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**Devolution (Further Powers) Committee**

# **New Powers for Scotland: An Interim Report on the Smith Commission and the UK Government's Proposals**





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# Devolution (Further Powers) Committee

To consider matters relating to The Scotland Act 1998 (Modification of Schedule 5) Order 2013, the Scottish Independence Referendum Act 2013, its implementation and any associated legislation. Furthermore, (i) until the end of November 2014 or when the final report of the Scotland Devolution Commission has been published, to facilitate engagement of stakeholders with the Scotland Devolution Commission and to engage in an agreed programme of work with the commission as it develops its proposals; and (ii) thereafter, to consider the work of the Scotland Devolution Commission, the proposals it makes for further devolution to the Scottish Parliament, other such proposals for further devolution and any legislation to implement such proposals that may be introduced in the UK Parliament or Scottish Parliament after the commission has published its final report.



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**Deputy Convener**  
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**Linda Fabiani**  
Scottish National Party



**Rob Gibson**  
Scottish National Party



**Alex Johnstone**  
Scottish Conservative  
and Unionist Party



**Alison Johnstone**  
Scottish Green Party



**Stewart Maxwell**  
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**Lewis Macdonald**  
Scottish Labour



**Mark McDonald**  
Scottish National Party



**Stuart McMillan**  
Scottish National Party



**Tavish Scott**  
Scottish Liberal  
Democrats



# Executive Summary

1. Following the result of the Scottish Independence Referendum on 18 September 2014, the previous UK Government launched a process culminating in the publication of a cross-party agreed report of the Smith Commission and the publication of draft legislative proposals by the then UK Government to take forward the recommendations of the Smith Commission.
2. The Devolution (Further Powers) Committee has been tasked to scrutinise the recommendations of the Smith Commission and any subsequent proposals for further legislation.
3. Over the course of 7 months, involving nearly 20 committee meetings, around 50 submissions of written evidence and fact-finding visits and public meetings in Hamilton, Aberdeen and Lerwick, we have carefully considered views on the Smith Commission's recommendations and how these have been translated into proposed law by the previous UK Government.
4. The culmination of this process is the publication of this Interim Report on the Smith Commission and the then UK Government's Proposals. The report is an initial step as its findings do not necessarily represent the Committee's final view on these matters or on the question of whether the Scottish Parliament should give its legislative consent to these proposals. Such considerations await our scrutiny of any bill that is introduced by the new UK Government following the May 2015 UK General Election.
5. **The purpose of our report has been to provide a considered and constructive commentary for the new UK Government on the current package of measures being proposed for further devolution and where these can be improved. In short, all of the Committee want to see both the letter and the spirit of the Smith Commission's report fully translated into a legislative package in the next UK Parliament.**
6. In the time available between the publication of the then UK Government's proposals and the dissolution of the UK Parliament for the last General Election, the Committee has not been able to consider detailed evidence on all aspects proposed for further devolution. Instead, we have focused on the following:
  - The permanency of the Scottish Parliament and the Sewel Convention (legislative consent procedures);
  - Taxation and borrowing;
  - Welfare and benefits;
  - The Crown Estate; and

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- Inter-governmental relations and parliamentary oversight.
7. **In some of these areas, the Committee believes that the current draft legislative proposals meet the challenge of fully translating the political agreement reached in the Smith Commission. In other areas, improvements in drafting and further clarification are required. In some critical areas, the then UK Government's draft legislative clauses fall short.**
  8. **Our key conclusions and recommendations are set out in the final section of this report. In addition, Annexe A provides a summary position of the Committee's detailed conclusions and recommendations against the question – do the draft clauses fully meet both the letter and the spirit of the agreement reached by the five political parties represented in the Scottish Parliament during the Smith Commission's work?**

### **Next steps**

9. Following the UK General Election, the Committee will re-commence with its detailed scrutiny of all of the provisions in any 'Scotland Bill' that may be introduced by the new UK Government in its first Queen's Speech. The Committee expects to issue a further call for evidence in mid-2015 and to take further evidence during the remainder of 2015 and early 2016, with a view to issuing a Final Report on any bill and the issue of legislative consent before the Scottish Parliament is dissolved in advance of the Scottish Parliamentary elections of May 2016.
10. Throughout this process, the Committee intends to continue with its practice of as wide as possible public engagement, with further meetings and visits across Scotland.

# Introduction

## A brief timeline

11. On 15 October, 2012, the *Edinburgh Agreement*<sup>1</sup>, signed by then First Minister Alex Salmond MSP and Prime Minister David Cameron MP, paved the way for a national referendum held on 18 September, 2014, on the issue of independence for Scotland.
12. Following a record turnout of nearly 85% of those registered to vote in the referendum, just over 2 million voted to remain in the UK (55.3%), with a little over 1.6 million (44.7%) voting for independence.<sup>2</sup>
13. On the morning after the referendum, the Prime Minister held a press conference leading to the establishment of a commission to look at proposals for the devolution of further powers to the Scottish Parliament.
14. The commission would be chaired by Lord Smith of Kelvin, who would be assisted by 2 representatives of each of the five political parties represented in the Scottish Parliament. This became known as the Smith Commission.
15. The Smith Commission published its report on 30 November 2014<sup>3</sup>, with the previous UK Government publishing its response in January 2015 – in the form of a Command Paper and a set of draft legislative clauses<sup>4</sup> – which, in its view, would give effect to the agreement reached by all five political parties within the Smith Commission.
16. Since January 2015, the Prime Minister and the then Deputy Prime Minister in the then UK Government, and the then Leader of the Opposition in the House of Commons, all publicly signalled their intention to introduce a bill in the UK Parliament, as part of a first Queen's Speech, to take forward proposals for further devolution.
17. Any bill of this nature – affecting as it does the legislative competences of the Scottish Parliament and the executive powers of the Scottish Government – will require the consent of the Scottish Parliament before it can be passed into law by the UK Parliament.<sup>5</sup>

## This report

18. At its meeting of 29 October 2014, the Scottish Parliament agreed that the work of the previous Referendum (Scotland) Bill Committee should be refocused and augmented, now that the independence referendum had been held; thereby creating the Devolution (Further Powers) Committee.
19. The remit of the Committee is—

To consider matters relating to The Scotland Act 1998 (Modification of Schedule 5) Order 2013, the Scottish Independence Referendum Act 2013, its implementation and any associated legislation. Furthermore, (i) until the end of November 2014 or when the final report of the Scotland Devolution Commission has been published, to facilitate engagement of stakeholders with the Scotland Devolution Commission and to engage in an agreed programme of work with the commission as it develops its proposals; and (ii) thereafter, to consider the work of the Scotland Devolution Commission, the proposals it makes for further devolution to the Scottish Parliament, other such proposals for further devolution and any legislation to implement such proposals that may be introduced in the UK Parliament or Scottish Parliament after the commission has published its final report.

20. **This interim report sets out the summary of the evidence that we have taken so far on the major components within the package of measures being proposed by the previous UK Government, and our conclusions and recommendations at this stage of the process.**
21. **This report is not our final view on the matter or an indication of any recommendation for legislative consent at this stage.** Upon introduction of any bill in the UK Parliament following the UK General Election on 7 May, we would begin the process of considering the bill and any proposals for amendments. Any final decision by the Scottish Parliament on legislative consent is likely to take place in the early part of 2016.
22. **All five political parties on the Committee have entered into the process of producing this report with the aim of finding as much consensus as possible to provide a constructive commentary for the new UK Government on the current package of measures being proposed for further devolution and where these can be improved. In short, all of the Committee want to see both the letter and the spirit of the Smith Commission's report fully translated into a legislative package in the next UK Parliament.**

## **Our advisers**

23. To assist us in the preparation of this report, the Committee appointed three advisers:
  - Professor Nicola McEwen, University of Edinburgh;
  - Christine O'Neill, Chairman, Brodies LLP; and
  - Dr. Heidi Poon, Judge of the First tier Tribunal (Tax Chamber), External Lecturer, University of Edinburgh.
24. **The Committee is grateful to all of our advisers for their work.**



## Our approach to date and engagement with the people of Scotland

25. The Scottish Independence Referendum campaign was marked by the degree of public engagement culminating in the highest turnout in Scotland for an electoral event since the extension of the franchise. The Smith Commission worked to an extremely tight timescale but nevertheless sought to maximise public engagement within its work whilst recognising the time constraints it was operating within.
26. Nevertheless, the Committee has received a range of views from across civic society in Scotland that, despite the Smith Commission's best efforts, the timetable set for it did not allow sufficient time to foster wider public engagement and participation in the process given the importance of the issues being considered. Lucy McTernan, from the Scottish Council for Voluntary Organisations (SCVO), commented on the voluntary sector's experience of engaging with the Smith Commission process as follows—

” The voluntary sector engaged with the Smith Commission with great enthusiasm. It was a very intense period of work and the voluntary sector had a lot to say on all the subjects that eventually emerged in the commission's report. [...] We found doing this kind of work in that very intense and quick way quite frustrating. It did not allow us to engage with the people whom we represent and involve them in the thorough way that we would have liked.

” Everybody who engaged did so thoroughly and with a lot of enthusiasm, because this is such an important set of issues, but we need to create the space for discussion about what is appropriate governance for Scotland and for Scottish society and people, wherever they are, in whichever communities.<sup>6</sup>

27. There has also been recognition, in evidence submitted to the Committee, that the widespread public engagement during the Referendum is a democratic phenomenon that should not be allowed to dissipate. Within this context, witnesses have also stressed the need for the Scottish Parliament to speak directly to the public and go further than engaging with what may be termed mainstream, representative organisations. For example, Dave Moxham, from the Scottish Trades Union Congress (STUC) commented—

” ...people need to be really aware that although we are civil society organisations that engage with Parliament, the referendum process has shown some of us that that is not enough. I am enjoying the meeting very much and I am glad to be here, but it is not enough for Parliament to have a relationship with existing civil society organisations and then think that it has done its job. That links in with the idea that we and others have raised

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about citizen juries and other ways of creating a representative democracy that is also able to do detail; doing the detail is often what is difficult. We have the time to do that, but unless there is, for example, a two-year referendum process it is hard for the person in the street to do that. We need to think about the mechanisms that we can use to supplement the consultative role that Parliament undertakes.<sup>7</sup>

28. The Devolution (Further Powers) Committee has, since its establishment, recognised the need to engage with local organisations and the wider public in communities across Scotland. The initial work of the Committee was focussed on the issues associated with extending the voting franchise to 16 and 17 year olds for future Scottish Parliament and local government elections. As part of this process, the Committee undertook informal engagement events with 16 and 17 year old school pupils, in Fort William and Levenmouth, who were eligible to vote in the Referendum. In addition, the Committee also undertook an [online survey](#) which obtained the views of over 1,200 16 and 17 year old voters on the issue of extension of the franchise.



Committee members speaking to 16-17 year old voters in Levenmouth as part of our engagement efforts and Parliament Day

29. This approach has continued through into the Committee's scrutiny of the Smith Commission recommendations and the translation of these recommendations into draft legislative clauses. The Committee has held public meetings, and informal discussions with local stakeholder groups, in Hamilton, Aberdeen and the

Shetland Islands. The content of these discussions has informed the work of the Committee and subsequently of this report.



**Committee members at a public meeting in Aberdeen to discuss proposals for devolution**

30. The Committee recognises that it can only attempt to make a contribution to the process of public engagement in relation to the proposals for further devolution. Nevertheless, the Committee intends to ensure that public engagement remains a key motif of its scrutiny over the remainder of the lifetime of the Committee's work.
31. **The Committee believes that further public engagement, directly with the people of Scotland as well as representative bodies, charities, industry groups, voluntary bodies etc. is still a vital activity that needs to be carried out and is fully committed to the spirit of the recommendation made by the Smith Commission in this respect.**
32. The Committee calls on the UK and Scottish Governments to consider how to commit to the spirit of the Smith Commission's recommendation in this respect.

# Constitutional matters

## Background

33. The Smith Commission's report made a range of recommendations within the area of constitutional matters.
34. Table 1 below produced by SPICe sets out a comparison of the Smith Commission's proposals and the previous UK Government's Command Paper in the area of **constitutional matters**.

**Table 1**

Smith Commission Report	Para	Draft Clauses	Clause
<ul style="list-style-type: none"><li><b>Permanence of the Scottish Parliament</b></li></ul> UK legislation to state that the Scottish Parliament and Scottish Government are permanent institutions.	21	Clause 1 seeks to give effect to the Smith Commission recommendation to state in statute that the Scottish Parliament and Government are permanent institutions. Clause 1 would amend the Scotland Act 1998 to state that:  "A Scottish Parliament is recognised as a permanent part of the United Kingdom's constitutional arrangements" and,  Section 44 of the 1998 Act would be similarly amended to state that:  "A Scottish Government is recognised as a permanent part of the United Kingdom's constitutional arrangements" (new s1A)	1
<ul style="list-style-type: none"><li><b>The Sewel Convention</b></li></ul> The Sewel Convention to be put on a statutory footing	22	Clause 2 seeks to give effect to the Smith Commission recommendation to make the Sewel Convention statutory. It would do this by adding a new sub-section to section 28 of the 1998 Act stating:  "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"  However, section 28(7) of the 1998 Act, which provides that this section does not affect the power of Westminster to legislate for Scotland, is not amended or repealed by the draft clauses.	2

<p>• <b>Operation of the Scottish Parliament and Scottish Administration</b></p> <p>Scottish Parliament to have powers to make decisions about all matters relating to the arrangements and operations of the Scottish Parliament and Scottish Government, including:</p> <ul style="list-style-type: none"> <li>○ the overall number of MSPs or the number of constituency and list MSPs.</li> <li>○ the disqualification of MSPs from membership and the circumstances in which a sitting MSP can be removed.</li> </ul>	<p>26</p> <p>26(1)</p> <p>26(2)</p>	<p>Clause 3 would provide the Scottish Parliament with the powers over the operation of the Scottish Parliament and Government recommended by Smith by making amendments to paragraph 4 of Schedule 4 of the 1998 Act. These amendments would add further exceptions to the prohibition which prevents the Scottish Parliament from modifying the 1998 Act.</p> <p>The powers set out in this draft clause will require a super majority, as provided for in draft clause 4.</p>	<p>3</p>
<p>• <b>Elections</b></p> <p>The Scottish Parliament to have all powers in relation to elections to the Scottish Parliament and local government elections in Scotland (but not in relation to Westminster or European elections), including powers in relation to campaign spending limits and periods and party political broadcasts. The Scottish Parliament already has many of these powers in relation to local government elections in Scotland.</p> <p>The Scottish Parliament to have competence over the functions of the Electoral Commission in relation to Scottish Parliament elections and local government elections in Scotland. The Electoral Commission to report to the UK Parliament in relation to UK and European elections and to the Scottish Parliament in relation to Scottish Parliament and local government elections in Scotland.</p> <p>The Boundary Commission to report to the Scottish Parliament in relation to boundary reviews for the Scottish Parliament. UK Government powers in relation to Scottish Parliament boundaries will transfer to the Scottish Government.</p> <p>Devolve the relevant powers in time to enable the franchise in Scotland to be extended to 16 and 17 year olds for the 2016 SP elections.</p>	<p>23</p> <p>24(2)</p> <p>24(3)</p> <p>25</p>	<p>Clause 5(2) sets out restrictions on the day on which a general election to the Scottish Parliament can be held, in order to prevent the date coinciding with other elections being held in Scotland.</p> <p>Clause 5(3) would substitute a new Section 12 in the Scotland Act 1998 including the amendment to Section 12 contained in Section 1 of the Scotland Act 2012 (which is not yet in force). The draft clause gives powers over Scottish Parliament elections to Scottish Ministers, instead of the Secretary of State.</p> <p>This clause maintains the Secretary of State's power to combine Scottish Parliament elections, with the permission of Scottish Ministers, again negating the need to bring Section 2 of the Scotland Act 2012 into force.</p> <p>The proposed new Section 12 includes giving Scottish Ministers responsibility over the limits of election expenses of candidates, but not of registered political parties.</p> <p>Clause 6 devolves the franchise for Scottish Parliament and local elections to the Scottish Parliament. A reservation will be maintained on the digital service, i.e. the Individual Electoral Registration Digital Service (IERDS) and the verification of applications to the system.</p> <p>The Scottish Parliament will gain the power to extend the franchise to 16 and 17 year olds for the Scottish Parliament elections and local government elections. A Section 30 / 63 Order devolving this power has been passed by the Scottish and UK Parliaments and the Privy Council to enable the franchise to be extended to 16 and 17 year olds in</p>	<p>5 - 9</p>

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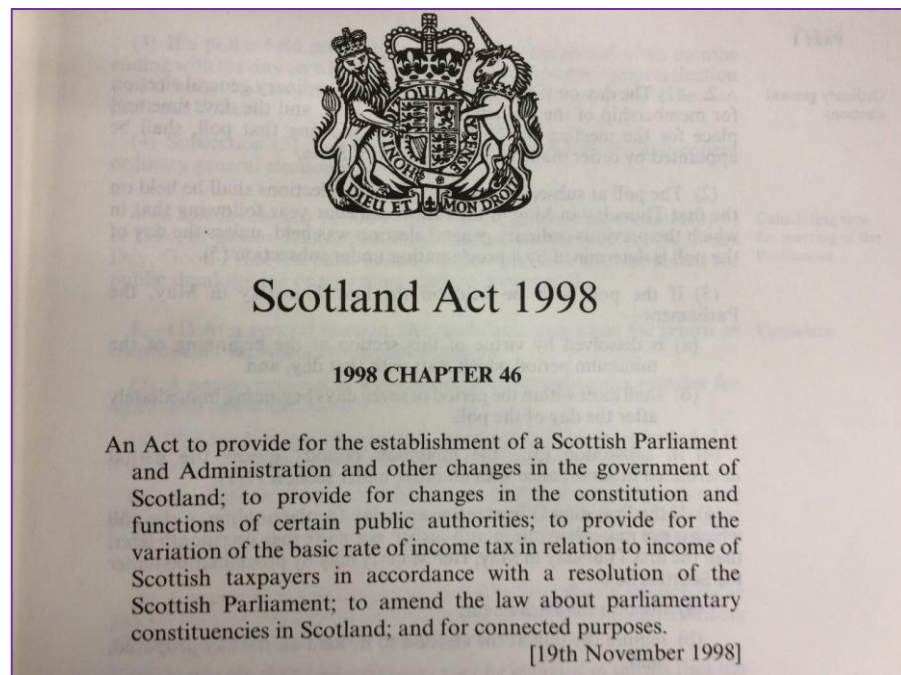
		<p>time for the 2016 Scottish Parliament election should the Scottish Parliament choose to do so.</p> <p>Clause 7 devolves responsibility for the control of campaign expenditure and expenditure by third parties in relationship to Scottish Parliament and local government elections, except for elections combined with other elections.</p> <p>Clause 8 will devolve powers over Sections of the Political Parties, Elections and Referendums Act 2000 relating to the Electoral Commission, with regard to Scottish Parliament elections, to the Scottish Parliament.</p> <p>Clause 9 would amend Schedule 1 of the Scotland Act 1998 to require reports on reviews of Scottish Parliament constituency boundaries, carried out by the Boundary Commission for Scotland, to be submitted to Scottish Ministers, instead of the Secretary of State. Orders to put in place recommendations from those review reports will no longer need to be approved in the UK Parliament.</p>	
<ul style="list-style-type: none"><li>• <b>Supermajority for legislation on the Scottish Parliament franchise etc.</b></li></ul> <p>Legislation changing the franchise, the electoral system or the number of constituency and regional members for the Scottish Parliament to be passed by a two-thirds majority of the Scottish Parliament.</p>	27	<p>This is similar to the requirement in the Scotland Act 1998 and the Fixed Term Parliaments Act 2011, which provide that the Scottish and UK Parliaments can only be dissolved by a two-thirds majority in the Scottish Parliament and the Commons respectively.</p>	4

35. In relation to these recommendations, the Committee has focussed this section of the interim report on the permanence of the Scottish Parliament, Legislative Consent Memoranda (frequently termed the 'Sewel' Convention), and the devolution of certain equalities matters. In addition, the Smith Commission made a number of recommendations in relation to inter-governmental relations and this subject is considered in detail later in this report.



## Permanency of the Scottish Parliament and Scottish Government

36. The Smith Commission recommended that “UK legislation will state that the Scottish Parliament and Scottish Government are permanent institutions”.<sup>8</sup> Section 1(1) of the Scotland Act 1998 provides that “there shall be a Scottish Parliament”. The previous UK Government’s proposed draft clause adds an additional subsection which provides that “a Scottish Parliament is recognised as a permanent part of the United Kingdom’s constitutional arrangements”.<sup>9</sup> The draft clauses contain similar provisions in relation to the Scottish Government.



**The Scotland Act 1998**

37. The main tenet of UK Parliamentary sovereignty, that no Parliament can bind its own successor Parliaments, is a well-established doctrine. This doctrine poses a significant obstacle to establishing the permanency of the Scottish Parliament in UK legislation. This difficulty was recognised by Lord Smith when he commented in evidence to the Committee that—

” The UK law will say that this institution is permanent; that is our intention. However, nothing—since the Magna Carta, I think—can be permanent; I am told by constitutional experts down in London, in what used to be called Dover house but is probably now called Scotland house, that that cannot be done because it would bind future Parliaments. However, we intend the law to be written in such a way that a plague of boils or something will break out if anyone ever decides to prorogue—or whatever you want to call it—this Parliament. The language will be as strong as it is possible to be.<sup>10</sup>

38. He further stated that—

” You are absolutely right that nothing is permanent, because future democratically elected Governments could change that permanence. However, this Parliament will be permanent and it will be described as permanent in UK law. Of course, as I say, UK law can be changed.<sup>11</sup>

” If you know a way of making the institution permanent, tell me, because that is the Scottish people’s will.<sup>12</sup>

39. The Committee is aware that the UK Parliament has passed legislation, such as the Canada Act 1982 and the Hong Kong Act 1985, which provided for the UK Parliament permanently relinquishing Parliamentary sovereignty over these jurisdictions. **However, the Committee is of the view that such legislation does not provide a helpful precedent given that Scotland currently remains part of the United Kingdom. In any event, it is at least arguable that these earlier examples do not represent legal limits on the sovereignty of the United Kingdom Parliament: each could in theory be repealed by an Act of the Westminster Parliament, however unlikely that might be.**

40. In his evidence to the Committee, the previous UK Government’s Secretary of State for Scotland, Alistair Carmichael MP, recognised that the legal position makes entrenching the Scottish Parliament in legislation “a challenging prospect” but considered that, in practice, “the permanence of the Scottish Parliament is guaranteed by the will of the Scottish people”.<sup>13</sup>

41. The Committee has received a range of evidence that the draft clauses do not fully implement the recommendation of the Smith Commission as a result of using the phraseology that the ‘Scottish Parliament *is recognised* as a permanent part of the United Kingdom’s constitutional arrangements’. For example, the Law Society of Scotland commented—

” The phrasing in the draft clause does not literally implement the terms of Paragraph 21 of the Smith Report. The use of the phrase “recognised as permanent” has a different nuance from a statement that “the Scottish Parliament and Scottish Government are permanent institutions”. The difference in wording between the Smith Report and the draft clause is significant. The draft clause could be said to acknowledge or declare a matter of fact rather than provide a statement in law.<sup>14</sup>

42. The Committee also received a joint written submission from Dr Eve Hepburn, from the University of Edinburgh, and Professor Sionaidh Douglas-Scott, from University of Oxford, who considered that draft clause 1 did not fulfil the Smith Commission recommendation and that, as currently drafted, the draft clause had no legal content. Dr Hepburn and Professor Douglas-Scott stated that a more substantial concern is that—

” ...in none of the depictions of ‘permanence’ worded in the vow, the Smith Report or the Command Paper, were there any attempts to detail the



practicalities of entrenching permanence in law. The draft clauses do not contain any provisions to render the Scottish parliament permanent, for instance by ensuring that the provisions contained within the Scotland Act cannot be abolished or amended unless certain conditions are met.<sup>15</sup>

43. Dr Hepburn and Professor Douglas-Scott suggested a range of amendments to the draft clause in order to seek to entrench the Scottish Parliament based around a model of 'federacy'. 'Federacy' refers to a situation where a sub-state unit within a state with an asymmetric distribution of territorial powers provide specific protections to the powers of a sub-state unit. Examples cited included the Åland Islands in Finland and the position of Greenland within the Danish state. Dr Hepburn and Professor Douglas-Scott summarised the rationale for their proposed amendments to the permanency clause as being to include—

” ...a new provision that any changes to the Scotland Act must require mutual consent from both the UK and Scottish Parliaments, giving the Scottish Parliament greater control over its destiny and ensuring a form of equal partnership between Scotland and the UK that is characteristic of federal-type arrangements. There are legal precedents for the UK Parliament renouncing a degree of its sovereignty, including the renunciation of a certain amount of its sovereignty to the EU and to the UK's former colonies. It would not be unthinkable to apply the same self-limitations with regard to Scotland.<sup>16</sup>

44. The view of the Scottish Government on this issue was given by the Deputy First Minister in his evidence. He said—

” On the issue of permanency, particular words are used in the clause that I am not sure need to be there. I do not know quite what the purpose is of adding the words “recognised as”, and I think that it would be clearer if they were not in clause 1. The proposed new subsection (1A) in section 1 of the 1998 act states:

” A Scottish Parliament is recognised as a permanent part of the United Kingdom's constitutional arrangements.

” It would be blunter if it read, “A Scottish Parliament is a permanent part of the United Kingdom's constitutional arrangements.” We all know the limitations of that type of arrangement. Given that knowledge, I think that it would be better if we stated it as boldly as possible.<sup>17</sup>

45. On the issue of 'super majorities' and whether this provision could be applied to any legislation that would abolish the Scottish Parliament, the Deputy First Minister wrote to the Committee as follows—

” The Scottish Government would be content with any move to attach super-majority requirements to future Westminster legislation that sought to

remove powers from the Scottish Parliament or to dissolve the Scottish Parliament. However we note that the prevailing Westminster doctrine of parliamentary sovereignty might make this hard to achieve in practice if a super-majority requirement at Westminster could itself be amended or repealed by a simple majority.<sup>18</sup>

46. Whereas, the view of the former Secretary of State for Scotland was as follows—



The draft clause delivers the Smith Commission Agreement by stating in law that a Scottish Parliament is a permanent part of the UK's constitutional arrangements. There has never been any question in the past 16 years that the Scottish Parliament and Scottish Government are anything other than permanent. Placing conditions or procedures on these draft clauses and on the face of the statute book would invite a scenario that was never envisaged in 1998 and is not envisaged today.<sup>19</sup>

47. **The Committee is of the view that the inclusion of the words ‘is recognised’ in draft clause 1 has the potential to weaken the effect of this clause, which would be unfortunate given the all-party agreement to this recommendation as part of the Smith Commission, and the views expressed to us by the former Secretary of State for Scotland that he perceives that the permanence of the Scottish Parliament and Scottish Government is guaranteed.**

48. Accordingly the Committee recommends that the UK Government removes the words ‘is recognised’ from this clause.

49. **In evidence to the Committee, the former Secretary of State for Scotland commented that he was “open to thinking about different ways in which ... permanence could be achieved”<sup>20</sup>. The Committee welcomes the open-minded approach of the former Secretary of State with regard to this issue. The Committee therefore considers that there is scope to further strengthen the permanency provisions.**

50. The Committee considers that the effect of the clause on permanency, as currently drafted, is primarily declaratory and political rather than legal in effect. The UK doctrine of Parliamentary sovereignty makes achieving permanence problematic. The Committee recommends that the Scottish electorate should be asked to vote in a referendum if the issue of permanency was in question, with majorities also being required in the Scottish Parliament and the UK Parliament.

## The Sewel Convention/Legislative Consent Memoranda

51. The process for agreeing to Legislative Consent Memoranda, frequently termed the Sewel Convention, refers to a statement made by Lord Sewel, then Parliamentary Under-Secretary of State at the Scottish Office, during the passage of the Scotland Act 1998 through the House of Lords. He said “we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament.”<sup>21</sup>
52. The Convention was subsequently set out in a Devolution guidance note (DGN 10)<sup>22</sup> between the Scottish and UK Governments albeit this guidance does not have the force of law. The guidance sets out the process to be followed with regard to UK Government legislation, draft legislation and Private Members’ Bills.
53. The Smith Commission recommended that “the Sewel Convention will be put on a statutory footing”.<sup>23</sup> The previous UK Government’s draft clauses seek to amend section 28 of the Scotland Act 1998 to include the wording, “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”.
54. The Law Society of Scotland, in written evidence, considered that the Sewel Convention had worked “relatively well” and that “there appear to have been no significant problems with the operation of the Convention”.<sup>24</sup> The Law Society went on to consider whether the draft clause would be justiciable in the event that Westminster legislated in a devolved area without the consent of the Scottish Parliament and concluded—

” ... in theory, it might be litigated upon but would a court strike down UK legislation affecting a devolved area where the consent of the Scottish Parliament had not been given? Under the terms of Section 28(7) the answer to that question is probably not. However, purposive interpretation and declarations of incompatibility under the Human Rights Act 1998 as well as an enhanced sense of constitutionalism under devolution legislation indicate that when the courts consider UK legislation to be seriously flawed Parliament has considered itself bound to alter that legislation. It may therefore be the case that the courts will be called upon to adjudicate in a declaratory way in the event of a statutory formulation of the Sewel Convention being breached.”<sup>25</sup>

55. The Law Society of Scotland also raised concerns that the draft clause does not fully place the Sewel Convention on a statutory footing in terms of the formulation of the Convention set out in the Devolution guidance note (DGN10). The Law Society commented—

” It is significant that DGN10 also requires the consent of the Scottish Parliament in respect of provisions of a Bill before the UK Parliament which

would alter the legislative competence of the Scottish Parliament or the executive competence of the Scottish Ministers (see DGN 10 at paragraphs 4(iii) and 9). It would seem, however, that Clause 2 would not apply to this latter category of provision.<sup>26</sup>

56. Commenting on the legal effect of the draft clause, Professor Alan Page, from the University of Dundee, observed—

” The convention extends to Westminster legislation altering the Scottish Parliament’s legislative competence and the executive competence of Scottish Ministers as well as with regard to devolved matters. It would be preferable therefore for that to be made clear on the face of the legislation. The implication that Westminster might unilaterally alter the Scottish Parliament’s legislative competence might however be politically more difficult to pass into law than the implication that it might legislate with regard to devolved matters.<sup>27</sup>

57. The Royal Society of Edinburgh, in a written submission to the Committee in partnership with the British Academy, commented on the wording of the draft clause as follows, “if the legislation is to put the Sewel Convention on a statutory footing, it is insufficient to state that the UK Parliament would not ‘normally’ legislate in areas devolved to Scotland since that can only give rise to legal uncertainty”.<sup>28</sup>

58. Appearing before the Committee, the Deputy First Minister gave his view of the current provisions relating to the Sewel Convention. He said—

” Draft clause 2 would put the Sewel convention into statute as a convention, rather than put the convention on a statutory footing. That is an issue that we need to explore with the UK Government.

59. He subsequently went on to add—

” The issue is about whether the substance—the process—is put into statute to give us confidence around the substance of Sewel, as opposed to stating in statute, “There shall be a Sewel convention”. That gets to the point of the convener’s questions about whether, if we put more of the substance into statute, that would restrict the flexibility to negotiate. All that I am saying is that, if we put the substance into statute, we have to do it in a fashion that respects the point that the convener has made about the necessity for flexibility.<sup>29</sup>

60. The former Secretary of State for Scotland’s view was as follows—

” The Sewel Convention refers to the statement made by Lord Sewel during the passage of the Scotland Bill 1997/8 that he would “expect a convention to be established that Westminster would not normally legislate with regard

to devolved matters in Scotland without the consent of the Scottish Parliament.



As successive UK Governments have adhered to the Sewel Convention, the language that forms the basis of the Sewel Convention was adopted in the draft clause. For the same reason i.e. because of that adherence to the general principle, there has been no need to unpack the words “not normally”. It was not intended by Lord Sewel to carry a technical meaning and, similarly, the expectation is that the phrase in the clause will take its ordinary English language meaning. The draft clause published on 22 January places the Sewel convention on a statutory footing and therefore delivers the recommendation in the Smith Commission Agreement.<sup>30</sup>

61. The Committee considers that the current draft clause, whilst placing the purpose of the Sewel Convention in statute, does not incorporate in legislation the process for consultation and consent where Westminster plans to legislate in a devolved area. The Committee considers that it should do so. Moreover, the Committee considers that the use of the words ‘but it is recognised’ and ‘normally’ has the potential to weaken the intention of the Smith Commission’s recommendation in this area and recommends that these words be removed from the draft clause.

## Equal Opportunities

62. The report of the Smith Commission made the following recommendation with regard to equal opportunities—

” The Equality Act will remain reserved. The powers of the Scottish Parliament will include, but not be limited to, the introduction of gender quotas in respect of public bodies in Scotland. The Scottish Parliament can legislate in relation to socio-economic rights in devolved areas.<sup>31</sup>

63. The previous UK Government's Command Paper comments on the purpose of the draft clauses in this area as follows—

” This power 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 regard to their devolved functions. However, the Scottish Parliament will not be able to lower the protections found in the Equality Act 2010.<sup>32</sup>

64. Draft clause 24 of the previous UK Government's Command Paper seeks to give effect to the recommendation of the Smith Commission in this area by narrowing the scope of the general reservation of equal opportunities, within the Scotland Act 1998, by introducing new 'exceptions' to the general reservation.

65. The draft clauses also contain an 'exception to the exception' which states that the power is not devolved "to the extent that provision is made by the Equality Act 2006 or the Equality Act 2010". The Coalition for Racial Equality and Rights (CRER) commented on this aspect of the clause in the following terms—

” The expression "to the extent that provision is made" is ambiguous. On one view, that could mean that if the Equality Act deals with a subject in any way – "provision is made", and that's the final word and not amenable to legislation by the Scottish Parliament. Another view would be that unless a proposal by the Scottish Parliament in relation to Scottish functions of a Scottish public authority is actually prohibited by the Equality Act, then it would be safely acting within its powers. Depending on how that clause is interpreted, it could lead to a situation where there is very limited scope at all for the Scottish Parliament to take action on equalities.<sup>33</sup>

66. **This particular provision is an area that the Committee intends to return to at a later date upon introduction of any new 'Scotland Bill' following the UK General Election. At this stage, the Committee seeks clarification, from the UK Government, on the scope of the provision in clause 24 with regard to the extent to which the Equality Act 2006 and 2010 would limit the ability of Scottish Ministers to legislate with regard to equalities issues.**

67. **The Committee also notes that the Equality Act 2006 is not mentioned in the Smith Commission recommendation, yet the reservation in the draft clause**



**also includes the 2006 Act and seeks clarification, from the UK Government, on what effect the inclusion of this Act has upon the proposed power for Scottish Ministers in this area.**

### **Socio-economic inequalities**

68. Clause 24 would provide the Scottish Parliament with the power to legislate in relation to those aspects of socio-economic inequalities which fall within the subject matter of Part 1 of the Equality Act 2010. Part 1 of the Equality Act 2010, which is entitled 'socio-economic inequalities', creates a 'socio-economic equality duty' which requires public authorities to consider socio-economic inequalities in their decision-making processes. Specifically, the 2010 Act provides that each authority to which the duty applies must, "when making decisions of a strategic nature about how to exercise its functions, have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage".<sup>34</sup>
69. Part 1 of the Equality Act 2010 has never been brought into force by the UK Government and so public authorities in the United Kingdom are not yet bound to observe the socio-economic equality duty.
70. Part 1 of the Equality Act 2010 confers on Scottish Ministers a power to add new public authorities to the list of those to whom the socio-economic equality duty applies.
71. BEMIS Scotland commented, in written evidence, that they are uncertain what powers the clause relating to the socio-economic inequalities provides to Scottish Ministers, stating—

” With devolution of these powers in relation to a socio-economic duty we would like to clarify the position that this will afford the Scottish Government/Parliament on the enactment of a future Scotland (2015) Bill.<sup>35</sup>

72. In a letter to the Committee, the Deputy First Minister set out his views on the provisions in clause 24 relating to socio-economic duties. He said—

” ...we are considering the drafting and interpretation of clause 24 very carefully. It remains unclear to us what more the clause will enable us to do and we are having discussion with the UK Government on this.<sup>36</sup>

73. The Committee remains unclear about the scope of the proposed extension of legislative competence to socio-economic rights and, in particular, whether any extension would be limited to the socio-economic equality duty contained in Part 1 of the Equality Act 2010. It recommends that further thought be given to the drafting of this clause to ensure that the aims of the Smith Commission are fulfilled.

## Gender quotas

74. The Smith Commission recommended that the devolution in relation to gender quotas include, but not be limited to, the introduction of gender quotas in respect of public bodies in Scotland. The draft clause relates to the Scottish functions of any Scottish public authority or cross-border public authority.
75. This is not an area in which we have taken a significant amount of evidence on which to make observations or conclude. However, in evidence and advice to the Committee, a view was expressed that the way that the draft clauses are currently drafted could imply that the Equality Act 2010 may still reserve the creation of gender quotas. This is because of the inclusion of the phrase “except to the extent that provision is made by the Equality Act 2006 or the Equality Act 2010”.
76. Speaking to the Committee on this matter, the Deputy First Minister said—

” ...the command paper says that that should be the case, but our reading of the clause is that it is far from clear that that is actually the provision. It may be a question of drafting and interpretation. We would certainly want the ability to act in that fashion, but we are not confident that what is in front of us enables us to do so.”<sup>37</sup>

77. In correspondence to the Committee, the former Secretary of State for Scotland said—

” This draft clause [clause 24] delivers the Smith Agreement recommendation that the Scottish Parliament will have powers to introduce gender quotas in respect of public bodies in Scotland. On this, and all the clauses we have produced, we are considering any feedback we have received as we refine the draft clauses.”<sup>38</sup>

78. The Committee considers that the words “except to the extent that provision is made by the Equality Act 2006 or the Equality Act 2010” creates doubt about the power of the Scottish Parliament to legislate for gender quotas in relation to Scottish public authorities and cross-border public authorities. It recommends that further thought be given to the drafting of this clause to ensure that the aims of the Smith Commission are fulfilled.



# Taxation

## Background

79. Alongside plans for the devolution of further powers on welfare and benefits, the Smith Commission and previous UK Government's proposals for greater fiscal powers for the Scottish Parliament form the two most significant components of the overall package of provisions.
80. Increased levels of fiscal autonomy have been a feature of devolution since the re-establishment of the Scottish Parliament in 1999 through the passage of the Scotland Act 1998.
81. The first Scotland Act's main financial provision was to give the Scottish Parliament the power to set the Scottish Variable Rate and alter the basic rate of income tax up to 3p in the pound. This power was not used.
82. The Scotland Act 2012 amended the income tax varying powers of the Scottish Parliament by replacing the Scottish Variable Rate with 'the Scottish Rate of Income Tax' (SRIT), scheduled for implementation in April 2016. The provision is to reduce the rate of income tax in Scotland by ten percent for each band set by the UK Parliament, adding the SRIT set by the Scottish Parliament. The SRIT provision allows the Scottish Parliament to reduce the basic, higher and additional rates by up to 10p in the pound, or to increase the rates by any amount without limit. In addition, the borrowing powers of the Scottish Government were extended (see subsequent section of this report).
83. Apart from the powers to vary income tax rates, the Scotland Act 2012 also implemented the proposals in Calman Commission Report with regard to the two taxes that were named as candidates for devolution. From 1 April 2015, the Stamp Duty Land Tax is replaced by Land and Buildings Transaction Tax (LBTT) in Scotland, and the UK-wide Landfill Tax, by the Scottish Landfill Tax (SLfT).
84. Aggregates Levy and Air Passenger Duty (APD) were two further taxes recommended for devolution in the Calman Commission Report. The Aggregates Levy had been considered by the previous UK Government for devolution but has not taken place due to the levy being subject to legal proceedings. These two taxes are again recommended for devolution by the Smith Commission.

