



Political and Constitutional Reform Committee

Oral evidence: [Constitutional implications of draft Scotland clauses](#), HC 1022

Monday 2 February 2015

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Written evidence from witnesses:

- [Dr Mark Elliott](#)

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Members present: Mr Graham Allen (Chair); Mr Christopher Chope; Tracey Crouch; Mark Durkan; Paul Flynn; Duncan Hames; Robert Neill

Questions 1 – 46

Examination of Witnesses

Witnesses: **Dr Mark Elliott**, Reader in Public Law, University of Cambridge, **Michael P Clancy OBE**, Director, Law Reform, Law Society of Scotland, **Professor Ian Loveland**, Professor of Law, City Law School, and **Professor Aileen McHarg**, Professor of Public Law, Strathclyde University, gave evidence.

Q1 Chair: Mark, Michael, Ian, Aileen, welcome. I will resist the normal offer of “would you like to say something” because if you all do we could be here quite late. I am sure you will pick up the parliamentary atmosphere and work in whatever you really wanted to say to the questions we ask you. Chris, will you start us off?

Mr Chope: Dr Elliott has described clause 1 as legally vacuous, particularly the inclusion of the words “is recognised as” rather than “is”. Do you all agree with that? If so, what are the consequences of enacting it and are there any risks associated with enacting it?

Professor McHarg: I do agree it is legally vacuous because it purports to recognise a factual situation rather than having any kind of normative content. It does not purport to change anything; it does not impose any obligations on anyone. From that point of view, I think it is legally vacuous.

Are there risks attached to its enactment? I am exercised by the fact that it says “recognise the permanence of a Scottish Parliament” rather than “the Scottish Parliament”. I can’t see any particular reason for not recognising the permanence of the Parliament that we have at the moment. Otherwise I can’t see any strong risks in having it, other than in its current form it does not attempt to do what the Smith commission promised to do. I think there is a separate question about whether what the Smith commission promised is legally possible, but attempting to do it is important, from

a political point of view if you are a party in Scotland trying to show that you have done your best to fulfil the vow.

Professor Loveland: I can't see that there is any legal point to clause 1 as it is currently formulated. I don't think it will have any legal effect at all. In that sense, there is no risk to enacting it because it would be very easy to change it at any point in the future. I would echo what Aileen said about the political risks because, in so far as this is a measure that is presumably intended in some part to defuse any further pressure for independence in Scotland, I very much doubt that many people who favour independence would be satisfied by a clause of this sort. It provides, as far as I can see, no legal protection at all for the long-term existence of the Scottish Parliament and the Scottish Government.

Michael Clancy: I suppose it depends on the perspective that you are taking. If the question is about the legality of this, then people can make their own judgments about whether the word "vacuous" should be used. I think this is something we have to see through the eyes of the Smith commission and the political interlocutors. We have to see it through the perspective of the time period over which it was drawn up and the opportunity people had to think about it. Fundamentally, this is a political statement in legislative form.

Why do I reflect on the time taken? Remember that Lord Smith was asked immediately after the referendum to produce something by 30 January; he met that deadline. The commission and the political interlocutors did not have the opportunity to sit down and think, "We are drafting instructions to draftsmen when we are preparing this". The Smith commission report is not instructions to draftsmen. After the commission had reported, there was a very short period of time for the civil service to do their work. Reading Mark's paper, I think the criticisms about the way in which this is formulated and the distinction between the foreword and the paragraphs in the Smith report can all be explained by the utmost haste with which this piece of work was carried out.

We have to see it through political eyes rather than through constitutional lawyers' eyes. To that extent, I can't subscribe to "vacuous" but I think that there are certainly questions, within the current constitution, about what this actually does achieve.

Q2 Mr Chope: You have described it as a political statement in legislative form, which is a rather longer version of "vacuous". Do you have any other succinct description for it?

Michael Clancy: It is going to be section 1 of the Scotland Bill 2015.

Q3 Mr Chope: What about Dr Elliott?

Dr Elliott: I stand by my view that it is legally vacuous. I didn't say it is vacuous. I don't think it is constitutionally vacuous or politically vacuous but I think it is legally vacuous. I don't think that in law it succeeds in making the Scottish Parliament permanent and I don't think that it attempts to do that. As a matter of law, it is exceptionally unlikely that that can actually be done at all. As a matter of legal analysis, it does not make the Scottish Parliament permanent. It will not have that effect, but in political terms it is very clearly a quite powerful statement of intent. Is there a risk to doing this? There is a risk in the sense that you might argue that it is disreputable from one point of view to almost try to convey the impression that something is being given legal effect when in fact it is not. A cynic might say that this is trying to pull a fast one.

Q4 Mr Chope: Are there any precedents for this sort of drafting of something that is a political statement dressed up in a form of legislation?

Dr Elliott: I can't think of any precise analogues. There is the Statute of Westminster that in effect limits the authority of the Westminster Parliament to legislate for other parts of what was then the

Empire. There are modern parallels, for example the Fiscal Responsibility Act 2010 in which section 1 imposes duties on the Treasury and section 2 permits the Treasury by order to place further duties on itself in relation to fiscal responsibility. The Act then goes on to say that these duties are not legally enforceable and the only way of enforcing them is by accountability to Parliament. In that sense, there is a precedent, and there are other precedents no doubt, for legislation that seeks to bring about a state of affairs or impose duties or whatever but which seeks to stop short of making those legally enforceable.

Q5 Mr Chope: We are now moving from gesture politics to gesture legislation. Is that really what is happening?

Dr Elliott: That is one way of putting it.

Q6 Mr Chope: Does anyone else want to comment on that?

Michael Clancy: On the point of precedents, I think there are quite a number of statutes that have some kind of declaratory statement. For example, in the Hong Kong Act 1985, the Queen shall no longer make orders in Council that will apply in Hong Kong; “no longer” sounds kind of permanent to me. The Canada Act says that Acts of this Parliament will not apply in Canada. These are declaratory statements and run against the classic Diceyan idea of what political sovereignty of the Queen and Parliament actually means. There are a number of declaratory statements that one can point to in our statute book so I am not too fussed about—even section 1 of the 1998 Act, “There shall be a Scottish Parliament”, in one sense is declaratory of a political ideal coming into being.

Professor McHarg: If I can interject, all of the examples you have given are normative statements, they are “ought” statements, albeit ones that are not necessarily enforceable before a court of law. The statute book is full of what are sometimes called duties of imperfect obligation. They create an obligation but it is not enforceable. The difference in clause 1 is it is not a normative statement. It is a statement that purports to recognise a state of affairs. I don’t know of any direct precedent for that. This obviously could have been rendered in some kind of normative form, and then we would be discussing whether it is enforceable and can bind a future Parliament, but I think we are not even in that territory because it is not stated in that form.

Professor Loveland: I would just add that the precedent that appears to me is that the Act of Union itself in 1707 contains what one might think are substantively entrenched clauses; there are certain things that shall never be done. Some of them have not yet been done—Scotland still has its own independent Church and independent legal system—but I think it is also correct to say that many of those entrenched clauses have disappeared. They have disappeared simply through the enactment of ordinary legislation by the United Kingdom Parliament, particularly at various points in the mid to late 19th century. That is a clear statement of, it seems, political and legislative intent that certain things shall never happen. Yet here we are, and they have indeed happened and nobody seemed to take much exception to them when they did.

