



Political and Constitutional Reform Committee

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

Monday 9 February 2015

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Written evidence from witnesses:

- [Dr Eve Hepburn, University of Edinburgh](#)

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Members present: Mr Graham Allen (Chair); Mr Christopher Chope; Tracey Crouch; Mark Durkan; Robert Neill; Mr Andrew Turner

Questions 47 – 92

Examination of Witnesses

Witnesses: **Professor Sionaidh Douglas-Scott**, Professor of European and Human Rights Law, University of Oxford, **Dr Eve Hepburn**, Senior Lecturer in Politics, University of Edinburgh, and **Professor Michael Keating FRSE FBA**, Professor of Politics, University of Aberdeen, gave evidence.

Q47 Chair: It is good of you to visit us this time rather than us come to you. You are very welcome. Thank you all for sparing the time to come and see us, particularly because we know that we are all moving at a rapid pace. We were quite determined to do a bit of pre-legislative scrutiny on these clauses, so it is very good to see you. Did you want to say anything to start off, or shall we jump straight into questions? Are you happy to dive in? I am sure, being expert witnesses, you will work into what we ask you whatever you would like to say.

Professor Keating: I will just say something on my own behalf. I am here with a Royal Society of Edinburgh hat on, but I also have my own views about this. The Royal Society will be putting in evidence next week and that will be their official position. I will make a distinction, maybe, between what is their official position and what is just my own view.

Chair: Thank you, Michael. Bob, do you want to kick us off?

Q48 Robert Neill: Ladies and gentleman, you have all looked at the clauses. We have seen the written submissions that you have made. I would like to get a sense from you, for the record, of these draft clauses overall. What are the overall implications of them? Are they workable? What do

they do? Where do they take us? What is your overall sense of it as far as the operation of a devolution settlement that might be in operation is concerned?

Dr Hepburn: I would say it is a very incrementalist approach to constitutional change, based very much on the minimum level of agreement between the parties in Scotland that were involved in the supervision, which includes the devolution of some powers, especially in the area of tax, and the retention of other powers.

Robert Neill: Are we all right with the mics? Yes. Perhaps you could try to speak into the mic a bit. I thought our recorder was having a bit of trouble, that's all.

Chair: The acoustics in these rooms are notoriously bad.

Robert Neill: They are much worse than the ones in Portcullis House.

Dr Hepburn: I will try to speak up.

Robert Neill: That is better.

Dr Hepburn: It is a very incrementalist approach to constitutional change, based on the lowest common denominator—in my view not offensive in the least but, I imagine, extremely disappointing to people in Scotland who thought that the vow and the Smith commission would result in further extensive powers to Scotland and something potentially on a par with the near federalism that Gordon Brown talked about. In particular, in my view, it is disappointing because it has not changed the status of the Scottish Parliament in relation to the UK. It is still in a hierarchical relationship, subservient to the UK, so there is no radical break. It is not really creating the Scottish Parliament as an equal partner to the UK.

Professor Keating: My view on this, and the view of the Royal Society, is that this whole thing was done with undue haste, for political reasons that we are familiar with, in the last week of the campaign. There was this so-called vow to do something very quickly, and that was then translated into a timetable under which there had to be proposals by St Andrew's Day, 30 November, and then draft clauses by Burns Night, which is 25 January. This did not give any time for consultation with Scottish civil society. I know no group in Scottish civil society that says it had adequate consultation over this. There was not a chance for the Scottish Parliament or the Scottish electorate to engage in it.

This is particularly unfortunate because these new powers were sprung during the referendum campaign, when at an earlier stage we were told that more powers for Scotland was not part of the referendum debate. It was simply about independence or not, and the extra powers option was not on the ballot paper and therefore not for discussion. Then we were told that whatever the outcome of the next general election, there would be more powers and that a no vote meant more powers.

There are problems with that process from a democratic and participative perspective, but it also meant that there was not time to do all the technical work that is required when you are doing things like calculating the effects of changing the income tax, and the effects of income tax on broader UK and macroeconomic stability, or how you calculate the Barnett formula. The danger then is that if you implement these proposals as they are, we are going to end up with something that will have to be revisited because there have not been the simulations or the homework behind them all.

Finally, the parties have said that these will be delivered after the election whatever the outcome of the election. Constitutionally, they cannot bind a future Parliament, and politically we do not know what the future Parliament is going to look like. We imagine the next Parliament will have its own view on these matters and the Scottish Parliament will have their own view on these matters. All I can see is that these clauses are a contribution to debate.

Finally, although Sionaidh knows much more about this than I do, there are problems in the technical drafting of the clauses themselves, so we were very concerned whether they would even deliver on the Smith proposals as they are drafted.

Q49 Robert Neill: Before you go into it, the logic of your position, Mike, is that if Scottish civil society and the Scottish Parliament may have a view for the future, so must the civil society of the rest of the United Kingdom.

Professor Keating: Absolutely.

Robert Neill: They may take a very different view as to the adequacy or otherwise, mightn't they?

Professor Keating: Yes.

Professor Douglas-Scott: I completely agree with what both Eve and Michael have said so far, and I will not go over that again. I do think that as a result of that, these draft clauses raise certain questions about instability in the British constitution, because there are certain political pressures that can arise as a result of them but also certain constitutional and legal points. What Smith throws up is a sort of dismantling, to an extent, of a certain amount of coherence in the British constitution, which then gives rise to all sorts of questions about parliamentary sovereignty, the role of the House of Lords, the role of the House of Commons, and the relationship of the Scottish Government and the UK Government. I would agree with what Michael said about the shortness of time being a worry in the context of such important questions.

