of the two coalition parties and calls for responses to be directed to them, rather than to the Government. As such it appears to be a mechanism for developing party policy rather than forming a consensus view or Government position. The Conservative Party subsequently announced its preference for one of the three options it put forward.<sup>52</sup> The Liberal Democrats and the Labour Party have not announced any further development of their policies on this issue.

#### *The devolution of constitutional powers*

53. The Draft Clauses contain a number of proposals for the devolution of constitutional powers to the Scottish Parliament that would not have a direct constitutional impact outside Scotland, but which could have a knock-on effect on other devolved settlements or on the UK constitution as a whole. To some extent this is to be welcomed, in that—as with other policy areas—devolution allows for variation between different parts of the UK that could lead to the adoption of successful policies in other parts of the country.

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<sup>49</sup> We also noted the absence of any provisions relating to these issues in our report on the last Scotland Bill: Constitution Committee, *Scotland Bill* (17th Report, Session 2010–12, HL Paper 184), para 31.

<sup>50</sup> Smith Commission, *Report*, para 95(1)

<sup>51</sup> First Secretary of State, *The Implications of Devolution for England*, Cm 8969, December 2014: <https://www.gov.uk/government/publications/implications-of-devolution-for-england> [accessed 17 March 2015]

<sup>52</sup> ‘William Hague unveils plans to stop Scottish MPs voting on English issues’, *The Guardian*, 3 February 2015: <http://www.theguardian.com/uk-news/2015/feb/03/william-hague-plan-bar-scottish-mps-voting-english-issues> [accessed 25 February 2015]

54. While variation of policies is welcome in some areas, it remains the case that some powers are reserved in order to maintain consistency across the United Kingdom.<sup>53</sup> In particular, we are concerned that the devolution of constitutional powers—for example, over the franchise—risks introducing variation where there should be none. Where that line should be drawn on constitutional matters should be a matter for general discussion and decided on a UK-wide basis. As Dr Elliott noted:

“One of the points of devolution is that different parts of the country are supposed to be able to do things differently—be that on prescription charges, tuition fees or whatever. The question arises as to whether we reach a point at which we say that certain constitutional changes are so significant and cross-cutting that it does not make sense to deal with them on a devolved basis.”<sup>54</sup>

55. We do not make any recommendations at this stage on the devolution of particular constitutional decisions to the Scottish Parliament, but **we note with concern that a wider discussion about the most appropriate level of devolution for constitutional issues was not held.** This risks a piecemeal approach to constitutional change (as discussed in Chapter 2) on the basis of other devolved legislatures each seeking to catch up with Scotland, rather than changes following a nationwide debate and agreed principles. We have already seen a commitment by the UK Government to devolve to the National Assembly for Wales many of the constitutional powers promised for the Scottish Parliament in *Scotland in the United Kingdom*.<sup>55</sup>

### Permanence of the Scottish Parliament and Government

56. **Draft Clause 1** provides for the 1998 Act to be amended to embody the Smith Commission’s recommendation that “UK legislation will state that the Scottish Parliament and Scottish Government are permanent institutions.”<sup>56</sup>
57. Section 1(1) of the 1998 Act, which states that “There shall be a Scottish Parliament”,<sup>57</sup> would be followed by the statement:
- “A Scottish Parliament is recognised as a permanent part of the United Kingdom’s constitutional arrangements.”
58. A similar provision inserted into section 44 of the 1998 Act would also recognise the Scottish Government as permanent.
59. Parliamentary sovereignty is the defining principle of the United Kingdom’s constitution. By this principle, Parliament’s law-making power is not subject to any permanent restrictions, and therefore Parliament cannot bind its successors. The Scottish Parliament and Scottish Government are created by

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<sup>53</sup> The UK Government list of “Issues to be Considered in moving from a Conferred to a Reserved Powers Model” starts with a similar point about where consistency is needed: *Powers for a purpose*, Annex D.

<sup>54</sup> [Q 6](#)

<sup>55</sup> *Powers for a purpose*, Chapter 2

<sup>56</sup> Smith Commission, *Report*, para 21

<sup>57</sup> Scotland Act 1998, [section 1\(1\)](#)

statute (the Scotland Act 1998 as amended by the Scotland Act 2012) and hence subordinate to Westminster.

60. As a matter of constitutional law, Parliament has the power unilaterally to amend the Scottish Parliament's powers (as the current process demonstrates) or to abolish these institutions altogether. In political terms the latter scenario is of course most unlikely, but as a matter of constitutional law the question arises as to whether the proposal to make the Scottish Parliament and Scottish Government 'permanent' is an attempt to restrict the legal power of a future Parliament, and if so, how such a measure would be effective. If it is not intended to have legal power, it may be wondered what its effect would be, as the 1998 Act is already considered to be a constitutional statute, cited in significant court judgments as not being liable to implied repeal (most prominently, by Lord Justice Laws in *Thoburn v Sunderland City Council* and Lord Hope of Craighead in *BH v Advocate General*).<sup>58</sup>
61. The draft clause faithfully reproduces the Smith Commission's recommendation.<sup>59</sup> Lord Smith of Kelvin told the Scottish Parliament's Devolution (Further Powers) Committee that he was aware that a new Scotland Bill could not bind future Parliaments, but said that "we intend the law to be written in such a way that a plague of boils or something will break out if anyone ever" tried to abolish the Scottish Parliament.<sup>60</sup> The clear intent, then, was for a political entrenchment rather than a constitutional one. The Advocate General for Scotland acknowledged that, "In the last 16 years, there has been no question but that the Scottish Parliament and the Scottish Government are permanent and should be permanent institutions".<sup>61</sup> However, he told us that the Smith Commission's recommendation was "a very good signal of—'intent' is not quite the right word—recognition, perhaps, of the central importance of the Scottish Parliament and the Scottish Government in the United Kingdom's constitutional arrangements."<sup>62</sup> As Dr Elliott told us: "It is a statement in a statutory text of a political reality".<sup>63</sup>
62. There is a question as to whether Draft Clause 1 might be open to differing interpretations. Lord Hope of Craighead, at the time Deputy President of the Supreme Court, described the Scottish Parliament in a key constitutional case as "self-standing".<sup>64</sup> This appears to be a markedly different understanding from that which considers the Scottish Parliament simply to be a creation of Westminster legislation. Lord Hope of Craighead has previously stated that: "Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament ... is being

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<sup>58</sup> *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin); *BH & Anor v The Lord Advocate & Anor (Scotland)* [2012] UKSC 24

<sup>59</sup> Smith Commission, *Report*, para 21. Lord Smith's foreword was phrased differently; the Draft Clause reflects the recommendation rather than the foreword.

<sup>60</sup> Oral evidence taken before the Devolution (Further Powers) Committee of the Scottish Parliament, [2 December 2014](#)

<sup>61</sup> Oral evidence taken on 11 February 2015 (Session 2014–15), [Q 86](#); see also [Q 9](#) (Dr Mark Elliott)

<sup>62</sup> Oral evidence taken on 11 February 2015 (Session 2014–15), [Q 86](#)

<sup>63</sup> [Q 9](#)

<sup>64</sup> *AXA General Insurance v Lord Advocate* [2011] UKSC 46, para 46

qualified,”<sup>65</sup> and ruled that Acts of the Scottish Parliament which are within competence enjoy “the highest legal authority”.<sup>66</sup> Professor Adam Tomkins, John Millar Chair of Public Law at the University of Glasgow, has argued that Lord Hope is placing “Holyrood legislation and Westminster statutes on the same constitutional plane.”<sup>67</sup>

63. If there are different interpretations as to the status of the Scottish Parliament in its present constitutional configuration then it is not implausible that Clause 1 could be interpreted by certain judges to be a form of entrenchment that could not then be repealed by Westminster legislation without the consent either of the Scottish Parliament or the Scottish people voting in a referendum.
64. **It is a fundamental principle of the UK constitution that Parliament is sovereign and that no Parliament may bind its successors. It is clear that Draft Clause 1 is designed to be a political and symbolic affirmation of the permanence of the Scottish Parliament and Government. While we do not consider that it imposes any legal or constitutional restriction on the power of the UK Parliament, it does create the potential for misunderstanding or conflict over the legal status of the Scottish Parliament which may result in legal friction in the future.**
65. The UK Government’s February 2015 announcement on Welsh devolution included the suggestion of a similar statement of the permanence of the National Assembly and the Welsh Government in statute.<sup>68</sup> This would seem to raise the same constitutional issues we draw attention to above in relation to Scotland. The situation in Northern Ireland is different, however: the Belfast Agreement represents a delicate settlement, also involving the Republic of Ireland, and Parliament should take care to ensure that any change in the constitutional status of the Scottish Parliament and Scottish Government does not in any way unsettle the arrangements for Northern Ireland.

### **Putting the Sewel convention on a statutory footing**

66. The Scotland Act 1998 states that the powers of the Scottish Parliament do not affect the power of the Parliament of the United Kingdom to make laws for Scotland. This means that Parliament retains the power to legislate for Scotland in devolved as well as reserved matters. However, during the passage of that Act, Lord Sewel, the Scotland Office minister responsible for the passage of the Act in the House of Lords, announced that the Government “would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland

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<sup>65</sup> *Jackson v Attorney General* [2006] 1AC 262, per L Hope at p 303 para 104

<sup>66</sup> *AXA General Insurance v Lord Advocate* [2011] UKSC 46, para 46

<sup>67</sup> Adam Tomkins, ‘Confusion and Retreat: The Supreme Court on Devolution’, UK Constitutional Law Association Blog, 19th Feb 2015: <http://ukconstitutionallaw.org/2015/02/19/adam-tomkins-confusion-and-retreat-the-supreme-court-on-devolution/> [accessed 2 March 2015]

<sup>68</sup> *Powers for a purpose*, para 2.2.4

without the consent of the Scottish Parliament.”<sup>69</sup> This became known as the ‘Sewel convention’.

67. This commitment is repeated more fully in the Memorandum of Understanding between the UK Government and the devolved administrations:

“The United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power. However, the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government.”<sup>70</sup>

68. As a consequence of this convention it has become standard practice that, where the Scottish Government agrees with the UK Government that a Westminster Bill should include provisions on devolved matters, Scottish Ministers will promote a Legislative Consent Motion in the Scottish Parliament, consenting to the UK Government legislating in devolved areas. The convention and the Memorandum are not legally binding.

69. The use of the convention also seems increasingly to extend even to certain reserved matters. As the Scottish Government puts it, it now covers matters “which, although reserved, affect the breadth of the devolved institutions’ powers—i.e. the legislative competence of the Scottish Parliament or the executive competence of the Scottish Ministers.”<sup>71</sup>

70. **Draft Clause 2** would fulfil the Smith Commission’s recommendation that “The Sewel convention will be put on a statutory footing”.<sup>72</sup> Section 28 of the 1998 Act gives the Scottish Parliament the power to make laws; it currently concludes with section 28(7), which confirms Parliament’s enduring power to legislate even in devolved matters: “This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland”.

71. Draft Clause 2 would introduce a new section 28(8), which would read:

“But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.”