Q7 Mark Durkan: There is an element of “There’s a hole in my bucket, dear Liza”, once we come to trying to make any sort of provision like this in terms of agreement. In Northern Ireland we certainly had legislation where I suppose the issue was more setting aside the Government of Ireland Act and so on or, on the resumption of devolution, removing the suspension legislation but that did not stop us teetering on suspension in recent months again. If clause 1 as it appears now does not of itself make the devolved institutions permanent, does not make the Scottish Parliament permanent and freestanding, how could this actually be achieved in practice or in law?

Professor McHarg: I think you have to separate out two questions. One is: how would you formulate a provision that purported to make the Scottish Parliament permanent? I think you would probably want something that lays down the conditions in which it can be amended or repealed. That might be with the consent of the Scottish Parliament or it might be in certain exceptional circumstances. The second question is: what effect would any such clause have? There you are really dependent on the reaction of the courts. It would be up to the courts whether they chose to follow a statement that the Scottish Parliament is supposed to be permanent in the face of subsequent legislation that ignored it.

We know that parliamentary sovereignty is not immutable, that it has changed to some degree in recent years. There is a statement in section 2(1) of the European Communities Act that is an attempt to bind future parliaments, which has been partially successful in the Factortame case. A later statute, the Merchant Shipping Act 1988, was disapplied by the then House of Lords and it was justified by Lord Bridge in terms of, "This is what Parliament wants us to do. Parliament, when it enacted the European Communities Act, told us that we were to give precedence to inconsistent rules of European Union law". Academic lawyers discuss ad nauseam exactly what is going on in that case and how it was justified and how it came about, but there has been a shift because in that particular context the latest Act of the UK Parliament does not necessarily prevail. So it is not inconceivable that a court in future could react to a similar instruction in relation to the Scottish Parliament, but it is not certain that it would.

Dr Elliott: Can I follow up on that by saying that I agree with what Aileen has said, but there is no doubt whatever that if the EC Act 1972 were repealed the courts would stop giving priority to European Union law. In that sense, the EC Act is not a precise comparison because there is no question of Parliament having permanently relinquished its sovereignty to the institutions of the EU, in the way that it seems there is some kind of intention here to relinquish the sovereignty of this Parliament to make way for the permanence of the Scottish Parliament.

Q8 Mark Durkan: Is there any way in which the permanence can be affirmed, asserted, entrenched beyond subsequent possible amendment by this Parliament or anywhere else?

Dr Elliott: As I say in my paper, there are two potential ways in which it could be done. One is simply by enacting that there shall be a permanent Scottish Parliament and then protecting that provision against repeal. There are no clear authorities to suggest that a court would uphold that kind of provision. The weight of authority would say that a court would give effect to a later Act of Parliament that seeks to unpick that. That attempt at absolute protection of the permanence of the Scottish Parliament is very unlikely to succeed, I think. The alternative is a conditional or contingent kind of entrenchment of the provision that makes the Scottish Parliament permanent, where we say there is a Scottish Parliament and it cannot be abolished or perhaps changed in certain fundamental ways unless a given condition is satisfied first. That condition might be, for example, the assent of the Scottish Parliament itself. So you have a kind of lock procedure whereby the Westminster Parliament is disabled from unilaterally interfering.

There is not clear authority to say that that kind of conditional limitation would be accepted by the courts and there are cases that point both ways. There are some cases that clearly say this can't be done and if Parliament lays down this kind of restriction on itself it can just as easily get rid of it by passing an ordinary future Act. There are some indications, particularly in the decision of the House of Lords on the Hunting Act, that this might be possible and that the Supreme Court, as it now is, might be open to the possibility of actually treating those kinds of restrictions as binding restrictions that, if not fulfilled, would then deprive the new legislation of force.

Q9 Robert Neill: That is very helpful. I think it would be useful to have an understanding of what is really meant by this idea of a contingent entrenchment because it seems an oxymoron in a sense until one talks about it. In terms of the case law, you have a distinction almost between the John Laws point of view and the Johan Steyn point of view to some measure.

Just thinking about this, are we arguably making more out of it than is necessary? I was also struck with your observation in paragraph 16, Dr Elliott, that, “Analysing these matters through a legal lens may be inapposite”. You go on, perhaps wisely, to quote Lord Denning when he said, “Legal theory must give way to practical politics”. Are we not running round and round in circles? In reality, what court is going to say, unless the Scottish people themselves decided that they wanted to get rid of their Parliament, who is going to take it away? This is angels dancing on the head of a needle.

Professor McHarg: We have to identify what is at stake here, and I think there are two things. One is the practical consequences of what would happen if the UK Parliament tried to abolish the Scottish Parliament without consent and so on. I tend to agree that there is an air of unreality about that. If we ever were in that circumstance, the kind of Parliament that was willing to abolish the Scottish Parliament without consent and without any justification is probably not the kind of Parliament that is going to pay much attention to what the courts say anyway.

Robert Neill: We probably wouldn't be sitting here, would we?

Professor McHarg: The other and the more important issue for me is a question of constitutional fair labelling. At present what we have is a situation where the legal and the political constitutions don't coincide and while there can be arguments for that in some circumstances—ambiguity is sometimes useful—as a matter of principle the law ought to, so far as possible, try to reflect the reality of the constitution as we know it.

Q10 Robert Neill: Any thoughts from the others?

Michael Clancy: I agree with you. I think that it is a matter of political judgment at any one time as to whether or not this would come under any scrutiny with a view to repeal. It would be a brave government that would decide to do that, and so in that sense Mark and I meet on this point. It is exactly the point I was making in my initial remarks, that this is a political statement clothed in a legislative form.

Q11 Robert Neill: You are in a pretty similar position on that. I can see that. What about yourself?

Professor Loveland: I think the absence of a clear legal process will in itself be problematic and it puts one in mind of the situation that existed in Canada up until 1982. Canada became a sovereign state in 1931 but without any internal mechanism of constitutional amendment. So, periodically over the next 50 years there were bitter fights between provincial and federal spheres of government as to how the constitution ought to be amended and if so under what circumstances. It was eventually resolved in 1980, but an awful lot of political energy was spent over the course of 50 years in trying to establish a mechanism through which we change these values that we regard as fundamental. It would seem helpful, if this is to be recognised as a constitutional moment where fundamental changes are being made, if those fundamental changes have a legal as well as a political and/or moral underpinning.

Michael Clancy: I suppose it takes us back to that earlier discussion that this Committee had over constitution building and the paper “A New Magna Carta?”, because if there is going to be a fundamental change to the constitution we ought to start thinking about it in an orderly fashion.

Robert Neill: That is very helpful. Thank you.

Q12 Tracey Crouch: Can we turn to clause 2, please? Do you think that clause 2 effectively makes the Sewel convention binding, or is it also legally vacuous?

Dr Elliott: I don't think that it makes the Sewel convention legally binding. The part of the Smith report that deals with this point is quite short and it is not entirely clear to me from just reading the report what they had in mind. I think there are two possibilities. One would be simply for a statute to acknowledge the existence of the Sewel convention, and I suppose it does that but the most that it does is to acknowledge the existence of the convention as a convention. In that sense, its legal effect must be very limited, if it has any at all, because it is not purporting to change the status of the rule – to the extent that there is a rule there in the Sewel convention.

The other possibility that the commission might have had in mind when it proposed putting the convention on a statutory footing is actually moving to a position where the Westminster Parliament disables itself or says that it is disabling itself from making law on matters that are devolved to the Scottish Parliament. Whether it can do that takes us back to some of the points that we have been talking about already, but clearly, as drafted clause 2 does not have that effect.