Q50 Robert Neill: Is that a significant break there, as far as you are concerned? Have we been there before or not?

Professor Douglas-Scott: It does not even have to be a very large break for these questions to arise. As we see in the context of the question of whether you can make the Scottish Parliament permanent, that then gives rise to all sorts of issues of parliamentary sovereignty, which could go in a variety of directions depending on what the parliamentary will is. I think that without a broader conversation about these issues, there is a worry about what will happen.

Q51 Robert Neill: I do not get a sense that anybody feels that this is something that is likely to endure. Tell me if I am wrong.

Dr Hepburn: I do not think it is at all enduring, not least because it does not represent by a long shot what the people in Scotland want. Colleagues at Edinburgh University conducted various public opinion surveys looking at people's thoughts about the Smith process, and they found that about 63% of Scots want to fully devolve tax and welfare, including about 58% who also want to devolve pensions and other benefits as well. I do not think those people will be satisfied with the draft clauses as they currently remain.

As Michael said, there is that need, if you want to build an enduring settlement or you want to have a settled will of the Scottish people, to spend time engaging with the public on what they want. We had an opportunity during the independence referendum to engage with people and their views not only about the constitution of the UK but also about what kind of society they wanted. Unfortunately, since the result we have not had an opportunity to engage with the public on their views on their relationship within the UK and I think that is absolutely necessary to get a sense of ownership by the Scottish people on Scotland's relationship to the rest of the UK.

Q52 Robert Neill: None of you seem to think this is really a federal arrangement.

Professor Keating: No, it is not. In the RSE we pick up this notion of enduring settlement as well. What makes it non-federal, among other things, is that instead of saying that there will be certain blocks of competencies that will go to the Scottish Parliament and certain blocks that will be reserved to the UK, they take individual policies and pick little bits out, so the draft clauses become exceptions to exceptions—this will not be devolved except for this, except for that—and it just makes it very difficult. It will make policy making extremely difficult, because in order to get anything done you will have to line up so many different levels of government at the same time. It does not make for good policy making.

Then it raises issues that are simply undefined. The notion of detriment, which is a novel constitutional idea—the idea that if one Parliament does something that imposes a cost on the other Parliament there should be compensation—potentially could be very wide-ranging indeed. It is nowhere defined and it is nowhere limited.

Then there is the whole question of the Barnett formula. It is difficult to see how you can talk about assigning and devolving taxes to Scotland and then not look at the other side of the equation, which is how the Barnett formula works out. That is a matter of principle, but it is also very important when you work out the details, because there is a lot of money involved there. There are a lot of questions simply unanswered about how Barnett is going to work in the future and how the income tax base is going to be calculated.

Q53 Robert Neill: Do you think it was wise to have made the pledge to keep Barnett, or should that be part of the wider conversation?

Professor Keating: The problem is that people have their own interpretations of Barnett, and it is easy to say in Scotland, “Oh, we will have Barnett because it is fair”. People were saying during the referendum campaign that Barnett distributes resources according to need—which it does not, we know that it is not what it does—and saying other kinds of things in other parts of the United Kingdom. It is no longer possible to have those separate debates, because people are listening to debates elsewhere, so we need a UK-wide debate about how we are going to resolve these things.

Professor Douglas-Scott: You did ask whether it looks federal or is federal; I cannot remember your exact wording. I would say no, it does not, particularly in the context that you do not have protected competencies for Scotland. You do not have anything clear about shared rule either, about Scotland’s role in national co-determination. I think from those two respects it does not look like federalism at all.

Q54 Chair: Are there lessons to read across to England from this? Could you have an unsatisfactory arrangement that was spread to other countries and, because it was common, became more satisfactory—we will all suffer together?

Professor Keating: There are some implications of this immediately for England. One, for example, is that income tax becomes an England and Wales tax, depending on what happens in Northern Ireland. You are effectively devolving it to England. What happens to income tax yields in England? What happens if UK-wide income tax is raised to fund expenditure in England and that affects the Barnett formula? That kind of thing has an immediate impact on England. The Barnett calculations themselves have been obscure for the last 40 years, almost, and it is only a series of parliamentary questions and FOI requests that have gradually got out of the Treasury bit by bit how it works. We still do not know about those calculations, and people in England are understandably concerned about those. Whenever something comes that might cause an anomaly—for example, if you change the income tax base that immediately affects the Scottish income tax base—they say, “The Treasury will sort it all out, don’t worry”. Again, in a federal system you would have some

principles there. You would not just leave it to the Treasury, which brings me to another point that the RSE was very keen on.

If you are going to have devolved taxes and devolved tax bases and arguments about funding, there should be some source of knowledge of information about this to do the calculations independent of both Governments, so at least we are arguing on the basis of the same set of figures. That is not in here either, but in a federal system normally you would have some place where there is a trusted source of calculations. You may not agree on the policies, but at least you will agree about the basic facts and the basic statistics.

