



The Scottish Parliament
Pàrlamaid na h-Alba



External Experts Panel

Inaugural Meeting, 13th June, 2017,
Edinburgh

Proceedings



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ABOUT THE EXTERNAL EXPERTS PANEL – SOME BACKGROUND

The fifth session of the Scottish Parliament (2016-2021) is set to be dominated by two major constitutional developments. These are the ongoing process of **devolution and implementation of new powers** and developments associated with **Brexit**. Specifically, three aspects will demand the ongoing attention, reflection and constitutional expertise of MSPs across a number of parliamentary committees:

- ❖ The Scotland Act 2016 significantly increased the powers and responsibilities of the Scottish Parliament, especially in tax and social security. The process of transferring and implementing new powers is complex and challenging and requires careful scrutiny. Many of the matters under consideration are multi-disciplinary touching upon tax, social security law and benefits design, intergovernmental relations and wider constitutional arrangements.
- ❖ The new powers agreed in the Scotland Act 2016 are underpinned by the Fiscal Framework Agreement, an intergovernmental agreement between the Scottish and UK government. It sets out principles and mechanisms of territorial finance and financial management under the new arrangements, with many details surrounding how these will function in practice still unclear.
- ❖ The new devolution settlement is, in general, more complicated than the previous system, with more interdependencies and shared competencies between the Scottish and UK Government's. It will require ongoing communication and cooperation between the two governments. The current system of intergovernmental relations has been judged by numerous parliamentary committees in Holyrood and Westminster as not fit for purpose, with strong demands for greater scrutiny and accountability.

The result of the Brexit referendum has accentuated the need for improved constitutional scrutiny and expertise. The UK's potential withdrawal from the European Union, whichever form it takes, will have direct and indirect consequences for devolution. At present, it is not possible to foresee the form that developments arising out of Brexit may take. However, the issues which Scottish Parliament Committee's will be required to scrutinise will be complex, technical and will require expert insight, analysis and creative thinking.

The debate around Brexit and wider issues will involve the Scottish Parliament being involved in consideration of: the proposed European Union (Withdrawal) Bill and issues of potential legislative consent; subsequent primary and secondary legislation as cited in the UK Government's recent White Paper, and; any Withdrawal Agreement resulting from the Brexit negotiations, possible transitional arrangements and any subsequent agreement on a new relationship between the UK and the EU27.

Currently, parliamentary committees have a range of means by which they can gain additional insight and analysis. Committees may choose to appoint a limited number of external advisers or commission research from external sources. Committee are

also free to use the resources available within their own clerking teams, in our own research service (SPICe) and in the Office of the Solicitor to the Scottish Parliament. The External Experts Panel is a means of supplementing existing means of contracting expert advice on behalf of parliamentary committees, and is being established as a pilot to the summer recess in 2018 to assist three parliamentary committees. These committees are the most likely to be at the heart of work that is done in relation to the implementation of the Scotland Act 2016 provisions and on Brexit.

The broader purpose is to exploit the evident opportunity to promote knowledge exchange during a period of intense change in a way that supports the activities and priorities of the Scottish Parliament while meeting the needs of a wider expert grouping.

The members of the External Experts Panel have been selected so that the expertise of the Panel – collectively – spans the following fields:

1. Constitutional law
2. Governance and institutional design
3. Democratic accountability
4. Taxation and public finance
5. Social security legislation, policy and implementation
6. EU institutions, law and constitution
7. Brexit process and its implications for Scotland



MEMBERS OF THE EXTERNAL EXPERTS PANEL

Constitution/politics/governance etc.	
Professor Nicola McEwen	University of Edinburgh and the Centre on Constitutional Change
Professor Aileen McHarg	University of Strathclyde
Professor James Mitchell	University of Edinburgh
Professor Michael Keating	University of Aberdeen and the Centre on Constitutional Change
Professor Cathy Gormley-Heenan	University of Ulster
Professor Richard Wyn Jones	University of Cardiff
Dr Sandra Leon	University of York
Professor Michael Kenny	University of Cambridge
Mr Akash Paun	Institute of Government, London
EU/Brexit/International Trade matters	
Dr Tobias Lock	University of Edinburgh
Professor Damian Chalmers	London School of Economics
Dr Gracia Marin-Duran	
Dr Matias E Margulis	University of Stirling
Professor Alan Page	University of Dundee
Professor Laura Cram	University of Edinburgh
Taxation, economic policy and fiscal matters	
David Phillips	Institute of Fiscal Studies, London
Dr Katerina Lisenkova	University of Strathclyde
Professor David Bell	University of Stirling
Professor Graeme Roy	Fraser of Allander, University of Strathclyde
Social security and social policy	
Dr Sharon Wright	University of Glasgow
David Finch	Resolution Foundation
Dr Jackie Gulland	University of Edinburgh
Dr Nicola Cunningham	University of Stirling
Dr Hayley Bennett	University of Edinburgh and What Works Scotland
Standing Adviser to the Finance & Constitution Committee	
David Eiser	University of Strathclyde