Q13 Tracey Crouch: Do other witnesses agree?

Professor McHarg: Yes, I agree with that. There are at least three problems with clause 2 as it is currently drafted. One is the use of the word “recognise” and the lack of any attempt to change the rule. Section 28(7) remains a problem. It basically restates in statutory form that the unlimited sovereignty of the Westminster Parliament is unchanged. Until that is changed, until that is qualified, then Sewel, the requirement to get the consent of the Scottish Parliament, cannot have any legal effect. The third problem with it is that it does not encapsulate the Sewel convention as it currently operates, because Sewel has two elements to it. It is not entirely clear to me whether both elements are captured there.

One element of Sewel is that when this Parliament wants to legislate on a matter that is devolved to the Scottish Parliament, like health or education, it must have the prior consent. The second element is that when this House is changing the Scotland Act or changing the powers of the Scottish Parliament or the Scottish Ministers, then that also requires the consent of the Scottish Parliament. I am not sure that that bit of it is encapsulated within the wording of clause 2, particularly given that that is going to appear as the new section 28(8).

Section 28 is a provision that deals with the ability of the Scottish Parliament to make law. If you read it in its context, any effect that it has would be limited to this Parliament legislating in devolved areas rather than this Parliament effecting the scope of the devolution settlement, which is also really important. That is an important guarantee of the permanence and so on.

Tracey Crouch: It might not be vacuous but it is extremely problematic.

Professor McHarg: I don't think it does do anything and, even if it does, it is problematic in its scope.

Professor Loveland: I couldn't see any basis for any court enforcing section 28(8) as it stands at all. I am also concerned by the use of the word “normally”, which seems to me a completely empty phrase.

Tracey Crouch: I am going to come on to that in a second.

Professor Loveland: If the intention is to ensure that legislation on devolved matters is not passed without the consent of the Scottish Parliament, then it seems to me that something much tighter ought to be in place in section 28(8). I would think in terms of an explicit prohibition on the power

of the House of Lords at Third Reading to assent to any Bill on a devolved matter until such time as the consent of the Scottish Parliament to that Bill had been expressed in a form specified by the Act. I would suggest that because it does not seem uncontroversial to most constitutional lawyers that Parliament has the power to control the powers of the House of Lords. The Parliament Acts 1911 and 1949 are obvious examples of that. That would entail also some consequential additions about disabling article 9 of the Bill of Rights in respect of this issue, so that this would be a proceeding in Parliament that could be challenged in the courts. It would make it clear that the Parliament Acts 1911 and 1949 could not apply to this either, so that the House of Lords could not be bypassed.

That kind of provision would be something on which lawyers could get a grip, whereas what they have now is like a bowl of jelly really. There is no way of holding on to that.

Michael Clancy: I was in the House of Lords in the Opposition advisers box when this particular statement was made. The provisions of clause 2 are almost an exact quote from Lord Sewel when he was answering an amendment by Lord Mackay of Drumadoon. It does not surprise me that it is not statutorily framed, although you would have to take up with Lord Sewel whether he agrees that it is like a bowl of jelly. It clearly would need a bit of revision to make it as effective as you would expect.

I agree that a convention as such is not justiciable. I think there is authority for that in the case of *Madzimbamuto v. Lardner-Burke*, where a statement in very similar terms made by the United Kingdom Parliament about the legislative assembly in Southern Rhodesia was litigated on and there was no way in which that would have had any judicial impact. Although it might be unconstitutional to disregard the convention, I don't think it would be justiciable to disregard the convention. If this was put into a more effective form of language in the statute, yes, that would make a difference, but how far one would be able to take it depends upon the kind of analysis about *Jackson v. the AG* and the tension between the Diceyan idea and what Lord Steyn called the rule of law.

Q14 Tracey Crouch: You have sort of answered my next question, but I am going to ask it because I am interested in your views about "normally". Do you think that Parliament can effectively bind itself by recognising that it will not normally legislate on certain matters? Do you think there is any watertight legal definition of the word "normally" as stated in clause 2?

Professor McHarg: At the moment, no. If a court were called upon to determine what "normally" meant then it would be possible for the court to have a look at the precedents and try to work out what the conventions mean. There are examples of that having happened quite recently in the Evans case, where a *Guardian* journalist was trying to get access to the Prince of Wales' correspondence with Ministers. The upper tribunal in that case had to determine for itself, although not in any binding way, the scope of the so-called education convention and it went through the precedents and so on. There would be nothing to stop a court doing that. I don't think there is much guidance at the moment. We don't have enough to go on to decide when it would be acceptable to disregard Sewel.

Q15 Tracey Crouch: What you are saying is basically that if this legislation passes as currently stated, constitutional lawyers are going to make a fortune out of it, in that there is going to be a proper bun fight.

Michael Clancy: Enticing though that prospect might be for some constitutional lawyers, we have to remember that the Sewel convention has operated since 1999 to the present day with hardly any difficulty at all. I think there has been only one inadvertent breach of it.

Q16 Tracey Crouch: So is clause 2 irrelevant then?

Michael Clancy: It is not irrelevant if you are wanting to make a political statement.

Tracey Crouch: But it is irrelevant legally?

Michael Clancy: It does not add much to the existing situation because it is a direct quote of the existing situation. I agree with Aileen that there is a lot more to the Sewel convention than simply the statement on the page. The devolution guidance note number 10 goes into some detail on the way in which the Sewel convention should operate so that Parliament here and Whitehall there does not make a mistake that causes a constitutional outrage.

Q17 Tracey Crouch: It takes us back full circle to where Dr Elliott started from, which is that it is effectively legally vacuous.

Professor McHarg: As currently drafted, yes. I think it would be possible to give the Sewel convention some bite if you amended section 28(7) to make it clear that this Parliament's powers to legislate for Scotland required consent. Any attempt to disregard that consent in a subsequent statute would possibly fall foul of a little known decision called *H v. Lord Advocate* in which the Supreme Court said that the Scotland Act can't be impliedly repealed; it can only be expressly repealed. That would allow a subsequent Parliament to continue to legislate for Scotland without consent but only to do so explicitly and to take the political consequence. Breaches of the Sewel convention can come about in two ways: they can come about deliberately, but more likely they are going to come about inadvertently. There might be some value in having a device that would deal with those inadvertent breaches of the convention.

Q18 Paul Flynn: This is not entirely theoretical because in Wales we have just gone through a period of judge-led democracy where the laws passed by the Welsh Assembly Government were queried and contested by the present Government and they were eventually decided by judges. This may well turn up again. Do you foresee the possibility of a contest and a deadlock between the courts and the lawmakers on this in the future? Is it likely to happen? You mentioned the very interesting case of Prince Charles' letters, where the Government took one line – that we as democrats, as subjects, were not fit to see these letters, otherwise it might mean that we would recognise that Charles was not fit to be a monarch –and the courts took a different point of view, yet to be decided. Can you see a possible deadlock with these clauses?

Dr Elliott: I think we are familiar with the idea, not of deadlock between the courts and every other part of the machinery of government: we are used to a situation where the courts can say, either to the UK Executive or to devolved administrations, or even to devolved legislatures, that they have acted unlawfully. That is not a form of deadlock; that is simply the courts enforcing the rule of law. The novel questions that are raised by provisions of this nature are whether the intention is to set up a situation in which the courts can turn round to this Parliament and say, "You aren't allowed to do that, you aren't allowed to abolish the Scottish Parliament", or "You aren't allowed to legislate on devolved matters affecting Scotland because you have tied your hands". That is a kind of constitutional deadlock that we have no real precedents for because of the principle of the sovereignty of the UK Parliament. One of the questions is: to what extent is there a desire to move towards a situation whereby these matters become judicialised and ultimately the Supreme Court can turn round and say, "Sorry, but you can't do that"?