Dr Hepburn: In terms of the broader question of what lessons there are for England from this and a higher process, I would say there is very little from the process of the Smith commission, which was essentially a party political deal. I would draw bigger lessons from the Scottish constitutional convention in the 1980s and the 1990s, which brought together a group of civic actors—civic society—to decide a blueprint for the Scottish Parliament. In fact, I am heading down to Yorkshire later this week, where they are going to be establishing a Yorkshire regionalist movement that engages lots and lots of different actors from civic society, more on the Scottish constitutional convention model rather than the Smith model.

Q55 Chair: I understand why you say that but, equally, this has been a long and painful process and nearly, for those who believe in the Union, ended in tears. Perhaps it is the way not to do this, because it came so close to disaster. Perhaps Government should move much quicker and not have to be dragged towards devolution or not have to have a nationalist party that had a very tiny level of support several decades ago but now runs the Executive in Scotland. Perhaps this is an example of how not to do it. Perhaps we should listen much earlier in Whitehall and Westminster rather than have to be dragged to a devolution settlement for any other country in the Union.

Dr Hepburn: I would say from a comparative perspective that if you look at the independence referendum and the Edinburgh agreement, that was absolutely exemplary in terms of how these negotiations were conducted peacefully and accepted by both sides. The problem arose with this very hasty, breakneck-speed timetable in which to come up with draft legislation. I think, as both my colleagues have said, there is an absolute necessity to spend more time scrutinising this legislation in detail. As Michael said earlier, we also do not know which party will win the general election and what they will eventually enact.

Q56 Chair: It was all okay up to the Edinburgh agreement; is that what you are saying?

Dr Hepburn: Devolution was created to satisfy the will of the Scottish people. That settlement lasted very nicely for 10 years but, as happens in devolved situations, nationalist parties often have an opportunity to take Government and win a greater share of the votes. Whether or not this is a slippery slope to independence or whether devolution kills nationalism stone dead—you cannot talk on those binary terms. You can look, however, at what the public wants in Scotland, and it has been very clear for years now, for over a decade, that Scots would like an enhanced Scottish Parliament with greater tax and welfare powers but not independence. I think that should be the question of what Scottish voters want.

Q57 Chair: Can I pursue this line of argument? Michael, I will come to you in one second. Is it then the case that a measure of devolution came to Scotland, but that the main political parties and the ruling party in Scotland at that time, the Labour Party, did not believe in devolution and did not believe in responding further, and that maybe there was a big sigh of relief that we have had some devolution and that is enough? Maybe people felt there was not a commitment to devolution from the

Labour Party in Scotland or nationally. I am not trying to draw you into party politics; I am trying to look at this objectively in saying that the continued evolution maybe did not seem to have momentum.

Dr Hepburn: I cannot speak on behalf of the Labour Party or the Scottish Labour Party.

Chair: Oddly enough, neither can I.

Dr Hepburn: I do remember conducting research in about 2004 with various Members of the Scottish Parliament about their views on further devolution. At that point, the Labour Party struck me as a party—one of their members said to me, “Why should we run before we can walk?” with regard to the devolution settlement—as having no appetite whatsoever to enhance the powers, because they wanted to test the capacity of the Parliament before doing so. I cannot comment on the party politics that have happened within the Scottish Labour Party since then, but recently Scottish Labour has been the party most resistant to increasing the devolution settlement.

Professor Keating: Back in the 1970s, the Scottish Labour Party—it was called something else, Labour in Scotland—was dragged into devolution. It did not really believe in it. There was a small group who believed in it, but they were dragged into it because they were frightened of the SNP. The second time around, in the 1990s, there was a commitment. They had convinced themselves to do it.

Then, in the early years of devolution, opinion in England was remarkably tolerant and open to the idea of Scottish devolution, mainly because they just did not think about it— Scots can do what they like. Things went fairly smoothly, but there was bound to be a point at which the growth of Scottish devolution would affect the whole of the United Kingdom. That is the debate that we have needed to have for a very long time—how that fits together. Until other parts of the United Kingdom can decide what their aspirations are, it becomes difficult to do it. You can no longer talk about Scottish devolution in the way you could in the 1990s as something apart from the rest of the UK. I think that is what has happened partly as a result of the referendum, but partly as a result of the maturing of devolution within Scotland.

Q58 Chair: There are two things here. I am sorry, Sionaidh, I will come to you; forgive me for pursuing this line. One is sloth in the response from the Whitehall machine that forces people to push the pace along, and the second thing Michael is leading me to think about is the failure to have a coherent ask. We have got to this point in Scotland and people are arguing about which policy should be in or out. You would have thought that would have been something settled a while ago, but let me go to England and say, “Where is the coherent ask on English devolution?” Aren’t we repeating history here by Whitehall not being proactive and by the people who you think would benefit from this not really being cogent in terms of putting forward what they aspire to do?

Professor Keating: I think that is right. Another remarkable thing about the UK, which is why it is not a federation, is that there has been so little change at the centre as a result of devolution. We still have the UK and English Government and we do not really know sometimes which hat they are wearing.

Dr Hepburn: I was just going to say, mimicking Michael, that yes, there is a need to fundamentally look at the UK as a whole and not just continue this process of further devolving small aspects of power to Scotland. There is a need to imagine how the UK would act as a coherent entity. For that reason, I think it is important to look at these different models of federalism and federation in order to determine these very important aspects of shared rule that we would need—that we do need—in order to continue as a polity.

Professor Douglas-Scott: One perception of the 1998 Scotland Act was that it was carefully crafted to prevent further cries for independence and home rule. There must have been a perception somewhere that the job had been done for a generation, whether or not it had been.

