

Submission to The Smith Commission: Creating the Post-Referendum Scotland

Introduction

1. The challenge facing the Commission, from both a political and legal standpoint, is a difficult one. From the former, it must seek to reconcile wildly different approaches to devolution and, consequently, varying visions for its future. From the latter, it must draft a Bill that must be introduced to a parliament, of which we do not know the make-up, and has yet to be elected. The time-scale imposed by what has become known as “The Vow” is, while achievable, tight and will require a great deal of negotiation and compromise. In light of recent events in the Scottish political sphere, this will be more challenging than it may have been otherwise. I wish the Commission and its members well in that respect.
2. The role of the Commission is to produce “Heads of Agreement with recommendations for further devolution of powers to the Scottish Parliament”.¹ This limits the Commission in what it can recommend, and means it cannot examine the implementation of devolution across the UK – which I feel is an important aspect of the whole devolution settlement – nor the difficult issue of the shape of devolution *within* Scotland. This will restrict substantially the suggestions I would make as part of this submission
3. The nature of the Scotland Act is that all power is devolved to Scotland, except that which is retained by Westminster. This model is undoubtedly the correct one, since it reinforces the position that Scotland is part of a wider UK, with power flowing from its centre. This stricter should lead to a frame of thought that *every power* should be devolved except those which can reasonably and rationally be reserved to Westminster for a Social, Political, Economic or Legal purpose.
4. I have broken my submission up into 4 main sections. The first, and most substancial, covers the Constitutional relationship between the Scottish Parliament at Holyrood and the UK Parliament at Westminster (as far as it lies within the remit of this Commission). The second discusses tax and revenue raising powers, which had been a major focus of the Independence referendum campaign, and will be key in constructing a stronger Scottish Parliament. The third examines the current division of Social Security powers, and what (if any) welfare benefits should come under the sphere of Holyrood’s legislative competence. The final section will deal with miscellaneous provisions that, while not as glamorous or ‘important’ would, I feel, be best devolved to the Scottish Parliament.

¹ Smith Commission Terms of Reference

The Constitution

Matters Affecting the Union

5. Currently under the Scotland Acts, constitutional matters of fundamental importance to the UK are reserved to Westminster. Specifically, the matter of “The Union of the Kingdoms of Scotland and England” is outwith the legislative competence of the Scottish Parliament as defined by The Scotland Act 1998 (the ‘1998 Act’).² Despite this, there was great contention as to whether the Scottish Parliament was still able to hold a Referendum on Scottish Independence. While an order under Section 30 of the Scotland Act was made, explicitly granting the power to the Scottish Parliament to hold a referendum, there was no agreement whether this order confirmed an already existing power the Scottish Parliament had, or whether it was granting a new power to the Parliament. Indeed, the SNP have still not withdrawn the contention that the Scottish Parliament has always possessed such a power.
6. Specifically, the argument was put forward that, even if the Scottish Parliament did not have the competence to legislate for an Independence Referendum directly, it could hold a referendum asking whether its powers should “...be extended so that Independence could be achieved”.³ As such a question would not directly relate to the matter of the Union, the case that such an Act being *ultra vires* is much less simple, and relies on judicial interpretation of whether such a question “...relates to...” the union in terms of the 1998 Act.⁴
7. Therefore, **it will be beneficial to the stability and certainty of the Scottish Devolution settlement for it to be clarified in the Act whether the Scottish Parliament currently holds (or not as the case may well be) such a power to hold a referendum on Independence or further devolution, either in explicit terms (i.e. “Should Scotland be an Independent country?”) or by implication (“Should the Powers of the Scottish Parliament be extended powers [be] extended so that independence can be achieved?”) and, regardless, recommend to Parliament to clarify what the position is intended to be.**
8. In my view, it there are two options which are constitutionally sensible settlements of the issue:
 - a. The Scottish Parliament has the power to call a Referendum on Scottish Independence (with a statutory period of time requires to pass between such referendums).
 - b. A Referendum on Scottish Independence may only be held when Holyrood votes in support of one and Westminster subsequently does likewise (with a statutory period of time requires to pass between such referendums).