Q19 Paul Flynn: I think we all remember here the words of Donald Dewar when he said, "There shall be a Scottish Parliament", Scottish Government, and that seemed to be something that changed everything. Do you think these clauses are wise and should be enacted? This whole process is going on at a breakneck speed. Shouldn't there be second thoughts on this because of possible

problems? There are problems with the word “normally”. One of the witnesses said that it would need a brave government. Occasionally we do have brave governments who might wish to take a line that is contrary to the precedent and to the mood of the Scottish people.

Dr Elliott: I think it takes us back to the point that we began with, which is that it does not stop anything from happening as a matter of law but it means that a government that wanted to try to row back on this kind of position is going to have to confront the legislation and that is going to carry a significant political cost. Whether the imposition of that cost is a good thing or a bad thing is a question of perspective.

Paul Flynn: Will you be taking interest today in the Bill that is coming next in the House, the Social Action, Responsibility and Heroism Bill, which has been described as a milestone in legislative futility? It was a rhetorical question.

Q20 Duncan Hames: Perhaps we could turn to clause 3. My first question is: do you consider the clause as drafted gives the Scottish Parliament all the decision-making powers over its own affairs that you would expect?

Professor McHarg: I did try to work my way through that copy of the existing Scotland Act. It is not an easy read. I could not find anything that seemed to me to be problematic, but that does not mean to say there is not something there. It is quite difficult to work your way through those clauses because you are talking about exceptions to exceptions. Sometimes you are talking about exceptions to exceptions to exceptions, and sometimes only exceptions to exceptions, so A and B are different to C. The drafting is not a model of clarity, but I have no suggestions as to how it could be improved.

Professor Loveland: The only comment I have is the way that clause 3 fits in with clause 4 and the introduction of a super majority requirement for the changing of certain aspects of the electoral system, which I would see as being essential to the way that a Parliament operates and its own capacity to choose how its Members are chosen. It would seem to me very important. There is a curiosity, I would have thought, in that the Scots Parliament, which is elected by a system that is somewhat more representative in terms of the relationship between seats won and votes cast than applies to the House of Commons, is now being subject to a super majority in respect of this issue, whereas the House of Commons, of course, through Parliament, will operate by an ordinary majority in changing any aspect of its own electoral system. One can certainly see benefits to having a super majoritarian requirement over something as fundamental as this.

The question that then arises is: is this the only matter within the competence of the Scots Parliament that we should regard as so important that it is protected in this way? I suppose some people might also observe that, given the way that the electoral system is structured in Scotland, a two-thirds majority on anything other than an almost unanimous party basis is going to be essentially unachievable. That may be a good thing, but that is perhaps paralysis rather than simply entrenchment of particular values.

Professor McHarg: Except there is quite an easy way around deadlock in the Scottish Parliament or the inability to reach the two-thirds majority, which is to pass it back up to the UK Parliament, which, as Ian has pointed out, is not subject to any kind of super majority requirement. That seems to me a rather problematic loophole in the super majority requirement. You imagine there may be another majority government in Holyrood at some point and that majority government is also a majority government here. By consenting to a legislative consent motion by simple majority, it could do at Westminster what it could not do at Holyrood. There is no issue there, in that case, about the UK Parliament somehow not being tainted by political bias.

Michael Clancy: It is a bit of a thicket and I share Aileen’s frustration with it. I tried to track my way through it and it took me longer than I would have hoped, but it is quite difficult to see how

one could amend it in a particular way to make it more readable other than rewriting big chunks of the Bill and the existing Act. I was interested in the modification of the way in which Bills can be referred to the Supreme Court, which will now include whether or not it would modify a provision that was a protected subject matter. It does what it says it is going to do as far as I can see.

Dr Elliott: I do not have much to add to that. Stepping back from the detail, it seems to me that this is quite a significant change, in the sense that the original settlement was very much one in which the UK Parliament bequeathed certain constitutional arrangements to Scotland but retained very close control and ownership of them. This seems to me to be quite a significant transfer of this ownership to the Scottish Parliament itself.

Q21 Duncan Hames: What, say, if any, should the UK Parliament retain in how the Scottish Parliament and Scottish Government goes about its own affairs?

Professor McHarg: The Scottish Parliament cannot be in charge of the limits of its own competence and the means by which those are enforced. That would turn it into something that it is not. It would turn it into a sovereign Parliament, and it is not. Apart from that, I am quite attracted by the idea of the Scottish Parliament having extensive control over its own constitution as long as there are adequate safeguards of the super majority type. I have no quibble in principle with that.

Chair: I am keen that every witness does not feel obliged to reply because I am running a little short of time. Duncan, carry on.

Q22 Duncan Hames: If I might just probe this question with a further example. We are in the process of ensuring that in the next Scottish general election 16 and 17-year-olds will be able to vote. The logic that that is an innovation they want to take forward in Scotland, therefore we should let them, has a certain elegance to it, but I imagine if it was working in the opposite direction it would be a far more controversial development. If the proposal was not to extend the franchise but to restrict it, would that not be an instance where basic principles that people as part of the United Kingdom expect in terms of their empowerment, their enfranchisement as voters, should be more entrenched than the will of the Scottish Parliament to change?

Professor McHarg: There are additional restrictions. The Scottish Parliament is absolutely bound by the European Convention on Human Rights, which contains protection for voting rights. If you are starting to restrict the franchise, you might get into trouble with article 3 of Protocol 1. There are different ways of placing checks and balances on the powers of the Scottish Parliament.

Q23 Chair: A quick one from me: if there were much greater powers and independence for local government in England, would people be happy that the current relationship between Holyrood and local government in Scotland could persist and not catch up with greater independence for local government in England? Would that be entirely a Scottish Parliament matter?

Professor McHarg: This is an interesting question. The state of local government in Scotland is appalling. We have worse representation per capita even than England. During the referendum campaign there was quite a lot of discussion about a potential post-independence constitution and whether that would guarantee the rights of local government, and there is a certain attraction there. However, I would be rather reluctant to go down the road that I think some people are suggesting: that transfer of powers to Holyrood, for instance the Crown Estate, should be conditional on a further transfer to local government in Scotland. Again, why should we constitutionalise something for Scotland if it is not constitutionalised for the UK as a whole?

Q24 Chair: Indeed, but if there were to be a codification or even a written constitution that guaranteed the independence of local government, which is commonplace in many western democracies, that would immediately have implications for Scotland.

Professor McHarg: It would do, but I think that is a different question from saying the Scottish Parliament should be subject to limitations that do not apply to this Parliament. The issues arise again in relation to human rights protection. In principle, I do not see any strong justification why the Scottish Parliament should be absolutely bound when this Parliament is not. It smacks of distrust of the Scottish Parliament.

Chair: Michael, are you itching to come in on this?

Michael Clancy: I was thinking that Smith had said that there should be more consideration of further powers for local authorities. There probably is an appetite for that, Chairman, because we already see the Community Empowerment Bill, which is going to have its stage 1 debate in the Scottish Parliament tomorrow – that will extend powers into certain communities, the right to buy certain things, powers in relation to planning and allotments, lots of welfare aspects of local authority empowerment.