Secondly, there was also an opportunity earlier in the referendum process for a question of devo-more/devo-max to be put to the Scottish people. For various reasons that was not put, but that could have been an opportunity for this conversation to have taken place. I believe that one of the reasons why it was not put was a perception that it was necessary to have this broader conversation, which would include all of the UK, not just the people of Scotland. We are now in this rather unfortunate situation where there is not a great deal of time for these matters to be discussed. They are being discussed on the hoof in a rather ad hoc way, and I think that that is very unfortunate.

Chair: Years of sloth and then breakneck speed—a perfect combination.

Q59 Mr Chope: What this shows, surely, is that the vow was wholly misconceived, and that what we need to do is try to create a situation where the vow is removed, because it is based upon the false premise that you could have further devolution in Scotland without consulting the other parts of the United Kingdom.

Dr Hepburn: In that case, the vow should have been carefully considered before it was made, because our research has shown that the vow was incredibly important in swinging Scottish voters towards the “no” camp.

Q60 Mr Chope: Exactly. It would have been a good idea if the vow had been discussed in Parliament, and I have raised this myself. It was just written on the back of an envelope, or on the front page of the *Daily Record* to be precise, and nobody thought it through. Now you even have Gordon Brown, in his Adjournment debate last week, showing that he himself is disavowing the vow, effectively, and saying that we are now creating, as a result of the vow, the perception that the United Kingdom is not coherent and the two separate parts of the United Kingdom are fighting against each other. He is now saying that that is a consequence of the vow.

Dr Hepburn: It struck me as very odd that all of the Scottish political parties and unionist parties had undertaken commissions and produced reports in the two years before the referendum date that outlined how they wanted to strengthen the powers of the Scottish Parliament, but it was not until a few days before the referendum that they made this vow. I think a lot of effort could have gone into thinking about what proposals they wanted and putting them together to the Scottish people rather than, as you said, doing it on the back of an envelope a couple of days before the referendum and putting that to the Scottish people.

Q61 Mr Chope: Now we have the situation where you have the vow. If that is the holy grail, we are basically going down a path towards disaster, aren't we? Don't we have to try to remove the vow and get people to think about this in the context of the whole of the United Kingdom?

Professor Keating: I think there is something unreal about this vow business, because the parties have said it is a commitment. They say that it will be delivered whatever the outcome of the election, so neither the people of England nor the people of Scotland nor people anywhere else are going to get a vote on the matter. We all know that they cannot bind the next Parliament, and politically it just lacks credibility. It is going to have to be revisited. The next Parliament will have its own say. It may be a very fragmented Parliament. There may be rebellions within the main parties, as there were during the 1970s. I do not see that the party leaders are in any position to guarantee delivery of this even if they were all in agreement.

Q62 Mr Chope: Dr Hepburn, you very valiantly produced some alternative ideas—federacy—that are based upon what has happened in parts of the British empire apart from anywhere else. For example, in the West Indies countries moved from self-government to increasing independence. Do you really think that that model would work in the United Kingdom?

Dr Hepburn: There are two models there that you refer to. There is the federacy model, which is used in places like Denmark and Finland with regard to their autonomous islands, and then there is the model of free association—associated statehood—which is a model that the UK Parliament used during the decolonisation process for islands within the West Indies. I was asked to draw upon these models to share further information about different constitutional options for the UK.

I think the federacy model has worked incredibly well in different parts of Scandinavia. There are aspects of devolution and federalism in the federacy model, because what it would do is grant constitutionally entrenched self-rule to the substate entity, but without the need to federalise the rest of the country, which again seems unlikely to be achieved in the next few months in the UK. That is why I looked at that.

I think the federacy model really touches on the issue of the permanence of the Scottish Parliament, which again was in the vow, and it was in the Smith report as well. It is in the draft clauses, but in a slightly different form. I know that you had various legal experts speak to you about that last week, so I do not need to go into any depth on that. There is an issue there of whether or not to make those clauses about permanence binding, and that is what federacies do. They make those clauses binding by making any change subject to mutual consent of the substate unit and the central state Government. We do not have that in the draft Bill as it stands.

Mr Chope: We do not have that in our constitution because of the sovereignty of Parliament.

Dr Hepburn: Yes, that is an issue. Would you like to pick that up?

Professor Douglas-Scott: I could try to pick it up, yes. I think that it is not impossible, but what the federacy/associated states question raises is an issue not of entrenching certain procedural limits, which is what we have been talking about in the context of making a Scottish Parliament permanent, but rather of certain substantive limits and an actual renunciation of sovereignty. It would be a question of the UK Parliament renouncing a certain amount of sovereignty. It has done that in the past. It has done that in the context of the independence of former colonies, and we could argue that that has happened in the context of the EU. The EU is slightly different, because while there has been a renunciation of a certain amount of sovereignty, I think most people would say that sovereignty could be reclaimed by the repeal of the European Communities Act.

There are definitely precedents, but if we are going down that route, I think we should acknowledge that something different is happening from the question of whether there could be certain entrenched conditions in the context of a Scottish Parliament being made permanent—some sort of limitation, some sort of two-thirds majority or some sort of clause that would say that the Scottish Parliament could not be abolished without its consent or without the consent of both Parliaments. I see these as two different situations, and in the context of renouncing sovereignty I think it is going to look very different. There is going to be a very broad conversation, and there is a question of whether such a measure could get through the Westminster Parliament.