² (1998 c.46); s30 with Sch.5, Para.1(b)

³ Scotland’s future: Draft Referendum (Scotland) Bill Consultation Paper (2010); p.22

⁴ The 1998 Act, s.29

9. While the latter option may grant Westminster a veto over the will of the Scottish Parliament, there is a political balance that would have to be struck as any denial by the UK Parliament of a referendum where there is a clear appetite for one in Scotland would be politically dangerous. This was tacitly acknowledged by the Prime Minister who, while opposed to Scottish independence, did not deny the right of the Scottish people to hold a referendum on the issue, unlike the situation in Spain. **In light of this, I support the latter option.**
10. A length of time should be required to pass between referendums to avoid Scottish politics becoming bogged down in “the constitutional question” to the expense of substantive political action. Such a provision is present in the Northern Ireland Act 1998 to prevent such a situation occurring.⁵ Given the reaction of some to the result of the 2014 Referendum, including recent comments made by Nicola Sturgeon MSP, it feels that in spite of the assurance that the referendum would be decisive and a “once in a generation”⁶ event, this assurance required statutory backing. **The length of the time limit (7 years in Northern Ireland) would be a matter for negotiation, but personally believe it should be 10 years, given the seriousness of the issue at hand.**

Relationship between the UK and Scottish Parliaments

11. The position and character of the Scottish Parliament as an institution has been hotly contested since its creation, but the conventional view is that it is a body established by statute and, equally, a body that can be abolished by statute.⁷ The political ramifications of such an action would be fatal for those that attempted to do so (without a referendum of the people supporting such a move). The Labour submission makes clear they seek to “enshrine” the Scottish Parliament in law. How this could be done is unknown, since the UK knows no concept of Higher law, and the discussion of such a topic is outwith the remit of this commission.
12. The UK Parliament is not bound by, and can repeal any Act of the Scottish Parliament should it choose to.⁸ In practice, however, Westminster does not legislate in an area of devolved competence without a Legislative Consent motion being passed by Holyrood. This has become known as the Sewell Convention and has become a standard part of the devolution process. It is, however, not a legal duty of either parliament, and can be broken with no (legal) consequence. **I would submit that the process known as the Sewell Convention be put into law so that the UK Parliament can only substantively legislate on a devolved competence with the consent of the Scottish Parliament as expressed in a Legislative Consent Motion.**
13. Such a measure would protect the powers of the Scottish Parliament, allowing a quasi-federal division of powers to establish itself, but not completely shatter the parliamentary sovereignty of Westminster, as per British constitutional tradition. While such a law

⁵ Northern Ireland Act 1998 (1998 ch. 47); Sch. 1 para 3

⁶ BBC News, “Salmond: Referendum is once in a generation opportunity” (Accessible at: <http://www.bbc.co.uk/news/uk-scotland-29196661>) [Accessed 27th October 2014]

⁷ However, this may be disputable. cf. *AXA General Insurance Ltd. v. Scottish Ministers and Others* [2011] UKSC 46; para. 46

⁸ The 1998 Act, s.28(7)

could be repealed by Westminster, just as easily as it was made, it would be clearly seen as an attack on the power and position of the Parliament, and so acts as another layer of protection for Holyrood's sphere of competence.

14. Such a move would also clarify the relationship between the UK and Scottish Parliaments as co-equal partners in legislating for Scotland, and not Acts of the Scottish Parliament existing but for the mercy of Westminster.
15. Going further, and somewhat counter-intuitively, an additional layer of security for the Scottish Parliament could be created by creating a method by which the Scottish Parliament could be abolished. **If the Scottish Parliament had to vote in favour of its own abolition, as well as Westminster, then its existence is all but assured.** These proposals, or a combination of them, would secure the position of the Scottish parliament within the current UK Legal framework and would help further clarify the character of the parliament.

Finance and Tax

16. The 1998 Act as passed gave the Scottish Parliament very little control over tax policy. The only major taxes it could control were "Local taxes to fund Local Expenditure".⁹ It also granted the Parliament the power (which was never used) to vary the basic rate of income tax by 3p on the UK Basic rate of tax, with additional revenue being collected by the Parliament.¹⁰ The 2012 Act replaced this with the "Scottish Rate of Income Tax", which was a markedly more drastic shift of tax-raising from Westminster to Holyrood, increasing the ability to vary to 10p, and forcing the Scottish Parliament to make an order as to whether tax rates should be altered up, down or with no change each year. It is also a feature of the 2012 Act that all bands must be altered evenly.
17. During the Referendum campaign it was accepted that this power (even though it has not yet been enacted, let alone implemented) would be built on or changed. There is, however, disagreement on how this should be implemented. The parties forming part of The Commission all have different proposals, but I feel that none of these are entirely desirable.
18. Devolving the all income tax powers (Banding, Rates, Personal Allowance and Reliefs) would create internal disparity within the UK, leading to intra-state tax competition. There is a clear economic, social and political case against devolution of all income tax powers. Similarly, merely increasing the rate at which the Scottish Parliament could vary Income Tax by 50% is too limited to be meaningful change.¹¹

