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SPICe Briefing

The Smith Commission Report - Overview

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The Report of the Smith Commission for further devolution of powers to the Scottish Parliament was published on 27 November 2014. This briefing provides background to the Smith Commission. It considers the recommendations made by the Commission, the current position with regard to the powers considered for further devolution and, where relevant, the submissions made to the Commission by the main political parties and by other bodies. In some cases, comparative information from other countries is provided.



The Scottish Parliament
Pàrlamaid na h-Alba

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EXECUTIVE SUMMARY

On 18 September 2014, the people of Scotland voted on whether Scotland should be an independent country. A majority 2,001,926 (55.3%) voted against independence with 1,617,989 (44.7%) voting in favour on a turnout of 84.6% (SPICe 2014).

On the morning after the referendum, the Prime Minister, David Cameron, announced the appointment of Lord Smith of Kelvin to take forward the proposals made in a joint declaration by the three pro-union parties of more powers for the Scottish Parliament in the event of a 'No' vote. Lord Smith was tasked to produce, by 30 November 2014, a report outlining Heads of Agreement with recommendations for further devolution of powers to strengthen the Scottish Parliament within the UK.

The Smith Commission reported with its recommendations for further powers for the Scottish Parliament on 27 November 2014.

The Smith Commission adopted what it calls "a principles-based approach to the negotiations" so that the package of powers agreed should:

- Form a substantial and cohesive package of powers, enabling the delivery of outcomes that are meaningful to the people of Scotland.
- Strengthen the Scottish devolution settlement and the Scottish Parliament within the UK (including the Parliament's levels of financial accountability).
- Aim to bring about a durable but responsive democratic constitutional settlement, which maintains Scotland's place in the UK and enhances mutual cooperation and partnership working.
- Not be conditional on the conclusion of other political negotiations elsewhere in the UK.
- Not cause detriment to the UK as a whole nor to any of its constituent parts.
- Cause neither the UK Government nor the Scottish Government to gain or lose financially simply as a consequence of devolving a specific power.
- Be implementable; be compatible with Scotland's and the UK's international obligations, including EU law; and be agreed with a broad understanding of the potential associated costs.

The Smith Report presents the new powers agreed by the five political parties participating in the process under Heads of Agreement divided into three broad 'pillars':

- Pillar 1: providing a durable but responsive constitutional settlement for the governance of Scotland
- Pillar 2: delivering prosperity, a healthy economy, jobs, and social justice
- Pillar 3: strengthening the financial responsibility of the Scottish Parliament

Among the key recommendations of the Smith Report are:

- UK legislation will state that the Scottish Parliament and Scottish Government are permanent institutions.

- The Sewel Convention, under which the UK Parliament will only legislate on devolved matters with the agreement of the Scottish Parliament, will be placed in statute
- The Scottish Parliament will have full powers over elections to the Scottish Parliament and local government elections; the parties have called on the UK Parliament to devolve these powers in time to allow the Scottish Parliament to extend the franchise to 16 and 17-year-olds for the 2016 Scottish Parliamentary elections
- The inter-governmental machinery between the Scottish and UK governments (including the Joint Ministerial Committee) should be reformed and scaled up
- The Scottish Parliament should have responsibility for the management of the Crown Estate's economic assets in Scotland, and the revenue generated from these assets
- The State pension will remain reserved to Westminster, including new single-tier pension, entitlements to legacy state pensions whether in payment or deferred, pension credit and the rules on state pension age
- Both the UK and Scottish Parliaments will share control of income tax but the Scottish Parliament will have the 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
- The receipts raised in Scotland by the first 10 percentage points of the standard rate of VAT will be assigned to the Scottish Government's budget
- The power to charge tax on air passengers leaving Scottish airports will be devolved as will the power to charge tax on the commercial exploitation of aggregate in Scotland
- 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, but the Barnett Formula should continue. The revised funding framework should result in the devolved Scottish budget benefiting in full from policy decisions by the Scottish Government that increase revenues or reduce expenditure, and the devolved Scottish budget bearing the full costs of policy decisions that reduce revenues or increase expenditure
- Additional borrowing powers should be provided to "ensure budgetary stability and provide safeguards to smooth Scottish public spending in the event of economic shocks",
- Universal Credit (UC) will remain a reserved benefit administered and delivered by the Department for Work and Pensions (DWP). However, the Scottish Government will have the 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. The Scottish Parliament will also 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-dependents.
- Powers over the following benefits will be devolved to the Scottish Parliament:
 - 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
 - Severe Disablement Allowance
 - Benefits which currently comprise the Regulated Social Fund:
 - Cold Weather Payment
 - Funeral Payment
 - Sure Start Maternity Grant
 - Winter Fuel Payment

➤ Discretionary Housing Payments

- The Smith report also called for greater inter-governmental co-operation on a number of 'additional policy matters' with a view to finding ways for the Scottish Government and Parliament to exert a degree of influence over the following policy areas:
 - food labelling and recognition under EU law of a 'Made in Scotland' brand
 - HE students' who graduate from Scotland's colleges and universities to remaining in Scotland for a defined period
 - the temporary right of victims of human trafficking to remain in Scotland
 - the provision of certain services to Asylum seekers, including the right to lodge an asylum claim from within Scotland
 - the ability of MSPs to make direct appeals to UK immigration authorities on behalf of their constituents in relation to devolved matters
 - the retention by the Scottish Government of fines, forfeitures, fixed penalties imposed by courts and tribunals in Scotland, as well as sums recovered under Proceeds of Crime legislation
 - the potential for Scotland to have an 'opt-in' option in relation to levy-raising
 - the functions and operations of the Health and Safety Executive in Scotland

THE SMITH COMMISSION: BACKGROUND

In the lead-up to the referendum on Scottish independence, the three main UK parties set up separate commissions to produce proposals for further devolution:

- Scottish Conservatives' [Commission on the Future Governance of Scotland](#) (2014)
- Scottish Labour Party Devolution Commission (2014) [Powers for a Purpose: Strengthening Accountability and Empowering People: final report - our proposals](#)
- Scottish Liberal Democrats Home Rule and Community Rule Commission (2012) [Federalism: the best future for Scotland](#) (Liberal Democrat Commission 2012)
- Scottish Liberal Democrats (2014) [Campbell II: The second report of the Home Rule and Community Rule Commission](#)

The proposals produced by each commission differ considerably in the breadth and degree of further devolution which each proposed or would consider. On 5 August 2014, the Scottish and UK unionist parties made a [pledge](#) to strengthen further the powers of the Scottish Parliament by putting the proposals made by their devolution commissions to the Scottish people through their respective manifestos.

However, on 8 September 2014, former Prime Minister, Gordon Brown MP, made a [speech](#) promising [substantial new powers](#) for the Scottish Parliament in the event of a 'No' vote in the referendum, and an accelerated timetable for delivering these powers. The timetable included a Command Paper by the end of October 2014, the equivalent of a White Paper by the end of November and draft clauses for a new Scotland Act by the end of January 2015.

On 16 September, [the Daily Record](#) carried on its front page a joint declaration or 'vow' by the three pro-union parties, signed by the Prime Minister, the Deputy Prime Minister and the Leader of the Opposition, supporting the timetable for action proposed by Gordon Brown and setting out the steps they would take jointly after a No vote. The joint declaration began:

"We are agreed that: The Scottish Parliament is permanent, and extensive new powers for the Parliament will be delivered by the process and to the timetable agreed and announced by our three parties, starting on 19th September."

On the morning after the referendum, the Prime Minister, David Cameron, [announced](#) the appointment of crossbench peer, Lord Smith of Kelvin, to take forward the proposals made in the joint declaration. Lord Smith was tasked to produce, by 30 November 2014, a report outlining Heads of Agreement with recommendations for further devolution of powers to strengthen the Scottish Parliament within the UK.

The Smith Commission, as it became known, held its [first session](#) of all-party talks on 22 October. The ten party representatives were drawn from the five main political parties in Scotland. At this meeting, the members of the Smith Commission agreed a set of principles to underpin the cross-party talks. These principles were that proposals agreed through the Smith Commission process, when taken together, should:

- Form a substantial and cohesive package of powers, enabling the delivery of outcomes that are meaningful to the people of Scotland.
- Strengthen the Scottish devolution settlement and the Scottish Parliament within the UK (including the Parliament's levels of financial accountability).
- Aim to bring about a durable but responsive democratic constitutional settlement, which maintains Scotland's place in the UK and enhances mutual cooperation and partnership working.

- Not be conditional on the conclusion of other political negotiations elsewhere in the UK.
- Not cause detriment to the UK as a whole nor to any of its constituent parts.
- Cause neither the UK Government nor the Scottish Government to gain or lose financially simply as a consequence of devolving a specific power.
- Be implementable; be compatible with Scotland's and the UK's international obligations, including EU law; and be agreed with a broad understanding of the potential associated costs.

In addition to the cross-party talks, the Smith Commission [consulted](#) (Smith 2014c) with a wide range of Scottish civic institutions and with members of the public. Over 400 submissions were received from [organisations and groups](#) and over 18,000 [submissions](#) (Smith 2014c) from people across Scotland.

The Smith Commission [reported](#) (Smith 2014b) on 27 November, outlining a package of further powers for the Scottish Parliament. The report also listed a number of additional policy matters, not requiring devolution, but which would allow the Scottish Parliament and Government to exert influence over a number of key policy areas.

The report divided the Heads of Agreement into three 'pillars' which it described as follows:

- Pillar 1: providing a durable but responsive constitutional settlement for the governance of Scotland
- Pillar 2: delivering prosperity, a healthy economy, jobs, and social justice
- Pillar 3: strengthening the financial responsibility of the Scottish Parliament

HEADS OF AGREEMENT: PILLAR 1 (CONSTITUTIONAL SETTLEMENT)

Pillar 1 is concerned with creating a stable and lasting constitutional settlement for Scotland but one which is sufficiently flexible to respond to the changing needs and aspirations of the people of Scotland. Pillar 1 is described as, “providing a durable but responsive constitutional settlement for the governance of Scotland.”

Permanence of the Scottish Parliament and Scottish Government

Current position

The Scottish Parliament is an institution established by a statute passed by the UK Parliament, [the Scotland Act 1998](#). However, the fundamental constitutional principle of the sovereignty of the UK Parliament means that the relevant legislation could be modified or repealed by the UK Parliament at any point in the future. Under this principle it is not possible for a UK Act to restrict the sovereignty or decisions of future Parliaments.

The Scotland Act 1998 also sets out the membership of the Scottish Government.

In a speech on 2 September 2014 Gordon Brown said:

“I believe that we should set down in legislation that the Scottish Parliament is permanent, it’s irreversible, it’s indissoluble, it’s part of the way we will run this country in this future forevermore”.

In the joint statement signed by the leaders of the three pro-unionist parties, and published in the Daily Record on 16 September, the signatories agreed that the Scottish Parliament is permanent.

Recommendations of the Smith Commission

The Report of the Smith Commission (at paragraph 21) proposes that:

“UK legislation will state that the Scottish Parliament and Scottish Government are permanent institutions”.

Impact of Smith

However, stating that the Scottish Parliament and Government are permanent institutions in UK legislation does not necessarily make it so. This is because, as suggested above, adopting the common view of parliamentary sovereignty, the UK Parliament is incapable of legally diminishing its sovereign authority.

Statutory basis for the Sewel Convention

Current position

The Sewel Convention was named after Lord Sewel, Minister of State in the Scottish Office during the passage of the Scotland Bill in 1998. In the Lords Committee stage of the Scotland

Bill he stated that the Government expected, “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” ([21 July 1998, Lords Hansard, vol 592, col 791](#)).

In practice, the Convention also applies to Westminster legislation to alter the legislative competence of the Scottish Parliament or to amend the devolved responsibilities of Scottish Ministers.

Under the Convention, if the UK Government and the Scottish Government agree that it is appropriate to include provisions affecting devolved matters in a Westminster Bill, the Scottish Government invites the Scottish Parliament to give consent to those provisions being dealt with by Westminster. This involves the Scottish Government providing a memorandum about the UK Bill, which is usually considered by a relevant Scottish Parliament committee. The Scottish Government will also lodge a motion to which the Parliament as a whole is invited to agree. The motion must normally be decided on before the Bill reaches its final amending stage at Westminster in the House in which it was first introduced.

Prior to 30 November 2005, the motion was known as a “Sewel motion” and the memorandum was known as a “Sewel memorandum”. From 30 November 2005, the motion has been known as a “legislative consent motion” (LCM) and the memorandum as a “legislative consent memorandum”. The procedure for scrutiny of legislative consent memorandums and motions is set out in Chapter 9B of the Parliament’s [Standing Orders](#).

Under the rules in Chapter 9B, the Scottish Government is obliged to lodge a legislative consent memorandum in relation to any UK Parliament Bill that contains provisions engaging the Sewel Convention, even if it does not intend to lodge a legislative consent motion in relation to that Bill. Legislative consent memorandums and motions may also be lodged by MSPs who are not Scottish Government Ministers.

The Calman Commission

During its consideration of devolution in Scotland, the Calman Commission looked at the operation of the Sewel Convention. In its final report the Commission noted that this convention:

“...works very well in practice and is probably the best example of where Scottish and UK institutions already cooperate well together”. (Paragraph 17)

It then went on to make a recommendation (4.2) that:

“As a demonstration of respect for the legislative competence of the Scottish Parliament, the UK Parliament should strengthen the Sewel Convention by entrenching it in the standing orders of each House”.

As stated before, the Scottish Parliament had already placed part of the process for the Sewel Convention into its Standing Orders but the Standing Orders make no mention of how the decision made in the Scottish Parliament is conveyed to the UK Parliament.

In practice, the Clerk of the Scottish Parliament writes to the Clerks of the two Houses of the UK Parliament to inform them of the outcome of the decision taken on a LCM. The Clerks also send a copy of the relevant Minutes of the Scottish Parliament and a copy of the Legislative Consent Memorandum. When they receive the letter from the Scottish Parliament the House of Commons’ Public Bill Office add a note to the House of Commons’ Order Paper stating that a copy of the LCM concerned is available in the Vote Office.

The Commons has recently reached an agreement to go beyond this and to publish the legislative consent motions online. The details of the legislative consent motions will be put on the 'Bills before Parliament' webpage, in the 'all Bill documents' section. There is no timescale as yet for this process to begin.

The system is different in the House of Lords as they are only informed of LCMs which have been agreed to. This is indicated next to the relevant bill in the 'Bills in Progress' section of the House of Lords Business. There is, however, no system to make the House of Lords aware when the Scottish Parliament, or one of the other devolved assemblies, has rejected an LCM. In these circumstances it is up to the relevant Secretary of State to inform Parliament.

In 2014, the House of Lords received representations from the Presiding Officer of the National Assembly for Wales asking whether it would review its procedures so that Members were also informed through the Order Paper when a LCM has been rejected by a devolved legislature. The Scottish Parliament and Northern Ireland Assembly supported such a change.

The House of Lords Procedure of the House Committee (2014) reported on the lack of a procedure to inform the House of Lords of a rejection of a LCM and recommended that the House should be informed through a note in the House of Lords Business document when a devolved assembly has rejected a Legislative Consent Motion relating to legislation under consideration by the House of Lords.

Recommendations of the Smith Commission

The Smith Commission report (at paragraph 22) proposes that, "The Sewel Convention will be put on a statutory footing". However, no detail is given on the processes a statutory Sewel Convention might adopt.

Scottish Parliament powers over own elections and local government elections

Current position

In Scotland, legislative competence for UK, Scottish and European Parliamentary elections, including the franchise, is reserved to Westminster. Although the Scottish Parliament has legislative competence over local government elections in Scotland, it does not have competence for the franchise. The Scottish Parliament has, within its general competence, legislated for new elections to Health Boards, National Park Authorities and the Crofting Commission.

As a result of the Edinburgh Agreement, the Scottish Parliament was given temporary responsibility for the franchise as it related to the Scottish Independence Referendum (SIR). As set out in the Agreement this enabled the Scottish Government to introduce legislation to extend the franchise for the SIR to include 16 and 17 year olds.

The means of temporarily extending the legislative competence of the Scottish Parliament was an Order made under Section 30 of the Scotland Act 1998. This Order was made after consideration in both Parliaments.

Recommendations of the Smith Commission

The Smith Commission recommended (at paragraph 23) that:

“The Scottish Parliament will 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). This will include powers in relation to campaign spending limits and periods and party political broadcasts”.

Developments since the Publication of the Smith Commission Report

It was announced by the Prime Minister, on 15 December 2014, that he would do all he could to extend the franchise for Scottish Parliament elections to 16 and 17 year olds in time for the 2016 Scottish Parliament elections.

On 5 January 2015, it was reported that the Secretary of State for Scotland had announced that the Scottish Parliament would have the power to give votes to 16 and 17-year-olds before the UK general election in May 2015. The intention is to again make a Section 30 Order, which will extend the legislative competence of the Scottish Parliament. Thereafter the Scottish Government would introduce a Bill to extend the franchise.

In December 2014, the Law Commission, the Scottish Law Commission and the Northern Ireland Law Commission issued a joint consultation paper on electoral law. The consultation encompasses the law governing the conduct of elections and referendums in the United Kingdom, including the legislative framework, rules governing electoral registration, polling, the count, campaign regulation, electoral offences and legal challenge.

The exercise is being undertaken because electoral law in the UK has become complex, voluminous, and fragmented, with an enormous amount of primary and secondary legislative material governing elections. The twin aims of the consultation are to ensure that:

- electoral laws are presented within a rational, modern legislative framework, governing all elections and referendums within scope
- electoral laws are modern, simple, and fit for purpose.