Q63 Mr Chope: You see clause 1 as it is currently drafted as doomed to fail?

Professor Douglas-Scott: I do not think it manages to do what the Smith commission seemed to want it to do. I think there is a problem that it is not well drafted. It does not achieve that, and there are better ways of trying to make the Scottish Parliament permanent than wording that has been described as “legally vacuous”. I think it could be done better, yes.

Q64 Mr Chope: You have put forward your solution as to how that could be resolved, and in a sense Dr Hepburn has put forward her solution. Do you have a solution, Professor Keating?

Professor Keating: I know the Royal Society of Edinburgh has some wording, but I will not try to remember off the top of my head. It is to the effect that the Scottish Parliament is a permanent part of the constitutional arrangements of the United Kingdom or something. The final version will be drafted by a very distinguished lawyer. The Royal Society was quite unanimous that this was not good drafting. As Sionaidh said, it would not do what it is trying to do.

Q65 Mr Turner: We have also heard that clause 2 does not encapsulate the Sewel convention. How far do you agree?

Professor Keating: Yet again, this seemed to be strangely worded, because it includes the word “normally”, “The UK Parliament will not normally legislate in devolved matters”. We thought it was very strange to put the word “normally” in an Act of Parliament. Either it can or it cannot; that is the law. “Normally” is a matter of practice and convention, but a law should be a great deal clearer. Then there is the question of how you would entrench that in the constitution and how you would make that effective. It might need to be embedded in a broader constitutional understanding rather than simply appearing as an amendment to the Scotland Act, which it is. It is the clause “but blah, blah, blah, dependent on the existing legislation.” Again, we thought that that would not really do the trick.

Dr Hepburn: I have a problem with the word “normally” as well, for the various reasons that Michael has talked about but also because it allows the UK Parliament to still unilaterally amend or dissolve the Scottish Parliament. My problem there, and other people’s problem, too, is that there needs to be mutual consent in order to make the Parliament permanent. A two-thirds majority is possibly a way of ensuring that permanence and preventing unilateral action, which again is a self-limitation on the UK Parliament.

Q66 Mr Turner: But if we are saying there should be mutuality, that assumes that the Scottish Nationalists politically and the Conservatives and other powers in the south are capable of wanting the same things. What happens when the Scottish Nationalists go for their second referendum? Are they playing the game?

Professor Keating: That maybe hinges on the old argument about whether the Scottish Parliament has the power to call a referendum, and that issue was effectively fudged. The other thing we said in the RSE was that if there are circumstances in which the UK can intervene either to change the power of the Scottish Parliament, which is a new interpretation of the Sewel convention that has emerged in recent years, or to legislate in devolved matters, these circumstances should be clearly specified in the legislation. Something as vague as “normally” should not, but otherwise it might be suggested that it would apply in a national emergency, in a state of war, or for the UK’s international obligations. There are various things that might be put in there that would tie this down.

Professor Douglas-Scott: It is very poorly drafted. As it stands right now, apart from the problems with the word “normally”, it seems just to be the acknowledgement of the existence of a convention. A better job could be done to put this convention on a statutory footing, and that does not seem to have been attempted.

Q67 Mr Turner: What is the solution? Is the solution to hold back and rewrite these difficult words, or is it just to put up with it?

Professor Douglas-Scott: I would not put up with it. I would attempt to redraft those first couple of clauses at the very least, to provide for some sort of entrenchment—a requirement that consent be obtained of the Scottish Parliament if Westminster is going to legislate. There should be some attempt to do that. The same with the question of whether a Scottish Parliament could be made

permanent; there could be some conditions attached to that. That would be some sort of conditional entrenchment, if you like. There are reasonably good precedents in law that we can find, some of them from the Supreme Court of the United Kingdom. That would at least be an improvement on what we have now.

Q68 Tracey Crouch: Can I apologise for missing the start? I was speaking in the Chamber. I wanted to ask you about clauses 3 and 4. The Government indicates that draft clause 3 would devolve to Edinburgh full power over the Scottish Parliament's and Government's own arrangements and operations. How effectively do you think it does this?

Professor Douglas-Scott: I found it difficult to get my head around some of this. I think it is very confusingly drafted. One has to do a lot of reading, which gives one quite a bit of a headache, to work this out. I have not managed to come up with any great objections so far. It seems to be reasonable. As for the clauses concerning the need for a super-majority, I might have some points to make about that, but in terms of the control of the Scottish Parliament of certain affairs concerning its own composition and organisation, I do not see any outright problems.

Q69 Tracey Crouch: Getting your head around clause 3 is not unique. With the evidence that we heard last week, the drafting of clause 3 was heavily criticised for its rather convoluted approach. Professor Keating, do you have any comments or thoughts?

Professor Keating: I think the drafting is confusing but the principle that the Scottish Parliament should have control over its own procedures is quite sound and in line with what happens in federal and devolved systems elsewhere. The requirement also that there should be a super-majority for things like the electoral system I think is reasonable as well.

Tracey Crouch: You think the principle is sound, but perhaps the way this clause is drafted at the moment will not implement that principle?

Professor Keating: Yes.

Q70 Tracey Crouch: Do you agree, Dr Hepburn?

