The Smith Commission and further powers for the Scottish Parliament

There was only one question on the ballot paper for the referendum on Scottish independence on 18 September 2014: ‘Should Scotland be an independent country?’ As part of the negotiations over a referendum that was ‘legal, fair and decisive’, the SNP Government had sought a second question on further powers for the Scottish Parliament, but the UK Government was adamant that only once the question of Scotland’s future within the United Kingdom had been settled could there be any consideration of further devolution. With a UK general election set to take place in May 2015, the assumption was that work on the question of further powers in the event of a No vote would only begin after the UK general election, by which time the countdown to the Scottish Parliament elections in May 2016 would already have begun. In the final days of the referendum campaign, however, with the polls suddenly narrowing, the leaders of the three main political parties at Westminster ‘vowed’ to deliver ‘extensive new powers’ for the Parliament ‘by the process and according to the timetable announced by our three parties, starting on 19 September’, ¹ a vow that was widely regarded, rightly or wrongly, as having sealed victory for the No campaign.

The Smith Commission

On the morning of 19 September, once the results of the referendum had become clear, the Prime Minister announced that Lord Smith of Kelvin had agreed to oversee a set of cross-party talks with the purpose of agreeing a package of new powers to be devolved to Holyrood. By its terms of reference, which were published on 23 September, the Commission was required to ‘convene cross-party talks and facilitate an inclusive engagement process across Scotland to produce, by 30 November 2014, Heads of Agreement with recommendations for further devolution of powers to the Scottish Parliament. This process will be informed by a Command Paper to be published by 31 October and will result in the publication of draft clauses by 25 January. The recommendations will deliver more financial, welfare and taxation powers, strengthening the Scottish Parliament within the United Kingdom.’ Over the course of the next five weeks, the Commission in which all five political parties in the Scottish Parliament including the SNP took part, reached agreement on a package of new powers, ² confounding those who doubted whether any form of agreement could be reached in such a short space of time, but at the same time inviting the criticism that the question of further powers had not been properly thought through. Lord Smith, in his foreword to the agreement, described it as an ‘unprecedented achievement’, which showed that, ‘however difficult, our political leaders can come together, work together, and reach agreement with one another.’

The ‘Smith Commission agreement’ is made up of three ‘pillars’. Pillar 1 – ‘providing a durable but responsive constitutional settlement for the governance of Scotland’ – represents the elusive holy grail of the devolution settlement since the Scotland Act 1998. The Commission agreed that the Scottish Parliament and Scottish Government should be made permanent (‘UK legislation will state that the Scottish Parliament and Scottish Government are permanent institutions’), ³ and that the Sewel convention, whereby the UK Parliament

¹ Daily Record, 16 September 2014
² Report of the Smith Commission for further devolution of powers to the Scottish Parliament (27 November 2014)
³ (n 2) para 21
does not legislate with regard to devolved matters without the Scottish Parliament’s consent, should be ‘put on a statutory footing’. The Scottish Parliament should also 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), together with control over its composition and function. Acknowledging the risk that a future Scottish Government might seek to amend the legislation to suit its own ends, the Commission agreed that, rather than being amendable by ordinary process of legislation, Scottish Parliament legislation amending the franchise, the electoral system or the number of constituency and regional members for the Scottish Parliament should require to be passed by a two-thirds or super-majority of the Scottish Parliament.

Pillar 2 – ‘delivering prosperity, a healthy economy, jobs, and social justice’ – tackles the question of more powers for Holyrood, particularly in the field of welfare. The Commission agreed that the state pension should remain reserved, as should universal credit, which will replace the existing means-tested benefits when it is fully implemented. The Scottish Ministers, however, should have the power to change the frequency of universal credit payments, and the Scottish Parliament power to vary the housing costs elements, including the under-occupancy charge or so-called ‘bedroom tax’. Outside universal credit, a number of benefits should be devolved, including attendance allowance, carers allowance, disability living allowance and personal independence payment. Holyrood should also have the power to create new benefits in areas of devolved responsibility.

Pillar 3 – ‘strengthening the financial responsibility of the Scottish Parliament’ – takes up the question of the Parliament’s responsibility for raising the money it spends from the point at which it was left by the Scotland Act 2012, following the deliberations of the Calman Commission. The Commission agreed that Holyrood should have the power to set the rates of UK income tax and the thresholds at which these are paid for the non-savings and non-dividend income tax of Scottish taxpayers, but not the personal allowance; that the first ten percentage points of the standard rate of VAT raised in Scotland should be assigned to the Scottish Government’s budget; and that air passenger duty and the aggregates levy should be devolved, as had been recommended by the Calman Commission. The Commission also agreed that the devolution of further responsibility for taxation and public spending, including elements of the welfare system, should be accompanied by an ‘updated fiscal framework for Scotland, consistent with the overall UK fiscal framework.’ That framework would include a number of aspects, including continuation of the Barnett formula; borrowing powers to reflect the additional economic risks, including volatility of tax revenues, the

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4 (n 2) para 22
5 (n 2) paras 23 and 26
6 (n 2) para 27
7 (n 2) paras 44-45
8 (n 2) para 49
9 (n 2) para 54
10 Serving Scotland Better: Scotland and the United Kingdom in the 21st Century (June 2009)
11 (n 2) paras 76-77
12 (n 2) para 84
13 (n 2) paras 84 and 89
14 (n 2) para 94
Scottish Government would have to manage when further financial responsibilities were devolved; and enhanced independent financial scrutiny.\(^{15}\)

No figures were put on any of this, but it is estimated that as a result of the agreement the Parliament will control around 60 per cent of spending in Scotland and retain around 40 per cent of Scottish tax,\(^{16}\) with the difference between income and expenditure continuing to be met by Treasury block grant calculated in accordance with the Barnett formula.