The consultation runs until 31 March 2015 and in the light of the responses received, the Law Commissions will decide on their recommendations for reform and present them to the UK Government in the form of a report.

Supermajority for legislation relating to franchise, elections and membership of the Parliament

Current position

Provisions requiring a super-majority are not unprecedented in Scotland. Section 3 of the Scotland Act 1998 allows for the dissolution of the Scottish Parliament provided that it has been agreed to by a motion of the Scottish Parliament which had been passed by a two-thirds majority.

Recommendations of the Smith Commission

In order to provide an adequate check on Scottish Parliament legislation which aims to change the franchise, the electoral system or the number of constituency and regional members for the Scottish Parliament, the Smith Commission (at paragraph 27) suggests that the UK legislation would require such legislation to be passed by a two-thirds majority of the Scottish Parliament, a super-majority.

Scottish Parliament powers over the number and type of MSPs

Current position

The size of the Scottish Parliament is a reserved matter. A UK statute, the Scottish Parliament (Constituencies) Act 2004, retained the number of MSPs at 129 and removed the link between the Scottish Parliament and UK Parliament constituencies, which was set out in the Scotland Act 1998.

The Boundary Commission for Scotland is responsible for reviews of constituencies and regions for the Scottish Parliament. Full reviews of Scottish Parliament boundaries are carried out every 8-12 years, with interim reviews of selected areas sooner if necessary. The Boundary Commission completed its First Periodic Review of Scottish Parliament Boundaries in 2010.

The Commission submitted the review report to the Secretary of State for Scotland who was responsible for laying it before the UK Parliament, and for introducing legislation to implement the report's recommendations. The Commission also laid its report before the Scottish Parliament which could debate the report, but has no power to reject or amend it.

An Order in Council, The Scottish Parliament (Constituencies and Regions) Order 2010, was made by the UK Government in November 2010. The Order amended the constituency boundaries for the 2011 Scottish Parliament election.

Recommendations of the Smith Commission

The Smith Commission, at paragraph 26(1) called for UK legislation to give the Scottish Parliament powers to make decisions about all matters relating to the arrangements and operations of the Scottish Parliament and Scottish Government, including powers over the overall number of MSPs or the number of constituency and list MSPs.

Scottish Parliament powers over the disqualification of MSPs

Current position

Disqualification rules are the same for MSPs and MPs and are reserved to Westminster.

Section 15(1)(b) of the Scotland Act 1998 provides that an MSP is disqualified if they are disqualified from being an MP.

(1) A person is disqualified from being a member of the Parliament (subject to section 16) if— [...] (b) he is disqualified otherwise than under that Act [House of Commons Disqualification Act 1975] (either generally or in relation to a particular parliamentary constituency) from being a member of the House of Commons or from sitting and voting in it.

The legislation that sets out when an MP should be disqualified is Section 1 of the Representation of the People Act 1981

Disqualification of certain offenders for membership of the House of Commons.

A person found guilty of one or more offences (whether before or after the passing of this Act and whether in the United Kingdom or elsewhere), and sentenced or ordered to be imprisoned or detained indefinitely or for more than one year, shall be disqualified for membership of the House of Commons while detained anywhere in the British Islands or

the Republic of Ireland in pursuance of the sentence or order or while unlawfully at large at a time when he would otherwise be so detained.

In this respect, each parliament mirrors the other, i.e. a person disqualified from being an MP is also disqualified from being an MSP. This prevents a person disqualified in one parliament seeking to sit in the other parliament.

Recommendations of the Smith Commission

The Smith Commission, at paragraph 26(2) called for UK legislation to give the Scottish Parliament powers to over the disqualification of MSPs from membership.

The power to recall MSPs

Current position

“Recall” is a term used to describe a process whereby the electorate (typically, of an individual constituency) can petition to trigger a vote between scheduled elections on the suitability of an existing elected representative to continue in office.

There is no recall procedure in the UK, although following the MPs’ expenses scandal, the main political parties in the UK Parliament proposed introducing different forms of recall. There was a commitment in the Coalition Agreement which led to the introduction of the Government Bill, Recall of MPs in June 2014.

The Bill (as amended in the House of Commons) outlines three circumstances under which recall will be triggered:

- an MP is convicted in the United Kingdom of an offence and receives a custodial sentence which is not overturned on an appeal brought within the usual time limit for appeals
- following on from a report from the Committee on Standards, the House of Commons orders the suspension of an MP from the service of the House for a period of at least 10 sitting days, or, if the period is not expressed as a specified number of sitting days, for a period of at least 14 days
- an MP is convicted under section 10 of the Parliamentary Standards Act 2009 (offence of providing false or misleading information for allowances claims), regardless of the sentence imposed.

The Bill only addresses matters relating to the UK Parliament. There was an amendment proposed in the House of Commons that recall from Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly be made a devolved matter. This amendment was not selected.

The Bill is currently awaiting its Committee Stage in the House of Lords.

Recommendations of the Smith Commission

The Smith Commission, at paragraph 26(2) also called for UK legislation to give the Scottish Parliament powers over the circumstances in which a sitting MSP can be removed.

Inter-governmental machinery

Current position

The inter-governmental machinery in the United Kingdom is underpinned by the [Memorandum of Understanding](#) (MoU) (UK Government 2013) between the UK Government and the Devolved Administrations in Scotland, Wales and Northern Ireland. It was first agreed in 1999 and has been updated a number of times since, most recently in October 2013. The Memorandum sets out the understanding of the United Kingdom Government and the devolved administrations of the principles that will underlie relations between them.

The MoU addresses the following issues:

- Communication and Consultation between the administrations
- Co-operation between the administrations
- Exchange of information, statistics and research between the administrations
- The principle of confidentiality covering communications and exchange of information between the administrations

The MoU also provides for the establishment of a Joint Ministerial Committee (JMC) consisting of Ministers from the UK, Scottish, Welsh and Northern Ireland governments. The primary purpose of the JMC is “to consider non-devolved matters which impinge on devolved responsibilities and devolved matters which impinge on non-devolved responsibilities”.

According to the MoU, plenary meetings of the JMC are to be held at least once a year. Along with plenary meetings of the JMC, the MoU states it may also meet in other “functional” formats such as Europe (JMC(E)) and Domestic (JMC(D)). Functioning of the JMC(E) is addressed in the section on Scottish Government representation of the UK to the EU.

The current MoU and Concordats have no legislative footing and as such are simply a non-binding understanding between the UK Government and the Devolved Administrations about how inter-governmental relations should work.

The Respect Agenda

Following the 2010 UK General Election, the Prime Minister was keen to promote the ‘respect agenda’ and create a good first impression for his government and its ‘fresh approach’ to intergovernmental relations. This approach was confirmed by the first post-election Joint Ministerial Committee held in June 2010. According to the official communiqué from that meeting:

“The meeting discussed: the mutual respect agenda and how the four administrations could work together to make this a reality; the economy and public finances and intergovernmental relations. It confirmed the continuing importance of the institution of the Joint Ministerial Committee and agreed a programme of meetings for the year ahead.” (Scottish Government 8 June 2010)

The Scottish Government has supplied SPICe with the calendar of meetings that have taken place since June 2007. This shows that the Joint Ministerial Committee meetings in all three formats, Plenary, Europe and Domestic, have taken place regularly over the last seven years. The European format has met four times a year since 2007 whilst the JMC Plenary has met once a year since 2008 with the 2014 meeting taking place on 15 December. The Domestic format of JMC met twice in 2009, 2010 and 2012 and once in 2011, 2013 and 2014 (see Table 1 for further details).

Submissions to the Smith Commission

The Scottish Conservatives proposals set out in the Strathclyde Commission suggested that the present arrangements for intergovernmental machinery between the UK Government and the Devolved Administrations were operating successfully. According to the Strathclyde Commission:

“We are inclined to agree that intergovernmental relations have been exercised more or less successfully in the 15 years of devolution. The Memorandum of Understanding between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers and the Northern Ireland Executive reflects the benefits of mutual cooperation. The Joint Ministerial Committee as well as bilateral departmental relations (sometimes underpinned by concordats) exist to further cooperation on an executive level.” (Strathclyde Commission 2014)

The Labour Party’s proposals set out in “Powers for a Purpose” suggested that the intergovernmental arrangements should be placed on a statutory footing:

“There is a strong case for giving partnership arrangements a legal existence, in the form of statutory obligations on both administrations to co-operate in the public interest, or through the creation of a formal Intergovernmental Council or its equivalent with the duty to hold regular meetings.” (Labour Commission 2014)

The Scottish Government’s proposals “More Powers for the Scottish Parliament” did not address the issue of intergovernmental relations directly though it did make proposals in the area of EU relations. These proposals are covered in the section on “Scottish Government representation of the UK to the EU”.

Recommendations of the Smith Commission

The Smith Commission recommended (at paragraph 28) that, “the current inter-governmental machinery between the Scottish and UK Government, 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”. (Smith Report 2014b)

The Smith Commission’s proposals concluded that reform would also need to take into account the views of the Northern Ireland Executive and the Welsh Assembly Government. Under Smith’s proposals, a new Memorandum of Understanding between the UK Government and the Devolved Administrations would be developed which would also take into account the governance arrangements required to oversee the changing tax and welfare powers which have been proposed elsewhere in the Smith Report. In addition, it has been proposed that further new Joint Ministerial Sub-Committees should be instituted, possibly covering policy areas such as home affairs; rural policy; agriculture and fisheries and social security/welfare. (The Smith Report)

Building on this increased inter-governmental machinery, the Smith Report suggests that stronger and more transparent parliamentary scrutiny should be introduced into the process. This would involve laying reports on the operation of the MoU and the pro-active reporting of the conclusions of Joint Ministerial Committee and other inter-governmental groupings to respective Parliaments and Assemblies.

The proposals under Smith for new inter-governmental machinery propose a range of new Joint Ministerial Sub-Committees but don’t address the issue of how these inter-governmental groupings will function in practice. The suggestion of greater transparency and more reporting

of proceedings and outcomes to legislatures is likely to only work effectively if the MoU allows for sharing (albeit limited) of information rather than the current situation which binds all sides to the “principle of confidentiality covering communications and exchange of information between the administrations”.

At the JMC Plenary meeting held on 15 December 2014, Ministers discussed the current programme of constitutional change including the recommendations of the Silk and Smith Commission reports in relation to intergovernmental relations. According to the Communique published following the meeting:

“Ministers noted that the constitutional landscape has changed fundamentally since the Memorandum of Understanding was agreed between the UK government, Scotland, Wales and Northern Ireland in 2000 and agreed to commission work on a revised Memorandum of Understanding. Ministers also discussed ways in which their respective Parliaments and Assemblies could be kept informed of the work of Joint Ministerial Committee (JMC).”

Table 1: Joint Ministerial Committee meetings since June 2007 (Number)

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

(Information supplied by the Scottish Government)

Scottish Government representation of the UK to the EU

Current position

As European and Foreign Affairs are reserved to the UK Government and UK Parliament, relations between the UK Government and the Devolved Administrations in relation to the European Union are managed by the Memorandum of Understanding and the Concordats on Coordination of European Union Policy Issues (UK Government 2013).

The Concordat on Co-ordination of European Union Policy Issues specifically manages the United Kingdom Government’s relationship with the Scottish Government in the provision of information, the formulation of UK policy, attendance and representation at Council of Ministers meetings, implementation of EU obligations and infraction proceedings.

In many ways, the Smith Report proposals in relation to Scottish Government representation of the UK to the European Union are largely a reiteration of the current non-legislative procedure which is outlined in the Memorandum of Understanding and relevant Concordats. However, the proposals to include a UK Minister representing England (or England and Wales) and the provisions to include a presumption a devolved administration Minister may lead the UK

delegation in the event the UK Minister is unavailable can be seen as developing the processes already in place.

As a postscript, on 2 December 2014, the UK Government announced that the Scottish Government's Cabinet Secretary for Education and Lifelong Learning, Angela Constance MSP, had been invited to take part and speak on behalf of the UK at the upcoming EU Education, Youth, Culture and Sport Council in Brussels on 12 December (Scotland Office 2014).

Submissions to the Smith Commission

The Scottish Government submitted the most developed proposals to the Smith Commission on the way in which the Scottish and UK Governments' cooperate on European Union affairs. Chapter 7 of The Scottish Government's proposals for "More Powers for the Scottish Parliament" addressed Scotland's Place in the World. In it, the Scottish Government proposed a range of measures relating to European and international affairs. Specifically on European affairs, the Scottish Government proposed:

- To establish a new partnership between the Scottish and UK Governments on international and European matters the two governments should develop a statutory Co-operation Agreement with strong bilateral inter-governmental and information-sharing arrangements, and swift dispute-resolution mechanisms. This would complement the Memorandum of Understanding that guides the way all parts of the UK should work together.
- Scotland should have guaranteed rights to engage directly with EU institutions and EU decision-making processes in areas of devolved competence.
- A statutory mechanism should be put in place to enable Scotland to jointly develop, influence and represent UK policy positions on broader European matters (for example on EU reform or treaty change) (Scottish Government submission 2014)

The Scottish Green Party proposed that Scotland should have "a clear right to full participation in UK delegations where areas of devolved responsibilities are under discussion" and also suggested that "an enhanced ability to contribute to the development of UK policy stances" would be appropriate. (Green Party submission 2014)

The Scottish Government's proposals mirror aspects of practice already adopted in EU member states such as Belgium, Germany and Spain. However, many of the arrangements in place in other countries to support sub state Governments in their engagement with both the European Union and international organisations do not easily cross over to the United Kingdom's system where devolution is limited to Scotland, Wales and Northern Ireland.

Recommendations of the Smith Commission

Following on from inter-governmental machinery, and whilst recognising that foreign affairs is a reserved matter, the Smith Report makes proposals about the way in which the Scottish and UK Governments co-operate on European Union affairs. Smith suggests that the:

"...implementation of the current Concordat on the Co-ordination of European Union Policy Issues should be improved". (The Smith Report paragraph 31)

The proposals made by the Smith Report in this area are, in many ways, a reiteration of the current situation in that the Devolved Administrations already have a formal role (outlined in the current Concordats) in contributing to and agreeing the final UK negotiating position.

However, there are two notable aspects of Smith's proposals. Firstly, the proposed suggestion that "a UK Minister chairs a meeting of devolved administration Ministers where another UK Government Minister represents the position of England (or England and Wales in certain policy areas) while devolved administration Ministers represent their respective interests". This proposal seems to be an attempt to address the current situation which, with England governed solely from Westminster, leaves the UK Government responsible for representing the interests of the United Kingdom and England at the same time (SPICe briefing - McIver 2014).

The second interesting aspect of the proposals is that a presumption should be made that "a devolved administration Minister can speak on behalf of the UK at a meeting of the Council of Ministers according to an agreed UK negotiating line where the devolved administration Minister holds the predominant policy interest across the UK and where the relevant lead UK Government Minister is unable to attend all or part of a meeting" (The Smith Report 2014). This proposal appears to stem from examples when Scottish Government Ministers have asked to attend Councils when the UK Minister is unavailable and have been refused the opportunity to lead the UK delegation (BBC News online, November 2014)¹.

In relation to attendance at Council of Ministers meetings, the Concordat on the Co-ordination of European Union Policy Issues as currently drafted states:

"In reaching decisions on the composition of the UK team, the lead Minister will take into account that the devolved administrations should have a role to play in meetings of the Council of Ministers at which substantive discussion is expected of matters likely to have a significant impact on their devolved responsibilities. Requests by the Ministers of Devolved Administrations to attend Council of Ministers should be welcomed unless there is a compelling reason not to do so and which the lead Minister should be willing to explain."
(UK Government 2013)

This proposal does not introduce anything that cannot already be done under the current MoU – Scottish Ministers have led at Council of Ministers meetings before (Scottish Affairs Committee, 2010)² but the proposal would embed the presumption that a devolved administration Minister should lead the delegation in the absence of the lead UK Minister.

The Crown Estate

Current position

[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 of management or control. 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 to HM Treasury.

¹ For instance, it was reported in November 2014 that the Scottish Government's Minister for Environment and Rural Affairs had been prevented from leading the UK delegation at a Fisheries Council when the UK Government Minister with primary responsibility for fisheries was unable to attend.

² See evidence from the Secretary of State for Scotland to the Scottish Affairs Committee for a report which was published in March 2010. According to evidence submitted by the then Secretary of State for Scotland to the Committee: "In evidence to us the Secretaries of State for Justice and Scotland both argued strongly that the Scottish Executive had substantial access to Council meetings. In follow-up evidence to us, the Secretary of State for Scotland stated that Scottish Executive Ministers had attended 112 Council meetings since 1999 and had led the UK delegation on five occasions."

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.” 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.

In Scotland, the Crown Estate Commissioners manage four rural estates, including [Glenlivet Estate](#), mineral and salmon fishing rights, about half of the coastal foreshore and almost all seabed to 12 nautical miles. 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.

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).