Dr Hepburn: Yes. I tried to wade through the Scotland Act and the clauses as well. I found it quite impenetrable. Perhaps that is because I am not a constitutional lawyer, but I think it could be clarified much better, perhaps even so ordinary people could read it and understand it. In terms of the super-majorities, I think that is entirely appropriate and used very effectively, especially in other federal countries and especially on significant legislative issues. Yes, I do agree with that.

Professor Douglas-Scott: Sorry, could I just come in here?

Tracey Crouch: Of course you can.

Professor Douglas-Scott: I think that the super-majority point is particularly pertinent given that there is not a second Chamber in the Scottish Parliament. It does act as some sort of check that a second Chamber might otherwise provide, so I think it is important in that respect, too.

Q71 Tracey Crouch: Thank you. How extensive and comprehensive are the powers over elections to the Scottish Parliament and Scottish local government that would be devolved under the draft clauses 5 to 9? Do you think they are enough or too much?

Professor Douglas-Scott: I am not a great expert in election law. I did try to work through these and the only reservation I had was possibly concerning the role of the Boundary Commission and whether there might be a question mark over certain matters relating to the size of constituencies. The more I thought about it the more I thought that although that particular area would be devolved

to the Scottish Parliament, I do not see any real room for abuse in that area, any danger of gerrymandering. I think in that respect it seems to be satisfactory.

Q72 Tracey Crouch: Could you explain what your initial reservation was, just to expand on that?

Professor Douglas-Scott: Yes. The Boundary Commission that reported to the UK Parliament in the past would report with a review, as far as I understand the situation, on the size and shape of constituencies, and the question of whether its report would be adopted or not was a question for the UK Parliament. As I understand it, that matter will now be devolved to the Scottish Parliament. There are some concerns generally in electoral redistricting, so I thought: would this give rise to any possibility of gerrymandering in Scotland? I could not quite work out whether there was scope for the Executive to amend a report of the Boundary Commission or not. I am not quite clear about that, but as far as I can see I do not think it raises too much of a problem.

Tracey Crouch: Professor Keating, Dr Hepburn, did you have anything to add?

Professor Keating: No, I would say the same as Sionaidh.

Dr Hepburn: I would say the same.

Q73 Chair: Again, there are lessons for England in all this. If the vehicle for devolution in England is local government, is there any reason at all that powers over decisions around electoral systems and governance should not lie with local people representing their views in local government rather than the creation of an English Parliament?

Professor Keating: There are two questions here. One is about England and one is about governance within England. The English problem is to deal with the so-called West Lothian question and whether there should be an English Parliament, or an English Parliament created within this Parliament in some way. The question of government within England is a separate question, but it covers many of the things that in Scotland are dealt with under devolution.

It is very difficult to do something in the English regions that is the equivalent of a Scottish Parliament, and it would be inappropriate because the situation is quite different. Whatever regions or city regions you have in England, they will look different from what happens in Scotland, but as far as the organisation of government is concerned I think that the UK Government have been extraordinarily restrictive in the options they offered local government to organise its own affairs. There is pressure to have elected mayors whether they want it or not. They vote no in a referendum so they ask you again: please vote for elected mayors or you have to have a cabinet system. I could see no reason at all why local communities should not decide what kind of local government arrangement they are going to have, whether it should be proportional or whether it should be ward-based, whether you have an executive or whether you go back to the old committee system. That is the sort of thing that I think local communities are perfectly capable of resolving for themselves.

Dr Hepburn: I would add, echoing Michael, that any form of devolution to the English regions would be very specific to each region. Often scholars of federalism and devolution say that whatever decentralisational powers you have, they have to reflect the needs of that particular society. Again, that is why it is absolutely essential to have that level of engagement with civic society and the public at large, to determine what they want and what powers they want for local government or a regional assembly, or for English votes for English laws.

Professor Douglas-Scott: I would add that any devolution to English regions might raise the question of the role of the House of Lords. Should it become some sort of senate that represents regions? That would be a very big question to take on.

Q74 Chair: Only Michael really went beyond regions to the localities, and the localities may be the vehicle rather than regions. It does not stop localities making their own sub-regions, as many are doing now, or their own regions, but that would be them rather than the centre making the regions. In Nottingham, I have to say, Michael, we do not have a West Lothian question or West Lothian problem. We have a Whitehall problem and question.

Professor Keating: Indeed.

Chair: How can we get on and do what we know best at the right level?

Professor Keating: Central to this is the question of allowing local communities to raise their own money and spend it in the way they choose. Whitehall in general, the Treasury in particular, is extremely reluctant to do that. Until you get that, hardly anything else really matters. The initiatives that we have had—city regions and the Northern Way, all the kinds of things in John Prescott's proposals in the 2000s—said, "Yes, you can have local government but we will control the purse strings. If you behave yourselves and do this and this and fill in these boxes, then we will allow you to spend your own money". With the present city region agenda, it appears to be very much part of the same thing. It is not about telling the local communities, "It is up to you the way you want it, and if you make a mess of things then you have to respond to your own electorates and they will throw you out". That requires a change in attitude on the part of all the political parties in the UK.

Professor Douglas-Scott: Not just control of the purse strings but also the very existence of the entity in question; witness the GLC and its abolition.

