

HOUSE OF LORDS

Select Committee on the Constitution

6th Report of Session 2015–16

Scotland Bill

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Select Committee on the Constitution

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Scotland Bill

BACKGROUND

1. The Scotland Bill 2015–16 was introduced into the House of Commons on 28 May 2015 and had its second reading in the House of Commons on 8 June. Following a delay after committee stage, the report stage took place on 9 November, at which point a number of substantive Government amendments were made. It received its first reading in the House of Lords on 10 November, and its second reading is scheduled to take place on Tuesday 24 November.
2. The Bill is the culmination of the process which began with the ‘Vow’ issued by the main UK political parties shortly before the Scottish independence referendum of 18 September 2014. This led to the creation of the Smith Commission, whose report was published on 27 November 2014.¹ It was followed by the Command Paper *Scotland in the United Kingdom: An enduring settlement*, which was published by the United Kingdom Government on 22 January 2015.² That contained, as an Annex, the Draft Scotland Clauses 2015 (‘the Draft Clauses’). These clauses formed the basis of the new Scotland Bill which was subsequently introduced to Parliament three weeks after the General Election in May.
3. In March 2015 this Committee published a report on the Government’s proposals as set out in *Scotland in the United Kingdom*. That report (hereafter ‘report on the Draft Clauses’) set out the detailed background to this process and which we will not repeat here.³ In that report we assessed the likely constitutional significance of the Draft Clauses but in doing so stated that our views were, to a degree, provisional.⁴ We are now in a position to express a firmer view on the content of the provisions which appear in the Bill and our conclusions on the overall process to date. In doing so we draw upon the findings of our report on the Draft Clauses, and our separate but linked inquiry on *Inter-governmental Relations in the United Kingdom*,⁵ also published in March 2015.

¹ Smith Commission, *Report of the Smith Commission for further devolution of powers to the Scottish Parliament* (27 November 2014): <https://www.smith-commission.scot/wp-content/uploads/2014/11/The-Smith-Commission-Report-1.pdf> [accessed 19 November 2015]

² HM Government, *Scotland in the United Kingdom: An enduring settlement*, Cm 8890, 22 January 2015: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/397079/Scotland_EnduringSettlement_acc.pdf [accessed 19 November 2015]

³ Constitution Committee, *Proposals for the Devolution of Further Powers to Scotland* (10th Report, Session 2014–15, HL Paper 145), Chapter 1

⁴ *Proposals for the Devolution of Further Powers to Scotland*, p.9

⁵ Constitution Committee, *Inter-governmental relations in the United Kingdom* (11th Report, Session 2014–15, HL Paper 146)

Government response to the Report on the Draft Clauses

4. Before turning to the substance of the Bill, we wish to draw the attention of the House to the Government's response to our report on the Draft Clauses. This was sent to us on the day the Bill was introduced in the Lords.⁶
5. The Government's response was perfunctory and did not engage with our recommendations or concerns. It made no attempt whatsoever to address the Committee's concerns regarding the process that led to the publication of the Draft Clauses, nor its concerns about the impact of the proposals for the United Kingdom's constitution as a whole. Indeed, the Minister's substantive response to the Committee's seven conclusions on the constitutional provisions in the Draft Clauses was the following sentence:

“I am confident the provisions as drafted reflect the Smith Commission Agreement in full and are sensitive to the constitutional arrangements of the United Kingdom.”
6. We were pleased, therefore, that on Tuesday 17 November the Minister sent us another letter setting out further information on the issues raised in our report on the Draft Clauses.⁷ Unfortunately, while this further response covers the issues in more detail, it does little to engage with the substance of our concerns; nor does it even demonstrate an understanding of those concerns. A number of specific points raised in our report remain unaddressed. Nonetheless, where appropriate we have included the Government's views in this report for the information of the House.

The report

7. In light of the Committee's previous scrutiny, this report provides:
 - an overview of the main constitutional implications of the Bill;
 - a review of the process to date; and,
 - more detailed scrutiny of those clauses in the Bill which have significant constitutional implications.