## The recommendations of the Smith Commission and the previous UK Government's proposals

85. Table 2 below produced by Scottish Parliament Information Centre (SPICe) sets out a comparison of the Smith Commission proposals and the previous UK Government's Command Paper in the area of **taxation**.

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**Table 2**

Smith Commission Report	Para	UK Government Command Paper	Draft clause
<p><b>• Income Tax</b></p> <p>The Scottish Parliament to have power to set the rates of Income Tax and the thresholds at which these are paid for the non-savings and non-dividend income of Scottish taxpayers (as defined in the 2012 Act).</p> <p>There will be a corresponding adjustment in the block grant received from the UK Government, in line with the funding principles set out in paragraph 95.</p> <p>The Scottish Government to reimburse the UK Government for additional costs arising as a result of the implementation and administration of the Income Tax powers described above.</p>	<p>76</p> <p>78</p> <p>79</p>	<p>Draft clauses 10-12 broadly seek to give effect to the extension of income tax powers recommended by the Smith Commission. These would give the Scottish Parliament the power to set rates and bands in relation to non-savings and non-dividend income of Scottish taxpayers, above the UK personal allowance.</p> <p>Draft clause 12 also seeks to deal with the interaction between Income Tax and Capital Gains Tax (CGT). Currently individuals who pay Income Tax at the higher rate also pay CGT at the higher rate. This clause sets out that the rate of CGT that applies to Scottish income taxpayers will continue to be calculated using the UK Income Tax rate limits.</p> <p>There are no draft clauses in relation to the corresponding adjustment in the block grant or the Scottish Government reimbursing the UK Government for costs arising from implementing/administering these powers. These recommendations do not require legislation and it is anticipated that details for these would be outlined in the Command Paper accompanying the Scotland Bill.</p>	<p>10</p> <p>11</p> <p>12</p>
<p><b>• Value Added Tax</b></p> <p>The receipts raised in Scotland by the first 10 percentage points of the standard rate of Value Added Tax (VAT) to be assigned to the Scottish Government's budget. Receipts to be calculated on a verified basis, to be agreed between the UK and Scottish Governments, with a corresponding adjustment to the block grant, in line with the principles set out in paragraph 95.</p>	<p>84</p>	<p>Draft clause 13 would give effect to the Smith Commission recommendation that the Scottish Government be assigned receipts from the first ten percentage points of VAT. With the agreement of both governments it also proposes to go slightly further by notionally assigning 2.5 percentage points of the reduced rate of VAT as well (which stands at 5 per cent).</p> <p>The amount of VAT receipts attributable to Scotland is to be the subject of an agreement between the UK Government and the Scottish Government.</p> <p>There are no draft clauses in relation to the corresponding adjustment to the block grant. This does not require legislation and it is anticipated that further details would be outlined in the Command Paper accompanying the Scotland Bill.</p>	<p>13</p>
<p><b>• Air Passenger Duty</b></p> <p>The Scottish Parliament to have the power to charge tax on air passengers leaving Scottish airports</p> <p>The Scottish Government to reimburse the UK Government for any costs</p>	<p>86</p> <p>87</p> <p>88</p>	<p>Draft clause 14 would make this a devolved tax, as recommended by the Smith Commission. It would give HMRC the ability to 'switch off' these UK taxes in Scotland from a date to be set by secondary legislation.</p> <p>There are no draft clauses in relation to the Smith Commission recommendation that a fair share of</p>	<p>14</p>

incurred in 'switching off' APD in Scotland and a fair and equitable share of associated administrative costs to be transferred to the Scottish Government. The Scottish Government's block grant to be adjusted in line with the principles set out in paragraph 95.		the administrative costs for this tax should be transferred to the Scottish Government or in relation to the corresponding adjustment to the block grant. These recommendations do not require legislation and it is anticipated that details for these would be outlined in the Command Paper accompanying the Scotland Bill	
<ul style="list-style-type: none"> <li><b>Aggregates Levy</b></li> </ul> <p>The Scottish Parliament to have the power to charge tax on the commercial exploitation of aggregate in Scotland.</p> <p>The Scottish Government to reimburse the UK Government for any costs incurred in 'switching off' Aggregates Levy in Scotland and a fair and equitable share of associated administrative costs to be transferred to the Scottish Government. The Scottish Government's block grant to be adjusted in line with the principles set out in paragraph 95.</p> <p>The UK and Scottish Governments to work together to avoid double taxation and make administration as simple as possible for taxpayers</p>	<p>89</p> <p>90</p> <p>91</p> <p>93</p>	<p>Draft clause 15 would make this a devolved tax, as recommended by the Smith Commission. It would give HMRC the ability to 'switch off' these UK taxes in Scotland from a date to be set by secondary legislation.</p> <p>There are no draft clauses in relation to the Smith Commission recommendations that a fair share of the administrative costs for this tax should be transferred to the Scottish Government or in relation to the corresponding adjustment to the block grant and the avoidance of double taxation.</p> <p>These recommendations do not require legislation and it is anticipated that details for these would be outlined in the Command Paper accompanying the Scotland Bill.</p>	15

86. Table 3 below produced by SPICe sets out a comparison of the Smith Commission proposals and the previous UK Government's Command Paper in the area of the **fiscal framework, including borrowing**.

**Table 3**

Smith Commission Report	Para	UK Government Command Paper	Draft clause
<ul style="list-style-type: none"> <li><b>Scotland's Fiscal Framework</b></li> </ul> <p>The devolution of further responsibility for taxation and public spending, including elements of the welfare system, should be accompanied by an updated</p>	95	Although the UK Government has not published any draft clauses in relation to the fiscal framework, the Command Paper indicates intent to fulfil these Smith Commission recommendations through non-legislative means.	None

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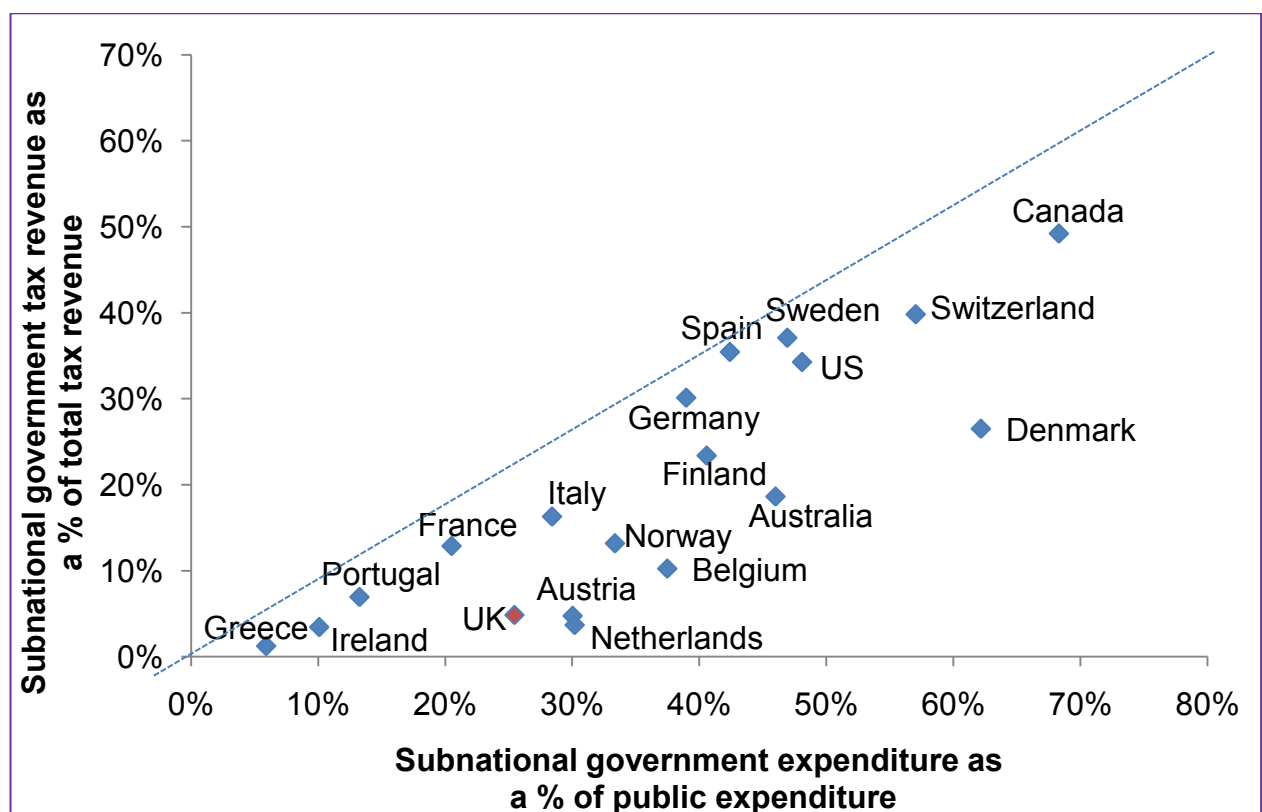
<p>fiscal framework for Scotland, consistent with the overall UK fiscal framework.</p> <p>The following aspects should be incorporated into Scotland's fiscal and funding framework.</p> <p>(1) <u>Barnett Formula</u>: the block grant to continue to be determined by the Barnett Formula.</p> <p>(2) <u>Economic Responsibility</u>: Scottish budget should benefit in full from policy decisions by the Scottish Government that increase revenues or reduce expenditure, and bear the full costs of policy decisions that reduce revenues or increase expenditure.</p> <p>(3) <u>No detriment as a result of the decision to devolve further power</u></p> <p>(4) <u>No detriment as a result of UK or Scottish Government policy decisions post-devolution</u></p> <p>(5) <u>Borrowing Powers</u>: Scotland's fiscal framework should provide sufficient, additional borrowing powers to ensure budgetary stability and provide safeguards to smooth Scottish public spending in the event of economic shocks, consistent with a sustainable overall UK fiscal framework. The Scottish Government should also have sufficient borrowing powers to support capital investment, consistent with a sustainable overall UK fiscal framework.</p> <p>(6) <u>Implementable and Sustainable</u>: the arrangements should be reviewed periodically to ensure that they continue to be seen as fair, transparent and effective.</p> <p>(7) <u>Independent Fiscal Scrutiny</u>: the Scottish Parliament should seek to expand and strengthen the independent scrutiny of Scotland's public</p>		<p>Specifically, the UK Government has committed to agreeing a fiscal framework with the Scottish Government through the Joint Exchequer Committee. The intention is to provide this alongside the introduction of the Scotland Bill so that both Parliaments will be able to consider the settlement as a whole from the outset. It may be that there is some legislation required in due course, but this depends on the nature of the new fiscal framework.</p> <p>Note that the UK Government did not publish any draft clauses in relation to borrowing. Whether any changes to Scotland's borrowing powers are needed will depend on a number of other factors likely to be determined by the overall fiscal framework (such as the risks the Scottish Government is exposed to by the method of block grant adjustment). While there is a power in the Scotland Act 2012 to increase borrowing limits by order, there may need to be further primary legislation in due course (e.g. if the circumstances under which the Scottish Government can borrow are changed).</p>	
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<p>(8) <b>UK Economic Shocks:</b> the UK Government should continue to manage risks and economic shocks that affect the whole of the UK.</p> <p>(9) <b>Implementation:</b> the two Governments should jointly work via the Joint Exchequer Committee to agree a revised fiscal and funding framework for Scotland based on the above principles.</p>			
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### Comparative information

87. The extent of fiscal devolution or financial decentralisation can be a disputed calculation. The Scottish Parliament's research team – SPICe – produced briefing material for this Committee at the outset of our work. The purpose of the research was to highlight the different scale of decentralisation across a number of countries selected by SPICe, compared to the United Kingdom; see Figure 1 below. It is important to note that in certain states with asymmetric distributions of fiscal powers between sub-national jurisdictions, such as Spain, the level of fiscal decentralisation can vary substantially between sub-national jurisdictions.

**Figure 1: Fiscal decentralisation in the UK compared to OECD countries (2013)**



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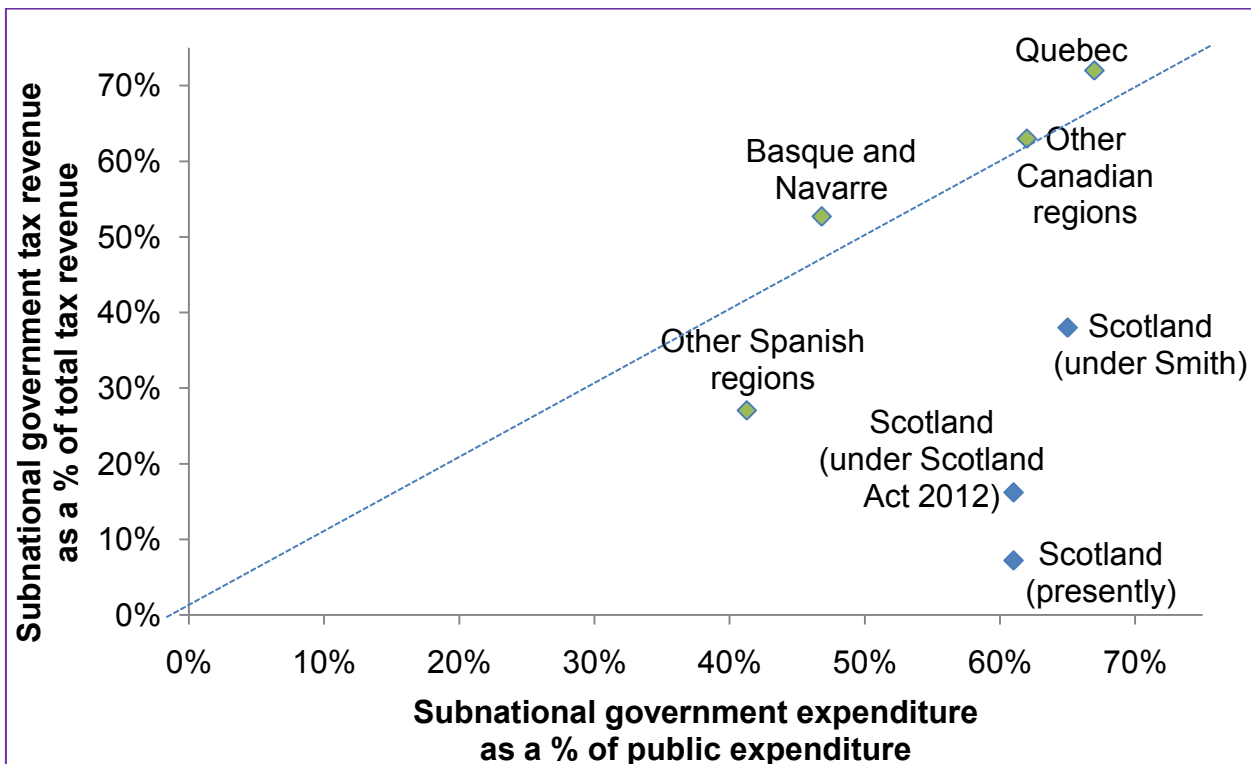
New Powers for Scotland: An Interim Report on the Smith Commission and the UK Government's Proposals, 3rd Report, Session 4 (2015)

Source: OECD (2015), OECD (2013) for Australian expenditure

Note – the UK figures represent devolution across the UK before the implementation of the Scotland Act 2012 financial provisions.

88. The degree of decentralisation tends to be highest in countries either with a federal system, such as Canada and Switzerland, or with a highly decentralised system of public services, such as Spain. By comparison, Belgium and Australia are examples where sub-national governments have relatively low levels of fiscal autonomy.
89. It is important, however, to recognise that even when a tax is devolved, there are varying levels of control that a sub-national government may have over the tax. Broadly speaking, this ranges from the full power to introduce taxes and the power to set tax rates and bases, to tax sharing arrangements where multiple levels of government can set tax rates or the central government assigns a proportion of tax revenues to the sub-national government.
90. Figure 2, below, shows the varying levels of control that sub-national state governments have over devolved taxes across the countries selected.

**Figure 2: Fiscal decentralisation to Scotland compared with other sub-central areas**



Source: SPICe calculations using GERS (2015), Statistics Canada (2015) and personal communication with Antoni Zabalza and Julio Lopez-Laborda (2015).

Note – Canadian figures are for 2009 and Spanish figures are for 2011.

91. It is observed that Basque and Navarre do not control all public expenditure, despite having full fiscal autonomy. This is because these sub-central governments are not responsible for spending on defence, foreign affairs, the royal household, airports, high speed rail, etc. Social security contributions and pensions are also not a responsibility these sub-national governments.
92. While these figures aid understanding of fiscal decentralisation in Scotland, the UK and other OECD countries, SPICe have a number of concerns about the accuracy and comparability of the information in Figure 2. In particular, a key test of accuracy is the extent to which figures for sub-central areas in Figure 2 (calculated by SPICe) aggregate up to the national totals in Figure 1 (provided by the OECD). This is shown in the Table 4 below:

Table 4

Country	Revenue decentralisation		Expenditure decentralisation	
	Figure 1	Figure 2 (aggregated)	Figure 1	Figure 2 (aggregated)
Canada	49%	65%	68%	63%
Spain	35%	29%	42%	42%

93. Looking more closely at the situation in Scotland as a consequence of any final agreement to the set of fiscal provisions set out by the previous UK Government in its Command Paper and draft clauses, it is also the case that a calculation of the level of spending that is now covered by devolved taxes varies between sources.
94. As with the international comparisons above, SPICe produced comparator information to assist us with our inquiry. It is important to recognise at the outset that this assessment of the level of fiscal autonomy can vary depending on how this is defined. Typically, one of three calculations is made:
- *Expenditure decentralisation* - The percentage of public expenditure in Scotland that is devolved (thus, devolved expenditure as a percentage of expenditure in Scotland).
  - *Revenue decentralisation* - The percentage of revenues raised in Scotland that are devolved or assigned (thus, devolved and assigned revenues as a percentage of revenues raised in Scotland).
  - *Self-funding percentage* - The extent to which own revenues fund devolved expenditure (thus, devolved and assigned revenues as a percentage of devolved expenditure).



95. Using these three different types of comparison, SPICe produced calculations for the Committee of the level of fiscal autonomy as a consequence of any agreement to the previous UK Government's proposals. Table 5 shows the percentage of tax revenues that are devolved or assigned; at present, under the Scotland Act 2012 and under the Smith Commission proposals.

**Table 5: A comparison of figures provided on fiscal devolution**

<b>Scenario</b>	<b>Percentage of tax revenues devolved</b>	<b>Percentage of tax revenues assigned</b>	<b>Total percentage devolved and assigned</b>
At present (March 2015)	7.2%	-	7.2%
Once Scotland Act 2012 fully implemented	16.0%	-	16.0%
Under Smith Commission proposals	28.9%	9.3%	38.2%

Notes: Based on 2013-14 revenue figures from [Government Expenditure and Revenue Scotland](#) (Scottish Government 2015). Total revenues include a geographical share of North Sea Revenue.

96. The different percentages for expenditure decentralisation and self-funding arise from different figures being used for devolved expenditure. Different figures being used for Scottish income tax revenues accounts for the difference in the revenue decentralisation percentages.

## **Evidence received**

### **Views in general on the content and coherence of the tax proposals**

97. The transfer of increased tax revenue raising powers has been a feature of devolution since the Scotland Act 1998. There have been mixed views on the extent the process of tax devolution has gone so far and should go in the future, and the spectrum of views are again reflected in the evidence the Committee received on the specific provisions in the draft clauses of the Command Paper in respect of further tax devolution.
98. Business organisations such as the Institute of Directors (IoD) in Scotland were broadly positive about a degree of further fiscal devolution. Its Director, David Watt, told the Committee that “it is a very good principle that this Parliament should be accountable for its income—at least, a significant amount of it—as well as for its expenditure”.<sup>39</sup> For the IoD, the process for further devolution needed to take the views of business in Scotland into account during implementation of any new power.
99. Other business and business-related groups such as the Glasgow Chamber of Commerce and the Scottish Council for Development and Industry (SCDI) also



expressed general support for the package of tax powers. For example, Stewart Patrick of the Glasgow Chamber said—

” We are constantly struck by the fact that the proportion of revenue that is raised in Scotland or in the UK city regions is under 20 per cent, whereas the Organisation for Economic Co-operation and Development average is more than 50 per cent. That has implications for the productivity and performance of the country. We therefore welcome the Smith commission’s nod towards further devolution of powers beyond the UK Parliament.<sup>40</sup>

100. Whilst welcoming the focus on the income tax powers, both the Glasgow Chamber of Commerce and the SCDI expressed views that other taxes, specifically corporation tax, should not be part of the devolution package. Ross Martin of SCDI said—

” ...our position on corporation tax is to leave it as is. However, if a deal were done with Northern Ireland that changed the system in that part of the UK, we would want to go back to our members over time to look at the evidence of any impact that that had.<sup>41</sup>

101. Other evidence received by the Committee, whilst supportive of aspects of the current devolution plans, considered that more could have been achieved. For example, Dave Moxham, Deputy General Secretary of the Scottish Trades Union Congress (STUC) said, “We welcomed the increase in tax powers, although we would have gone further”.<sup>42</sup>

102. Professor Anton Muscatelli, giving evidence in a personal capacity, told the Committee that—

” In my view, given that there now seems to be a strong appetite in Scotland for greater fiscal autonomy, the cleanest solution would have been to have a package that would have involved not only complete income tax devolution, including the personal allowance, but national insurance contributions and which would have perhaps allowed some flexibility around employers’ national insurance contributions to try to affect employment, since that issue seems to be of concern to Scotland.

” I also suggested that, in the light of European rules, areas such as VAT could be subject to assignation and that some flexibility could be introduced around corporate taxation to avoid administrative complexity and to link in more with employment decisions, when companies decide where to locate in the UK. The Holtham commission in Wales suggested that there could be such flexibility. Some of those options to go further than the current set of powers that is proposed by Smith could have been explored.<sup>43</sup>

103. Professor Andrew Hughes Hallett of the University of St. Andrews was also critical of the overall content and cohesiveness of the taxation proposals. He wrote—

” If devolution is to be partial or incomplete, it would pay to create a portfolio of smaller devolved taxes, or of larger taxes partly devolved rather than devolve one large tax. There are reasons for this. First, it will always be more effective to have a coherent set of taxes belonging to a consistent economic strategy, with coherent movements between them when you make changes. This cannot be done with a single devolved tax. Second, and probably more important, Scotland needs a diverse tax base.<sup>44</sup>

104. For Professor Heald of the University of Aberdeen, one potential problem of the current package of measures proposed for devolution related to how the interaction of tax policies north and south of the border will operate and how to avoid what he referred to as ‘gaming’. Referring to the recent development of the Land and Buildings Transaction Tax in Scotland which was to replace Stamp Duty Land Tax, he said—

” One saw in the autumn statement the disruptive potential of what the UK Government does. This Parliament spent a long time trying to reform stamp duty land tax and to produce a property tax that would be implementable by the beginning of April, but the UK Government has basically disrupted that implementation by suddenly changing the tax in the rest of the UK. The question of the interaction between the two Parliaments is therefore crucial. The Smith package can be made to work, but one must think very carefully about the institutional arrangements.<sup>45</sup>

### **Powers over income tax**

105. The Smith Commission recommended the Scottish Parliament to have the power to set the rates of income tax and the thresholds. The Scottish rates of income tax and thresholds will apply to all income (other than savings and dividends) of a Scottish taxpayer as defined by Scotland Act 2012. The determination of the income tax base, the setting of annual personal allowances, together with certain aspects concerning tax-band thresholds, are reserved to the UK Parliament.

106. The business organisations we took evidence from were broadly supportive of this further augmentation of the powers, under the 2012 Act, for a Scottish Rate of Income Tax (SRIT). However, some, such as the IoD Scotland, expressed concerns over the potential impact on businesses if the implementation of the new regime proved complex. David Watt recalled his previous experience in rolling out the development of SRIT under the Scotland Act 2012. He said—

” As one who recently sat through discussions on the coming Scottish rate of income tax and the defining of a Scottish taxpayer with 10 Treasury officials at the other end of a video camera and about five people, most of whom were actuaries, sitting in an office in the bowels of Melville Crescent, I can tell members that things are pretty painful as they are. If that is an example of how long it will take to do things, we will have challenges in the administration and definition of income tax.<sup>46</sup>

107. SCDI's Chief Executive, Ross Martin, set out what principles he wanted to see underpin the further devolution of powers over income tax. He said—

” To come back to the guiding principles of transparency, predictability and the desire for stability, the strong message from our members is that as long as the system contains those characteristics, and as long as there are no shocks or any structural changes that might impact unduly on one part and have a knock-on effect on another part, changes to certain aspects of it can be dealt with. That kind of predictability and the drive for stability are the overriding concerns; changes to individual taxes, allowances or credits are just the meat and drink of systems, and companies and organisations are used to dealing with them both nationally and, for our members who operate in different fiscal regimes across the world, in federal schemes or whatever.<sup>47</sup>

108. Professor Hughes Hallett was critical of a reliance on income tax as one of the main measures being devolved as he felt that experience has shown that this does not result in economic growth or job creation. He was also concerned at the retention of elements of income tax powers by the previous UK Government, such as the power to set levels of personal allowances and thresholds. He said—

” There should be no shared taxes, including no sharing of tax bands, of tax thresholds, or of exemptions or decisions about the definition of the tax base. This is to prevent conflicts, exploitable differences, or inconsistencies or ambiguity emerging between the two authorities responsible for each part of the tax. To allow that would create problems in implementation. It would also create problems of accountability. In order to remove the possibility that inconsistencies and/or exploitable differences may emerge, you would have to ensure that either a single tax authority implemented the tax or that all definitions (tax base, bands etc.) are unified – in which case little accountability is imposed on the regional tax authority while little incentive remains for using the devolved tax.<sup>48</sup>

109. The Institute of Chartered Accountants in Scotland (ICAS) expressed the view that the previous UK Government had adequately transposed the recommendations on income tax into draft legislative clauses. In its written evidence, ICAS said, “The draft clauses in the paper ‘Scotland in the UK: an enduring settlement’ will, in general terms, achieve their objectives of devolving certain powers and taxes”.<sup>49</sup>

110. ICAS did recommend, however, that very careful consideration be given to when the new powers being proposed now were to be implemented, given that the devolution of increased powers over income tax as part of the Scotland Act 2012 were only now coming on-stream. It said—

” The income tax proposals combine a pragmatic way of devolving further elements of income tax whilst retaining the UK infrastructure of tax collection with HMRC and employers, thereby avoiding the costs and

efforts of whole-scale change. At the same time the income tax proposals build upon existing devolved authority because a Scottish rate of income tax (SRIT) is already in place for April 2016, and extend this by offering the Scottish Parliament further decision making and finance raising responsibilities. ICAS recommends that implementation should be phased in over a number of years. The SRIT planned for 2016 should be permitted to settle in, say over two years, before there is further devolution of income tax.<sup>50</sup>

111. On the issue of the timing for the introduction of new income tax powers, the Deputy First Minister said—

” I am working on the assumption that we will be able to reach agreement on all questions for the Scotland bill to be passed by spring 2016. In April 2016, the Scottish rate of income tax, which is being introduced as a result of the Calman proposals, will begin to take effect. Given that the proposals envisage a two to three-year transition period or assurance about the sums that would be raised by a Scottish rate of income tax, we will be in a transition period in that respect for at least two or three years.

” [...] My preference is to move as quickly as we can towards the full provisions envisaged by Smith instead of having a long period for the implementation of the Calman proposals, but we would have to test out the detail to determine how readily that could be translated into practical reality. Obviously, it is dependent on interaction with HMRC, as it will collect the Scottish rate of income tax under both the Calman and Smith scenarios.<sup>51</sup>

112. Professor Heald raised the issue of the costs, complexity and timing of the implementation of new powers over income tax, and particularly the administrative and IT challenges ahead. He said—

” There is obviously a lot of reputational risk for the Scottish Parliament if the devolved tax powers are not implemented effectively. These things are difficult because the tax and benefits systems are complex and IT systems have to cope with millions of people and transactions. One has only to look at the difficulties with universal credit to see that this is a high-risk area that one has to think about carefully. That clearly means that sufficient resources have to be put into these things and they have to be given enough time.<sup>52</sup>

113. For ICAS, one of the on-going challenges with implementation of SRIT and of any further devolution of income relates to the residency test and the definition of a ‘Scottish taxpayer’. ICAS told the Committee that it will be important to think about the practical consequences of the proposals and—

” ...the need to identify a Scottish taxpayer – who are they and who is responsible for their identification? In broad terms, a Scottish taxpayer is

someone with their main residence in Scotland. Classification issues are more likely to occur with the top and bottom ends of the income scale; i.e. the very wealthy and more mobile, those who work across different parts of the UK, and migrant low-paid workers.<sup>53</sup>

114. One of the key features of the previous UK Government's proposals for devolution of income tax, as recommended by the Smith Commission, is that it proposes devolution of the setting of income tax rates and thresholds on non-savings and non-dividend income. Specifically, the Smith Commission recommended that "other aspects of Income Tax will remain reserved to the UK Parliament, including the imposition of the annual charge to Income Tax, the personal allowance, the taxation of savings and dividend income, the ability to introduce and amend tax reliefs and the definition of income".<sup>54</sup>

115. In his evidence to the Committee, Lord Smith explained the rationale for these exclusions—

” We were concerned about starting to interfere with savings, dividend income and interest income. There is a huge industry in Scotland and a lot of people's pensions are dependent on these issues. If we start to create differences across borders in areas such as pensions, we are taking a very big step that could lead to a lot of confusion.<sup>55</sup>

116. Some of the evidence we heard was critical of this aspect of the proposals, which is reflected in the draft legislative clauses and Command Paper. For example, NUS Scotland said in its written evidence—

” We believe that by only devolving non-savings taxes, the Scottish Parliament is put in a precarious position for any future tax rises, and particularly the introduction of a higher rate of tax. As was seen in the year before the introduction of the 50p rate in 2010, and then in the year following the reduction to 45p, those who it affected were able to shift extremely large sums of money between years and between income and dividends, in order to either escape or benefit from the changes in rates. Without the ability to tax dividends, there is a great risk that Scotland will never be able to fully utilise or benefit from any future reform of income tax.<sup>56</sup>

117. Research published by the Institute for Fiscal Studies (IFS), in December 2014, set out the opportunities and challenges that devolution of this particular aspect of income tax would bring. Author of the research, David Phillips, wrote—

” Full devolution of income tax on non-savings and non-dividend income removes anomalies under the system of partial devolution due to take effect in April 2016 which skews the Scottish Government's incentives towards tax rises and away from tax cuts. However, the system is not perfect. In particular, because the Scottish income tax would not apply to

dividends (or savings) income, if Scottish tax rates were higher than UK tax rates, some could respond by shifting their income into dividends, on which the UK rate will apply. This tax avoidance would reduce the amount Scotland could raise from higher tax rates. This problem could be fixed by also devolving the taxation of dividend and savings income to Scotland, but practical issues make doing so difficult.<sup>57</sup>

118. On the continued reservation of the personal allowances element of income tax, the IFS said—

” Although, with full powers over rates and bands, the Scottish Government could presumably introduce a zero-rate band, giving it the power to, in effect, increase but not decrease, the personal allowance in Scotland. With this in mind, it is hard to see any economic rationale for not devolving the personal allowance.<sup>58</sup>

119. Finally, in an issued related to the devolution of income tax, some charities and voluntary organisations, and their representative bodies, raised the issue of gift aid. The Scottish Council for Voluntary Organisations (SCVO) told the Committee that “Gift aid needs to be considered alongside the devolution of income tax; there are implications for charities relating to the collection and level of Gift Aid which need addressing immediately”.<sup>59</sup> SCVO explained—

” If income tax rates were to differ between Scotland and the rest of the UK, and Gift Aid continued to be a direct relief on income tax, then there would be complications for charities and Community Amateur Sports Clubs, and for donors. For example, a donor would likely need to declare at the time they make a donation whether they are a Scottish or rest-of-UK tax payer. Since this is calculated on where a tax-payer lives for the majority of the financial year, this may not always be clear to donors at the time of donation – what would happen, say, if they moved from one jurisdiction to another later in the year? Moreover, it is unclear whether tax-payers are currently aware that this is how their tax status for income tax purposes is defined – tax-payers would need to be educated that this is the case.<sup>60</sup>

120. SCVO also suggested that there may be unnecessary complications for pan-UK charities when receiving donations from different parts of the UK, with a lack of clarity on which government should pay the gift aid.

### **Assignment of a share of VAT revenues**

121. The recommendation of the Smith Commission, taken forward by the previous UK Government in its Command Paper, is that the Scottish Government should be assigned receipts from the first ten percentage points of the standard rate of VAT. Receipts are to be calculated on a verified basis.



122. The bulk of the evidence received by the Committee, whilst welcoming the principle, called for greater clarity in terms of how the assignment of revenues would work. As ICAS told the Committee—

” Clause 13 in the ‘Draft Scotland Clauses 2015’ regarding VAT delivers the mechanics of the assignment of VAT, but with the large caveat that it applies ‘where there is an agreement between the Treasury and Scottish Ministers...’. The rules for agreeing this have not been provided and it may not be easy to identify ‘Scottish VAT’.<sup>61</sup>

123. In oral evidence, Charlotte Barbour of ICAS elaborated further. She said—

” The assignment of VAT offers more opportunity for discussions on how that might be calculated. It slots in with the difficulties with the fiscal framework and some of the no-detriment issues. I am not quite sure how you would calculate it. If you take a rather general estimation process, that will not marry up with and give you a true reflection of the Scottish economy. However, the better it marries up with the economy, the more difficult it is to calculate. Such elements might run through how you calculate no detriment.<sup>62</sup>

124. Professor Anton Muscatelli agreed. He told the Committee—

” I, too, think that that will be difficult to measure. That is one of the reasons why, when we see assignation being used around the world, it is not as a way of handing over tax powers that can then influence the tax base but more as a way of saying, “Here’s your share of the tax take and you can use it on spending decisions. To impose administrative requirements that call for value added to be tracked at every stage would be hugely burdensome.”<sup>63</sup>

125. For PricewaterhouseCoopers (PwC), “The key to implementation [of the new proposals on VAT assignation] is obviously the agreement between Treasury and Scottish Ministers as to how to calculate ‘the amount attributable to Scotland for each period’ and how the adjustment to block grant will be calculated”.<sup>64</sup>

126. Other bodies, such as the STUC, were more broadly supportive of the assignment of a share of VAT. Its Deputy General Secretary, Dave Moxham, said—

” ... I am quite a fan of assigned revenue. I fully take your point that it is not a power in the sense of being usable to promote particular behaviours, but I return to my point about how good Scottish policy is reflected in the block grant. A degree of assigned revenue clearly rewards the Scottish Government for economic growth and, in our view, the closer we get to an amount of revenue that is derived from positive actions undertaken by the Scottish Government, the better. I take your point about it not being a lever, but I still think that it is useful that we move towards a situation in which a

larger proportion of Scottish revenue is derived from positive Scottish Government economic activity.<sup>65</sup>

127. Commenting on the issue of how to calculate the assignment of a share of VAT revenues, the Deputy First Minister said—

” A lot of technical and analytical work will need to be done to determine on what basis VAT should be assigned. As with all such matters, there is no one straightforward way of doing that, so we will have to work our way through a multiplicity of options. The opportunity to define much of that presents itself in the work that the Chancellor and I have commissioned from civil servants, which will be undertaken in the course of the next eight weeks or so.<sup>66</sup>

128. He also added that—

” There are two separate issues. One is establishing the analytical base for how VAT should be apportioned and the other is the policy question of guaranteeing that if those estimates are exceeded, Scotland retains the benefit of that improved economic performance and consequential improved VAT take. Those two separate issues have to be resolved as part of the exercise, and the policy question is an inherent part of the fiscal framework that must be put in place.<sup>67</sup>

129. The former Secretary of State for Scotland also commented on the issue of VAT in a letter to the Committee. He said—

” ...I can confirm that VAT assignment will link the Scottish Government's budget with economic activity in Scotland, providing incentives for growth. The amount of VAT to be assigned to the Scottish Government's budget will be based on an estimated share of the total VAT generated in the UK. The Scottish Government will be assigned the first 10 percentage points of the estimated VAT revenue generated by standard rated economic activity in Scotland and the first 2.5 percentage points of the estimated VAT revenue generated by reduced rated economic activity in Scotland, with corresponding adjustments to the Scottish block grant. The inclusion of the 2.5 percentage points reduced rate element enables assignment of precisely 50% of Scottish VAT receipts on the basis of current VAT rates. The UK and Scottish Governments will need to agree a methodology for estimating how much of that VAT is generated by Scotland and how much by the rest of the UK. The UK and Scottish Governments will also need to agree the operating principles, including mechanisms for verifying that the methodology has been applied correctly and how any adjustments might be carried out and arrangements for audit and transparency, including publication of results.<sup>68</sup>



## Air Passenger Duty

130. The report of the Smith Commission recommended that Air Passenger Duty (APD) should be devolved and the Scottish Parliament should have the power to charge a tax on air passengers leaving Scottish airports, with full control over the design and collection of any replacement tax. It further recommended that a fair share of the administrative costs would be transferred to the Scottish Government. This recommendation has been taken forward by the previous UK Government in its Command Paper.
131. A range of business organisations who appeared before the Committee during our evidence-taking, or whom submitted written views, including IoD Scotland, Glasgow Chamber of Commerce, the Scottish Chambers of Commerce and the Scottish Council for Development and Industry, all expressed support for the devolution of APD. This was coupled with support for either a reduction or scrapping of this duty after devolution had taken place.
132. Similarly, bodies such as ICAS expressed their support for devolution in the written evidence provided to the Committee, as did the National Farmers Union of Scotland who wrote—

“...we do welcome the UK Government's intention set out in the Command Paper to devolve Air Passenger Duty to the Scottish Parliament. During the Smith consultation phase, this was an issue raised time and again by NFUS members who considered it vital to increasing internal connectivity within Scotland and acting as a stepping-stone to furthering movement, investment and enterprise in Scotland's more remote areas.”<sup>69</sup>

133. Ross Martin of SCDI, in his appearance before the Committee, cited the potential for cross-border effects if APD is devolved and reduced/eliminated in Scotland. He highlighted research produced by HM Treasury in recent months which—

“...predicted that [abolition of APD in Scotland] would have a 3 per cent impact on Manchester, which is—in the chancellor's language—manageable, and a 10 per cent impact on Newcastle. Obviously, there would have to be a mechanism by which Newcastle was given a measure of support. From our discussions with the UK Government, we believe that it is alive to the issue. If APD can be reduced and abolished even quicker under the current arrangements, without going through the transfer of powers, that will be all the better, but if it will take devolution, we will be willing to look at that.”<sup>70</sup>

134. In written evidence provided to the Committee, the leaders of Glasgow, Edinburgh and Aberdeen International Airports stated that, whilst they recognised the concern that had been expressed about possible cross-border effects, they did not feel it applied as the amount of tax competition would be minimal and that Scottish airports do not, in their view, compete substantially for flights with airports in the north of England.<sup>71</sup>

135. In its written evidence, the Scottish Tourism Alliance was also supportive of the devolution of APD with a view to reduction/abolition, and called for “A working group made up of the Parliament and industry [to] be established to oversee a workable, effective and timeous transparent, implementation plan around a ‘new deal’ for APD in Scotland.”<sup>72</sup>

### **Aggregates levy**

136. Devolution of the Aggregates Levy has been a perennial candidate for devolution by the UK Government for a number of years, pending conclusion of the on-going legal proceedings.
137. The Smith Commission recommended that, once the current legal issues in relation to aggregates levy have been resolved, the Scottish Parliament should have the power to charge a tax on the commercial exploitation of aggregates in Scotland, with full control over the design and collection of any replacement tax. A fair share of the administrative costs would be transferred to the Scottish Government.
138. Clause 15 of the previous UK Government’s draft legislative clauses takes forward the Smith Commission’s agreement on the Aggregates Levy. Through this clause the power to charge tax on the commercial exploitation of aggregate in Scotland will be devolved to the Scottish Parliament. This devolution will take place once the current legal issues in relation to the Aggregates Levy have been resolved, using the commencement order making power in clause 15. These issues arise out of unresolved challenges to the lawfulness of the levy dating back to 2002.
139. Following the resolution of these challenges, the UK Government states that the clause will enable the Aggregates Levy to be turned off for aggregate commercially exploited in Scotland (including aggregate from Scottish territorial waters), giving the Scottish Parliament the power to make its own arrangements with regard to the design and collection of any replacement tax on the commercial exploitation of aggregate in Scotland. This will be subject only to the requirement that any tax so introduced fully complies with EU law.
140. The previous UK Government has stated that it will work with the Scottish Government to ensure that double taxation is avoided. This may require changes to the way that the Aggregates Levy operates in the rest of the UK. If required, these consequential changes will be made following the resolution of the legal challenges, further discussion with the Scottish Government and consultation with the quarrying sector. The previous UK Government has, therefore, not included this in draft clause 15.
141. The Committee has heard a limited amount of evidence relating to this provision. For the industry body, the British Aggregates Association (BAA), the concerns about the levy were more fundamental than simply its devolution. Richard Bird of the BAA wrote—

” The aggregates levy has been and is a very bad tax both here and in Northern Ireland where an even more bizarre situation arose. The sad thing is that Westminster has offered it as a devolved tax to Scotland, particularly as the current coalition government stated that it would drop the levy if it came to power.<sup>73</sup>

142. In his view, the Aggregates Levy has done very little to enhance the environment and in fact in many cases had a negative effect on the environment.
143. In its submission, the Scottish Chambers of Commerce stated that, “On balance, Scottish Chambers of Commerce believes that there would be little risk attached to devolving the Aggregates Levy.”<sup>74</sup>

### **Fiscal framework, institutional arrangements and the operation of ‘no detriment’**

144. Leaving aside the specific tax proposals and translation of the Smith Commission’s recommendation into draft legislation, the most significant issue that we took evidence on were the proposals for a new fiscal framework between the Scottish and UK Governments that would underpin this package of devolved powers. This includes the provisions on ‘no detriment’ arrangements. Additionally, the overall issue of what kind of institutional structure for oversight, regulatory functions etc. also featured in the evidence we have heard so far.