Submissions to the Smith Commission

In submissions to the Smith Commission, the **Scottish National Party** stated that, “Scotland should have the power to manage and benefit from its own natural resources including full devolution of the management of and revenues from all Crown Estate assets in Scotland, including the foreshore, seabed and Exclusive Economic Zone assets (with consequent benefits to local communities, especially in the islands)”. **The Scottish Labour Party** made three recommendations:

- “Local management agreements between local authorities and the Crown Estate, an example of best practice, should be applied as widely as possible, with the Crown Estate establishing appropriate mechanisms to facilitate maximum local authority and community engagement.
- The Crown Estate should adopt the approach that the default assumption is that the seabed and foreshore should be managed by local authorities or local communities, and should further develop leasing arrangements which make this possible. If this can be made to work, allowing the Crown Estate to take an interest in particular developments, we will support this. Thus, we propose to use the Crown Estate’s expertise and capital as necessary, but allowing councils and communities to manage the seabed in other respects, in order to achieve real devolution to local areas while preserving the benefits of the wider Crown Estate resource.
- There should be a Memorandum of Understanding between the Scottish Government and the Crown Estate, which should be accountable to the Scottish Parliament, with devolution agreed in respect of their common objectives on the development and management of the seabed and foreshore, and those local authorities with an interest in this area should be fully consulted throughout as to its contents”.

The Scottish Greens stated “There have been many, including the Scottish Affairs Select Committee at Westminster, who have argued for the devolution of the Crown Estate and powers of the Commissioners. We support this, and would seek to strike a balance between local control of assets and investment decisions, and the need for a coherent approach to issues such as renewable energy and the marine environment”. **The Scottish Liberal Democrats** recommended that, “Crown Estate assets and harbour, pier, foreshore and similar rights should be transferred to the control and benefit of local authorities, protected and sustained as ‘common good’ assets that cannot be disposed of”. The **Scottish Conservatives** made no specific recommendations.

Recommendations of the Smith Commission

The Smith Commission recommends (paragraphs 32-35) that:

“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.

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.

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 & security, oil & 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”.

The Smith Commission also recommended that:

“Responsibility for financing the Sovereign Grant will need to reflect this revised settlement for the Crown Estate”.

Impact of Smith

The latter recommendation pertains to the fact that the Sovereign Grant, which funds the Royal Household, is aligned to 15% of Crown Estate profits (though the money does not come from the Crown Estate). If management of Crown Estate assets transfer to the Scottish Government then profits of the remaining Crown Estate will drop, and the 15% figure will represent a lower amount. 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.

Formal consultative roles for the Scottish Parliament and the Scottish Government

The Smith Commission (at paragraphs 36 to 41) proposes a formative consultative role for the Scottish Government and Scottish Parliament in a number matters which are largely reserved to Westminster. These are discussed in the following sections of this briefing.

Broadcasting and the BBC's Charter

Current position

Following a recommendation (5.4) in the Calman Commission report the Scotland Act 2012 gives Scottish Ministers a role in the appointment of the Scottish member of the BBC Trust. The UK Minister must not exercise, without the agreement of the Scottish Ministers, functions relating to selection for a particular appointment by which a person becomes the member of the BBC Trust with responsibility for Scotland.

At present the BBC's Annual Report and full financial statements are only formally laid in the UK Parliament in accordance with the requirements of the Charter.

The BBC can be asked to attend Scottish Parliament Committee meetings to discuss matters relating to the BBC in Scotland but the BBC may decline to attend and provide oral evidence to Scottish Parliament Committees. In 2013, the Scottish Parliament Education and Culture Committee, in its report on Broadcasting, noted that it was "a matter of considerable regret that BBC Scotland initially declined our invitations to give oral evidence".

The Royal Charter is the constitutional basis for the BBC. It sets out the public purposes of the BBC, guarantees its independence, and outlines the duties of the Trust and the Executive Board. The current Charter runs until 31 December 2016.

The Charter is supplemented by an Agreement with the Secretary of State that sits alongside the Charter, which provides detail on many of the topics outlined in the Charter and also covers the BBC's funding and its regulatory duties.

The UK Parliament's Culture, Media and Sport Committee is currently holding an inquiry into Future of the BBC beyond 2016. This Committee has one member from a Scottish constituency. Both the National Assembly for Wales and the Northern Ireland Assembly have provided the Committee with written evidence, but neither the Scottish Government nor the Scottish Parliament have provided evidence to the Committee's inquiry.

Recommendations of the Smith Commission

The Smith Commission's proposals (paragraph 36) ask for a formal consultative role for the Scottish Government and the Scottish Parliament in the process of reviewing the BBC's Charter. It also asks for the BBC to 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.

MG Alba

Current position

During the passage of the Scotland Bill in 2011, following a recommendation of the Scottish Parliament Session 3 Scotland Bill Committee, a UK Government amendment was agreed which amended the Broadcasting Act 1990. This amendment means that Ofcom have to seek the approval of the Scottish Ministers as well as the UK Secretary of State for Culture before making appointments of members of the Gaelic Media Service (MG Alba) and for the appointment of a member as the chairman of the Service.

Recommendations of the Smith Commission

The Smith Commission report also calls for the power to approve Ofcom appointments to the board of the MG Alba to rest solely with Scottish Ministers (paragraph 37).

PO reforms and proposals

In his foreword to the Smith Commission report (page 6, paragraph 2), Lord Smith recommended that the Scottish Parliament's Presiding Officer should continue to build on her work on parliamentary reform by undertaking an inclusive review which will produce recommendations to run alongside the timetable for the transfer of powers.

Parliamentary reforms were instigated by the Presiding Officer in 2011. Subsequent recommendations from the Parliament's Standards, Procedures and Public Appointments Committee include:

- changes to the parliamentary sitting pattern
- more topical questions asked at short notice
- more entirely spontaneous questioning of Ministers
- additional members' business debates.

In October 2014, the Presiding Officer wrote to the Standards, Procedures and Public Appointments Committee asking it, as part of the continuing process of evaluation and reform of the Parliament, to examine another potential reform, namely the election of Committee conveners. The Committee put out a call for evidence on this proposal on 1 December 2014.

In the UK Parliament, since June 2010, the chairs of departmental select committees and five other committees (Environmental Audit, Public Accounts, Public Administration, Political and Constitutional Reform and Procedure) have been elected by secret ballot of the House of Commons.

Public engagement

In his foreword (page 6, paragraph 3) Lord Smith also highlighted that a challenge facing both the Scottish and UK Parliaments was the relatively weak understanding of the current devolution settlement.

He acknowledged that this was not surprising given the complex balance of powers, but he pointed that with the proposed increase in powers for the Scottish Parliament and Government it would be even more critical to improve the public's understanding of devolved powers, in order to sustain the trust and engagement of the public.

Lord Smith recommended that the Presiding Officer and Speaker of the House of Commons meet shortly after 25 January to agree on action to improve public understanding of Scotland's constitutional settlement.

In the present session the Scottish Parliament has introduced Parliament Days as a new method of engaging the Scottish public in each own locale with the work of the Parliament and its Committees. The Parliament Committees have held formal and informal meetings in various places through Scotland, including: Stirling, Dumbarton and Dumfries and Galloway.

The Presiding Officer has also attended the Parliament Days and Parliament staff have undertaken various outreach and education sessions with the aim of inspiring local people to take an interest in and engage directly in the work of their Parliament.

Regulation of Telecommunications and Postal Services

Current position - Ofcom

Ofcom operates under a number of Acts of Parliament, including in particular the [Communications Act 2003](#). Accountable to the UK Parliament, Ofcom sets and enforces regulatory rules. Ofcom also has powers to enforce competition law, alongside the Competition and Markets Authority.

The main legal duties of Ofcom include ensuring that:

- a universal postal service is provided in the UK,
- the UK has a wide range of electronic communications services, including high-speed services such as broadband;
- the radio spectrum (the airwaves used by everyone including mobile-phone companies) is used in the most effective way.

Ofcom's main decision making body is the Board, which provides strategic direction for the organisation. The Executive runs the organisation and answers to the Board.

The work of both the Ofcom Board and Executive is informed by committees and advisory bodies, which are required by the Communications Act. These include the England, Northern Ireland, Scotland and Wales Advisory Committees. The Advisory Committee for Scotland advises Ofcom about the interests and opinions, related to communications, of people living in Scotland.

Submission to the Smith Commission

The Scottish Government submission to the Smith Commission stated that "Formal shared responsibility for regulation would ensure that services such as mobile telecoms, broadband and postal services can be delivered in a way that properly supports the rural economy".

Recommendations of the Smith Commission

The Smith Commission (at paragraph 38) recommends a formal consultative role for the Scottish Government and Scottish Parliament in setting the strategic priorities for the communications regulator ([Ofcom](#)) with respect to its activities in Scotland.

The Smith Commission also recommends that the Scottish Ministers will have the power to appoint a Scottish member to the Ofcom Board, capable of representing the interests of Scotland. Ofcom will lay its annual report and accounts before the Scottish Parliament and submit reports to, and appear before, committees of the Scottish Parliament.

Maritime and Coastguard Agency

Current position

The MCA is an executive agency of the UK Department for Transport, answerable to the Secretary of State for Transport through its Advisory Board, which meets quarterly. The MCA Advisory Board reviews the Chief Executive's and the Agency's performance against its plans and resources. Membership of the Advisory Board consists of senior Department for Transport officials, the senior management of the MCA and two external members – appointed by the Secretary of State for Transport. The MCA currently lays its annual report and accounts before the UK Parliament.

Submissions to the Smith Commission

The submissions of the Labour Party (2014), Conservative Party (2014) and the Green Party (2014) make no specific mention of the MCA or maritime transport issues. The Scottish Government submission (2014) called for full responsibility for maritime transport to be devolved which, "...would enable Scotland to shape the future role of the Maritime and Coastguard Agency and take responsibility for coastguard functions in Scotland to reflect our distinctive seas and coastline." The Liberal Democrat Party Submission (2014) stated that, "...partnership-working would serve the country well in maritime policy where there are complex layers of interests – coastguard, merchant fleet, fisheries and conservation."

The MCA operates across all four UK nations.

Recommendations of the Smith Commission

The Smith Report (at paragraph 39) recommends that:

"There will be a formal consultative role for the Scottish Government and the Scottish Parliament in setting the strategic priorities for the Maritime and Coastguard Agency (MCA) with respect to its activities in Scotland. Scottish Ministers will have the power to appoint a Scottish member to the MCA's Advisory Board who is capable of representing the interests of Scotland. The MCA will lay its annual report and accounts before the Scottish Parliament and submit reports to, and appear before, committees of the Scottish Parliament."

Energy Market Regulation and Renewables

Current position

At present, energy matters are largely reserved under Schedule 5 Head D of the Scotland Act 1998 (c. 46), and DECC is responsible for UK Energy Policy. However, the Scottish Government has responsibility for the promotion of renewable energy generation, energy efficiency, and the consenting of electricity generation and transmission development.

The Renewables Obligation (Scotland), known as the ROS, is currently the Scottish Government's main means of increasing renewable electricity generation in Scotland. Responsibility for setting this support mechanism was specifically devolved to Scottish Ministers by the Utilities Act 2000. The ROS combines with near identical Obligations covering England and Wales, and in Northern Ireland, to create a UK wide market for Renewable Obligation Certificates (ROCs). It obliges electricity suppliers to produce a certain number of certificates - known as ROCs - as a proportion of the amount of electricity which they supply to their customers in Scotland.

The [Energy Act 2013](#) (c.32) replaces the RO with a new system of Contracts for Difference (CfD) which provide for a long-term stable price for electricity from low carbon plant. The 2013 Act does not specifically devolve CfD allocation to Scottish Ministers; rather, section 24 requires the Secretary of State for Energy to consult Scottish Ministers before making regulations. Section 55 also allows the Secretary of State to make a renewables obligation closure order; there are no specific requirements to consult Scottish Ministers before making this order. The Scottish Government ([2013c](#)) has expressed concern about the provisions in section 55.

At present, the Scottish Parliament does not have any formal powers over Ofgem; however it has appeared regularly before the relevant committee.

Submissions to the Smith Commission

With regard to further devolution of energy policy, the main party positions (where stated) are described below.

The Scottish Green Party gave support for the devolution of renewables incentives within a continuing GB market; as well as the regulation of Ofgem, particularly to support the development of local energy companies. The Scottish Liberal Democrats proposed the creation of a third category of government function (after devolved and reserved powers), called “partnership powers” which require the co-operation of both home rule and federal governments. One of these new powers would be over strategic decisions relating to the National Grid, energy planning and the security of energy supply, carbon trading and renewable developments. The Scottish National Party called for additional powers to tailor support for low carbon and renewables generation in Scotland, where this was considered a necessary and cost-effective means of delivering Scottish priorities. Also, for joint oversight of UK-wide bodies such as Ofgem.

Recommendations of the Smith Commission

The Smith Commission (at paragraph 41) states that:

“There will be a formal consultative role for the Scottish Government and the Scottish Parliament in designing renewables incentives and the strategic priorities set out in the Energy Strategy and Policy Statement to which OFGEM must have due regard. OFGEM

will also lay its annual report and accounts before the Scottish Parliament and submit reports to, and appear before, committees of the Scottish Parliament.”

HEADS OF AGREEMENT: PILLAR 2 (ECONOMY AND SOCIAL JUSTICE)

Pillar 2 is concerned with the devolution of powers intended to create wealth, improve economic performance and enhance social justice. The Smith Commission Report describes Pillar 2 as, “delivering prosperity, a healthy economy, jobs, and social justice.” Within this pillar, Smith recommends that matters such as the state pension and the National Minimum Wage remain reserved to Westminster.

Universal Credit

Current position

UC is a means tested benefit for working age people that replaces six existing working age benefits.³ UC is administered by the DWP and is being implemented on a phased basis until 2019 (National Audit Office 2014). The Scottish Government does not have any powers in relation to UC or the benefits it replaces.

Recommendations of the Smith Commission

The Smith Commission Report recommends that powers over a number of welfare benefits be devolved to the Scottish Parliament, including powers over certain elements of Universal Credit (UC) and powers to create new benefits and to ‘top-up’ reserved benefits. These are described in the following sections of this briefing. However, the Commission also recommends that some benefits remain the responsibility of the UK Parliament. These are: Bereavement Allowance, Bereavement Payment, Child Benefit, Guardian’s Allowance, Maternity Allowance, Statutory Maternity Pay, Statutory Sick Pay and Widowed Parent’s Allowance.

³ Income-based Job-Seekers Allowance; Income-related Employment and Support Allowance; Income Support; Child Tax Credits; Working Tax Credits and Housing Benefit.

Universal Credit Administration

Current position

The UC award is paid to the household on a monthly basis, and as a single payment, although alternative arrangements can be made in exceptional circumstances (DWP 2014). Concern has been raised that these payment methods may impact on individuals who are not used to budgeting on a monthly basis (Kennedy 2013).

The Scottish Government, in their White Paper on independence (2013) said that they would restore direct payments of housing benefit to tenants and restore the ability of claimants to receive individual support rather than single household payments.

Recommendations of the Smith Commission

The Smith Report recommends that the Scottish Parliament should 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 (paragraph 44).

The Housing Costs Element of Universal Credit

Current position

The housing costs element of UC has many similar features to the current housing benefit regulations. The UK Government's reforms to these regulations, for example, with the introduction of the "bedroom tax" and changes to the local housing allowance arrangements were controversial (see Berry 2011).

Submissions to the Smith Commission

None of the political parties' responses to the Smith Commission suggested varying the housing element of UC as a potential option for devolution. The SNP said they would restore housing benefit as a separate benefit (SNP submission 2014). The Scottish Labour and the Scottish Conservatives both argued that housing benefit should be devolved⁴ (Conservative Party submission 2014, Labour Party submission 2014).

Recommendations of the Smith Commission

The Smith Report recommends that the Scottish Parliament be given the power to vary the housing cost elements of UC (paragraph 45).

How the Scottish Government decides to use this power may also depend on how it chooses to use its new tax raising and borrowing powers in relation to the supply of affordable housing.

The Smith Report also states that, "Additional administration and programme costs directly associated with the exercise of the powers in paragraphs 44 to 45 will be met by the Scottish Government (paragraph 47).

⁴ The Scottish Conservatives said that this should only be done if it could be disentangled from UC

Impact of Smith

The proposed power to vary the housing cost elements of UC (see below) would allow the Scottish Government to reverse or change the recent UK Government's reforms, for example, by abolishing the bedroom tax.

However, it is not clear what further scope there would be for more fundamental change to the way housing costs are supported in Scotland. The housing element remains "locked in" within the structure of UC and the Scottish Parliament will not have the power to change any of the other elements within UC or the taper (this is the rate at which benefit is withdrawn as income increases).

Developments since the Publication of the Smith Commission Report

The Scottish Federation of Housing Associations (SFHA) had called for the devolution of all benefits (SFHA 2014a). They gave a "guarded welcome" to the Smith Report and said:

"The new powers on varying the housing cost elements of Universal Credit do not mean the abolition of the 'Bedroom Tax,' but they could lead to it. The power to allow for rent to be paid directly to social landlords would be significant in tackling the financial difficulties that the Universal Credit system has already been creating in its pilot areas in Scotland." (SFHA 2014a)

They also reiterated their previous call for the roll out of UC to be halted and said, "...a rushed approach puts at risk the incomes of the poorest and most vulnerable in our society, especially if changes subsequently have to be unpicked".

Dr Jim McCormick, from the Joseph Rowntree Foundation, said that he was broadly supportive of the proposals regarding varying the on housing costs element of UC. These powers combined with the devolution of discretionary housing payments would:

"...address major concerns in the Scottish housing sector. Retaining the integrated nature of UC is an important feature of the plan. In time, rebates for a future alternative to Council Tax might be included as well. Increasing the supply of affordable housing should be the first priority when new borrowing and bond-issuing powers come into use." (McCormick 2014)

Benefits devolved outside Universal Credit

Disability and Carer benefits

A key issue for the Scottish Government has been the introduction of Personal Independence Payment in Scotland to replace Disability Living Allowance. One intention behind the Personal Independence Payment is to reduce projected working-age expenditure by 20% in 2015/16 (NAO 2014). Because of concerns about the impact of Personal Independence Payment, the Scottish Government said it would halt the roll out following independence (2013b). The Expert Working Group on Welfare recommended that, following independence, the Scottish Government should commission an independent review of Personal Independence Payment and seek to replace Disability Living Allowance and Personal Independence Payment with a new benefit for disabled people (2014).