Q25 Chair: It is not an appetite sated by these clauses; it is one that is inferred as being something the Scottish Parliament should deal with?

Michael Clancy: It is certainly not in the draft clauses and it is something that Lord Smith put in his foreword, so I think that it is something we have to take in that view. On the point of these being draft clauses, we have to remember that this is something that will emerge after the election like some butterfly from a chrysalis. Well, it might be a butterfly. It is important for this Committee and other committees to look at these draft clauses and for us all to make our comments to the UK Government to seek to improve them so that when a Bill eventually emerges, it works.

Q26 Mr Chope: Turning to the provisions about elections, there are a wide range of powers over Scottish Parliament and Scottish local government elections that would be devolved under the draft clauses. Do you think that those are sufficient or too extensive?

Professor McHarg: Local government elections are already devolved, so the addition is powers over the Scottish Parliament. As far as I can see, the major restriction is powers over regulation of political parties and donations to political parties. The reasons for not devolving that seem to be fairly obvious, so I could not see any major difficulties with the provisions as they stand.

Q27 Mr Chope: Why do we have to do this at all? Why can we not have United Kingdom control over the franchise and the elections so that everywhere in the United Kingdom has the same system?

Professor McHarg: Well, we do not have the same system. We already have a different system in Scotland. We have the additional member system. It is different. In Scotland it is different; in Wales it is different. In Northern Ireland, we have a different system for local government; in Scotland, they have a different system for local government. That particular genie is already out of the bottle.

Mr Chope: My understanding is that all those systems were approved by the United Kingdom Parliament.

Professor McHarg: No, the introduction of single transferable vote for Scottish local government elections was introduced by the Scottish Parliament.

Q28 Mark Durkan: Going back to something that you have already touched upon in terms of the power to change the franchise for the Scottish Parliament and the question of the super majority being required, I detect from what some of you are saying that you can see difficulties with it. Can you say what people thought were the attractions of it in affording protections against particular changes or frequent changes? Notwithstanding those attractions, can you say something more about the difficulties that you might foresee? In particular, Ian, I heard you refer to the risk of paralysis.

Professor Loveland: Personally I am very attracted to the requirement of super majorities in law-making processes for those issues that you would regard as morally very important. Our constitution has managed to stumble along for the best part of 300 years without recognising any need to distinguish between fundamental moral issues and the most trivial ones when it comes to legislative initiatives. Anything can be done by a simple parliamentary majority and that is perhaps in some respects unfortunate.

The Scots Parliament is created, of course, on the basis that it is a Parliament of limited competence, so we do not have that ideological difficulty of accepting there are some things it should not be able to do at all. It is a lesser leap of the imagination from that premise to saying there are some things it should only be able to do in a particular way. That particular way should make it difficult for those things to be done at all. The voting system presumably underlies the legitimacy of everything the Scots Parliament does, so to put the content of the voting system at the mercy of what might be narrowly sectional majorities would seem to me very problematic indeed. If it is to be changed, it should be changed on the basis of a very broadly based level of consent and that would necessarily have to come with the agreement of two, three, possibly four substantial political parties. That is what the two-thirds majority requirement does. What perhaps is regrettable about it is that it is not applied to more issues that could also be assumed to have a fundamental status.

Dr Elliott: I think that the idea of making certain things harder to do is unfamiliar in our system because we expect anything and everything to be doable by simply getting a majority in Parliament. If we had a written constitution, there would be all sorts of things that it was very difficult to do. It seems to me very sensible that there are certain fundamental changes that should not be able to be made unless you can build that kind of broader consensus. As Ian said earlier, it does invite the question: aren't there other things that other Parliaments and this Parliament perhaps should not be able to rush into doing without getting that kind of broader consensus? It is a good thing it is in there, but I think it opens up Pandora's box.

Q29 Mark Durkan: Just by way of sharing an observation, obviously in the Northern Ireland situation we have parallel consent. We have cross-community support also by qualified weighted majority that involves a dimension of parallel consent. When we negotiated those, we specifically said we did not want a two-thirds majority. We regard a two-thirds majority as potentially more difficult, believe it or not. At what point would the two-thirds majority be required, say, in relation to constituency changes? Would it be required after the constituency changes are known or would it be required to mandate the position, the exercise that would set about drawing up the constituencies? At what point is the two-thirds majority required? Then you will know whether or not you are likely to have difficulties.

Dr Elliott: I think it applies at the point when the Bill is being enacted. It does not apply at the earlier stages.

Michael Clancy: It is at the final stage, the two-thirds majority. If you look at new section 30(a)(2), a Bill is passed by a majority of at least two thirds if at its final stage.

Duncan Hames: Aren't you referring to the subsequent order?

Professor McHarg: The protection is for a number of constituencies, not constituency boundaries, which I think is what you are getting at. As far as I can see, boundary changes are not protected.

Professor Loveland: That is perhaps very unfortunate.

Mark Durkan: One usually is not far from the other in politicians' minds.

Professor Loveland: The obvious example is what happened in the United States in the 1950s and early 1960s – the drawing of constituency boundaries with the most extraordinary geographical shapes in order to concentrate large numbers of voters inclined to vote in a particular direction in one constituency, thereby leaving other constituencies much more likely to be won by opposing political parties. It seems to me constituency boundaries are an extremely important part of the electoral system and my inclination again would be they are important enough that they should be subject to this higher degree of protection.

Michael Clancy: That experience in the US resulted in cases before the Supreme Court, which Mr Justice Stevens writes about extensively because he was astonished by some of the boundary delineations.

Q30 Mark Durkan: That is for changes, so if it is not a change, the status quo applies?

Professor McHarg: We already have a process for attempting to prevent the gerrymandering of constituency boundaries, which is the existence of a Boundary Commission. I think I read that the Boundary Commission, although it will report to the Scottish Parliament, will remain a UK body, so there is a protection there.

Chair: Thank you all very much indeed. Thank you very much for giving us your time today and the benefit of your expertise. We appreciate it, and the fact that you have had to move quickly to meet with us is doubly appreciated. Thank you very much for coming.

Examination of Witnesses

Witnesses: **Willie Sullivan**, Director, Electoral Reform Society Scotland, **Juliet Swann**, Campaigns and Research Officer, Electoral Reform Society Scotland, and **David Torrance**, Journalist and Author, gave evidence.

Q31 Chair: Juliet, David, Willie, welcome. Thank you for joining us today. It is very good to see you, again in some cases. I will not, if you do not mind, give you the opportunity of saying something to start with. I will let you work that into your answers because I need to make progress. I know that a number of members need to be elsewhere within the hour. Tracey, will you start us off, please?

Tracey Crouch: I would like to start by asking for your overview of the draft clauses. What do you think are the overall implications of the draft clauses for the operation of the devolution settlement? Do you think this is a radical break from what has gone before, or just another phase in the evolution of devolution? Catchy, I know.

David Torrance: I will kick off. Is this a radical break? No, I do not think it is and I do not think it was ever intended to be a radical break. As Professor Michael Keating said elsewhere, it has come up with as much as they feel they can get away with to fulfil the very careful wording of the pre-referendum vow. I also think they came up against in the very short process the sheer complexity of unpicking elements of a highly integrated, UK-wide welfare state. Some of the issues around the clauses relating to welfare speak more to the complexity of the issue, as well as some political

horse trading. It is very confidently subtitled “An enduring settlement”, which I think is quixotic in the extreme.