### **Background**

145. At present, the majority of the Scottish Government’s budget is funded by a block grant authorised by the UK Government. The Barnett Formula ensures that, when there are changes to spend in England in comparable devolved expenditure, the Scottish budget is also adjusted. This adjustment is based on spending comparability and Scotland’s population share, with the relevant percentages presented in the Statement of Funding Policy. The Scottish Government is not obliged to make changes in the same spending areas.
146. The provisions agreed to under the Scotland Act 2012 mean that there will be a deduction from the Scottish block grant as a result of the revenue-raising powers being transferred to the Scottish Parliament. There are two elements to the block grant adjustment; the initial reduction and the way in which the reduction is calculated, or indexed, in future years.
147. The Scottish and UK Governments have agreed a one-off adjustment to the block grant for 2015-16 for the two new devolved taxes. With regard to SRIT, the UK and Scottish governments have agreed to develop and agree the block grant adjustment mechanism based on the proposals of the Holtham Commission. This approach recalculates the block grant adjustment mechanism year by year by indexing it to movements in the Non Savings Non Dividend income tax base in the rest of the UK

148. The Smith Commission, and subsequently the previous UK Government, proposed that any devolution of further responsibility for taxation and public spending, should be accompanied by an updated fiscal framework for Scotland. Specifically, that—

- Additional devolution should bring about **no detriment** to the Scottish or UK Governments' budgets, simply as a result of the initial transfer of tax powers. This means that devolution should be accompanied by a reduction in the block grant equivalent to the revenue forgone by the UK Government, and that future growth in the reduction of the block grant should be indexed appropriately. Changes to the taxes in the rest of the UK (for which responsibility has been devolved to Scotland) should only affect spending in the rest of the UK. Changes to the devolved taxes in Scotland should only affect public spending in Scotland.
- The Barnett Formula will continue to operate to ensure that Scotland receives its population-based share of any changes in comparable spending by UK Government departments.
- The devolved Scottish budget should fully benefit/bear the costs of policy decisions by the Scottish Government and their impact on revenues.

#### Evidence received

149. In preceding paragraphs, the Committee has noted the views of Professor Heald that, unless efforts are made to prevent it, any new fiscal framework and arrangements for no detriment run the risk of 'gaming' by one side or another. His view was supported by SCDI in its evidence. Responding to a question from a Committee member, Ross Martin of SCDI said—

” There is a recognition that such things have to be made clear at the outset to reduce considerably the latitude for mischief making—or gaming, as Mark McDonald has called it. There are mature systems around the world from which we can learn lessons about relative power and the relationship between the federal and state levels.<sup>75</sup>

150. In an additional written submission of evidence provided to the Committee following his appearance, Professor Anton Muscatelli highlighted the importance of paragraphs 95(3) and 95(4) of the Smith Commission's report. He said—

” Both of these will require very close scrutiny when legislation is brought forward. In the case of paragraph 95(3) evaluating the administrative costs of devolving additional spending powers needs to be done on an appropriate and fair basis to take account of the full cost of delivery of the additional programmes. In addition, future block grant indexation has to be implemented fairly, and none of this is set out in full in the Command Paper.<sup>76</sup>

151. Professor Muscatelli concluded that there was insufficient detail at the moment to be clear on how the no detriment arrangements might work because the details had not been published in the draft legislation.<sup>77</sup>
152. For Professor Andrew Hughes Hallett, the functioning of the no detriment arrangements within the new fiscal framework and the specific restrictions placed on either government cannot be taken to mean literally no effect on any other party or it would never be possible to make any changes at all. He recommended that—
- ” The Committee should be careful to distinguish first and second round effects of a devolved power. That will allow it to consider devolution when it is not a zero-sum game; and where it is designed to correct imbalances of the past or to create gains to parties outside government.<sup>78</sup>
153. A number of organisations and individuals that provided evidence to the Committee called for greater detail on the fiscal framework to be produced as a matter of urgency and for there to be clarification of the institutional landscape that will define how it operates, particularly regarding how there will be independent scrutiny.
154. For example, both the IoD Scotland and SCDI made comments on the need to review the current institutional set up governing both the new fiscal powers and the borrowing provisions (see subsequent section). Ross Martin of SCDI put it succinctly—
- ” Over the piece—not just on borrowing, but on the whole array of powers—Scotland, not having previously had responsibility for revenue raising and that side of the balance sheet, as the Deputy First Minister would put it, does not have the mechanisms by which to make an independent assessment. In particular, the role of the Office for Budget Responsibility comes into question. Whether or not the OBR, as it currently exists, would be the appropriate body and mechanism for that, or whether its role should be devolved in some way, as some members would suggest, there needs to be a maturation of the accountability and responsibility aspect. That was a major aspect of our members’ views. With rights come responsibilities, and with responsibilities comes a need for regulation—clever, agile, flexible, accessible and transparent regulation.
- ” There must be a proper discussion about how we do that, who is going to be responsible for it, what the metrics will be and who will be responsible for policing it and for any fiscal transfers that are required, for example. There are a range of issues that the Scottish Parliament has not necessarily had to tackle in the past, and it will have to get up to speed on them pretty quickly.<sup>79</sup>

155. The Royal Society of Edinburgh (RSE) agreed with the suggestion of an equivalent body to the Office of Budget Responsibility (OBR) in Scotland. It told the Committee, “We believe that there is a need for an equivalent body to the Office for Budget Responsibility to be established for Scotland; in addition we recommend the establishment of a new body to provide independent analysis of the fiscal arrangements and balancing mechanisms that will exist between the United Kingdom and the four nations within the UK.”<sup>80</sup>
156. The RSE also called for much greater clarity as to the mechanism by which reductions in the block grant calculated under the Barnett formula (or any substitute formula) can be negotiated and agreed between the UK and Scottish governments in an open and transparent manner, and for the meaning of ‘no detriment’ to be defined.<sup>81</sup>
157. In his evidence to the Committee, the Scottish Government’s Deputy First Minister agreed that the details of the fiscal framework and the workings of the no detriment principle were important and that the Scottish Parliament should be provided with the necessary information before it considers any legislative consent of any new bill introduced after the UK General Election. He said—

” There has to be a fiscal framework in place that is acceptable to Parliament before any LCM [legislative consent motion] can be agreed to. It is in no way possible or plausible for an LCM to be agreed to without an agreed fiscal framework that is to the satisfaction of Parliament being in place.”<sup>82</sup>

### **The role of the Scottish Parliament and parliamentary oversight**

158. The particular importance of parliamentary oversight of both the development and functioning of the fiscal framework, and arrangements for no detriment and block grant adjustments, were highlighted by some of those who gave evidence to the Committee.
159. For example, Audit Scotland, in its written submission, stated that—

” Fiscal transparency becomes increasingly important, as the level of financial devolution increases, so that Parliament can properly scrutinise and take informed decisions such that public trust in government is maintained.

And that—

” Early consideration of the accountability processes and risk sharing arrangements between the parties will help successful design of the detailed rules and regulations.”<sup>83</sup>

160. In its recent report on *Further Fiscal Devolution*, the Scottish Parliament’s Finance Committee pressed this particular point. It recommended that—



” ...a clear timetable is agreed and published by the UK and Scottish Governments for the implementation of Scotland’s fiscal framework. This should include allowing sufficient time for consultation with both parliaments on a draft framework.<sup>84</sup>

161. It further recommended that, “there needs to be much stronger and more transparent parliamentary scrutiny of inter-governmental relations as more powers are devolved to Holyrood.”<sup>85</sup>

162. The Deputy First Minister commented on the balance to be struck in his opinion between private intergovernmental dialogue and parliamentary oversight during his evidence. He explained—

” The civil servants have to try to work their way through all the possible evidence that could be considered to do with resolving just one question in the fiscal framework, and there will be many such questions to be resolved. The civil servants have to marshal the evidence, test it and get it to a point at which they can extract the issues that ministers need to resolve so that, after the election is out of the way, ministers can consider the evidence and see what those issues are. We should be open to considering how much of that evidence can be shared with parliamentary committees to ensure that they have confidence in the process. Although there was a 15-minute discussion on the block grant adjustment, a lot of detailed work went into evidencing both propositions. Ultimately, we had to resolve the issue, and we did that by deciding on a figure that was in the middle. There was plenty of evidence that supported a block grant adjustment of £526 million and plenty of evidence that supported a figure of £461 million. We came to a political agreement about what was reasonable within that.

” Subject to reaching an agreed position with the United Kingdom Government about how comfortable it is with information sharing with committees, I am keen to be as open as possible about the process, because I acknowledge the importance of the Parliament being satisfied that a robust fiscal framework is in place.<sup>86</sup>

## Conclusions and recommendations on taxation provisions

163. **The focus of this interim report and of the Committee’s scrutiny to date has primarily been concerned with how the recommendations in the Smith Agreement have been translated into draft legislation by the previous UK Government and what improvements can be made.**

164. **On income tax, the Committee concludes that the essence of the Smith Commission’s recommendations has been translated appropriately by the previous UK Government into the draft legislative clauses. We have no particular concerns at this stage with the drafting. However, there are significant issues still to be resolved regarding the implementation of the**

**new powers, such as an appropriate definition of residency for a Scottish taxpayer, the details of the administration of the new regime (who collects the tax and how it will function), the costs on business and individuals, the need to avoid double taxation and the timing and phasing of the new powers on income tax relative to those already devolved under the Scotland Act 2012.**

165. **One area that requires further clarification from the UK Government, however, is whether the current provisions would permit the Scottish Parliament to set a zero rate of income tax.**

166. The Committee recommends that details on the implementation of the new powers over income tax be produced before the Scottish Parliament is expected to give its legislative consent.

167. **The Committee concludes that the wording of the previous UK Government's draft clauses for the assignment of a share of VAT revenues is adequate as currently drafted. However, there is still significant uncertainty on how the assignment of a share of revenues will be calculated and whether the Scottish Government will be able to reap the rewards of any economic stimulus that yields higher VAT revenues.**

168. The Committee recommends that details of the assignment of VAT revenues and the share of any benefits be produced before the Scottish Parliament is expected to give its legislative consent. The Committee further recommends that a bilateral process by discussion is entered into between the two governments to reach agreement for the 'verified basis' for VAT attribution to Scotland for assigning the receipts.

169. **The Committee is content with the proposals and the current drafting of the clauses relating to the devolution of Air Passenger Duty and the Aggregates Levy. In due course, the Scottish Government should set out its policy plans for both of these newly devolved powers.**

170. The single most critical observation we make at this stage relates to the proposed new fiscal framework, 'no detriment' principle, block grant adjustments and the institutional landscape. The details of these matters will be critical to the smooth and transparent functioning of the taxation provisions as recommended by the Smith Commission.

171. The Committee welcomes the recent report of the Finance Committee which considered further fiscal devolution and in particular the elements of the report which considered the implications of the Smith Commission recommendation that an updated fiscal framework for Scotland be developed.<sup>87</sup> In particular, the Committee notes that the Finance Committee found there to be clear differences



between the Scottish and UK Governments regarding the clarity of the no detriment principle. The Committee notes the Finance Committee's recent announcement that it will undertake an inquiry examining the proposals for a fiscal framework as set out in the previous UK Government Command paper. The Committee looks forward to the Finance Committee's report on this issue.

172. The Committee notes the evidence that the Public Audit Committee has taken from the Auditor-General for Scotland regarding accountability and audit arrangements arising from the Smith Commission recommendations. In evidence to the Public Audit Committee, the Auditor-General commented on the importance of the Scottish Fiscal Commission in relation to the taxation powers proposed for devolution by observing that-

” It is very clear that the OBR and the Scottish Fiscal Commission will need to work closely together on the issues in exactly the same way as Audit Scotland and the National Audit Office do. We do not want huge amounts of duplication in our respective roles, but we need to respect the fact that the UK Parliament and the Scottish Parliament have separate sets of interests that in many cases will overlap but which will not be the same. Both Parliaments need to be assured about the forecasts that the OBR and the Fiscal Commission will produce, the adjustments that are made to Government funding streams and, in our case, the annual results that come out of that in the financial statements.<sup>88</sup>

173. The Smith Commission recommended that a key component of an updated fiscal framework should be that 'no detriment' should occur to either Government as a result of the decision to devolve further power. No detriment was considered by the Smith Commission to consist of two components. Firstly, that the Scottish and UK Governments' budgets should be no larger or smaller simply as a result of the initial transfer of tax and / or spending powers. Secondly, that post-devolution of powers that where either the UK or Scottish Government makes policy decisions that affect the tax receipts or expenditure of the other, that the decision-making government will either reimburse the other if there is an additional cost, or receive a transfer from the other if there is a saving. The Smith Commission also recommended that there should be a shared understanding of the evidence between both Governments in order for any adjustments to be made.
174. The Committee has taken evidence which has questioned the timescales over which no detriment will apply and also stressed the need for an independent source of financial data to be established in order that there can be an independent source of data via which a shared understanding of the evidence can be obtained.

175. The Committee recommends that greater clarity is required with regard to how 'no detriment' will operate in practice with particular regard to the timescale and range of policy effects which will be considered as

constituting no detriment. Accordingly, the Committee calls on both the Scottish and UK Government to detail their understanding of the principle of no detriment. The Committee also calls on both Governments to detail how they consider a shared understanding of the evidence, with regard to the calculation of no detriment, will be obtained.

176. It will also be important for the two Governments to have a shared understanding of the figures and calculations for tax matters, and we recommend that both Governments enter into an agreement to establish a common database of tax information. This will assist with the process of dispute resolution. In addition, the Committee recommends that independent scrutiny of these matters, by the Scottish Fiscal Commission, will be an essential component of the scrutiny landscape if these proposals are to be implemented effectively.

177. As yet, we are not able to conclude that we are content with the fiscal framework and no detriment arrangements as these details are currently being discussed between the two governments. For the Committee, both the process of these negotiations and the outcome requires proper parliamentary scrutiny. We recommend both Governments reach an urgent agreement on just how this will be achieved and for the Scottish Government to report to the Committee on what arrangements it proposes to put in place for parliamentary oversight.

178. **In any case, the Committee concludes that any final detail of the fiscal framework and the other matters we have considered is provided to the Scottish Parliament before the question of legislative consent to any new bill is considered in the early months of 2016.**
179. **Given the importance of the fiscal framework and intergovernmental working more generally, the Committee gives notice that it intends to continue to develop ideas and recommendations in this area in advance of, and then alongside, scrutiny of any bill introduced by a new UK Government after the UK General Election. We will liaise closely with other parliamentary committees on this matter.**

# Borrowing

## Background – current situation

180. The ability to borrow to fund longer-term capital investment or to cover short-term revenue requirements is a common feature of governments across the world.
181. Currently, through the Scotland Act 2012, provisions are in place to enable the Scottish Government to borrow up to £2.2 billion in total for capital investment from 2015-16. Within this, the Scottish Government is able to borrow up to 10 per cent of its capital Departmental Expenditure Limits (CDEL) budget annually, which means that the Scottish Government will face a limit of £304 million in 2015/16.<sup>89</sup>
182. The Scottish Government is currently able to borrow this aggregate amount of £2.2 billion from the National Loans Fund (NLF), by commercial loan, or by issuing bonds. There is provision to raise (but never lower) this cap.
183. Additionally, the Scotland Act 2012 provides that, from April 2015, the Scottish Government is able to borrow up to £200 million in any one year with a cumulative limit of £500 million to deal with the situation when outturn tax receipts for devolved taxes such as Land and Buildings Transaction Tax or from the Scottish Rate of Income Tax are less than forecast. The first 0.5% (circa. £125 million) of tax shortfall must be absorbed by the Scottish budget. Furthermore, Scottish Ministers are required to repay their loans within a maximum of four years.
184. Finally, in December 2014, the previous UK Government announced that it was taking the next step in the formal process to give the Scottish Government the power to issue bonds from 1 April 2015.<sup>90</sup>

## Comparative information

185. In Scotland, local authorities have the power to borrow for capital purposes. There are no formal limits on the level of borrowing, although the Scottish Government and HM Treasury monitor borrowing levels to ensure they remain within acceptable limits.
186. The Northern Ireland Executive has certain borrowing powers proscribed in statute, with the existing general borrowing limit set at £3 billion through the Northern Ireland (Miscellaneous Provisions) Act 2006.<sup>91</sup> Under the Northern Ireland Act 1998, the Executive may also borrow up to £250 million from the National Loans Fund to manage temporary shortfalls in budgets. The Reinvestment and Reform Initiative (RRI) was introduced in 2002 to fund capital investment (although the Executive has also borrowed under the RRI for resource costs with HM Treasury permission). It addresses the fact that the Northern Ireland Executive retains control over a range of functions which are normally the responsibility of local government in Scotland and Wales. RRI borrowing is formally limited by HM Treasury, with the limit currently set at £200 million per

year. However, HM Treasury has frequently allowed additional borrowing, for example to bail out the Presbyterian Mutual Society, and for shared educational facilities under the 'Together Building United Communities' strategy.

187. The Welsh Assembly Government is able to borrow up to £500 million in total from the National Loans Fund to cover temporary shortfalls under the Government of Wales Act 2006<sup>92</sup>. The Wales Bill does not change the revenue borrowing limit but provides Welsh Ministers with the power to borrow for current spending (with a maximum of £200 million in a single year). The UK Government intends this power to come into force alongside the implementation of devolved taxes in 2018/19. The UK Government may increase or decrease the overall limit by secondary legislation but not below the initial £500 million. The Bill also provides for increased capital borrowing powers with an overall cap of £500 million on capital borrowing and an annual limit of £125 million from 2018/19.<sup>93</sup>
188. There are a number of international examples of successful sub-national devolution of borrowing powers, including in the US, Canada, Australia and Switzerland.

## **The recommendations of the Smith Commission and the previous UK Government's proposals**

189. Paragraph 95 (5) of the Smith Commission's Report made the following recommendations in relation to borrowing:<sup>94</sup>
- There should be sufficient additional revenue borrowing powers to ensure budget stability and provide sufficient safeguards to smooth public spending in the event of economic shocks.
  - There should also be sufficient capital borrowing powers to support capital investment, consistent with a sustainable overall UK fiscal framework and that the merits of a prudential borrowing regime should be considered.
190. It is proposed that borrowing powers should be agreed by the Scottish and UK Governments and their operation kept under review.
191. There are no published draft legislative clauses relating to borrowing within the previous UK Government's Command Paper. However, the previous UK Government does provide some commentary on how it envisages new borrowing powers will be provided to the Scottish Government and how these need to function within the proposed fiscal framework.

## Evidence received

### Critique of the current borrowing powers within the Scotland Act 1998 and Scotland Act 2012

192. In his Foreword to the report of the Smith Commission, Chairman, Lord Smith of Kelvin expressed his own personal view that increasing borrowing powers for the Scottish Government was an integral element of the new powers set out in the Commission's report. He said—

” Significantly more devolved spending in Scotland will now come from tax raised in Scotland with the remainder coming from the block grant provided by the UK Government. To balance this increased financial responsibility, the Parliament will be given increased borrowing powers, to be agreed with the UK Government, to support capital investment and ensure budgetary stability.<sup>95</sup>

193. His view was echoed in the evidence we received from other experts in this field. For example, Professor David Bell of the University of Stirling highlighted the current borrowing provisions as set out in the Scotland Act 2012, and posed the question of whether these would be sufficient. In his view, they would not be.<sup>96</sup>

194. In his written evidence, Professor Bell commented that, in particular, the current borrowing provisions designed to cover short-term revenue requirements had been designed for a different devolved tax structure than will be in place if further powers are devolved. He said—

” Once the Scotland Act 2012 comes into force, there will be an additional source of volatility, namely unexpected variation in tax revenues. This volatility will grow as Scotland becomes more dependent on its own revenues. So the implementation of the Smith proposals would increase substantially the potential volatility in Scotland's revenues. Hence the provisions to deal with that volatility will also have to increase. This might suggest that the £200 million limit is relatively modest, since it was designed for a different revenue structure.<sup>97</sup>

195. Don Peebles of CIPFA Scotland (The Chartered Institute of Public Finance and Accountancy) highlighted the comparison between the proposed capital borrowing limit for the Scottish Government (£2.2 billion) and the position of local authorities. He stated that the level of outstanding debt for local government is £15 billion. His conclusion was that, “even now, local authorities have considerably greater powers than the national [Scottish] Government”.<sup>98</sup>

196. CIPFA were supportive, however, of borrowing as a legitimate activity of governments, stating—

” It is also important to remember that, although risk is associated with debt and borrowing, borrowing is not a bad thing. It can be quite important for

Government to implement borrowing policies on a short to medium-term basis, although there is a long-term consequence associated with that.<sup>99</sup>

197. The Institute of Directors in Scotland in their evidence to the Committee were supportive of the principle of the Scottish Government being able to borrow, provided it was for a purpose, namely capital borrowing to finance infrastructure projects. Its Director in Scotland, David Watt, told the Committee that—

” We do not want borrowing for the sake of borrowing. As with all other powers, we want it for a purpose, such as infrastructure development.<sup>100</sup>

198. The Scottish Federation of Housing Associations (SFHA) in its written evidence was critical of the recently extended borrowing powers under the 2012 Act. It said—

” SFHA believes that the Fiscal Framework should give maximum powers in this area [borrowing], to provide further levers with which to balance priorities with resources. The Scotland Act has recently increased the cap on borrowing by the Scottish Government to £500 million. For purposes of comparison this is only slightly more than the current annual value of public investment in housing in Scotland and significantly less than the combined borrowing capacity of the SFHA's members of approx. £4 billion. This is insufficient for the country to be able to effectively manage new powers. The ability for the Scottish Parliament to make genuine long-term strategic decisions in line with current devolved powers is compromised by the lack of flexibility with respect to borrowing for capital investment.<sup>101</sup>

199. The Deputy First Minister set out his views to the Committee on the need to reform the current borrowing powers. He said—

” What was set out in the Smith report and what we will have to put into practice must acknowledge the importance of the revenue borrowing issue that I was discussing a moment ago to deal with volatility in revenues. We need greater flexibility and a greater facility to undertake borrowing for capital investment purposes, and the fiscal framework will have to determine how those things should be put in place and deployed.<sup>102</sup>

### **Principles of any new borrowing regime**

200. In his evidence to the Committee, Philip Milburn of The Investment Association, set out his overarching thoughts on what the markets and fund/asset managers would be looking for in any new borrowing regime established by further devolution. He said—

” The markets will always want as much certainty as possible. The stronger the framework and the stronger the legislation, the more the markets will understand and the less they will charge as a risk premium. Basically,

strong legislation is what the markets generically—not me specifically—would look for.<sup>103</sup>

201. His views on the perceptions that the markets and fund/asset managers might take of the new borrowing powers were supported by Professor Bell who warned that it was important that there was a clear institutional framework in place for any new regime. He said, “it is reasonable to ask whether there should be an external body that looks at borrowing and which has the confidence of the markets and can give some of the certainty that Philip Milburn was talking about”.<sup>104</sup> Professor Bell’s view was without such clarity being in place, the markets would penalise a Scottish Government through the levels of interest they would charge to lend money under this new regime.
202. For Don Peebles of CIPFA, three elements needed to be put in place within the context of any new regime for enhanced borrowing, namely a combination of primary legislation, regulation and professional practice.<sup>105</sup>
203. Some of those who gave evidence to the Committee were particularly supportive of the move towards what the Smith Commission and the previous UK Government describe as a ‘prudential borrowing regime’. Currently, the Scottish Government is held to limits in terms of the amount of short-term revenue or long-term capital borrowing it can undertake (see above).
204. Specifically, the Smith Commission agreed that consideration should be given to the introduction of a prudential regime for Scottish Government capital borrowing, similar to that which has regulated local authority borrowing in England, Scotland and Wales since 2004.
205. Questioned on whether the previous UK Government’s Command Paper and draft clauses had delivered on this particular recommendation, Don Peebles said—

” ... the discussion and the recommendation from the Smith commission was for the introduction of a prudential borrowing framework. The expectation was that that would translate through to the clauses, but it is not there. The command paper discusses the issue as though there will be a prudential framework, but the trigger point, which would be a proposal for primary legislation, is not there. Therefore, we can talk about a framework, but we do not have one and we do not have the basis to enable one to be introduced.<sup>106</sup>

206. In his view, a prudential borrowing regime, which had regard to affordability, sustainability and prudence rather than being restricted by limits, has not been bought forward by the previous UK Government. In his comments to the Committee, he drew the distinction between comments that had been made about a prudential framework in the Command Paper with the absence of any detailed information in the draft clause that would deliver this type of regime.<sup>107</sup>



207. CIFPA's preference was to adopt a borrowing regime that did not set a fixed, numerical limit on borrowing, but which was governed by issues of affordability and sustainability. The Investment Association made similar comments, with Mr Milburn telling the Committee that—

” I would try to avoid a hard limit, be it £2.2 billion or £5 billion. I would veer towards a form of percentage of Scottish GDP—obviously, it would need to be negotiated—so that a countercyclical measure can be put in place. If you assume there is a downturn in recession and GDP shrinks by 2 to 3 per cent, that starts to be a sensible area.<sup>108</sup>

208. Professor Bell also agreed with this type of approaching, stating that in his view—

” People might want the limit to be a share not of current GDP but of cyclically adjusted GDP. In that way, the cyclical effects are taken out.<sup>109</sup>

209. In addition to his views on the merits or otherwise of a specific index-linked limit in any new borrowing regime, Professor Bell stressed the fundamental importance of establishing a regime for accurately forecasting tax revenues and tracking spending in the context of borrowing powers. In his view, this was an important principle to get right in any new borrowing framework. A failure to correctly forecast tax receipts or spend what a government had predicted it would when it entered into borrowing ran the risk of building up uncertainties which would, in his view, only emphasise the need for the correct institutional and intergovernmental framework to be put in place in the UK.<sup>110</sup>

210. In written evidence to the Committee, Professor Hughes Hallett suggested that borrowing powers that adhered to 'the golden rule' were preferable and that the currently suggested borrowing regime was inadequate. He said—

” Since we are moving to a world with more uncertain and potentially volatile revenues, but fixed contractual costs, adequate borrowing measures need to be included in the devolution package. What adequate means in this context needs to be determined as part of the detailed negotiations, but it should certainly be sufficient for the “golden rule of public finance” (that borrowing be allowed to cover spending on public capital, but not for current spending) to operate freely and to cover normal expected fluctuations in public revenues. The golden rule is important here because it ensures adequate spending on public investment, especially on research and development, infrastructure investment, and training which are now considered by many to be the critical components for stimulating growth in a slow-growth environment. The current limits on borrowing (½% of GDP across the cycle to offset normal revenue fluctuations; and a running total of 2% of GDP for capital projects) fall well short of adequate for any measure of further devolution.<sup>111</sup>



## Bailouts

211. In his written evidence to the Committee, Professor David Bell highlighted that it is relatively common for sub-nation state governments across the world to experience fiscal distress. He stated that even though fiscal frameworks are intended to minimise this risk and to ensure that nation state governments macroeconomic policies are not affected by fiscal difficulties at the sub-nation state level, such problems do occur.<sup>112</sup>
212. Although there were no guarantees, Professor Bell informed the Committee that academic research into precedents in Austria, Germany, Italy and Sweden pointed towards bailouts being the norm especially where the political risk of failing to provide a bailout was deemed too high or where the nation state government and sub-nation state governed shared the same political persuasion.<sup>113</sup>
213. Philip Milburn's view was that—

” ...in the context of the international market, £2.2 billion is such a small amount of money that it would be implicitly assumed that, if the Scottish Government got into borrowing difficulties, there would be some form of bailout from the UK Government. That would be implicitly but not explicitly assumed by the markets.<sup>114</sup>

214. Professor Bell suggested to the Committee that it was not likely that the Scottish Government would need any bailout as a result of an inability to service the costs of capital borrowing even if up to the limit of £2.2 billion. He said if the Scottish Rate of Income Tax generated about £11 billion a year and half of VAT receipts added another £5 billion or so, then the servicing costs on borrowing of £2.2 billion “would go nowhere near the revenue that would be raised from income tax and VAT together, so I do not think that, in the first instance, would be much of an issue”.<sup>115</sup>
215. One potential criticism of a move towards a prudential borrowing regime (as opposed to one governed by set borrowing limits) is the suggestion that a sub-nation state government will be able to borrow regardless of ability to pay and irrespective of the views of the nation state or central government. In his evidence to the Committee, Don Peebles stressed that this was not currently the case in relation to the prudential regime in place for Scottish local authorities. He told the Committee, “on the point about local authorities and the possibilities that could transpire, under the 2003 act there is a reserved power for the Scottish Government that means that it can revert to central control, in effect”. He thought that any future ‘Scotland Bill’ introduced by a new UK Government after the UK General Election in May 2015 could have similar provisions.<sup>116</sup>

## Commentary on the current proposals of the previous UK Government

216. The main criticism of those who gave evidence on borrowing to the Committee was the current absence of any detail, particularly in terms of legislative clauses,

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of what the proposed new prudential regime cited in the Smith Commission and in the Command Paper itself would look like and how it would function. CIPFA told the Committee that the lack of substance in the clauses was perhaps an “omission” at this stage.<sup>117</sup>

217. Don Peebles elaborated on this point—

” A useful comparator is the introduction of the prudential code for local authorities by the Local Government in Scotland Act 2003. Primary legislation was required to enable the significant change—which it was at the time—that introduced a more flexible framework. Our expectation was that there would almost certainly be some indication or some forward notification of change, but you are right to observe that the clauses are silent on borrowing powers—a point that we made in our written submission.<sup>118</sup>

218. Both Professor David Bell and Philip Milburn of The Investment Association made calls for further clarity on certain aspects, such as where interest rate payments on borrowing would rank in terms of seniority of debt. Mr Milburn said—

” All that the markets want is to have interest paid on money that is loaned and to get that money back. There are almost institutional questions around that.<sup>119</sup>

219. He also wanted greater clarity on what revenues will service the debt, whether it would be the Scottish tax revenue or the Scottish tax revenue plus the remaining transfers from Westminster, or a mixture of both.<sup>120</sup>

220. Professor Bell also called for further information on what the current proposals and draft legislative clauses imply for the interplay between the new borrowing powers and the capital grant element of DEL (CDEL).<sup>121</sup>

221. This was also an issue for the Deputy First Minister who told the Committee that—

” I sense that borrowing for capital purposes might lead to a removal of the Scottish Government’s CDEL provisions, and I want to make it absolutely crystal clear to the committee that that is not my interpretation of Smith. I think that Smith envisages that we will have on-going CDEL capability and the ability to use capital borrowing to enhance our CDEL provision. Revenue borrowing is quite a different proposition altogether.<sup>122</sup>

222. For Philip Milburn, one important change in any future regime compared to the current proposals would be for the Scottish Government to be able to retain any underspends on a year-by-year basis. He said “In any future regime, it would be prudent not to have that clawback as such, because you will want to be able to hang on to that money for future years.”<sup>123</sup> His view on reserves was supported by CIPFA who stressed that the ability to hold reserves would mean that a future Scottish Government could more easily manage volatility.

223. Finally, both CIFPA and Professor Bell called for a revision to the nation's accounting standards, with the former telling the Committee—

” ...we heavily favour having a balance sheet for Scotland that would form part of whole-of-Scotland accounts that would allow us to assess the overall performance of the country and its public services. At the moment, we cannot do that without aggregating the audited financial statements of the nearly 200 public bodies that exist. We therefore favour whole-of-Scotland accounts.<sup>124</sup>

224. Finally, in a letter to the Committee, the former Secretary of State for Scotland provided some additional comments relating to borrowing. He said—

” Additional borrowing power will need to be agreed between the UK and Scottish Governments and will depend on the funding and fiscal framework which will be agreed between the UK Government and the Scottish Government. We will review further what primary and secondary legislative changes may be needed in light of an agreement on the overall Scottish fiscal framework, including additional independent scrutiny of the Scottish Government's public finances.<sup>125</sup>

## Conclusions and recommendation on borrowing

225. **The Committee is content with the agreement entered into by all parties to the Smith Commission that the current borrowing powers of the Scottish Parliament are too restrictive and too limited. Furthermore, we are supportive of a move towards a prudential regime which gives the Scottish Government more flexibility, within an overall framework that is governed by sound principles of affordability and sustainability, to borrow both for short-term revenue requirements as well as longer-term capital investment purposes.**

226. **We note the comments made to us that setting cash limits on the amount of borrowing that can be undertaken, especially for capital investment, is not necessarily consistent with the prudential regime specified by the Smith Commission or the most sensible way to proceed. One of the measures for assessing affordability, under a prudential regime, the Committee suggests would be the performance of the economy based on indicators such as cyclically-adjusted GDP.**

227. **We recommend that a future Scottish Government should be able to retain underspends so as to better manage volatility.**

228. **The current draft legislative clauses are silent on how a new borrowing regime will operate. This means that, at this stage, we are not able to conclude either way as to whether the agreements entered into as part of the Smith Commission have been delivered or could be improved.**

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229. We recommend that this area in particular is a high priority for both governments to develop and for both to report to the Scottish Parliament and its committees in the coming months so that we can adequately scrutinise plans for more borrowing powers before any future bill is passed.

# Welfare and benefits

## Background

230. Alongside the provisions on taxation, the proposals in relation to the devolution of some aspects of welfare and benefits are one of the most significant components of the Smith Commission's proposals.

231. Table 6 below shows the value of the benefits that are proposed, by the previous UK Government in its draft clauses, for devolution, based on the DWP spend on these benefits. The value is just over £2.5bn, or around 14% of current total welfare spend in Scotland.

**Table 6: Value of Benefits Proposed for Devolution 2013-14**

	£m
Disability Living Allowance	1,473
Attendance Allowance	481
Winter Fuel Payments	186
Carer's Allowance	182
Industrial Injuries Disablement Benefit	91
Severe Disablement Allowance	91
Discretionary Housing Payments *	18
Personal Independence Payments	17
Funeral Payments	4
Sure Start Maternity Grants	3.9
Cold Weather Payments **	0.0275
<b>Total</b>	<b>£2,547</b>

Sources: DWP *Benefit Expenditure by Region 1996/97 to 2013/2014*:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/361362/Expenditure\\_by\\_region\\_201314.xlsx](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/361362/Expenditure_by_region_201314.xlsx)

Department for Work and Pensions. *Outturn and Forecast: Budget 2014*. Available at:

<https://www.gov.uk/government/statistics/benefit-expenditure-and-caseload-tables-2014>. Funeral payments based on 10% of estimated GB spend in 2013-14 Sure Start based on 10% of GB spend in 2013-14. PIP spend: Scottish Government estimate in *Social Security for Scotland: Benefits being Devolved to the Scottish Parliament*: <http://www.gov.scot/Publications/2015/03/1692>

\*this is the DWP spend, the Scottish Government has also provided DHP funding. In 2013-14 the Scottish Government made £20m available for DHPs and in 2014-15 it made £35m available.

\*\* There were only 1,100 payments for 2013/14 due to a mild winter

## The recommendations of the Smith Commission and the previous UK Government's proposals

232. Table 7 below produced by SPICe sets out a comparison of the Smith Commission proposals and the previous UK Government's Command Paper in the area of **welfare and benefits**.