Submissions to the Smith Commission

In their submissions to Smith, Scottish Labour and the Scottish Conservatives did not mention Disability Living Allowance or Personal Independence Payments. Both proposed devolving Attendance Allowance on the grounds that it is closely linked with the devolved responsibilities of health and social care. However, academic opinion (Scottish Parliament Welfare Reform Committee (2014a and b)) on such an approach was cautious given the interconnection between Attendance Allowance and other disability related benefits. It was suggested that a better approach might be to focus on the client group concerned and the benefits they might be entitled to as a whole. In particular, reference had been made to the connections with Carer's Allowance and Disability Living Allowance/Personal Independence Payment.

In their [submissions to Smith](#), both Inclusion Scotland and Capability Scotland called for the devolution of all social security benefits. They also argued that there is a cumulative impact of all welfare reforms on disabled people and referred to research by the Scottish Government (2014) and the Equality and Human Rights Commission (Landman Economics and NIESR 2014). Carers Scotland also called for the devolution of all benefits and said it made "little sense" to ignore the connections between Attendance Allowance and a wide range of other benefits (Smith Submissions).

There was broad consensus between these organisations and the academics that devolving responsibility for some or all benefits would require the economic levers to affect change.

In terms of the number of claimants and expenditure, the big three benefits are Attendance Allowance, Disability Living Allowance (to be replaced by Personal Independence Payment for working age people) and Carer's Allowance. All are non-means tested and have links with other benefits.

- **Attendance Allowance (AA)** is a benefit available to people with a mental or physical disability who are 65 or over, who could benefit from personal care or supervision. Paid at two weekly rates of £54.45 or £81.30 depending on level of care needed. As at May 2014, there were 150,190 people entitled to AA in Scotland (DWP 2014c). Expenditure in Scotland for 2012/13 was £489m (Scottish Government 2014f).
- **Disability Living Allowance (DLA)** - for working age people aged 16 to 64 is being replaced by Personal Independence Payment under UK Government welfare reforms. Payable to people whether in or out of work. DLA was available to anyone under the age of 65 with a disability and who needed help getting around and/or with supervision or attention needs. Expenditure on DLA in Scotland for 2012/13 was £1.45bn (Scottish Government 2014f). There are over 343,000 claimants in Scotland. Over 200,000 claimants of DLA are working age and will be affected by the move to Personal

Independence Payment. A further 100,000 claimants are over working age (DWP 2014d).

- **Personal Independence Payment (PIP)** has replaced DLA for all new working age claimants since June 2013. This new benefit is for those who need help getting around and/or help with daily living activities. It is comprised of a daily living component and mobility component, payable at different rates: Daily living component £54.45 or £81.30; Mobility component £21.55 or £56.75. This benefit is yet to be fully rolled out.
- **Carer's Allowance** is paid to people who regularly care for someone who is severely disabled and who must be in receipt of certain benefits, e.g. Attendance Allowance (higher or lower rate), DLA care component (highest or middle rate). It is paid at the weekly rate of £61.35. Expenditure in 2012/13 in Scotland was £169m (Scottish Government 2014f). There are 103,760 carers in Scotland entitled to Carer's Allowance, but only 59,010 receive a Carer's Allowance payment (DWP 2014d). The other 44,750 claimants entitled to Carer's Allowance do not receive it because they have other income, or it is an overlapping benefit. A large number of those not entitled to Carer's Allowance, (36,280) are State Pensioners (Scottish Government 2014f).

Recommendations of the Smith Commission

The Smith Commission Report (at paragraph 49) recommends that powers over the following benefits in Scotland will be devolved to the Scottish Parliament:

- 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.
- Benefits which currently comprise the Regulated Social Fund: Cold Weather Payment, Funeral Payment, Sure Start Maternity Grant and Winter Fuel Payment.
- Discretionary Housing Payments.

Smith also recommends devolving "Industrial Injuries Disablement Allowance" and Severe Disablement Allowance. It is not entirely clear whether the former is a reference to the Industrial Injuries Disabled *Benefit* and the additional payments of Constant Attendance Allowance and Exceptionally Severe Disablement Allowance. Severe Disablement Allowance was abolished in April 2011, although some people who claimed before this date are still receiving it.

Regulated Social Fund

There is a discretionary social fund and a regulated social fund. The discretionary social fund has mostly been devolved already (and successor arrangements have been made in the Scottish Welfare Fund) with the exception of budgeting loans. Smith proposes that benefits which currently comprise the regulated social fund should also be devolved. These are:

- Cold Weather Payment - a sum of £25 paid each week of cold weather. Payments are made to older people receiving Pension Credit, disabled adults and children, and families with children under five who are receiving an income-related benefit. In 2012/13 £8.73m was paid out in Scotland. This will vary depending on the weather (DWP 2013).
- Funeral Payment – this is available to people who receive certain income related benefits to help them meet costs of a funeral for a partner, child, parent or close relative. Expenditure for UK in 2012/13 was £44m (DWP 2014).
- Sure Start Maternity Grant - £500 one off payment to people in receipt of certain income related benefits who are expecting their first child. Expenditure for UK in 2012/13 was £39m (DWP 2014).

- Winter Fuel Payment – annual payment for older people to help with heating bills. Payment varies between £100-300 depending on financial circumstances. Expenditure in Scotland in 2013/14 was £186m (DWP 2014).

Regulated social fund payments are not taxable, nor are they included as income when calculating means tested benefits or tax credits, nor are they included in the 'benefit cap'. These benefits on their own have not featured as part of the debate on further devolution, except for a range of organisations calling for all benefits to be devolved.

Discretionary Housing Payments

DHPs help tenants who are in financial hardship to pay their rent. Local authorities are responsible for administering DHPs and they have relatively wide discretion as to how they are used, with the regulatory framework and DWP guidance.

The DWP provides DHP funding to local authorities and local authorities can top up this funding. Since 2013-14, the Scottish Government has provided local authorities with additional funding to top up their DHP allocations to mitigate the impact of the bedroom tax (the Scottish Government's expectation is that everyone affected by the bedroom tax will be provided with a DHP to cover their bedroom tax liability). In 2014-15, £50.2m is available for DHPs; £15.2m from the DWP and £35m from the Scottish Government (Scottish Government 2014g)

Legislation had limited the total amount that could be spent on DHPs in any one year. However, recently the power to set the cap on DHP spending was transferred to Scottish Ministers. The Scottish Government has used this power to remove the cap on DHP spending⁵.

Devolving all responsibility for DHPs would presumably allow Scottish Ministers to make any changes to the current regulations⁶ or [guidance](#) that is in place. The financial implications would be to some extent dependent on how the Scottish Government chose to use its power to vary the housing element of Universal Credit. For example, if it chose to abolish the bedroom tax then it may choose to provide less DHP funding.

Expenditure

In terms of expenditure, it is [estimated](#) (Scottish Government 2014f) that £2.5bn of welfare spending will become the responsibility of the Scottish Government; around 14% of current welfare spending in Scotland.

Motability arrangements

Current position

DLA/PIP claimants who receive higher/enhanced rate mobility component can either receive the benefit directly (£56.75 per week as at April 2014) or can apply for a vehicle through Motability. Those in receipt of a vehicle through Motability will no longer receive DLA/PIP as a payment. Instead DWP will transfer the DLA/PIP benefit directly to Motability. Motability will then use this funding - along with charitable income - to provide a vehicle to the benefit recipient.

⁵ Discretionary Housing Payments (Limit on Total Expenditure) Revocation (Scotland) Order 2014 (SSI 2014/298)

⁶ The Discretionary Financial Assistance Regulations 2001 made under section 69 of the Child Support, Pensions and Social Security Act 2000

Approximately a third of DLA claimants across the UK do not access the cash benefit, instead using the benefit to finance a vehicle through Motability.

Motability is available to recipients of Higher Rate of Mobility Component of DLA, those in receipt of Enhanced Rate Mobility Component of PIP, War Pensioners' Mobility Supplement or the Armed Forces Independence Payment (AFIP). Attendance Allowance cannot be used to lease a car through Motability.

Recommendations of the Smith Commission

The Smith Commission (paragraph 50) proposes that new arrangements for how Motability will operate in Scotland will be agreed between the Scottish and UK Governments. This is required as a result of the proposed devolution of Disability Living Allowance and Personal Independence Payment.

Delivery and administration of benefits

Current position

The administration of benefits by the DWP is currently distributed across the UK. Not all Scottish claims are processed in Scotland and some claims that are not from Scotland are processed here. The proposals in Smith will require new or adapted administrative arrangements for:

- those benefits that are to be devolved
- variations to universal credit allowed by paragraphs 44-45 and
- any top ups to reserved benefits
- creation of new Scottish benefits in devolved areas

These do not necessarily all have to be done through DWP⁷. There are 94 Job Centre Plus offices in Scotland and 1 DWP centre for processing disability benefits. However, Attendance Allowance, Industrial Injury Disablement Benefit and Carer's Allowance are currently processed only in England and Wales. It is likely that new arrangements would be needed to administer the Scottish versions of these benefits following their devolution.

During the referendum debate, the IPPR proposed the devolution of some powers over welfare. In terms of administration they suggested that this would: "require changes to how the DWP works, to ensure that it was adequately accountable to devolved governments for what it did on their behalf". (IPPR 2014)

After the publication of the Smith Report, Professor Nicola McEwan said that while delivery partnership with DWP would be cost-effective:

"it is likely to mean that the autonomy which could be exercised over these benefits would be less than 'complete', curtailing the scope for distinctive policy development."
(Scottish Parliament 2014a)

In terms of top ups to reserved benefits, she referred to the need for DWP and HMRC to incorporate additional payments into their system and states that: "It is not clear whether these systems would have the capacity to distinguish and process claims on the basis of distinct Scottish entitlements."

⁷ For example, local authorities provide some financial social assistance and might therefore also be able to deliver new devolved benefits.

Recommendations of the Smith Commission

The Smith Commission suggests that the Scottish Government might ask the DWP to administer new Scottish benefits along with continuing reserved benefits (paragraph 54). It also proposes joint 'oversight' of development and delivery of universal credit. The administrative costs of new benefits, the topping up of reserved benefits or Scottish alterations to universal credit will be met by the Scottish Government. However the devolution of currently reserved benefits will include an amount for their administration being given to the Scottish Government (see paragraphs 48, 54 and 58).

Powers to create new benefits and top-up reserved benefits

Submissions to the Smith Commission

Prior to the referendum, the Scottish Conservatives were the only party which said there was a case for the Scottish Parliament to have the power to supplement welfare benefits legislated for at UK level (2014).

This proposal was also put forward by the IPPR (Lodge and Trench 2014) who argued that:

“...devolved governments should be allowed to supplement existing welfare benefits (or indeed introduce new ones). It would then be open to devolved legislatures to provide forms of welfare benefits as they saw fit, subject to funding these from within devolved resources.”

In their [responses](#) to the Smith Commission (2014), both CPAG and the Joseph Rowntree Foundation referred to the power to supplement UK benefits and cited potential benefits of this approach. However, CPAG noted that what could be achieved with such a power would depend on political ambition and necessary fiscal powers.

Recommendations of the Smith Commission

The Smith Report states (at paragraph 54) that the Scottish Parliament will have new powers to create benefits in areas of devolved responsibility, in line with the funding principles set out in paragraph 95. The Scottish Parliament will also have new powers to make discretionary payments in any area of welfare without the need to obtain prior permission from DWP.

Paragraph 55 proposes that any new benefits or discretionary payments introduced by the Scottish Parliament must provide additional income for a recipient and not result in an automatic offsetting reduction in their entitlement to other benefits or post-tax earnings if in employment.

Paragraph 56 states that the UK Government's Benefit Cap will be adjusted to accommodate any additional benefit payments that the Scottish Parliament provides.

Impact on other benefits

Since the Smith Commission report there has been a focus on the meaning of Paragraph 55. Bruce Crawford MSP, Convener of the Scottish Parliament's Devolution (Further Powers) Committee, questioned whether the power to supplement benefit was worthwhile if it was possible that such a power could end up reducing a recipient's Universal Credit award (2014a). Alistair Carmichael suggested that this may be an unintended consequence of the proposal and said it:

“...was all the more reason to ensure we have proper scrutiny of the draft clauses when they are brought forward”.

John Swinney said that the purpose of paragraph 55 was to ensure that:

“...anything that we do ‘must ... not result in an automatic offsetting reduction in their entitlement to other benefits’”

Both agreed to consider the matter and respond to the Committee.

On this particular point, Professor McEwan has said that:

“My reading of para.55 suggests that any additional benefit received by Scottish claimants as a result of devolved benefits or Scottish discretionary payments *should not* adversely affect entitlement to UK benefits or tax credits, but in practice the new complexities generated may be difficult to administer”(Scottish Parliament 2014).

New Benefits

The power to create new benefits in areas of devolved responsibility remains unclear. As Professor McEwan has stated:

“It is not clear what this means, since the provision of ‘assistance for social security purposes to or in respect of individuals by way of benefits’ (Scotland Act, schedule 5, Head F) will remain reserved matters, save for those specific exceptions identified above.” (Scottish Parliament 2014a)

This power appears rather broad and could feasibly include, for example, new benefits relating to housing, childcare, health, and older people’s services. This could give the Scottish Parliament significant powers in relation to social security, subject to the ability to fund it.

Benefit Cap

The benefit cap is part of the UK Government’s package of welfare reforms, announced as part of the October 2010 Spending Review. It was introduced in two stages in 2013. The benefit cap limits household benefits to:

- £500 per week for a family
- £350 per week for a single person with children

Currently the cap is being administered by local authorities and operates by reducing the claimant’s Housing Benefit entitlement where their total amount of benefit exceeds £500 a week for a family or £350 for a single person. Once Universal Credit is fully rolled out, the benefit cap will apply to the combined income from Universal Credit and other specified benefits, although there are exceptions (Wilson 2014). The specified benefits include Carer’s Allowance and Severe Disablement Allowance, both of which the Smith Report has proposed for devolution. On this point, Professor McEwan said “these should be excluded from the cap for Scottish claimants” (Scottish Parliament 2014).

The Smith Report has proposed (at paragraph 56) that the benefit cap will be adjusted to accommodate any additional payment that the Scottish Parliament provides. If the Scottish Parliament increases the payment of a particular benefit affected by the cap, it might be assumed that the cap would also be raised, although this will need to be clarified.

Employment programmes

Current position

While employment services are currently reserved to the UK Government, training for employment is a shared responsibility between the UK and Scottish Governments. A summary of [Scottish](#) and [UK policy](#) is available along with a [‘map’](#) of the current programmes provided by the DWP.⁸

The main DWP provision is through the ‘work programme’ provided in Scotland by Ingenus and Working Links. In addition there is ‘work choices’, provided in Scotland by Momentum Scotland Ltd, Shaw Trust and Remploy, which focuses on disabled people. There are also various pre-work programmes which include the controversial ‘mandatory work activity (McGuinness, F and Dar, A (2014) and Dar, A and McGuinness, F (2014)). It is not entirely clear from the wording of the Smith report whether or not these pre-work programmes would be included for devolution.

Submissions to the Smith Commission

In their submissions to the Smith Commission, the Labour Party called for the work programme to be devolved, as did the Scottish Government, although they also proposed devolution of all other employability programmes run by the DWP.

Recommendations of the Smith Commission

The Smith Report (at paragraph 57) recommends devolution of, “employment programmes currently contracted by DWP [...] on expiry of the current commercial arrangements Job centre plus will remain reserved.

Developments since the Publication of the Smith Commission Report

The DWP has extended its contracts with work programme providers from March 2016 until 2017 and this has been criticised by the Scottish Government (BBC News online 4 December 2014) Alistair Carmichael, Secretary of State for Scotland said that the decision to extend had been taken in August, before the Smith Commission was established. John Swinney said that he, “sat on the Smith commission in good faith, believing that [contracts would end] in March 2016”. (Scottish Parliament Devolution (Further Powers) Committee (2014a))

The work programme is closely linked to conditionality and sanctions in benefits such as JSA which will remain reserved. The Joseph Rowntree Foundation has therefore recommended that conditionality and sanctions related to employment programmes should also be devolved. (JRF 2014). Professor Nicola McEwan has suggested that this link between employability programmes and conditionality “is likely to generate operational challenges, political difficulties and accountability issues, given the concerns expressed by the Scottish Government and Parliament about the DWP’s conditionality and sanctions regime”. (Scottish Parliament Devolution (Further Powers) Committee (2014b))

More recently, Shadow Scottish Secretary, Margaret Curran MP, has called for the work programme to be devolved to the Scottish Parliament immediately. She said,

⁸ [Employability Scotland. \(online\) Get Britain working – DWP provision for the unemployed.](#)

“Scotland has been failed by the Work Programme, with as few as 15% of people on the programme in some parts of Scotland finding a job. Devolution to Scotland and then to Scottish local authorities would enable the Work Programme to better meet the needs of people across Scotland”. (Holyrood Magazine)

Equalities

Current position

Equal opportunities are reserved. The definition is:

“The prevention, elimination or regulation of discrimination between persons on grounds of sex, or marital status, on racial grounds, or on grounds of disability, age, sexual orientation, language or social origin or of other personal attributes, including beliefs or opinions such as religious beliefs or political opinions.” (Schedule 5, Section L2, Scotland Act 1998)

There are two exceptions to the reservation:

- “The encouragement (other than by prohibition or regulation) of equal opportunities and in particular the observance of equal opportunity requirements”. In effect the Scottish Parliament has the power to encourage good behaviour but no power to prohibit or regulate discriminatory behaviour (EHRC 2009).
- The Scottish Parliament has the power to impose duties on Scottish public bodies, or cross-border bodies with responsibility for devolved matters. It can require them to ensure their functions meet equal opportunity requirements. This power has been used in a range of legislation covering education, housing, social care, health and transport.