72. Although in this way the Sewel convention will be put on a statutory footing, the measure seems to have only symbolic significance, consolidating the idea

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<sup>69</sup> HL Deb, 21 July 1998, [col 791](#)

<sup>70</sup> Cabinet Office, ‘Devolution: Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee’, October 2013, para 14: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/316157/MoU\\_between\\_the\\_UK\\_and\\_the\\_Devolved\\_Administrations.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf) [accessed 17 March 2015]

<sup>71</sup> Key Facts on the Sewel Convention: <http://www.scotland.gov.uk/About/Government/Sewel/KeyFacts> [accessed 25 February 2015]

<sup>72</sup> Smith Commission, *Report*, para 22

that Scottish devolution is a permanent arrangement, the terms of which will not be changed unilaterally by the UK Parliament. Aside from the general rule that Parliament is unable to bind its successors (see paragraph 59 above), the use of the word ‘normally’ (which is unusual in legislation and is undefined) seems to make clear that Parliament will still have the legal power to legislate for Scotland, even on devolved matters, without the consent of the Scottish Parliament. Therefore, it can be said that the new provision will recognise the existence of the Sewel convention rather than turn it into a legally binding principle.

73. Nonetheless, since this provision will at the very least strengthen the political commitment inherent in the Sewel convention, it can be said that the powers of the Scottish Parliament would be, in political terms, more firmly beyond the unilateral competence of the UK Parliament than ever before. Professor Keating told us that the division of competences between layers of government and the recognition of that division were central to federalism and he felt that the UK now has “some kind of federal system”.<sup>73</sup> It could be argued that Draft Clauses 1 and 2, in political terms if not legal ones,<sup>74</sup> are moving the United Kingdom in a federal direction.
74. Others argued that this was another step towards an overall legalisation of the UK’s constitution.<sup>75</sup> Hugh Rawlings, Director of Constitutional Affairs in the Welsh Government, told us that “as a result of the Smith Commission we seem to be moving towards greater legalisation of the UK constitution ... are we, as appears to be [the case] at the moment, perhaps looking at legalisation of particular aspects of the constitution without regard for wider issues?”<sup>76</sup>
75. Although it may have little, or no, legal effect this draft clause would risk introducing a perception that the validity of laws passed by the UK Government would be justiciable should they contravene (or be argued to contravene) the Sewel Convention as set out in statute. It is extremely unlikely that any attempt to challenge legislation in the courts on this basis would succeed<sup>77</sup> in the light of Parliament’s enduring sovereignty and the fact that the passage of legislation itself is protected from judicial interference by parliamentary privilege.<sup>78</sup> It is nonetheless possible that a challenge might be made, drawing the courts unnecessarily into an area that has hitherto worked well on a conventional basis. This clause is also among those that the UK Government has proposed should be repeated in legislation relating to Wales.<sup>79</sup>
76. **As with Draft Clause 1, Draft Clause 2 seems unlikely to have any legal effect and is purely a declaratory statement of intent, restating the existing Sewel convention rather than attempting to make it enforceable.**

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<sup>73</sup> [Q 4](#)

<sup>74</sup> [Q 4](#) (Dr Mark Elliott)

<sup>75</sup> Written evidence on inter-governmental relations from Dr Andrew Blick ([IGR0006](#))

<sup>76</sup> Oral evidence taken on 21 January 2015 (Session 2014–15), [Q 54](#)

<sup>77</sup> [Q 9](#) (Dr Mark Elliott)

<sup>78</sup> As recently confirmed by the Supreme Court in *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3

<sup>79</sup> *Powers for a purpose*, 2.3.10

77. **Nonetheless, we note that both these draft clauses appear to be moving the United Kingdom in a federal direction, attempting to crystallise by way of statute, if not a written constitution, the status and powers of the devolved institutions in a way that has hitherto not been the case. We would welcome a clarification from the Government as to whether this was their intention. This is a matter that we trust will receive further scrutiny by the House when a Scotland Bill is introduced in the next Parliament.**

### **Powers over the composition of the Scottish Parliament and Scottish Government**

78. The Smith Commission recommended that the Scottish Parliament be given powers over its overall number of Members (MSPs) or the number of constituency and list MSPs, and powers over the disqualification of MSPs from membership and the circumstances in which a sitting MSP can be removed.<sup>80</sup>
79. **Draft Clause 3** proposes to extend broad competences to the Scottish Parliament on matters relating to the operation of the Scottish Parliament and Scottish Government. It does this by amending paragraph 4 of Schedule 4 to the 1998 Act to add the operation of the Scottish Parliament and Scottish Government to the list of sections of the Act that the Scottish Parliament can modify.<sup>81</sup> The aim is to provide the Scottish Parliament “with a greater role in setting its own internal arrangements and those of the Scottish Government.”<sup>82</sup> Included among these new competences is the power to regulate both numbers of MSPs and rules on their disqualification.
80. Since the proposals simply extend the power of the Scottish Parliament to regulate its own membership they do not seem to have further direct constitutional implications for the UK as a whole.
81. The provisions may, however, have indirect implications. In general, again, these powers may well lead to demands by the other devolved legislatures to get more control over their own composition, including the power to vary the size of these legislatures. The UK Government’s February 2015 Command Paper on Welsh devolution states its support for devolving similar powers to the National Assembly over its membership and elections as have been promised for Scotland.<sup>83</sup>
82. Specific consideration should be given to how these powers relate to the Recall of MPs Bill 2014–15.<sup>84</sup> Were the Scottish Parliament to introduce radical new approaches to disqualification or removal of MSPs, very different from any provisions adopted by Parliament, would the Scottish regime create pressure for further reform of the UK Parliament or the other devolved legislatures?

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<sup>80</sup> Smith Commission, *Report*, para 26

<sup>81</sup> *Scotland in the United Kingdom*, para 1.3.1

<sup>82</sup> *Scotland in the United Kingdom*, para 1.3.2

<sup>83</sup> *Powers for a purpose*, paras 2.2.10–2.2.17

<sup>84</sup> [Recall of MPs Bill](#) [HL Bill 94 (2014–15)]

## Elections

83. **Draft Clauses 5–9** propose powers for the Scottish Parliament over the administration and conduct of Scottish Parliament and local government elections in Scotland, electoral franchise and registration, campaign and controlled expenditure, the Electoral Commission and the Boundary Commission for Scotland in relation to Scottish Parliament constituency boundaries.
84. These proposals build upon the additional powers (not yet in effect) over the conduct of elections accorded to the Scottish Ministers in the Scotland Act 2012.<sup>85</sup> Powers over the conduct of elections were recommended by the Smith Commission,<sup>86</sup> although the provisions set out in **Draft Clauses 5–9** are considerably more detailed than the treatment they received in the Commission’s report.
85. Notably, **Draft Clause 6** provides for legislative competence in relation to the franchise for elections to the Scottish Parliament and local government elections in Scotland to be devolved. This provision has been preceded by a statutory instrument allowing the Scottish Parliament to enfranchise 16 and 17 year olds in time for the next round of these elections in May 2016 and May 2017 respectively.<sup>87</sup> As noted in our report on the draft statutory instrument,<sup>88</sup> the provision for control over the franchise for local government elections in Scotland goes beyond the Smith Agreement, albeit for understandable reasons.<sup>89</sup> Draft Clause 6 would give the Scottish Parliament much wider powers to vary the franchise for these elections; the franchise age is the most prominent element of this, but it could presumably allow variation in the enfranchisement or otherwise of non-British citizens living in Scotland,<sup>90</sup> and of British citizens living abroad who were previously electors in Scotland.<sup>91</sup> The UK Government has proposed that the National Assembly for Wales should have the same powers over the franchise as the Scottish Parliament.<sup>92</sup>
86. If there are elements of the constitution that should not be devolved so as to ensure consistency across the UK (see paragraph 54 above), it could be argued that the franchise should be one of them. It may appear incongruous if new categories of person are enabled to vote in Scottish Parliament and local government elections but not in Westminster elections or local government elections outside of Scotland. This may pressurise Parliament to make similar adjustments to the franchise for UK elections to maintain

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<sup>85</sup> Scotland Act 2012, [Part 1](#) ‘The Parliament and its powers’

<sup>86</sup> Smith Commission, *Report*, paras 23 and 24(4)

<sup>87</sup> Scotland Act 1998 (Modification of Schedules 4 and 5 and Transfer of Functions to the Scottish Ministers etc.) Order 2015

<sup>88</sup> Constitution Committee, *Draft Scotland Act 1998 (Modification of Schedules 4 and 5 and Transfer of Functions to the Scottish Ministers etc.) Order 2015* (9th Report, Session 2014–15, HL Paper 119)

<sup>89</sup> See HL Deb, 26 February 2015, cols [1769–70](#)

<sup>90</sup> The Scottish Parliament’s franchise currently includes all EU citizens and those Commonwealth citizens with the right to remain in the country; the UK parliamentary franchise does not include most non-British EU citizens.

<sup>91</sup> At present Britons are able to register as electors for the first fifteen years after they were last registered at a UK address.

<sup>92</sup> *Powers for a purpose*, para 2.2.15

consistency across the UK. There is an argument that fundamental changes to the franchise should result instead from a UK-wide debate about what the franchise should be, or a more principled delineation of which body or bodies should have the power to decide the franchise for different polls. That this power has been partially devolved in Scotland without such a debate, and that further powers would be devolved under this draft clause and the proposals for Welsh devolution, are symptoms of devolution being treated in a piecemeal manner, without proper consideration of the wider UK constitution. As we noted in our report on the draft statutory instrument, this process stands in contrast to the change in the voting age in the UK in the 1960s, which followed two Commission reports, and the consideration of the issue by a Constitutional Convention in the Republic of Ireland.<sup>93</sup>

87. **We note again our concern that power over constitutional matters is being devolved with no discussion as to whether such fundamental constitutional issues are better dealt with in a consistent manner across the UK.**
88. A particular difficulty that may arise relates to prisoner voting rights and the European Convention on Human Rights. The Scottish Parliament cannot make laws that are incompatible with Convention rights.<sup>94</sup> Given that the UK's current blanket ban on prisoners voting is deemed to be in contravention of the Convention,<sup>95</sup> there is a risk that any future legislation by the Scottish Parliament that purports to extend the franchise but which does not enfranchise prisoners in line with the recent judgments taken by the European Court of Human Rights<sup>96</sup> would itself be incompatible with Convention rights and could be struck down.<sup>97</sup> **The Scottish Parliament may find its ability to amend the franchise for Scottish parliamentary and local government elections constrained by its human rights obligations. The UK Government should set out its view of how these powers could be exercised within the Scottish Parliament's restricted competence.**
89. **Draft Clause 7** would extend the legislative competence of the Scottish Parliament to include campaign expenditure and controlled expenditure in relation to elections to the Scottish Parliament, and allow the Scottish Parliament to amend the rules for campaigning by political parties and non-party campaigners in the run-up to Scottish Parliament elections. There are, however, important limits. For example, the regulation of political parties, including donations to political parties, would remain reserved. Also, as stated in *Scotland in the United Kingdom*, "UK legislation will prevent the

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<sup>93</sup> Constitution Committee, *Draft Scotland Act 1998 (Modification of Schedules 4 and 5 and Transfer of Functions to the Scottish Ministers etc.) Order 2015*, para 10. In the Republic of Ireland, a referendum is due to be held on the voting age, a requirement for amendments to the country's constitution.

<sup>94</sup> Scotland Act 1998, [section 29\(2\)\(d\)](#); the same restriction applies to the National Assembly for Wales under the Government of Wales Act 2006, [section 81](#).

<sup>95</sup> See Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, *Draft Voting Eligibility (Prisoners) Bill*, (Report, Session 2013–14, HL Paper 103, HC 924), Chapter 3

<sup>96</sup> *Scoppola v Italy* (No.3), 22 May 2012; and see *Frith and others v UK*, August 2014 and *McHugh and others v UK*, February 2015.