PROGRAMME

- 10.00am *Arrival*
- 10.10am *Welcome, opening remarks and overview of the purpose of the Panel*
- Joan McAlpine MSP on behalf of Sandra White MSP and Bruce Crawford MSP
- Sir Paul Grice, Clerk/Chief Executive
The Scottish Parliament
- Professor Nicola McEwen
University of Edinburgh and the Centre on Constitutional Change
- 10.30am *Initial reflections (roundtable) – the Panel will be asked collectively for any initial reflections of the policy challenges ahead for the Scottish Parliament and how the Panel can work – chaired by Professor McEwen*
- 11.15am *Guests will then break into 3 separate groups of experts to join with the relevant Convener/Member, parliamentary clerks and researchers from the Finance and Constitution Committee, the Culture, Tourism, Europe and External Relations Committee and the Social Security Committee to discuss the detail of forthcoming challenges and opportunities for the three committees*
- 12.15pm *Comfort break and Reassemble*
- 12.30pm *Lunch and networking*
- 1.30pm *Close*



PROCEEDINGS

Initial reflections (Roundtable) - policy challenges ahead for the Scottish Parliament

1. Constitutional and Territorial Financing

The first contribution from one of our experts related to the [Fiscal Framework](#) that was established in parallel with the passing of the Scotland Act 2016. In their view, a key early priority for the relevant committees was to look at whether the Framework was having any effect on the underlying economic conditions in Scotland, as well as the detail of how the Fiscal Framework will be operationalised. It was noted that the forthcoming report of the Finance and Constitution Committee's [Budget Review Group](#) will cover some of these matters.

It was also recognised that, this autumn, we are expecting to see the publication of estimates and outturn figures for the Scottish Government expenditures. Additionally, the assignment of a share of VAT revenues will occur. It was also noted that the two governments will need to work out how to operationalise the "no detriment" clause in the Fiscal Framework for tax and for the social security powers. These were all cited as key policy challenges for scrutiny

Other areas worthy of scrutiny were: 1. the proposals for replacing previously streams of EU funds in agriculture, fisheries, regional development etc., and 2. the Conservative Party's proposed creation of a [UK Shared Prosperity Fund](#) to replace the EU's structural funds and how that Shared Prosperity Fund would work in practice (what sums would be available, how would they be allocated, who would make these decisions, what could be funded in such a Fund etc.). It was noted that HM Treasury was interested in proposals on these matters and Scottish parliamentary committees should therefor consider making such proposals.

The European Union (Withdrawal) Bill (formerly referred to as the 'Great Repeal Bill') was also discussed¹. Our Experts noted the advice that could be provided by the Panel on issues such as the debate on legislative consent as well as on the common policy frameworks outline above. It would also be critical for the Scottish Parliament to consider in some depth the powers suggested for UK and/or Scottish ministers to correct the statute book prior to Brexit and whether these were consistent with the Parliament's own interests and procedures for considering delegated powers.

2. Brexit

In their initial roundtable discussions, our Experts also discussed Brexit and wider issues such as intergovernmental relations and structures for the negotiations on withdrawal.

The first contribution made at the roundtable concerned the procedure for considering the impact on the devolution arrangements of previously exclusive or

¹ The inaugural meeting of the External Experts Panel was held prior to the UK Government introducing the European Union (Withdrawal) Bill in the UK Parliament.

shared EU competences that are not listed in [schedule 5 of the Scotland Act 1998](#) and would ordinarily therefore be devolved. A view expressed by one Expert was that decisions on these matters cannot be the sole preserve of the UK Government and that we need to make shared interests work in the UK and that the current arrangements don't appear to be working well for joint discussion on these matters. Their view was that the Scottish Parliament must consider how it wishes to have oversight of these discussions between the two governments and, over the longer term, address the challenges of scrutinising legislative change in respect to the return of these powers which may be done via secondary instruments, possibly enacted by the UK Government on a UK-wide basis.