**Table 7**

Smith Commission Report	Para	Draft Clauses
<ul style="list-style-type: none"> <li><b>Universal Credit</b></li> </ul> <p>The Scottish Government to have the administrative power to change the frequency of UC payments, vary the existing plans for single household payments, and pay landlords direct for housing costs in Scotland.</p> <p>The Scottish Parliament to have the power to vary the housing cost elements of UC, including varying the under-occupancy charge and local housing allowance rates, eligible rent, and deductions for non-dependants.</p>	<p>44</p> <p>45</p>	<p>Clauses 20 and 21 seek to give effect to paragraph 44. The clauses would give Scottish Ministers concurrent regulation making powers under the Social Security Administration Act 1992. Clause 20(4) and Clause 21(2) seeks to give Scottish Ministers powers to make regulations under certain sections of the Social Security Administration Act 1992. These powers would allow Scottish Ministers to vary plans for single household payments change the frequency of universal credit payments and make direct payments of UC.</p> <p>Clause 20 seeks to give effect to this recommendation. The clause aims to give Scottish Ministers regulation making powers under section 11(4) of the Welfare Reform Act 2012 (determination and calculation of housing costs element) where the claimant rents accommodation. The Command Paper at point 4.2.4 states that this power will include the power to vary or remove the under-occupancy charge.</p> <p>Both Clauses (at 20(4) and 21(3)) require that Scottish Ministers cannot make regulations unless they have consulted with the Secretary of State about the practicability of implementing regulations and the Secretary of State has given agreement as to when any such change made by the regulations is to have effect, such agreement not to be unreasonably withheld.</p>
<ul style="list-style-type: none"> <li><b>Benefits devolved outside Universal Credit</b></li> </ul> <p>The following benefits to be devolved to the Scottish Parliament: (1) Benefits for carers, disabled people and those who are ill: Attendance Allowance, Carer's Allowance, Disability Living Allowance (DLA), Personal Independence Payment (PIP), Industrial Injuries Disablement Allowance and Severe Disablement Allowance.</p>	<p>49</p>	<p>Clause 16 seeks to give effect to the devolution of benefits for carers and disabled people, as listed in paragraph 49(1) of the Smith Commission report. It seeks to do this by amending the current exception to the reservation on social security.</p> <p>Clause 16 defines 'disability benefit' for people who:</p> <ul style="list-style-type: none"> <li>have a physical or mental condition that has a significant, long term, adverse effect on their ability to carry out day-to-day activities;</li> <li>or a significant need arising from impairment to a person's physical or</li> </ul>

<p>(2) Benefits which currently comprise the Regulated Social Fund: Cold Weather Payment, Funeral Payment, Sure Start Maternity Grant and Winter Fuel Payment.</p> <p>(3) Discretionary Housing Payments.</p>		<p>mental condition (e.g. for attention or for supervision to avoid substantial danger to anyone).</p> <p>Clause 16 appears to encompass the legislative definitions for DLA/PIP/AA.</p> <p>The definition for carer's benefit includes being aged 16 or over, not in full-time education, not gainfully employed, and looking after a disabled person in receipt of a disability benefit. This appears to be similar to the existing criteria for Carer's Allowance.</p> <p>Severe Disablement Allowance (SDA) is payable to those incapable of work. The Scottish Parliament will have legislative competence over the provision of SDA, or a like benefit, for those claimants who remain eligible for the benefit at the point of devolution. This is because SDA was closed to new claimants in 2001, and existing claimants below state pension age have been, or are in the process of being, reassessed for eligibility to Employment and Support Allowance, which remains reserved.</p> <p>Industrial Injuries Benefit – for those who have suffered an injury or developed a disease at work. The Command Paper (para 4.3.1) clarifies that the correct term for Industrial Injuries Disablement Allowance is Industrial Injuries Benefit (IIB), which is the term used to describe benefits “paid as a consequence of workplace prescribed disease or injury”.</p> <p>Clause 17 seeks to give effect to the devolution of the Regulated Social Fund to the Scottish Parliament. It aims to do this by amending the current exception to the reservation on social security.</p> <p>Clause 19 seeks to give effect to the recommendation to devolve responsibility for discretionary housing payments (Smith paragraph 49(3)). The clause roughly follows the framework of regs 2, 3 and 4 of the Discretionary Financial Assistance Regulations 2001 which provide the current framework for discretionary housing payments. The Command Paper says, “The clause will devolve legislative competence in relation to Discretionary Housing Payments (DHP), subject to certain restrictions similar to those that already exist in respect of DHPs”.</p>
<ul style="list-style-type: none"> <li><b>Powers to create new benefits and top-up reserved benefits</b></li> </ul> <p>The Scottish Parliament to have powers to create new benefits in areas of devolved responsibility, in line with the funding principles set out in paragraph 95.</p>	<p>54</p>	<p>Paragraph 4.3.10 of the Command Paper says that the powers to create new benefits in areas of devolved responsibility are conferred by draft clauses 16, 17 and 19. These clauses relate to benefits for carers and disabled people, the</p>

## Devolution (Further Powers) Committee

New Powers for Scotland: An Interim Report on the Smith Commission and the UK Government's Proposals, 3rd Report, Session 4 (2015)

<p>The Scottish Parliament to have powers to make discretionary payments in any area of welfare without the need to obtain prior permission from DWP.</p> <p>The UK Government's Benefit Cap to also be adjusted to accommodate any additional benefit payments that the Scottish Parliament provides.</p>	<p>54</p> <p>56</p>	<p>Regulated Social Fund and DHPs. The draft clauses define the power to create new benefits to apply to areas of welfare responsibility that are devolved.</p> <p>Clause 18 seeks to give effect to paragraph 54 of the Smith Commission Agreement regarding discretionary payments. The Command Paper says (at 4.3.11) that the clause "broadens the provisions in the Scotland Act that allow for the Scottish Welfare Fund". The clause substitutes text in section F1 of Part 2 of Schedule 5 of the 1998 Act. The existing section F1 gives Scottish Ministers powers over:</p> <p>"providing occasional financial or other assistance to or in respect of individuals for the purposes of</p> <p>a) meeting, or helping to meet, an immediate short term need</p> <p>i) arising out of an exceptional event or circumstances, and;</p> <p>ii) that requires to be met to avoid a risk to the well-being of an individual".</p> <p>The Command Paper (paragraph 4.3.12) says that the "UK Government will ensure that if Scottish Ministers were to increase the amount of a payment in relation to any benefit included within the cap, then the additional amount provided by the Scottish Government would be disregarded for the purposes of the cap, and only the amount of the payment equivalent to that provided by the UK Government would be subject to the cap."</p> <p>There is a cap on total household benefits at £500 per week for a family and £350 per week for a single person.</p>
<p>• <b>Employment provision</b></p> <p>The Scottish Parliament to have all powers over support for unemployed people through the employment programmes currently contracted by DWP on expiry of the current commercial arrangements. The Scottish Parliament to have the power to decide how it operates these core employment support services. Funding for these services to be transferred from the UK Parliament in line with the principles set out in paragraph 95.</p>	<p>57</p>	<p>Clause 22 would insert an exception to paragraph H3 of Schedule 5 to the Scotland Act which seeks to give the Scottish Parliament legislative competence for employment schemes in relation to disabled people and those at risk of long-term unemployment who are claiming reserved benefits. The main scheme is the Work Programme. The conditionality and sanctions regime which governs referrals to the Work Programme will remain reserved.</p> <p>Schemes in relation to unemployment must last at least a year.</p> <p>Clause 22 also seeks to extend the existing shared ministerial competence for employment and training under the Employment and Training</p>



		Act 1973 to include provision made under s.17B of the Jobseekers Act 1995. This means that power would be shared between Ministers of the Crown and Scottish Ministers.
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## Evidence received

### Commentary in general on the welfare provisions in the Smith Commission Report and the previous UK Government's draft legislative clauses

233. The report of the Smith Commission made a range of recommendations in relation to welfare policy as the table above indicates. The Committee has received a range of evidence which, by way of general commentary, welcomed the opportunities that will be available to the Scottish Government should these powers be devolved. For example, John Dickie of the Child Poverty Action Group commented—

” ...there are real opportunities in the powers that are proposed for devolution and in the draft clauses, even as they stand. For example, there are opportunities to improve the delivery of universal credit and, potentially, levels of housing support, given the devolution of the housing element of universal credit. There is the potential to provide support with maternity costs and to improve the adequacy of and access to disability and carers benefits.<sup>126</sup>

234. Similarly, the ‘*Statement to the Joint Ministerial Working Group on Welfare*’ by organisations representing women, which was sent to the Committee by way of written evidence, also welcomed the opportunities that were being devolved. The statement noted that—

” ...there are real opportunities for the Scottish Government to improve the welfare system for women, to involve those directly affected in shaping how new powers are used, and to ensure that the gender discrimination at the heart of the UK system is not replicated in Scotland<sup>127</sup>

235. Nevertheless, despite a recognition that there are opportunities arising from the proposals contained in the draft clauses, some of the evidence we received set out significant concerns that the draft clauses do not implement the recommendations of the Smith Commission in terms of welfare. For example, Inclusion Scotland concluded, in written evidence, that—

” ...the clauses as currently drafted seem unlikely to deliver in full what the Smith Commission proposed, and the way they have been drafted may restrict the ability of the Scottish Parliament to use the new powers to their best potential. Inclusion Scotland believes that many of these concerns can be addressed if the draft clauses are redrafted in line with the original

intention of the Scotland Act, that is defining the matters that are reserved to Westminster rather than the powers devolved to Scotland.<sup>128</sup>

236. Similarly, Professor Paul Spicker of Robert Gordon University stated—

” There is a shortfall in the powers that have been suggested in the draft clauses relative to what was in the Smith agreement. There is a great deal of complexity. We begin from a position in which all social security powers remain reserved, unless there are specific exceptions. The way in which Smith has been translated into the clauses has seen, in general terms, erosion at most points of the conditions under which transfers are possible and a limitation on certain powers, including some powers that the Scottish Parliament already has.<sup>129</sup>

237. The Committee has received a considerable range of evidence expressing disappointment at: the scope of the Smith Commission recommendations; that the previous UK Government will continue to make policy and financial changes to the welfare system, such as the roll-out of Universal Credit, and; at the level of engagement which has taken place to date with stakeholders in this area.

238. The Poverty Alliance’s written evidence is an example of the type of evidence we received. It states—

” Unfortunately, when the draft clauses were published it became apparent that the powers promised in the Smith report were to be much more restricted than we could have ever imagined. We believe the speed of these negotiations has been too fast and not allowed for the much needed conversation and civil participation to enable the building of a system which works for those in poverty.<sup>130</sup>

239. The views of the former Secretary of State for Scotland on the issue of the draft clauses and whether they delivered on the recommendations of the Smith Commission were set out in a letter to the Committee—

” ...it is this Government’s view that the draft clauses do meet both the substance and the spirit of the Smith Commission, however we recognise there are some areas where the Scottish Government have a different interpretation of the Smith Commission recommendations and we encouraged the Scottish Government to provide comments at official level on both technical and policy views on the draft clauses. In addition we initiated the establishment of a Joint Ministerial Working Group on Welfare to allow the detail of these issues to be discussed.<sup>131</sup>

### **Power to create new benefits and top-up reserved benefits**

240. The Smith Commission recommended that the Scottish Parliament “have new powers to create new benefits in areas of devolved responsibility” and “also have

new powers to make discretionary payments in any area of welfare without the need to obtain prior permission from DWP”.<sup>132</sup>

241. The Committee has received a range of evidence from stakeholder groups that consider that the draft clauses, which have the effect of restricting the creation of new benefits to areas of welfare to be devolved under the proposed Bill, do not yet fulfil the agreement reached by the Smith Commission. The power envisaged in the Smith Commission’s report to top up benefit payments in any area of welfare seems to have been defined within the draft clauses as the power to introduce short-term discretionary payments under certain conditions to meet immediate or exceptional need.

242. For example, in his evidence to the Committee, Professor Paul Spicker commented—

” There is no power to create new benefits in these areas, because the criteria on which the benefits can be distributed are being specified in the legislation. There is no power to top up reserved benefits, which, again, was in the proposals. All that there is—it is being passed off as if it were that—is a discretionary power to deliver short-term benefits in cases of immediate need, which is a power that the Scottish Parliament already has as a result of an order relating to the discretionary social fund.<sup>133</sup>

243. Evidence received from a number of charities and voluntary organisations set out similar views. Citizens Advice Scotland summed up the views of a number of these types of organisations when stating—

” The interpretation of the Smith Commission report was that the Scottish Government could craft its own welfare system, outside of Universal Credit, taking into account the needs of Scotland. Whether this is indeed the case needs to be clarified and made clear in legislation. Equally the draft legislation does not make clear how powers to top-up benefits would be created, and this provision needs to be enshrined in legislation.

” In addition, as currently drafted, the definition of discretionary payments within clause 18 is too restrictive. It refers to discretionary payments as being made to individuals to meet a short-term need to avoid a risk to their well-being. Our understanding of the Smith Commission agreement is that the Scottish Parliament would have a much broader power to make discretionary payments, where such payments would be ‘discretionary’ because there is an administrative or governmental decision to make a payment outwith existing entitlements.<sup>134</sup>

244. The Scottish Government also regards clause 18 as more restrictive than was intended by the Smith Commission. In its view, the Smith Commission agreement to create ‘new powers to create new benefits in areas of devolved responsibility’ covered all areas of devolved responsibility and was not limited to replacing the

benefits to be devolved under the draft clauses. The Scottish Government has also expressed concerns at the restrictions imposed by draft clause 18 on its ability to top up reserved benefits.

245. In his evidence to the Committee, the Deputy First Minister elaborated—

” I do not think that draft clause 18 meets what was set out by the Smith commission. Within the commission, there was quite an explicit discussion on this point of distinction: whether the issue was the creation of the ability to establish new benefits in the areas that were being devolved, or “in areas of devolved responsibility”.

” My clear recollection is that there was agreement around the creation of new benefits in areas of devolved responsibility. To me, that should shape the clause, but that is not what happened.<sup>135</sup>

246. He further elaborated—

” Members should be fully aware of the difficulties and the limitations that are associated with the reservation on social security provisions. I can think of one particular issue that has stretched us significantly in trying to resolve policy questions. With regard to the council tax reduction scheme, the social security reservation was a significant impediment to the Scottish Government’s being able to work with our local authority partners in ameliorating the reduction that was applied in council tax benefit by the UK Government. We were able to do so, but it was a major impediment, and we should not underestimate the significance of that reservation in relation to handling legitimate aspirations of the Scottish Government and the Scottish Parliament. That is why, in my previous answer to Mr Maxwell, I made the point that it is vital that sufficient scope is carved out of that reservation to enable us to create “new benefits in areas of devolved responsibility”, as the Smith commission envisaged.<sup>136</sup>

247. In a letter the Rt. Hon Iain Duncan Smith MP, Secretary of State for Work and Pensions, told the Committee that discretionary payments were not the same as benefits and that because social security remained reserved, it was important to ensure that any power for discretionary payments didn’t inadvertently allow for new benefits to be created in areas that were not to be devolved. The clause had therefore been drafted to give the ability to make payments in the area of welfare but not the ability to create benefits, hence the reference to short-term need.<sup>137</sup>

248. The UK Secretary of State for Work and Pensions further explained in his letter that draft clause 18 does broaden the current exception in that there will no longer be a requirement for a person’s need to have arisen out of an exceptional event or circumstances. As such, a payment can be made to meet any need related to an individual’s well-being as long as it does not create an on-going entitlement. The only exception is if the need has arisen as the result of a sanction to a reserved

benefit. The clause does provide for a payment to be made in these circumstances if it is to cover an immediate short-term need that arises from an exceptional event or circumstance. This replicates the power in the Scottish Welfare Fund. The DWP therefore “does not consider that the draft clause restricts the existing powers.”<sup>138</sup>

### Definition of a carer

249. The Smith Commission recommended the devolution of benefits for carers. Clause 16 of the previous UK Government's draft legislative clauses seeks to implement this recommendation and in doing so defines ‘carers benefit’ as being ‘a benefit which is normally payable in respect of the regular and substantial provision of care by a relevant carer to a disabled person’. The clause also defines a carer as being ‘a person who is 16 or over, is not in full time education, and is not gainfully employed’.

250. The Committee has received a number of submissions during our work that expressed concern at the definition of ‘carer’ being proposed in the draft clauses. For example, Carers Scotland commented—

” The power to create a new benefit to replace Carers Allowance or make changes to Carers Allowance for carers in Scotland appears to be more restrictive than what we believe the Smith Commission outlined. Clause 16 appears to suggest that the power extends only to benefit to carers who are aged 16 or over, not in full time education, and not gainfully employed. We believed that this is unnecessarily restrictive and limits any future developments to, for example, support carers who wish to study whilst managing a caring role.<sup>139</sup>

251. NUS Scotland made a similar point in its written evidence to the Committee stating—

” ...benefits which are proposed for devolution, and could benefit students, such as carer's allowance still retain a number of restrictive UK regulations, including the fact that you may not be in full-time education, therefore ruling out any opportunity for the Scottish Parliament to redesign a more beneficial payment.<sup>140</sup>

252. Carer's allowance is a benefit which interacts with other benefits which will remain reserved. The Committee has received a range of evidence questioning how the ‘no detriment’ provision in the Smith Commission's report will operate in relation to the interaction of devolved and reserved benefits. In relation to Carers Benefit, Richard Gass of Rights Advice Scotland commented in evidence to the Committee that—

” The definition of a carer is such that they must provide regular and substantial care but not be in full-time employment or in education. At present, the Government says that at least 35 hours of care a week must

be provided. There would be nothing to prevent Scotland from setting the level at 17 hours a week or from allowing carers allowance to be paid to more than one person. However, the consequence is that entitlement to carers allowance is a passport to an increased element of a reserved benefit, and that brings us back to the issue of no detriment.<sup>141</sup>

253. Carers Scotland also raised concerns with regard to the drafting of the clauses on Carers Benefit in relation to no detriment. It said

” Equally these clauses appear to apply to any changes the Scottish Government may wish to make to Carers Allowance in line with its own policy direction. For example, we have been given to understand that the description “not gainfully employed” refers to the earnings limits currently in place for Carers Allowance – where a carer cannot earn more than a prescribed amount (after certain deductions) before all Carers Allowance is lost. This earnings limit will be £110 per week in April 2015.

” This limit is very low and every year many carers lose complete entitlement to Carers Allowance when the minimum wage rises, even when their earnings are merely a few pence above the earnings limit.<sup>142</sup>

254. Carers Scotland questioned whether the restrictive nature of the clauses will prevent the Scottish Government from removing this “cliff edge” or increasing the earnings limit in line with, for example, the Living Wage rather than the minimum wage and was seeking clarification on these matters.

255. The Scottish Government takes the view that this particular clause is broadly acceptable but does not allow it to take a wider view of certain aspects, for example, definitions of who might be eligible. In his evidence, the Deputy First Minister said—

” Some clauses either come very close to fulfilling, or do fulfil, what was expected by the Smith commission, but there are a number of instances where we do not believe that to be the case, and we have made representations to the UK Government. I will highlight the cases where we think the commitments have been fulfilled. We think that that is the case in relation to elements of paragraph 49 of the Smith commission report, on “Benefits for carers, disabled people and those who are ill”.<sup>143</sup>

256. In a follow-up letter, the Deputy First Minister elaborated—

” ...aspects of Clause 16 as currently drafted will significantly restrict the ability of the Scottish Parliament to exercise complete autonomy over the benefits it inherits, as paragraph 51 of the Smith Commission report called for.

” [...] Additionally, and equally restrictive, the Clause defines a 'relevant carer' as someone who is over 16, is not in full-time education, and is not



gainfully employed. The result is that the Scottish Parliament will not have the power to determine the structure and value of these benefits as envisaged by the paragraph 51 of the Smith Commission report.<sup>144</sup>

257. In a letter from the Rt. Hon Iain Duncan Smith MP, Secretary of State for Work and Pensions, disagreed with the Scottish Government on the issue of the definition of carer. He wrote—

“...taken together with existing devolved powers in areas like social care, the clauses do ensure that the Scottish Parliament will have the powers to set out the way in which support is provided for carers, including the rate at which it is paid, and there is also a very broad definition of “the disabled person” in respect of whom a carer’s benefit can be paid.

“ I believe that we fully meet the intent and spirit of the Smith Commission report as far as the “structure and value” is concerned. There are many areas in which we have framed the clauses in a way which allows flexibility to the Scottish Parliament to depart from other eligibility rules in the existing benefits.<sup>145</sup>

### Definition of disability

258. Draft clause 16 includes the provision which seeks to devolve benefits to disabled persons. Elsewhere in the previous UK Government’s proposals, in relation to the devolution of employment support programmes, draft clause 22 defines disability as having the same meaning as that contained in the Equality Act 2010. The Committee has received a range of evidence which has questioned why two differing definitions of disability are being applied in the draft clauses and, in particular, concern has been expressed at what some witnesses have considered to be the narrow definition of disability being applied in draft clause 16.

259. For example, in written evidence, the Scottish Federation of Housing Associations (SFHA) expressed the following view on this issue—

“ Housing associations provide homes for many disabled tenants and SFHA – along with other organisations - is concerned about the varying definition of ‘Disability’ in different sections of the Draft Clauses. In Clause 16, a disabled person is defined as someone “to whom a disability benefit is normally payable” (p 106). In Clause 22 it says that a “ ‘disabled person’ has the same meaning as it has in the Equality Act 2010.” The definition needs to be consistent and match the definition of the Equality Act.<sup>146</sup>

260. Professor Paul Spicker commented on the definition of disability in clause 16 as follows—

“ I am rather concerned that the extremely strange definition of disability does not include certain groups that would have been fairly automatically included in other definitions, such as people with terminal cancer, multiple



sclerosis or fluctuating conditions. That would be easy to deal with in legislative terms if the same phrase that is used in clause 22 was used in clause 16.

” There is not a major problem about the drafting, but what is it that the UK Government has done with this particular clause? Why has it been done that way? It seems that it has wished to carry forward the current criteria for DLA and attendance allowance rather than to create the opportunity for the Scottish Parliament to define benefits within that area of responsibility, which was the declared intention.<sup>147</sup>

261. Responding to Professor Spicker’s comments, John Dickie, from Child Poverty Action Group Scotland, observed—

” I agree with what Paul Spicker said about the definitions of disability constraining the possibilities. Even more than that, the clause as it is currently framed does not allow for the payment of a PIP/DLA replacement in Scotland to those who are terminally ill if there is no current impairment to their capability. It took a separate section of the Welfare Reform Act 2012 to allow for payment of PIP/DLA to terminally ill claimants. As the clauses are currently framed, the capability is not there to enable that in Scotland. There is a gap—there is a clear problem that needs to be resolved.<sup>148</sup>

262. In response to this issue, the Deputy First Minister commented—

” ...it is clear to me that Clause 16, by setting out the criteria to whom disability benefits may be paid, restricts the ability of the Scottish Parliament to be able to determine eligibility for any replacement benefit.<sup>149</sup>

263. In correspondence from the Rt. Hon Iain Duncan Smith MP, Secretary of State for Work and Pensions, explained the rationale for the two different definitions. He wrote—

” There are indeed differences in the proposed definitions, but the legislative and factual context of clause 16 is different from the context of clause 22. The two clauses are drawn up differently for the purposes of meeting differing issues of devolution.

” [...] Putting this another way, clause 22 is not a provision concerning the kind of social security benefits covered by clause 16, so the definitions of “disabled person” need not necessarily be tied to those which apply for benefits.<sup>150</sup>

264. The Department of Work and Pensions’ letter to the Committee did provide an assurance that both definitions would apply to people with terminal cancer, MS or other fluctuating conditions, or who are terminally ill.

## Universal Credit

265. The Smith Commission recommended that Universal Credit (UC) should remain a reserved benefit. However, it was proposed that the power to vary the housing cost elements of UC and administrative powers relating to the frequency of UC payments, to vary existing plans for single payments to households and to allow landlords to be paid directly should be devolved. Lord Smith explained, in evidence to the Committee, the rationale for this recommendation in the following terms—

” As you know, the universal credit system is a major new reform in the welfare system. The parties agreed that it would be quite difficult to break that asunder but that Scotland could have flexibilities around it, particularly in things such as the housing element.

” You know that a lot of housing is already devolved, so the Scottish Government having the housing element of the universal credit made a lot of sense as there would be complementarity. There are quite different housing issues in Scotland compared with elsewhere in the UK. Housing payments could be increased or reduced, there could be flexibility around timing and so on. However, it was felt that to attack universal credit was not somewhere we could go in arriving at a consensus in the room.<sup>151</sup>

266. The powers which have been proposed for devolution have been welcomed by a range of stakeholders, albeit many of them would have wished a greater degree of devolution in this policy sphere. For example, the Wise Group commented in written evidence that—

” The power to split Universal Credit payments within households, to increase the frequency of payments and to make housing element payments direct to landlords will allow the flexibility in benefit payments to fit with the needs of some of the most vulnerable groups in society.<sup>152</sup>

267. Citizens Advice Scotland described the proposals for devolution with regard to Universal Credit as follows—

” The devolution of limited powers over Universal Credit (UC) is welcome though CAS would have preferred if all the elements of UC had been devolved in their entirety to allow for it to be responsive to the needs of Scottish people. However, it does appear that within these limited powers, there is some scope for some policy innovation and to enable policy changes which would benefit Scotland's citizens.<sup>153</sup>

## Shared and concurrent powers

268. As highlighted earlier in this report, the Smith Commission recommendations will result in a significant degree of shared or concurrent powers. This situation is particularly acute with regard to recommendations in relation to Universal Credit. The Smith Commission report recognised this in specifically recommending that—

” Joint arrangements for the oversight of DWP development and delivery of UC, similar to those established by HM Revenue and Customs (HMRC) in relation to the Scottish rate of Income Tax, should be established by the UK and Scottish Governments.<sup>154</sup>

269. The importance of inter-governmental relations to the effective implementation of UC has been a recurring theme during the Committee’s evidence-taking on this issue. Prior to the publication of the draft legislative clauses, Mary Taylor from the Scottish Federation of Housing Associations (SFHA) said—

” Given the terrain that we are in, the Smith commission was helpful in shining a light on the whole area of intergovernmental working. When there is a mixture of devolved and reserved powers, whatever they are, we need to have effective mechanisms for managing them at both political and official levels. Smith rightly identified those as issues—they are coming to light as issues through the stakeholder group. It is a matter of trying to manage the follow-on from Smith.<sup>155</sup>

270. SFHA further elaborated their view on this issue, in written evidence following the publication of the previous UK Government Command Paper, as follows—

” Overall, the draft clauses reveal the complexity of the new devolution settlement, setting out an array of exceptions to the powers which will still be reserved to Westminster. They make critical the need for intergovernmental cooperation between the Scottish and UK Governments, not just to implement the new powers, but to manage the interdependencies of the new settlement on an on-going basis.

” This is especially important for welfare powers, where the interconnections will be complex and the people who rely on benefits are often vulnerable. For example, some benefits that will be devolved can act as a passport to benefits and other exemptions which will remain reserved. Universal Credit is reserved, but aspects of the housing elements of Universal Credit will be devolved to the Scottish Parliament. So careful on-going management of these powers between the two governments will be essential for delivery of an effective and safe welfare system.<sup>156</sup>

271. For Citizens Advice Scotland (CAS), the newly-established Joint Ministerial Committee on Welfare has an important role to play in ensuring that the social security systems run by both the Scottish and UK Governments will engage with and work with each other. CAS recommended that this be made clear and was written into legislation, ensuring both governments are sharing information,

processes and, where necessary, systems and infrastructure. In its view, it is imperative if people are to navigate the systems that there is clear legislation, guidance, and regulations in place governing the interaction between both systems especially in areas of Universal Credit.<sup>157</sup>

272. The importance of establishing a structure which will enable issues such as 'no detriment' to be addressed, both at an individual and governmental level, will be essential and will require a shared understanding between governments of the evidence base and the mechanisms which will be put in place to resolve disputes or tensions. Jim McCormick, from the Social Security Advisory Committee (SSAC), commented on this issue that—

” Inevitably, there will need to be last-resort ways of resolving tension and conflict and, ultimately, there will need to be appeals. However, in the interim, the best solution will be to work through what the proposals could mean in practice in half a dozen key areas in which either powers are being wholly devolved or an administrative power is coming, so there is a concurrent power shared. We need both Governments and Parliaments to work through those examples early so that we have a clear sense of where we might be going if different choices are made. Ultimately, it comes down to where the costs and benefits of different choices lie. Even if the evidence is contested in future, we will need to have robust procedures in place, and we need to do some of that design in advance.<sup>158</sup>

273. The role of the Scottish and UK Parliament in scrutinising this process of inter-governmental relations has also been a recurring theme in evidence taking. Currently, SSAC performs a scrutiny role in relation to DWP and the Northern Ireland Executive's functions in relation to welfare. Jim McCormick highlighted the role of SSAC, and the issue of Parliamentary scrutiny more generally, as follows—

” The Social Security Advisory Committee currently has a remit for the DWP and the Department for Social Development in Northern Ireland in relation to secondary legislation on welfare and pensions, and it can give advice to ministers, whether that advice is asked for or proactively given. It also has the power to undertake independent work on areas of concern. Our hope is that, emerging from the joint ministerial group on welfare, both Governments will actively consider how such an arrangement can be put in place through SSAC or others to ensure that Scottish parliamentary scrutiny and the capacity for scrutiny outside the Parliament are improved.<sup>159</sup>

274. The Scottish Government agrees that there will be a need for on-going discussion between the two governments on all aspects of delivery and administration as part of planning for implementation. On this matter, the Deputy First Minister said—

” On welfare administration, you will appreciate that this is very early in the process for discussing options. We recognise the skills and expertise that

different sectors and organisations can bring to the table in delivering the new social security benefits. We will wish to consider a range of delivery options carefully and in consultation with all interested parties. I am happy to keep the Committee apprised of our work in this area.<sup>160</sup>

275. Referring to the importance of the new joint ministerial group on welfare as an important vehicle for intergovernmental dialogue and the on-going discussions between officials, the view of the former Secretary of State for Scotland was as follows—

” the UK Government stands ready to provide the information and support necessary to enable the Scottish Government to take on these areas of responsibility [welfare] in a successful way.<sup>161</sup>

#### Universal Credit: Policy flexibility

276. The aspects of Universal Credit which have been proposed for devolution have been broadly welcomed by stakeholders and in certain instances considered that it should be relatively straight forward for a future Scottish Government to make policy choices regarding the frequency / timing of Universal Credit payments and to whom the payments are made. For example, John Dickie from the Child Poverty Action Group Scotland stated—

” In theory, the system has been designed to allow for that anyway, so there should not be huge issues in applying a different policy approach to direct payments, payments to the main carer and more frequent payments. It is also important to note that there is no legislative barrier even now to the UK Government and the Scottish Government agreeing to provide a more wide-ranging flexibility on those matters.<sup>162</sup>

277. Indeed, in some areas it has been considered that the draft legislative clauses may be broader than what the Smith Commission proposed. For example, Professor Spicker noted, in oral evidence to the Committee, that the draft clause provision in relation to frequency of payments is broader than the Smith Commission recommendation commenting—

” In the case of universal credit, Smith proposed that there should be the power to alter frequency of payments. What the draft clauses suggest is a power to alter the timing of payments. Those two things are not equivalent. Timing is rather broader than frequency, and it could, for example, affect when the first payment is made, at least in principle.<sup>163</sup>

278. However, the Committee also received evidence which suggests that if the Scottish Government wished to undertake more substantial policy variation then there could be significant barriers which would undermine the ability of a future Scottish Government to make significant alterations to the operation of Universal Credit.

279. Citizens Advice Scotland (CAS) expressed concerns along these lines in the written evidence we received. It said that, in practice, devolving the abilities for the Scottish Government to vary elements of Universal Credit within a wider system administered by the Department of Work and Pensions will be highly challenging, but possible.

280. To achieve this, CAS called for further clarity on a number of elements: how the devolved elements of UC will operate in the UK-wide system; and how the Scottish Government can make their requirements work on a UK Government system.

281. Citizens Advice Scotland concluded that—

” Regardless of what approach is enshrined in legislation, operating this system in practice will require joint working at an administrative level between the Scottish and UK Governments. CAS recommends that work begins as soon as possible to ensure that the full range of options available for variation in Universal Credit devolved to the Scottish Government will be practically possible to implement with minimal delay should the Scottish Government choose to exercise them.<sup>164</sup>

282. In its view—

” It would not be acceptable to the public or in the best interests of vulnerable claimants if devolved powers could not be used because of inflexible process, IT systems or disputes over responsibilities. Setting up joint working arrangements on an administrative basis between the two governments at this stage would help to overcome that.<sup>165</sup>

#### Universal Credit: ‘Veto’ Power?

283. Draft Clauses 20(4) and 21(3) require Scottish Ministers, when using a power to vary the person to whom, or the timing of, Universal Credit payments, including the housing cost component of Universal Credit, to “have consulted the Secretary of State about the practicability of implementing the regulations”. The Secretary of State would then have to give “agreement as to when any change made to the regulations is to start to have effect, such agreement not to be unreasonably withheld”.<sup>166</sup> In addition, the Secretary of State will not be able to create regulations in this area unless the Secretary of State consults Scottish Ministers.

284. The Scottish Government believes that the requirement to obtain legal consent is unnecessary. The Deputy First Minister, in a statement in the Scottish Parliament on the draft legislative clauses, commented—

” I highlight the provisions that require the Scottish ministers to consult UK ministers and those that say that the Scottish ministers must obtain consent. No one in this chamber would want decisions of this Parliament on issues such as the bedroom tax to be frustrated by the need for consent



from the UK Government. Even the Secretary of State for Scotland agreed over the weekend that there should be no right of veto. It is therefore important that the UK Government revisits the clauses that require consent.<sup>167</sup>

285. The Committee has received a range of evidence regarding whether or not these clauses represent a veto. For example, the Poverty Alliance in a written submission considered that the clauses did constitute a veto. They said—

” We were also particularly disappointed to see what is ultimately a veto given to the Secretary of State over any future changes to the devolved elements of Universal Credit by the Scottish Government.<sup>168</sup>

286. Inclusion Scotland considered that the clauses probably did not amount to a veto but could be inconsistent with the spirit of the Smith Commission report. Inclusion Scotland observed—

” There has been some comment on whether draft clauses 20(4) and 21(3) amounts to a UK Government veto on the devolved powers on Universal Credit. Given that agreement cannot be “unreasonably withheld” by UK Ministers, it probably does not constitute a veto, although it could result in a delay to the implementation of mitigation policies agreed by the Scottish Parliament. This may not be consistent with the spirit of the Smith Commission which implies that the devolved welfare powers can be exercised without the need to obtain prior permission from the DWP.<sup>169</sup>

287. CAS considered this issue at length and expressed concern that should this process result in dispute between the Scottish and UK Governments then this could cause confusion for recipients of Universal Credit. CAS’s view was that the clauses do require the Scottish Government to consult the UK Government and to gain their agreement to the timing of any variance. They observed that, should the UK Government wish to make regulations in this area that affected Scotland; they need only consult the Scottish Ministers, but are not required to seek their agreement.

288. For Citizens Advice Scotland—

” This raises a number of issues. Firstly, enabling the UK Secretary of State to make regulations in an area which is devolved to the Scottish Parliament without its consent does not appear to be consistent with the Smith Commission agreement that the Sewel Convention should be put on a statutory footing. Secondly, whilst the intention appears that the timing of any changes needs to be subject to negotiation on what it is practically possible to do, there is scope for wide interpretation of the circumstances it might be considered ‘reasonable’ for the Secretary of State to withhold their agreement to the Scottish Government utilising their devolved power to make regulations in this area.



” This may have the effect of causing the same stand-off and claimant confusion as if no process were outlined in the clauses. Citizens Advice Scotland believes that this section should be re-drafted to ensure that the Scottish Government can exercise its devolved function, whilst at the same time ensuring that practical considerations are reflected in the legislation.<sup>170</sup>

289. The Deputy First Minister commented at some length on whether the requirements on the Scottish Government to consult with, and seek the agreement of, the UK Government on some aspects of welfare and benefits constituted a veto. He said—

” It is not terribly difficult to foresee how what appear to be pretty innocuous requirements to consult the secretary of state and secure his or her agreement could be translated into what is essentially a blocking power, because all sorts of excuses could be used to prevent something from happening. Our concern is that how clauses 20 and 21 are drafted conveys the ability of a UK minister to prevent the Scottish Government from doing something. If that minister has a reasonable explanation for why they are doing that, that passes the test in the clause, which to me therefore gives the UK Government the ability to veto a decision that the Scottish Government and Scottish Parliament have taken.

” The UK Government contends that the arrangements in clauses 20 and 21 are about administrative operation and efficiency and all the rest of it but, having just spent a couple of years of my life trying to make progress on the block grant adjustment and being stalled and delayed with more analysis—before I knew it, two years of my life had passed—it seems to me that the clauses present a serious impediment to the ability of the Scottish Parliament to exercise the powers that were envisaged by the Smith commission.<sup>171</sup>

290. He concluded as follows—

” Another important point of principle is involved about the proper definition of devolution. To me, devolution involves passing over the power to the Scottish Parliament to do with as it sees fit. It is not about the UK Government saying, “We’ll pass over the power, subject to our agreeing that it is all fine for it to proceed.” That is not devolution, as it retains control in the UK Government in the form of a veto and the ability to say, “Actually, we don’t approve of what is happening here and we’ll find some way of preventing it from happening.”<sup>172</sup>

291. The view of the former Secretary of State for Scotland was as follows—

” As we set out in the draft clauses, the Command Paper and on the day of publication, there is no veto. The clauses are quite clear that the Secretary of State will not unreasonably withhold his consent; the provision simply

recognises the fact that Universal Credit will remain a reserved benefit administered by the UK Government – something that was agreed and signed up to by all parties to the Smith Commission – and as a result there is a need to ensure that Scottish Government proposals can be delivered effectively as part of an integrated delivery plan. This drafting mechanism simply reflects the reality of the close inter-governmental working that will be required, and I have every confidence that officials in both Governments will be able to work together constructively in practice.<sup>173</sup>

### **Under Occupancy Charge/'Bedroom Tax'**

292. Draft clause 20 seeks to provide for the Smith Commission recommendation that “the Scottish Parliament will have the power to vary the housing cost elements of UC, including the under-occupancy charge and local housing allowance rates, eligible rent, and deduction for non-dependents”.<sup>174</sup> The previous UK Government’s Command Paper summarises the purpose of draft clause 20, in relation to the under-occupancy charge which is frequently termed the ‘bedroom tax’, in the following terms—

” Scottish Ministers will have the power to decide in what circumstances an under-occupancy charge will be made, and at what percentage reduction rate from the housing costs covered by Universal Credit for social sector tenants. This means that Scottish Ministers will be able to decide whether to apply any under-occupancy reductions, or to choose to set them at different levels and provide for an extra room for certain groups of claimants. They will also be able to decide on the level of any deductions for non-dependents and whether to introduce further categories of exemption from the non-dependent deductions. In calculating the amount of rent to be included in the housing costs calculation the Clause will enable Scottish Ministers to decide in what circumstances the level of rents charged by social sector landlords would be considered excessive. For private sector tenants they would be able to vary the local housing allowance rates by varying the manner in which the maximum level of housing support is set.<sup>175</sup>

293. Draft clause 19 seeks to give effect to the recommendation to devolve responsibility for discretionary housing payments. The Committee received evidence from some that draft clause 19 would not fully mitigate the impact of the under-occupancy charge (if the Scottish Government did not use its powers under draft clause 20 to remove the under-occupancy charge). For example, John Dickie of the Child Poverty Action Group Scotland, said—

” The new clause does not give power to enable local authorities to make discretionary housing payments to individuals who are not in receipt of housing benefit. Because of the way in which the under-occupancy charge—the bedroom tax—is applied at the moment, some claimants, particularly those who are in work and receiving a relatively small amount

of housing benefit, lose all that benefit, which essentially means that they are not entitled to a discretionary housing payment. In effect, as the clauses are currently drafted, we could not fully mitigate the impact of the bedroom tax through discretionary housing payments, given that some people will not be entitled to such payments because they have lost all their housing benefit as a result of the bedroom tax. That is an effect of the clauses and something for the committee to be aware of.<sup>176</sup>

294. In its evidence, CAS raised a wider issue with regard to whether discretionary housing payments would remain available to Scottish local authorities should a future Scottish Government decide to remove the under-occupancy charge. They commented—

“...we would like to have full understanding and clarity of what will happen to current DHP payments made available to local authorities from UK Government funding, if Scottish Ministers chose to make exemptions such as those CAS advocate, or indeed choose to remove the Under Occupancy charge altogether.