The Scotland Act definition is much broader than what is provided for in the Equality Act 2010 which covers age, disability, sex, race, religion and belief, marriage and civil partnership, sexual orientation, gender reassignment, and pregnancy and maternity.

In 2009, the EHRC published [‘An uncertain mix: equality and Scottish devolution’](#). The report considered the role of equalities in Scotland since devolution. It found that the Scottish Parliament’s impact on tackling inequality, while positive, had been limited. It described equal opportunities as ‘one of the most problematic grey areas’ in the devolution settlement. The EHRC said this had led to confusion over:

- what equality law permits and requires
- who is accountable for delivering change; and,
- what the mechanisms are for checking commitments are delivered.

Submissions to the Smith Commission - Partial devolution of equalities

Enforcement powers

Scottish Labour’s Devolution Commission (2014) said that the enforcement of equalities legislation should become a devolved matter, as well as devolving responsibility for employment tribunals. The EHRC (2009) had considered the possibility of devolving enforcement powers, but said that the uncertainty about the extent of reserved employment responsibilities, for example, would potentially be an obstacle to pursuing this option.

Gender quotas for public boards and political representation

The Labour Commission also said they would support the transfer of powers, should it be required, to ensure women are fairly represented on Scotland's public boards and in other public appointments. The Scottish Government is keen on introducing mandatory quotas that ensure a minimum of 40% of women on public boards. It had previously [asked](#) the UK Government to agree to an Order under section 30 of the Scotland Act 1998 to enable the Scottish Parliament to legislate on this issue (August 2014).

On 28 September, a cross-party group⁹ of MSPs called for [legal quotas to ensure 50/50 representation of women](#) in the Scottish Parliament, in local government and in public bodies (The Scotsman 2014). The intention of the [women 50:50](#) campaign is to allow for the Scottish Parliament to introduce legal quotas for political parties and for representation on public boards. Paragraph 60 of the Smith Commission report implies that the responsibility for gender quotas in respect of public bodies will be devolved. It is not yet clear how this will be achieved.

In response to paragraph 60, Professor Christine Bell (Bell 2014) has said:

“This paragraph seems to suggest that in principle devolving such a power is now agreed. But it is a bit difficult to understand how it will take place legally. These quotas would be likely to be unlawful under the Equality Act 2010, and devolving power to the Scottish Government does not resolve that, unless the Equality Act is simultaneously amended. If this sounds confusing, it is because it is. Hopefully, however, where there is a will there is a way, and the Smith Commission report establishes the will”.

Furthermore, paragraph 60 does not mention devolving power for women-only shortlists. Paragraph 23 does propose devolving powers for elections, but this would not necessarily extend to the power for women-only shortlists. Paragraph 24(1) states that the power to regulate political parties will remain reserved, which suggests the power over women-only shortlists will remain reserved (Bell 2014).

Submissions to the Smith Commission - Full devolution of equalities

In their submissions to the Smith Commission, both the Scottish Government (2014) and the Scottish Green Party (2014) called for equality law to be devolved. The Scottish Government said this would strengthen the existing equalities framework in Scotland. The Scottish Greens referred to a range of equality organisations that have made the case for the devolution of equality law. Additionally, they referred to the devolution of equality law in Northern Ireland, and that variations in equality law are common across the EU. Minimum standards are set at EU level with each member state able to establish additional protections (2014).

Twelve equality organisations submitted a [letter](#) (October 2014) to the Smith Commission encouraging it to consider the devolution of equalities legislation (Scottish Refugee Council 2014). Part of the letter said:

“We do not claim that devolving equality law would be a panacea for the inequalities and discrimination which still exist in Scotland. However, further devolution in this area could open the door to more appropriate and effective solutions...”

⁹ Kezia Dugdale (Scottish Labour), Alison Johnstone (Scottish Greens), Marco Biagi (SNP), Jean Urquhart (Independent), Alison McInnes (Scottish Liberal Democrats), and Jackie Baillie (Scottish Labour).

Recommendations of the Smith Commission

The Smith Commission states (at paragraph 60) that the Equality Act 2010 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.

Health and social affairs

Current position

The National Health Service (NHS) was established in Britain in 1948 and provides the vast majority of health care in Scotland. The NHS in Scotland carries on the principle of collective responsibility by the state for the provision of comprehensive health services free at the point of use. Services are funded from central taxation and access is based on need. The main legislation providing the legal framework for the NHS in Scotland is the National Health Service (Scotland) Act 1978 (as amended).

Health policy was, in the main, devolved to the Scottish Parliament under the terms of the Scotland Act 1998. However, there are some areas of health policy which remain reserved to Westminster. These are outlined below.

Reserved areas and responsible bodies

Table 2 outlines the key policy areas in health that are reserved under the Scotland Act 1998 and Scotland Act 2012. It also provides the section number for the provision (this relates to Part 2 of Schedule 5 of the Scotland Act 1998) and also any responsible body or useful further information.

Table 2: List of key reserved health areas and responsible bodies

Reserved area	Section	Responsible bodies / further information
<p>Regulation of the health professions</p> <p>Includes determining a practitioner’s fitness to practice and dealing with complaints made against them. It also includes education and training, though the delivery of these is devolved</p>	G2	<ul style="list-style-type: none"> • General Chiropractic Council (regulates the practice of osteopathy in the United Kingdom. By law osteopaths must be registered with us in order to practise) • General Dental Council (regulates all dentists, dental nurses, dental technicians, clinical dental technicians, dental hygienists, dental therapists and orthodontic therapists) • General Medical Council (regulates all doctors in the UK) • General Optical Council (regulates all optometrists, dispensing opticians, student opticians, and optical businesses) • General Pharmaceutical Council (regulates pharmacists, pharmacy technicians and pharmacy premises) • Health Professions Council (regulates 15 health professions often referred to as Allied Health Professionals) • Nursing and Midwifery Council (regulates nurses and midwives across the UK) <ul style="list-style-type: none"> • All of these regulators are themselves overseen by the Council for Healthcare Regulatory Excellence, which: checks on how well the health professional regulators carry out their work • audits initial handling of fitness to practise cases • refers cases to court where decisions are considered too lenient <p>provides advice on policy</p>
<p>Abortion</p> <p>The legislation governing the termination of pregnancy is a reserved matter.</p> <p>However, the delivery and monitoring of services provided on the NHS in Scotland is a devolved matter, as with other NHS services. The regulation of private hospitals is also a devolved matter, and this covers the two private clinics that carry out terminations in Scotland.</p>	J1	<p>The power to legislate in this area is reserved. The current legislation is the Abortion Act 1967 (as amended).</p> <p>Any monitoring of NHS services in this regard would be a matter for Healthcare Improvement Scotland (HIS). In addition, HIS is responsible for the regulation of independent healthcare in Scotland. Those services subject to regulation are required to register with HIS and are inspected according to the National Care Standards for independent healthcare services. If standards are breached, HIS has a number of powers at its disposal to improve quality, or in the most serious circumstances it can remove the registration of the services, thus preventing it from operating.</p>
<p>Xenotransplantation</p> <p>This is the transplantation of tissue and organs between different species, and in particular the transplantation of animal tissue into</p>	J2	<p>Until December 2006, this used to be regulated through the United Kingdom Xenotransplantation Interim Regulatory Authority, but its functions are now undertaken by a number of Government Committees, Research Ethics Committees, and through clinical governance arrangements</p>

humans, for example the use of pig heart valves in humans		(Department of Health, online). Xenotransplantation guidance is available from the UK Department of Health. Trials of xenogenic cell therapy may be considered to be trials of advanced therapy medicinal products. Such trials must comply with the Advanced Therapy Medicinal Product Regulations (EC) No 1394/2007
Surrogacy When another woman carries and gives birth to a baby for the couple who want to have a child	J3	This is governed by provisions in the Human Fertilisation and Embryology Act 2008 and the Surrogacy Arrangements Act 1985. Whilst not regulated by the Human Fertilisation and Embryology Authority , it provides information to the public (see here) and has issued guidance through its code of practice for licensed centres (see here)
Embryology The branch of clinical science that deals with the development of an embryo from the fertilisation of the ovum to the foetus stage. For example, In Vitro Fertilisation (IVF)	J3	The Human Fertilisation and Embryology Authority is the UK's regulator of treatment using eggs and sperm, and of treatment and research involving human embryos. It sets standards for, and issue licences to, research centres.
Genetics The branch of science that deals with how human beings inherit physical and behavioural characteristics	J3	Different aspects are regulated by different bodies: <ul style="list-style-type: none"> • Regulation of Gene Therapy, Tissue Therapy and Cell Therapy in Europe- Committee for Advanced Therapies at the European Medicines Agency • Any relevance to medicines and medical devices - Medicines and Healthcare products Regulatory Agency • Regulation of the delivery of treatments using human eggs and sperm, and treatment and research involving human embryos - Human Fertilisation and Embryology Authority (see Genetics Alliance UK for further details)
Regulation of Medicines and medical supplies	J4	This area is governed through EU regulations. The responsible body is the Medicines and Healthcare products Regulatory Agency . It has a range of responsibilities concerning the regulation of medicines and medical devices. A brief outline is contained here.
Poisons	J4	Laws over regulation of the sales of poisons, the 'poisons list' and other rules are provided for through the Poisons Act 1972, Poisons Rules 1982, Poisons List 1982 and associated amendments. There is a Poisons Board, but it has an advisory role to the UK Secretary of State for the Home Department.
Regulation of prices charged for medical supplies or medicinal	J4	The majority of branded, licensed medicines are covered by a voluntary agreement between the UK

<p>products</p> <p>Under the National Health Service Act 2006, UK Ministers have the power to regulate the price paid for medicines.</p>		<p>Government and the pharmaceutical industry – the Pharmaceutical Price Regulation Scheme (PPRS). However, there is a statutory scheme for those companies that are not members of the PPRS.</p> <p>Monitoring of the PPRS is a matter for the UK Department of Health.</p>
<p>Welfare foods</p> <p>The Welfare Foods Scheme was originally introduced in 1940. The current scheme includes the provision of vouchers for milk, infant formula milk and fruit and vegetables for families on low incomes</p>	<p>J5</p>	<p>This is a power currently applied through the Healthy Start Scheme (online) and in the provision of Nursery Milk scheme (online)</p>

Submissions to the Smith Commission

Neither the Scottish Conservatives (2014) nor the Scottish Liberal Democrats (2014) discussed these reserved powers in their proposal documents. Scottish Labour (2014, p 26) did, and believed that they should remain reserved.

The Scottish Green Party (2014, p 10) discussed the power related to abortion and stated:

“Devolved services deliver services relating to sexual and reproductive rights and health, however the law on abortion was held back at the time of devolution. While this position may have been taken in the light of prevailing social attitudes at the time, it may now be appropriate to recognise that the progressive, human rights based agenda make it unlikely that Scotland would take actions which restrict women’s reproductive rights.”

The Scottish National Party presented the Scottish Government’s (2014) document on what it considered should be devolved to the Scottish Parliament. In this it called for the devolution of the “remaining reserved health matters in the Scotland Act 1998” (p 25).

Recommendations of the Smith Commission

The Smith Report (at paragraph 61) states that the parties were of the view to recommend the devolution of abortion. They agreed that a process should be established to undertake further consideration of the issue. In addition, the report (at paragraph 62) considered that the devolution of xenotransplantation, embryology, surrogacy and genetics, medicines, medical supplies and poisons, and welfare foods should be discussed further by the UK and Scottish Governments.

Tribunals

Current position

Tribunals are specialised bodies which adjudicate on disputes, normally in relation to governmental decisions.

In Scotland, UK tribunals exist which deal with reserved matters (for example employment tribunals). However, there are also Scottish tribunals for devolved areas of policy (for example mental health). The responsibility for reserved tribunals lies with HM Courts and Tribunals Service, an executive agency sponsored by the UK Ministry of Justice (see UK Government 2014a). Devolved tribunals are administered by the Scottish Tribunals Service (STS) as set up by the Tribunals (Scotland) Act 2014 (Scottish Government 2014h).

Prior to the Tribunals (Scotland) Act 2014, discussions had been on-going between the Ministry of Justice and the Scottish Government about the possibility of transferring the administration of reserved tribunals to Scotland. However, at the time of the Bill no agreement had been reached (Scottish Parliament 2013a).

Recommendations of the Smith Commission

The recommendation made by the Smith Commission (at paragraph 63) is that:

“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 Commission¹⁰ and the Proscribed Organisations Appeals Commission¹¹.”

However, it also points out, at paragraph 64, that:

“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).”

Therefore, under these plans, the management of almost all reserved tribunals would be devolved, while the UK government would remain responsible for the underlying laws (e.g. employment law in the case of employment tribunals). The Scottish Government has indicated that it will consider the details of any transfer with other interested parties and that any transfer is likely to be made on a phased basis over a period of years (Scottish Government 2014j).

Scottish rail franchises

Current position

The GB-wide system of rail franchising operates under the provisions of the Railways Act 1993 (“the 1993 Act”). The 1993 Act designates Scottish Ministers as franchising authority for Scottish passenger rail services (provided through the ScotRail and Caledonian Sleeper franchises). The 1993 Act requires Scottish Ministers, from time to time, to hold an open competition for the award of a franchise to provide these services. The 1993 Act is clear that

¹⁰ This body deals with appeals from individuals who have been deported or kept out of the country for national security reasons or whose British citizenship has been removed

¹¹ This body deals with appeals from organisations banned by the Home Office due to involvement in terrorism

franchised Scottish passenger rail services cannot be provided by Scottish Ministers, local authorities, public bodies, publicly owned companies or their subsidiaries.

The “Provision and regulation of rail services” is specifically reserved to the UK Government under Heading E2, Schedule 5 of the Scotland Act 1998. However, Scottish Ministers can exercise statutory functions over reserved matters if this is required by UK legislation, as set out in Section 52 of the Scotland Act 1998. This means that while Scottish Ministers can exercise functions set out in the 1993 Act, they cannot amend it.

Submissions to the Smith Commission

The Labour Party submission (2014) states that “We support devolution of railway powers that could facilitate consideration of a “not for profit” option in terms of the ScotRail franchise. This will widen the powers of the Scottish Parliament over the rail system.” The Scottish Government submission (2014) states “Other key economic levers, including...transport policy not currently the responsibility of the Scottish Parliament (including rail)...should be devolved”. The Green Party submission (2014) states that “...further devolution would be beneficial in areas such as: the legislative framework for railways...” The Liberal Democrat Party submission (2014) and the Conservative Party submission (2014) do not mention further devolution of rail powers to the Scottish Parliament.

Recommendations of the Smith Commission

The Smith Report (at paragraph 65) recommends that, “The power will be devolved to the Scottish Government to allow public sector operators to bid for rail franchises funded and specified by Scottish Ministers.”

Comparative information

All, non-Scottish, GB rail franchises are currently let and managed by the UK Department for Transport. The UK Government has indicated that it will devolve responsibility for the Wales and Border franchise to the Welsh Government in time for the next franchise competition, probably during 2016. Rail services in Northern Ireland are provided by Northern Ireland Railways, part of Translink – a public sector organisation.

Road signs

Current position

Scottish roads authorities (i.e. Transport Scotland for all Scottish trunk roads and local authorities for all other public roads) may only use traffic signs (including carriageway marking) of a size, colour and type prescribed in The Traffic Signs Regulations and General Directions 2002 (TSRGD). Information on the design, location and use of traffic signs is set out in the UK [Traffic Signs Manual](#) (Department for Transport 2013).

It is worth noting that while the TSRGD grants the UK Secretary of State for Transport, the Scottish Ministers and the National Assembly of Wales the power to authorise the use of special non-standard signs, the Traffic Signs Manual is clear that “Only in exceptional circumstances will special signs be authorised. This is essential in order to keep the number of sign types to the absolute minimum required for the safe and efficient functioning of the road system.”

Submissions to the Smith Commission

The submissions of the Labour Party (2014), the Liberal Democratic Party (2014), Conservative Party (2014) and Scottish Government (2014) make no specific mention of the devolution of road signage. The Green Party submission (2014) is the only party submission which specifically requests the devolution of powers over traffic signage.

The Traffic Signs Regulations and General Direction 2002 and the Traffic Signs Manual apply across all four UK nations.

Recommendations of the Smith Commission

The Smith Report (at paragraph 66) recommends that “Powers over all road traffic signs in Scotland will also be devolved.”