⁶ Scotland Office, *Government response to the Committee's report on the Proposals for the devolution of further powers to Scotland* (10 November 2015): <http://www.parliament.uk/documents/lords-committees/constitution/GovernmentResponse/Govt-response-draft-clauses-10-Nov-2015.pdf> [accessed 20 November 2015]

⁷ Scotland Office, *Further Government response to the Committee's report on the Proposals for the devolution of further powers to Scotland* (17 November 2015): <http://www.parliament.uk/documents/lords-committees/constitution/GovernmentResponse/Further-Govt-response-draft-clauses-17-November.pdf> [accessed 20 November 2015]

CONSTITUTIONAL IMPLICATIONS—AN OVERVIEW

8. The Bill contains a number of provisions of the highest constitutional importance. In affirming the permanence of the Scottish Parliament and Scottish Government and declaring that they are not to be abolished except following a referendum in Scotland,⁸ and in giving statutory recognition to the Sewel convention,⁹ the Bill carries potential implications for Parliament’s own sovereignty. At the same time, the Scottish Parliament acquires control of its own composition and electoral system.¹⁰ The Bill devolves significant tax powers, particularly in relation to the rates and bands of income tax, and allocates a significant share of VAT receipts to the Scottish Government.¹¹ Powers in relation to welfare benefits are devolved for the first time, and amendments tabled at report stage in the Commons significantly expand the reach of these powers.¹² The Scottish Parliament and Government acquire new powers in policy areas such as employment, transport, energy efficiency, fuel poverty, and onshore oil and gas extraction, and authority in relation to a range of public bodies, hitherto reserved.¹³ They will also have competence over the Crown Estate,¹⁴ equal opportunities¹⁵ and abortion policy,¹⁶ plus many other public functions;¹⁷ while almost all Tribunals will be devolved.¹⁸
9. In our report on the Draft Clauses, we expressed concern at “the failure of the UK Government directly to address the implications of these proposals for the United Kingdom as a whole.”¹⁹ We questioned how any process that did not consider the future of the Union “could provide for an ‘enduring’ settlement”,²⁰ and recommended that “the Government give urgent consideration to the consequences of the Draft Clauses for the constitution of the United Kingdom as a whole. This should happen before they are passed into law.”²¹ **There is little evidence that such consideration has been given to date.**
10. We note the Government’s view, expressed in its response to our report on the Draft Clauses, that its proposals are “responsive and pragmatic, according with the different natures, requirements and arrangements of the constituent parts of the UK”, and that its aim is “to establish settlements tailored to the requirements of the different parts of the

⁸ [Clause 1](#)

⁹ [Clause 2](#)

¹⁰ [Clauses 3–11](#)

¹¹ [Clauses 13–19](#)

¹² [Clauses 20–33](#)

¹³ Especially [Clauses 42–43](#) and [51–53](#)

¹⁴ [Clause 34](#)

¹⁵ [Clauses 35–36](#)

¹⁶ [Clause 50](#)

¹⁷ For example [Clauses 44–49](#) and [54–64](#)

¹⁸ [Clause 37](#)

¹⁹ *Proposals for the Devolution of Further Powers to Scotland*, para 13

²⁰ *Proposals for the Devolution of Further Powers to Scotland*, para 23

²¹ *Proposals for the Devolution of Further Powers to Scotland*, para 23

Union”.²² What is absent from the Government’s response is any sense that the role and future of the Union are being taken into account in that process. We therefore reiterate our previous recommendation: **“The UK Government and the major UK-wide political parties need urgently to devise and articulate a coherent vision for the shape and structure of the United Kingdom, without which there cannot be constitutional stability.”**²³