Q75 Chair: Again, I am looking for lessons for England here. Before recent events there was the Scotland Act 2012, which gave some income tax assignment. Even before the big change in recent months, there was a precedent. Do you see that precedent as being useful for England and English local government, so that perhaps the DCLG could fulfil the same role as the Scottish Executive in being the agency that then distributed, as indeed it does now, the product of part of the national income tax?

Professor Keating: The history of Scottish devolution has been that of Treasury reluctance to concede any taxation, effectively. Initially, when the Scottish Parliament was set up, it could change the income tax rate by 3p in the pound either way. It never did that, because the power was more or less unusable anyway. Under the Calman proposal and the 2012 Act, they get control of half of the income tax. That has not even come in yet. Under Smith, they get the whole of the income tax, but it does not give them as much financial flexibility as you might think, because it puts all the discretion, or most of it, on to a single tax, which is very difficult to raise and has not been raised since the 1970s and which is not particularly buoyant these days because of the way that the recession has failed to deliver rising incomes. Employment is going up but incomes have been stagnant for the last few years. It is not a buoyant tax. It is a very difficult tax to raise. It is a politically difficult tax and there are problems in having substantial differences between Scotland and England.

The alternative would be to say that the Scottish Parliament could have a wide basket of taxes. That would give it real discretion. Changing a little bit here and a little bit there could make a real difference. Similarly, if local government had a wider tax base, that would give it more discretion to make those choices at the margin but which over time can be quite substantial.

Chair: Anything from anyone else on taxation and lessons for England?

Dr Hepburn: Nothing to add.

Q76 Mark Durkan: I know the issue of super-majorities was slightly touched on earlier, but can I ask about draft clause 4, which seems to cover legislation that could then result in changes to the franchise, electoral systems, numbers of constituencies and regions and the number of regional Members? That legislation would require a super-majority of two thirds. How appropriate and desirable is that? How problematic may it actually be in practice?

Professor Keating: I think it is undesirable that a simple majority should be enough to change the electoral system, because it is open to evident kinds of abuse. They have this system in France, and they keep on changing the electoral system to suit the party in power. The only saving grace is that sometimes it backfires and they get their calculations wrong. Normally it requires a broader majority, and a two-thirds majority would make it virtually impossible for any conceivable single party to change the electoral system in Scotland. One can imagine a single party getting two thirds, but it really is highly unlikely, given the proportional system. This guarantees that there must be cross-party agreement and that one single party is not able to abuse this power. I think that is entirely appropriate.

Q77 Mark Durkan: Do you see any problems in achieving the two thirds, that parties might say, “We will only go along with this legislation if we get consideration on something else”, and that there would end up being a degree of horse trading around achieving the super-majority, which is some of the experience we have had in Northern Ireland of qualified majority voting?

Professor Keating: I can see where you are coming from, obviously. I do not really see this as being a problem in Scotland, because the present electoral system does command a broad consensus. To move away from proportionality would require the Opposition as well as the Government to agree with it, and it is difficult to see why they would do that. There has been a danger in some systems—the Republic of Ireland is a case in example—where the big parties gang up to try to squeeze out the small parties. That might be problematic; a two-thirds majority would allow them to do that. I think that is a risk that you might have to take. Two thirds seems to be appropriate, because it does prevent a single party but it does not make it impossible to change the electoral system. There may be a consensual movement to change the electoral system at some point. Some people have talked about the desirability of making it more proportional than it is at the moment, for example. Some people have talked about moving to STV. It is not a big issue—they do not talk about it a great deal—but I think it is appropriate that Parliament should be able to do that. The important thing is that it should continue to be proportional, and no party could come in and say, “We are going to have first past the post again”. I think this clause would do that.

Q78 Mark Durkan: The two-thirds majority only applies to the legislation; is that right? It does not apply to decisions that are then taken as a result of the legislation in terms of boundary decisions or boundary reviews or final numbers that Boundary Commissions are coming up with?

Professor Douglas-Scott: My reading is that it applies to the legislation.

Q79 Mark Durkan: The Parliament is to be given power to change the age limit on the franchise for Scottish Parliament elections in 2016. That is by secondary legislation, which would be an order under section 30, I understand. Would it be better to do that through primary legislation?

Professor Douglas-Scott: You can see arguments either way, but I think the section 30 route is preferable. There are some risks. One is that the section 30 route curtails the opportunity to have a debate in the UK Parliament about this, and there are a lot of people who would not be in support of this measure were it to be applied to the UK as a whole. But if it is to be introduced more broadly in Scotland, there may be an argument that if there can be rights to vote for 16 and 17 year-

olds in Scottish parliamentary elections, why shouldn't this be the case in seats for the general election in Scotland? That may then push for the increase of this, and at the point it happens it will not be possible to have that debate in the UK Parliament. So far in Europe, as far as I understand it, in the EU there is only one other country in which 16 and 17 year-olds can vote in national elections. I believe that is Austria; I may be wrong on that. This is in a way quite a radical step, but it obviously worked well in the context of the independence referendum in Scotland.

The other problem I could see in going down the section 30 route rather than primary legislation is that somebody somewhere might want to bring a judicial review. It does open this step up to the possibility of litigation, and then you would have all the questions about standing and the lawfulness of it. I suppose somebody aggrieved might try to bring an action. I do not think it is very likely, though. But those to me seem to be the two main problems with going down this route. I do not think they are insurmountable.