⁹ The 1998 Act; Sch.5, Head A, s.A1

¹⁰ The 1998 Act; ss.73-80

¹¹ In addition, if the UK government were to set a banding to Income Tax at less than 15%, the Scottish Parliament's range of alteration would be limited, or people may be in a "negative tax band". This is a risk with the system introduced in the 2012 Act, but the creation of a, say, 10% tax band is much more likely than a 15% one.

19. There *is*, however, a case for devolution of some Income Tax powers. **I would submit, that The Scottish Parliament be able to alter the rate of Income Tax payable in each band (but not the band threshold themselves) independently of each other, within 10p of the rate set in by the UK Government. At 2014/2015 rates, this would mean the Scottish Parliament could vary the UK rates between:**

- a. **BASIC Rate: 10% \leftarrow 20% \rightarrow 30%**
- b. **HIGHER Rate: 30% \leftarrow 40% \rightarrow 50%**
- c. **ADDITIONAL Rate: 35% \leftarrow 45% \rightarrow 55%; without uniform shift.**

20. **Any consequential of these changes would as a whole, be passed to the Scottish parliament (whether positive or negative).**

21. This system would mean (for example) the Scottish Parliament could lower tax rates for Basic rate payers, but increase the Higher and Additional rates, negating (or even exceeding) any loss of revenue from the Basic rate variation. This would allow for the progressive nature of the Income Tax system to be expanded or contracted as the Scottish Parliament see fit, while still ensuring income tax bands thresholds would remain consistent throughout the UK, minimising the risk intra-state competition full Income Tax devolution would pose. It also grants the Scottish Parliament the full responsibility of their decision.

22. In addition to the partial devolution of Income tax, I would submit that **Inheritance Tax should be devolved to the Scottish Parliament**. This would supplement the devolution of Land Taxes (such as SDLT), since estates on which the tax would be charged have a strong (and almost irremovable) connection to Scotland, making the subjects of the tax clearly determinable. There is also a link between Inheritance Tax and land transfers, re-enforcing the logic behind its devolution, and making any case for its continues reservation difficult to justify. The small number of cases where non-heritable assets alone trigger a relevant transfer is, I feel, an easily surmountable problem.

23. **In any event, any tax or other revenue stream devolved to the Scottish Parliament should be accompanied by a proportionate reduction in the Scottish Block Grant.** For example, if a tax contributing 5% of whole UK revenue were devolved, the Scottish Block Grant should be reduced accordingly. Also, the Scottish Parliament should have an explicit power

The Welfare System

24. Applying the same argument as outlined above (i.e. the UK is partly a social union), to allow excessive intra-state variance in social security provision would be to weaken the ties between the nations of the UK. There is a strong social and economic case for most UK social security benefits to remain reserved. I do not believe The Scottish Parliament should have a general competence over social security legislation, as I believe the system

benefits, both economically and socially, by being substantially delivered at the UK level.