11. Another concern is that, once more, extensive new powers are being devolved to Scotland, and the other devolved nations, in a reactive and *ad hoc* way. A Draft Wales Bill has now been published,²⁴ with its own proposals for further extensive devolution to Wales. We can see no evidence of a concerted attempt to coordinate these two processes. The speed with which the Scotland Bill is passing through Parliament has in part precluded this, which means that the possible implications of each of these processes for the other, or for the wider UK, have not been systematically addressed. We have stated that such a disjointed approach “risks a piecemeal approach to constitutional change ... on the basis of other devolved legislatures each seeking to catch up with Scotland, rather than changes following a nationwide debate and agreed principles.”²⁵ **The Bill serves to exacerbate rather than alleviate these concerns.**
12. We have previously noted that the Draft Clauses contained a number of proposals for the devolution of constitutional powers to the Scottish Parliament that would not have a direct constitutional impact outside Scotland, but which could have a knock-on effect on other devolved settlements or on the UK constitution as a whole. Whilst recognising that some scope for variation in policy was welcome, we were concerned “that a wider discussion about the most appropriate level of devolution for constitutional issues” had not been held,²⁶ and that the devolution of certain constitutional powers—for example over the franchise—risked introducing variation where there should be none. We have seen no evidence that a discussion about such matters has taken place since our previous report. **We continue to be concerned that powers over constitutional matters are being devolved with no discussion as to whether there are fundamental constitutional issues that are better dealt with in a consistent manner across the UK.**
13. The Bill also has significant implications for England. Considerably fewer issues will now be reserved, and the West Lothian Question issue is consequently intensified. **We note that the Scotland Bill, by increasing the scope of matters devolved to the Scottish Parliament, will increase the number of issues to which the new English votes for English Laws procedures could apply and add to the complexity of**

²² Scotland Office, *Further Government response to the Committee’s report on the Proposals for the devolution of further powers to Scotland* (17 November 2015): <http://www.parliament.uk/documents/lords-committees/constitution/GovernmentResponse/Further-Govt-response-draft-clauses-17-November.pdf> [accessed 20 November 2015]

²³ *Proposals for the Devolution of Further Powers to Scotland*, paras 23–24

²⁴ *Draft Wales Bill*, Wales Office, 20 October 2015

²⁵ *Proposals for the Devolution of Further Powers to Scotland*, para 55

²⁶ *Proposals for the Devolution of Further Powers to Scotland*, para 55

establishing whether new legislation deals solely with devolved matters.

14. The Bill proposes to devolve extensive tax powers and provides for the assignment of VAT revenues. This will be accompanied by the negotiation of a new fiscal framework, which is currently being undertaken. Our report on the Draft Clauses noted that there were “key considerations around the fiscal framework that should be addressed by the Government before these proposals are implemented, and explained to Parliament when a bill is introduced”.²⁷ These matters, on the face of the Bill, remain unaddressed. Parliament has been asked to vote on devolution of taxation powers and welfare spending powers without a full picture of the implications of these for future central funding of the devolved administrations, of how the block grant will be adjusted to take account of the newly devolved fiscal powers, or of the processes by which funding arrangements will be worked out. The Smith Commission itself made no assessment of the impact of its proposals on the rest of the United Kingdom but did frame its proposals with the intention that they should “not cause detriment to the UK as a whole nor to any of its constituent parts”.²⁸ **In the absence of any information about the fiscal framework, it will be impossible for the House to assess whether or not the Bill will cause detriment to all or part of the United Kingdom.**
15. The Government response to our report on the Draft Clauses noted that the Government aim to complete work on the fiscal framework “as soon as possible in order to give respective Parliaments time for due consideration of both the Fiscal Framework and the Scotland Bill. This is likely to be after both the UK Spending Review and the draft Scottish Budget”²⁹ The draft Scottish Budget is due to be published on 16 December, so the fiscal framework is likely to be published at some point after that date.
16. It is not clear how the Government expect the House of Commons to give “due consideration” to both the fiscal framework and the Scotland Bill when the Commons has already passed the Scotland Bill to the House of Lords. In addition, we do not consider that it was appropriate for the Bill to be introduced, and to pass entirely through one House, without this information being made available. **The absence of a fiscal framework will cause significant difficulties for the House as it looks to subject the Bill to appropriate scrutiny and debate. The House may therefore wish to consider whether the committee stage of the Bill, or of those provisions to which the framework relates, should be delayed until the fiscal framework is available for scrutiny alongside the Bill.**
17. A further feature of the Bill is the extent to which its provisions will require cooperation between the UK and Scottish Governments across a range of new areas. These include:

²⁷ *Proposals for the Devolution of Further Powers to Scotland*, para 101

²⁸ Smith Commission, *Report*, para 7(4)