A key issue in respect of the above will be the intergovernmental arrangements that are put in place to discuss the return of these competences and for the discussion on proposals for common policy frameworks in the UK on issues such as agriculture, fisheries, regional development and industrial strategies etc. It was noted that the results of the recent UK General Election re-opened these matters for debate but that the time to resolve was very tight. Additionally, the proposed confidence/supply arrangement between the Conservative Party and the Democratic and Unionist Party was thought to be relevant and it would be important to study that agreement in detail for any wider impacts on these matters.

Members of the Panel seemed in general agreement that MSPs are going to have to work out how to navigate the conflict that is going to emerge in debates on the common policy frameworks that are going to be put in place in the UK. It was suggested that lessons could be learnt from other states such as Spain given the nature of its constitutional arrangement with formalised agreements on territorial financing.

Following on from the European Union (Withdrawal) Bill, our Experts highlighted the importance of looking at the detail of the other Brexit-related bills announced in the recent Queen's Speech, such as on agriculture, fisheries, trade, customs etc. In this respect, again, the potential relevance of what may be agreed with the DUP was mentioned.

In relation to the Brexit negotiations itself, our Experts considered that it will be necessary to first await discussions and decisions on whether the Devolved Administrations are involved in, or consulted about, the UK's negotiations with the EU27 before deciding how parliamentary committees should aim to scrutinise this relationship. However, one Expert did suggest that it would be prudent to develop understanding in the Scottish Parliament of what a 'no deal' outcome would mean for Scotland. One of the challenges in doing that is that there are few Scottish-level economic statistics so it will be harder to begin work on understanding the 'no deal scenario'. Additionally, we will also have to await the 'divorce deal' first before we know what follows.

Finally, one of our Experts stressed the importance – within the context of Brexit – of relevant parliamentary committees looking at the longer term issues for the legal system, beyond Brexit. They noted that there will be significant technical challenges in how people access the law, make sense of the statute book, the role of our courts

etc. so the question of what kind of legal system we are left with after Brexit is a key issue for the Scottish Parliament to be considering.

3. Social Security Powers

Our third and final area for initial discussion was that of the implementation of the new social security powers under the Scotland Act 2016.

In this respect, the situation in Northern Ireland was worthy of consideration according to one of our Experts because of its prior devolution of certain welfare and social security matters. Here, their experience of implementing and financing new powers was worthy of some inter-parliamentary dialogue, as would be the practical and political challenges of policy setting in a shared space with the UK Government.

One of our Experts counselled us that a key challenge for the Scottish Parliament will be avoiding complexity when establishing a welfare system in Scotland and ensuring that changes we make here don't have detrimental impacts on other reserved benefits that claimants may be in receipt of.

In relation to the recently introduced [Social Security Bill](#), one of the main challenges for MSPs is to consider how to deal with people with long-term conditions and their associated benefits, and how to extend safeguards to these claimants within a rights-based approach.

From a practical perspective, modelling the impact of social security changes is going to be much harder to do in Scotland and forecasting the fiscal impacts is going to be a challenge. This is because we do not have reliable data on thresholds and issues such as poor health levels, so it will be harder to calculate what certain policy decisions in the design of new benefits are likely to cost. In this regard, it was noted that the current cost of mitigating against some of the UK Government's welfare reforms, not including sanctions, is around £1bn in Scotland so there are significant financial challenges ahead for the Scottish Parliament to consider.

One potential area to be aware of when considering the new welfare policies is being locked into UK decisions through a fear that claimants in Scotland may be sanctioned because of decisions taken in Scotland and hence a perception that it is safer to stay in line with UK welfare policy.

It was also noted that we have a challenge of managing the public's need for clear information on the source of the new devolved and reserved benefits and how to go about claiming entitlement from these increasingly diverse sources.

Finally, as has been noted for tax discussions and for Brexit, our Experts highlighted that there did not seem to be much co-ordination of policy, such as welfare, across the UK and between the relevant governments and social security bodies. This is going to be more important in the future. In their view, there should be some mechanism that allows for this otherwise the balance of decision-making will tip to the centre to the detriment of the Devolved Administrations.