<sup>97</sup> As shown in the UK Government's inability issue to a Human Rights Act s.19 'statement of compatibility' in relation to the [House of Lords Reform Bill](#) [Bill 52 (2012–13)] because it dealt, in part, with the franchise.

Scottish Parliament deciding that general elections should be held on the same day as general elections to the UK Parliament, European Parliament or local government elections in Scotland”.<sup>98</sup>

90. Since these powers affect Scottish elections and the powers of the Scottish Parliament only, they will not have direct constitutional implications for the wider UK. These powers are among those that the UK Government supports being devolved to the National Assembly for Wales.<sup>99</sup>
91. As noted in Chapter 2, consultation is a vital part of an effective process for constitutional change. **When bringing forward a bill implementing these Draft Clauses, the Government should set out the extent to which the views of the Electoral Commission, Scottish Assessors Association, Boundary Commission and Local Government Boundary Commission have been taken into account in formulating these proposals and in considering possible unforeseen consequences. Similarly, the views of the Law Commission and Scottish Law Commission should be sought as to how these proposals relate to the recent major inquiry into electoral law and practice conducted by the Commissions.**
92. One notable provision of constitutional significance is **Draft Clause 4**. This would require certain types of electoral legislation—legislation amending the franchise, the electoral system or the number of constituency and regional members for the Scottish Parliament—to be passed by a “super-majority”, i.e. a two-thirds majority of the Scottish Parliament.<sup>100</sup> One aim is to ensure that electoral laws are not changed for the advantage of a particular party. The UK Parliament is able to impose such a measure upon a subordinate legislature which will be bound by this in law; it does not purport to affect the legislative power of the UK Parliament itself. As with other provisions in the Draft Clauses, this may lead to calls for similar provisions for the UK Parliament,<sup>101</sup> although any such move would be limited by the fact that one Parliament cannot bind its successors.<sup>102</sup> In our report on the Process of Constitutional Change, we did not recommend that any new parliamentary procedures such as super-majorities should be introduced for constitutional legislation in the UK parliament.<sup>103</sup>

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<sup>98</sup> *Scotland in the United Kingdom*, para 1.4.4. See also Smith Commission, *Report*, para 24(4)

<sup>99</sup> Wales Office, *Powers for a purpose*, paras 2.2.10-2.2.17

<sup>100</sup> See Smith Commission, *Report*, para 27

<sup>101</sup> See [Q 8](#) (Dr Mark Elliott)

<sup>102</sup> The UK Parliament has included a two-thirds majority requirement in [section 2](#) of the Fixed-term Parliaments Act 2011 (required to call an early election without a vote of no confidence in the Government). There are key differences however: the super-majority does not relate to a stage in the law-making process; and the UK Parliament could, with a simple majority, remove the requirement for the super-majority, while the Scottish Parliament could not remove the super-majority requirement in Draft Clause 4.

<sup>103</sup> Constitution Committee, *The Process of Constitutional Change*, para 99

## CHAPTER 4: CONSTITUTIONAL IMPLICATIONS OF OTHER DRAFT CLAUSES

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93. This chapter addresses the remaining substantive chapters of *Scotland in the United Kingdom* and their related Draft Clauses. These are not specifically constitutional measures, but some raise points of constitutional interest or concern. We address each chapter of the Command Paper in turn.

### Fiscal Framework (Chapter 2)

94. These provisions address Pillar 3 in the Smith Report: “Strengthening the financial responsibility of the Scottish Parliament”. The Draft Clauses contain detailed proposals for the management of extensive tax devolution and offer principles and details for the management of fiscal relations across the United Kingdom.
95. *Scotland in the United Kingdom* explains the significance of the proposed changes:
- “Under the Scotland Act 1998 (the 1998 Act), the Scottish Parliament is responsible for almost 60 per cent of public spending in Scotland (e.g. health, education, housing, policing, justice etc.) but is responsible for only around 10 per cent of Scottish tax (council tax and non-domestic (business) rates). While the Scottish Government is also able to vary the basic rate of income tax in Scotland (by up to 3p) it has never used this power.”<sup>104</sup>
  - “As a result of the Smith Commission Agreement, the Scottish Parliament will control around 60 per cent of spending in Scotland and retain around 40 per cent of Scottish tax. This will therefore make the Scottish Government one of the most powerful subcentral governments in the OECD, just behind the Canadian provinces and Swiss cantons. Importantly, it will therefore give the Scottish Government substantial choices in relation to levels of tax and spending in Scotland.”<sup>105</sup>
96. **The main constitutional issues are, first, whether due diligence has been done in terms of assessing the possible implications of these changes for the British economy and the formation of central economic and fiscal policy and, secondly, how the principles, institutions and practice of inter-governmental relations should be adapted in light of these new powers.**
97. The Draft Clauses propose a revised fiscal framework. This follows from a recommendation of the Smith Report.<sup>106</sup> *Scotland in the United Kingdom* explains the importance of such a framework:

“A fiscal framework is the set of rules and institutions that are used to set and coordinate sustainable fiscal policy. The rules can include short-

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<sup>104</sup> *Scotland in the United Kingdom*, para 2.3.6

<sup>105</sup> *Scotland in the United Kingdom*, para 2.2.10

<sup>106</sup> Smith Commission, *Report*, para 94

term and medium-term targets for debt and for borrowing, as well as rules restricting borrowing or encouraging saving. It is critical for a fiscal framework to ensure that debt remains at sustainable levels, maintaining the confidence of financial markets that the government is able to repay its debts.”<sup>107</sup>

98. Such a framework also deals with situations where one part of the UK faces an economic challenge such as a fall in tax revenues, pressure on public services or a temporary increase in unemployment, ensuring the impact and the cost is shared across all parts of the UK.<sup>108</sup> According to the Government: “A fiscal framework needs to be established so that actions across the authorities in the union will deliver the fiscal mandate set by the UK Government, while enabling the Scottish Government to exercise its devolved powers effectively.”<sup>109</sup> It is also needed to ensure “that Scotland contributes proportionally to the overall fiscal consolidation pursued by the UK Government. A framework that fails to deliver this outcome would result in the unequal treatment of citizens across the UK.”<sup>110</sup> In short, these draft clauses seek to “incorporate the key features agreed by the Smith Commission, consistent with the UK Government’s continuing responsibility for UK-wide fiscal policy.”<sup>111</sup>
99. In considering the impact of the division of powers on each Government’s budgets, Professor Michael Keating emphasised additional difficulties around the concept of “detriment” in the devolution of tax and other powers:
- “The concept of detriment ... has been introduced in the Command Paper, which says essentially that if one Parliament does something that imposes a cost upon the other Parliament there should be compensation. That sounds straightforward enough, but it has not been defined properly and potentially has extremely wide ramifications. One could have interpreted it in the narrow sense that if there is a transfer of competences, the money should go with that. But in a broad sense, it seems that almost anything that one Parliament could do could affect the other Parliament. We need to discuss the scope of that—whether it is to have a narrow or broad application, because it could be extremely difficult and get us into all kinds of political and legal difficulties unless it is properly specified.”
100. Fiscal devolution is a very complex area and other committees will no doubt consider the consequences of these changes for fiscal, economic and social policy. We note that the House of Commons Treasury Select Committee is currently carrying out an inquiry into the Draft Clauses.<sup>112</sup>

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<sup>107</sup> *Scotland in the United Kingdom*, para 2.2.3

<sup>108</sup> *Scotland in the United Kingdom*, para 2.1.1

<sup>109</sup> *Scotland in the United Kingdom*, para 2.2.8

<sup>110</sup> *Scotland in the United Kingdom*, para 2.2.5

<sup>111</sup> *Scotland in the United Kingdom*, para 2.1.2

<sup>112</sup> Proposals for further Fiscal and Economic Devolution to Scotland: <http://www.parliament.uk/business/committees/committees-a-z/commons-select/treasury-committee/inquiries1/parliament-2010/proposals-for-further-fiscal-and-economic-devolution-to-scotland/> [accessed 25 February 2015]

101. At the constitutional level, **there are key considerations around the fiscal framework that should be addressed by the Government before these proposals are implemented, and explained to Parliament when a bill is introduced.** These are as follows:

- (1) How the new fiscal framework will be agreed and implemented jointly by the UK Government and Scottish Government through the Joint Exchequer Committee; the roles for the UK and Scottish parliaments respectively in this process; and plans by the UK Government to publish annual implementation reports in relation to the design and implementation of a new fiscal and funding framework.<sup>113</sup>
- (2) How opportunities for proper scrutiny of these proposals will be developed.
- (3) How the workings of the Barnett formula will be affected by the new tax powers.<sup>114</sup>
- (4) How the details of new structures will be worked out to give effect to the Fiscal Framework and oversee the practice of the Scottish parliament's tax and borrowing powers. As *Scotland in the United Kingdom* states: "it is clear from international best practice that a set of fiscal rules and robust institutional arrangements will need to be in place to ensure that the overall UK public finances remain sustainable."<sup>115</sup>
- (5) How the fiscal framework will be reviewed periodically "to ensure it remains fair, transparent and effective."<sup>116</sup>
- (6) How to ensure the delivery and scrutiny of proposals from the Scottish Government in relation to independent fiscal scrutiny.<sup>117</sup>
- (7) How to co-ordinate the respective plans by which the UK Government will manage UK-wide risks and how the Scottish Government will manage Scotland-specific risks in devolved areas.<sup>118</sup>
- (8) Whether changes in fiscal and other powers will have any knock-on consequences for the powers of Scottish MPs. There does not appear to be a Government position on this issue at present; however, the Conservative Party have announced plans to limit the voting rights of Scottish MPs, so that "where taxes have been devolved to Scotland the equivalent taxes in England would require the consent of English MPs".<sup>119</sup>

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<sup>113</sup> *Scotland in the United Kingdom*, para 2.4.37

<sup>114</sup> See Smith Commission, *Report*, para 95(1) and *Scotland in the United Kingdom*, paras 2.4.2-2.4.3

<sup>115</sup> *Scotland in the United Kingdom*, para 2.4.28

<sup>116</sup> *Scotland in the United Kingdom*, para 2.4.30

<sup>117</sup> *Scotland in the United Kingdom*, para 2.4.31 and see Smith Commission, *Report*, para 95(7)

<sup>118</sup> *Scotland in the United Kingdom*, para 2.4.35

<sup>119</sup> 'William Hague unveils plans to stop Scottish MPs voting on English issues', *The Guardian*, 3 February 2015: <http://www.theguardian.com/uk-news/2015/feb/03/william-hague-plan-bar-scottish-mps-voting-english-issues> [accessed 25 February 2015]

- (9) How the Government is addressing any wider consequences for how the legislative process and scrutiny functions of Parliament should operate in light of these proposals.