²⁹ Scotland Office, *Government response to the Committee’s report on the Proposals for the devolution of further powers to Scotland* (10 November 2015): <http://www.parliament.uk/documents/lords-committees/constitution/GovernmentResponse/Govt-response-draft-clauses-10-Nov-2015.pdf> [accessed 20 November 2015]

- Concurrent powers: Clause 6 (Electoral registration), Clause 26 (Power to create other new benefits), Clause 27 (Universal Credit), Clause 56 (Energy Company obligations).
- Duty of Consultation: Clause 43 (British Transport Police), Clause 58 (Renewable electricity incentive schemes).
- Need for consent: Clause 6 (Electoral registration), Clause 38 (Roads) and Clauses 26-29 on welfare. Clauses 26–29 in particular are so complex and potentially controversial as to be a possible source of considerable political disagreement.
- Information-sharing: Clause 32.
- Sharing proceeds: Clause 46 (Onshore petroleum: existing licences).
- Provisions in relation to management of cross-border bodies: Clause 35 (Equal opportunities), Clause 43 (British Transport Police).

18. The Committee noted in its report on the Draft Clauses that:

“the hitherto fairly straightforward demarcation between reserved powers and those devolved to the Scottish Parliament will become considerably less clear. A number of significant areas of government, for example in relation to tax and welfare powers, will be shared concurrently by the UK and Scottish Governments. This will breach the hitherto unitary structure of taxation throughout the UK. It will also have knock-on implications for inter-governmental relations and increase the risk that political and legal disputes will become a far more significant feature of these relations.”³⁰

19. The evidence the Committee received during its inquiry into inter-governmental relations in the UK also made clear that the range of concurrent or shared powers in the Draft Clauses would make inter-governmental relations both more complex and more important.³¹ Ensuring an effective framework for inter-governmental relations is now an even more pressing issue in light of the provisions in the Bill. The Government is currently negotiating a new Memorandum of Understanding with the devolved administrations, but no draft has been published and the date by which a final text is likely to be agreed is uncertain.³² The Government has offered to “update the House on progress” of the review of the MoU and the Joint Ministerial Committee structure “as the Scotland Bill continues its passage”. **The House will no doubt welcome such updates.**

20. **Given that the Scotland Bill will increase both the scope and complexity of concurrent and shared powers between the UK and Scottish governments, we are concerned that the House is being asked to scrutinise the Bill without any information as to how they will manage these areas of ‘shared rule’, or any explanation of how**

³⁰ *Proposals for the Devolution of Further Powers to Scotland*, para 20

³¹ Constitution Committee, *Inter-governmental relations in the United Kingdom*, para 4

³² The new Memorandum is due to be agreed at the next plenary meeting of the Joint Ministerial Committee; no date has been announced for this meeting. The Committee noted the lack of transparency about the date and agenda of JMC meetings in its *Inter-governmental relations in the United Kingdom* report (para 184).

relations between the two governments and legislatures will be managed in order to avoid disputes arising from the wide range of shared powers within the Bill.

21. **As with the absence of a fiscal framework, the House may wish to consider whether the committee stage of the Bill should be delayed until the revised Memorandum of Understanding is available for scrutiny alongside the Bill.**

PROCESS

22. In our 2011 report *The Process of Constitutional Change*, we listed steps that we regarded as essential for the Government to undertake prior to the introduction of legislation implementing significant constitutional change. These were:
- considering the impact of the proposals upon the existing constitutional arrangements,
 - subjecting the proposals to detailed scrutiny in the Cabinet and its committees,
 - consulting widely, and
 - publishing green and white papers and subjecting the bill to pre-legislative scrutiny.
23. These should, we stated, be treated as a package that should be departed from “only in exceptional circumstances and where there are clearly justifiable reasons for so doing”.³³
24. In our report on the Draft Clauses we concluded that “We do not believe that the process by which these proposals have been brought forward meets this standard.”³⁴ Nor did we consider that the referendum and subsequent events constituted a “clearly justifiable” reason for adopting such an unusual process for initiating significant constitutional change. We do not consider that the subsequent process has improved matters. At the root of our concern was our conclusion that Parliament had been, in effect, “excluded from the decision-making process” given that the leaders of the main UK-wide political parties agreed in advance to implement the recommendations of the Smith Commission in full. This agreement pre-empted any possibility of meaningful consultation or discussion on the merits of the Smith Commission proposals—including with the parliaments of Scotland and the United Kingdom.
25. **We have previously expressed concern that the “agreement by the leaders of the three main UK-wide political parties to implement the recommendations of the Smith Commission, made before that Commission had even met, appears to have pre-empted any possibility of meaningful consultation and discussion on the merits of the proposals”. We do not believe that the process by which the Bill has been taken forward since then has addressed these concerns. The political parties remain constrained by ‘the Vow’ and Parliament is therefore unable to meaningfully debate the merits of the proposals contained in this Bill.**