Speed limits

Current position

Section 21 of the Scotland Act 2012 amended the Road Traffic Regulation Act 1984 to allow Scottish Ministers:

- To make Regulations setting the speed limits on special roads in Scotland (special roads are almost always trunk roads) (amending Section 17 of the 1984 Act). This power was used to increase the speed limit for HGVs travelling on single carriageway sections of the A9 between Perth and Inverness from 40mph to 50mph
- To make Regulations setting the speed limit for particular categories of vehicle on any class of road in Scotland (amending Section 86 of the 1984 Act to allow Scottish Ministers to create Regulations that amend Schedule 6 of the 1984 Act. This schedule establishes maximum speed limits for different categories of vehicles on different classes of road)
- To make Orders setting temporary speed limits that can continue indefinitely on any class of road. These powers allow such limits to apply to the whole of Scotland or a specified area of Scotland (amending Section 88 of the 1984 Act)

The Scotland Act 2012 did not devolve the power to change the 30mph limit on “restricted roads” set out in Section 81 of the 1984 Act, i.e. the standard speed limit on urban roads with street lighting.

Submissions to the Smith Commission

The submissions of the Labour Party (2014), the Liberal Democratic Party (2014), Conservative Party (2014) and Scottish Government (2014) make no specific mention of the further devolution of speed limit powers. The Green Party submission (2014) is the only party submission which specifically requests the devolution of powers over speed limits on restricted roads.

Recommendations of the Smith Commission

The Smith Report (at paragraph 66) recommends that “Remaining powers to change speed limits will be devolved to the Scottish Parliament.”

Comparative information

Speed limits in England and Wales are regulated under the Road Traffic Regulation Act 1984, which still provides the basis for speed limit legislation in Scotland – although control over speed limits on many Scottish roads has been devolved to Scottish Ministers as outlined above. Speed Limits in Northern Ireland are regulated under the Road Traffic Regulation (Northern Ireland) Order 1997.

British Transport Police

Current position

The British Transport Police (BTP) currently consists of 2,931 police officers and is responsible for policing Britain’s railways. The BTP also police the London Underground, Docklands Light Railway, the Midland Metro tram system, Croydon Tramlink, Sunderland Metro, Glasgow Subway and Emirates AirLine¹².

In April 2014, the BTP radically altered its structure in order to provide more frontline officers to cope with the demands of an expanding railway industry. The BTP currently consists of a force headquarters (FHQ) and three divisions which represent three geographic regions of railways around Britain.

- FHQ - retains overall command of BTP activity and houses central departments and functions, including responsibility for resources such as forensics, CCTV and major investigations. The headquarters are in Camden Town, London
- B Division - East and South of England and Transport for London is a vital area of rail travel. It accounts for the majority of passenger journeys in Britain across East Anglia, the south coast and the capital, including London Underground and Docklands Light Railway
- C Division - Pennine, Midlands, South West and Wales is the largest of the new divisions, covering rail networks beyond the South East. It includes the policing of major transport hubs such as Birmingham, Leeds and Manchester
- D Division - Scotland is a unique division working under Scottish law and legislation that requires dedicated officers to police the railways in Scotland

D Division covers the following areas: Aberdeen; Ayrshire and Inverclyde; Dundee; Edinburgh to Glasgow; Edinburgh Waverley; Inverness; Glasgow (including the Glasgow Subway); Kirkcaldy; Perth; and Stirling.

Each division is headed by a divisional commander at the rank of Chief Superintendent. The current divisional commander for Scotland is Temporary Chief Superintendent John McBride.

The BTP’s jurisdiction is set out in section 31 of the Railways and Transport Safety Act 2003. The Explanatory Notes to the 2003 Act state:

¹² [British Transport Police website](#) as at 15 December 2014.

The BTP's main duties consist of public policing, exactly like a Home Office police force. However, unlike a Home Office force, almost all of the BTP's duties, and in particular its routine patrols, occur on private property, albeit property to which the public may have access i.e. railway stations and trains. The BTP's existing jurisdiction on this private property flows from a combination of a 1949 private Act of Parliament and numerous private agreements between the Strategic Rail Authority (SRA) and the railway companies. Most operators of railway vehicles and certain railway assets are required under the Railways Act 1993 to have a licence. It is a condition of those licences that the operator must enter in to an agreement with the SRA to engage the services of the BTP on its property. It is these agreements, combined with the 1949 Act that gives the BTP the right to police most railway property.

Section 31 gives the BTP a wholly statutory railway jurisdiction throughout England, Scotland and Wales. Within this jurisdiction a BTP constable has the powers and privileges of a Home Office constable. The jurisdiction extends over all railway property. It also extends outside railway property (a town high street for example) throughout Great Britain in relation to railway matters. This jurisdiction would, for example, allow a BTP constable to pursue a person who commits an offence on the railways but then absconds from railway property.

The [British Transport Police Authority](#) (BTPA) is the independent body responsible for ensuring an efficient and effective BTP force for rail operators, their staff and passengers. Its duties and functions are similar to those of the Scottish Police Authority or a police and crime commissioner in England and Wales, but it oversees a force that is responsible for policing a much wider area i.e. the railways of Great Britain.

There are fifteen members of the police authority who provide knowledge and experience of issues that concern passengers, the railways industry, railways employees and the regions. They meet six times a year to set BTP targets, monitor its operations and allocate funds for its budget.

The BTP is funded by the companies that provide passenger, freight and infrastructure services on railways across England, Scotland and Wales (i.e. the train operating companies, freight companies and Network Rail). The BTPA enters into a Police Service Agreement (PSA) with each of these companies, indicating the level of policing resource that will be allocated to its line and services. The BTP budget for 2013-14 was £203.9 million, an increase of 1.8 per cent on the previous year. (This largely excludes BTP's funding from London Underground, which is arranged separately).

In its document [More Powers for the Scottish Parliament: Scottish Government Proposals](#), the Scottish Government, under the heading of Justice and Security, proposed that:

“Now that there is a single Police Service for Scotland, the staff and powers of the British Transport Police and Civil Nuclear Constabulary should be brought within its remit to improve coherence and operational flexibility”. (Scottish Government 2014)

Recommendations of the Smith Commission

Under the Heads of Agreement: Pillar 2, the Smith Commission report stated that functions of the British Transport Police in Scotland will be a devolved matter (paragraph 67).

Energy efficiency and fuel poverty

Current position

As previously noted, the Scottish Government currently has responsibility for the promotion of energy efficiency; however the regulation of the energy market, and therefore the design and implementation of schemes involving energy companies, is reserved.

The Energy Companies Obligation (ECO) places an obligation on the larger energy suppliers to support energy efficiency and heating measures that will reduce domestic carbon dioxide emissions and reduce household fuel bills. The Warm Home Discount provides eligible pensioners with a one-off £140 discount on electricity bills, usually between October and March.

Regarding Scottish specific schemes, the Energy Saving Trust (EST) provides referrals to the [Home Energy Efficiency Programmes for Scotland](#) (HEEPS), on behalf of the Scottish Government. Basic information about eligibility and the HEEPS is readily available; however the existence of multiple Scottish and UK wide schemes, and the manner within which they interact, creates a complicated policy landscape. The Scottish Government designed the HEEPS to work in tandem with ECO.

DECC has recently [published figures](#) for ECO measure installations in Scotland, which follow a similar pattern to GB figures as a whole, however rural delivery rates still lag behind urban ones. The Scottish Government has written to the UK Government on a number of occasions to stress the importance of improving delivery to rural and remote areas, in particular because of the high rates of fuel poverty in these areas, and hopes that further devolution of these schemes will enable a more focused approach.

Submissions to the Smith Commission

Regarding further devolution of energy policy, the main party positions (where stated) were as follows:

The Scottish Green Party proposed that the Scottish Government should have the power to direct and co-ordinate delivery of energy efficiency spending by energy companies to better align with Scottish needs and circumstances. The Scottish Liberal Democrats proposed the creation of a third category of government function (after devolved and reserved powers), called “partnership powers” which require the co-operation of both home rule and federal governments. One of these new powers would be over energy policy. The Scottish National Party called for control over the full scope of regulation relating to energy efficiency to enable the Scottish Government to tailor policies to the specific needs of Scottish households and businesses; particularly to tackle fuel poverty and help address climate change emissions, consistent with a single GB energy market and energy regulator.

Recommendations of the Smith Commission

The Smith Commission Report (at paragraph 68) states that:

“Powers to determine how supplier obligations in relation to energy efficiency and fuel poverty, such as the Energy Company Obligation and Warm Home Discount, are designed and implemented in Scotland will be devolved. Responsibility for setting the way the money is raised (the scale, costs and apportionment of the obligations as well as the obligated parties) will remain reserved. This provision will be implemented in a way that is not to the detriment of the rest of the UK or to the UK’s international obligations and commitments on energy efficiency and climate change.”

Onshore oil and gas extraction

Current position

The licensing of onshore oil and gas extraction is reserved, and the Department of Energy and Climate Change (DECC) issues Petroleum Exploration and Development Licences (PEDL) across the UK. However, whilst the extraction of unconventional gas (e.g. shale gas, coal bed methane) requires a PEDL, these licences provide the first step to starting drilling – but do not give absolute agreement to drill. On top of a licence, any further drilling application will require planning permission from the local authority, as well as permits from the Scottish Environment Protection Agency and sign-off from the Health and Safety Executive.

SPICe briefing 13-68 on Unconventional Gas in Scotland ([2013](#)) sets out some of the economic, environmental and social arguments relating to this topic, and the relevant consenting process.

Currently, companies need to obtain a legal right of access from landowners for both surface and underground land. However, following [consultation](#), the UK Government has recently tabled an [amendment](#) to the UK Infrastructure Bill to change trespass law to allow onshore gas and oil operators the right to access land deeper than 300m, and to pass “any substance through”, or put “any substance into, deep-level land or infrastructure installed in deep level land”. The Scottish Government [objected](#) to these proposals.

Submissions to the Smith Commission

Regarding further devolution of onshore oil and gas, the main party positions (where stated) were as follows:

The Scottish Green Party called for the devolution of unconventional gas extraction. The Scottish National Party proposed greater responsibility for all energy policy and regulation, including all oil and gas.

Recommendations of the Smith Commission

The Smith Commission Report (at paragraphs 69 and 70) states that:

“The licensing of onshore oil and gas extraction underlying Scotland will be devolved to the Scottish Parliament. The licensing of offshore oil and gas extraction will remain reserved”.

“Responsibility for mineral access rights for underground onshore extraction of oil and gas in Scotland will be devolved to the Scottish Parliament”.

Competition Policy

Current position

Competition policy, which is reserved to Westminster, includes rules on anti-competitive agreements and mergers, the abuse of a dominant position and markets with competition problems. The rules are enforced by the Competition and Markets Authority (CMA) which is a

non-ministerial department based in London. It acquired its powers in April 2014, taking over the roles of the Office of Fair Trading (OFT) and Competition Commission (CC).

The rules apply UK-wide and in most situations the CMA takes decisions independently of government. The UK Government does, however, have limited powers to intervene in mergers where a strictly defined public interest is at stake. In addition, it can also require the CMA to carry out market investigations on competition grounds.¹³ These are in-depth investigations into a particular market, which give the CMA the power to require businesses/assets to be divested or to require companies to act in a certain way. They can be contrasted with more preliminary investigations known as market studies.

The Scottish Government does not have a formal role in the system. It can, however, informally request that matters be looked into and can make representations to the CMA in the context of a market study. In addition, the CMA has two staff in Edinburgh who represent it in Scotland and provide it with local intelligence. For more information on the CMA's Scottish role see Scottish Parliament 2014b and CMA 2014a.

Recommendations of the Smith Commission

At paragraph 71, the Smith Commission Report states:

“Scottish Ministers already have the ability to request that a UK regulatory body carry out a market study of their area of responsibility to examine particular competition issues arising in Scotland. Scottish Ministers will also have the power to require the Competition and Markets Authority to carry out a full second phase investigation (in the same way as UK Ministers), after such an initial study has been completed, in relation to particular competition issues arising in Scotland.”

The aim is therefore to give the Scottish Government similar powers to the UK Government to trigger full market investigations. It would not give the Scottish Government additional powers to investigate mergers, anti-competitive agreements, or abuses of a dominant position. In addition, no new agencies would be created.¹⁴

For the CMA's general view on issues surrounding the devolution of competition policy see its response to the Smith Commission (CMA 2014b). See also Andreangeli (2014) which notes that there may be difficulties in identifying genuinely Scottish cases given the UK nature of many markets¹⁵ and that, in implementing the Smith Commission's proposals, thought would have to be given as to how to fund and prioritise Scottish cases (see also CMA 2014b paragraphs 24–27).

¹³ For details see section 132 of the Enterprise Act 2002. The UK Government can also carry out its own market investigations on limited public interest grounds (national security) - section 139 of the Enterprise Act 2002

¹⁴ This can be contrasted with the situation in Spain and Germany, where the Spanish autonomous regions/German Länder have their own competition authorities which deal with local competition issues (see Bundeskartellamt 2014 and CNC 2013).

¹⁵ For more general arguments on the difficulties of allocating cases between national and regional competition authorities see MMS 2014

Consumer protection

Current position

Consumer protection is currently entirely reserved to Westminster. Policy development is undertaken at a UK level, although it is heavily constrained by EU law (which seeks to harmonise the regimes in place in different member states in this area).

Enforcement is, broadly speaking, undertaken by Trading Standards, although various government bodies (eg. Ofgem) have enforcement powers in relation to regulated markets such as energy and postal services. UK Government funded consumer advice and advocacy is provided by Citizens Advice Scotland. Other independent organisations – most notably Which? – also provide advice and advocacy.

Submissions to the Smith Commission

The SNP called for consumer protection and regulation generally to be devolved. They saw this as an opportunity to simplify the system and, as a result, build consumer confidence. They wanted to work with the UK Government to establish a Scottish Consumer Ombudsman as a way of resolving complaints.

The Scottish Labour Party called for a Scottish model for the delivery of consumer advice and advocacy. This view was supported by the Scottish Greens. The Scottish Liberal Democrats argued that regulation which supports the EU single market, including consumer regulation, should be retained at a UK level.

Citizens Advice Scotland supported the devolution of consumer protection, including consumer advice and advocacy. It argued that devolution would increase fairness and equality, as well as providing a regime that was more responsive for citizens. The Competition and Markets Authority (the UK consumer regulator) argued that consumer protection was better delivered at a UK-level because most markets operate at this level.

Recommendations of the Smith Commission

The Smith Commission recommends (at paragraph 72) that consumer advocacy and advice be devolved to the Scottish Parliament.

Impact of Smith

Citizens Advice Scotland is currently funded by the UK Government to deliver consumer advice and advocacy. The main impact of the Smith Commission recommendation would appear to be that funding would now be the responsibility of the Scottish Government. The Scottish Government would also be able to develop other policies in this area and fund a wider range of providers if it chose to do so. However, the legal framework of consumer protection would remain reserved to Westminster.

Payday lending

Current position

Payday lenders provide short-term loans to consumers on the basis that they will repay the sum loaned from their next wages payment. Interest rates often exceed 1,500% APR (although this figure is distorted by the short-term nature of the loan).

Payday lenders have been the subject of much criticism and a number of specific campaigns. The main concerns are: that payday lenders do not do enough to check whether their customers can afford to borrow; that payday lenders take advantage of some customers' financial situations, making money out of fees and charges (including for "rolling over" a loan where a customer cannot afford to repay it); and that payday lending exacerbates inequality.

The Financial Conduct Authority is responsible for regulating payday lenders. It has announced stricter rules, including a cap on the interest rates and fees which can be charged.

Submissions to the Smith Commission

The Scottish Labour Party called for local authorities to be given the powers to prevent the proliferation of payday loan shops. The other political parties were silent on this issue.

Citizens Advice Scotland supported powers to local authorities in this area but noted that most payday lending takes place online and so cannot be effectively dealt with by limiting the number of physical premises. It urged the Scottish and UK Governments to work together to tackle the issues that caused people to use payday lenders.

Recommendations of the Smith Commission

The Smith Commission states (at paragraph 73) that, "The Scottish Parliament will have the power to prevent the proliferation of Payday Loan shops".

Impact of Smith

It is not clear what powers are proposed to deal with the proliferation of payday lending shops. Stella Creasy MP brought forward a Private Member's Bill in Westminster in 2010 which aimed to control payday lending. It included proposals to give local authorities the power to license premises used by consumer credit businesses and thus restrict their number. It would also be possible to use planning controls to limit the number of payday lending shops. However, as Citizens Advice Scotland notes, neither of these regimes would deal with the vast majority of payday lending, which takes place online.

Betting, gaming and lotteries

Fixed-odds Betting terminals

Current position

FOBTs are simulated casino-style games (eg. roulette), designed for single players and played using a terminal in a betting shop. The Gambling Commission regulates all gambling in the UK. Under the regime in place for FOBTs, it is possible to place a maximum stake of £100 for a

maximum prize of £500. Note that repeat bets can be made, so that large sums of money can be gambled very quickly.

Under Gambling Commission rules, each betting shop can host a maximum of four terminals. Some campaigners have argued that the proliferation of betting shops is driven by a desire by bookmakers to increase the number of FOBTs available to customers.

Local authorities, through licensing boards, have a role in issuing premises licences for gambling premises. However, their discretion is limited by guidance issued by the Gambling Commission.

Campaigners have raised concerns about links between gambling and deprivation. SPICe briefing 14-89 "[Gambling in Scotland](#)" (Marsh 2014) looks into these issues in more detail.

Submissions to the Smith Commission

The Scottish Labour Party called for local authorities to have the powers to prevent the proliferation of FOBTs. The Scottish Greens called for the devolution of gambling powers generally but made specific reference to calls for local authorities to be able to limit the number of FOBTs in their area.