Breakout Groups

Following the Roundtable summarised above, our Experts then split up into three separate Breakout Groups, each chaired by the Convener or Deputy Convener of the three parliamentary committees involved in establishing the External Experts Panel.

1. Constitution and Territorial Financing

This group commenced its conversations with a discussion about the outcome of the recent UK General Election and the (then) proposed confidence/supply agreement between the Conservative Party and the Democratic and Unionist Party (DUP). The view of one Expert was that the UK Government's constitutional vision amounts to a resurgence of a more Westminster-centric vision of the constitution, which is based upon a set of shared assumptions regarding UK territorial relationships. In their view, with regard to the UK election result, the DUP was viewed as a pro-Westminster party that would not necessarily change this constitutional vision.

Another Expert indicated that in their view the Welsh Assembly Government position is, in essence, the UK Labour position on matters to do with the constitution and that there is also considerable similarity between the positions of the Scottish and Welsh governments. They thought that the Welsh Assembly Government accepts the principle of common policy frameworks but does not necessarily want these imposed from the centre.

Our Experts' view was that the Finance and Constitution Committee should ensure that it keeps abreast of developments in Northern Ireland and Wales as these will be important in terms of developing a common response to Brexit and influencing change to issues such as common policy frameworks. Joint meetings between committees from different legislatures were suggested as helpful given the tight timescale for Brexit.

For another Expert, there are three main issues that the Scottish Parliament needs to consider in terms of Brexit:

- ❖ *Impact of the Scotland Act 1998* – What might replace the current EU constraints that are within the 1998 Act? What will be the impact on intergovernmental structures?
- ❖ *Delegated Powers* – the use of delegated powers will be essential for Brexit to happen in terms of the process to 'correct the statute book'. The key issues are what procedural and substantive constraints will be placed on the use of Delegated Powers, what will be the role of the Scottish Government and Scottish Parliament in this process and how will powers be shared out territorially?
- ❖ *Continuity provisions* – What will be the impact on the Scottish statute book of 'Europe derived laws'?

In the view of one Expert, post-election, the likelihood is of a more consensual approach being followed by the UK Government and that the proposed European Union (Withdrawal) Bill may not impact on the devolution settlement itself although the main impacts are likely to be more from the subsequent legislation (e.g. the separate Agriculture or Fisheries Bill). The key question/challenge for the Parliament and its committees is how to make a reality of shared powers? The view that a more consensual approach was likely to emerge was not agreed by all, with another, more sceptical view being proposed based on recent relations in the Joint Ministerial Committee (EU negotiations); JMC(EN).

Turning to the proposed European Union (Withdrawal) Bill and issues of legislative consent and scope, an Expert counselled the Group that the application of Sewel (legislative consent process) was the wrong focus to take. In their view, what matters is not the European Union (Withdrawal) Bill but the protections (for devolved competences) that are put in the Bill. Procedures such as joint consent and the sharing of delegated powers are mechanisms that are not unusual in the UK. Another Expert thought that the scope of the European Union (Withdrawal) Bill will be kept quite tight so as to minimise the areas where the issue of the legislative consent of the Scottish Parliament might be required; hence scrutiny of the scope of the Bill will be an immediate challenge for the Scottish Parliament.

Another Expert raised the issue of the proposed common policy frameworks, provisions about which may be in the European Union (Withdrawal) Bill. They question if these frameworks should be placed in statute or on a more informal basis as per the Joint Ministerial Committees, and asked if these frameworks should be subject to Scottish Parliament consent.

One Expert's view was that the Scottish Parliament should take a view that these common policy frameworks needed to be negotiated between the governments and not imposed, and that they should be statutorily underpinned.

Another Expert noted that the UK Government has not had time or space to think through the common policy frameworks and their preferred approach because of other matters (e.g. Article 50, EU27/UK negotiations commencing, UK General Election etc.). In their view, this may lead to the need, for example on a new common policy framework for agriculture, an approach which would be park this issue through providing funding guarantees for the remainder of the UK Parliament's term and come back to reform at a later date.