³³ Constitution Committee, *The Process of Constitutional Change* (15th Report, Session 2010–12, HL Paper 177), para 73

³⁴ *Proposals for the Devolution of Further Powers to Scotland*, para 49

SPECIFIC CLAUSES WITH CONSTITUTIONAL IMPLICATIONS

Clause 1: The Scottish Parliament and the Scottish Government

26. Clause 1 inserts a new section 63A(1) into the Scotland Act 1998, which states that:

“The Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom’s constitutional arrangements.”

27. Two further sub-sections follow:

“(2) The purpose of this section is, with due regard to the other provisions of this Act, to signify the commitment of the Parliament and Government of the United Kingdom to the Scottish Parliament and the Scottish Government.

“(3) In view of that commitment it is declared that the Scottish Parliament and the Scottish Government are not to be abolished except on the basis of a decision of the people of Scotland voting in a referendum.”

28. This wording has evolved from the Draft Clause 1 included in the Command Paper published earlier this year which provided that section 1(1) of the 1998 Act, which states that “There shall be a Scottish Parliament”, would be followed by the statement:

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

A similar provision would also have recognised ‘a’ Scottish Government as permanent on the same terms.

29. In our report on the Draft Clauses, having noted that “It is a fundamental principle of the UK constitution that Parliament is sovereign and that no Parliament may bind its successors”,³⁵ we did not consider that Draft Clause 1 imposed any legal or constitutional restriction on the power of the UK Parliament. We did however note that it created “the potential for misunderstanding or conflict over the legal status of the Scottish Parliament which may result in legal friction in the future.”³⁶

30. The risk of misunderstanding and legal dispute was based upon an assessment of recent case law in which certain judges have called into question the absolute nature of parliamentary sovereignty³⁷ and offered varying interpretations of the status of the Scottish Parliament as presently constituted.³⁸ On that basis we observed that:

“If there are different interpretations as to the status of the Scottish Parliament in its present constitutional configuration then it is not

³⁵ *Proposals for the Devolution of Further Powers to Scotland*, para 64

³⁶ *Proposals for the Devolution of Further Powers to Scotland*, para 64

³⁷ *Jackson v Attorney General* (2006) 1AC 262, per L Hope, para 104 (see also *obiter* comments by Lord Steyn and Baroness Hale)

³⁸ *AXA General Insurance v Lord Advocate* (2011) UKSC 46, per L. Hope, para 46

implausible that [Draft] Clause 1 could be interpreted by certain judges to be a form of entrenchment that could not then be repealed by Westminster legislation without the consent either of the Scottish Parliament or the Scottish people voting in a referendum.”³⁹