The Association of British Bookmakers rejected any link to payday lending implied by the Scottish Labour Party's proposals (both matters were dealt with in the same recommendation). It called for a period of regulatory stability.

Recommendations of the Smith Commission

The Smith Commission recommends that the Scottish Parliament be given the power to prevent the proliferation of Fixed-Odds Betting Terminals (FOBTs).

Impact of Smith

It is not clear how the proposed new powers to limit the proliferation of FOBTs will operate. As noted above, local authorities (through licensing boards) already have a role in licensing gambling premises. It is possible that they could be given additional powers to control premise numbers. The previous gambling licensing regime required licence applicants to demonstrate demand for their facilities. Licences could be refused on the basis that there was no unmet demand. Planning controls could also have a role in limiting the number of FOBTs.

HEADS OF AGREEMENT: PILLAR 3 (FISCAL FRAMEWORK)

Powers to be devolved under Pillar 3 are concerned with Scotland's fiscal framework, including the tax raising and borrowing powers of the Scottish Parliament. The Smith Commission states that these powers are intended to strengthen the financial responsibility of the Scottish Parliament

The Commission proposes that income tax will remain a shared UK tax, with the Scottish Parliament given devolved power to set both the rates and thresholds for income tax collected from Scottish taxpayers.

However, under the Smith proposals, all aspects of the following taxes will remain reserved: National Insurance Contributions (NICs), Inheritance Tax, Capital Gains Tax, Corporation Tax, taxation of oil and gas receipts and Excise Duties.

Taxation

Current position

Scotland currently has control over Non-Domestic Rates (NDR) and Council Tax. Business rates are set by the Scottish Government, collected by local authorities on behalf of the Government, paid into the Government's business rates pool and then paid back to local authorities. Council tax is a locally set and collected tax. Since 2008-09, the Scottish Government and local authorities have agreed to freeze council tax across Scotland (at 2007-08 levels). The Scotland Act 1998 also gave the Scottish Parliament the power to vary the basic rate of Income Tax by three pence in the pound (the Scottish Variable Rate), although this power has never been used.

The Scotland Act 2012 transfers a number of additional tax powers to the Scottish Parliament:

- From April 2015, Stamp Duty Land Tax and Landfill Tax will become fully devolved taxes with the design and collection becoming the responsibility of the Scottish Government. These are being replaced by the Scottish Land and Buildings Transactions Tax and Scottish Landfill Tax. In addition, the Act allows for additional taxes to be devolved in the future, by Order, and gives the Scottish Parliament the power to be able to introduce specified new taxes applicable only to Scotland, with the agreement of the UK Parliament.
- From April 2016, the Scottish Rate of Income Tax (SRIT) supersedes the existing Scottish Variable Rate. The UK rates of Income Tax will be reduced for Scottish taxpayers by 10p at the basic, higher and additional rates and the Scottish Parliament will have the flexibility to set a different rate of Income Tax for Scottish taxpayers by adding a new amount uniformly to all rates.

Submissions to the Smith Commission

The five political parties represented at the Scottish Parliament submitted proposals to the Smith Commission on what further taxation powers should be devolved. Although the proposals varied substantially, there were some taxes where the majority of proposals recommend some form of devolution to be considered (where no recommendation was made, none is stated). These were:

- Income Tax – The Scottish Green Party and the Scottish National Party (SNP) proposed full devolution, including responsibility for rates, bands, reliefs and personal allowances. The Scottish Conservatives and Scottish Liberal Democrats proposed devolution of rates and bands, but not the personal allowance. The Scottish Labour Party proposed an extension of the SRIT to 15p instead of 10p, as well as power to increase the rates of tax in the higher and additional bands.
- VAT – The SNP and the Scottish Green Party recommended that revenues should be assigned to Scotland and the Scottish Conservatives recommended that the case for revenue assignment should be examined.
- Corporation Tax – The SNP recommended that it should be devolved and the Scottish Green Party and Scottish Liberal Democrats recommended that revenues should be assigned to Scotland.

- **Aggregates Levy** – The SNP, the Scottish Labour Party and the Scottish Liberal Democrats recommended that it should be devolved and the UK Government stated that it would consider devolution as soon as the EU court proceedings in relation to the aggregates levy are completed.
- **Air Passenger Duty** – The SNP, the Scottish Conservatives and the Scottish Liberal Democrats recommended that it should be devolved.

Recommendations of the Smith Commission

Paragraphs 75 to 92 of the Smith Commission Report recommend further devolution in relation to the following tax powers:

- **Income Tax** - The Scottish Parliament should have the power to set rates and thresholds for tax on non-savings and non-dividend income of Scottish taxpayers. The personal allowance and tax reliefs will remain reserved.
- **VAT** - 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.
- **Aggregates Levy** - Once the current legal issues in relation to aggregates levy have been resolved, the Scottish Parliament will have the power to charge tax on the commercial exploitation of aggregate in Scotland, with full control over the design and collection of any replacement tax. A fair share of the administrative costs will be transferred to the Scottish Government.
- **Air Passenger Duty** - The Scottish Parliament should have the power to charge tax on air passengers leaving Scottish airports, with full control over the design and collection of any replacement tax. A fair share of the administrative costs will be transferred to the Scottish Government.

Devolved tax powers in other UK legislatures

The following paragraphs outline the extent to which tax powers are devolved across other legislatures in the UK.

Wales

At present, only Council Tax is within the legislative competence of the National Assembly for Wales. The Wales Bill aims to improve the financial accountability of the Assembly by devolving greater powers over taxation. The measures introduced are broadly similar to those introduced for Scotland in the Scotland Act 2012. The Bill devolves stamp duty land tax and landfill tax, and would allow for the devolution of some powers over income tax to the Assembly if Wales voted in favour of this in a referendum. Note that, as recommended by the Silk Commission, the Welsh Government should be able to set separate Welsh rates of income tax for each of the three bands, as the restriction on this was removed at the Lords committee stage.

Northern Ireland

At present, the Regional Rate (paid by both households and the non-domestic sector) is the main tax power within the legislative competence of the Northern Ireland Assembly. This is supplemented by the District Rate (also paid by both households and the non-domestic sector) set by the District Councils and used to finance their services. The Assembly does have a power to introduce entirely new taxes as long as they are not 'substantially of the same character' as existing UK taxes; this has already been demonstrated by the Plastic Bag Levy. Northern Ireland has recently gained additional provisions to reflect the special circumstances

brought about by having a border with the Republic of Ireland. In November 2011, the Northern Ireland Executive gained an exemption from the higher Air Passenger Duty tax rate which had applied to the long haul, trans-Atlantic route. Power to set the tax for that route has since been formally devolved and the rate reduced.

Northern Ireland has also been exempted from the proposed UK increases in the level of carbon pricing, and had a partial relief in relation to the Aggregates Levy (although this was subject to legal challenge in 2010 and has subsequently been suspended). In its Autumn Statement 2014, the UK Government also stated that it wishes to implement the devolution of Corporation Tax rate-setting powers to Northern Ireland, provided that the Executive is able to manage the financial implications (UK Government 2014b).

Scotland's Fiscal Framework

Current position

The vast majority of the Scottish Government's budget is funded by a block grant authorised by the UK Government. In addition, the Barnett Formula ensures that, when there are changes to comparable expenditure in England, Scotland and Wales receive adjustments in the same spending areas on the basis of their population share.

There will be a deduction from the Scottish block grant as a result of the revenue-raising powers being transferred to the Scottish Parliament via the Scotland Act 2012. 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.

There are a number of considerations to take into account when considering the most suitable form of block grant adjustment. Firstly, some taxes are more volatile, making it harder to agree on a representative figure for Scottish revenues. Secondly, the longer-term trend in relation to revenues may be increasing/decreasing as is the case with Landfill Tax where the waste being sent to landfill is reducing. In addition, if the tax base is shared between the Scottish Government and the UK Government, as is the case for the Scottish Rate of Income Tax, then there is a risk that a policy change by one government could have an impact on the revenue raised by the other. These factors, among others, may make it difficult to reach a decision on the appropriate form of block grant adjustment for each tax.

For the adjustment in relation to the Scottish Rate of Income Tax, the Scottish Government and the UK Government have agreed to use an indexed deduction method, based on the proposals of the Holtham Commission in Wales. This involves an initial deduction being indexed to the growth in the relevant UK tax base. An agreed deduction mechanism for Stamp Duty Land Tax and Landfill Tax has yet to be finalised by the Scottish and UK Governments. The Scottish Government has indicated that it will seek the agreement of the Scottish Parliament on the adjustments to the block grant.

Submissions to the Smith Commission

In their proposal to the Smith Commission, the Scottish Government emphasised that any funding arrangement for Scotland would need the Barnett formula to be retained with the block grant adjusted appropriately for the degree of fiscal devolution. The Scottish Conservatives emphasised that a stable long-term funding mechanism should be devised, demonstrating a clear link between Scottish fiscal policy choices and expenditure in Scotland.

Recommendations of the Smith Commission

Paragraphs 94 and 95 of the Smith Commission Report recommend that the devolution of further responsibility for taxation and public spending, “should be accompanied by an updated fiscal framework for Scotland”. Specifically, it states 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.

Implications for the Scottish budget

Replacing a portion of the block grant with a stream of tax revenue increases the volatility of public funding in Scotland. The Holtham Commission ([2010](#)) noted three main risks associated with devolved tax receipts:

- i) **Macro fiscal or cyclical risk.** Some tax receipts are highly cyclical with significant year-on-year volatility.
- ii) **Differential tax base growth.** This is the risk that the tax base in the devolved administration grows differently from the equivalent tax base across the UK as a whole and therefore over time generates differing levels of resources for the devolved administration than it would have received from a grant-based regime that is ultimately sourced from the UK tax base.
- iii) **Policy risk.** If powers over the overall structure of a devolved tax are retained at the UK level, there is a risk that a policy change by the UK Government could have a large impact on the revenue raised by the devolved tax. We refer to this as UK policy risk. Similarly, Scottish policy risk arises if decisions by Scottish Ministers impact on the Scottish tax base and affect the revenue raised by a devolved tax.

This volatility may be lessened or exacerbated by the method of block grant reduction and the type of taxes that are devolved (pro-cyclical taxes are associated with increased volatility). The best deduction method needs to be assessed individually for each tax according to factors such as forecast growth in the tax base, revenue volatility and potential exposure to policy risk. The issue of block grant determination remains critical to assessing the impact of The Smith Commission recommendations in aggregate.

Funding of other UK legislatures

At present the Welsh Assembly’s funding comes almost entirely in the form of a block grant from the UK Government. Under the proposals in the Wales Bill, the block grant will be reduced to take into account additional revenue raising powers. The adjustment methods have not been specified in the draft Bill. However, the Command Paper details how the Welsh block grant will be reduced if income tax powers are devolved to Wales. The same indexed deduction method

which will be used for Scotland is proposed for Wales. By indexing against the tax base rather than tax revenues or total income, the Silk Commission recognised that this, “automatically incorporates the principle of ‘no detriment’” as is also the case in Scotland (UK Government [2014f](#)). The block grant will also be reduced following the devolution of stamp duty land tax, landfill tax and business rates. The mechanism for adjusting the block grant in relation to these taxes was not set out in the draft Bill (Webb et al [2014](#)).

Borrowing

Current position

Under the current legislative framework the Scottish Government has limited borrowing powers. [Sections 66](#) and [67](#) of the Scotland Act 1998 allow the devolved administration to borrow up to £500 million from the National Loans Fund (NLF) to cover “temporary shortfalls of cash or for providing a working balance, in the Scottish Consolidated Fund” ([Scotland Act 1998 Explanatory Notes](#)). Since 1999 no administration has used this power. The Act forbids the Scottish Government from borrowing for any other purposes. The Scotland Act 2012 provides for a Scottish cash reserve and a revenue borrowing facility so that the Scottish Government can manage differences between tax forecasts and actual receipts. The Act also provides new capital borrowing powers from April 2015. These are outlined in detail below:

- **Revenue borrowing:** From April 2015 (when SDLT and Landfill Tax are devolved), the Scottish Government will be able to borrow up to £200 million in any one year with a cumulative limit of £500 million to deal with deviations between forecast and actual revenues. Borrowing will be from the NLF and Scottish Ministers will be required to repay loans within a maximum of four years. HM Treasury will have the power to revise the borrowing limits upward or downward through secondary legislation but not below the initial £500 million limit.
- **Capital borrowing:** The Scottish Government will also be given new capital borrowing powers from April 2015. It will be able to borrow up to 10% of Capital Departmental Expenditure Limit (DEL) in any one year with a cumulative 10-year limit of £2.2 billion. The UK Government has the power to raise and reduce this limit by Order but not to a level that is lower than the initial £2.2 billion limit.

The Act also provided for the UK Government to amend, in future, the way in which Scottish Ministers can borrow to include bond issuance, without the need for further primary legislation. In December 2014, the UK Government announced that it is taking the next step in the formal process to give the Scottish Government the power to issue bonds from 1 April 2015 (UK Government [2014d](#)).

Submissions to the Smith Commission

In its submission to the Smith Commission, the Scottish Government refers to the need for “sufficient borrowing powers to ensure budgetary stability and safeguards to maintain Scottish public spending”. The Scottish Liberal Democrat and Scottish Green Party submissions also made specific recommendations on borrowing powers. Alongside increased revenue-raising powers, the Scottish Liberal Democrats recommended increasing the revenue borrowing limit to £1 billion and a fiscal pact to define limits on borrowing. The Scottish Green Party suggested that the Scottish Government should be free to determine the appropriate level of borrowing, without UK Government approval.

Recommendations of the Smith Commission

Paragraph 95 (5) of the Smith Commission Report made the following recommendations in relation to borrowing:

- 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.

It is proposed that borrowing powers should be agreed by the Scottish and UK Governments and their operation kept under review.

Comparative information

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.

The Northern Ireland Executive has certain borrowing powers proscribed in statute, with the existing general borrowing limit set at £3bn through the [Northern Ireland \(Miscellaneous Provisions\) Act 2006](#). Under the [Northern Ireland Act 1998](#) the Executive may also borrow up to £250m 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 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 £200m 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.

The Welsh Assembly Government is able to borrow up to £500m in total from the National Loans Fund to cover temporary shortfalls under the [Government of Wales Act 2006](#). 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 (Webb et al [2014](#)).

There are a number of international examples of successful sub-national devolution of borrowing powers, including in the US, Canada, Australia and Switzerland.

ADDITIONAL ISSUES

The Smith Commission report lists a number of matters under the heading "Additional issues for consideration". These issues were raised by the parties involved in the negotiations. They are

not concerned with the formal devolution of powers but rather with seeking agreement between the UK and Scottish Governments over the following matters:

Food labelling

Current position

Food labelling regulations come from Europe (European Commission, 2014). Implementing Regulation (EU) No 1337/2013 lays down rules for the application of Regulation (EU) No 1169/2011 (Official Journal of the European Union, 2013). These regulations states that fresh, chilled and frozen meat of swine, sheep, goats and poultry must be labelled with the country of origin. For other foods, country of origin labelling is voluntary unless its absence could mislead consumers.

The EU regulations require that place of rearing and place of slaughter is on the food label, and that country of origin should be indicated by the Member State or third country. The EU classifies Scotland as a region within a Member State. This means that food from Scotland is labelled as from the UK. A change in the regulations at EU level would be required for “made in Scotland” to be allowed as the country of origin label.

Submissions to the Smith Commission

The Scottish Government’s (SNP 2014) submission to the Smith Commission raised this issue stating that:

“The food and drink industry is of greater importance to the Scottish economy than it is at UK level. Formal responsibility for policies such as food labelling, applications for protected food names and all aspects of export certification would enable Scotland to better integrate measures to support the industry’s continued growth.”

The National Farmers Union for Scotland’s (NFUS) (2014) submission contained an argument relevant to this issue. It states that “NFUS considers that trade policy should remain reserved to Westminster, however a more co-ordinated approach to export promotion would be desirable, particularly in strengthening the Scottish food and drink brand in foreign and emerging markets.”

Recommendations of the Smith Commission

The Smith Commission report (at paragraph 96(1)) states that the parties have agreed that the Scottish and UK Governments should work together to:

“...seek, with respect to food labelling, to agree changes to the European country of origin rules so that a ‘made in Scotland’ brand is recognised under EU law.”

Schemes to allow international HE students to remain in Scotland

Current position

In June 2005, the UK Government laid regulations allowing international (non-EU) students who were studying in Scotland to make an application to stay and work in Scotland for two years after the end of their studies without the need for a work permit. Those eligible for permission to

stay were those graduating from a programme of higher education (from Higher National Diploma through to PhD level study) from one of Scotland's public colleges or higher education institutions. Eligible students had one year from completion of their studies to apply for permission to stay (Scottish Executive, 2005).

As immigration is reserved, the right to remain through the Fresh Talent initiative required the UK Government to introduce regulations: *The Immigration (Leave to Remain) (Prescribed Forms and Procedures) (No. 2) Regulations 2005* – which were updated in 2006 and 2007. In 2008, this initiative was subsumed into a UK *Tier 1 (post study work)* visa scheme. However, that scheme was closed across the whole of the UK in April 2012.

Submissions to the Smith Commission

A number of submissions to the Smith Commission recommended Scotland having the right to reintroduce a post-study work visa, for example the Scottish Government (2014), Scottish Greens (2014) and Universities Scotland (2014). The suggestion put forward in the Smith Commission Report (2014), based on submissions received, was not for devolution of powers over immigration, but greater flexibility within the UK framework, including allowing Scotland to reintroduce a post-study work visa scheme. The proposal suggested by Universities Scotland is for an adaptation to UK immigration policy similar to that previously in place with Fresh Talent, to allow international graduates from Scottish higher education to remain in Scotland for a period of two years without need for a work visa. Offering a mechanism for keeping skilled graduates in Scotland - either for a short period or longer term – is recognised as offering a range of economic, social and cultural advantages to Scotland.