We have to take into account the broader politics and this is a much wider point. The Scottish Government for as long as it is led by the Scottish National Party is fundamentally not interested in making any of these schemes work. Think back to the Calman commission a few years ago. I remember speaking to Scottish Government advisers who said that they tried to pretend it did not exist. When it required a vote in the Commons, of course they took a view and they voted for it, but they did not want to do anything that gave the impression that they thought this was a legitimate exercise or something they approved of or wanted to do anything with.

I think the same applies to the Smith commission. At the end of the day, the party leading the Scottish Government wants independence for Scotland. If they wanted devolution to work better, they would not have been criticising this as stridently as they have, because if this did work and did bed down, the risk from their point of view is that Scottish public opinion will move away from independence and towards the status quo. For obvious political reasons, that is not something they want to happen.

From the UK Government’s point of view, this sort of continual process of ad hoc devolution, of piecemeal devolution, in response to electoral pressure from the SNP is subject to the law of diminishing returns. It is very difficult from their point of view to get any political or electoral capital as a result. The SNP, the Scottish Government, has everything to gain from saying this does not go far enough and what little there is will not work.

Willie Sullivan: Yes, it seems to me as well that it is a continuing process. That is partly because of the party politics but it seems to me it is because it is a bilateral discussion all the time. It has to broaden out beyond that. I think there needs to be some sort of constitutional settlement for the whole of the UK, not just the relationship between Scotland and Westminster. While the party politics is an important part of that, the way that it might be enduring is if there is some sort of public or citizen support for that settlement. Part of the problem with this is it was done so quickly and it was done, as Charlie Jeffery said, seemingly for partisan tactics and had divisive results between Scotland and England, between political parties. For it to be a finished settlement, it seems like that is pretty tricky to achieve.

Q32 Tracey Crouch: You have both mentioned the enduring settlement. Do you think it is any more stable and durable than the settlements of 1998 and 2012?

Willie Sullivan: It is certainly not more.

Tracey Crouch: Should I say, any more or any less?

Willie Sullivan: I would say it is much less than 1998. I do not know if people have caught up with 2012 yet.

Juliet Swann: Yes, and that is part of the problem, isn’t it? Basically, there is a gap between what is happening now and what either the Scottish people want or what they know is happening already. David mentioned reflecting what the Scottish population think, but we do not really know what they think. We had a referendum on a yes and a no decision and then suddenly we had the Smith commission. Now we have draft legislation and no one has spoken to anybody and asked them what they want or what the purpose of devolving further powers is. We are going about it in such a piecemeal fashion, rather than thinking about the whole of the UK context and where Scotland and the Scottish Parliament fit within that and what the purpose is of devolving more powers, other than political tactics, and it is a bit of a guddle.

Chair: Is that a Scottish word?

Juliet Swann: I like my Scots words.

David Torrance: A bit of a mess, I think is the translation. The original 1998 Act endured fairly stably for a decade. The original legislation was quite well crafted and matched, I think it is fair to say, the aspirations of the Scottish people at that time. Since 2007, you have had this constant process of the steady rise of the SNP and then the referendum, a much larger yes vote than I think many people in London anticipated. That is what now moves everything forward. Public opinion is fairly clear that it wants all of welfare devolved, and that obviously has not happened, and also all income tax. There is probably more in that direction than there is welfare in the draft clauses. Of course, it is not that straightforward. Government is not simply about translating public opinion directly into legislation. We would end up in a very different situation if it was. It is a balancing act between, I suppose, public opinion – what the parties judge to be electorally appealing – and also what is possible. I referred earlier to the sheer complexity of unpicking elements of the UK-wide welfare state.

Juliet Swann: You said obviously the 1997 process has endured in a number of ways, but then the process leading up to that took a number of years. It was not decided in months, which is what we are looking at here. If we are going to learn anything from the fact that that endured for as long as it did, or continues to endure in a manner of speaking, then for me that would be, “take your time”.

Q33 Paul Flynn: Going back to Dr Mark Elliott’s comment regarding the permanence of the devolved institutions and the civil convention – legally vacuous but politically significant – if we have to begin to realise that the word “enduring” means six months, who is providing the vacuum and who is providing the significance?

Willie Sullivan: I am a political animal much more than a legal animal. The previous discussion was interesting, but I think we need to be honest with people about what these things are and what they achieve and what the possibilities are. To pretend that they are something other than they are is what erodes trust in the political system. The bigger question about the erosion of trust in the political system partly manifests itself in Scotland’s growing support for devolution. It is not just about nationalism. It is about distrust in politics as it has been done in the past.

David Torrance: Regarding the permanence issue, I was thinking about this earlier and I am slightly mystified as to why this assumed such significance. I think it originated with a Gordon Brown financial speech during the referendum campaign. Beyond some fringe eccentrics, no one seriously suggested that the Scottish Parliament was not a permanent institution, so quite what they thought they were combating – some Scottish Nationalists, in my experience, reference the Stormont Parliament in Northern Ireland, which of course was abolished, but equally, in quite extreme circumstances. I do not think anyone saw that applying or arising in Scotland. Inasmuch as I understand the constitutionality of it and the legality of it, the only way to make it permanent is with a written constitution. Even then it is not permanent because constitutions can be amended. It seems to me to have been bigged up and given much greater significance than it required even in the political sense.

Juliet Swann: I think that is what it would be for me as well, when the previous panel was talking about the fact that the Sewel convention has worked quite efficiently since 1997. It is fine. Does it need to be made permanent? What are we trying to say by making it permanent? I would also totally agree with David that the only way to make any of these constitutional conventions and settlements permanent would be for us all to have a written constitution that was the end point. If Parliament cannot bind its successors, which it cannot, then you cannot possibly say if anything is permanent or not because the next Government could decide that it is not.

Q34 Paul Flynn: You have written, Mr Torrance, that the Smith commission further reduces the distance between the constitutional status quo and independence. How is this apparent from these draft clauses? Do you think there is a danger that we are eliminating future possibilities such as federalism?

David Torrance: Two points. Any further process of devolution necessarily reduces the distance between the status quo and independence. I just think that is a truism. It depends whether that is seen as politically desirable from the people devolving the power. Sometimes I think that in a philosophical sense, Westminster, or rather the UK Government, does not give as much thought as they should to the holistic consequences of that.

Does it reduce the likelihood of a federal settlement? I think there are huge parts of these draft clauses that hint ever more in a quasi-federal direction. For example, Lord Smith placed great weight on inter-governmental relationships, which at the moment are quite informal and casual, mainly the Joint Ministerial Council. He wants these to be given much wider scope. Indeed, I think discussions are already under way in that regard. Those would be recognised by any other country, Australia or Canada, as discussions between the federal government and state or regional governments. We may get on to this: the super majorities, the two-thirds majorities, are a feature of federal constitutions around the world.

In parallel to this process, of course, as the Prime Minister famously set out the morning after the referendum, there is an ongoing discussion about English governance, which has always been the elephant in the room. Federalism depends much more on that being resolved adequately and, of course, the Upper House rather more so than anything in Scotland. Scotland is now a fairly established, devolved part of the United Kingdom and I think will be, inasmuch as there is public consent for that. No, I do not think this precludes a federal settlement. In some ways, it points more in that direction.

Q35 Paul Flynn: Do you think there is a possibility, since the change in opinion in the Irish Republic after the Queen put on a green dress and bowed her head in penitence in Croke Park, of having a federal system of five nations?

David Torrance: I think that is extremely unlikely.

Paul Flynn: Sinn Fein might win the election.