31. The new Clause 1 seems to strengthen this argument. First, unlike Draft Clause 1 it does not say that the Scottish Parliament and Government are ‘recognised’ as permanent, but states boldly that they are permanent. Secondly, sub-section 1(2) signifies the commitment of the Parliament and Government of the United Kingdom to the Scottish Parliament and the Scottish Government. On the one hand, this might serve to weaken the effect of the section as a whole: if the purpose of the section is to “signify the commitment”, then that might be taken to mean that it is not the purpose of the section to (among other things) prevent the UK Parliament from going back on that commitment. But another reading, and the one seemingly more consistent with the overall thrust of the new section seen in the light of the Vow, the Smith Commission and subsequent events, is that this is indeed an explicit attempt to make clear what is intended by the Clause as a whole; sub-section (2) is in effect an aid to interpretation that affirms Parliament’s commitment to the permanence of the Scottish institutions.
32. It has long been a fundamental tenet of the UK constitution that Parliament is sovereign and that no Parliament can bind its successors. But while it has always been highly implausible in political terms, if not absurd, to consider a scenario in which Parliament might unilaterally attempt to abolish the Scottish Parliament, there is now a stronger legal argument that such a move might be interpreted by the courts as no longer valid. The most significant provision is sub-section 1(3). This introduces a step by which Parliament appears to make its own legislative competence contingent upon an intervening stage, namely a referendum result in Scotland in favour of abolition of the Scottish Parliament. This new clause may be seen as something of a half-way house; a contingent rather than an absolute form of self-limitation. It is not that Parliament cannot abolish the Scottish Parliament, but that it has circumscribed the conditions under which it may do so by creating the referendum requirement.
33. It is uncertain whether or not the courts would recognise such a contingent self-limitation, but it is at least arguable that they would.⁴⁰ Parliament has legislated previously to alter the process by which legislation is to be made, notably in the Parliament Acts. These acts created only *internal* procedural changes to the passage of legislation, but a closer analogy to Clause 1 is the European Union Act 2011 section 2 which, in a similar way, seeks to introduce an *external* procedural step, by providing that a treaty amending the European treaties is not to be ratified unless certain conditions are met, including a referendum approving the change.
34. In Clause 1, Parliament is explicitly seeking to limit its own competence by way of an external procedural limitation (a referendum in Scotland) and were it ever to be tested, it is by no means clear what view the Supreme Court would take. The political impetus for this self-limitation derives from a series of strong political commitments from the Vow to the Smith Commission

³⁹ *Proposals for the Devolution of Further Powers to Scotland*, para 63

⁴⁰ *Jackson v Attorney General* (2006) 1AC 262

agreement, which again could potentially influence judges in the highly unlikely event that they were ever given cause to consider its enforcement. In any event, the fact that Parliament is extremely unlikely ever to attempt to repeal the provision without a preceding referendum may also serve to consolidate its constitutional significance.

35. **In our report on the Draft Clauses we drew a distinction between the political improbability that Parliament would abolish the Scottish Parliament without consent, and the fact that it retained the constitutional authority to do so. It seems that, with the revised wording of Clause 1, this distinction hangs by a thread.**
36. **It is a fundamental principle of the UK constitution that Parliament is sovereign and that no Parliament may bind its successors. There is now a strong argument that Parliament is seeking to limit its own competence in a way that the courts may seek to uphold in future given that it rests on a requirement for popular consent. While we recognise that it is extremely unlikely that this will ever be tested in the courts, it is nonetheless symbolically important and we are concerned that these provisions, as currently worded, risk introducing uncertainty concerning the absolute nature of parliamentary sovereignty where there should be none.**

Clause 2: The Sewel Convention

37. This Clause states that “it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.”
38. It is notable that the Sewel Convention set out here is stated to apply to “devolved matters”. This is a narrower definition than that recognised by the UK Government its guidance for civil servants, which suggests that the convention covers a proposed bill which: “contains provisions applying to Scotland and which are for devolved purposes, or which alter the legislative competence of the Parliament or the executive competence of the Scottish Ministers.”⁴¹ The UK Government seems to have accepted that the convention covers bills that will change the legislative competence of the Scottish Parliament either restrictively or in an empowering way. The Scottish Government also takes an expansive view of the convention.⁴² These differences in understanding could be a source of future disagreement and potentially of legal dispute. **We invite the Government to clarify its understanding of the reach of this convention, and the meaning of the word “normally” in this context.**
39. It could also be the case that Clause 1 will impact upon the interpretation given to Clause 2. A parliament recognised as permanent and in relation to whose existence Parliament has sought to limit its own competence will, in the eyes of many, acquire an even stronger constitutional status than that which it currently enjoys. By placing the Sewel Convention in statute, the

⁴¹ Department for Constitutional Affairs, *Devolution Guidance Note 10: Post-devolution Primary Legislation affecting Scotland* (November 2005): <http://www.gov.scot/Resource/Doc/37349/0066833.pdf> [accessed 19 November 2015]