It was also agreed that nothing in the Commission’s report prevented Scotland becoming an independent country in the future should it so choose.\(^{17}\)

**Draft clauses**

Draft clauses were published in accordance with the timetable laid down on 22 January 2015.\(^{18}\) Of particular interest to constitutional lawyers are the clauses 'entrenching' the devolution settlement. If the clauses are enacted in their published form, the Scottish Parliament will simply be ‘recognised as a permanent part of the United Kingdom’s constitutional arrangements’, as will the Scottish Government, but with no attempt being made to limit the sovereignty of the UK Parliament.\(^{19}\) Section 28(7) of the Scotland Act which affirms the continuing power of the UK Parliament to make laws for Scotland is not to be amended or repealed. The Smith Commission agreement - ‘UK legislation will state that the Scottish Parliament and Scottish Government are permanent institutions’ – will thus have been faithfully translated into law, while the question of the continuing sovereignty of the Westminster Parliament will have been avoided. The practical political effect of 'recognition', however, will be to confer on the Scottish Parliament and Scottish Government the same ‘in all time coming’ status as was conferred on the Court of Session by the Acts of Union three centuries ago (art XIX).

The draft clauses take the same matter of political fact approach to the Sewel convention. As set out in the Memorandum of Understanding that governs relations between the UK Government and the devolved administrations, the convention states that ‘the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature.’\(^{20}\) Recast in statutory form, it will be ‘recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.’\(^{21}\) The possibility of unilateral Westminster legislation with regard to devolved matters cannot therefore be ruled out, but Westminster will doubtless continue to legislate in the devolved areas only with the consent of the Scottish Parliament.\(^{22}\)

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\(^{15}\) (n 2) para 95
\(^{16}\) *Scotland in the United Kingdom: An enduring settlement* (Cm 8890, 2015) para 2.2.10
\(^{17}\) (n 2) para 18
\(^{18}\) Cm 8990 (n 16)
\(^{19}\) Draft cl 1 inserting new ss 1(1A) and 44(1A) in the Scotland Act 1998
\(^{20}\) *Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee* (October 2013) para 14
\(^{21}\) Draft cl 2, inserting new s 28(8) in the Scotland Act 1998
\(^{22}\) The convention extends to Westminster legislation altering the Scottish Parliament’s legislative competence and the executive competence of the 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
Next steps

The draft clauses will form the basis of a new Scotland Bill to be brought forward by the next UK Government - within its first 100 days in Labour's case should it win the general election. Quite apart from any further powers that might be added, and the process of bidding up has already begun, that legislation requires considerable work, as the accompanying White Paper recognises.\(^{23}\) One area in which work is being pursued is intergovernmental relations. The Smith Commission saw increased powers for the Scottish Parliament as demanding strengthened collaboration between the Scottish and UK Governments: ‘The parties believe that the current inter-governmental machinery between Scottish and UK Governments, including the Joint Ministerial Committee (JMC) structures, must be reformed as a matter of urgency and scaled up significantly to reflect the scope of the agreement arrived at by the parties.’\(^{24}\) In a personal recommendation added to the report, Lord Smith urged the two governments to tackle the issue of ‘weak intergovernmental working’. The 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.’ At the plenary meeting of the JMC on 15 December 2014, Ministers agreed to commission work on a revised Memorandum of Understanding. A feature of the current arrangements is that they are entirely non-statutory. As the proposed treatment of other elements of the devolution settlement demonstrates, however, there is no reason why intergovernmental relations, too, should not be recognised, and indeed much to be said for their recognition, as ‘a permanent part of the United Kingdom’s constitutional arrangements’.

The question of intergovernmental relations has an important European Union dimension. One of the amendments 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.\(^ {25}\) 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.’\(^ {26}\) 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’,\(^ {27}\) but precisely what, if anything, that means in terms of ‘guaranteed rights’ remains to be seen.

A final area deserving of mention, which as yet has attracted little comment, is the question of an updated fiscal framework for Scotland. In what is the longest chapter in the White Paper, the Treasury emerges as resolutely opposed to Edinburgh becoming once again the ‘Athens of the North’, but for reasons that have nothing to do with its architecture. The concern here is that whether by accident or design a future Scottish government will spend more than it raises in taxes and receives by way of block grant and then either seek to borrow more or else look to the UK government to make up the shortfall. That it turn raises the

\(^{23}\) Cm 8990 (n 16) para 9.1.1

\(^{24}\) (n 2) para 28

\(^{25}\) Scottish Government, Scotland Bill – EU Involvement (August 2012)


\(^{27}\) (n 2) para 31
question of checks on an imprudent Scottish government. At the UK level of government, one such check is provided by the Office of Budget Responsibility, established by the Budget Responsibility and National Audit Act 2011. In the run up to the referendum the Scottish Government set up a non-statutory Scottish Fiscal Commission to scrutinise its forecasts for the two devolved taxes (land and buildings transaction tax and landfill tax), but the White Paper makes it clear that a ‘sustainable and effective fiscal framework’ will require ‘enhanced’ independent scrutiny. ‘Given the increased importance of effective scrutiny as more responsibilities are transferred to the Scottish Parliament, independence, transparency and resources will be particular areas for further progress.’ The UK Government ‘looks forward’ to the Scottish Government’s proposals on how to enhance existing arrangements, which will need to be ‘agreed’ as part of a new fiscal framework for Scotland alongside the introduction of the new Scotland Bill. In this as in many other respects we have some way to go yet before we will be able to fully discern the consequences of last September’s independence referendum for the governance of Scotland.

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28 Cm 8990 (n 16) para 2.4.34
29 Cm 8990 (n 16) paras 2.4.31 and 2.4.37