David Torrance: Well, yes, but for all sorts of reasons it is unlikely. It is fun drawing comparisons between the Irish experience a century ago and the Scottish experience, but the clear difference was that public opinion was unequivocal in the case of Ireland. It was not split down the middle as it is in Scotland. I am pretty sure that remains the case.

Q36 Duncan Hames: We discussed earlier how clause 3 in the draft clauses for the Bill sets out to devolve control over the arrangements for the Scottish Parliament and the Scottish Government. Do you consider what is there to be comprehensive?

Juliet Swann: Unlike Aileen, I did not take the time to work out exactly which clauses it amended and which ones it did not, and I think that is problematic in so far as how anybody would actually know. I am beginning to think that all draft legislation should come with an amended version of the legislation it is seeking to amend. Obviously, decisions were made behind closed doors by Lord Smith and the delegates to his commission and this is supposed to give effect to that, but whether that gives effect to what people want is, I think, another question altogether. If constitutional lawyers cannot understand it, then you are in trouble.

Q37 Duncan Hames: In terms of not so much the legislation but the principle, what say, if any, should the UK have on how the Scottish institutions administer their own affairs?

Willie Sullivan: I guess if you are devolving power you are devolving power, so whatever you have devolved you should then not have any say on. If powers are reserved, then that is the matters that the UK Parliament has a say over.

David Torrance: The exception being welfare, I suppose. The vow was quite clear that welfare would be a shared responsibility and the Scottish Government made much of some of the draft clauses in welfare terms. To my reading, it was an entirely innocuous suggestion that if the Scottish Government were to exercise certain welfare powers once this is implemented, they should seek agreement on logistics, timing and dates and so on with the Secretary of State for Scotland. This was bigged up to be some sort of veto exercise by Westminster but, again, I think that was largely political.

The Scottish Government, curiously, devotes immense energy to emphasising and explaining how they cannot use devolved powers and how they will not use the even more devolved powers in the future. Welfare in political terms is particularly tricky for them; beyond the rhetoric of the referendum surrounding tackling inequality and social justices and so on, in policy terms the Scottish Government does not have much on welfare. I suppose what they are trying to do is to close that down ahead of the powers being devolved. They do not want there to be an impression or an expectation that they will do something radically different with welfare. Doing something radically different would be expensive and potentially unpopular, so it is intensely political there.

Coming back to the point about a federal system, shared arrangements are a perfectly common feature and shared arrangements, shared powers, hinge upon good intergovernmental relations and ongoing discussions, negotiations and meetings. I think that was blown out of proportion by Scottish Ministers for obvious political reasons.

Willie Sullivan: The truth is that if you have to get agreement from somebody in order to do something and you cannot do it without that agreement, then it is technically a veto. Obviously, there is interrelationship. There are interactions between what one government does and what on and agreed upon somehow. I am not sure we really know how to do that yet. I think there is a problem with us looking upon government in this country as a pyramid when in reality, the states who seem most stable in quite a changing time, when democracy is struggling a bit – that is a concern for the Electoral Reform Society. I know when Graham was at the BBC thing on the Democracy Day that the results from *The Economist* survey on the Democracy Index were concerning. In these times, we need to look at what is stable. The most stable governments seem to be ones that look much more like a set of nodes in a net than like a pyramid. There are many more points of flex with them. The relationship between the Scottish Parliament and the UK Parliament needs to be quite flexible. It seems difficult in our culture and the way that we think about Government and politics for that to come about, though.

Juliet Swann: If you are talking about relationships between the two Governments, then clauses 20 and 21 become interesting. I would not agree that they are innocuous, but I also would not agree that they are a veto. I think there is something there about learning, as Willie says, to work together and to co-operate rather than thinking of one as the big brother to the other. I thought the clauses were interesting in their similarity to some of the clauses in the Government of Wales Acts to do with the LCOs, and probably what we have learnt from that experience and the problems and positive things there have been would be worth reflecting on when thinking about it. The Smith recommendations that we put in place some kind of proper formal working relationship are incredibly important if there is going to be that level of understanding that it is not about big brother telling little sister what to do. It is a complementary relationship where you are trying to work together to produce a system that benefits each area to the best of that area's needs.

Willie Sullivan: Here is the principle, though. Who knows if both Governments can agree what a tax system is for, for example, or a welfare system? Different political points of view will define what those purposes are on different things. Unless you can get both the bodies to agree what the purposes of those things are, you have a difficult starting point. But maybe they do not have to agree what the purposes are. Maybe they just have to put it on the table that they disagree – “This is what we think a welfare system is for” and, “This is what we think a welfare system is for” – and work within the fact that you have different purposes for them.

Q38 Mark Durkan: I am tempted by examples in the Northern Ireland context in relation to welfare, where on paper the Assembly has the legislative power devolved to it in terms of welfare but has, in effect, found itself in the position where that is merely by way of karaoke legislation. The British Government has in the past couple of years, for instance, effectively fined the spending of the block grant on the basis that they calculated that because welfare reform legislation had not passed the Assembly, that meant more than should be spent under welfare reform had been spent, therefore the money has been taken out of the block grant. A Westminster Government decided that it can do this and, of course, has also said it is not just what the rules and the rates are about, where there may be some flexibility, not least allowed under the Stormont House Agreement, but in effect statements are made to the devolved Administration that, “You cannot share in the new computer system unless you do this our way and to our form”. While it is provided for on paper by way of who has legislative authority over these things, when it comes to the actual system building and system making, you are then in a very different equation. The relationship is not quite one of fine constitutional theory, then. Have you any thought about the sheer practicalities – the real, literally machinery and technology of government issues that they in practice face and who has leverage in that situation?

David Torrance: It requires a mature relationship between all the different Administrations and different Parliaments. Of course, you cannot legislate for maturity and good relations; if only we could. Coming back to my point initially, welfare is incredibly complex and it has been so highly integrated for so long. Of course, Northern Ireland is a historical anomaly. The situation arises because the Stormont Parliament pre-existed most elements of the welfare state and so when the NHS was created they had to adopt the legislation. That is not the case in Scotland, although equally elements of welfare have been devolved to the Scottish Parliament quite quietly and unostentatiously over the past few years. Very modest measures but, as far as I know from discussions with officials and Ministers in both Administrations, they are often surprised at how well those negotiations and transfers of powers have gone. I think there is a gap between the reality on official level and perhaps the political presentation of it. Welfare is difficult. It is politically difficult above all and, as Willie says, it is maybe wishful thinking to think it will ever be entirely smooth.

Willie Sullivan: I think the difference in these clauses is that the welfare system can be changed. The elements of it that are getting devolved can be different. There could be a different welfare system. Tax would be equally contentious if it was not for the fact that there seems to be an acceptance that there is one type of tax system. You can only design your tax system in the way that the UK has designed it, and what is going to be given to Scotland is just the ability to collect those taxes within that set system. If they were to truly have the power to change that into a different tax system to tax different things—because tax is as important if not more important than welfare in the effects that it has on your society and your economy, obviously.

David Torrance: There is probably also a cultural issue, dare I suggest, with the Treasury and the DWP being reluctant to cede power. The Treasury is well known for not enjoying that process. There were suggestions that in the closing stages of the Smith negotiations there was a bit of watering down instigated by the DWP. I suppose there would need to be a cultural change at that level in Whitehall, with those two departments in particular, to get beyond the psychological hurdle

that they run the show in every respect. I imagine that would come with time but it is not going to be easy.