Recommendations of the Smith Commission

The Smith Commission Report (at paragraph 96(2)) recommends that Scottish and UK governments should 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.”

Right to remain in Scotland for victims of human trafficking

Current position

Immigration and asylum issues are reserved under Schedule 5 (B6) of the Scotland Act 1998.

There are no immigration categories which are only valid for residence in certain parts of the UK.

Under current arrangements for victims of trafficking, various different immigration outcomes are possible if they have an insecure immigration status. For example, there is some scope to grant temporary leave in light of on-going legal proceedings. However, it is possible for a person to be found to be a victim of trafficking but ineligible for leave to remain in the UK, since trafficked people are not automatically granted permission to stay in the UK.

There are grounds for granting temporary leave to remain (Discretionary Leave) to recognised victims of trafficking, including if the victim is assisting with police enquiries from within the UK and the police make a formal request for the victim to be granted leave to remain on this basis;

or if the victim needs to stay in the UK to pursue a claim for compensation against their traffickers (and it would be unreasonable to pursue a claim for compensation from overseas).

If a recognised victim of trafficking is not eligible for Discretionary Leave to Remain or leave to remain on other grounds, they are expected to leave the UK (Home Office guidance 2014).

Scottish context

Preventing and tackling human trafficking in Scotland is a joint responsibility of the Scottish Government, UK Government, the police, prosecutors, local authorities, support agencies and others (Scottish Government 2014a).

The [Human Trafficking and Exploitation \(Scotland\) Bill](#) was introduced in the Scottish Parliament on 11 December 2014. The Bill aims to strengthen criminal law against traffickers, with a new single offence against trafficking of both adults and children for all forms of exploitation. In terms of adult victims, the Bill will provide the same rights to access immediate support and assistance which child victims already have in Scotland. It will also ensure guidance for prosecutors in dealing with the victims of trafficking who are forced to commit crime as a direct result of their victim status.

Submissions to the Smith Commission

None of the political parties made any reference to victims of human trafficking in any of their documents regarding further devolution of powers, either before or after the referendum.

This proposal was raised by the Scottish Refugee Council (SRC) in its [response](#) to Smith. It said that Scottish Ministers should have the power to grant temporary leave to remain/residence permit to non-EEA survivors of human trafficking who are identified and assisted in Scotland. The SRC argued this would promote the fullest possible recovery for survivors, with access to care and legal support. It would also support the aims and objectives of the Scottish Government's Bill on human trafficking.

The Scottish Refugee Council said that the number of survivors this would affect is low - 61 non-EEA survivors of trafficked exploitation were identified in Scotland from January to December 2013. The SRC suggested that this proposal could be implemented by means of a section 63 Order which can devolve functions exercisable by UK Ministers to Scottish Ministers, but the subject matter remains reserved.

Michael Matheson MSP, Cabinet Secretary for Justice, has said that this proposal from the Smith Report will be explored "as a matter of urgency with the UK Home Office" (Scottish Government 2014b).

Recommendations of the Smith Commission

The Smith Commission Report (at paragraph 96(3)) explores 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.

Access to accommodation and financial support and advice

Current position

Immigration and asylum issues are reserved under Schedule 5 (B6) of the Scotland Act 1998. However, the Scottish Government is responsible for devolved matters which relate to integration of refugees and asylum seekers in Scotland. This includes, for example, access to health and education.

Asylum seekers are not eligible for mainstream welfare benefits. If they are destitute they can apply to UK Visas and Immigration (UKVI – a Home Office directorate) for accommodation and/or financial support whilst their asylum claim is being considered¹⁶. The UK Government provides details of what [asylum support](#) is available.

Accommodation is offered on a no-choice basis, generally in areas outside of London and the south-east, in accordance with successive governments' 'dispersal' policy. Accommodation is provided by private providers contracted by the Home Office. Serco currently holds the contract for providing accommodation in Scotland (UK Government 2014g).

Financial support is provided in cash, collected from Post Offices.

The Home Office provides funding to external agencies to provide asylum seekers with advice and assistance on asylum support (House of Commons 2011a)¹⁷. Earlier this year, it awarded the national contract for 2014-16 to [Migrant Help](#), a registered charity which has previous experience of providing asylum advice services (UK Government 2014h). The Scottish Refugee Council, which had a long record of providing similar services under successive contracts with the Home Office, was part of a rival consortium bid which was unsuccessful. This was despite the bid providing a 'much reduced' version of what it currently provided (Scottish Refugee Council 2013b).

Submissions to the Smith Commission

The Scottish Conservatives and Scottish Liberal Democrats did not make any reference to immigration or asylum in their submissions to Smith. The Scottish Labour Party said immigration should remain reserved. In their submission to Smith, the Scottish Greens called for the Scottish Parliament to be able to exercise "a degree of flexibility", in relation to legal representation and practical support for asylum seekers (2014).

The Scottish Government called for some aspects for immigration to be devolved, but the focus for this was the post study visa, "in order to better meet our particular economic needs" (2014). The Scottish Greens made some specific recommendations which are referred to below.

In its [submission to Smith](#), the Scottish Refugee Council said that the competence for many reception conditions for asylum seekers, such as health, education and child protection, are already [devolved](#). It called for 'executive devolution' where power is retained at UK level but Scottish Ministers are given operational responsibility. This would allow the Scottish Government to provide accommodation, financial support and advice to asylum seekers in Scotland.

¹⁶ Part V of the Immigration and Asylum Act 1999 (as amended)

¹⁷ For an indication of the range of services covered by contracts, see [HC Deb 29 June 2011 c863-4W](#) and [HL Deb 3 June 2013 cWA102](#)

Recommendations of the Smith Commission

The Smith Commission (at paragraph 96(4) (a)) calls for exploratory discussions between the Scottish and UK Governments on ways of enabling different powers in Scotland for, “asylum seekers to access accommodation and financial support and advice.”

Lodging a claim for asylum from within Scotland

Current position

Asylum seekers are expected to lodge an asylum claim at the earliest opportunity. They can do so on arrival in the UK, by notifying Border Force staff at a port of entry.

People seeking to claim asylum after they have entered the UK must do so at the Asylum Screening Unit in Croydon. In exceptional cases UKVI may agree to lodge and screen an asylum claim at one of the Home Office’s local enforcement offices, for example, in the case of unaccompanied asylum seeking children who cannot travel to Croydon.

Prior to 14 October 2009, there was an additional Asylum Screening Unit in Liverpool (See House of Commons 2013a and 2013b) The Scottish Refugee Council opposed the closure of the Liverpool ASU at the time, and more recently it has called for regional asylum screening offices to be established (Scottish Refugee Council 2009) (BBC News online 2013).

Submission to the Smith Commission

This proposal was put forward by the Scottish Refugee Council. It said that it would ensure asylum seekers arriving in Scotland would have access to the asylum procedure and ‘adequate local reception conditions as early as possible’. The SRC argues that costs are unlikely to be significant because the Home Office in Scotland already has resources in place to implement the registration process, and the number of asylum applications in Scotland is likely to be very small.

Recommendations of the Smith Commission

The Smith Commission (at paragraph 96(4) (b)) calls for arrangements which would enable asylum seekers to lodge, “from within Scotland an asylum claim to the Home Office”.

Direct appeals by MSPs to UK immigration authorities on behalf of their constituents

Current position

The Home Office's current policy is that its MP correspondence channels do not provide substantive replies to enquiries from Members of Devolved Legislatures on individual cases, since immigration is a reserved matter¹⁸. The Home Office expects Members of Parliament to raise these types of enquiry. However, the Home Office does provide substantive replies to general and policy-related queries raised by Members of Devolved Legislatures, and it does provide substantive responses to enquiries about individual cases if they are raised by Ministers of Devolved Legislatures in their ministerial capacity (House of Commons 2011b)¹⁹.

Submissions to the Smith Commission

In their submission to Smith, the Scottish Greens said:

“There is also a clear need to address the UKBA's unwillingness to engage with MSPs in any meaningful way, even on individual constituency casework. A degree of joint governance between the Scottish and UK administrations would help to achieve this”.

Recommendations of the Smith Commission

Paragraph 96(4) (c) of the Smith Commission Report calls for:

“MSPs being able to represent directly to UK Visas and Immigration and Immigration Enforcement Officers their concerns with respect to devolved matters affecting their constituents”.

Levy raising

Current position

Quality Meat Scotland (QMS) is a Non Departmental Public Body (NDPB) whose core function is to work with the Scottish red meat industry to improve its efficiency and profitability, and to maximise its contribution to Scotland's economy. Its main focus is on industry development, marketing, communication and quality assurance. QMS has equivalent organisations in England (EBLEX for beef and sheep and BPEX for pigs); Wales (Hybu Cig Cymru), and Northern Ireland (Livestock and Meat Commission), which are funded by levy collected at point of slaughter.

QMS is funded by a levy collected per head for cattle, sheep and pigs²⁰. The levies are collected at the point of slaughter, so animals born and reared in Scotland but slaughtered in England or Wales, are paid to EBLEX/BPEX or [Hybu Cig Cymru](#) (Meat Promotion Wales), the equivalent bodies there. As Scotland is a net exporter of livestock to other parts of the UK, there have been concerns that Scotland is losing out on levy funding. This has been estimated at around £1.5 million per year (Quality Meat Scotland 2014a).

Quality Meat Scotland (2014b) received £4.09 million from levies collected in Scotland in 2013-14. The then First Minister, Alex Salmond MSP, wrote to the Prime Minister in August 2013, calling for a review of the system of levy funding, and for the lost levy to be returned to Scotland

¹⁸ *Personal communication*. House of Commons Library .

¹⁹ See also [w4MP](#) *Hotlines for MPs, AMs, MSPs, MEPs and their staff*, 4 December 2014; [HC Deb 13 October 2011 cc507-8W](#)

²⁰ The levies are set under the Quality Meat Scotland Order 2008.

(Scottish Government 2013). This call was rejected by the Prime Minister, who argued that changing the system would be costly and would require legislation in all parts of Great Britain. He also argued that all UK farmers benefited from the activities of the Agriculture and Horticulture Development Board (AHDB) in England, including meat marketing, export certification and research and development. The Prime Minister called for a forum of the different UK red meat promotion bodies to be established (Farmers Weekly 2013).

The Seafish Industry Authority (Seafish) is a UK NDPB set up by the Fisheries Act 1981. It is funded by a levy on the first sale of seafood products in the UK. Levy income was £8.2m in 2012-13 (Seafish 2013). Seafish's overall purpose is to secure a sustainable and profitable future for the UK seafood industry. Its main [role](#) is to promote seafood, but it also works in other areas, such as to improve the safety of fishermen, and in monitoring and advising on the regulation of sea fishing.

[Seafood Scotland](#) is an industry organisation that works throughout the supply chain with fishermen, fish/shellfish farmers, processors, retailers, food service companies, caterers, NGOs and consumers. Some of the staff of Seafood Scotland are seconded from Seafish, and Seafish provides funding for some of Seafood Scotland's work.

Submissions to the Smith Commission

Of the submissions to the Smith Commission, only the Scottish Government (SNP submission 2014) raised this issue. It called for Scotland to be able to take its own decisions on the collection and use of agricultural and seafood levies.

The Quality Meat Scotland submission to the Smith Commission points out that a review of levy bodies carried out in 2005 recommended that it would be preferable to distribute meat levies on the basis of where animals are born and reared, rather than where they are slaughtered, and that ways of achieving this should be investigated. QMS suggested two options for achieving this: that levies should continue to be collected as now at point of slaughter, but should be redistributed; or that they should be raised a point of presentation to the market.

The submission from Scotland Food and Drink commented on the levy bodies in other sectors:

“The case for devolution of other levies (those covering seafish, dairy, cereals, potatoes and horticulture) has historically been less clear and the consensus amongst Scottish levy payers is that UK arrangements work well, particularly as the predominant focus of expenditure is on research and industry development as opposed to national promotion. That said, the current arrangements - with control over the statutory levy system residing at Westminster - sits uneasily when agriculture, horticulture, fisheries, food and drink are devolved matters.”

Scotland Food and Drink suggested that Scotland should be able to decide whether to continue to opt-in to these arrangements, or develop its own arrangements.

Recommendations of the Smith Commission

The Smith Commission report (at paragraph 96(5)) states that the parties have agreed that the Scottish and UK Governments should work together to:

“explore whether to revise the current legal and practical arrangements in respect of levy raising (for example, with respect to red meat and seafood) to ensure that Scotland is able to decide at any stage whether to opt into UK arrangements and, if so, receives an equitable share of any UK monies levied.”

Retention of Financial Penalties and Proceeds of Crime

Current position

Under current arrangements, monies collected in relation to some court fines are remitted to the Scottish Consolidated Fund whilst the Scottish Court Service is able to retain a proportion of other court fine income to cover certain court costs (Scotland Act 1998 (Designation of Receipts) Order 2009).

With regard to financial penalties imposed by the police and prosecution (eg police fixed penalties and fiscal fines), the Scottish Government currently has an agreement with HM Treasury allowing the Scottish Court Service to keep a proportion of sums collected. Again, retained monies are used to cover some of its costs. Any excess is remitted to the Scottish Consolidated Fund.

The Scottish Government also has an agreement with HM Treasury allowing it to retain sums recovered under Proceeds of Crime legislation up to a certain amount. In practice this level has allowed it to retain all such monies but any excess would be remitted to the Scottish Consolidated Fund.

The Scottish Consolidated Fund is the account into which payments to and receipts from the Scottish Government flow. Most of the receipts are paid into it by the Secretary of State for Scotland and are the monies authorised by the UK Parliament to fund the Scottish assigned budget. However, it also includes receipts from charges and other income. In relation to monies remitted to the Scottish Consolidated Fund under the current arrangements for financial penalties and proceeds of crime, as outlined above, they must be surrendered to the UK Government rather than forming part of the budget available to the Scottish Government.

Recommendations of the Smith Commission

The Smith Report (at paragraph 96(6)) notes that the parties agreed that the Scottish and UK Governments should work together to:

“ensure that fines, forfeitures, fixed penalties imposed by courts and tribunals in Scotland as well as sums recovered under Proceeds of Crime legislation are retained by the Scottish Government. The Scottish Government’s block grant would need to be adjusted in line with the funding principles set out in paragraph 95 to accommodate the retention of these sums.”²¹

Health and Safety at work

Current position

Health and safety at work is a reserved matter, though some related matters such as employers promoting healthy lifestyles are devolved. The [Health and Safety Executive](#) (HSE) is the national independent watchdog for work-related health, safety and illness. It acts across Great Britain’s workplaces, and works closely with devolved bodies where appropriate (for example nuclear regulation). Whilst health and safety law is the same across Great Britain, crime is

²¹ Paragraph 95 of The Smith Report refers to the need for an updated fiscal framework for Scotland.

prosecuted differently in Scotland. HSE inspectors report matters and make recommendations on offences to the Crown Office and Procurator Fiscal Service which has a specialist Health and Safety Division. HSE is an executive non-departmental public body, sponsored by the UK [Department for Work and Pensions](#). The Minister for Public Health is HSE's Scottish Government Ministerial contact. A [concordat](#) between HSE and the then Scottish Executive was published in 1999. The Partnership on Health and Safety in Scotland was formed in 2005 to provide a Scottish forum on health and safety.

The number of HSE-enforced premises in Scotland is approximately 74,000 compared with 740,000 in England and 48,000 in Wales ([HSE 2013](#)). HSE has 270 staff in Scotland based in offices in Edinburgh, Glasgow, Aberdeen and Inverness, and has a Scotland Director. Since 2007 HSE and the Scottish Government have exchanged seconded staff.

In Northern Ireland, the [Health and Safety Executive for Northern Ireland](#) is an executive Non-Departmental Public Body sponsored by the Northern Ireland [Department of Enterprise, Trade and Investment](#) (DETI). HSENI is the lead body responsible for enforcement of health and safety at work in Northern Ireland.

Submissions to the Smith Commission

In submissions to the Smith Commission the Scottish National Party called for “full responsibility for health and safety [to] allow for a more coherent system in Scotland”. The Scottish Labour Party stated the need “to establish a Scottish Health & Safety Executive to set enforcement priorities, goals and objectives in Scotland. This body would still be required to operate within the reserved health & safety framework and regulations and [be] closely linked with the UK HSE, but it would be for the body – reporting to the Scottish Government, scrutinised by the Scottish Parliament and accessing funding provided by that Parliament – to set and achieve the health & safety objectives of most relevance and importance to Scotland”. The Scottish Greens “saw merit” in Scottish Labour’s suggestions. The Scottish Liberal Democrats called for health and safety legislation to “be allocated to the UK (and then federal) level [with] scrutiny of any particularly Scottish implications from those powers [...] the responsibility of Scottish MPs at Westminster”. The Scottish Conservatives made no specific recommendations.

Recommendations of the Smith Commission

Whilst it was [reported](#) that drafts of the Smith Commission report included devolution of health and safety (Herald 2014), paragraph 96(7) of the final report stated that the Scottish and UK Governments should work together to:

“...review the functions and operations of the Health and Safety Executive in Scotland and consider how the future requirements to best serve the people of Scotland could be delivered operationally whilst remaining within a reserved health and safety legislative framework”.

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