“In particular, we would like clarity over whether the funding from the UK Government currently allocated to Scottish local authorities' DHP pots would remain, to avoid the full £50m burden of mitigating this policy falling entirely on the Scottish Government.<sup>177</sup>

295. The view of the former Secretary of State for Scotland was as follows—

“With regards to Discretionary Housing Payments (DHP), clause 19 provides for the devolution of powers to provide DHPs as they currently apply in England, Wales and Scotland. As a result, the restrictions set out in the draft clause already exist with respect of DHPs and are not new. The Scottish Parliament will have great freedom to design and deliver a system of support for people who need help with their housing costs.<sup>178</sup>

## Winter Fuel Payments

296. The Smith Commission recommended the devolution of a range of benefits which are collectively termed the 'Regulated Social Fund'. The fund includes cold weather payments and winter fuel payments. Draft clause 17(3) proposes to devolve to Scottish Ministers 'expenses for heating in cold weather'. However, the Committee has received evidence that this clause may not include winter fuel payments. For example Professor Spicker commented—

“I think—although I do not know—that winter fuel payments will not be possible under the draft clauses. The white paper says that those payments will be possible, but the form of words that legitimated winter fuel payments has been removed. Is that deliberate? I cannot tell you. Will that actually be the effect? Again, I cannot say with any confidence whether it will.<sup>179</sup>

297. The Scottish Federation of Housing Associations (SFHA) took a more definitive position commenting that draft clause would not include winter fuel payments as follows—

” One area of concern is the change in wording between the Smith Agreement and Draft Clauses on the recommendation to devolve the Winter Fuel Payment (WFP) (Smith para 49). In the Draft Clause 17, this is changed to “expenses for heating in cold weather.” However, the WFP and Cold Weather Payments are two different things, so if the current wording of the Draft Clause is not changed, WFP would continue to be reserved, which appears to be contrary to the intention of the Smith Agreement.<sup>180</sup>

### **Scottish Welfare Fund**

298. The Committee received some evidence that the effect of draft Clause 18, which deals with discretionary payments, could restrict eligibility to the Scottish Welfare Fund which the Scottish Government currently provides.

299. For the Child Poverty Action Group Scotland, the key issue is that, with the current powers that the Scottish Welfare Fund operates under, it is possible for people to access crisis grants, for example, even if they have lost reserved UK benefits as a result of being sanctioned, as long as there is a risk to their wellbeing. Child Poverty Action Group Scotland pointed out that being sanctioned is not an automatic bar to their accessing the support. In its view, that is important because, in some cases, people have been sanctioned and left with no money and the Scottish Welfare Fund has been crucial in supporting them.

300. Child Poverty Action Group Scotland said—

” It looks as though clause 18 restricts that further by saying that there needs to be an additional exceptional event or circumstance. Clearly, that could act as a bar to the scope in which Scottish welfare fund payments could be made if someone has been sanctioned in relation to a UK benefit. Even further than that, and not just in relation to someone having their benefits sanctioned, the draft refers to benefit being lost as a result of the claimant’s conduct. That could mean someone losing benefit because they have failed to return a form or filled in the form wrongly. That sometimes happens to people with mental health problems, learning difficulties and literacy issues. That could be described as a conduct issue. It would be a serious blow for people in such situations not to have access to the Scottish welfare fund under the new discretionary payment powers.<sup>181</sup>

301. The Scottish Government believes that Clause 18 does not appear to give Scottish Ministers new powers in relation to discretionary payments.

### **Employment Programmes**

302. In relation to employment, the Smith Commission recommended that—

” The Scottish Parliament will have all powers over support for unemployed people through the employment programmes currently contracted by DWP (which are presently delivered mainly, but not exclusively, through the Work Programme and Work Choice) on expiry of the current commercial arrangements. The Scottish Parliament will have the power to decide how it operates these core employment support services.<sup>182</sup>

303. Generally, the evidence the Committee received in this area welcomed the devolution of powers relating to employment. For example, the British Association for Supported Employment (BASE) commented—

” BASE believes that the potential devolution of powers over employment programmes provides a welcome opportunity for Scotland to radically improve the way jobseekers with a complex or substantial economic disadvantage are supported into or back into the labour market.<sup>183</sup>

304. Some of the evidence we received, whilst welcoming the powers to be devolved, expressed a view that a greater degree of devolution was required within this sphere. The Employment Related Services Association (ERSA) adopted this view in its evidence which states—

” While ERSA broadly welcomes the recommendations of the Smith Commission Report, it still has concerns that sufficient provision has not been made in the draft clauses to create appropriate incentives. ERSA continues to believe that this would be best achieved through the devolution of responsibility for all in work and out of work welfare policies and benefits to the Scottish Government, including responsibility for Jobcentre Plus in Scotland.<sup>184</sup>

305. The Scotland Act 1998 reserved employment policy including job search and support (with the exception of careers service and training for employment). Draft clause 22 sets out further exceptions to the reservation in the 1998 Act with regard to “assisting disabled persons to select, obtain and retain employment” and to assist “persons claiming reserved benefits who are at risk of long-term unemployment to select, obtain and retain employment, where the assistance is for at least a year”.<sup>185</sup>

306. The Committee has received evidence questioning whether this particular draft clause fully meets the intention of the Smith Commission. For example, Inclusion Scotland commented in written evidence that—

” The Smith Commission proposes that “The Scottish Parliament will have all powers over support for unemployed people through the employment programmes currently contracted by DWP.” However, both the narrative and draft clauses appear to restrict this power to employment support schemes that last over a year. It is not clear why this restriction has been

included and it appears to be a direct contradiction of the Smith Commission proposal.

” Indeed, it can be argued that the most effective employment support schemes are short term schemes designed to identify the barriers preventing someone gaining employment and providing support, training and assistance to overcome these. If a scheme lasts for more than a year without supporting someone into employment, surely it has failed?

” The UK Government also appears to have arbitrarily applied the reference to conditionality and sanctioning for Universal Credit (paragraph 46) to devolved employment support schemes, including the use of mandatory placements. It is not clear how this is compatible with the Scottish Parliament having all powers over support for unemployed people through the employment programme, for example if the Scottish Parliament determines that participation in such schemes should be voluntary.<sup>186</sup>

307. The Committee has also received a number of submissions questioning whether the Access to Work programme will be devolved. For example the Wise Group commented, in written evidence, that—

” Within the proposed legislation, there is a lack of any proposed method or programme involving Access to Work, which is a key lever for getting people into work. We would currently seek to clarify whether this will be devolved as part of the package of DWP contracts as it is an important programme which can be vital in the process of increasing employability for ESA customers.<sup>187</sup>

308. The Scottish Government's view of draft clause 22 is the current scope falls short of implementing the Smith Commission's recommendation that the Scottish Parliament will have “all powers over support for unemployed people through the employment programmes currently contracted by DWP through the Work Programme and Work Choice.” In a follow-up letter after his evidence to the Committee, the Deputy First Minister said—

” We strongly agree with the concerns about employment raised in evidence to the Committee. The main effect of Clause 22 of the draft Scotland Bill suggested by UK Government is that it would devolve Work Programme and Work Choice only. We believe that devolution of employment support on this basis is inconsistent with both the letter and spirit of paragraph 57 of the Smith Commission report, which states that the Scottish Parliament will have all powers over support for unemployed people through the employment programmes currently contracted by the UK Department for Work and Pensions.

” Our concerns are concentrated in two key areas. Firstly, the clauses restrict the transfer of powers to the Scottish Parliament to 'those at risk of long



term unemployment'. Secondly, the UK Government's stipulation that our future devolved services must operate for at least one year restricts scope for innovation and flexibility in designing new programmes. Neither of these restrictions that appear in Clause 22 reflect paragraph 57 of the Smith Commission report, the intention of which is clearly to devolve all employment support programmes.

” These are fundamental points which would restrict our ability to develop existing and future support programmes for the unemployed and to fully integrate future services in Scotland. We have expressed our dissatisfaction to UKG, and continue to press them on this. At the last Joint Ministerial Group on Welfare on 11th March, Scottish Ministers offered to revise the draft clause to be more in line with the Smith Commission report.

” In respect of Access to Work, we have asked the UK Government to clarify whether Access to Work will be devolved under clause 22 and they have made clear their expectation that as this programme is a JobCentre Plus service to customers and not a contracted employment programme it will remain reserved.<sup>188</sup>

309. In correspondence, the Rt. Hon Iain Duncan Smith MP, Secretary of State for Work and Pensions, explained the rationale for the two different definitions. He explained that claimants need different types of support to enter the job market and that, in the early stages, some of this comes from Jobcentre Plus, which remains a reserved issue. In the longer-term, claimants are referred onto Work Programme or Work Choice and the aspects of the provisions to be devolved.<sup>189</sup>

310. The close connection between employment support and benefit entitlement will necessitate close inter-governmental cooperation if the structure of support is to operate effectively. This aspect of the proposals to devolve employment support has elicited a wide range of comment in evidence to the Committee. For example, Jim McCormick, of SSAC, commented—

” It strikes me that a revised work programme could help people at risk of long-term unemployment and disabled people into work and could support them in staying in work. Under the proposals, we might end up in a situation in which future public service providers in Scotland—which might be third sector providers—would be accountable to the Scottish Parliament for their financial performance and their programme performance but would still have to apply a conditionality system and a sanctions regime to those programmes.

” As well as creating problems for claimants, that would create strange incentives for providers—it would create incentives for gaming and false reporting. That is a particularly jagged edge, because one thing that we know about the current social security system and the welfare reforms is that a tougher sanctions system has caused a great deal of difficulty for



some of the most vulnerable people in our society. That jagged edge around conditionality is a particular cause for concern.<sup>190</sup>

311. The interaction between reserved and devolved programmes particularly with regard to the DWP conditionality and sanctions regime remaining reserved has been of particular concern to some of our witnesses. On this matter, John Dickie told the Committee that—

” ...as far as working-age benefits are concerned, the current reserved conditionality and sanctions regime, which is undermining people’s attempts to move into work and towards the labour market, will still apply. That comes back to Jim McCormick’s point about the jagged edge between what we in Scotland might want to do differently in devolved employment programmes and the requirement for those programmes to work within a reserved benefits regime that too often imposes arbitrary conditions or conditions that are not helpful in supporting people to move into work and which imposes damaging sanctions on them when they fail to meet those conditions.

” Even under the current proposals, there will be real opportunities to do things differently, to ensure that employment support in Scotland is more suited to the local labour market and more appropriate to the childcare and other support that are available to enable parents, for example, to move back into work and—I hope—to reduce the number of inappropriate or arbitrary tasks that people have to undertake to meet the benefit requirements. However, there will be a limit to that, because the benefits regime will be as it is now—unless, of course, we manage to get it changed in the way that we want.<sup>191</sup>

312. The issue of how the ‘no detriment’ principle outlined in the Smith Commission report will operate in the context of the devolution of employment support programmes has also been a recurring theme in evidence. Jim McCormick summed up this issue as follows. He said—

” The important underlying issue is incentives. If a future Scottish work programme or a variation in the work choice programme that we have at the moment were to invest in a different way—for example, by investing more in training, childcare and a kind of social investment cycle—it might take longer to get the payback but the payback might be bigger. Therefore, it is important that we understand the relationship between the policy choices that are made in Scotland and the actual outcomes rather than the apparent, short-term outcomes.

” Paragraphs 2.4.16 and 2.4.17 in the command paper talk about the need for ‘a shared understanding of the evidence’. That sounds like a technical point, but I suspect that it will be extremely important in working through what we mean by no detriment. Where is the incentive for Scotland to

invest more or differently in order to get a better payback? We are only in the foothills of understanding what “a shared understanding” means in the context of the relationship between policy choices and outcomes, and I suspect that, quite quickly, we will need some worked-through examples of what that might mean. Employment programmes and universal credit are two areas that jump out immediately from the draft clauses.<sup>192</sup>

313. The Employment Related Services Association (ESRA) highlighted the importance of the relationship and interaction between devolved employment support programmes and Job Centre Plus. ESRA commented—

” ERSA and its members also believe that while not explicitly referred to in the draft clauses it is important for the Westminster and Scottish Governments to establish a good referral mechanism from Jobcentre Plus to subsequent employment support in Scotland. Specifically ERSA recommends that the Joint Ministerial Working Group should consider how to manage the referral from Jobcentre Plus at 52 weeks to the next phase of employment support in Scotland. This will be a crucial period in engaging jobseekers and ERSA is keen to ensure that a robust mechanism, which includes a warm handover process and information sharing, is developed to adequately meet jobseeker need.<sup>193</sup>

### Inter-governmental relations in welfare provision

314. The preceding discussion of the welfare provisions, particularly those with regard to Universal Credit and employment support, have highlighted the central importance of having an effective structure of inter-governmental relations if the Smith proposals are to be implemented. The Smith Commission recommendations, and the drafting approach taken in the clauses, significantly alter the structure of the devolution settlement from a system based on largely separate powers between tiers of government to a system of shared or concurrent powers in many spheres of policy.
315. Welfare is an area of policy where effective inter-governmental relations will be paramount in order to deliver the spirit and substance of the Smith Commission recommendations. This issue will be considered later in this report but is raised here given the range and strength of concerns which have been raised on this issue.
316. Jim McCormick, representing SSAC, succinctly summed up the issue in the following terms—

” Smith observed that we have weak intergovernmental working, which is a problem and is not an ideal context for welfare devolution. The draft clauses go some way to responding to that, but they also contain an explicit reference to concurrent powers in relation to universal credit, which puts us formally into a very different place in terms of how Governments, and

therefore Parliaments, will need to work together. We are used to thinking in terms of reserved/devolved splits, but now there are shared areas.

” We need to start thinking about appropriate oversight, scrutiny and transparency arrangements so that, whatever emerges from the revised clauses, we have much better machinery for independent and parliamentary oversight.<sup>194</sup>

317. The Scottish Federation of Housing Associations (SFHA), in written evidence, summed up the complexity and potential risks of this new structure of shared powers between tiers of government within this policy sphere as follows—

” Overall, the draft clauses reveal the complexity of the new devolution settlement, setting out an array of exceptions to the powers which will still be reserved to Westminster. They make critical the need for intergovernmental cooperation between the Scottish and UK Governments, not just to implement the new powers, but to manage the interdependencies of the new settlement on an on-going basis.

” This is especially important for welfare powers, where the interconnections will be complex and the people who rely on benefits are often vulnerable. For example, some benefits that will be devolved can act as a passport to benefits and other exemptions which will remain reserved. Universal Credit is reserved, but aspects of the housing elements of Universal Credit will be devolved to the Scottish Parliament. So careful on-going management of these powers between the two governments will be essential for delivery of an effective and safe welfare system.<sup>195</sup>

## **Conclusions and recommendations on welfare and benefits**

### **General**

318. The purpose of our report has been to provide a constructive commentary to a new UK Government on the draft clauses as they relate to the Smith Commission recommendations. However, the Committee has concerns with a number of the welfare provisions and considers that the relevant clauses do not yet meet the spirit and substance of the Smith Commission's recommendations and potentially pose challenges in any attempt to implement them. Central to the effective delivery of the welfare clauses will be ensuring that key stakeholders in the delivery of welfare are fully involved in shaping the welfare provisions and their delivery.

319. The Committee believes that the welfare provisions will impact upon some of the most vulnerable and disadvantaged individuals in Scottish society. It is imperative therefore that the welfare clauses meet the expectations of Scottish society, provide genuine policy discretion to the Scottish Government as envisaged by the cross-party agreement within the Smith Commission, and are capable of being implemented efficiently and in a way

**that ensures any new benefits or discretionary payments introduced in Scotland by either government provide additional income for a recipient and do not result in an automatic offsetting reduction in their entitlement to other benefits, discretionary payments, tax credits or allowances.**

320. Accordingly, the Committee recommends that a new UK Government further engages in the development of legislation in this area in co-operation with stakeholders in Scotland on the welfare clauses in any Scotland bill. This should include securing the agreement of the Scottish Government and stakeholders that the welfare clauses do meet the spirit and substance of the Smith Commission recommendations. In addition, the process via which it will be ensured that the introduction of any new benefits or discretionary payments by a future Scottish Government should provide additional income to a recipient without any offsetting reduction in reserved entitlements should be made clear and have been agreed to by stakeholders and the Scottish Government.
321. The Committee also calls on the UK Government to consider the issues raised in this report both with regard to the scope of the clauses as currently drafted and issues with regard to implementation before drafting legislation in this area.

### **New and top-up benefits**

322. The Committee reaffirms the agreement in the Smith Commission report that the Scottish Parliament should have the power to create new benefits in areas of devolved responsibility and also new powers to make discretionary payments in any area of welfare without the need to obtain prior permission from the DWP, whilst recognising that there will be a need for the Scottish Government to provide the DWP with early notification of its intentions because of the potential for overlap with the administrative responsibilities of the UK Government in welfare matters. The Committee notes the view that the approach taken of creating exceptions to existing benefits limits the scope of policy discretion which would be available to a future Scottish Government to create new benefits or to top-up benefits. The Committee recommends that the UK Government re-consider the draft clauses designed to devolve the creation of new benefits and enable the top-up of reserved benefits in order to ensure that the relevant sections of any future Bill meet the spirit and substance of the Smith Commission thereby ensuring that the Scottish Government would have genuine policy discretion in this area.

## **Carers**

323. The Committee is concerned that the current definition of carer in the draft clauses appears overly restrictive and could limit the policy discretion of future Scottish administrations in this area. The Committee recommends that the clause should be re-drafted to ensure that the future Scottish administrations are able to define what constitutes a carer.

324. The Committee also recognises that the fiscal framework is currently the subject of discussion between the Scottish and UK Government. The Committee considers that the issue of 'no detriment' as it applies to individuals, particularly those in receipt of benefits, should be a crucial component of these discussions. The Committee seeks clarity on the procedures through which the commitment in paragraph 55 of the Smith report will be honoured to ensure that any new benefits or discretionary payments introduced by the Scottish Parliament will provide additional income for recipients and not be offset by reductions in entitlements to benefits, tax credits or tax relief provided by the UK Government.

## **Definitions of disability**

325. The Committee is concerned that the definition of disability contained in draft clause 16 is overly restrictive and would not provide a future Scottish Government with the power to develop its own approach to disability benefits in the future. Accordingly, the Committee recommends that the definition of disability used in the Equality Act 2010 is also used in draft clause 16.

326. **The Committee welcomes the assurances from the DWP that both definitions of disability used in the draft clauses would apply to people with terminal cancer, MS or other fluctuating conditions, or who are terminally ill.**

**Universal Credit – a shared power**

327. The Committee recognises that the effective operation of inter-governmental relations will be critical to the successful operation of the devolved aspects of Universal Credit. The Committee welcomes the recent establishment of the Joint Ministerial Working Group on Welfare and expects this forum to become an effective means of dealing with relations between the UK and Scottish governments in this sphere. The Committee expects to be kept fully informed on discussions between governments on the arrangements being developed for inter-governmental relations with regard to Universal Credit and welfare issues in general. The Committee noted the commitment of both the Scottish and UK governments to provide detailed minutes of the Joint Exchequer Committee to the Scottish Parliament Finance Committee and the Scottish Affairs Committee. We would encourage the Joint Ministerial Working Group on Welfare to follow this example, by providing detailed minutes of its meetings to appropriate committees in the Scottish and Westminster Parliaments.

328. The Committee recommends that the principles which will govern the operation of inter-governmental relations with regard to welfare should be placed in any future Bill devolving power in this area. Moreover, the Committee expects that this will include the principles via which Parliaments can maintain scrutiny and oversight of the inter-governmental machinery with regard to welfare.

**Universal credit – policy flexibility**

329. The Committee considers that the policy autonomy of a future Scottish Government with regard to its devolved welfare responsibilities should not be constrained as a consequence of process issues relating to the boundary between devolved and reserved systems and processes.

330. The Committee therefore recommends that Joint Ministerial Working Group on Welfare considers as a matter of urgency the extent to which the policy autonomy of a future Scottish Government may be undermined as a consequence of being reliant on systems which have been designed by DWP and how any such barriers of this kind can be overcome. Such an understanding should form a key understanding or principle governing inter-governmental relations in this sphere.

**Universal Credit – ‘veto’ power?**

331. The Committee concludes that there is a case to be made that draft clauses 20(4) and 21(3) could be considered or perceived as a veto. The Committee considers that this is an issue which requires resolution through the Joint



**Ministerial Working Group on Welfare.** In effect, this issue provides an early test of the effectiveness of inter-governmental relations. The Committee expects this issue to have been resolved to the satisfaction of both the Scottish and UK Governments before any future legislation is introduced. During this process, the Committee would expect the Scottish Government to report to Parliament and its committees on the progress of discussion and specifically before any final agreement is reached.

### **Under Occupancy Charge/'Bedroom Tax' and Discretionary Housing Payments**

332. The Committee seeks clarity on the issues which have been raised with regard to the inter-play between the power to remove the under-occupancy charge and discretionary housing payments. The Committee considers that it is essential that the application of these clauses should not have the effect of causing detriment to individuals in receipt of discretionary housing payments.

### **Winter Fuel Payments**

333. The Committee considers that it is imperative that any future Bill is drafted to ensure that both winter fuel payments and cold weather payments are devolved, and agreement is reached on adopting a system of payments which better reflects the climate conditions in different parts of Scotland. The Committee seeks an assurance from the UK Government that if the current draft clause excludes the devolution of winter fuel payments then any future Bill is drafted to ensure that such payments are devolved.

### **Scottish Welfare Fund**

334. The Committee seeks clarification from the UK Government that access to the Scottish Welfare Fund will not be restricted as a consequence of the draft clause provisions in relation to discretionary payments.

### **Employment Programmes**

335. The Committee considers that the clauses as currently drafted do not fully implement the Smith Commission recommendations. The Committee considers that the Smith Commission intended that all employment programmes currently contracted by DWP should be devolved. Therefore, the Committee recommends that any future Bill should not place any restriction on the type of person receiving support or in regard to the length of unemployment any person has experienced. The Committee considers that this should include the devolution of the Access to Work Programme.

336. The Committee recognises that the effective operation of inter-governmental relations will be critical to the successful operation of the devolved aspects of employment support. The Committee welcomes that this is recognised in



the previous UK Government Command Paper and also welcomes the recent establishment of the Joint Ministerial Working Group on Welfare and expects this forum to become an effective means of dealing with relations between governments in this sphere. The Committee expects to be kept fully informed on discussions between governments on the arrangements being developed for inter-governmental relations with regard to employment support and welfare issues in general.

337. The Committee recommends that the principles which will govern the operation of inter-governmental relations with regard to welfare, including employment support, should be placed in any future Bill devolving power in this area. Moreover, the Committee expects that this will include the principles via which Parliaments can maintain scrutiny and oversight of the inter-governmental machinery with regard to welfare and employment support.

#### Inter-governmental Relations in Welfare

338. The Committee considers that the operation of inter-governmental relations will be central to the effective implementation of many of the Smith Commission recommendations. However, the operation of inter-governmental relations will be critical within the area of welfare policy. The Committee therefore welcomes the recent establishment and meetings of the Joint Ministerial Working Group on Welfare.

339. The Committee recognises that for inter-governmental relations to operate effectively that there must be space for the discussions between governments to take place in confidence and the Committee recommends that any future Bill should place the general principles underpinning the operation of inter-governmental relations on welfare in statute. The Committee also considers that the general principles underpinning the structures which will be put in place for dispute resolution should also be placed in statute. Such a Bill should also include the general principles which will enable Parliamentary scrutiny of this process to take place. The Committee considers that the detail of the process for conducting inter-governmental relations should then be placed in a Memorandum of Understanding agreed between the governments. During this process, the Committee expects the Scottish Government to report to the Parliament and its committees on the progress of discussion and specifically before any final agreement is reached.

# The Crown Estate

## Background

340. The Crown Estate is the Crown property, rights and interests that are managed by the Crown Estate Commissioners in England, Wales, Northern Ireland and Scotland. The Crown Estate is not the personal property of HM the Queen – it is owned by the Sovereign in right of the Crown. The Sovereign is the legal owner but has no powers over management or control.
341. The Crown Estate Commissioners is a statutory corporation constituted by the Crown Estate Act 1956. Under the Crown Estate Act 1961, Commissioners must follow directions from the Chancellor of the Exchequer and the Secretary of State for Scotland. Crown Estate profits flow direct to HM Treasury. In 2013/14, Crown Estate profits from activities in Scotland were £13.6 million, 3.9% of the UK total. The total property value of the Crown Estate in Scotland was £267 million.<sup>196</sup>
342. Scotland is represented by a Scottish Commissioner. Whilst one Commissioner has always been from Scotland, this was not required under statute. The Scotland Act 2012 required that a, “Crown Estate Commissioner with special responsibility for Scotland shall be appointed on the recommendation of the Chancellor of the Exchequer, who shall consult the Scottish Ministers before making that recommendation.” This Commissioner “must be a person who knows about conditions in Scotland as they relate to the functions of the Commissioners.”<sup>197</sup>
343. Chaired by the Scottish Commissioner, the Crown Estate’s Scottish Management Board comprises the Chief Executive, the Scottish Leadership Team (which comprises staff in Edinburgh) and additional senior staff. The Crown Estate has been subject to considerable parliamentary scrutiny over the past 8 years including consideration by committees in the UK and Scottish Parliaments.
344. In Scotland, the Crown Estate Commissioners manage four rural estates, including the Glenlivet Estate, mineral and salmon fishing rights, about half of the coastal foreshore and almost all seabed to 12 nautical miles. It is important to note that the Crown Estate does not claim any foreshore in Shetland. In Orkney there are numerous stretches of foreshore where Crown ownership has been displaced by Udal titles.
345. Through, for example, leasing of moorings, the Crown Estate plays a role in supporting aquaculture, marine leisure, ports and harbours, and offshore renewable energy, the latter is important for Scottish waters, such leases are commercial agreements, which enable the construction and operation of renewable energy projects for a specified period (for example, 50 years). In return for the grant of rights, the developer pays the Crown Estate a commercially negotiated rent.

346. The urban estate comprises 39-41 George Street, Edinburgh, and a 50% interest in an English Limited Partnership which owns Fort Kinnaird Retail Park in Edinburgh. On 29 November 2014, rights to naturally occurring oysters and mussels transferred to Scotland from the Crown Estate (Scottish Government 2014). A full list of Crown Estate Assets in Scotland is set out in Table 8 below.

**Table 8: Crown Estate Assets in Scotland.**

<b>Asset</b>	<b>Definition</b>
George Street	the land owned by Her Majesty known as 39 to 41 George Street, Edinburgh
Seabed	the land owned by Her Majesty forming the seabed of Scottish Territorial Waters
Storage Rights (Seabed)	the rights of: (1) Unloading gas to installations and pipelines; (2) Storing gas for any purpose and recovering stored gas; and (3) Exploration with a view to use for (1) and (2)
Energy rights (Seabed)	the rights of exploitation, exploration and connected purposes for the production of energy from wind or water
Mineral Rights (Seabed)	the right to exploit the Seabed and its subsoil other than for hydrocarbons
Cables (including interconnectors)	the right to install all or part of a distribution or transmission system on or under the Seabed
Pipelines	the right to install pipelines
Whitehill	the Whitehill estate in the County of Midlothian owned by Her Majesty;
Glenlivet	the Glenlivet estate in the County of Moray owned by Her Majesty
Applegirth	the Applegirth estate in the County of Dumfries and Galloway owned by Her Majesty
Fochabers	the Fochabers estate in the County of Moray owned by Her Majesty
Aquaculture Rights (Seabed)	the right to farm aquatic organisms;
Mooring Rights (Seabed)	the right to lay and use permanent moorings
Foreshore	the land that is owned by Her Majesty: (1) In Orkney and Shetland, lying between mean high water springs and lowest ebb tide; and (2) In the rest of Scotland, lying between mean high and low water springs
Internal Waters	the land owned by Her Majesty forming the internal waters of Scotland
Salmon Fishing	the right to fish for salmon in rivers and coastal waters where the right belongs to Her Majesty
Gold and Silver (onshore minerals)	the right to all naturally occurring gold and silver except where the right is vested in some person other than Her Majesty
Reserved Minerals	all the reserved mineral rights owned by Her Majesty in Scotland other than on the Seabed

Source: Prepared January 2015 by the Crown Estate, following a request from SPICe

## The recommendations of the Smith Commission and the previous UK Government's proposals

347. The Smith Commission report recommended that responsibility for the management of the Crown Estate's economic assets in Scotland, and the revenue generated from these assets, be transferred to the Scottish Parliament. This was to include the Crown Estate's seabed, urban assets, rural estates, mineral and fishing rights and the Scottish foreshore for which it is responsible.<sup>198</sup>
348. Table 9 below produced by SPICe sets out a comparison of the Smith Commission proposals and the previous UK Government's Command Paper in the area of **The Crown Estate**.

**Table 9**

The Smith Commission	Scotland in the UK
Responsibility for the management of the Crown Estate's economic assets in Scotland, and the revenue generated from these assets, will be transferred to the Scottish Parliament. This will include the Crown Estate's seabed, urban assets, rural estates, mineral and fishing rights, and the Scottish foreshore for which it is responsible.	<p>Clause 23 would allow, but not require, the UK Treasury to make a scheme, through a statutory instrument, transferring all Scottish functions of the Crown Estate Commissioners to Scottish Ministers. This scheme can only be made with agreement of Scottish Ministers and may be modified "by agreement" (with modifications to be retrospective). The scheme will also transfer responsibility for liabilities e.g. to ensure renewables are decommissioned. "Rights and liabilities" are expected to be identified in detail in the scheme.</p> <p>The scheme will not include "property, rights or interests held by a limited partnership registered under the Limited Partnerships Act 1907". Fort Kinnaird Retail Park in Edinburgh falls into this category, and management and revenues associated with this site would remain reserved.</p> <p>Clause 23 includes provision as the "Treasury considers necessary or expedient" relating to interests of defence, national security, telecommunications, oil &amp; gas, and electricity. There is reference to an intention to transfer to the Scottish Parliament competence to legislate on the management of Scottish assets before the transfer scheme.</p>

	<p>Revenues would transfer to the Scottish Consolidated Fund, however the Command Paper refers to safeguards that taxation of oil and gas receipts will remain reserved.</p> <p>After the transfer, the Crown Estate will still be able to invest in Scotland with the management of any such investment, and revenues flowing from it, remaining reserved matters.</p>
<p>Following this transfer, responsibility for the management of those assets will be further devolved to local authority areas such as Orkney, Shetland, Na h-Eilean Siar or other areas who seek such responsibilities. It is recommended that the definition of economic assets in coastal waters recognises the foreshore and economic activity such as aquaculture.</p>	<p>Clause 23 makes no explicit reference to further devolution to local authority level, though does state that functions could be transferred to “a person nominated by the Scottish Ministers” at the point of transfer. It is expected any further devolution from Scottish Ministers would take place through Scottish Parliament legislation.</p>
<p>The Scottish and UK Governments will draw up and agree a Memorandum of Understanding to ensure that such devolution is not detrimental to UK-wide critical national infrastructure in relation to matters such as defence &amp; security, oil &amp; gas and energy, thereby safeguarding the defence and security importance of the Crown Estate’s foreshore and seabed assets to the UK as a whole.</p>	<p>The Command Paper, but not clause 23, states that a Memorandum of Understanding will be drawn up between the Scottish and UK Governments.</p>
<p>Responsibility for financing the Sovereign Grant will need to reflect this revised settlement for the Crown Estate.</p>	<p>The Sovereign Grant is not mentioned in the Command Paper – the link between Crown Estate profit and the Sovereign Grant is a proxy, rather than relating to direct funding.</p>

## Evidence received

### The legislative route adopted for devolution

349. As set out above, the Smith Commission proposed that responsibility for the management of the Crown Estate’s economic assets in Scotland, and the revenue generated from these assets, would be transferred to the Scottish Parliament.

Following this transfer, responsibility for the management of those assets would be further devolved to local authority areas such as Orkney, Shetland, Na h-Eilean Siar or other areas who seek such responsibilities.<sup>199</sup>

350. In its Command Paper, the previous UK Government sets out its approach for the devolution of these economic assets. Specifically, the new powers will be given to the Scottish Government by a transfer scheme, transferring in a single transfer the Crown Estate Commissioners' functions of managing wholly-owned Scottish property assets currently forming part of the Crown Estate.

351. The previous UK Government explains its reasoning as follows—

” The scheme has been chosen for a number of reasons. Firstly, it will enable the rights and liabilities that are transferring to be identified in detail so that the ‘starting point’ for the management of the Scottish assets in Scotland is made clear in a public manner. Secondly, it will enable provision to be made for the protection of strategic UK assets. Thirdly, the scheme will include provision for the protection of the employment rights of those Crown Estate staff who are connected with the management of the Scottish assets. This is essential to ensure that the Commissioners are able to transfer a viable on-going enterprise.

” With the approval of the Scottish Ministers, the Treasury may make a transfer scheme in relation to the management of the Scottish assets.<sup>200</sup>

352. During its consideration on this matter, the Committee heard evidence questioning why this particular legislative approach (a statutory transfer scheme which HM Treasury may make) was adopted.

353. Andy Wightman, and independent writer and researcher on land rights, set out his views on why the previous UK Government had proposed what he viewed as a complex scheme to transfer the rights. He said—

” Given its complexity, it at least has the potential to frustrate what is in my view a fairly simple task of devolving administration and management of the rights in question. That should be a fairly straightforward legislative matter, but because of the way in which the command paper has been drafted, the complex scheme that has been proposed could end up a quagmire.<sup>201</sup>

354. This requirement for a scheme was also questioned by Aileen McHarg, Professor of Public Law at the University of Strathclyde in her written submission to the Committee. She wrote, “As others have noted, this is a more complex way of transferring responsibility for the Crown Estate in Scotland than is strictly necessary.”<sup>202</sup> Professor McHarg suggested that—

” All that would have been required would have been to delete paragraph 2(3) from Schedule 5, Part 1. This would have automatically given the

Scottish Ministers and Scottish Parliament control over the Crown Estate assets in Scotland along with other “functions exercisable by any person acting on behalf of the Crown.”<sup>203</sup>

355. Professor McHarg sought to explain the reasoning that the previous UK Government may have had for the adopted of the transfer scheme in her submission to us. She wrote that—

“...in making the scheme, the Treasury is required to make such provision as it considers necessary or expedient in the interests of defence or national security [...] These are reasonable objectives. However, it is not clear why the device of a transfer scheme is necessary in order to secure them.”<sup>204</sup>

356. In his evidence to the Committee, the Deputy First Minister was critical of the translation of the agreement in the Smith Commission into the draft legislative clauses as set out in the Command Paper. He said—

“... we need to interact closely on the scheme, because it looks very complicated when, in fact, it was envisaged that the Crown Estate function and the management of the assets would be devolved to the Scottish Parliament. From looking at the scheme, it seems overly complicated for the realisation of the policy objectives that we all share.”<sup>205</sup>

357. In evidence to the Committee, Vivienne King of The Crown Estate set out its position on the use of a transfer scheme. She said—

“We are looking for absolute clarity on the transfer of the management functions of the Crown Estate so that, from day 1 after transfer, the business, which we have been running successfully, can continue running to that standard and customers understand exactly where they stand with us. [...] My firm belief is that a statutory transfer scheme is the ideal vehicle. Of course, the matter is being led by the Treasury, but I am supportive of its approach.”<sup>206</sup>

358. Some members of the Committee also questioned the specific use of the word “may” in the current draft clause relating to the role of HM Treasury in making a transfer scheme. Ms King of The Crown Estate explained—

“You will appreciate that parliamentary counsel draft the statutes, not me. My understanding is that that wording is necessary to empower the Treasury to deliver on the requirements of Smith.”<sup>207</sup>

359. In his evidence to the Committee, the Deputy First Minister recommended that, “the clause should say that the Treasury “shall” do that, or even “will” do it, which is a bit firmer.”<sup>208</sup>

360. The former Secretary of State for Scotland provided his view on this matter in writing. He said—



” The UK Treasury’s discretion to make the scheme is there in order to facilitate agreement between Scottish and UK Ministers. Draft clause 23 provides that the Treasury may not make a scheme without the agreement of the Scottish Ministers. The majority of the scheme should be non-contentious (it will simply transfer the management of the Scottish assets) but for those aspects which need to be negotiated we think it right that agreement is reached. The use of ‘may’ and the requirement for the consent of Scottish Ministers achieves that. No timescale has been included as it will first be necessary to have the legislation enacted and commenced, and the date of transfer will depend on many factors including the readiness of the transferee. Nonetheless, we are looking to implement the transfer as soon as possible after the Royal Assent subject to the preparedness of the Scottish Government.<sup>209</sup>

### **The role of successor to The Crown Estate in the rest of the UK to continue to invest in Scotland – two Crown Estates?**

361. In the Command Paper, the previous UK Government set out its view that it will remain possible for The Crown Estate to make investments in Scotland and the management of any such investment by the Crown Estate in property in Scotland after the transfer and that this will remain a reserved matter.<sup>210</sup> Reference to continued investment activity by the corporate entity that remains in the rest of the UK after devolution was not mentioned in the agreement of the Smith Commission.

362. Gareth Baird, Crown Estate Commissioner for Scotland explained the rationale behind a continued investment role for the remainder of the Crown Estate that would now operate from the rest of the UK. He said—

” At the moment, pre further devolution, the Crown Estate is a £10 billion-asset organisation. As Vivienne King said, our benchmarks in industry are recognised as being either at the top or very near the top. I am not speaking as a Crown Estate commissioner now; I am speaking as a Scot. Why would we in Scotland not want a very big, successfully managed business investing in our country?<sup>211</sup>

363. Alan Laidlaw of The Crown Estate elaborated further on the types of investment that might be envisaged by the non-devolved part of The Crown Estate. He said—

” None of the assets of the sea bed or the coastal areas would be involved. I suspect that it would probably concern areas of business investment into sectors that we are involved in elsewhere—ports and harbours, energy and others. We are discussing schemes with our tenants where they are looking for capital investment. That is alongside our ownership of the foreshore and sea bed. We would be a partner, potentially to help unlock economic activity in key sectors in Scotland.