On intergovernmental relations (IGR) structures more generally, one of our Experts considered that it was important to start thinking about the broader IGR issues rather than only the scrutiny role / role of the Scottish Parliament that has been the main focus previously. Their views were that the Scottish Parliament should be seeking to shape the structure of the IGR machinery more generally. On this matter, another Expert said that the Scottish Parliament had an opportunity to shape the Brexit structures for IGR and we should be asking questions on whether these should these structures should be bi- or multi-lateral? In their view, there is a risk that if the Parliament does not get involved, then the structures for intergovernmental dialogue

on Brexit negotiations will be an outcome of bargaining between the governments alone to the detriment of the legislatures in terms of accountability and transparency.

It was suggested here that there was scope for a common cause between the devolved administrations and their legislatures to agree a common position on the structure of IGR for Brexit as well as more generally for constitutional reform. They also believed that there was a need for the Scottish Parliament and its committees to think about Review Clauses and Sunset Clauses within the European Union (Withdrawal) Bill relating to these common policy frameworks.

There was also a reasonable amount of consensus in the Breakout Group on the reported inadequacies of the current JMC and JMC(EN) structures and operation. One Expert noted that Cabinet Office is not Whitehall and that other players, such as DExEU (Department for Exiting the EU) was a key body now. They observed the strong criticism from the Welsh and Scottish governments of the JMC(EN) and felt that, prior to the UK General Election, the likely election outcomes was that there would be little change in terms of the JMC(EN) as the process was being driven by the PM and Number 10. Another Expert indicated that perhaps the UK Government had set expectations initially on the role of the devolved administrations within the JMC(EN) that the UK Government could not meet. A different Expert took the view that the Territorial Departments (Welsh, Scotland, Northern Ireland offices) and the Cabinet Office were critical of the overall UK Government approach to Brexit. In their opinion, in order for the devolved administrations to shape IGR, a multi-lateral approach made sense.

Looking more generally at the issues of territorial financing following Brexit, one Expert's view was that there was less scope for quadrilateral discussions (UK Government and the three Devolved Administrations) on finance issues arising within this area due to differing views of devolved administrations.

In the view of another Expert, there are 3 main finance issues to consider:

- ❖ Implementation of the Fiscal Framework from the Scotland Act 2016
- ❖ Scottish tax and social security policy and how it is designed
- ❖ How EU funding streams are dealt with after Brexit

One Expert noted that HM Treasury had used the fact that the Welsh Assembly Government was going to adopt the Comparative Model, within their fiscal framework, as a means to argue that Scotland should move to the same and away from the current Per Capita Index Model that is in place until the review scheduled for 2021/22.

Another Expert suggested that a short-term challenge/priority for the Scottish Parliament would be to consider the impact of different Brexit outcomes (e.g. in or out of a customs union etc.) on the Scottish economy. There was a need to consider sectoral differences and the impact of trade deals on the Scottish economy. It was also important for the Scottish Parliament to consider if there is merit in maintaining

the ethos of the current EU 'needs based system' for Structural Funds when these are replaced after Brexit with a proposed UK Shared Prosperity Fund.

2. Brexit

As with the previous Breakout Group, this Group also started with considering the implications of the recent UK General Election result on Brexit and whether a "softer" Brexit was more or less likely and what impact the potential agreement between Conservative Party and DUP would have. The DUP's position in relation to the border between Northern Ireland and the Republic of Ireland was noted and discussed in terms of how any agreement on that had a crossover for Scotland.

The Group then discussed intergovernmental structures in relation to Brexit with one Expert stressing the importance of the scrutiny of the intergovernmental process going forward and importance of process and integrity of within that. The Group noted that criticisms of the JMC(EN) and the limitations of the current structures for negotiations on UK positions for Brexit . It was not clear when this Group was meeting whether the JMC(EN) would be the structure for the new relationship between the UK Government and the Devolved Administrations to discuss Brexit.

The Group also discussed the issue of the future trading relationships between the UK and the EU27 and noted the previous [work](#) of the Culture, Tourism, Europe and External Relations Committee. One of our Experts referred to the Canadian experience of the CETA negotiations (Canada-EU Trade Agreement). They explained the structures at the provincial and political level and the potential for stakeholders to engage with it. They also stressed the importance of having a provincial presence at the negotiations between the EU and Canadian Federal Government as the provinces had a major role to play when CETA needed to be implemented.