### Tax (Chapter 3)

102. **Draft Clauses 10–15** propose the devolution of a number of specific tax powers, relating principally to income tax, Air Passenger Duty, the Aggregates Levy and a proportion of the revenue raised by Value Added Tax (VAT).<sup>120</sup> This is a very complex area and once again other committees will no doubt consider the policy consequences of these changes. At the constitutional level, key considerations centre mainly upon how inter-governmental relations will work in relation to these powers. In particular:

- (1) Joint working between the UK and Scottish Governments, specifically to avoid double taxation and to make administration as simple as possible for taxpayers.<sup>121</sup>
- (2) How existing arrangements for relations among HM Revenue and Customs, HM Treasury and the Scottish Government will be developed to ensure the most efficient implementation and administration of the new powers.
- (3) How the Memorandum of Understanding will be adjusted in respect of these relations and how the Joint Exchequer Committee will work towards this goal.<sup>122</sup>

103. In our report on inter-governmental relations, we set out a number of recommendations for improving these relationships in light of current difficulties and the requirements of the evolving devolution settlements. **The Government should explain to Parliament how it plans to adjust its inter-governmental relations arrangements to accommodate the devolution of tax powers.**

### Welfare Benefits and Employment Support (Chapter 4)

104. Substantial elements of the United Kingdom's welfare system would be devolved to Scotland under **Draft Clauses 16–22**. According to Scotland in the United Kingdom this will give the Scottish Parliament “the levers it needs to make and create changes to suit Scottish circumstances, while retaining the strength, stability and economies of scale found in the UK-wide system.”<sup>123</sup> The Command Paper notes that these provisions are significant: “The Smith Commission proposals, set out in the draft legislation, will devolve benefits which last year accounted for £2.5bn of spending, or around one quarter of all welfare spending outside the state pension.”<sup>124</sup>

105. The constitutional issues are again principally issues of effective inter-governmental relations and scrutiny. *Scotland in the United Kingdom*

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<sup>120</sup> *Scotland in the United Kingdom*, para 3.1.1

<sup>121</sup> *Scotland in the United Kingdom*, para 3.1.3 and see Smith Commission, *Report*, para 93

<sup>122</sup> *Scotland in the United Kingdom*, para 3.1.5

<sup>123</sup> *Scotland in the United Kingdom*, para 4.1.2

<sup>124</sup> *Scotland in the United Kingdom*, para 4.1.2

acknowledges: “As with other draft clauses they are not complete in that there will be many consequential issues that the UK Government and the Scottish Government will work on over the coming months ahead of introduction of the legislation to Parliament.”<sup>125</sup>

106. At the constitutional level, key considerations that should be addressed by the Government before these proposals are implemented are as follows:

- (1) How will the joint Ministerial Working Group on Welfare work, and how will it involve both UK Ministers and Scottish Ministers in discussing the new arrangements?<sup>126</sup> How will this build upon current arrangements under the 2012 Act?
- (2) In relation to Universal Credit the aim is that “the UK Government should continue to be able to develop and initiate policy changes for Universal Credit without overriding or undermining any decisions made by the Scottish Government.”<sup>127</sup> The current welfare arrangements at UK level are themselves new and developing. To devolve aspects of such a system will be enormously complex with the potential for significant political disputes emerging. The Government should consider these changes carefully, and in particular how they will be effected by way of existing mechanisms for inter-governmental relations. The Government should also consider carefully how the risk of both political disputes and the judicialisation of the welfare system can be minimised.
- (3) How will relations between the Scottish Ministers and the Secretary of State be developed to ensure that any changes that the Scottish Government wish to take forward are delivered? The Draft Clauses provide that the Secretary of State could not unreasonably withhold his agreement, and impose an obligation on the Secretary of State for Work and Pensions to consult Scottish Ministers before making regulations that relate to certain matters involving Universal Credit and housing.<sup>128</sup> How will this measure be implemented?

107. **The Government should set out how they intend to address these issues, before bringing forward a new Scotland bill.**

108. Again inter-governmental relations are important. The Government will need to clarify what arrangements are to be put in place for relations between the two governments in the design, implementation and operation of their respective programmes and the way in which the Joint Ministerial Working Group on Welfare<sup>129</sup> and other forums operate to achieve co-ordinated decision-making. We address the issues around the transparency of inter-governmental relations in our report on the subject.<sup>130</sup>

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<sup>125</sup> *Scotland in the United Kingdom*, para 4.1.6

<sup>126</sup> *Scotland in the United Kingdom*, para 4.1.9

<sup>127</sup> *Scotland in the United Kingdom*, para 4.2.7

<sup>128</sup> *Scotland in the United Kingdom*, para 4.2.8

<sup>129</sup> *Scotland in the United Kingdom*, para 4.4.8

<sup>130</sup> Constitution Committee, *Inter-governmental relations in the United Kingdom*

109. Other important changes, although with no obvious constitutional implications relate to Motability<sup>131</sup> and Employment Support.<sup>132</sup>

### Other Legislative Competences (Chapters 5–8)

#### *Crown Estate*

110. **Draft Clause 23** would transfer management and revenue of Crown Estate assets in Scotland to the Scottish Parliament.<sup>133</sup> The Crown Estate is an independent commercial public body with responsibility for managing and turning to account Crown property forming part of the estate. Defence is, and will remain, a reserved matter and current and future Defence use of Crown property assets will be given legal protection.<sup>134</sup>
111. The Smith Commission recommended devolution to the Scottish Parliament of responsibility for the Crown Estate’s economic assets in Scotland, and the revenue generated from these assets. A Memorandum of Understanding between the Scottish and UK Governments to protect strategic UK-wide critical national infrastructure (such as defence and security, oil and gas, and energy) is intended to regulate this area of devolution and relations between the two governments.<sup>135</sup>
112. It is intended that the scheme through which this is devolved “must also include such provision as the Treasury considers necessary or expedient in the interests of defence or national security. The transfer scheme is subject to those provisions. The purpose of these provisions is to ensure that the transfer is not detrimental to the defence of the realm or the interests of UK-wide national security.”<sup>136</sup>
113. This is an important area of responsibility but it does not raise direct constitutional implications. However, **since these powers would be effected not through legislation but through a Memorandum of Understanding, the Government should clarify what role Parliament will play in approving the terms of that Memorandum.**

#### *Equal Opportunities*

114. **Clause 24** will devolve to the Scottish Parliament the power to legislate on equalities in respect of public bodies in Scotland and cross-border public authorities with Scottish functions, which will include but not be limited to the introduction of gender quotas and the consideration of socio-economic inequality when making strategic decisions. This power would be delivered through specific exceptions to paragraph L2 of Schedule 5 to the Scotland Act 1998, which specifically deals with equal opportunities. It will enable the Scottish Parliament, by imposing new requirements on public bodies in Scotland, to introduce new protections for employees and customers of those bodies with regards to their devolved functions. However, the Scottish

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<sup>131</sup> *Scotland in the United Kingdom*, para 4.3.9

<sup>132</sup> *Scotland in the United Kingdom*, para 4.4.1

<sup>133</sup> See Smith Commission, *Report*, paras 32–35

<sup>134</sup> *Scotland in the United Kingdom*, para 5.5.3

<sup>135</sup> Draft Clause 23 and *Scotland in the United Kingdom*, para 5.5.1

<sup>136</sup> *Scotland in the United Kingdom*, para 5.5.6

Parliament will not be able to lower the protections found in the Equality Act 2010, and that Act will remain reserved.

115. As these proposals develop **the Government should make clear how they intend powers over equal opportunities to be devolved without any infringement of the Equality Act, which remains reserved under Schedule 4 to the 1998 Act, and whether any change in the reserved status of the legislation might be required to give effect to these powers.**

*Scottish tribunals*

116. Under **Clause 25** all powers over the management and operation of all reserved tribunals (which includes administrative, judicial and legislative powers) would be devolved to the Scottish Parliament other than the Special Immigration Appeals Commission and the Proscribed Organisations Appeals Commission.<sup>137</sup>
117. These measures are intended to allow the Scottish Parliament to streamline the tribunals system in Scotland. There would continue to be a number of important reservations,<sup>138</sup> in particular the laws providing for the underlying reserved substantive rights and duties would continue to remain reserved—in other words the management of the tribunals would be devolved but the substantive areas of law upon which they adjudicate, such as employment and immigration law, would in many respects still be reserved. There is also provision for ongoing discussion between the two governments:

“The UK Government and the Scottish Government will need to discuss the application of this clause to relevant tribunals that sit in Scotland, for example, tribunals dealing with social security, criminal injuries and information rights. These discussions will need to include extensive engagement with the judiciary in both Scotland and England and Wales.”<sup>139</sup>

118. **The Government should set out what institutional mechanisms will be put in place to manage the balance between devolved and reserved matters for Scottish tribunals.**
119. **Draft Clauses 26–33** concern roads, policing of railways and railway property, onshore oil and gas extraction, consumer advocacy and advice, and fixed odds betting terminals. These provisions have no constitutional implications.

*Other Executive Competences:*

120. A series of provisions cover the management and operation of regulatory bodies in the UK (**Draft Clauses 34–41**).<sup>140</sup> The Smith Commission report suggests a formalised role for the Scottish Government and the Scottish Parliament with regard to a number of public bodies and executive agencies.

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<sup>137</sup> See Smith Commission, *Report*, paras 63–64

<sup>138</sup> *Scotland in the United Kingdom*, paras 6.3.2–6.3.6

<sup>139</sup> *Scotland in the United Kingdom*, para 6.3.7

<sup>140</sup> *Scotland in the United Kingdom*, para 5.1.1

The main aim is to give Scottish Ministers a consultative role in the governance of those organisations that provide UK- or Great Britain-wide services.

121. *Scotland in the United Kingdom* provides that the UK Government “will work with the Scottish Parliament and the Scottish Government to devise a proportionate and workable method of consulting the Scottish Parliament on this range of issues.”<sup>141</sup>
122. The regulatory structures and bodies they will affect include the BBC Charter,<sup>142</sup> Ofcom appointments to the board of MG Alba (Gaelic TV),<sup>143</sup> Ofcom, the Maritime Coastguard Authority and the Northern Lighthouse Board, and OfGem.
123. The main constitutional issue relates to the conduct and scrutiny of this consultation. **The Government should set out how the Scottish Parliament’s consultative role will be provided for; how in each sector it will be overseen and scrutinised; and how the performance of these roles by Scottish Ministers will be reported to the Scottish Parliament, and by the UK Government to the UK Parliament.**
124. **These powers will be effected not through legislation but through a Memorandum of Understanding. Again, the Government should clarify what role Parliament will play in approving the terms of that Memorandum.**

*Miscellaneous*

125. **Draft Clauses 42–44** have no constitutional implications.