25. This does not mean, however, that no welfare benefits can be devolved within the UK framework. There are, I believe, areas where devolution would be sensible, beneficial, and would fill holes in the current scheme.
26. **Powers relating to Disability Benefits, Unemployment Benefits and Incapacity Benefits should not be devolved to the Scottish Parliament.** To devolve such powers would drastically alter the way in which the UK Welfare system operates and deviate from its fundamental principle of “From each according to their ability to pay; To each according to their need”. To devolve such powers would create a regional welfare system, not a national one. The costs involved would also be substantial, not just in the way of benefit payments themselves, but the support that would surely have to be made available to support claimants in their various and varied situations.
27. On this point, the submission from the Conservative Party suggests that the Scottish Parliament should have a power to add on to, but not take away from, the UK level of benefit. Essentially a ‘Scottish Premium’ would be paid from Holyrood resources. Notwithstanding what I have said above, This is an argument I am not entirely unsympathetic toward. If the Scottish Parliament were able, **from its own resources**, to be able to fund and implement such a premium, there may be a case for it. However, there are a number of technical and administrative points that would have to be addressed before I would support such a proposal. Primary among these would be the status of the Scottish Premium i.e. would it be counted as “income” for other benefit calculations? if so, it’s knock-on effect for other benefit calculations may have a net-negative impact on those who receive it. **Until the details of such a proposal can be established, I would hesitate to support such a proposal.**
28. Separately, while powers related to Housing provision are devolved, powers relating to housing benefit are not. I would submit, therefore, that to fix this anomaly, **The Scottish Parliament should be given complete control over the provision of ‘Housing Benefit’ (as it is currently known).** This would allow the benefit to be moulded as to fix the needs of Scottish tenants and the demands of the Scottish people. Devolving Housing Benefit could also allow improved planning and administration of housing provision in Scotland.
29. Upon a similar principle, Council Tax being currently devolved, **powers relating to (what is currently known as) Council Tax Reduction should also be completely devolved.** Administratively, power currently resides with the Scottish Parliament, but the mechanics of the system itself are established at Westminster.¹² This would allow the Scottish Parliament to more effectively administer local taxes as a whole, including their subsidising for those who are deemed to require it.

¹² The Council Tax Reduction (Scotland) Amendment Regulations 2014 (SSI 2014/35); with The Council Tax Reduction (Scotland) Regulations 2012 (SSI 2012/303)

Miscellaneous Powers

30. In addition to the above, I would submit that the following powers, currently reserved to Westminster, by devolved to the Scottish Parliament:

- a. Betting and Gambling (but not provisions regarding the regulation of lotteries, including the National Lottery)¹³:** devolving such powers would allow the Scottish Parliament to tackle the rising issue of increased betting shops and ‘Fixed Odds Betting terminals’ within those premises, while paying heed to the Scottish Factors at play.
- b. Road Transport – Public Service Vehicle operator Licensing¹⁴:** this would allow the Scottish Parliament (and so potentially local authorities) to alter the approach it takes to the management and licensing of Public Passenger and Public Service Vehicles – in particular bus and taxi services.
- c. Rail Transport – Provision and regulation of railway services¹⁵:** the Scottish parliament should be able to regulate the running and provision of the railways in Scotland. This power would allow the Scottish Parliament to alter the procurement process for Scottish rail services.
- d. Abortion¹⁶:** The National Health Service is, generally, devolved in Scotland. NHS Scotland’s funding and use of medicine and medical treatments is currently decided by the Scottish Medicines Consortium, meaning that some medicines and procedures available in Scotland may not be available in England, and *vice versa*. Abortion (as controversial a procedure as it may be) is, at its simplest, a medical procedure like any other, and so should be within the remit of Scotland to regulate. This would include the Scottish Parliament controlling access, term limits and other such allowances and/or restrictions. Other “matters of conscience” are decided regularly in the Scottish Parliament (including ‘end-of-life’ matters) and allowance has been made for other devolved territories, albeit still being legislated for at Westminster.
The above notwithstanding, It is right that regulation of the Medical professions remains reserved as to ensure an approximately equal level of knowledge and expertise across the whole UK.
- e. Surrogacy Arrangements¹⁷:** As matter of Family Law, including the recognition of familial relationships, is already a responsibility of the Scottish parliament, the regulation of Surrogacy Arrangements should also be brought within the competence of the Scottish parliament as to allow a more joined up approach to emerge with regards to non-conventional families in a Modern Scotland

¹³ As is currently reserved under The 1998 Act; Sch.5, Part 2, s.B9

¹⁴ As is currently reserved under The 1998 Act; Sch.5, Part 2, s.E1

¹⁵ As is currently reserved under The 1998 Act; Sch.5, Part 2, s.E2

¹⁶ As is currently reserved under The 1998 Act; Sch.5, Part 2, s.J1

¹⁷ As is currently reserved under The 1998 Act; Sch.5, Part 2, s.J3

31. **FINALLY**, any power currently reserved to Westminster I have not explicitly argued to be devolved should, in my view, remain reserved for the time being.

32. I would commend the above proposals for the Commission's consideration.

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