” I was not involved in the drafting of the clauses, but I suspect that they are there so that if, for instance, a large harbour was undergoing an expansion and wanted £30 million of investment, that might be open to the Crown Estate body corporate from the south in the future.<sup>212</sup>

364. Asked whether there was scope for a joint investment in projects, such as a harbour development in Scotland, between the two corporate entities after devolution, Alan Laidlaw said. “That is highly unlikely. Having been involved in such decisions, I could not envisage that ever happening.”<sup>213</sup>

365. In a follow-up letter to the Committee, Gareth Baird, explained—

” We would not envisage making any future investment in coastal assets, rural assets, or the seabed, in or around Scotland. As with other parts of the UK the focus for our investment activity would be prime retail schemes, for example shopping centres or retail parks, where we can deploy in excess of £80-100m per asset. We often do this in partnership with major international investors, including some of the world’s largest sovereign wealth funds; investment which is generally welcomed locally. We do not see this as building up a “new Crown Estate” in Scotland, which is clearly of concern to the Committee.<sup>214</sup>

366. In its submission to the Committee, NFU Scotland was split on the implications of a continued role for the corporate entity from the rest of the UK to continue to invest in Scotland. It said—

” Whilst this is a move away from previous understanding about the operation of the Crown Estate in Scotland post-devolution, NFUS considers that once the existing Crown Estate assets in Scotland are handed over to Scotland, investment in Scotland by the ‘Scottish Crown Estate’ will be of primary concern and, so long as good management and continued investment in current assets continue, UK Crown Estate purchasing further assets in Scotland is negligible.<sup>215</sup>

367. Others who gave evidence to the Committee were not as supportive of a continued role. Explaining his concerns about the current proposals, Andy Wightman said—

” There is a further complication in that there is a proposal that the Crown Estate Commissioners should continue to have an involvement in Scotland after the rights over which they currently have responsibility are devolved. That seems to me to be both improper and politically very complex.<sup>216</sup>

368. He elaborated further—

” I do not understand why, in the same breath, one would devolve the administration and management, yet a new Crown estate would arise,

phoenix-like, from the ashes of the scheme to continue to be administered and managed exactly as it is now.<sup>217</sup>

369. The Deputy First Minister was also critical during his evidence to the Committee. He said—

” The Crown Estate continuing is a very interesting concept. This is where we get into the space in which I think that the spirit of the Smith commission is not being respected. We all know what we are talking about here. This issue has been around for a long time and lots of people have got long-standing commitments in this area that they thought would be fulfilled by the Smith commission. Hey presto! One Thursday morning a committee is advised that, although it has been devolved, the Crown Estate will still be here and continuing its activities. It is disrespectful to the spirit of the Smith commission and what it concluded.<sup>218</sup>

370. He explained his views later in his evidence to the Committee—

” I return to what the Smith commission said on this, which was about the devolution of the Crown Estate to Scotland and, within Scotland, to our island communities. If the Smith commission had said that the Crown Estate assets would be devolved but the Crown Estate would be allowed to continue in Scotland, people’s jaws would have hit the table. There is a real danger of having an undesirable and confusing competitive environment, but more importantly, the Crown Estate has taken a fundamentally disrespectful view.<sup>219</sup>

371. The former Secretary of State for Scotland wrote to the Committee on this issue. He said—

” It is correct that, in theory, the Crown Estate will still be able to make commercial investments in Scotland as and when suitable investment opportunities arise just like any other business. Taking a different approach would be to turn away potential inward investment in Scotland. This has not, however, been a particular feature of the way that the Crown Estate has operated over the year.

” Any future investments in Scotland by the Crown Estate would continue to be made in accordance with its commercially independent investment strategy which reflects the requirements of the Crown Estate Act 1961. The Act requires a commercial return to be secured from investments, but does not preclude joint investment with any fully compatible party.

#### **‘Jointly held’ economic assets that are excluded from transfer – Fort Kinnaird**

372. The draft legislative clauses produced by the previous UK Government allow for the functions relating to the Crown Estate that exist of property, rights or interests in land in Scotland, excluding property, rights or interests mentioned in subsection

(3) to be devolved. Subsection 3 excludes property, rights or interests held by a limited partnership registered under the Limited Partnership Act 1907.<sup>220</sup>

373. One particular asset that falls into this category is that of the Fort Kinnaird. Fort Kinnaird is a large outdoor retail park located in the South-East of Edinburgh and opened in 1989. Work began in 2013 on a £24 million extension to the park. This is not listed amongst the Crown Estate's urban assets and as such would not be devolved. In correspondence with SPICe the Crown Estate advised—

” Fort Kinnaird isn't classified as an asset in the same way. It is held in an English Limited Partnership as a joint venture unit trust managed and majority owned by British Land plc., known as the Gibraltar Limited Partnership. The investment includes retail assets in both Scotland and in England. We are working on the basis that a partnership share in an ELP (which includes English and Scottish properties) does not fall within the description of “an economic asset in Scotland” and we are working with officials to inform legislation that will provide confirmation on that point.<sup>221</sup>

374. This position was explained by Vivienne King of The Crown Estate during her appearance. She said—

” Fort Kinnaird is held in a separate structure. It is not actually a Scottish asset in the Crown Estate's Scottish portfolio; our interest in it is a partnership interest that is held in a mixed property English limited partnership along with another property in Cheltenham. We do not have a direct interest in the property and do not manage it. We have never included it in the financial statement for Scotland that is contained in our Scotland report. As a result, it is not an economic asset in Scotland as envisaged by Smith.<sup>222</sup>

375. In subsequent correspondence requested by the Committee, The Crown Estate set out further details in relation to the Fort Kinnaird investment. This confirmed that the net revenue (covering all revenue generated in the English limited partnership (net of borrowing) from all its interest) in the Gibraltar Partnership totalled £38.8 million between 2007/08 and 2013/14. The Crown Estate explained—

” The Crown Estate is a 50:50 joint venture partner with the Hercules Unit Trust – which owns the other limited partnership interest. Hercules Unit Trust is a property unit trust, managed by Schroders, which holds investments worth around £1.7 billion in retail property across the United Kingdom. Hercules Unit Trust is circa 67 per cent owned by FTSE100 listed property company British Land, the balance being owned by a range of pension funds and other institutional investors. The Crown Estate's revenues from the Gibraltar Partnership (which holds assets in England and Scotland) are split 50:50 with the Hercules Unit Trust.<sup>223</sup>

376. Asked for his view on whether Fort Kinnaird should have been included in the economic assets to be devolved, the Deputy First Minister said—

” This is a very good example of what I have been talking about. If Fort Kinnaird were not to be devolved, that would strike me as not being in the spirit of what the Smith commission agreed.<sup>224</sup>

377. Asked by the Committee whether The Crown Estate would have any intention of making future investments in Scotland through this type of limited partnership investment structure prior to devolution taking place and whether there would be anything that would legally prevent The Crown Estate from doing so, the organisation responded—

” We have no intention of making such investments prior to devolution, but would not want to be barred from making such investments. Legally, we do not believe that we are prevented from doing so.<sup>225</sup>

378. The former Secretary of State for Scotland set out his views on this matter in a letter to the Committee. He said—

” ...the management of all the Crown Estate’s wholly-owned Scottish assets will be transferred under the transfer scheme. This does not include Fort Kinnaird. The Crown Estate holds an interest in an English limited partnership which owns property in different parts of the UK including Fort Kinnaird in Scotland.<sup>226</sup>

## **Definition of zones**

379. At point of devolution, responsibility for the foreshore and the territorial seabed will transfer to Scottish Ministers and the Scottish Parliament. During an early part of our scrutiny, the question arisen of how far this extended out from the shore. The Scotland Office clarified the situation as follows—

” Currently, the Crown Estate has responsibility for management of the foreshore and territorial seabed out to 12 nautical miles. The Crown Estate also has responsibility for certain economic activities in the Exclusive Economic Zone (which extends to a maximum of 200 nautical miles from shore). Post devolution, the Crown Estate’s role will pass to the new Scottish Manager.<sup>227</sup>

380. What was less clear from the evidence heard by the Committee is whether there is any distinction between the differing zones referred to in the Smith Agreement and Command Paper and how these are defined, particularly the concept of a “Scottish zone”. Three different zones are mentioned in the proposals as far as the sea bed is concerned: the exclusive economic zone, the Scottish zone and the Scottish maritime zone.

381. In follow-up information, The Crown Estate explained—

- ” The “Scottish zone”: The “Scottish zone”, which is referenced in new section 90B(2)(b) of the draft bill is already defined in section 126(1) of the Scotland Act 1998 as being “*the sea within British fishery limits (that is, the limits set by or under section 1 of the Fishery Limits Act 1976) which is adjacent to Scotland*”
- ” The referenced fishery area includes the whole of those areas on the continental shelf where The Crown Estate manages sovereign rights to minerals, offshore renewables and gas storage (under the Continental Shelf Act 1964, the Energy Act 2004 and the Energy Act 2008 respectively) to a maximum of 200nm from shore.
- ” Those boundaries were later formalised under the Scottish Adjacent Waters Boundaries Order 1999 (setting the limits as against the rest of the UK) and we are therefore clear that Crown assets managed by The Crown Estate on the continental shelf adjacent to Scotland (to a maximum of 200nm) will devolve to Scottish Ministers.<sup>228</sup>

### Devolution / decentralisation beyond the Scottish Parliament

382. As an integral part of the plans for the Smith Commission to devolve the management and revenues of the economic assets held in Scotland to the Scottish Parliament was the agreement that this should be followed by a further process. Specifically, the Smith Commission recommended that, following transfer to the Scottish Parliament, responsibility for the management of those assets would be further devolved to local authority areas such as Orkney, Shetland, Na h-Eilean Siar or other areas who seek such responsibilities. It was recommended that the definition of economic assets in coastal waters recognises the foreshore and economic activity such as aquaculture.

383. As part of the evidence received on this matter, the Committee took representations via a written submission from Comhairle nan Eilean Siar, Shetland Islands Council and Orkney Islands Council on behalf of *Our Islands: Our Future Campaign*. They wrote—

- ” The position of the Campaign is that the management of local asset revenues by Local Authorities makes sense because only these Local Authorities truly represent the communities hosting Marine Estate developments and only these Local Authorities have a detailed knowledge of their own economic situation with the insight to provide targeted economic interventions when they are needed.<sup>229</sup>

384. Similarly, the view of local authority umbrella group CoSLA was that—

- ” This proposal builds on COSLA’s long standing case for greater devolution of Crown Estate and also Marine planning responsibilities to coastal authorities and communities....We need to ensure that the Smith Commission’s recommendations are acted on in full by ensuring that



Crown Estate operations and associated revenues are fully devolved to Local Government.<sup>230</sup>

385. Representatives of The Highland Council told the Committee that it was keen to ensure that devolution down to local authority level happens, and that they are included in the other areas who seek such responsibilities referred to in the Smith Agreement. Steve Barron, Chief Executive of Highland Council stated—

” The Highland Council’s position is well aligned with that of the island authorities. The council wishes to see Crown Estate revenues directed to local coastal communities and the management of Crown Estate transferred from the commissioners to the Scottish Parliament and local communities, as appropriate [...] The Smith Commission report mentions the islands specifically but does not mention Highland Council. That is of concern to us, given the lead role that we have played in establishing and leading the working group and the high relative value of the Highlands in terms of the Crown Estate income.<sup>231</sup>

386. In his evidence session, the Deputy First Minister reaffirmed his support for this process. He said—

” We are open to pursuing that discussion with island authorities. We recognise their specific and special interest in the area. That is why Mr Mackay is working with the island authorities on those points. We have to see it within the wider context of the framework that is put in place.<sup>232</sup>

387. Not all of those who gave evidence to the Committee were fully supportive of the proposal to devolve certain economic assets to local authorities. In their written submission to the Committee, Scottish Renewables, RYA Scotland and Walter Speirs, Director, Muckairn Mussels Ltd made comments along these lines as follows—

” **Scottish Renewables** – “While Scottish Renewables understands the case for greater local ownership and sharing of revenues, we would again emphasise that strategic oversight of our offshore assets would best be achieved by a Scotland-wide body which could ensure continued investment in the growth of offshore renewables, and a consistent leasing process for developments.”<sup>233</sup>

” **RYA Scotland** - “The decentralisation of powers from a single expert body to multiple local bodies is likely to result in a loss of institutional knowledge and expertise. Further we are concerned that the bodies receiving these new powers may not have the financial or staff resources to properly discharge their duties in respect to marine seabed and foreshore management [...] we have concerns regarding the suggestion of devolving powers beyond the level of a single national body. With a few specific exceptions of island authorities, we believe the case for decentralising the



powers and functions of the Crown Estate to local authorities has yet to be soundly made.”<sup>234</sup>

” **Walter Speirs** - “I agree that what the Smith Commission has proposed is correct in one sense, but it is also hugely complex. There is a simple solution: there is the management job to be done with the estates, and at present that is done very well, in my opinion, by the Crown Estate. The revenues seem to be what is in question, but I see no reason why, through the existing management structure, the revenues cannot be channelled to wherever the Scottish Government decides to put them. That would mean that existing tenants would not have a period of uncertainty in which, in all probability, different regimes would operate in different areas of Scotland.”<sup>235</sup>

388. However, Steve Barron, Chief Executive, The Highland Council, and Councillor Angus Campbell, Leader, Comhairle nan Eilean Siar, were both very confident that their local authorities could deal with the new responsibilities. Steve Barron told the Committee that—

” Highland Council is well able to take on the responsibilities and has in-house expertise. We are already working with harbours and we are dealing with marine planning and aquaculture issues perfectly professionally. Taking on the new powers and responsibilities would enhance rather than add to what we do.”<sup>236</sup>

And that—

” It is very clear to us that the work that the Crown Estate does on the ground could easily be taken into local authorities. We have the ability to do such things already, so it would be an expansion of that.”<sup>237</sup>

389. To better understand the importance of this matter to island communities, the Committee undertook a visit to the Shetland Islands in March 2015. The ability of the local authority, in its opinion, to take on these responsibilities was made clear to us in the meetings we held with Shetland Island Council. Others we met on the island broadly shared this view although some expressed the need for any revenues generated to be carefully ring-fenced and invested back into local industries such as aquaculture and not to be considered as general revenue.

## **Devolution (Further Powers) Committee**

New Powers for Scotland: An Interim Report on the Smith Commission and the UK Government's Proposals, 3rd Report, Session 4 (2015)



**Committee members on a visit to The Shetland Islands at Scottish Sea Farms Taing Shore Base, Burra Isle, Shetland**

390. It was further made clear to us that there is scope for a wider devolution to, or at least partnership working with, others in these areas such as harbour and port authorities, local marine interests and experts etc.

## **Conclusions and recommendations on The Crown Estate**

391. The Committee agrees that the particular legislative approach adopted to devolve the management and revenues of The Crown Estate could be construed as overly complicated unless there is full transparency and full consultation with the Scottish Parliament and Government during the process. The Committee believes that there is merit in considering an approach based on that set out by Professor McHarg and others. The Committee recommends that the UK Government considers revising its drafting approach

392. Furthermore, if a transfer scheme of this type is to be adopted, then the Committee recommends that the UK Government replaces the word “may” in draft clause 23 with “shall”.

393. **The Committee believes that it is right and proper that the corporate entity that exists to manage the non-devolved assets of The Crown Estate in the rest of the UK should be free to decide its own activities. However, the Smith Agreement was very clear that the management and revenue of The Crown Estates economic assets held in Scotland should be devolved. The UK**

**Government's current proposals may result in the creation of 'two Crown Estates'. We believe this is not consistent with the Smith Agreement. The Committee therefore has serious concerns regarding the situation in Scotland post-devolution and the competition and confusion that may arise from this.**

394. The Committee would wish to see absolute clarity on this matter from the UK Government and HM Treasury in particular (as The Crown Estates' sponsoring department) and we recommend that, at the very least, there should be an obligation placed on the non-devolved Crown Estate to consider the option of shared investments with the devolved Crown Estate in Scotland, with a fair allocation of revenues.

395. The Committee notes the previous UK Government's intention to exclude Fort Kinnaird from devolution. The Committee sees no need for this proposal and calls on The Crown Estate and HM Treasury to find a means of ensuring that a full share of the Crown Estate's revenues from Fort Kinnaird accrue to Scotland. Furthermore, the Committee is concerned that the investment vehicle used in the example of Fort Kinnaird could be repeated as a means of avoiding the devolution of future investments in the intervening period between the passing of any bill and the transfer of assets.

396. We seek clarity on the longer-term operation of the policy and financial position of the Crown Estate on this issue. The Committee believes that Scotland should receive its fair share from any such investment vehicles operating within Scotland in the future.

397. The Committee is reassured by the clarification provided by the Scotland Office on the issue of economic rights and assets out to 12 and 200 nautical miles. However, when any bill is introduced, we believe that it will be important to be clear about the definition of any zone referred to in the legislation to avoid the potential for confusion.

398. Once the powers over the Crown Estate have been transferred, the Committee recommends the early implementation of the Smith Commission recommendation that "responsibility of the management of the Crown Estate assets in Scotland should be devolved further to local authorities such as Orkney, Shetland, Na h-Eilean Siar or other areas who seek such responsibilities".<sup>238</sup> These are matters where discussions should, in our view, continue to progress as a matter of urgency and we endorse the work of the Scottish Government and the *Our Islands, Our Future* initiative to reach an amicable agreement that suits local circumstances.

399. **The Committee believes that there is scope in some communities for further devolution of the management of certain economic assets to, or at least partnership working with, others in these areas such as harbour and port authorities, local marine interests and experts etc.**

400. We recommend that the Scottish Government keeps this and other committees in the Parliament up-to-date with the discussions with local authorities and others as they continue, and report to the Scottish Parliament for endorsement before agreement on any proposals for further devolution is reached.

401. The Committee recognises that The Crown Estate has made itself available to report to Parliamentary committees on an annual basis (and has done three or four times) and that this Committee recommends that the Scottish Parliament would expect such regular scrutiny to continue.

402. The Committee notes the previous UK Government's intention that the Scottish and UK Governments will draw up an Memorandum of Understanding, including further detail on the legal protections for defence or national security as well as providing that the transfer of management responsibility for the Crown Estate is not detrimental to UK-wide critical national infrastructure in relation to matters such as oil and gas, telecommunications and energy, thereby safeguarding the importance of the Crown Estate's foreshore and seabed assets to the UK as a whole. **The Committee expects the Scottish Parliament to be consulted during the process of drawing up the MoU.**

403. Finally, the Committee welcomes the comments from the Crown Estate Commissioner for Scotland that discussions are already underway with staff on the implications to them. The Committee expects the recommendations in the Smith Commission report to be fully implemented, such as the commitment to the protection of the employment rights of those Crown Estate staff who are connected with the management of the Scottish assets.

## Other provisions and issues

### Background

404. The report of the Smith Commission and the previous UK Government's Command Paper contain a number of provisions that have not been covered by the Committee in preceding sections of its report, as they were not the immediate focus of the oral evidence sessions we were able to organise in the time available before the UK General Election. However, some of these provisions were areas where we did receive some written evidence and this is reflected below.
405. It would be the intention of the Committee that should such provisions be contained in any bill introduced by a new UK Government after the UK General Election, then these would be scrutinised as part of the legislative consent process.

### Recommendations of the Smith Commission

#### Payday Loan Shops

406. The Smith Commission report states that the Scottish Parliament will have the power to prevent the proliferation of Payday Loan shops.<sup>239</sup> In its Command Paper, the previous UK Government stated that—
- ” Planning powers are already devolved in Scotland, meaning that the Scottish Parliament already has legislative competence to pass laws in relation to planning, including the use of shops for payday loan businesses across Scotland.
- ” Officials in the UK Government and Scottish Government will continue to discuss this part of the Smith Commission Agreement to consider whether any other action is required to deliver it.<sup>240</sup>
407. As such, the previous UK Government has not included the proposals of the Smith Commission in their draft clauses.
408. In its written submission of evidence to the Committee, Citizens Advice Scotland wrote—
- ” We are aware that planning laws can only tackle Payday Loan shops and do not tackle online presence of many payday companies. In response to a recent consultation, CAS supported the intention to allow planning authorities the ability to control the provision of both payday lending shops and betting offices if they feel the need due to overprovision in the local area. The impacts of inappropriate high-cost lending are numerous and CAS has extensively set out our evidence on the impacts of such borrowing in recent years. Using planning laws should not be seen as providing a

blanket ban on such facilities but the government's proposal did allow for individual decisions to be made on a local basis thus allowing for controls to be implemented if there is local reasoning for doing so. CAS believes that the level of control that was consulted on is appropriate and allows the planning authority to take into account if further provision would be damaging to an area and its citizens. CAS is therefore disappointed that the Scottish Government decided after consultation that they will not progress the ability for planning authorities to control over-provision.<sup>241</sup>

**409. Citizens Advice Scotland concluded—**

” We would reiterate this stance if both Governments are to address fully and positively, the issues people currently face with debt and access to credit and banking. CAS would recommend, as we did in our Smith Commission submission, that this is done through closer co-operation and communication, not just between Governments, but between other institutions and organisations directly with the Scottish Government, Scottish Parliament and other stakeholders in Scotland such as Citizens Advice Scotland.<sup>242</sup>

**410. Money Advice Scotland commented as follows that—**

” more should be done to raise awareness of the negative impacts and alternatives to payday loans. Such as:

- Regulation on advertising: mainstream events and appealing to children (e.g. football matches, puppet advertising, attractive bright colours on adverts making it appear fun and non-serious to borrow money with high interest rates).
- Further regulation on interest rates and charges.
- Regulation on delivery of sale of loan: identify that the customer understands what they are signing up to and the impacts it may have upon their finances. There needs to be better affordability tests in the first instance<sup>243</sup>

**411. The initial view of the Committee is that the current provisions could go further and consideration could be given to including powers over licensing and regulation not just planning.**

**Fixed-Odds Betting Terminals**

412. The Smith Commission report states that the Scottish Parliament will have the power to prevent the proliferation of Fixed-Odds Betting Terminals.<sup>244</sup> While the previous UK Government's draft clauses look to devolve this power to the Scottish Parliament, and places the relevant clause under the heading '*Power to change the number of fixed odds betting terminals*', the Command Paper states "The



amendments made by this section do not apply in relation to a betting premises licence issued before this section comes into force.”<sup>245</sup>

413. The Committee received a small number of written submissions of evidence in this area. The submission by the Law Society of Scotland, for example, questions whether the previous UK Government’s draft clauses give proper effect to paragraph 74 of the Smith Commission Agreement. The Law Society wrote—

” We note that the exception will only permit the variation of the number of FOBTs authorised by a new betting premises licence, but does not in terms of Clause 33(6), apply to existing betting premises licences.

” Consideration should be given to devolve competence to permit the variation of the number of gaming machines authorised by existing gaming licences.

” Furthermore the Gambling Act 2005, Section 172 provides the authority for allowing various categories of gaming machines, defined in the relative regulations according to stake and prize money. Clause 33(1) excepts from the reservation the setting of the number of gaming machines where the stake is more than £10. The Scottish Parliament should be able to limit the number of machines irrespective of the value of the stake.”<sup>246</sup>

414. The submission from the Association of British Bookmakers Ltd (ABB) looked at the issue of problem gambling. ABB stated that it did not believe that reducing the number of fixed-odd betting terminals was the best way to deal with the issue. ABB concluded as follows—

” All current research indicates that problem gambling is about the person not the product. Therefore we firmly believe that the proposed policy undermines a co-ordinated and effective harm reduction strategy for Scotland.”<sup>247</sup>

415. **At this stage the Committee has not taken any detailed oral evidence on this issue. We look to do so once we receive any bill introduced by a new UK Government. However, at this stage, the Committee questions whether the draft clause, as currently written, gives any meaningful effect to the Smith Commission proposals in this area. The draft clause would only provide the power to restrict the number of Fixed-Odds Betting Terminals where a new betting premise licence is being sought. The Committee has some sympathy with the Law Society of Scotland submission that the clauses should be amended to include the ability to limit the number of gaming machines in both existing and new betting premises.**

## **Tribunals**

416. The report of the Smith Commission recommended that—



” 63. All powers over the management and operation of all reserved tribunals (which includes administrative, judicial and legislative powers) will be devolved to the Scottish Parliament other than the Special Immigration Appeals Commission and the Proscribed Organisation Appeals Commission.

” 64. Despite paragraph 63, the laws providing for the underlying reserved substantive rights and duties will continue to remain reserved (although they may be applied by the newly devolved tribunals).<sup>248</sup>

417. Inclusion Scotland stated that they welcomed the draft clauses transferring responsibility for administration of tribunals to the Scottish Government and hoped that the Scottish Parliament will use this new power to address the financial barriers caused by increased fees for taking cases to tribunals.<sup>249</sup>

418. The Committee also received evidence from the Law Society of Scotland that highlights some concerns regarding the draft clause relating to Tribunals (Clause 25). It said—

” In general terms we welcome the inclusion of Clause 25 which is directed at tribunals dealing with reserved matters in Scotland. We however have reservations about the drafting of Clause 25, believing it does not give effect to Paragraphs 63 and 64 of the Smith Commission Report. We believe that Clause 25 sets limitations on the transfer of responsibility for management of transferred tribunals.<sup>250</sup>

419. However, the Law Society of Scotland stated that in implementing Paragraph 63 of the Smith Commission Report there must be some scope for the continued reservation of the substantive law and that that may take forms which require some limitation on the functions transferred. Its view was that limitations on the transfer should be only such as are objectively necessary and that they must not be unduly restrictive of the principle in Paragraph 63.

420. The Society called for the complete transfer of responsibility in this area to avoid questions as to the status of tribunals which deal with Scottish matters but which were not within the devolved responsibility of the Scottish Parliament. In its view, without clarification in statute, questions might arise as to whether such tribunals dealing with Scottish issues (while not part of the Scottish Tribunals system) were in fact part of the English legal structure.

421. The Law Society of Scotland also set out a series of further issues which are set out in its written evidence to the Committee.

422. **The Committee welcomes the transfer of powers for tribunals to the Scottish Parliament but notes the views of the Law Society of Scotland about the drafting of the relevant clause and potential limitations. The Committee seeks assurances from the UK Government on these matters before a new bill is introduced after the UK General Election.**

## Broadcasting

423. The report of the Smith Commission recommended that—

” There will be a formal consultative role for the Scottish Government and the Scottish Parliament in the process of reviewing the BBC’s Charter. The BBC will lay its annual report and accounts before the Scottish Parliament and submit reports to, and appear before, committees of the Scottish Parliament in relation to matters relating to Scotland in the same way as it does in the UK Parliament.

” The power to approve OFCOM appointments to the board of the MG Alba will rest solely with Scottish Ministers.<sup>251</sup>

424. In its Command Paper, the previous UK Government stated that this will be enacted by Memorandum of Understanding (MoU). This MoU, entered into by the UK Government, Scottish Government, Scottish Parliament and the BBC, will fulfil the Agreement’s proposal by setting out commitments that guarantee a full consultative role for the Scottish Government and Scottish Parliament in the review of the Royal Charter and the on-going scrutiny of the BBC.<sup>252</sup>

425. **It could be expected that the discussions on the MoU would need to be completed before work on reviewing the BBC’s Royal Charter begins in the summer of 2015. The Committee, therefore, gives notice that it intends to take a role in considering the draft MoU and report to Parliament in due course.**

## Food labelling and seafood/red meat levies

426. These are areas where the Committee took some informal evidence from local industry groups during our visit to the Shetland Islands. Some concerns were raised by these bodies and we intend to return to these issues following introduction of any bill after the UK General Election. **In any reforms to these schemes, the Committee believes it will be important that Scotland has the ability to introduce an EU recognised ‘Made in Scotland’ label and also that Scotland is able to decide at any stage whether to opt into UK arrangements on seafood/red meat levies and, if so, receives an equitable share of any UK monies levied.**

## Elections, the workings of the Scottish Parliament etc.

427. The Smith Commission made a series of recommendations relating to elections to the Scottish Parliament and to the functioning of the Parliament. The Committee has not taken detailed evidence on these matters at this stage. The Committee is aware that work is on-going at official level to comment on the draft clauses. The Committee intends to return to these issues following introduction of any bill after the UK General Election. The Committee expects the commitments in the Smith Agreement to be translated into legislation by a new UK Government. The

Committee will work with other committees, such as the Standards, Procedures and Public Appointments Committee on these matters.

**Telecommunications, postal services, energy, transport, health and social affairs, and consumer protection**

428. The Smith Commission made a series of recommendations relating to elections to the Scottish Parliament and to the functioning of the Parliament and the Committee expects these to be translated into legislation. The Committee has not taken detailed evidence on these matters at this stage. The Committee intends to return to these issues following introduction of any bill after the UK General Election.

**Additional issues raised by the Smith Commission**

429. The Smith Commission report also made a number of recommendations on other additional issues for consideration. These were areas where the political parties raised a number of additional policy matters which do not involve the devolution of a power to the Scottish Parliament. Whilst the Committee did not take any formal oral evidence on these issues, we did receive various written submissions that looked at some of the issues, and we reflect this evidence below.

**Post-Study Work Visas**

430. The Smith Commission recommended that both governments work together to explore the possibility of introducing formal schemes to allow international higher education students graduating from Scottish further and higher education institutions to remain in Scotland and contribute to economic activity for a defined period of time.<sup>253</sup>
431. In previous years, the Scottish Government introduced a scheme similar to the Smith Commission's recommendations known as the *Fresh Talent – Working in Scotland Scheme*. *Fresh Talent* was an immigration scheme launched to deal with problems of population decline and skill shortages in Scotland. It ended on 29 June 2008, when it was replaced by the Tier 1 (Post Study Work) Programme at UK level. *Fresh Talent* allowed non-EEA nationals who successfully complete a relevant Scottish degree or postgraduate qualification to work or set up a business in the UK for 24 months without needing a Work Permit. The principle of the scheme, and of its successor, was to retain skilled and educated graduates as part of the UK labour force, who could then switch to longer term schemes. The Tier 1 (Post Study Work) Programme closed on 5 April 2012.
432. In its submission to the Committee, the National Union of Students Scotland stated it was—



...disappointed that the publication of the draft clauses did not also include an update on this, and the other areas for consideration, and concerned that it will simply be deferred until following the UK general election, leaving

it to the whim of the government of the day as opposed to being part of this, defined process.<sup>254</sup>

433. As a minimum, the NUS Scotland called for the introduction of more flexibility in Scotland and a scheme similar to *Fresh Talent*.
434. Universities Scotland in its submission asked for, the “Early introduction of a devolved capacity to re-introduce a two-year post-study work entitlement for international students graduating from Scottish higher education institutions”.<sup>255</sup> It noted that the Scottish Government has put work in hand with Universities Scotland and other stakeholders to design a new scheme to allow international graduates to contribute to the Scottish economy, but its implementation is dependent on UK Government agreement.
435. **The Committee reinforces the recommendation of the Smith Commission on this issue and believes that this important issue should be addressed through discussion between the two governments in advance of the introduction of any new bill after the UK General Election.**

### Victims of Trafficking

436. The Smith Commission raised the issue of victims of human trafficking. It said both governments should explore the possibility of extending the temporary right to remain in Scotland for someone who is identified as a victim of human trafficking, including in particular to enable the individual to participate in relevant legal proceedings.
437. In a written submission received from Scottish Women’s Convention (SWC), it said—

” The SWC would wholeheartedly support this proposal. The women whose lives have been blighted by exploitation, rape and other forms of abuse are valued, and they deserve to be afforded the opportunity to access the support and assistance necessary to move on from their ordeal.<sup>256</sup>

438. **The Committee reinforces the recommendation of the Smith Commission on this issue and believes that this important issue should be addressed through discussion between the two governments in advance of the introduction of any new bill after the UK General Election.**

### Additional issues for consideration

439. The Committee notes the other issues contained within the Smith Commission report in the section of the report entitled ‘Additional issues for consideration’, relating to: asylum seekers; fines, forfeitures, fixed penalties imposed by courts and tribunals and sums recovered from crimes; and, the functions and operations of the Health and Safety Executive. **The Committee reaffirms the view of the**

**Smith Commission that these issues need to be the subject of discussion between the two governments.**

440. The Committee also notes the recommendations of the Smith Commission in relation to health and social affairs which were that:

” The parties are strongly of the view to recommend the devolution of abortion and regard it as an anomalous health reservation. They agree that further serious consideration should be given to its devolution and a process should be established immediately to consider the matter further.

” The devolution of xenotransplantation; embryology, surrogacy and genetics; medicines, medical supplies and poisons; and welfare foods (i.e. matters reserved under Sections J2 to J5 of Head J – Health and Medicines, Schedule 5 to the Scotland Act 1998) should be the subject of further discussions between the UK and Scottish Governments. Those discussions are without prejudice to whether or not devolution takes place and in what form.

441. **The Committee considers that these issues require serious further consideration and discussion between the Scottish and UK Governments.**

# Inter-governmental relations and parliamentary oversight

## Background and recommendations of the Smith Commission

442. By design, intergovernmental relations (IGR) in the UK are mainly informal and underpinned by the need for good communication, goodwill and mutual trust. The Memorandum of Understanding (MoU), the concordats between the Scottish government and Whitehall departments, and the Devolution Guidance Notes were intended at the time of the initial devolution to Scotland, Wales and Northern Ireland to embody and nurture a co-operative working culture among civil servants in different administrations on a day-to-day basis.
443. The MoU provided for the establishment of a Joint Ministerial Committee (JMC) to bring together all three of the devolved administrations with the UK Government. It met only a few times in plenary and functional formats before becoming largely redundant in 2002. The exception was the JMC (Europe) where there was a clear and continuing need to bring the devolved administrations together with the UK Government before European Council meetings.
444. The JMC was only resurrected after the emergence of party political incongruence in the composition of governments north and south of the border in 2007. It now meets annually in plenary format and when required (usually annually) in its domestic format. Meetings of the JMC (Europe) continue to conform to the timetable of European Council meetings.
445. Table 10 below sets out further information on the recent frequency of JMC meetings.

**Table 10: The number of Joint Ministerial Committee meetings since June 2007**

Year	Plenary	Europe	Domestic
2007	0	4	0
2008	1	4	0
2009	1	4	2
2010	1	4	2
2011	1	4	1
2012	1	4	2
2013	1	4	1
2014	1	4	1

Source: Information provided to SPICe by the Scottish Government

446. It is important to note that the JMC is a consultative not an executive body – it facilitates communication, not co-decision. In 2011, it developed a Dispute Avoidance and Resolution Protocol for those issues ‘where a dispute cannot be resolved bilaterally or through the good offices of the relevant territorial Secretary of State’. Several disputes have been considered under this protocol, including a dispute raised by the three devolved administrations with the UK Government over Barnett consequentials arising from spending on the 2012 London Olympics.
447. The JMC remains the tip of the iceberg of intergovernmental relations. A number of other forums bring the UK and devolved governments together, e.g. the ‘Finance Quadrilaterals’ between devolved Finance secretaries and Treasury ministers. Some bilateral forums have emerged, including the Joint Exchequer Committee and, recently, the new Joint Ministerial Working Group on welfare, though these are mainly focused on facilitating the implementation of new devolved powers.
448. Most intergovernmental exchange continues to take place below the radar, between officials of varying levels of seniority working in similar or overlapping policy issues on a (vertical and horizontal) bilateral basis and ultimately in ad hoc meetings between ministers.

### **The Smith Commission’s views**

449. The report of the Smith Commission emphasised the need for change to the current system of inter-governmental relations in operation within the United Kingdom. Lord Smith, in his foreword to the Commission report, highlighted this issue as follows—

” Throughout the course of the Commission, the issue of weak inter-governmental working was repeatedly raised as a problem. That current situation coupled with what will be a stronger Scottish Parliament and a more complex devolution settlement means the problem needs to be fixed. Both Governments need to work together to create a more productive, robust, visible and transparent relationship. There also needs to be greater respect between them.<sup>257</sup>

450. In his evidence to the Committee in this subject, Lord Smith commented on the current system of inter-governmental relations in the following terms—

” The system is kind of broke and is not working perfectly, and that is getting in the way. I am talking about civil servants, too. If we fix things quite formally at ministerial level, there will be an opportunity for such an approach to cascade down.<sup>258</sup>

451. The current system of inter-governmental relations is primarily governed by a range of non-statutory arrangements. Professor Aileen McHarg of the University of Strathclyde summarised these arrangements as follows—



” The current machinery for inter-government relations is largely non-statutory – contained in a Memorandum of Understanding (MoU) and Supplementary Agreements, as well as various Bilateral Concordats between the UK Government and the devolved administrations, which are expressly declared not to be legally-binding.<sup>259</sup>

452. As part of a process of reform, the Smith Commission recommended a number of changes in relation to inter-governmental working. These included that:

- the current Joint Ministerial Committee structures required to be reformed and scaled up to reflect the content of the Smith Commission report;
- formal processes should be developed via which the Scottish and UK Parliaments can collaborate in order to hold their respective Governments to account;
- the Memorandum of Understanding between the UK Government and devolved administrations be revised;
- a stronger and more transparent process of parliamentary scrutiny of inter-governmental relations be established; and
- mechanisms be established to resolve inter-administration disputes.

## Evidence received

### Views of the two governments

453. The former Secretary of State for Scotland commented, in evidence to the Committee, on the approach of the UK Government post-devolution in 1999 that—

” In many ways, after the Scottish Parliament was set up in 1999, the UK Government kind of left the field in Scotland. We did not do enough to remind people here of the continuing, substantial responsibilities that we have as a Government, and more requires to be done in that regard. One thing that the referendum campaign brought about was a beefing up of the Scotland Office operation in terms of stakeholder engagement—I use that term loosely. That involved better engagement not just from the Scotland Office but from UK Government departments across the field.

” At the Scottish business board a few weeks ago, one of the members said to me that it had been great for the past couple of years, with people such as the permanent secretary to the Department for Transport coming up to talk to and engage with people directly, and he asked me to promise that that sort of engagement will continue. I could give him that promise, because I am determined that it will.

” There is no denying the fact that we—I mean the UK Government in a previous guise—somewhat took our eye off the ball. There is no point getting excited about that now, but we will do it differently in the future.<sup>260</sup>

454. The Deputy First Minister commented on the current operation of inter-governmental relations and the scope for improvement in the following terms—

” A lot of the joint work that goes on between the Scottish and United Kingdom Governments is good and orderly, but there is room for significant improvement in other areas. Generally, those are areas such as welfare policy, where we disagree about how we should proceed. I get very frustrated by having decisions taken in London of which I completely disapprove; that is at the heart of my frustration about many of the choices that we have to make.

” In trying to resolve such issues, we must have better intergovernmental machinery. However, we should not try to persuade ourselves that all the disagreements that we have will disappear with lovely intergovernmental machinery; we will still disagree about certain matters because of our different views. That is a difficulty of politics.<sup>261</sup>

455. Speaking specifically about IGR mechanisms in the area of finance, the Deputy First Minister set out his views to the Committee on reforms that he believed were necessary. He said—

” One of my frustrations with the finance ministers' quadrilateral and the Joint Exchequer Committee is that, ultimately, if we do not like what happens, the Treasury view tends to prevail. I do not think that that enables the obtaining of an outcome that is satisfactory to the Scottish interest in all circumstances.

” One issue that needs to be explored is how we can make the intergovernmental machinery a more meaningful part of the process—how we can enable discussions to take place in such a fashion that they lead to devolved Administrations feeling that they have made some progress, as opposed to being thwarted by a final view being taken by the Treasury or the UK Government.<sup>262</sup>

### **Effectiveness of the current system for IGR and on the recommendations for reform**

456. Professor Charlie Jeffery, in evidence to the Committee, commented on the current inter-governmental machinery and whether the structures were currently in place to implement the Smith recommendations. He said—

” The answer to that is: not yet, no. Page 15 of the Smith report says that there is a need to lay out details of the new bilateral governance arrangements which will be required to oversee the implementation and

operation of the tax and welfare powers to be devolved by way of this agreement.