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<sup>141</sup> *Scotland in the United Kingdom*, para 5.1.3

<sup>142</sup> *Scotland in the United Kingdom*, para 5.2.1

<sup>143</sup> *Scotland in the United Kingdom*, para 5.2.4

## CHAPTER 5: NEXT STEPS

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126. The final chapter of *Scotland in the United Kingdom* sets out the Government's plans for implementing the Draft Clauses.<sup>144</sup> It is intended that a new Scotland Bill will be brought forward in the first session of Parliament after the general election in May 2015. Much remains to be done before this can happen, including finalising those areas which are still being considered for devolution.<sup>145</sup> An important aspect will be improving the current system of inter-governmental relations, including the Memorandum of Understanding and the Joint Ministerial Committee system. These are issues we explore in greater detail in our report on that subject.<sup>146</sup>
127. The Command Paper also sets out the Government's commitment to "a continued focus and dedication to public and stakeholder engagement"<sup>147</sup> in Scotland ahead of a bill being introduced in the next Parliament. As we noted earlier in this report, the Government must ensure that this engagement is extended beyond Scotland. **If an "enduring settlement" is to be reached, it must be accepted by the UK as a whole and not simply one part of it. A campaign of meaningful and effective public engagement, which has been lacking thus far in relation to the proposals set out in *Scotland in the United Kingdom*, should be conducted across the whole of the UK.**
128. The expressed intention of the three major UK-wide political parties is to introduce a bill implementing the proposals contained in the Draft Clauses in the next Parliament. Given the lack of consultation to date, **we urge Parliament to ensure that the new Scotland bill, when introduced, receives the detailed scrutiny it requires and any amendment that may be necessary.**
129. **We urge both the current Government and whichever party or parties form the Government after the general election to consider carefully the points we have made in this report. Any Government seeking to change the UK's devolution settlements needs to acknowledge that devolution is a nationwide issue. The implications for the whole UK of proposals relating to any one part must be fully considered.**

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<sup>144</sup> *Scotland in the United Kingdom*, Chapter 6

<sup>145</sup> *Scotland in the United Kingdom*, para 9.1.1

<sup>146</sup> Constitution Committee, *Inter-governmental relations in the UK*

<sup>147</sup> *Scotland in the United Kingdom*, para 9.1.3

## SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

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### **From the referendum to the Draft Clauses: an appropriate process for constitutional change?**

1. We are astonished that the UK Government do not appear to have considered the wider implications for the United Kingdom of the proposals set out in *Scotland in the United Kingdom*. We do not consider that it is appropriate, or sustainable, to address the issue of additional powers for Scotland alone without also considering the knock-on consequences for the wider UK constitution. (Paragraph 22)
2. We recommend that the Government give urgent consideration to the consequences of the Draft Clauses for the constitution of the United Kingdom as a whole. This should happen before they are passed into law. We recognise the political imperatives behind these changes but piecemeal, ad hoc changes to the Scottish devolution settlement without wider consideration of their impact could well destabilise the Union as a whole in the longer term. We question how any process that does not consider the future of the Union as a whole could provide for an ‘enduring’ settlement. (Paragraph 23)
3. The UK Government and the major UK-wide political parties need urgently to devise and articulate a coherent vision for the shape and structure of the United Kingdom, without which there cannot be constitutional stability. (Paragraph 24)
4. We do not consider that the Smith Commission process, its conclusions, and this Command Paper represent sufficient engagement and consultation with the public for these significant constitutional changes. Given that the leaders of the main UK-wide political parties had agreed in advance to implement the recommendations of the Smith Commission, which could be characterised as an abrogation of their responsibility to set policy, we are particularly concerned at the speed with which these proposals were formulated and with the fact that there was no meaningful interaction with either the Scottish or UK Parliament, or indeed with citizens and civil society both in Scotland and across the UK. (Paragraph 32)
5. The Government should consider how ongoing public engagement and consultation, so far conducted only in Scotland, could now be extended throughout the United Kingdom. (Paragraph 34)
6. We are concerned that Parliament has been, in effect, excluded from the decision-making process in light of the cross-party agreement already in place among the leaders of the main UK-wide political parties. This significantly restricts its capacity to contribute to the development of these proposals. Parliament is expected to pass these proposals into law without significant amendment, even though it is not clear whether vital considerations such as the impact of these proposals on the UK as a whole will have been taken into account. (Paragraph 43)
7. We do not believe that the referendum and subsequent events constitute a “clearly justifiable” reason for adopting such an unusual process for initiating significant constitutional change. The undue haste with which the process

was conducted, including the use of arbitrary deadlines based on significant dates in the Scottish calendar, undermines confidence in the outcome. (Paragraph 47)

8. Moreover, we are deeply concerned that an agreement by the leaders of the three main UK-wide political parties to implement the recommendations of Smith Commission, made before that Commission had even met, appears to have pre-empted any possibility of meaningful consultation and discussion on the merits of the proposals, including with the parliaments of Scotland and the United Kingdom. (Paragraph 48)
9. This is not the first time that we have expressed concerns about the process by which constitutional reforms have been implemented. As we have previously noted, “The constitution is the foundation upon which law and government are built. The fundamental nature of the constitution means that it should be changed only with due care and consideration.” We do not believe that the process by which these proposals have been brought forward meets this standard. (Paragraph 49)

### **Constitutional provisions in the Draft Clauses**

10. There have been many criticisms of the Barnett Formula. This report is not the place to rehearse those arguments, but we are concerned by the failure to address that element of the funding of devolved administrations while significant changes are being made to other elements of the funding arrangements for Scotland. What is clear is that the changes to income tax in Scotland will reduce significantly the size of the block grant to Scotland and therefore the impact of the Barnett formula. (Paragraph 51)
11. We note with concern that a wider discussion about the most appropriate level of devolution for constitutional issues was not held. (Paragraph 55)
12. It is a fundamental principle of the UK constitution that Parliament is sovereign and that no Parliament may bind its successors. It is clear that Draft Clause 1 is designed to be a political and symbolic affirmation of the permanence of the Scottish Parliament and Government. While we do not consider that it imposes any legal or constitutional restriction on the power of the UK Parliament, it does create the potential for misunderstanding or conflict over the legal status of the Scottish Parliament which may result in legal friction in the future. (Paragraph 64)
13. As with Draft Clause 1, Draft Clause 2 seems unlikely to have any legal effect and is purely a declaratory statement of intent, restating the existing Sewel convention rather than attempting to make it enforceable. (Paragraph 76)
14. Nonetheless, we note that both these draft clauses appear to be moving the United Kingdom in a federal direction, attempting to crystallise by way of statute, if not a written constitution, the status and powers of the devolved institutions in a way that has hitherto not been the case. We would welcome a clarification from the Government as to whether this was their intention. This is a matter that we trust will receive further scrutiny by the House when a Scotland Bill is introduced in the next Parliament. (Paragraph 77)

15. We note again our concern that power over constitutional matters is being devolved with no discussion as to whether such fundamental constitutional issues are better dealt with in a consistent manner across the UK. (Paragraph 87)
16. The Scottish Parliament may find its ability to amend the franchise for Scottish parliamentary and local government elections constrained by its human rights obligations. The UK Government should set out its view of how these powers could be exercised within the Scottish Parliament's restricted competence. (Paragraph 88)
17. When bringing forward a bill implementing these Draft Clauses, the Government should set out the extent to which the views of the Electoral Commission, Scottish Assessors Association, Boundary Commission and Local Government Boundary Commission have been taken into account in formulating these proposals and in considering possible unforeseen consequences. Similarly, the views of the Law Commission and Scottish Law Commission should be sought as to how these proposals relate to the recent major inquiry into electoral law and practice conducted by the Commissions. (Paragraph 91)

#### **Constitutional implications of other Draft Clauses**

18. The main constitutional issues are, first, whether due diligence has been done in terms of assessing the possible implications of these changes for the British economy and the formation of central economic and fiscal policy and, secondly, how the principles, institutions and practice of inter-governmental relations should be adapted in light of these new powers. (Paragraph 96)
19. There are key considerations around the fiscal framework that should be addressed by the Government before these proposals are implemented, and explained to Parliament when a bill is introduced. (Paragraph 101)
20. The Government should explain to Parliament how it plans to adjust its inter-governmental relations arrangements to accommodate the devolution of tax powers. (Paragraph 103)
21. The Government should set out how they intend to address these issues relating to welfare benefits and employment support, before bringing forward a new Scotland bill. (Paragraph 107)
22. Since these powers over the Crown Estate in Scotland would be effected not through legislation but through a Memorandum of Understanding, the Government should clarify what role Parliament will play in approving the terms of that Memorandum. (Paragraph 113)
23. The Government should make clear how they intend powers over equal opportunities to be devolved without any infringement of the Equality Act, which remains reserved under Schedule 4 to the 1998 Act, and whether any change in the reserved status of the legislation might be required to give effect to these powers. (Paragraph 115)
24. The Government should set out what institutional mechanisms will be put in place to manage the balance between devolved and reserved matters for Scottish tribunals. (Paragraph 118)

25. The Government should set out how the Scottish Parliament's consultative role in relation to these regulatory bodies will be provided for; how in each sector it will be overseen and scrutinised; and how the performance of these roles by Scottish Ministers will be reported to the Scottish Parliament, and by the UK Government to the UK Parliament. (Paragraph 123)
26. These powers with regard to the management and operation of regulatory bodies will be effected not through legislation but through a Memorandum of Understanding. Again, the Government should clarify what role Parliament will play in approving the terms of that Memorandum. (Paragraph 124)

### Next steps

27. If an "enduring settlement" is to be reached, it must be accepted by the UK as a whole and not simply one part of it. A campaign of meaningful and effective public engagement, which has been lacking thus far in relation to the proposals set out in *Scotland in the United Kingdom*, should be conducted across the whole of the UK. (Paragraph 127)
28. We urge Parliament to ensure that the new Scotland bill, when introduced, receives the detailed scrutiny it requires and any amendment that may be necessary. (Paragraph 128)
29. We urge both the current Government and whichever party or parties form the Government after the general election to consider carefully the points we have made in this report. Any Government seeking to change the UK's devolution settlements needs to acknowledge that devolution is a nationwide issue. The implications for the whole UK of proposals relating to any one part must be fully considered. (Paragraph 129)

## APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTERESTS

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### Members

Lord Brennan  
Lord Crickhowell  
Lord Cullen of Whitekirk  
Baroness Dean of Thornton-le-Fylde  
Baroness Falkner of Margravine  
Lord Goldsmith  
Lord Lang of Monkton (Chairman)  
Lord Lester of Herne Hill \*  
Lord Lexden  
Lord Powell of Bayswater  
Baroness Taylor of Bolton

\* Lord Lester of Herne Hill was absent from the Committee for much of the inquiry and took no part in consideration of the report.

### Declarations of interest

No interests relevant to the subject-matter of the report were declared by Members of the Committee.

A full list of members' interests can be found in the Register of Lords' Interests: <http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests>

Professor Stephen Tierney, Professor of Constitutional Theory at the University of Edinburgh, acted as Specialist Adviser. He declared no relevant interests.

**APPENDIX 2: ORAL EVIDENCE TAKEN ON 4 FEBRUARY 2015**

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## Members present

Lord Lang (Chairman)	Baroness Falkner of Margravine
Lord Brennan	Lord Lexden
Lord Cullen of Whitekirk	Lord Powell of Bayswater
Baroness Dean of Thornton-le-Fylde	Baroness Taylor of Bolton

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**Examination of Witnesses****Professor Michael Keating, Director of the Economic and Social Research Council, Centre on Constitutional Change, and Dr Mark Elliott, Reader in Public Law at the Faculty of Law, University of Cambridge**

**Q1 The Chairman:** I welcome both our witnesses this morning—Professor Michael Keating, director of the Economic and Social Research Council’s Centre on Constitutional Change and part-time professor at Edinburgh University; and Dr Mark Elliott, reader in public law at the Faculty of Law in Cambridge and a fellow of the Bingham Centre for the Rule of Law. Welcome to you both. I do not know whether you read our last report, Dr Elliott, in which the rule of law featured when we were looking at the role of the Lord Chancellor.

**Dr Mark Elliott:** Indeed.

**The Chairman:** But we will not question on that this morning because we have committed ourselves. We are most grateful to you for coming. We are tackling the draft clauses that have just been published and intergovernmental relations in general. There is an interrelation and an overlap, but that may not always be relevant in some of the questions that we ask or in some of the answers that you give. However, we are happy to cover that territory in any way that emerges in the course of questioning.

I will start the ball rolling by asking whether you feel that the constitutional changes in the Command Paper had enough consultation and scrutiny in advance.