Juliet Swann: We are considering legislation and the legislation will empower the Scottish Parliament to make changes, sometimes in consultation with Westminster. Making that cultural change and making that actually work practically is up to the individuals who are faced with the discussion and the decisions at the time. It does seem complicated because it has been so speedy, and it is incredibly complex and there has not been any robust consultation. Of course, it feels like we have no idea whether it is going to work or not because no one really talked it through. I think your example is absolutely perfect. Yes, it is all very well saying you can do this, but if you do not provide the systems to make it work then it is not going to happen.

Q39 Mark Durkan: Touching now separately on the issue of the electoral arrangements, have you any views on the adequacy, balance or necessity in respect of the powers over Scottish Parliament and Scottish local government elections and systems?

Willie Sullivan: It seems about right to us. As has been said previously, we have different electoral systems, a different political culture, different political parties. It seems right that the Scottish Parliament should have power over its elections and how they are run and the rules of that. I don't know if you want to talk later about the super majority.

Mark Durkan: You can go on to it, yes.

Willie Sullivan: As was said before, on an issue as important as how power is transferred from the people to the politicians, then it seems right that it should be more difficult to do than other forms of legislation. I also agree with the point that that should apply as much here as it does in Scotland.

Juliet Swann: If you look at what has happened since the Scottish Parliament was established, the control over local elections – and that even when it did go wrong, the Gould report was swiftly commissioned and the Electoral Management Board was established. The Electoral Management Board very successfully ran a referendum with a hugely high turnout and massively high registration rates and all the local registration officers obviously also had to work. The fact is it is working, so it seems to me that it makes sense to then reflect on the fact that the Scottish Parliament is different and does have different parties and different political cultures. Allowing the Scottish Parliament to make decisions about its own electoral arrangements seems to me to make perfect sense.

David Torrance: I agree with Juliet. The success of the referendum makes the case unanswerable that the Scottish Parliament should be responsible for its own elections. As we know, it is already responsible for local government elections. It may be running another referendum campaign. I think the precedence is clearly set there for a section 30 order and everything that goes with it.

The super majorities I think is a sensible measure as a recognition that changes like that require a much broader consensus than just a straightforward majority. Again, I suppose the historically minded will have in mind Stormont and its pretty swift move to gerrymander both the Parliament and also local government for sectarian reasons, essentially, at the time. I am not suggesting there is a parallel now, but a super majority would avoid abuse. Of course, we cannot anticipate any bad behaviour from future Governments, but it does not mean it is not going to happen. Super majorities in that sense is a bit of a departure constitutionally for us, but at the same time I think there is a pretty good case for them.

Juliet Swann: It is a useful thing to have, especially because we do not have a second Chamber in Scotland, but I think a little bit of tweaking at the edges of reform to the Scottish Parliament system – it probably needs to be more considered and broader, given that the whole system was set up so

that we would never have a majority Government and we do have one. Reform of the committee structure is already being talked about. While super majority makes sense for these issues because they are so important, if you are going to start changing the way the Scottish Parliament functions, is there more that needs to be looked at?

Q40 Mark Durkan: You would have no worries with the super majority delaying changes that might sensibly have been made, people using it to—

Juliet Swann: I do not think so. We are pretty good at consensus when we need to be. We ran a minority Government for four years; it was all good.

Willie Sullivan: I guess a lot of our members of the Electoral Reform Society would want the Scottish Parliament to change to a single transferable vote but even with that self-interest, as I say, the way that power is transferred from people to politicians is that fundamental that it should not be done lightly. I have often said that it should happen here. There is virtually a convention now to have a referendum to change the electoral system here, so people know it is important.

Q41 Mark Durkan: You would have no worry about other issues being brought in as trade-offs? That has been the experience of Northern Ireland where you have the requirement for agreement, which in effect means vetoes and necessary authorities, so then quite extraneous issues find themselves bartered and brokered in before you get that.

Juliet Swann: I suppose that comes down to mature consideration of issues and responsible government, doesn't it? As I say, when the minority Government first arrived in 2004, it was like, "Will this work? Won't this work?"

David Torrance: 2007.

Juliet Swann: Yes, 2007. I knew I was wrong as soon as I said it. Will it work; won't it work? Yes, you are right, there were trade-offs. The SNP worked with the Tories on some things and with Labour on others and the Greens on others.

David Torrance: Although they have tried very hard to airbrush that.

Juliet Swann: We got things like the Climate Change Act. We got things through. There are only 129 of them. It is not as difficult as when there are 650.

Q42 Paul Flynn: I think you have partially answered this. Do you, Mr Sullivan and Ms Swann, think there is any danger of these arrangements leading to a divergence or possibly a further divergence of election standards within the United Kingdom?

Willie Sullivan: Not really. Most advanced liberal democracies seem to run their elections pretty well to a pretty acceptable standard. There might be slight differences, but as to them being looked upon as good, free, fair elections, I do not think there is much danger of that divergence.

Juliet Swann: We had a number of international observers in for the referendum and, as I say, the Electoral Management Board is a unique body that exists at arm's length from Government to run elections. That is its job and I genuinely think it is doing a really good job. The international observers seemed to agree.

Willie Sullivan: If one bit of the UK does it better than another, then I am sure they will share their learning.

Q43 Paul Flynn: Do you think there is any threat to the Electoral Commission as a UK body as a result of changes? Will it still continue as a single body?

Willie Sullivan: Yes.

Juliet Swann: We would still need it to exist at a UK level because it would be the UK Electoral Commission and look after—

Willie Sullivan: The office that is answerable to the Scottish Parliament and the bits that it is answerable to are quite distinct. It would be good for sharing that learning that I spoke about as well. I do not think they have to be separate. They could be separate, though; I do not think they have to be.

Q44 Paul Flynn: I was not aware of it, but you say there was some supervision or at least some observations by international bodies like the Council of Europe at the Scottish referendum. Do you think that is likely to continue?

Juliet Swann: Yes, we had people from all kinds of different places, lots of very strange countries.

Q45 Duncan Hames: I hope they found the committee reassuring when it declared on polling day that no voters would be shot. It all depends on what you understood “no voters” to mean. I wanted to return to this question of the extension of the franchise to 16 and 17-year-olds. This is being done under a section 30 order. Do you think there would have been any case for doing it through primary legislation?

Juliet Swann: Had we not already been through the process of extending the franchise to 16 and 17 year-olds, the consultation that went with it, understanding the problems and the hurdles that had to be overcome and some of the difficulties around data protection and so on, then maybe, but we have been through that process. We understand what needs to be done in order to create that register, so I am very relaxed about it.

Willie Sullivan: There is political consensus so it seems like a good thing to do.

David Torrance: Again, I think after the referendum it became inevitable that that would flow to other elections. It is very difficult intellectually to argue that the future of Scotland as part of the UK is so important that 16 and 17-year-olds have to vote on it and they are able to vote on it, but somehow they are not capable of considering local government or devolved elections. I think that became inevitable and, as you say, it was run successfully in logistical terms. I cannot think of an argument against it.

Q46 Chair: Thank you very much indeed, David, Juliet, Willie. Nice to see Juliet and Willie again; David, nice to meet you too.

David Torrance: My pleasure.

Chair: Thank you very much for your evidence today and thank you for making yourself available at very short notice. You can gather we are trying to fulfil Parliament’s duty to pre-legislatively scrutinise. Even on a very tight timetable, we will not be defeated.

Juliet Swann: Good luck.

Chair: Thank you so much. Good to see you again.