” Those details are not there. They need to be there and we have heard from the panellists some features of the machinery that will be needed, including regularity, transparency and a clear set of principles that will underlie the operation of such arrangements. However, those arrangements are clearly not yet in place.<sup>263</sup>

457. Some of the evidence received by the Committee was critical of the ability of the Scottish Government and other devolved administrations to influence and shape the agenda of intergovernmental dialogue. Professor Aileen McHarg said to the Committee that—

” ...the current system for inter-governmental relations has been much less effective in allowing the Scottish government (and other devolved administrations) to exercise an effective influence in areas of mutual concern. It has been argued that the preference for informality – and for ad hoc and bilateral relations – enables the UK government to determine the extent to which and the terms on which discussions take place. The devolved administrations have no consistent means of ensuring that they are consulted, or that their views are taken into account, and there is a risk that their interests may simply be overlooked by UK policy-makers. There is limited evidence of a partnership approach in areas of mutual interest, and there have also been complaints of a lack of mutual respect, although relations are better in some areas than others.<sup>264</sup>

### **New institutional structures, bilateral versus multilateral and formal versus informal**

458. The importance in any process of reform of ensuring that future arrangements have an institutional structure was touched upon by Professor Michael Keating. He stressed the need for inter-governmental relations to be viewed through a multi-lateral lens. In his view, “the Smith report contains a lot of good intentions and words about co-operation and so on, but if that is not underpinned by institutions, it will not necessarily amount to very much”.<sup>265</sup> Professor Keating elaborated on this during his appearance at the Committee. He said—

” What has been lacking in the debate is any appreciation of what happens in federal systems. There has been a lot of loose talk about federalism and how it is the answer, but the point about federal systems is that both levels have guaranteed powers and institutional capabilities that allow them to co-operate. Otherwise it is just one-way traffic: it is just the Treasury laying down the law and the Scottish Parliament having to accept those rules. We do not have that federal spirit at all in the United Kingdom; it has to develop.

## Devolution (Further Powers) Committee

New Powers for Scotland: An Interim Report on the Smith Commission and the UK Government's Proposals, 3rd Report, Session 4 (2015)

” It is difficult to talk about a bilateral UK-Scottish arrangement when other parts of the UK are putting forward their own demands and will have to be part of the process. They may not have exactly the same arrangements, but it would be very difficult to imagine a system in which there was one set of arrangements for Scotland and a completely different set of arrangements for Wales or Northern Ireland, responding to different principles and different ideas.<sup>266</sup>

459. Professor Charlie Jeffery of the University of Edinburgh explored this area with the Committee in more detail. In his view, it would be utterly characteristic of this state for different arrangements to be produced for different parts of it, each with their own impenetrable complexities. That, in his opinion, would be the natural modus operandi. For Professor Jeffery-

” There is a challenge on this Parliament, and on this committee in preparing the Parliament's thinking on the Smith commission powers, to situate Scotland's debate within the wider UK and not to see it as something that is self-contained in Scotland. There are very clear links across debates. The Welsh debate about fair funding is essentially a debate about what many see as unfair funding for Scotland. The drive, which is becoming significant in English public opinion, for some kind of institutional recognition for England has an awful lot to do with perceptions about Scotland.

” If we are to come to an arrangement involving a set of UK-wide transparent, regular arrangements, those debates need to be connected and reconciled as one single set of issues, and not considered as issues to be dealt with bilaterally through bespoke arrangements for each bilateral relationship.<sup>267</sup>

460. Giving evidence before her appointment as an adviser to the Committee, Professor Nicola McEwen, highlighted the balance between the need for bi-lateral and multi-lateral structures to manage inter-governmental relations in the United Kingdom. She said—

” I agree that there is a need not only for stronger multilateral agreements but for bilateral arrangements, because there are specific issues for the Scotland-UK relationship as a result of the settlement.<sup>268</sup>

## IGR and discussions on development of policy on EU matters

461. This report has already considered a range of issues relating to the operation of inter-governmental relations regarding the taxation, welfare and employment support recommendations of the Smith Commission. However, the Smith Commission also highlighted the importance of inter-governmental relations with regard to representing the views of the Scottish Government in European Union policy-making structures. The Smith Commission stated--

” The parties recognise that foreign affairs will remain a reserved matter. They also recognise the need to reflect fully the views of the other devolved administrations when drawing up any revised governance arrangements in relation to Scottish Government representation of the UK to the EU. In that context, the parties agree that the implementation of the current Concordat on the Co-ordination of European Union Policy Issues should be improved.<sup>269</sup>

462. In his written evidence to the Committee, Professor Alan Page of the University of Dundee discussed this issue further. In his opinion, one of the amendments that the SNP Government sought but failed to secure to the Bill that became the Scotland Act 2012, in order to make it a Bill ‘worthy of the name’, was a statutory right to be included in the UK delegation at formal and informal meetings of EU Ministers at which non-reserved matters affecting Scotland were to be considered. He told the Committee that—

” The question of intergovernmental relations has an important European Union dimension. In its submission to the Smith Commission, the SNP renewed its call for ‘guaranteed rights to engage directly with EU institutions and EU decision-making processes in areas of devolved competence.’ The Commission agreed that the implementation of the current *Concordat on Coordination of European Policy Issues*, which govern relations between the UK Government and the devolved administrations in relation to EU matters, should be ‘improved’, but precisely what, if anything, that means in terms of ‘guaranteed rights’ remains to be seen.<sup>270</sup>

### Role of Parliament in scrutinising inter-governmental relations

463. The Committee received a range of evidence that particularly highlighted the lack of the transparency of the current system of inter-governmental relations in the UK and the need for parliamentary oversight. Professor Aileen McHarg, for example, summarised the main characteristics of the current system in terms of transparency and accountability as being—

- A lack of transparency and democratic oversight in the design and review of the arrangements;
- An excessive insistence on confidentiality, and inadequate publicity for the work of the JMC;
- No consistent arrangements at either UK or Scottish level for parliamentary oversight of inter-governmental relations;
- Weak to non-existent inter-parliamentary links;
- Weak judicial oversight – this is side-stepped by lack of use of formal legal provisions, but is likely to be quite limited anyway<sup>271</sup>.

464. In Professor McHarg's view, the shortcomings of the current system are symptomatic of weak constitutional recognition of the principle of "shared rule" – i.e. that the devolution of power needs to be balanced by mechanisms for territorial co-operation<sup>272</sup>.

465. For her, a new set of principles for IGR in the future should be adopted, namely:

- An extension of existing arrangements to reflect new areas of inter-governmental working such as taxation and welfare;
- Stronger guarantees that the interests of devolved administrations be taken into account in areas of overlapping responsibilities;
- Statutory recognition of the fundamental principles of inter-governmental working;
- A greater commitment to transparency in the conduct of inter-governmental relations; and
- Stronger arrangements for Parliamentary oversight.

466. For Professor Michael Keating, the nature of inter-governmental relations is such that it tends to be done behind closed doors and as such tends to downgrade the role of Parliament. In this sense, the experience of inter-governmental relations in the United Kingdom is far from unique although Professor Keating did highlight some positive practices in Nordic countries when speaking on this issue before the Committee. He said—

” With regard to the capacity of Parliaments to hold Governments to account in relation to European negotiations, the Nordic countries and particularly Denmark give an example of what can be done. Ministers have to come and explain their position to extremely specialised committees that know the dossiers, and those committees report back to the Parliaments. Something like that could be done here for intergovernmental relations. All the arguments about not showing your hand or about confidentiality are just special pleading by Governments that do not want to be held accountable.<sup>273</sup>

467. He concluded that—

” In the case of Scotland, I would add that, if the Scottish Government and the Scottish Parliament are going to be given greater responsibilities for European matters and will be participating more fully in the Council of Ministers, the accountability arrangements here will have to be improved, as they were in Westminster.<sup>274</sup>



## Conclusions and recommendations

468. The Committee concludes that ensuring that the Scottish and UK Parliaments, and other devolved assemblies, can effectively scrutinise inter-governmental relations represents a significant challenge posed by the Smith Commission for these legislatures.
469. The Committee recognises that, in part, it is a challenge to which the Scottish Parliament must respond. To this end the Committee signals its intention to undertake further work in this area in the period before the summer recess of 2015, and on the issue of inter-governmental relations more generally, during the passage of any bill that may be introduced after the UK General Election. This will include not just the machinery of inter-governmental relations but also how the Scottish Parliament can assess the Scottish Government's performance in delivering new powers.
470. As previously noted in relation to welfare (paragraph 339), the Committee recognises that for inter-governmental relations to operate effectively that there must be space for discussions between governments to take place in confidence. However, the Committee recommends that any future bill should place the general principles underpinning the operation of inter-governmental relations in statute. The Committee also considers that the general principles underpinning the structures which will be put in place for dispute resolution should also be placed in statute. Such a bill should also include the general principles which will enable Parliamentary scrutiny of this process to take place. The Committee considers that the detail of the process for conducting inter-governmental relations should then be placed in a Memorandum of Understanding agreed between the governments. During this process, the Committee expects the Scottish Government to report to the Parliament and its committees on the progress of discussion and specifically before any final agreement is reached.
471. The Committee agrees with the Smith Commission that the largely non-statutory machinery governing inter-governmental relations needs reform. In our view, it is not fit for purpose and will be unable to cope with requirements arising from the Smith Commission's recommendations.
472. The Committee considers that establishing a statutory and institutional structure for a scaled up approach to inter-governmental relations represents the most significant challenge to be addressed in implementing the Smith Commission recommendations.
473. The Committee considers that these issues will be most acute in relation to the policy areas of European Union representation, taxation, welfare and employment support.
474. The shift from a devolution settlement based on a system of largely separate powers to one of shared powers, which is recommended by the Smith



**Commission, represents a fundamental shift in the structure of devolution settlement. The Committee agrees with the view that this will require both bi-lateral structures to be established between the UK and Scottish Governments as well as multi-lateral structures between the UK Governments and the devolved administrations.**

475. The Committee has considered the issue of inter-governmental relations with regard to the taxation and welfare proposals earlier in this report. As a consequence of the importance of the new arrangements for the inter-governmental structures, we recommend that these are subject to parliamentary scrutiny before any legislation in this area can be passed. This will include the detail of a new fiscal framework and the principles which will govern the operation of welfare, including the operation of 'no detriment', and for dealing with Scottish Government representation with regard to EU issues. The Committee recommends that the general principles which will govern the operation of inter-governmental relations should be placed in any future Bill devolving power in this area.

# Coherence and cohesiveness of the proposals for further devolution

## Background

476. Prior to the publication of the Smith Commission's report and again prior to the previous UK Government setting out its views in its Command Paper, the Committee took a range of evidence from representatives of civic society organisations, the business community and academics. During these sessions, the Committee received evidence where some organisations expressed a view that the package of proposals recommended by the Smith Commission lacked a degree of coherence and would benefit from additional powers being devolved. These views continued to be expressed by some in the evidence that the Committee has received since the publication of the draft legislative clauses.
477. **As noted at the beginning of this report, all members of the Committee entered into the process of producing this report with the aim of finding as much consensus as possible in order to provide a constructive commentary for a new UK Government on the current package of measures being proposed for further devolution. Accordingly, the Committee does not, at this stage, intend to take a collective position on this strand of the evidence it has gathered. Some members consider that the powers proposed for devolution do not go far enough. For example, in relation to taxation, some members consider that a wider range of taxes such as National Insurance Contributions, Corporation Tax and aspects of Income Tax such as personal allowances and thresholds should be devolved. For other members on the Committee, this is not the case and they are content with the current proposals. This section of the report is intend to give a 'voice' to the evidence that the Committee has received which has questioned the coherence of the package of proposals for further devolution.**

## Evidence received

### Economic coherence

478. The Deputy First Minister, in evidence to the Committee prior to the publication of the draft clauses, questioned the coherence of the Smith Commission recommendations with regard, in particular, to the extent to which the proposals would provide the flexibility to improve Scotland's economic performance. In particular, the Deputy First Minister highlighted three areas where he considered additional powers would have aided economic performance and job creation. The Deputy First Minister stated—

” There could have been movement on issues such as the power to vary and control employers' national insurance contributions, which employers see

as being a crucial factor in determining the cost of employment and, therefore, the ability to recruit additional staff.

” Secondly, discretion over research and development tax credits in order to encourage investment by the private sector would have been good. One of the recurring analyses in the past 25 to 30 years of Scottish economic history has been the relatively poor performance in private sector research and development in our economy. We have to do something distinctive to improve that. Obviously, another way in which that could be dealt with would be to give us powers over corporation tax; that has been a long-standing position of the Scottish Government. We believe that those measures could have delivered for the Scottish Government greater flexibility to enhance and improve economic performance.<sup>275</sup>

479. The coherence of the taxation proposals was questioned by Professor Michael Keating who suggested that the devolution of a broader range of taxes would have provided greater flexibility to the Scottish Government. Professor Keating observed—

” On the taxation side, it would have been better to think about the range of taxes that might be appropriate for the Scottish Parliament. There was an unfortunate fixation on income tax, so practically all the extra tax powers are loaded on to a single tax, which itself has various problems—I am sure that my colleagues on the panel can explain them—rather than there being a broad range of taxes, as would be more normal in devolved and federal systems.<sup>276</sup>

480. Dave Moxham, of the STUC, also sought a greater range of taxation powers to be devolved and highlighted that the STUC would have preferred greater devolution of powers than the Smith Commission proposed in relation to labour market policy. Mr Moxham stated—

” ...the trade union movement in Scotland is looking extremely closely and with a not uncritical eye at the potential to devolve a range of powers relating to what we categorise as workplace protections, including employment law, the minimum wage and health and safety, that in our view fit the committee's prescription for improving the quality of work and wages and reducing the benefits bill.

” Although we were aware of many of the historical arguments about the clear advantages of maintaining a single market across the UK, in the end we looked at the fact that the Scottish Government already exercises a large number of economic and economic development powers. In addition, it has the justice system, which clearly interacts with the workplace. When we looked at the issue in the round, we came to the clear view that control over such workplace protections, including the minimum wage, fitted better

with devolution. Therefore, we feel that that is a clear omission from the Smith proposals.<sup>277</sup>

481. Support for devolution of the minimum wage was made by a number of witnesses, including Peter Kelly, from the Poverty Alliance, who said—

” We, too, called for control of the national minimum wage to be devolved. That brings me back to the point that I made at the start about coherence, which we mentioned in our submission to Smith. Given the range of employability and social security powers that we had hoped would come, it would have been natural to have included the national minimum wage in that overall package to support people in making the transition from being out of work to being in work.

” We are disappointed that the national minimum wage has not been devolved. Although there is still much that we can do—and much that the Scottish Government and a range of organisations around the table and outside Parliament are doing—to promote a living wage, the fundamental point is that having the legal mechanism to set a floor for wages would have been very helpful in linking the economic development ambitions of the Scottish Government and the Scottish Parliament.<sup>278</sup>

482. Business organisations, who gave evidence to the Committee, were generally content with the powers that were proposed for devolution. However, some witnesses did express concern that, should corporation tax be devolved to Northern Ireland, consideration should be given to also devolving this tax to Scotland. For example, David Watt, from the IoD, commented—

” ...the IoD has been strongly against devolving corporation tax, but I suspect that I will have to hold back my members in Scotland from demanding that if it is devolved to Northern Ireland. There will be challenges if that happens. There is an issue there, as well.<sup>279</sup>

483. A range of organisations that deal with welfare issues highlighted the linkages between employability and equalities and suggested that the devolution of equalities legislation and employment law would have resulted in a more coherent package of proposals for devolution. For example, Bill Scott, of Inclusion Scotland, reflected on the degree of support this proposal had amongst people with disabilities as follows—

” We were very careful to warn all the disabled people who came to our engagement events that the simple transfer of powers would not change anything for the better or for the worse, because those powers would then have to be used one way or another, and they could well be used to affect our lives negatively rather than for the better. Nevertheless, the overwhelming message that we got back from 80 or 90 per cent of people was that they wanted equalities law and employment law to be devolved.

” If employability is going to be addressed, we have to bear in mind the key policy areas that affect the employability of disabled people. Less than half of disabled people are in work. Of those who are in work, the majority are in entry-level jobs and depend on the minimum wage being set at a level that removes them from poverty; otherwise, they would just be exchanging out-of-work poverty for in-work poverty. They got the point. They saw that bringing everything up here would provide a coherent approach that would allow us to affect employability over the longer term and to address the particular issues that single parents, disabled people and so on face in the current market.<sup>280</sup>

## **Coherence - Welfare**

484. The Committee has received a range of evidence which whilst welcoming the powers proposed for devolution, in terms of welfare, questioned whether the Scottish Government will have sufficient financial flexibility to be able to exercise these powers effectively. Frequently, witnesses drew parallels to the situation in Northern Ireland with regard to the devolution of welfare powers. For example, the Chartered Institute of Housing stated—

” Our main concern was that if certain elements of welfare were devolved to the Scottish Government without the means to fund these changes, this could result in a situation, similar to that in Northern Ireland, whereby the Scottish Government would technically have the power to make changes to welfare provision but the complexity of the system and lack of fiscal leverage would mean that, in reality, the opportunity for implementing and changes would be severely restricted.<sup>281</sup>

485. That Universal Credit should have been devolved in its entirety, in part as a means of avoiding potential ‘cliff edges’ between two governments having responsibility for different aspects of the same system, was another theme to emerge in evidence the Committee received. Mary Taylor, from SFHA, emphasised that SFHA supported the entire devolution of Universal Credit by stating that—

” The Scottish Federation of Housing Associations has consistently thought that the powers to support tenants to live in any kind of housing, in the form of housing benefit, should have been devolved at the time that the Parliament was set up. More recently, on taking advice about the way that social security was going and the formation of universal credit, we arrived at the position that the whole of social security needed to be devolved in its entirety.<sup>282</sup>

486. From a different perspective, the Committee received evidence which considers that the Smith Commission recommendations will not provide future Scottish administrations with the powers to be able to address poverty effectively and do not include a range of policy areas which would be required in any coherent

attempt to do so. Satwat Rehman, representing One Parent Families Scotland, took this perspective when reflecting, in oral evidence to the Committee, that—

- ” We, too, engaged effectively and widely with single parents in the lead-up to and during the referendum. They have shown energy for continuing to be involved, particularly on the issues that affect them. Welfare benefits, the work programme and Jobcentre Plus are the areas that they expressed the most disappointment about when we went back to them with what came out of the Smith commission. Although the work programme will be devolved, the policy framework will remain reserved and the regime of conditionality and sanctions, which is having such a negative impact on the families with whom we work, will remain in place.
- ” On whether we are content with what came out of the commission, when we look back at the tests that we were going to apply to it—would what was proposed alleviate or reduce poverty and support children and families, particularly single-parent families; would it avoid or address the cliff edges that exist currently between the two regimes; and would it address inconsistencies in the system?—it is clear that the proposals fall short in a number of areas that colleagues have spoken about.
- ” One area in particular that is not mentioned in the Smith report even though we had a specific session on it with Lord Smith is childcare. For us, that is one of the starkest examples of what happens when supply and demand—funding, in a way—is split across two Parliaments. We are disappointed that there is no mention of childcare and nothing to consider how it could be addressed through the greater powers that will be given to Scotland.<sup>283</sup>

### An Enduring Settlement?

487. Finally, a constant theme throughout the Smith Commission report, and indeed this report, has been the importance of fostering effective inter-governmental relations if the Smith Commission recommendations are to be implemented effectively. The extent of shared powers which are contained within the Smith Commission report represents a significant shift in the structure of the devolution settlement and will present significant challenges to deliver. The degree of interdependence has led a variety of witnesses to question the sustainability of the package of powers proposed for further devolution. In this regard, Professor Nicola McEwen, giving evidence before her appointment as a Committee adviser, observed—

- ” I think that we are moving away from the reserved powers model that was one of the strengths of the original devolution settlement. That increases the powers of the Parliament, but at the same time it makes Parliament more dependent in a way, because of the direct interdependencies in relation to tax and welfare policy. Managing that interdependence would

create some anomalies and some constraints on policy options. There are lots of challenges.

” The report is implementable and, in the implementation process, we will start to get some more substance on what the proposals actually mean, which could change things along the way. However, I do not think that it is sustainable. Politics might dictate the process of change anyway, but I think that new anomalies will emerge that increase pressure to revisit the issue and come up with something a bit more coherent.<sup>284</sup>

488. The approach taken to drafting the legislative clauses which shifts from the approach of the Scotland Act 1998 of defining reserved powers to creating exceptions to reserved powers has also been considered by many witnesses to not only be a source of future instability but also acts to limit devolved powers. Inclusion Scotland summarised this view, in written evidence, by stating that whilst it—

” ...is disappointed that the Smith Commission proposals do not match the aspirations of disabled people, particularly in relation to powers on welfare and taxation, we believe that there are substantial opportunities to design a fairer Scotland that promotes the right to Independent Living for disabled people. However, the clauses as currently drafted seem unlikely to deliver in full what the Smith Commission proposed, and the way they have been drafted may restrict the ability of the Scottish Parliament to use the new powers to their best potential.

” Inclusion Scotland believes that many of these concerns can be addressed if the draft clauses are redrafted in line with the original intention of the Scotland Act, that is defining the matters that are reserved to Westminster rather than the powers devolved to Scotland.<sup>285</sup>

## Conclusion

489. **The Committee notes the evidence it has received on the coherence of the Smith Commission recommendations. The focus of this report is on whether the draft legislative clauses meet the spirit and substance of the Smith Commission report, and to produce findings around which all members can agree. Accordingly, the Committee does not take a view on these issues at this juncture.**



# Key conclusions and recommendations

490. The following text contains an extract of the key conclusions and recommendations that can be found throughout the body of this report. **The conclusions and recommendations were agreed unanimously.**
491. **Annexe A** to this report provides a summary position of the Committee's detailed conclusions and recommendations against the benchmark of whether the draft clauses fully meet both the letter and the spirit of the agreement reached by the five political parties represented in the Scottish Parliament during the Smith Commission's work.

## General

492. This report is not the Committee's final view on the Smith Commission or the then UK Government proposals, or an indication of any recommendation for legislative consent at this stage. Upon introduction of any bill in the UK Parliament following the UK General Election on 7 May, we would begin the process of considering the bill and any proposals for amendments. Any final decision by the Scottish Parliament on legislative consent is likely to take place in the early part of 2016.
493. **In some of the areas set out in the previous UK Government's Command Paper, the Committee believes that the current draft legislative proposals meet the challenge of fully translating the political agreement reached in the Smith Commission. In other areas, improvements in drafting and further clarification are required. In some critical areas, the then UK Government's draft legislative clauses fall short.**

## The need for greater public engagement

494. The Committee believes that further public engagement, directly with the people of Scotland as well as representative bodies, charities, industry groups, voluntary bodies etc. is still a vital activity that needs to be carried out and is fully committed to the spirit of the recommendation made by the Smith Commission in this respect. **The Committee calls on the UK and Scottish Governments to consider how to commit to the spirit of the Smith Commission's recommendation in this respect.**

## Constitutional matters

### Permanency of the Scottish Parliament and Scottish Government

495. The Committee is of the view that the inclusion of the words "is recognised" in draft clause 1 on the permanency of the Scottish Parliament and Scottish Government has the potential to weaken the effect of this clause, which would be unfortunate given the all-party agreement to this recommendation as part of the Smith Commission, and the views expressed to us by the then Secretary of State

for Scotland that he perceives that the permanence of the Scottish Parliament and Scottish Government is guaranteed. **Accordingly the Committee recommends that the UK Government removes the words 'is recognised' from this clause.**

496. In evidence to the Committee, the then Secretary of State for Scotland commented that he was “open to thinking about different ways in which ... permanence could be achieved”. The Committee welcomes the open-minded approach of the previous Secretary of State with regard to this issue. The Committee therefore considers that there is scope to further strengthen the permanency provisions.
497. **The Committee considers that the effect of the clause on permanency, as currently drafted, is primarily declaratory and political rather than legal in effect. The UK doctrine of Parliamentary sovereignty makes achieving permanence problematic. The Committee recommends that the Scottish electorate should be asked to vote in a referendum if the issue of permanency was in question, with majorities also being required in the Scottish Parliament and the UK Parliament.**

#### **Sewel Convention and Legislative Consent Memoranda**

498. **The Committee considers that the current draft clause 2, whilst placing the purpose of the Sewel Convention in statute, does not incorporate in legislation the process for consultation and consent where Westminster plans to legislate in a devolved area. The Committee considers that it should do so. Moreover, the Committee considers that the use of the words “but it is recognised” and “normally” has the potential to weaken the intention of the Smith Commission’s recommendation in this area and recommends that these words be removed from the draft clause.**

#### **Equal opportunities: socio-economic inequalities and gender quotas**

499. This particular provision is an area that the Committee intends to return to at a later date upon introduction of any new ‘Scotland Bill’ following the UK General Election. **At this stage, the Committee seeks clarification, from the UK Government, on the scope of the provision in clause 24 with regard to the extent to which the Equality Act 2006 and 2010 would limit the ability of Scottish Ministers to legislate with regard to equalities issues.**
500. The Committee also notes that the Equality Act 2006 is not mentioned in the Smith Commission recommendation, yet the reservation in the draft clause also includes the 2006 Act and **seeks clarification, from the UK Government, on what effect the inclusion of this Act has upon the proposed power for Scottish Ministers in this area.**
501. The Committee remains unclear about the scope of the proposed extension of legislative competence to socio-economic rights and, in particular, whether any extension would be limited to the socio-economic equality duty contained in Part 1

of the Equality Act 2010. **It recommends that further thought be given to the drafting of this clause to ensure that the aims of the Smith Commission are fulfilled.**

502. The Committee considers that the words “except to the extent that provision is made by the Equality Act 2006 or the Equality Act 2010” creates doubt about the power of the Scottish Parliament to legislate for gender quotas in relation to Scottish public authorities and cross-border public authorities. **It recommends that further thought be given to the drafting of this clause to ensure that the aims of the Smith Commission are fulfilled.**

## **Taxation**

### **Income tax**

503. **On income tax, the Committee concludes that the essence of the Smith Commission’s recommendations has been translated appropriately by the then UK Government into the draft legislative clauses. We have no particular concerns at this stage with the drafting. However, there are significant issues still to be resolved regarding the implementation of the new powers, such as an appropriate definition of residency for a Scottish taxpayer, the details of the administration of the new regime (who collects the tax and how it will function), the costs on business and individuals, the need to avoid double taxation and the timing and phasing of the new powers on income tax relative to those already devolved under the Scotland Act 2012.**
504. **One area that requires further clarification from the UK Government, however, is whether the current provisions would permit the Scottish Parliament to set a zero rate of income tax.**
505. **The Committee recommends that details on the implementation of the new powers over income tax be produced before the Scottish Parliament is expected to give its legislative consent.**

### **Assignment of VAT**

506. **The Committee concludes that the wording of the former UK Government’s draft clauses for the assignment of a share of VAT revenues are adequate as currently drafted. However, there is still significant uncertainty on how the assignment of a share of revenues will be calculated and whether the Scottish Government will be able to reap the rewards of any economic stimulus that yields higher VAT revenues.**
507. **The Committee recommends that details of the assignment of VAT revenues and the share of any benefits be produced before the Scottish Parliament is expected to give its legislative consent. The Committee further recommends that a bilateral process by discussion is entered into between the two**

**governments to reach agreement for the ‘verified basis’ for VAT attribution to Scotland for assigning the receipts.**

### **Aggregates Levy and Air Passenger Duty**

508. The Committee is content with the proposals and the current drafting of the clauses relating to the devolution of Air Passenger Duty and the Aggregates Levy. In due course, the Scottish Government should set out its policy plans for both of these newly devolved powers.

### **Fiscal framework, institutional arrangements and ‘no detriment’**

509. **The Committee recommends that greater clarity is required with regard to how ‘no detriment’ will operate in practice with particular regard to the timescale and range of policy effects which will be considered as constituting no detriment.** Accordingly, the Committee calls on both the Scottish and UK Government to detail their understanding of the principle of no detriment. The Committee also calls on both Governments to detail how they consider a shared understanding of the evidence, with regard to the calculation of no detriment, will be obtained.
510. It will also be important for the two governments to have a shared understanding of the figures and calculations for tax matters, and **we recommend that both governments enter into an agreement to establish a common database of tax information.** This will assist with the process of dispute resolution. **In addition, the Committee recommends that independent scrutiny of these matters, by the Scottish Fiscal Commission, will be an essential component of the scrutiny landscape if these proposals are to be implemented effectively.**
511. As yet, we are not able to conclude that we are content with the fiscal framework and no detriment arrangements as these details are currently being discussed between the two governments. For the Committee, both the process of these negotiations and the outcome requires proper parliamentary scrutiny. **We recommend both governments reach an urgent agreement on just how this will be achieved and for the Scottish Government to report to the Committee on what arrangements it proposes to put in place for parliamentary oversight.**
512. **In any case, the Committee concludes that any final detail of the fiscal framework and the other matters we have considered is provided to the Scottish Parliament before the question of legislative consent to any new bill is considered in the early months of 2016.**
513. Given the importance of the fiscal framework and intergovernmental working more generally, the Committee gives notice that it intends to continue to develop ideas and recommendations in this area in advance of, and then alongside, scrutiny of

any bill introduced by the new UK Government after the UK General Election. We will liaise closely with other parliamentary committees on this matter

## Borrowing

514. **The Committee is content with the agreement entered into by all parties to the Smith Commission that the current borrowing powers of the Scottish Parliament are too restrictive and too limited. Furthermore, we are supportive of a move towards a prudential regime which gives the Scottish Government more flexibility - within an overall framework that is governed by sound principles of affordability and sustainability - to borrow both for short-term revenue requirements as well as longer-term capital investment purposes.**
515. We note the comments made to us that cash setting limits on the amount of borrowing that can be undertaken, especially for capital investment, is not necessarily consistent with the prudential regime specified by the Smith Commission or the most sensible way to proceed. One of the measures for assessing affordability, under a prudential regime, the Committee suggests would be the performance of the economy based on indicators such as cyclically-adjusted GDP.
516. **We recommend that a future Scottish Government should be able to retain underspends so as to better manage volatility.**
517. The current draft legislative clauses are silent on how a new borrowing regime will operate. This means that, at this stage, we are not able to conclude either way as to whether the agreements entered into as part of the Smith Commission have been delivered or could be improved. **We recommend that this area in particular is a high priority for both governments to develop and for both to report to the Scottish Parliament and its committees in the coming months so that we can adequately scrutinise plans for more borrowing powers before any future bill is passed.**

## Welfare

### General

518. The purpose of our report has been to provide a constructive commentary to the new UK Government on the draft clauses as they relate to the Smith Commission recommendations. However, **the Committee has concerns with a number of the welfare provisions and considers that the relevant clauses do not yet meet the spirit and substance of the Smith Commission's recommendations and potentially pose challenges in any attempt to implement them.** Central to the effective delivery of the welfare clauses will be ensuring that key stakeholders in the delivery of welfare are fully involved in shaping the welfare provisions and their delivery.

519. The Committee believes that the welfare provisions will impact upon some of the most vulnerable and disadvantaged individuals in Scottish society. It is imperative therefore that the welfare clauses meet the expectations of Scottish society, provide genuine policy discretion to the Scottish Government as envisaged by the cross-party agreement within the Smith Commission, and are capable of being implemented efficiently and in a way that ensures any new benefits or discretionary payments introduced in Scotland by either government provide additional income for a recipient and do not result in an automatic offsetting reduction in their entitlement to other benefits, discretionary payments, tax credits or allowances.
520. Accordingly, **the Committee recommends that the new UK Government further engages in the development of legislation in this area in co-operation with stakeholders in Scotland on the welfare clauses in any Scotland Bill.** This should include securing the agreement of the Scottish Government and stakeholders that the welfare clauses do meet the spirit and substance of the Smith Commission recommendations. In addition, the process via which it will be ensured that the introduction of any new benefits or discretionary payments by a future Scottish Government should provide additional income to a recipient without any offsetting reduction in reserved entitlements should be made clear and have been agreed to by stakeholders and the Scottish Government.
521. **The Committee also calls on the UK Government to consider the issues raised in this report both with regard to the scope of the clauses as currently drafted and issues with regard to implementation before drafting legislation in this area.**

#### **New and top-up benefits**

522. **The Committee reaffirms the agreement in the Smith Commission report that the Scottish Parliament should have the power to create new benefits in areas of devolved responsibility and also new powers to make discretionary payments in any area of welfare without the need to obtain prior permission from the DWP, whilst recognising that there will be a need for the Scottish Government to provide the DWP with early notification of its intentions because of the potential for overlap with the administrative responsibilities of the UK Government in welfare matters.** The Committee notes the view that the approach taken of creating exceptions to existing benefits limits the scope of policy discretion which would be available to a future Scottish Government to create new benefits or to top-up benefits. **The Committee recommends that the UK Government re-consider the draft clauses designed to devolve the creation of new benefits and enable the top-up of reserved benefits in order to ensure that the relevant sections of any future Bill meet the spirit and substance of the Smith Commission thereby ensuring that the Scottish Government would have genuine policy discretion in this area.**



## Carers

523. **The Committee is concerned that the current definition of carer in the draft clauses appears overly restrictive and could limit the policy discretion of future Scottish administrations in this area. The Committee recommends that the clause should be re-drafted to ensure that the future Scottish administrations are able to define what constitutes a carer.**
524. The Committee also recognises that the fiscal framework is currently the subject of discussion between the Scottish and UK Government. The Committee considers that the issue of 'no detriment' as it applies to individuals, particularly those in receipt of benefits, should be a crucial component of these discussions. **The Committee seeks clarity on the procedures through which the commitment in paragraph 55 of the Smith report will be honoured to ensure that any new benefits or discretionary payments introduced by the Scottish Parliament will provide additional income for recipients and not be offset by reductions in entitlements to benefits, tax credits or tax relief provided by the UK Government.**

## Definitions of disability

525. **The Committee is concerned that the definition of disability contained in draft clause 16 is overly restrictive and would not provide a future Scottish Government with the power to develop its own approach to disability benefits in the future. Accordingly, the Committee recommends that the definition of disability used in the Equality Act 2010 is also used in draft clause 16.**
526. The Committee welcomes the assurances from the DWP that both definitions of disability used in the draft clauses would apply to people with terminal cancer, MS or other fluctuating conditions, or who are terminally ill.

## Universal Credit – a shared power

527. The Committee recognises that the effective operation of inter-governmental relations will be critical to the successful operation of the devolved aspects of Universal Credit. The Committee welcomes the recent establishment of the Joint Ministerial Working Group on Welfare and expects this forum to become an effective means of dealing with relations between the UK and Scottish governments in this sphere. The Committee expects to be kept fully informed on discussions between governments on the arrangements being developed for inter-governmental relations with regard to Universal Credit and welfare issues in general. The Committee noted the commitment of both the Scottish and UK governments to provide detailed minutes of the Joint Exchequer Committee to the Scottish Parliament Finance Committee and the Scottish Affairs Committee. We would encourage the Joint Ministerial Working Group on Welfare to follow this example, by providing detailed minutes of its meetings to appropriate committees in the Scottish and Westminster Parliaments.



528. **The Committee recommends that the principles which will govern the operation of inter-governmental relations with regard to welfare should be placed in any future Bill devolving power in this area. Moreover, the Committee expects that this will include the principles via which Parliaments can maintain scrutiny and oversight of the inter-governmental machinery with regard to welfare.**

#### **Universal credit – policy flexibility**

529. The Committee considers that the policy autonomy of a future Scottish Government with regard to its devolved welfare responsibilities should not be constrained as a consequence of process issues relating to the boundary between devolved and reserved systems and processes.
530. **The Committee therefore recommends that Joint Ministerial Working Group on Welfare considers as a matter of urgency the extent to which the policy autonomy of a future Scottish Government may be undermined as a consequence of being reliant on systems which have been designed by DWP and how any such barriers of this kind can be overcome.** Such an understanding should form a key understanding or principle governing inter-governmental relations in this sphere.

#### **Universal Credit – ‘veto’ power?**

531. **The Committee concludes that there is a case to be made that draft clauses 20 (4) and 21 (3) could be considered or perceived as a veto. The Committee considers that this is an issue which requires resolution through the Joint Ministerial Working Group on Welfare.** In effect, this issue provides an early test of the effectiveness of inter-governmental relations. The Committee expects this issue to have been resolved to the satisfaction of both the Scottish and UK Governments before any future legislation is introduced. During this process, the Committee would expect the Scottish Government to report to Parliament and its committees on the progress of discussion and specifically before any final agreement is reached.

#### **Under Occupancy Charge/‘Bedroom Tax’ and Discretionary Housing Payments**

532. The Committee seeks clarity on the issues which have been raised with regard to the inter-play between the power to remove the under-occupancy charge and discretionary housing payments. The Committee considers that it is essential that the application of these clauses should not have the effect of causing detriment to individuals in receipt of discretionary housing payments.

#### **Winter Fuel Payments**

533. The Committee considers that it is imperative that any future Bill is drafted to ensure that both winter fuel payments and cold weather payments are devolved, and agreement is reached on adopting a system of payments which better reflects the climate conditions in different parts of Scotland. **The Committee seeks an**

**assurance from the UK Government that if the current draft clause excludes the devolution of winter fuel payments then any future Bill is drafted to ensure that such payments are devolved.**

### **Scottish Welfare Fund**

534. **The Committee seeks clarification from the UK Government that access to the Scottish Welfare Fund will not be restricted as a consequence of the draft clause provisions in relation to discretionary payments.**

### **Employment Programmes**

535. **The Committee considers that the clauses as currently drafted do not fully implement the Smith Commission recommendations. The Committee considers that the Smith Commission intended that all employment programmes currently contracted by DWP should be devolved. Therefore, the Committee recommends that any future Bill should not place any restriction on the type of person receiving support or in regard to the length of unemployment any person has experienced. The Committee considers that this should include the devolution of the Access to Work Programme.**
536. The Committee recognises that the effective operation of inter-governmental relations will be critical to the successful operation of the devolved aspects of employment support. The Committee welcomes that this is recognised in the then UK Government Command Paper and also welcomes the recent establishment of the Joint Ministerial Working Group on welfare and expects this forum to become an effective means of dealing with relations between governments in this sphere. The Committee expects to be kept fully informed on discussions between governments on the arrangements being developed for inter-governmental relations with regard to employment support and welfare issues in general.
537. **The Committee recommends that the principles which will govern the operation of inter-governmental relations with regard to welfare, including employment support, should be placed in any future Bill devolving power in this area.** Moreover, the Committee expects that this will include the principles via which Parliaments can maintain scrutiny and oversight of the inter-governmental machinery with regard to welfare and employment support.

### **Intergovernmental Relations in Welfare**

538. The Committee considers that the operation of inter-governmental relations will be central to the effective implementation of many of the Smith Commission recommendations. However, the operation of inter-governmental relations will be critical within the area of welfare policy. The Committee therefore welcomes the recent establishment and meetings of the Joint Ministerial Working Group on Welfare.
539. The Committee recognises that for inter-governmental relations to operate effectively that there must be space for the discussions between governments to

take place in confidence and **the Committee recommends that any future Bill should place the general principles underpinning the operation of inter-governmental relations on welfare in statute. The Committee also considers that the general principles underpinning the structures which will be put in place for dispute resolution should also be placed in statute.** Such a Bill should also include the general principles which will enable Parliamentary scrutiny of this process to take place. **The Committee considers that the detail of the process for conducting inter-governmental relations should then be placed in a Memorandum of Understanding agreed between the governments.**

During this process, the Committee expects the Scottish Government to report to the Parliament and its committees on the progress of discussion and specifically before any final agreement is reached.