**Professor Michael Keating:** No, I do not think that they did. This goes all the way back to the famous vow made in the last week of the Scottish referendum campaign, in which the unionist parties promised that there would be more powers for the Scottish Parliament in the event of a no vote. Then there was what I thought was an unrealistic timetable that proposals would be produced by St Andrew’s Day and draft clauses by Burns night, and that these would be agreed among the parties. This was not debated within the general public. There is not a lot of understanding about what these involve. It was done in excessive haste, and there are all kinds of technical problems. There was no time for a proper discussion with representatives of civil society, and there was no time to do a lot of the technical work needed to make sure that the details of the proposals were right. I could not see what the hurry was. Furthermore, the Command Paper has been almost superseded, as far as the Labour Party is concerned, because it has produced yet more proposals. So we do not even have an agreed draft set of proposals among the political parties. It would have been healthier if the parties had paused a little and taken their proposals into the election, as this would have provided an opportunity for a proper discussion in the next Parliament.

**The Chairman:** Before I go to Dr Elliot, are there specific areas to which you would like to draw attention in which there might be serious implications, either for Scotland or for the rest of the United Kingdom?

**Professor Michael Keating:** Yes, there is the concept of detriment that has been introduced in the Command Paper, which says essentially that if one Parliament does something that imposes a cost upon the other Parliament there should be compensation. That sounds straightforward enough, but it has not been defined properly and potentially has extremely wide ramifications. One could have interpreted it in the narrow sense that if there is a transfer of competences, the money should go with that. But in a broad sense, it seems that almost anything that one Parliament could do could affect the other Parliament. We need to discuss the scope of that—whether it is to have a narrow or broad application, because it could be extremely difficult and get us into all kinds of political and legal difficulties unless it is properly specified.

Another area is to do with welfare, where instead of thinking about of thinking about what broad blocks of competences the Scottish Parliament might have, the approach has been to take little bits of existing policies out, which is going to cause great difficulties for the rollout of universal credit, which has not yet happened in Scotland. We do not know how that will work. It may have been appropriate at least to pause the rollout of universal credit in Scotland until what was going to be devolved had been worked out.

**The Chairman:** We will come back to these subjects in the course of our discussion.

**Dr Mark Elliott:** I agree with much of that. It is extraordinary that this has been, or is being, done in such haste. While it is entirely politically understandable why the vow was made and why this timetable is felt to have been imposed, it is constitutionally quite extraordinary to be contemplating really quite significant changes of this nature and to be trying to hurry them through in this way. I welcome the fact that this sort of scrutiny is happening now, and that only draft clauses are being scrutinised, because there is significant room for improvement in some areas. A concern that that raises is whether this scrutiny process is as helpful as it might be if what is being scrutinised is preliminary and will have to change substantially between now and when more crystallised proposals are brought forward. However, it is good that this is happening.

**The Chairman:** Thank you, and can I also thank you for the paper that you submitted in advance on the permanence or otherwise of the Scottish Parliament and on the Sewel convention?

**Baroness Taylor of Bolton:** Can I follow up on this? The vow, which I am not sure was totally politically understandable, has led to more problems than it solved, although that is a personal view. Some of the follow-on consequences mean that we are now in a situation where we have what seems to many of us to be a really difficult position for Parliament. We have, more or less, a *fait accompli* being promised after the next election, regardless of the outcome. Many people would agree with what you have already said: that these new clauses were produced in haste, that there were technical difficulties, and that there was a lack of consultation. However, we are in a new situation, because we are being presented with something that Parliament has a responsibility and a duty to scrutinise, and yet the actual outcome is predetermined by political leaders. How would you recommend that the next Parliament deals with this?

**Professor Michael Keating:** We do not know what the next Parliament is going to look like after the election, and there is no way in which the existing party leaders can bind the next Parliament. It may be a very fragmented Parliament, there may be no majority, and I suspect that this whole package will be reopened again and negotiated. When it is, I just hope that Parliament will take the necessary time to think these things through properly.

**Dr Mark Elliott:** There is a political and a constitutional dimension to this. I agree that in political terms it is clear that the Smith agreement is heavy on compromise, but whether that issue is re-opened will depend on the outcome of the election. In constitutional terms, Parliament should feel entirely at liberty to deal robustly with the scrutiny of these proposals. If we compare this with, for example, the Good Friday agreement, we are in very different constitutional territory. The Good Friday agreement represented the culmination of a long, thorough and at least in some respects transparent process, and one that ultimately received the assent of a large proportion of the people of Northern Ireland and the Republic of Ireland. When Parliament is presented with a Bill like the Northern Ireland Bill that implements that kind of settled constitutional view, its hands are tied to an extent, and rightly so. The Smith agreement is not in that league. I do not think that Parliament constitutionally should feel that it has been presented with a *fait accompli*, whatever the politics of it might be. It should bear that distinction in mind.

**Q2 Baroness Taylor of Bolton:** One of the pillars of the Smith commission report was for a durable settlement. Do you think that the issue so far, the draft clauses that we have seen, make for workable legislation on a durable basis?

**Professor Michael Keating:** No, I do not think that they do. I can see numerous traps there. One is this notion of detriment that I have mentioned. The other is the attempt to give the Scottish Parliament new tax-raising powers but not do anything about the Barnett formula. That is technically very difficult, because we want to know exactly what adjustments will be made to the Barnett formula in response to more tax powers. That should be more transparent than the Barnett formula currently is, and it is politically very difficult because there are a lot of people and MPs in England and in Wales in particular who want to see the Barnett formula, along with financial powers for the Scottish Parliament, revised. However, the way in which the parties are proceeding has been to say, “We are just going park the Barnett formula and not do anything about it”. That is highly problematic.

**Q3 Baroness Falkner of Margravine:** Professor Keating, I wanted to press you a little on your views about how—I will not use the word “durable”—sustainable the Smith proposals and the draft clauses are in the light of Labour’s commitment to a new home rule Bill and what you have just said about the potential for another commission being established. Am I correct in deriving from your comments that you do not think that this will be the foundation, the basis, for an eventual Act of Parliament?

**Professor Michael Keating:** No, I do not think so, and if the parties were to try and drive it through, it would be a mistake. The other thing that we do not have is consensus within Scotland. I know that all the parties supported Smith, but they did so for very different reasons. The SNP said, “We’ll ask for everything and take what we can”, while the other parties said, “We’ll concede this and that”, and they all said, “We’ll accept these powers”. However, there has been no consensus in society. The yes side in the referendum campaign has to accept that they lost and

therefore say, “Let us join in a realistic settlement for what Scotland can do within the United Kingdom”. On the no side there has to be willingness to recognise that there is going to be a compromise. This has to come first from Scotland; if there is agreement within the Scottish Parliament, there has to be agreement with the rest of the United Kingdom. All this takes time, but that is how you build a durable settlement.

**Lord Powell of Bayswater:** I absolutely agree with that last remark, but I want to come back Dr Elliott’s point about Parliament’s continuing ability to scrutinise. Of course in theory that must be right. Indeed, we can talk about it, but have we not been stitched up? Will the Whips not be out? The Whips will say that this is what was agreed and it must stand, and scrutiny will be a bit of a farce. Do you not think there is a danger of that?

**Dr Mark Elliott:** I entirely agree with you. That is why I said that the politics and the constitutionality of it are two distinct matters, and the politics may well override and overwhelm the constitutionality. This raises wider questions, in which this Committee has an enduring interest, of how we do constitutional reform and whether this is an appropriate way to do this. It perhaps demonstrates that it is not.

**The Chairman:** No disagreement there.

**Q4 Baroness Dean of Thornton-le-Fylde:** Good morning. For obvious reasons, the majority of the questions and discussions that we have been having are about Scotland, but I would like to move to the impact on the union as a whole, which is probably more important. I want to ask you about welfare, but not yet. Professor Keating referred to it. What in your view are some of the potential implications for the union as a whole of the new devolution settlement put forward by Smith?

**Professor Michael Keating:** One thing that the UK has to come to terms with is that we now have some kind of federal system in this country. It is not a conventional federation. There are different kinds of federalism and federal systems, and this will be a very asymmetrical federation. The notion of federalism is about dividing power and recognising that power is divided. At the centre, as well as in the devolved territories, there has to be recognition of that principle. People are starting to talk about federalism now, but nobody has ever defined it. That is a just a general way of thinking: that the centre as well as the devolved Administrations have to take this into account.

There is a huge question about the distribution of finance, which has been managed over the years since devolution, because there used to be plenty of money to go around. Now there no longer is, obviously. There is a great deal of discontent in other parts of the United Kingdom about what is perceived as Scotland’s favourable deal from the Barnett formula, and that is just not going to go away. At the centre of any kind of devolved or federal system you have to have some agreed principles for distributing resources. You will always have arguments, of course—it is about money, so that is perfectly natural—but you at least have to have some principles by which you can resolve these. The Barnett formula is based on no principle whatever. It was thought up as a short-term expedient back in the 1970s and it remains only because nobody has thought of a better way of doing things.

**Dr Mark Elliott:** I agree. The notion of shifting towards a federal model is clearly raised by what has been proposed. Lady Hale, the Deputy President of the

Supreme Court, said three years ago that we now have a federal constitution in the UK, so we may already be there. In terms of constitutional law, we are not there yet, and when we come to talk about draft Clauses 1 and 2 I will argue that they will not get us there either in strictly legal terms. It has been clear from the beginning that devolution is irreversible in all political senses, and in broader constitutional terms what has been proposed simply cements this idea and makes explicit what has been implicit all along.

**Q5 Lord Lexden:** There is no curbing of this extraordinary tendency to proceed in one part of the United Kingdom without reference to the implications elsewhere. Corporation tax is being brought forward in Northern Ireland, naturally sparking in Scotland an interest in a similar arrangement. It is an extraordinary theme from which our politicians seem to be unprepared to break.

*Professor Michael Keating:* That is right. I am very sceptical of the idea that you could resolve everything in the UK constitution in one go—a big bang approach—because you just overload the agenda and nothing ever gets done. On the other hand, simply proceeding piecemeal is not very satisfactory either. Constitutional change takes place when the political circumstances are right, not because philosophers come up with a plan and people adopt it for good reasons, so politically we have to be realistic. But at least when we are proceeding in one direction, we should be aware of the consequences for other parts of the United Kingdom—that is what is missing here—and not just the consequences for Scotland or Northern Ireland but for the centre of the things that you are doing in the devolved territories.

Thinking about how the devolved territories can be represented in the centre, one thing that we are missing is federal institutions at the centre—a second chamber. We have been talking about the reform of this House and how that might work in. One idea is that there should be a chamber of territorial representation. As well as devolving to the peripheral territories, we should be thinking about how the peripheral territories play in the centre as well. We have not really had that conversation. Instead, we have proceeded piecemeal, one territory at a time.

**Baroness Dean of Thornton-le-Fylde:** The second part of my question is: are there any constitutional implications of the proposals in the Command Paper for welfare and fiscal devolution?

*Professor Michael Keating:* Mark is the lawyer, so strictly speaking it should be answered—

**Baroness Dean of Thornton-le-Fylde:** Have you seen what Professor Nicola McEwen wrote—

*Professor Michael Keating:* Yes, I have seen Nicola's submission.

**Baroness Dean of Thornton-le-Fylde:**—on the need for “ongoing intergovernmental collaboration ... way beyond the Joint Ministerial Committee”, and some mechanisms to manage policy interdependence on a longer-term basis? She ends by saying that if there is none, that will lead to “growing pressure for a further revision of the devolution settlement”.