For one Expert, the Scottish Parliament needed to a focus on what Scotland will need to implement. They considered that the UK might come to some arrangement with the EU27 in the Brexit negotiations on programmes such as Europe 2020 and Erasmus. In terms of the future relationship, they believed that the options for the UK in terms of a new trading relationship were EEA membership, a Canada-type Free Trade Agreement or nothing. They thought that no deal would be catastrophic from an economic perspective, causing a shock to the economy.

Another Expert noted that the EU has in the past been very creative. They considered that the EU27 would dictate almost every aspect of the negotiation and had the capacity to pressure the UK Government. They didn't discount 'no deal' being the final outcome with the UK leaving on WTO terms. They thought that the EU27 might move negotiations at different speeds depending on the complexity or political will. Their view was that there would be room for flexibility around the timetable and potential for a transition. For the Scottish Parliament, they suggested building relationships in Brussels as a source of intelligence on the negotiations as a key priority.

One Expert's view was that there could be an agreement on the EU27 side for an agreement to take effect at a future defined date, leaving time to fine-tune a

transitional agreement. They thought there would be different stages to the exit process with a period of time for the UK to be in an EEA-type agreement. They thought it would be impossible for the UK to replicate the regulatory functions of the European Commission and its agencies in a short period of time currently allowed for as part of the Brexit timetable. The Group also discussed if a more Swiss-style agreement for the UK might be feasible with some kind of mutually-recognised court and greater certainty about enforcement arrangements.

In terms of priorities for Scottish parliamentary committees, one of our Experts suggested that it would be important to scrutinise UK Government position papers and documents to assess whether they were really representative of the UK as a whole, and not just purporting to be so. Another Expert indicated the importance of looking at the EU's bilateral agreements. They also stressed the importance of collecting data on Scotland's trade flows and gathering more information on Scotland's trading patterns and relationships.

Finally, one of our Experts emphasised the lack of engagement of the EEA Member States on the Brexit negotiations thus far, even though there was increasing talk of an EEA solution, particularly for any transition period.

3. Social Security Powers

Our final Breakout Group's role was to look at the new social security powers within the Scotland Act 2016 and the plans for implementation.

For one Expert, the key questions that the Parliament needs to be considering are clarity on who will be involved in delivering the new powers and what role there might be for the third sector? The integration of health and social care might also present opportunities that should be explored.

The view of another Expert was that there was not currently a level-playing field in terms of funding for front-line delivery staff, with comparisons being made between Macmillan and others.

Other key questions discussed – and challenges for the future – were how the new Scottish social security agency will link in with existing Community Planning Partnerships, as well as what links there will be between their operational work programmes and the new social security agency?

One Expert suggested that The Hub in Bathgate provided a good example of a one-stop shop and that this might be worth a visit for MSPs. In their view, the local advice sector has a crucial role in understanding the UK and Scottish interface and understanding how both work together and then being able to advise claimants of benefits. The critical issue of providing practical support to Scottish claimants is needed for the claims process and that it would be important for Scottish parliamentary committees to look into this matter.

In relation to a Scottish version of the Carers' Allowance, the feedback from one Expert was that people are increasingly being cared for at home and it was important to consider what difference will the increase make for carers? Their view was that

there could be tensions between any policy areas seeing their funding decrease. They noted that there are historical gender issues around carers benefit and the level of payment .

Finally, the Group discussed the new income raising powers available to the Scottish Government and the opportunity to do things differently. The Experts discussed whether people are willing to pay more in tax for reform to the benefits system in Scotland in devolved areas or in the form of top-up benefits.

MORE INFORMATION

More information on the work of the External Experts Panel to support parliamentary committees in the Scottish Parliament can be obtained by contacting:

Stephen Imrie
Clerk Team Leader
Committee Office
The Scottish Parliament
stephen.imrie@parliament.scot

More information on the work of the three parliamentary committees involved in this Panel can be obtained from:

Jim Johnston
Clerk
Finance and Constitution
Committee
James.johnston@parliament.scot

Katy Orr
Clerk
Culture, Tourism, Europe and
External Relations Committee
katy.orr@parliament.scot

Simon Watkins
Clerk
Social Security Committee
simon.watkins@parliament.scot

Finally, more information on the work of the Centre on Constitutional Change based at the University of Edinburgh is available by contacting:

Professor Nicola McEwen
Centre on Constitutional Change
N.McEwen@ed.ac.uk