## **The Crown Estate**

540. The Committee agrees that the particular legislative approach adopted to devolve the management and revenues of The Crown Estate could be construed as overly complicated unless there is full transparency and full consultation with the Scottish Parliament and Government during the process. The Committee believes that there is merit in considering an approach based on that set out by Professor McHarg and others. **The Committee recommends that the UK Government considers revising its drafting approach regarding the provisions relating to The Crown Estate.**
541. **Furthermore, if a transfer scheme of this type is to be adopted, then the Committee recommends that the UK Government replaces the word “may” in draft clause 23 with “shall”.**
542. The Committee believes that it is right and proper that the corporate entity that exists to manage the non-devolved assets of The Crown Estate in the rest of the UK should be free to decide its own activities. However, the Smith Agreement was very clear that the management and revenue of The Crown Estates economic assets held in Scotland should be devolved. The then UK Government’s proposals may result in the creation of ‘two Crown Estates’. We believe this is not consistent with the Smith Agreement. **The Committee therefore has serious concerns regarding the situation in Scotland post-devolution and the competition and confusion that may arise from the creation of ‘two Crown Estates’.**
543. The Committee would wish to see absolute clarity on this matter from the UK Government and HM Treasury in particular (as The Crown Estates’ sponsoring department) and **we recommend that, at the very least, there should be an obligation placed on the non-devolved Crown Estate to consider the option of shared investments with the devolved Crown Estate in Scotland with a fair allocation of revenues.**
544. The Committee notes the former UK Government’s intention to exclude Fort Kinnaird from devolution. **The Committee sees no need for this proposal and**

**calls on The Crown Estate and HM Treasury to find a means of ensuring that a full share of the Crown Estate's revenues from Fort Kinnaird accrue to Scotland.** Furthermore, the Committee is concerned that the investment vehicle used in the example of Fort Kinnaird could be repeated as a means of avoiding the devolution of future investments in the intervening period between the passing of any bill and the transfer of assets.

545. **We seek clarity on the longer-term operation of the policy and financial position of the Crown Estate on this issue. The Committee believes that Scotland should receive its fair share from any such investment vehicles operating within Scotland in the future.**
546. The Committee is reassured by the clarification provided by the Scotland Office on the issue of economic rights and assets out to 12 and 200 nautical miles. However, when any bill is introduced, we believe that it will be important to be clear about the definition of any zone referred to in the legislation to avoid the potential for confusion.
547. **Once the powers over the Crown Estate have been transferred, the Committee recommends the early implementation of the Smith Commission recommendation that “responsibility of the management of the Crown Estate assets in Scotland should be devolved further to local authorities such as Orkney, Shetland, Na h-Eilean Siar or other areas who seek such responsibilities”.** These are matters where discussions should, in our view, continue to progress as a matter of urgency and we endorse the work of the Scottish Government and the *Our Islands, Our Future* initiative to reach an amicable agreement that suits local circumstances.
548. The Committee believes that there is scope in some communities for further devolution of the management of certain economic assets to, or at least partnership working with, others in these areas such as harbour and port authorities, local marine interests and experts etc.
549. We recommend that the Scottish Government keeps this and other committees in the Parliament up-to-date with the discussions with local authorities and others as they continue, and report to the Scottish Parliament for endorsement before agreement on any proposals for further devolution is reached.
550. The Committee recognises that The Crown Estate has made itself available to report to Parliamentary committees on an annual basis (and has done three or four times) and that **this Committee recommends that the Scottish Parliament would expect such regular scrutiny to continue.**
551. The Committee notes the then UK Government's intention that the Scottish and UK Governments will draw up an Memorandum of Understanding, including further detail on the legal protections for defence or national security as well as providing that the transfer of management responsibility for the Crown Estate is not detrimental to UK-wide critical national infrastructure in relation to matters

such as oil and gas, telecommunications and energy, thereby safeguarding the importance of the Crown Estate's foreshore and seabed assets to the UK as a whole. This Committee expects the Scottish Parliament to be consulted during the process of drawing up the MoU.

552. Finally, the Committee welcomes the comments from the Crown Estate Commissioner for Scotland that discussions are already underway with staff on the implications to them. This Committee expects the recommendations in the Smith Commission report to be fully implemented, such as the commitment to the protection of the employment rights of those Crown Estate staff who are connected with the management of the Scottish assets.

## **Other provisions in the draft legislative clauses or additional issues cited in the Smith Commission's report**

### **Payday loan shops**

553. **The initial view of the Committee is that the current provisions for payday loan shops could go further and consideration could be given to including powers over licensing and regulation not just planning.**

### **Fixed-Odds Betting Terminals**

554. At this stage, the Committee questions whether the draft clause, as currently written, gives any meaningful effect to the Smith Commission proposals in this area. The draft clause would only provide the power to restrict the number of Fixed-Odds Betting Terminals where a new betting premise licence is being sought. **The Committee has some sympathy with the Law Society of Scotland submission that the clauses should be amended to include the ability to limit the number of gaming machines in both existing and new betting premises.**

### **Tribunals**

555. The Committee welcomes the transfer of powers for tribunals to the Scottish Parliament but notes the views of the Law Society of Scotland about the drafting of the relevant clause and potential limitations. **The Committee seeks assurances from the UK Government on these matters before a new bill is introduced after the UK General Election.**

### **The BBC and the agreement to a Memorandum of Understanding**

556. In its Command Paper, the former UK Government stated that there will be an Memorandum of Understanding (MoU) entered into by the UK Government, Scottish Government, Scottish Parliament and the BBC, to set out commitments that guarantee a full consultative role for the Scottish Government and Scottish Parliament in the review of the Royal Charter and the on-going scrutiny of the BBC.

557. It could be expected that the discussions on the MoU would need to be completed before work on reviewing the BBC's Royal Charter begins in the summer of 2015. The Committee, therefore, gives notice that it intends to take a role in considering the draft MoU and report to Parliament in due course.

### **Food labelling and seafood/red meat levies**

558. In any reforms to these schemes, the Committee believes it will be important that Scotland has the ability to introduce an EU recognised 'Made in Scotland' label and also that Scotland is able to decide at any stage whether to opt into UK arrangements on seafood/red meat levies and, if so, receives an equitable share of any UK monies levied.

### **Elections, the workings of the Scottish Parliament etc.**

559. The Committee has not taken detailed evidence on these matters at this stage. The Committee intends to return to these issues following introduction of any bill after the UK General Election. The Committee expects the commitments in the Smith Agreement to be translated into legislation by the new UK Government.

### **Telecommunications, postal services, energy, transport, health and social affairs and consumer protection**

560. The Committee has not taken detailed evidence on these matters at this stage. The Committee intends to return to these issues following introduction of any bill after the UK General Election

### **Post-Study Work Visas & Victims of trafficking**

561. The Committee reinforces the recommendation of the Smith Commission on these issues and believes that this important issue should be addressed through discussion between the two governments in advance of the introduction of any new bill after the UK General Election.

### **Asylum seekers; fines, forfeitures and fixed penalties imposed by courts and tribunals; and the functions of the Health and Safety Executive**

562. The Committee reaffirms the view of the Smith Commission that these issues need to be the subject of discussion between the two governments.

## **Inter-governmental Relations**

563. The Committee concludes that ensuring that the Scottish and UK Parliaments, and other devolved assemblies, can effectively scrutinise inter-governmental relations represents a significant challenge posed by the Smith Commission for these legislatures.

564. The Committee recognises that, in part, it is a challenge to which the Scottish Parliament must respond. To this end the Committee signals its intention to undertake further work in this area in the period before the summer recess of



2015, and on the issue of inter-governmental relations more generally, during the passage of any bill that may be introduced after the UK General Election. This will include not just the machinery of inter-governmental relations but also how the Scottish Parliament can assess the Scottish Government's performance in delivering new powers.

565. As previously noted in relation to welfare (paragraph 339), the Committee recognises that for inter-governmental relations to operate effectively that there must be space for discussions between governments to take place in confidence. However, **the Committee recommends that any future Bill should place the general principles underpinning the operation of inter-governmental relations in statute. The Committee also considers that the general principles underpinning the structures which will be put in place for dispute resolution should also be placed in statute.** Such a Bill should also include the general principles which will enable Parliamentary scrutiny of this process to take place. **The Committee considers that the detail of the process for conducting inter-governmental relations should then be placed in a Memorandum of Understanding agreed between the governments.** During this process, the Committee expects the Scottish Government to report to the Parliament and its committees on the progress of discussion and specifically before any final agreement is reached.
566. **The Committee agrees with the Smith Commission that the largely non-statutory machinery governing inter-governmental relations needs reform. In our view, it is not fit for purpose and will be unable to cope with requirements arising from the Smith Commission's recommendations.**
567. The Committee considers that establishing a statutory and institutional structure for a scaled up approach to inter-governmental relations represents the most significant challenge to be addressed in implementing the Smith Commission recommendations.
568. The Committee considers that these issues will be most acute in relation to the policy areas of European Union representation, taxation, welfare and employment support.
569. The shift from a devolution settlement based on a system of largely separate powers to one of shared powers, which is recommended by the Smith Commission, represents a fundamental shift in the structure of devolution settlement. The Committee agrees with the view that this will require both bi-lateral structures to be established between the UK and Scottish Governments as well as multi-lateral structures between the UK Governments and the devolved administrations.
570. The Committee has considered the issue of inter-governmental relations with regard to the taxation and welfare proposals earlier in this report. As a consequence of the importance of the new arrangements for the inter-governmental structures, **we recommend that these are subject to**



**parliamentary scrutiny before any legislation in this area can be passed.** This will include the detail of a new fiscal framework and the principles which will govern the operation of welfare, including the operation of 'no detriment', and for dealing with Scottish Government representation with regard to EU issues. **The Committee recommends that the general principles which will govern the operation of inter-governmental relations should be placed in any future Bill devolving power in this area.**

<sup>1</sup> The Edinburgh Agreement. Available at:

<http://www.gov.scot/About/Government/concordats/Referendum-on-independence>

<sup>2</sup> Scottish Independence Referendum results. Available at: <http://scotlandreferendum.info/>

<sup>3</sup> The Smith Commission Report. Available at: <https://www.smith-commission.scot/smith-commission-report/>

<sup>4</sup> UK Government, Command Paper, *Scotland in the United Kingdom: An enduring settlement*. Available at: <https://www.gov.uk/government/publications/scotland-in-the-united-kingdom-an-enduring-settlement>

<sup>5</sup> Sewel Convention. Available at: <http://www.parliament.uk/site-information/glossary/sewel-convention/>

<sup>6</sup> Scottish Parliament Devolution (Further Powers) Committee. *Official Report*, 15 January 2015, Col. 4.

<sup>7</sup> Scottish Parliament Devolution (Further Powers) Committee. *Official Report*, 15 January 2015, Col. 37.

<sup>8</sup> Smith Commission. *Report of the Smith Commission for further devolution of powers to the Scottish Parliament*, para. 21.

<sup>9</sup> UK Government. *Scotland in the United Kingdom: An enduring settlement*, p.92.

<sup>10</sup> Scottish Parliament Devolution (Further Powers) Committee. *Official Report*, 2 December 2014, Col. 23.

<sup>11</sup> Scottish Parliament Devolution (Further Powers) Committee. *Official Report*, 2 December 2014, Col. 23.

<sup>12</sup> Scottish Parliament Devolution (Further Powers) Committee. *Official Report*, 2 December 2014, Col. 23.

<sup>13</sup> Scottish Parliament Devolution (Further Powers) Committee. *Official Report*, 4 December 2014, Col. 3.

<sup>14</sup> Law Society of Scotland. Written evidence submitted to the Committee.

<sup>15</sup> Dr Hepburn and Professor Douglas-Scott. Written evidence submitted to the Committee.

<sup>16</sup> Dr Hepburn and Professor Douglas-Scott. Written evidence submitted to the Committee.

<sup>17</sup> Scottish Parliament, Devolution (Further Powers) Committee, *Official Report*, 12 March 2015, Col 34.

<sup>18</sup> Letter from the Scottish Government to the Committee, 25 March 2015. Available at:

[http://www.scottish.parliament.uk/S4\\_ScotlandBillCommittee/General%20Documents/2015.03.24\\_Letter from the DFM to the Convener.pdf](http://www.scottish.parliament.uk/S4_ScotlandBillCommittee/General%20Documents/2015.03.24_Letter_from_the_DFM_to_the_Convener.pdf)

<sup>19</sup> Letter from the Scotland Office to the Committee, 23 March 2015. Available at:

[http://www.scottish.parliament.uk/S4\\_ScotlandBillCommittee/General%20Documents/2015.03.23\\_Letter from SOS to Convener.pdf](http://www.scottish.parliament.uk/S4_ScotlandBillCommittee/General%20Documents/2015.03.23_Letter_from_SOS_to_Convener.pdf)

<sup>20</sup> Ibid, Col. 3.

<sup>21</sup> House of Lords, *Hansard*, 21 July 1998, Col. 791.

<http://hansard.millbanksystems.com/lords/1998/jul/21/scotland-bill>

<sup>22</sup> See Devolution Guidance Note 10: Post Devolution Primary Legislation affecting Scotland:

<http://www.gov.scot/Resource/Doc/37349/0066833.pdf>

<sup>23</sup> Smith Commission. *Report of the Smith Commission for further devolution of powers to the Scottish Parliament*, para. 22.

<sup>24</sup> Law Society of Scotland. Written evidence submitted to the Committee, p.5.

<sup>25</sup> Law Society of Scotland. Written evidence submitted to the Committee p.6.

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- <sup>26</sup> Law Society of Scotland. Written evidence submitted to the Committee, p.5.
- <sup>27</sup> Professor Alan Page. Written evidence submitted to the Committee, footnote 22.
- <sup>28</sup> Royal Society of Edinburgh / British Academy. Written evidence submitted to the Committee, p.5  
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- <sup>29</sup> Scottish Parliament, Devolution (Further Powers) Committee, *Official Report*, 12 March 2015, Col 35.
- <sup>30</sup> Letter to the Committee from the Secretary of State for Scotland, 29 March 2015. Available at  
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- <sup>31</sup> Smith Commission. *Report of the Smith Commission for further devolution of powers to the Scottish Parliament*, para. 60.
- <sup>32</sup> UK Government. *Scotland in the United Kingdom: An enduring settlement*, p.65-66.
- <sup>33</sup> Coalition for Racial Equality and Rights. Written evidence submitted to the Committee.
- <sup>34</sup> Equality Act 2010, Part One, Section 1(1).  
<http://www.legislation.gov.uk/ukpga/2010/15/part/1>
- <sup>35</sup> BEMIS. Written evidence submitted to the Committee, p.3.
- <sup>36</sup> Letter from the Scottish Government to the Committee, 25 March 2015. Available at:  
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- <sup>37</sup> Scottish Parliament, Devolution (Further Powers) Committee, *Official Report*, 12 March 2015, Col 38.
- <sup>38</sup> Letter from the Scottish Government to the Committee, 25 March 2015. Available at:  
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- <sup>39</sup> Scottish Parliament, Devolution (Further Powers) Committee, *Official Report*, 22 January 2015, Col 4.
- <sup>40</sup> Scottish Parliament, Devolution (Further Powers) Committee, *Official Report*, 22 January 2015, Col 3.
- <sup>41</sup> Scottish Parliament, Devolution (Further Powers) Committee, *Official Report*, 22 January 2015, Col 11.
- <sup>42</sup> Scottish Parliament, Devolution (Further Powers) Committee, *Official Report*, 15 January 2015, Col 5.
- <sup>43</sup> Scottish Parliament, Devolution (Further Powers) Committee, *Official Report*, 5 February 2015, Col 28.
- <sup>44</sup> Professor Andrew Hughes Hallett. Written submission to the Committee.
- <sup>45</sup> Scottish Parliament, Devolution (Further Powers) Committee, *Official Report*, 11 December 2015, Col 3.
- <sup>46</sup> Scottish Parliament, Devolution (Further Powers) Committee, *Official Report*, 22 January 2015, Col 20.
- <sup>47</sup> Scottish Parliament, Devolution (Further Powers) Committee, *Official Report*, 22 January 2015, Col 21-22.
- <sup>48</sup> Professor Andrew Hughes Hallett. Written submission to the Committee.
- <sup>49</sup> ICAS. Written evidence submitted to the Committee.
- <sup>50</sup> ICAS. Written evidence submitted to the Committee.
- <sup>51</sup> Scottish Parliament, Devolution (Further Powers) Committee, *Official Report*, 12 March 2015, Col 20-21.
- <sup>52</sup> Scottish Parliament, Devolution (Further Powers) Committee, *Official Report*, 11 December 2015, Col 10.
- <sup>53</sup> ICAS. Written evidence submitted to the Committee
- <sup>54</sup> The Smith Commission, *Report of the Smith Commission for further devolution of powers to the Scottish Parliament*, 27 November 2014, page 23.
- <sup>55</sup> Scottish Parliament, Devolution (Further Powers) Committee, *Official Report*, 2 December 2014.
- <sup>56</sup> NUS Scotland, Written evidence submitted to the Committee.
- <sup>57</sup> Institute for Fiscal Studies, *The Smith Commission's Proposals – how big a change do they represent? And what questions remain to be addressed?* December 2014.
- <sup>58</sup> Institute for Fiscal Studies, *The Smith Commission's Proposals – how big a change do they represent? And what questions remain to be addressed?* December 2014
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- <sup>62</sup> Scottish Parliament, Devolution (Further Powers) Committee, *Official Report*, 5 February 2015.
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- <sup>64</sup> PricewaterhouseCoopers. Written evidence submitted to the Committee.
- <sup>65</sup> Scottish Parliament, Devolution (Further Powers) Committee, *Official Report*, 15 January 2015.
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- <sup>69</sup> NFU Scotland. Written evidence submitted to the Committee.
- <sup>70</sup> Scottish Parliament, Devolution (Further Powers) Committee, *Official Report*, 22 January 2015.
- <sup>71</sup> Glasgow, Edinburgh and Aberdeen International Airports. Written evidence submitted by the Committee.
- <sup>72</sup> Scottish Tourism Alliance. Written evidence submitted to the Committee.
- <sup>73</sup> British Aggregates Association. Written evidence submitted to the Committee.
- <sup>74</sup> Scottish Chambers of Commerce. Written evidence submitted to the Committee.
- <sup>75</sup> Scottish Parliament, Devolution (Further Powers) Committee, *Official Report*, 22 January 2015.
- <sup>76</sup> Professor Anton Muscatelli. Additional written evidence submitted to the Committee.
- <sup>77</sup> Scottish Parliament, Devolution (Further Powers) Committee, *Official Report*, 5 February 2015.
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- <sup>80</sup> Royal Society of Edinburgh. Written evidence submitted to the Committee.
- <sup>81</sup> Royal Society of Edinburgh. Written evidence submitted to the Committee.
- <sup>82</sup> Scottish Parliament, Devolution (Further Powers) Committee, *Official Report*, 12 March 2015, Col 18.
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- <sup>266</sup> Scottish Parliament Devolution (Further Powers) Committee. *Official Report*, 11 December 2014, Col. 11-12.
- <sup>267</sup> Scottish Parliament Devolution (Further Powers) Committee. *Official Report*, 11 December 2014, Col. 12-13.
- <sup>268</sup> Scottish Parliament Devolution (Further Powers) Committee. *Official Report*, 11 December 2014, Col. 20.
- <sup>269</sup> Smith Commission. *Report of the Smith Commission for further devolution of powers to the Scottish Parliament*, p.15.
- <sup>270</sup> Professor Alan Page. Written evidence submitted to the Committee, p.4.
- <sup>271</sup> Professor Aileen McHarg. Written evidence submitted to the Committee, p.3-4.
- <sup>272</sup> Professor Aileen McHarg. Written evidence submitted to the Committee, p.3-4.
- <sup>273</sup> Scottish Parliament Devolution (Further Powers) Committee. *Official Report*, 11 December 2014, Col. 20-21.
- <sup>274</sup> Scottish Parliament Devolution (Further Powers) Committee. *Official Report*, 11 December 2014, Col. 20-21.
- <sup>275</sup> Scottish Parliament Devolution (Further Powers) Committee. *Official Report*, 4 December 2014, Col. 26-27.
- <sup>276</sup> Scottish Parliament Devolution (Further Powers) Committee. *Official Report*, 11 December 2015, Col. 2.
- <sup>277</sup> Scottish Parliament Devolution (Further Powers) Committee. *Official Report*, 15 January 2015, Col. 16.
- <sup>278</sup> Scottish Parliament Devolution (Further Powers) Committee. *Official Report*, 15 January 2015, Col. 17.
- <sup>279</sup> Scottish Parliament Devolution (Further Powers) Committee. *Official Report*, 22 January 2015, Col. 20.
- <sup>280</sup> Scottish Parliament Devolution (Further Powers) Committee. *Official Report*, 15 January 2015, Col. 19-20.
- <sup>281</sup> Chartered Institute of Housing Scotland. Written evidence submitted to the Committee.
- <sup>282</sup> Scottish Parliament Devolution (Further Powers) Committee. *Official Report*, 15 January 2015, Col. 11.
- <sup>283</sup> Scottish Parliament Devolution (Further Powers) Committee. *Official Report*, 15 January 2015, Col. 7.
- <sup>284</sup> Scottish Parliament Devolution (Further Powers) Committee. *Official Report*, 11 December 2014, Col. 3.
- <sup>285</sup> Inclusion Scotland. Written evidence submitted to the Committee.

## Annexe A – a summary guide to the Committee's views on the draft legislative clauses compared to the Smith Agreement

<b>Permanency of the Scottish Parliament</b>	
<b>The Sewel Convention and the legislative consent of the Scottish Parliament</b>	
<b>Equal opportunities</b>	
<b>Income Tax</b>	
<b>Assignment of a share of VAT</b>	
<b>Air Passenger Duty</b>	
<b>Aggregates levy</b>	
<b>Fiscal framework, no detriment etc.</b>	
<b>Borrowing</b>	
<b>Welfare and Benefits</b>	
<b>The Crown Estate</b>	
<b>Intergovernmental Relations and Parliamentary Oversight</b>	
<b>Other provisions and issues</b>	

### Key

	Amendments required to the draft legislative clause(s)
	Clarification required on the draft legislative clause(s) or some amendment needed, or further information required on how these provisions will operate
	No significant issues raised in the evidence received to date on the Smith Commission's recommendations or the draft clauses

## Annexe B

### Extract from the minutes of the meetings of the Committee and links to the Official Reports

#### **4th Meeting, 2014 (Session 4), Tuesday 2 December 2014**

Present:

Bruce Crawford (Convener)

Rob Gibson

Annabel Goldie

Alison Johnstone

Bill Kidd (Committee Substitute)

Lewis Macdonald (Deputy Convener)

Mark McDonald

Stuart McMillan

Drew Smith

Also present: Patrick Harvie

Apologies were received from Linda Fabiani, Stewart Maxwell, Tavish Scott.

The meeting opened at 9.00 am.

**1. Declaration of interests:** Alison Johnstone and Mark McDonald had no relevant interests to declare.

#### **2. The Smith Commission: The Committee took evidence from—**

Lord Smith of Kelvin, Chair, and Jenny Bates, Head of Secretariat, The Smith Commission.

The meeting closed at 10.09 am

*Official Report:*

<http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=9663#.VH3ORdJSiz4>

### 5th Meeting, 2014 (Session 4), Thursday 4 December 2014

Present:

Bruce Crawford (Convener)  
Linda Fabiani  
Rob Gibson  
Alex Johnstone  
Alison Johnstone  
Bill Kidd (Committee Substitute)  
Lewis Macdonald (Deputy Convener)  
Mark McDonald  
Stuart McMillan  
Tavish Scott  
Drew Smith

The meeting opened at 9.01 am.

**1. Declaration of interests:** Alex Johnstone declared that he had no relevant interests.

#### **2. The Smith Commission: The Committee took evidence from—**

Rt. Hon Alistair Carmichael, Secretary of State for Scotland, and Chris Platt, Principal Private Secretary, Scotland Office;

and then from—

John Swinney, Deputy First Minister & Cabinet Secretary for Finance, Constitution and Economy, Gerald Byrne, Elections and Constitution Division, and Sean Neill, Fiscal Responsibility Division, Scottish Government.

The meeting closed at 11.29 am.

*Official Report:*

<http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=9674>

#### **Supplementary Written Evidence**



[The Scotland Office](#)



[The Scottish Government](#)

## **Devolution (Further Powers) Committee**

New Powers for Scotland: An Interim Report on the Smith Commission and the UK Government's Proposals, 3rd Report, Session 4 (2015)

### **6th Meeting, 2014 (Session 4), Thursday 11 December 2014**

Present:

Bruce Crawford (Convener)  
Linda Fabiani  
Rob Gibson  
Alex Johnstone  
Alison Johnstone  
Bill Kidd (Committee Substitute)  
Lewis Macdonald (Deputy Convener)  
Mark McDonald  
Stuart McMillan  
Tavish Scott  
Drew Smith

The meeting opened at 10.00 am.

#### **1. The Smith Commission: The Committee took evidence from—**

Professor David Bell, Professor of Economics, University of Stirling;  
Professor David Heald, Professor of Accountancy, University of Aberdeen Business School;  
Professor Nicola McEwen, Associate Director, ESRC Centre on Constitutional Change;  
Professor Charlie Jeffery, Professor of Politics, University of Edinburgh;  
Professor Michael Keating, Professor of Politics, University of Aberdeen.

The meeting closed at 11.35 am.

*Official Report:*

<http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=9688>

#### **Written evidence**



[Professor David Heald](#)



[Professor Charlie Jeffrey](#)



[Professor Michael Keating](#)



[Professor Nicola McEwen](#)



[Professor David Bell](#)

## 2nd Meeting, 2015 (Session 4), Thursday 15 January 2015

Present

Bruce Crawford (Convener)

Linda Fabiani

Rob Gibson

Alex Johnstone

Alison Johnstone

Lewis Macdonald (Deputy Convener)

Stewart Maxwell

Mark McDonald

Stuart McMillan

Duncan McNeil

Tavish Scott

The meeting opened at 9.31 am.

**1. Declaration of interests:** Duncan McNeil declared that he had no relevant interests beyond those declared in the Register of Interests.

**2. Choice of Deputy Convener:** The Committee chose Duncan McNeil as its new Deputy Convener.

**3. Evidence from civic Scotland organisations on the Smith Agreement.**  
**The Committee took evidence from—**

Peter Kelly, Director, Poverty Alliance;

Dave Moxham, Deputy General Secretary, Scottish Trades Union Congress;

Lucy McTernan, Deputy Chief Executive, Scottish Council for Voluntary Organisations;

Satwat Rehman, Director, One Parent Families Scotland;

Bill Scott, Director of Policy, Inclusion Scotland;

Mary Taylor, Chief Executive, Scottish Federation of Housing Associations

All the witnesses were invited to send any additional written evidence they wished. It was further agreed that the Convener and the Deputy Convener would meet with the witnesses listed above (if available) to discuss how civil society and the general public can engage with the Committee as it continues its work looking at draft clauses and any subsequent bill to devolve further powers to the Scottish Parliament

The meeting closed at 11.29 am









## **Devolution (Further Powers) Committee**

New Powers for Scotland: An Interim Report on the Smith Commission and the UK Government's Proposals,  
3rd Report, Session 4 (2015)

*Official Report:*

<http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=9729>

### **Written Evidence**

-  [Poverty Alliance](#)
-  [STUC](#)
-  [SCVO](#)
-  [One Parent Families Scotland](#)
-  [Inclusion Scotland](#)
-  [SFHA](#)

### 3rd Meeting, 2015 (Session 4), Thursday 22 January 2015

Present

Bruce Crawford (Convener)

Linda Fabiani

Rob Gibson

Alex Johnstone

Lewis Macdonald

Stewart Maxwell

Mark McDonald

Stuart McMillan

Duncan McNeil (Deputy Convener)

Tavish Scott

Apologies were received from Alison Johnstone.

The meeting opened at 9.31 am.

#### **1. Evidence from Scottish business organisations on the Smith Agreement. The Committee took evidence from—**

David Watt, Executive Director, Institute of Directors;

Ross Martin, Chief Executive, Scottish Council for Development and Industry;

Alan Watt, Chief Executive, Civil Engineering Contractors Association;

Stuart Patrick, Chief Executive, Glasgow Chamber of Commerce.

The meeting closed at 11.30 am.

*Official Report:*

<http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=9746>

#### **Written Evidence**



[Institute of Directors](#)



[SCDI](#)



[CECA Scotland](#)



[Glasgow Chamber of Commerce](#)

#### **4th Meeting, 2015 (Session 4), Thursday 5 February 2015**

Present:

Bruce Crawford (Convener)

Linda Fabiani

Alex Johnstone

Alison Johnstone

Bill Kidd (Committee Substitute)

Stewart Maxwell

Mark McDonald

Stuart McMillan

Duncan McNeil (Deputy Convener)

Apologies were received from Rob Gibson, Lewis Macdonald and Tavish Scott.

The meeting opened at 9.01 am.

**1. Decision on taking business in private:** The Committee agreed to take item 3 in private.

**2. Evidence on Taxation clauses:** The Committee took evidence from—

Charlotte Barbour, Head of Taxation (Private Clients & Small Businesses), ICAS;  
Professor Anton Muscatelli, Principal, University of Glasgow;  
Gwyneth Scholefield, Director, and Steve Couch, Partner,  
PricewaterhouseCoopers.

**3. Choice of Adviser (in private):** The Committee considered a list of candidates for the posts of adviser and selected its preferred nominees.

The meeting closed at 10.56 am.

*Official Report:*

<http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=9775>

#### **Written Evidence**



[PricewaterhouseCoopers](#)

### 5th Meeting, 2015 (Session 4), Thursday 19 February 2015

Present:

Bruce Crawford (Convener)

Linda Fabiani

Rob Gibson

Alex Johnstone

Alison Johnstone

Lewis Macdonald

Stewart Maxwell

Mark McDonald

Stuart McMillan

Duncan McNeil (Deputy Convener)

Tavish Scott

In attendance: Professor Nicola McEwen, Committee Adviser

The meeting opened at 9.02 am.

**1. Decision on taking business in private:** The Committee agreed to take item 3 in private and that all future agenda items on reviews of evidence would be heard in private.

**2. Evidence on Welfare Clauses:** The Committee took evidence from—

John Dickie, Director, Child Poverty Action Group;

Richard Gass, Member of the Policy and Standards Committee, Rights Advice Scotland;

Paul Spicker, Professor of Public Policy, Robert Gordon University;

David Ogilvie, Head of Policy and Public Affairs, Chartered Institute of Housing;

Jim McCormick, Expert Adviser (Scotland), Social Security Advisory Committee.

**3. Evidence on Welfare Clauses (in private):** The Committee considered evidence heard during the meeting.

The meeting closed at 11.25 am.

*Official Report:*

<http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=9786>

**Written Evidence**



[CPAG](#)



[Paul Spicker](#)



[Chartered Institute of Housing](#)



[Rights Advice Scotland](#)

## Devolution (Further Powers) Committee

New Powers for Scotland: An Interim Report on the Smith Commission and the UK Government's Proposals, 3rd Report, Session 4 (2015)

### 6th Meeting, 2015 (Session 4), Thursday 26 February 2015

Present:

Bruce Crawford (Convener)

Linda Fabiani

Rob Gibson

Alex Johnstone

Alison Johnstone

Bill Kidd (Committee Substitute)

Lewis Macdonald

Mark McDonald

Stuart McMillan

Duncan McNeil (Deputy Convener)

Apologies were received from Stewart Maxwell, Tavish Scott.

In attendance: Heidi Poon, Committee Adviser

The meeting opened at 9.01 am.

**4. Evidence on Borrowing Powers:** The Committee took evidence from—

Professor David Bell, Professor of Economics, University of Stirling;

Don Peebles, Head of CIPFA Scotland;

Philip Milburn, Investment Manager, Kames Capital and the Investment Association.

**5. Review of evidence (in private):** The Committee reviewed the evidence taken on borrowing powers at today's meeting.

The meeting closed at 11.21 am.

*Official Report:*

<http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=9803>

### Written Evidence



[David Bell](#)



[CIPFA](#)



[Investment Association](#)

### 7th Meeting, 2015 (Session 4), Thursday 5 March 2015

Present:

Bruce Crawford (Convener)

Linda Fabiani

Rob Gibson

Alex Johnstone

Alison Johnstone

Lewis Macdonald

Stewart Maxwell

Mark McDonald

Stuart McMillan

Duncan McNeil (Deputy Convener)

Tavish Scott

The meeting opened at 9.01 am.

#### **2. Evidence on the Crown Estate provisions The Committee took evidence from—**

Andy Wightman, Independent Writer and Researcher on Land Rights;  
Dan Finch, Chief Executive, Moray Offshore Renewables;  
Walter Speirs, Director, Muckairn Mussels Ltd and former Director at Scottish Aquaculture Innovation Centre;  
Angus Campbell, Leader, Comhairle nan Eilean Siar;  
Steve Barron, Chief Executive, Highland Council;

and then from—

Gareth Baird, Scottish Commissioner, Vivienne King, Director of Business Operations and General Counsel, Ronnie Quinn, Head of Ocean Energy and Energy & Infrastructure Lead (Scotland), and Alan Laidlaw, Rural and Coastal Portfolio Manager (Scotland), The Crown Estate.

**3. Review of evidence heard (in private):** The Committee reviewed the evidence heard on the Crown Estate during today's meeting.

The meeting closed at 11.38 am.

*Official Report:*

<http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=9818>

#### **Written Evidence**



[Andy Wightman](#)

### **Devolution (Further Powers) Committee**

New Powers for Scotland: An Interim Report on the Smith Commission and the UK Government's Proposals, 3rd Report, Session 4 (2015)



[Muckairn Mussels](#)



[Moray Offshore Renewables](#)



[Comhairle nan Eilean Siar, Shetlands Islands Council and Orkney Islands Council on behalf of Our Islands: Our Future Campaign](#)



[The Highland Council](#)



[The Crown Estate](#)

### **Supplementary written evidence**



[The Crown Estate](#)



### 8th Meeting, 2015 (Session 4), Thursday 12 March 2015

Present:

Bruce Crawford (Convener)

Linda Fabiani

Rob Gibson

Alex Johnstone

Alison Johnstone

Bill Kidd (Committee Substitute)

Lewis Macdonald

Stewart Maxwell

Stuart McMillan

Duncan McNeil (Deputy Convener)

Tavish Scott

Apologies were received from Mark McDonald.

In attendance: Christine O'Neill, Nicola McEwen and Heidi Poon, Committee Advisers

The meeting opened at 9.31 am.

#### **1. Proposals to devolve further powers to Scotland and scrutiny of the UK Government's draft legislative clauses: The Committee took evidence from—**

John Swinney, Deputy First Minister & Cabinet Secretary for Finance, Constitution and Economy, Donald McGillivray, Deputy Director, Elections and Constitution Division, Stephen Kerr, Head of Social Security Policy and Delivery Division, and Sean Neill, Acting Deputy Director, Finance and Fiscal Responsibility Division, Scottish Government.

**2. Decision on taking business in private:** The Committee will consider whether its consideration of a draft report on proposals for further devolution should be taken in private at future meetings at its next meeting.

**3. Review of evidence (in private):** The Committee reviewed the evidence heard at today's meeting.

The meeting closed at 11.36 am

Official Report:

<http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=9851>

**Devolution (Further Powers) Committee**

New Powers for Scotland: An Interim Report on the Smith Commission and the UK Government's Proposals,  
3rd Report, Session 4 (2015)

**Supplementary written evidence**

[The Scottish Government](#)

**10th Meeting, 2015 (Session 4), Thursday 26 March 2015**

Present:

Linda Fabiani

Rob Gibson

Alex Johnstone

Alison Johnstone

Bill Kidd (Committee Substitute)

Lewis Macdonald

Stewart Maxwell

Mark McDonald

Stuart McMillan

Duncan McNeil (Deputy Convener)

Tavish Scott

Apologies were received from Bruce Crawford (Convener).

In attendance: Heidi Poon, Nicola McEwen and Christine O'Neill, Committee Advisers

The meeting opened at 10.05 am.

**1. Draft report on proposals to devolve further powers to Scotland and scrutiny of the UK Government's draft legislative clauses (in private):** The Committee discussed a draft report.

The meeting closed at 11.29 am.

## **Devolution (Further Powers) Committee**

New Powers for Scotland: An Interim Report on the Smith Commission and the UK Government's Proposals, 3rd Report, Session 4 (2015)

### **11th Meeting, 2015 (Session 4), Thursday 2 April 2015**

Present:

Bruce Crawford (Convener)

Linda Fabiani

Rob Gibson

Alex Johnstone

Alison Johnstone

Lewis Macdonald

Stewart Maxwell

Mark McDonald

Stuart McMillan

Duncan McNeil (Deputy Convener)

Tavish Scott

The meeting opened at 10.50 am.

**3. Draft report on proposals to devolve further powers to Scotland and scrutiny of the UK Government draft clauses (in private):** The Committee considered a draft report.

The meeting closed at 11.33 am.

**12th Meeting, 2015 (Session 4), Thursday 23 April 2015**

Present:

Bruce Crawford (Convener)

Linda Fabiani

Rob Gibson

Alison Johnstone

Lewis Macdonald

Stewart Maxwell

Mark McDonald

Stuart McMillan

Tavish Scott

Apologies were received from Alex Johnstone and Duncan McNeil (Deputy Convener).

The meeting opened at 9.00 am.

**2. Draft report on proposals to devolve further powers to Scotland and scrutiny of the UK Government's draft legislative clauses (in private):** The Committee discussed a draft report.

The meeting closed at 11.32 am.

**13th Meeting, 2015 (Session 4), Thursday 30 April 2015**

Present:

Bruce Crawford (Convener)  
Linda Fabiani  
Rob Gibson  
Alison Johnstone  
Lewis Macdonald  
Stewart Maxwell  
Mark McDonald  
Stuart McMillan  
Tavish Scott

Apologies were received from Alex Johnstone, Duncan McNeil (Deputy Convener).

The meeting opened at 8.03 am.





















**1.Draft report on proposals to devolve further powers to Scotland and scrutiny of the UK Government's draft legislative clauses (in private):** The Committee considered a draft, interim report.

**4.Draft report on proposals to devolve further powers to Scotland and scrutiny of the UK Government's draft legislative clauses:** The Committee considered and agreed its interim report.

The meeting closed at 10.08 am.

# Annexe C

## List of other written evidence

-  [Aileen McHarg](#)
-  [Alan Page](#)
-  [Andrew Hughes Hallett](#)
-  [Association of British Bookmakers](#)
-  [BASE](#)
-  [BEMIS](#)
-  [British Aggregates Association](#)
-  [Campaign for Scottish Home Rule](#)
-  [Carers Scotland](#)
-  [Citizens Advice Scotland](#)
-  [Citizens Advice Scotland - additional submission](#)
-  [COSLA](#)
-  [CRER](#)
-  [Dr. Eve Hepburn and Prof. Sionaidh Douglas-Scott](#)
-  [ENABLE Scotland](#)
-  [Engender](#)
-  [ERSA](#)
-  [Federation of Small Businesses](#)
-  [Gavin Roberts](#)
-  [Glasgow Airport](#)
-  [Ian Martlew](#)
-  [ICAS](#)
-  [Inclusion Scotland](#)
-  [John SH Drummond Moray](#)
-  [Law Society of Scotland](#)
-  [Money Advice Scotland](#)
-  [NFU Scotland](#)
-  [NUS Scotland](#)
-  [Poverty Alliance](#)
-  [Royal Society of Edinburgh](#)
-  [RYA Scotland](#)
-  [ScotlandIS](#)
-  [Scottish Chambers of Commerce](#)
-  [Scottish Federation of Housing Associations](#)
-  [Scottish Renewables](#)
-  [Scottish Retail Consortium](#)
-  [Scottish Tourism Alliance](#)
-  [Scottish Women's Convention](#)
-  [SCVO](#)
-  [SELECT](#)



## **Devolution (Further Powers) Committee**

New Powers for Scotland: An Interim Report on the Smith Commission and the UK Government's Proposals,  
3rd Report, Session 4 (2015)



[SELECT background paper 1](#)



[SELECT background paper 2](#)



[Universities Scotland](#)



[Wise Group](#)