*Professor Michael Keating:* On the intergovernmental side, I say in my paper, which I submitted for this Committee, that, yes, this is problematic, but I am very suspicious about proliferating intergovernmental mechanisms all over the place, because you plateau the institutional landscape. It is more important, first of all, to get the balance of powers right. What has come out of the Smith commission and

the Command Paper is a bit of a hotchpotch of competences here and there without any clear blocks of competences belonging at one level or the other. That is what is going to proliferate all these interdependencies.

**Baroness Dean of Thornton-le-Fylde:** Could you argue, therefore, that welfare devolution is in fact not welfare devolution because so many elements of it are reserved?

**Professor Michael Keating:** Indeed, it is not welfare devolution; it is interpreted in a very narrow way. On housing benefits, for example, there is strangely worded clause that is supposed to deal with the so-called bedroom tax/spare room subsidy issue. That is a very specific issue. Instead of saying, “Let’s devolve housing benefit”, or, “Let’s devolve universal credit” and having a coherent block of things that the Scottish Parliament looks after and other things which the Westminster Parliament looks after, you have bits and pieces that are pulled out. That just unnecessarily complicates matters. I do not think it is effective policy-making; it could give rise to all kinds of legal complications and to dysfunctions, because you do not get things co-ordinated in the right way. We could have avoided that by taking time to think through the welfare reform and the devolution that are going on and how those two processes can come together in a coherent way. That has never happened. In my centre we are trying to do this, but I fear we may be too late, because by the time we have some proposals this legislation might already have gone through.

**Dr Mark Elliott:** There is nothing I want to add.

**Q6 Lord Brennan:** Professor Keating, Chapter 2 bespeaks financial co-operation and financial responsibility by central and devolved government. So that we understand what the Bill does not explicitly deal with, what happens if things go disastrously wrong and Edinburgh cannot pay its way? It remains the fact, does it not, that the Bank of England and the UK central government are the ultimate guarantors of the functioning of the Scottish economy. If that is correct, you will remember from your visiting professorship in Spain the degree of tension and the complications that have arisen during the recession, whereby central government had to rescue nearly all the autonomous governments’ finances at enormous cost. It is not in the Bill, but it ought to be widely known, do you not agree, that this is the correct state of affairs in Scotland, which overall is financially subservient to central government.

**Professor Michael Keating:** The Scottish Parliament has to run a balanced budget. That will be true under the Smith proposals and those in the Command Paper. It is not allowed to run a deficit, which in some federal systems devolved Governments are doing. The main problem about financial viability concerns borrowing powers. If the Scottish Parliament is to get them, the UK Government will have some kind of responsibility, given that this will all count as UK borrowing in international and European statistics, whether as the Scottish Parliament, local government or whatever. However, the provisions proposed are quite restrictive in that regard. The Scottish Parliament will have very limited borrowing powers. This is true now of devolved Parliaments throughout Europe—indeed, throughout the world. A recent IMF publication demonstrates this. For example, the Spanish autonomous communities can no longer borrow in the way they used to in the 1980s and 1990s, because Spain has to ensure that it meets the European deficit targets, and that includes the devolved Administrations. So I think there has been some learning about that and I would not be too worried

about the possibility that the Scottish Parliament could go bankrupt because its borrowing power will be very restricted.

**Lord Brennan:** I was not so much thinking about whether it would deliberately or negligently go bankrupt but about a major recession in which central government have to bail out devolved Governments.

**Professor Michael Keating:** Yes. That risk is increased the more tax powers the Scottish Parliament has; so it relies less on transfers from the centre but to a large degree on devolved income tax and its assigned share of value added tax. These are vulnerable in a recession because tax receipts will reduce and there will be no automatic mechanism for compensating from that situation. Therefore, the Scottish Parliament will bear the full risk. On the other hand, if there is a boom in Scotland, it will get all the benefit from that. Therefore, there is no countercyclical mechanism built into this. There is some provision for the Scottish Parliament but it is not clear how that will work as regards the ability to borrow in recessions. That needs to be clarified. If you have tax-raising powers, you need borrowing powers because you run up a surplus in good times and then you can run a deficit in poor times. That has not been thought through properly, but it is very important.

**Lord Powell of Bayswater:** I had wanted to pick up Professor Keating on the intergovernmental aspects, but perhaps we can come to those later. Can we come back to the question of the voting age for 16 and 17 year-olds? Is this not another case of Parliament getting stitched up? Here is a major constitutional change if it were to be applied to the UK, and it has not been done in any other major European country—I think in any other European country at all—yet it is going to be implemented in Scotland by secondary legislation, with Parliament having no chance to effect it. There must be a strong likelihood of a carryover into a future debate in England. Is it right to do these things by secondary legislation, and what else is going to be done by secondary legislation?

**Professor Michael Keating:** Secondary legislation or a Section 30 order can give the Scottish Parliament the power to determine the voting age, so there will be a parliamentary process but it will be done within Scotland. Constitutionally and legally, that has no effect on anywhere else in the United Kingdom, but politically it will be seen as some kind of precedent. I have the impression that following the experience of the referendum political opinion across the UK is beginning to change on the issue. Some parties in Scotland have already changed their view, having opposed it, saying that it worked pretty well. However, it will still be up to Westminster to decide what the voting age will be in other parts of the UK.

**Dr Mark Elliott:** It would introduce a great anomaly if people who are 16 and 17 can vote in elections to the Scottish Parliament but are disbarred from voting in elections to the UK Parliament. It puts an onus on those who are trying to justify the status quo in the rest of the UK. This raises a larger question. One of the points of devolution is that different parts of the country are supposed to be able to do things differently—be that on prescription charges, tuition fees or whatever. The question arises as to whether we reach a point at which we say that certain constitutional changes are so significant and cross-cutting that it does not make sense to deal with them on a devolved basis. My sense is that this matter crosses that line.

**Lord Powell of Bayswater:** You put my point much more eloquently than I did. It is essentially what I was trying to say. In a sense, the change could be done by the back door; because we are doing it by secondary legislation for Scotland, it

embeds it there, and the chances of Parliament being able to have a wholly independent debate on the issue here will be lessened. This is of such consequence that it ought to require more than just secondary legislation for Scotland.

**Professor Michael Keating:** I see no good reason for it to be done by secondary legislation. The only reason that I can think of—I assume that it is the reason—is that it is being rushed through in time for the 2016 elections to the Scottish Parliament and, to revert to my earlier point, making these kinds of changes to that kind of political timetable is not how we should make these sorts of constitutional reforms.

**Q7 Lord Brennan:** Do you advocate an objective way in which to create a constitutional framework for the future in something like a constitutional convention that embraces all four countries and their futures together, or are we stuck by historical and political circumstance and doing it country by country, hoping for the best? You are both talented men. Is there some way in which one can combine the two—a constitutional framework within which actual progress can be made?

**Professor Michael Keating:** I am not opposed to a constitutional convention for the UK that could ventilate these issues and have a discussion. I am very sceptical as to whether it would ever reach a conclusion, because the situation is so different in the various parts of the United Kingdom that there will be many demands. For a long time I lived in Canada, which has been trying to amend the constitution since 1867 and has never succeeded. Every time it is attempted, some other group says, “You have forgotten about us. We need to be in there”. People therefore just kind of muddle on reasonably successfully. There may be a point at which some kind of constitutional convention in the UK could be the culmination of a process of thinking about how the various parts of the UK fit together, but you are never going to get agreement across the UK on the foundations of the constitution. Even within Northern Ireland, the parties agree to disagree about the foundations but agree on institutions—and as long as they work, that is good enough. In Scotland, people think differently about the constitution and sovereignty from the dominant legal discourse in England, and it is futile to try to resolve that because we will just disagree. However, it does not mean that we cannot have institutions that work. If we therefore have this pluralistic notion about a constitution, it can be understood a little differently in different parts of the United Kingdom but we can agree on the constitution. That is probably as much as we can expect. Then we have to address the obvious anomalies that arise—things that really get in the way—and I mentioned the Barnett formula. This view is informed by a spirit of federalism. We recognise diversity across the United Kingdom. That is the way we can find that we can live together. A constitutional convention may be a way of saying, “Okay, we may have our disagreements, but we can at least agree on how we are going to do things, even if our long-term ambitions may be rather different”.

**Dr Mark Elliott:** There is a gaping chasm between the Heath Robinson way in which we traditionally make constitutional changes here and the sort of “big bang” approach whereby a convention would devise a new constitution. My feeling is that that would be so countercultural and alien that it might not work. We need something more modest than that. We need some sort of process—call it a convention if you wish—that actually tries to devise some sort of overarching sense of where we are, where we want to get to and how we propose to get there. We need, in other words, joined-up thinking rather than this incredibly fragmented approach that we have at present.

**Baroness Taylor of Bolton:** Triggered by that, I have a quick follow-up question and ask for your views on moving to a more formalised written constitution.

**Professor Michael Keating:** We are actually doing that already but in a typically British, piecemeal muddled way. There are these proposals to entrench the Scottish Parliament and the Sewel convention. Mark has talked about that and pointed out its difficulties. However, the fact is that we have a written constitution. It may not be codified but many bits of it are in practice written down. It would be useful to think about that, and about how much more of it might be written down and how much of it can just be left to convention. We have not had that, and when we introduce new proposals we never ask ourselves that question.

**Q8 Lord Brennan:** What do you think about having a Joint Committee of both Houses of Parliament, with the stature of the Treasury Select Committee, whose permanent job would be to consider constitutional change and consolidation of statutes? Should there be some parliamentary vehicle for ensuring that the haphazard approach has some scrutiny?

**Professor Michael Keating:** That would be extremely useful. It would also involve the devolved legislatures, but that kind of thing would be useful—not by trying to resolve everything in one act but continually reviewing the process and seeing what understandings there are and where there a lack of understanding is causing difficulties.

**Lord Powell of Bayswater:** I have a small supplementary question for Dr Elliott on his suggested process for bringing about constitutional change. Do you think that higher thresholds for constitutional change in general are a good principle—for example, the requirement for a two-thirds majority, as appears in part of the Scottish legislation, as well, of course, as in the five-year fixed-term Parliament legislation?

**Dr Mark Elliott:** Yes, I do. One point on which I was going to differ from Professor Keating was when he said that we have a written constitution. I understand his point that we have many texts that stitched together could be seen to perform that function. We do not, however, have a hierarchically superior set of constitutional texts that crucially are harder to amend or change. There is great merit in having certain fundamental arrangements that are more difficult to alter than an ordinary law. One of the interesting aspects of the draft clauses is that that sort of restriction is to be imposed on the Scottish Parliament. It invites the question, “If that is good for Scotland, is it not good for Westminster as well?”

**Q9 Lord Cullen of Whitekirk:** I turn to draft Clause 1, which states that, “A Scottish Parliament is recognised as a permanent part of the United Kingdom’s constitutional arrangements”. I am grateful to Dr Elliot for his paper on this subject. If those words have no legal effect, what is their purpose?

**Dr Mark Elliott:** To satisfy the drafters of the Smith agreement.

**Lord Cullen of Whitekirk:** What do you think they had in mind? I know that this is merely speculative, but is there some practical purpose to it?