⁴² The Scottish Government, ‘The Sewel Convention: Key Features’: <http://www.gov.scot/About/Government/Sewel/KeyFacts> [accessed 19 November 2015]

Government risks introducing a perception that the validity of laws passed by the UK Parliament would be justiciable should they contravene (or be argued to contravene) the Sewel Convention as set out in statute. We recognise that the use of the word “normally” seems to make clear that Parliament will still have the legal power to legislate for Scotland, even on devolved matters, without the consent of the Scottish Parliament. **Nonetheless, in combination with Clause 1, which appears to seek to limit Parliament’s competence with regard to the devolved institutions, we are concerned that Clause 2 risks creating a route through which the courts might be drawn inappropriately into an area that has previously been within the jurisdiction of Parliament alone, namely its competence to make law.** We note that this provision and a ‘permanence’ clause are also included in the draft Wales Bill.⁴³

40. In its report on the Draft Clauses the Committee observed:

“we note that both these draft clauses [1 and 2] appear to be moving the United Kingdom in a federal direction, attempting to crystallise by way of statute, if not a written constitution, the status and powers of the devolved institutions in a way that has hitherto not been the case. We would welcome a clarification from the Government as to whether this was their intention. This is a matter that we trust will receive further scrutiny by the House when a Scotland Bill is introduced in the next Parliament.⁴⁴

41. **One of the key features of political systems based on written constitutions is that the constitutional powers of the constituent units are protected beyond the unilateral competence of the central legislature. Clauses 1 and 2 attempt to protect the ‘self-rule’ of the Scottish Parliament. We would welcome clarification from the Government as to whether these clauses, and similar clauses in the draft Wales Bill, are a deliberate attempt to impose constitutional limits on the competence of the UK Parliament in relation to the status and powers of the devolved institutions.**

Clauses 3–9: Elections and related matters

42. Clauses 3 and 4 concern the general powers over the conduct of Scottish Parliament elections which are to be devolved to the Scottish Parliament and Scottish Government, including competence over the franchise.

43. The Scottish Parliament has already been given the power to extend the franchise to 16 and 17-year-olds for the Scottish Parliament elections in 2016;⁴⁵ and it has legislated to do so.⁴⁶ Clause 3 will provide powers to control the franchise for all Scottish Parliament elections and local government elections in Scotland. In our report on the Draft Clauses, we noted that the Scottish Parliament’s control over the franchise for its elections may cause problems regarding prisoner voting rights, as (unlike the UK Parliament) the Scottish Parliament cannot make laws that are

⁴³ [Draft Wales Bill](#), Clause 2

⁴⁴ [Proposals for the devolution of further powers to Scotland](#), para 77

⁴⁵ [Scotland Act 1998 \(Modification of Schedules 4 and 5 and Transfer of Functions to the Scottish Ministers etc.\) Order 2015](#)

⁴⁶ [Scottish Elections \(Reduction of Voting Age\) Act 2015 asp 7](#)

incompatible with Convention rights under the European Convention on Human Rights. The UK's blanket ban on prisoners voting has been deemed incompatible, meaning that unless some prisoners were to be enfranchised in Scotland, legislation on the franchise there might be invalid. The Committee called on the Government to "set out its view of how these powers could be exercised within the Scottish Parliament's restricted competence."⁴⁷ The Government did not address the issue in either of its responses to the Committee's report. Nor does the Bill address this issue, meaning that the potential problem still remains. **The House may wish to seek clarification from the Government as to how they will ensure that the Scottish Parliament will be able to exercise its powers over the franchise in a way compatible with Convention rights.**

44. Clause 5, on the timing of elections, ensures that elections to the Scottish Parliament cannot be held on the same day as UK general elections or elections for the European Parliament. The Bill originally provided that a Scottish Parliamentary election could not take place within two months before either of these elections, but this was removed on amendment at Committee stage in the Commons. The Minister noted in the Commons that the change "brings us more closely in line with the Smith Commission",⁴⁸ which stated simply that elections to the Scottish Parliament should not take place on the same day as elections to the UK Parliament, the European Parliament or local authorities in Scotland. **The House may wish to consider whether this amendment was a positive step. Elections which take place in rapid succession may confuse voters, affect participation and complicate spending rules and purdah periods.** We hope that the Electoral Commission will inform the House as to its views on the potential impact of holding elections to different bodies in close proximity to each other.