**Dr Mark Elliott:** I think that our whole constitution to an extent is built on smoke and mirrors—that we have a set of constitutional laws that say one thing and a set of political practices and conventions that dictate that reality is different. The key difficulty that Clause 1 highlights is the problems that you encounter when you bring those two aspects of the constitution into relationship with each other. The law is that Parliament cannot make the Scottish Parliament permanent,

and clearly this clause does not even attempt to do that. What it is doing, I think, is acknowledging that in political terms the Scottish Parliament is permanent. I think it has been permanent since it began to sit, over 10 years ago, and I do not think that it makes any difference in that sense. It is a statement in a statutory text of a political reality.

**Lord Cullen of Whitekirk:** One point intrigues me. The Scottish Parliament is, of course, a devolved parliament. If that devolved parliament is to be permanent—the word used in this clause—can the UK Parliament at some point in the future order a referendum that might remove devolution?

**Dr Mark Elliott:** Yes.

**Lord Cullen of Whitekirk:** Does that mean that there is a hole in the wording, because it can never be permanent in the absolute sense?

**Dr Mark Elliott:** I entirely agree. As a matter of orthodox UK constitutional law, no Act of this Parliament can make any other institution like the Scottish Parliament permanent. It can say that it is permanent, or it can say more diluted things, such as that it recognises its permanence, but that will not make it so.

**Lord Cullen of Whitekirk:** So it is not just a question of this Parliament being unable to give away part of its sovereignty but a question of what the words can mean. They cannot mean an absolute ban, because there must be some room for exceptions.

**Dr Mark Elliott:** I agree. There are parallels that we can think of and analogies that we can draw. One would be the implications of the European Communities Act 1972 and the extent to which sovereignty there was acceded to the European Union. Another example is legislation that has granted independence to former territories or colonies. I do not think that any of those are a perfect analogy or that any of them necessary implies that this Parliament has given away its sovereignty in a strictly legal sense. Whatever form of words was used in Clause 1, I do not think it would accomplish making the Scottish Parliament legally permanent.

**Lord Lexden:** Would you take a similar view that draft Clause 2 will, in practice, make little or no difference?

**Dr Mark Elliott:** I do. I do not think Clause 2 makes any legal difference. It is a straightforward function of the sovereignty of this Parliament that it can make or unmake whatever laws it wants. That must, by definition, include laws that impinge on Scottish devolved competence. Clause 2 does not take the rule, as it were, in the Sewel convention and attempt to make it into a statutory restriction on this Parliament's powers, so certainly as drafted that point would be unarguable.

There are more imaginative ways in which Clause 2 could have been drafted. One possibility would have been to attempt to impose some kind of procedural or conditional restriction on the enactment of legislation by this Parliament impinging on devolved matters. It could have said, for example, that in the absence of a consent Motion passed by the Scottish Parliament, this Parliament would not legislate on devolved matters.

In terms of the law, it is unclear whether a court would treat an Act of this Parliament passed in breach of that kind of condition as valid or not. There are authorities that point in both directions, but certainly the point is at least arguable, and if the framers of Clause 2 wanted to go further, there are respectable legal avenues that they could explore.

**Lord Lexden:** So as things stand at the moment, this could increase confusion, not produce clarity.

**Dr Mark Elliott:** If the matter were litigated, any confusion would be very quickly resolved and the courts would say that it makes no legal difference.

**Lord Lexden:** But Parliament would need to be aware that Clause 2 could make the convention justiciable, and Parliament should be made fully aware of that.

**Dr Mark Elliott:** I do not think that it makes the convention justiciable; the only justiciable question is whether Clause 2 creates a legal restriction on Parliament's power. That would be answered promptly and clearly in the negative.

**Q10 Baroness Falkner of Margravine:** Both of you dealt quite a bit with intergovernmental relations under the implications of the Smith proposals. Could we explore to what extent fiscal and welfare devolution would impact on the current status quo? Professor Keating, you say that there would be no detriment. You gave the example of the Barnett formula, but would you see welfare and fiscal devolution beyond Barnett also coming into that and there being no detriment? I think of the furore that erupted recently over the mansion tax being raised primarily in London funding the National Health Service in Scotland, for example.

**Professor Michael Keating:** Yes, there are three areas where I said that intergovernmental relations really are critical. One is finance; one is the EU, where there are mechanisms but there are some complaints about how they work; and the third is welfare. As far as finance is concerned, the Barnett formula is not statutory. It is entirely at the discretion of the Treasury, and it has taken Parliamentary Questions and FOI requests for almost 40 years to extract from the Treasury the basis of the Barnett formula. It would be extremely useful to have more clarity about that. It would be very important, if we are going to get into things like detriments and the implications of mansion taxes or whatever, to have some independent body that does the homework and produces the statistics, just as the OBR does with regard to public spending. Something like that, which would be independent of both levels of government, could say, "Well there is detriment. This is what it amounts to". That is absolutely critical. The Treasury just deciding this unilaterally is going to get us into political rows and political arguments that will be settled by political haggling. It is important that there is some kind of intergovernmental ministerial committee that can be convened to consider this evidence and then come to a political decision. Quite rightly, the politicians take the decision at the end of the day, but they should do it in a way that is informed by the evidence and that is transparent and accountable.

There will be similar kinds of arguments about the effect of welfare changes at one level on welfare benefits elsewhere. There is this notion of passporting benefits: if you get one benefit, that entitles you to another benefit. If you are devolving some of those benefits, you have to work out that connection. There is the benefit cap, and so on. We are told that that will not be affected by devolved welfare payments, but it will in all kinds of ways. So the first thing I would say about welfare is: try to make the lines of accountability transparent; do not have too much entanglement; do not make the welfare system even more complicated than it already is. Secondly, once again, have some independent source of advice that can provide the figures and have some mechanism whereby the politicians can get together to resolve the conflicts when they arise. I am suspicious of setting up a committee just for its own sake and expecting people to turn up, but where you have these real problems, there is a need for intergovernmental mechanisms to resolve them.

**Baroness Falkner of Margravine:** You mentioned the EU in your opening remarks.

*Professor Michael Keating:* Yes. The Joint Ministerial Committee on Europe is the only one that has really worked continuously since 1999, because it is necessary for the devolved Administrations and Whitehall to agree a common position where devolved matters are concerned. These mechanisms seem to work pretty well most of the time. The Scottish Government have made some demands with regard to these, saying that the devolved Administrations should have a right to be present in the delegation to the Council of Ministers. You can argue about that. Most of the time they are invited anyway, but if they had a right to be there, that might strengthen things. There are questions about whether the devolved Administrations are present in the preparatory meetings and the Civil Service meetings and so on—or indeed whether they have the capacity to be present at all these meetings, because it is all right: they can demand to be present everywhere, but if you do not have the capacity you cannot be everywhere. That is a lively debate in Scotland at the moment. It is not high profile politically, but it would be worth revisiting.

**Baroness Falkner of Margravine:** How would disagreements between the devolved Administrations in the area of their perceived interests—whether fisheries, agriculture or whatever—and the main delegation, if they were to be present, be resolved? You would have the United Kingdom speaking with potentially four voices.

*Professor Michael Keating:* The problem lies in the asymmetrical nature of UK devolution. In Germany, if there is a disagreement between the Länder, if it is a Land competence the Länder get together and vote in the Bundesrat. In Belgium, the regions and the communities all have a veto, which sounds like a recipe for the proliferation of deadlocks but it is not, because in Belgium they have this tradition of arguing and haggling and coming to some kind of agreement. You cannot do that in the UK, because the UK Government are also the Government of England and the larger parts and we do not have a territorial second chamber that could make those kinds of decisions. So there is no escape from that dilemma; it is the UK Government who will represent the UK. The important thing is that the devolved Administrations have an opportunity to present their case. They can influence things, not so much by having legal rights but by coming up with good policy ideas and contributing to the UK position. So it is as much up to the practice as it is to any statutory mechanisms. I cannot think of a statutory mechanism that would make that work. Of course, even in Belgium and Germany the state has to speak with one voice. They might argue about what that position is, but they have only one block of votes in the Council of Ministers.

**Q11 Lord Powell of Bayswater:** Let us come back to intergovernmental relations, on which you have made some comments. It is a rather more general question. I think everyone agrees that these clauses would considerably extend and make more complex intergovernmental relations, but we have heard conflicting evidence as to whether the best solution is to seek more formal structures through which these things would be settled or to make much of it depend on the informal relationships. We heard some quite impressive evidence from a number of civil servants who are at the coalface of intergovernmental relations that actually the informal arrangements work much better and would probably continue to work much better in future. Creating formal structures and drawing up battle lines make it more likely that there will be confrontations. I just wondered where you both thought the balance of advantage lay? Obviously there will have to be a bit of both;

I am not saying that we should have one at the exclusion of the other. Which way would you tilt the balance?

**Professor Michael Keating:** There is no point in creating formal structures if they are not going to be used, and they will not be used because people will wonder, “What is the point of coming to a meeting when there is nothing to discuss this month?”, and because if you have unduly formal structures the politicians get together somewhere else and the decision is taken somewhere else. We have to recognise that political reality. That is why I am sceptical about saying that everything can be done in formal institutions. We also do not have that culture of working through legalistic institutions. They do in Germany, but we just do not have that culture anywhere in the United Kingdom. We need a framework—a place where things can be taken. We need a lot more impartial advice about the facts and figures behind many of these things. For the really big issues, where there is conflict we need somewhere where it can be resolved. It may be about finance, it may be about a particular aspect of welfare reform. If so, you can convene this committee when necessary—it does not have to meet every month—to resolve it.

In the case of the EU it is quite different, because there are EU council meetings every month and there is a mechanism that meets quite regularly and works to try to get a common UK position.

**Dr Mark Elliott:** I would add two brief points. One of the perhaps surprising things about devolution so far is that it has been relatively unlegalistic, and the courts have been called upon quite rarely to resolve demarcation disputes. So in that sense the evidence might seem to suggest that a relatively informal approach works.

The only other point I would air more generally about intergovernmental relations is that, to pick up on one of Professor Keating’s points, there is a difficulty when we think about intergovernmental relations and the capacity in which UK Ministers take part in those sorts of processes, because in a sense they are conflicted in that they are both acting as UK Ministers trying to produce a position which the UK as a whole can sign up to and agree to, and at the same time, de facto in many instances, advocating for interests that might be peculiar to England. That has not necessarily been fully thought through so far.

**Lord Powell of Bayswater:** It seems that the great bulk of these discussions are actually conducted between civil servants, and they on the whole manage to do it much better through informal structures than through having to go regular meetings. The Cabinet Office probably takes a different view. They like to agglomerate everything in the Cabinet Office, but the front-line ministries seem to prefer the informal approach.

**The Chairman:** It has been a very interesting session. Have we failed to cover anything that you would like to unburden yourself of before you leave? You have as long as you like, within limits. Professor Keating, is there anything that we have overlooked or not developed enough?

**Professor Michael Keating:** These were the important issues. I have nothing more to add.

**Dr Mark Elliott:** I would simply add by way of conclusion that these proposals are indicative of the fact that for the last 15 years now we have been in a state of permanent constitutional upheaval, and that seems to me to be quite unprecedented in a mature democracy. Many, many countries have constitutional

moments when they decide to make changes and then live with those changes and try to make them work. To see devolution or any other aspect of constitutional change as a process almost without end is to misunderstand what a constitution is about.

**The Chairman:** Yes. This Committee will have plenty to do for the next few years, by the look of it. Thank you very much indeed. It has been extraordinarily helpful, with very lucid, concise and effective answers. We are most grateful.