Clauses 13–19: Tax

45. Clauses 13–19 cover provisions relating to the devolution of tax powers, including income tax, and the assignment of value added tax revenues. The devolution of tax powers, and assignment of VAT revenues, will be accompanied by adjustments to the block grant received from the UK Government under the Barnett Formula. This will be negotiated in terms of an updated fiscal framework for Scotland. It is unclear what these changes will mean for Scottish public finances. **As noted above (paragraphs 14–16), the House may wish to consider whether it is appropriate for Parliament to be asked to approve the devolution of such extensive taxation powers, and the extension of competence over so many areas of welfare policy, without a fiscal framework to scrutinise.**

Clauses 20–33: Welfare benefits and employment support

46. Clause 26 was inserted at report stage in the House of Commons. It is a wide-ranging provision which creates a new exception to the social security reservation to provide the Scottish Parliament with new powers to create new benefits in areas of devolved responsibility, the cost of which is to be met

⁴⁷ *Proposals for the devolution of further powers to Scotland*, para. 88

⁴⁸ John Penrose MP, HC Deb, 15 June 2015, [col. 115](#)

from the Scottish Consolidated Fund. The power to create new benefits will not extend to pensions.

47. It would appear that the potentially open-ended nature of the powers to be devolved in this area create an area of possible confusion and disagreement. The Explanatory Notes which accompanied the Bill to the House of Lords state that: “The clause will give the Scottish Parliament parallel legislative competence to that of the UK Parliament but not the power to amend UK legislation. The UK Parliament will still be able to legislate in all areas of welfare across Great Britain without the requirement of a legislative consent motion, except for those areas already devolved and those being devolved by other clauses of this Bill (for example, carers and disability benefits covered by Clause 20).” It is not clear that the full implications of these changes, tabled so late in the legislative process in the Commons, have been fully considered. **The House may wish to clarify how the boundaries of devolved competence will be regulated under this Clause, and what efforts are being made to avoid disputes arising, not only here, but in other areas of welfare policy where powers are shared between the UK and Scottish governments. As noted above (paragraphs 20 and 21) the House may also wish to consider whether such clarity is possible while negotiations on a new Memorandum of Understanding are underway.**
48. Similar concerns about how inter-governmental relations will be managed arise in relation to Clauses 27 and 28, which provide for Scottish Ministers to vary certain benefits under the Universal Credit system, as well as in relation to the information sharing provisions in Clause 32.

Clauses 35 and 36: Equal opportunities

49. Clause 35 gives the Scottish Parliament the competence to legislate on the subject of equal opportunities in relation to the boards of Scottish public bodies and cross-border bodies, for example to introduce new positive discrimination provisions such as gender quotas. In effect, this permits the Scottish Parliament to legislate above the floor of the Equality Acts of 2006 or 2010, but it may not legislate *contrary* to existing obligations under this legislation which remain reserved.
50. Under Clause 36, Scottish Ministers have the power to commence Part 1 of the Equality Act 2010 in respect of public bodies exercising devolved functions in Scotland. This part of the Equality Act is concerned with reducing “the inequalities of outcome which result from socio-economic disadvantage.” It is not yet commenced in any part of the United Kingdom. It will potentially make Scotland the first place where these provisions will take effect.
51. **The House may wish to ask for clarification as to the extent to which these provisions may have an impact on private, rather than public, bodies.**

Clause 68: Power to make consequential, transitional and saving provision

52. Finally, we draw Clause 68 to the attention of the House. This Clause contains a Henry VIII power which allows the Secretary of State to make

consequential, transitional and saving provisions in connection with the provisions in the Bill. As has become a trend over the years, the Government has put forward a Henry VIII clause which gives it powers well beyond those which are necessary to achieve this end. We do not intend to discuss this matter in detail since the Delegated Powers and Regulatory Reform Committee will undoubtedly scrutinise this provision in more depth, but we once again must express our concern at a Government proposal that would provide Ministers with too much power at the expense of Parliament. We propose to return to this wider trend.