Professor Keating: I think it is appropriate that the transfer of power should be under section 30, because it will require legislation in the Scottish Parliament to do it. That is where the legislative process will take place. This is something that is up to the Parliament and people of Scotland. We are talking about Scottish elections, not UK elections. There is a consensus in Scotland at the moment. All the parties are now in favour of it. Yes, it may set a political precedent for the UK, but that is something that the UK Parliament will have to respond to. They are not obliged to do it just because the Scottish Parliament has decided to do it. I suspect that this is an idea whose time has come and that the UK parties are probably moving in that direction anyway.

Dr Hepburn: I also very much agree. I would also add that there was significant discussion and consultation about 16 and 17 year-olds getting the right to vote during the referendum. In fact, that age group seemed to be one of the most politically informed during the referendum process with some very strong arguments in favour of granting 16 and 17 year-olds the right to vote. As Sionaidh said, it would be a shame not to also have that kind of debate on a UK-wide level, but for Scotland I think it is also appropriate for the section 30 order.

Q80 Mark Durkan: I did table an amendment for the Northern Ireland Assembly to have similar powers some time ago. Going back to the issue of the super-majority, would there be any other issues in which you think that a super-majority would be relevant or appropriate, for instance in relation to local government?

Professor Keating: I have not thought through this a great deal, but it may be relevant in relation to local government. I think it is very difficult to entrench local government in the way that the Scottish Parliament is entrenched, because it is a different kind of constitutional creature. It would be useful to have some kind of stronger safeguards for local government than currently exist. There may be scope for thinking that through.

Q81 Chair: Couldn't your super-majority be a Westminster bar that had to be cleared? For example, if, as we have heard from various sources, Holyrood is a highly centralising institution, particularly in respect of Scottish local government, there should be some power where if the rights of local government, however they would be defined, were transgressed, the all-Union Parliament could come to the rescue of any local government organisation in any of the nation states of the Union.

Professor Keating: No, I do not agree. In my last appearance before this Committee I said that the structure of local government is clearly the devolved competence of the Scottish Parliament. That would be a recentralisation. This is something that has to be resolved within Scotland. My view is that Scotland is over-centralised, but that is something that the Scots have to work out for themselves. It would cause immense resentment if Westminster were trying to reach over the heads of the Scottish Parliament to local government in Scotland.

Dr Hepburn: I very much agree that local government is a devolved competence, and that would also lead me to try to make the Scottish Parliament permanent, not only as a symbolic act or to stop it from being abolished but also to protect its competencies from external encroachment as well. Regarding potentially local government, but I was also thinking about the European Union aspect, too, when thinking about the issue of the permanence of the Scottish Parliament—I am going off on a bit of a tangent here—I talked about the federacy model before, and a big issue for the Åland Islands was EU membership. In a federacy model, if you have a permanent Parliament then you can have a veto over any international treaty making. If we were to make the Scottish Parliament permanent and it could only be amended by mutual consent, then that would mean that the Scottish Parliament would have to assent to exiting the European Union, because the European Union obviously has a significant impact on Scottish Parliament legislation. I think that, again, there is a necessity there to give some teeth to the issue of permanence and make it constitutionally entrenched.

Professor Douglas-Scott: I think that may be an issue anyway, because of the connections within the Scotland Act to the European Union membership of the UK. A legislative consent order would be necessary, and Scotland might well not agree.

Q82 Chair: So, Michael, it is okay to abuse local government in Scotland providing it is done by the Scottish Parliament, but not acceptable if it is done by Whitehall?

Professor Keating: No, I do not think it is any of Whitehall's business, just as it is none of the Scottish Parliament's business whether Whitehall decides to abuse local government in England. That is the constitutional position, and I think we are perfectly capable of looking after our own interests in Scotland where local government is concerned rather than Whitehall.

Q83 Chair: Is that happening in local government, then?

Professor Keating: No, but it is not happening in England either, because all the parties in the UK, it seems to me, are—

Chair: I agree very much with that, but you are not offering me a solution for England. You are saying things are as bad in England as they are in Scotland.

Professor Keating: Yes, but we certainly would not trust the UK Government to come to our rescue.

Chair: I will come back to that, but now Andrew wants to come in.

Q84 Mr Turner: I can quite understand why you would not want us to organise what should be done in Scotland, because that is clearly Scottish, but I am not quite sure that I can see why three quarters, four fifths or even nine tenths of the population in England could be driven to stay in the Common Market when we have voted against it.

Professor Douglas-Scott: There would be a strictly legal problem, which I have tried to discuss earlier. The Scotland Act would have to be amended, and I think there would be problems with that, because I am not sure that there would be a legislative consent order given. That would raise all sorts of constitutional issues, possibly leading to some sort of crisis. I also think that we have to consider the relationship of the devolved nations to Westminster. It is not something that we would look at in terms of just size of populations. There are other relationships and other issues of parity going on there. Simply to look at it in terms of—

Mr Turner: Yes, but sorry, what do you mean? I do not understand what you mean.

Professor Douglas-Scott: I think that if we simply say that a certain percentage of the population as a whole has voted to leave the EU—for the sake of argument let us say the majority of people in England vote to leave the EU—on population percentage terms then you probably would have a majority over the UK. But devolution is premised on something in addition to that, which is an acknowledgment of a singular and specific status of certain regions of the UK, which takes them beyond just the size of their population.

Q85 Mr Turner: But you are saying, “Blow you, you are nine tenths, but we are going to veto this”.

Professor Douglas-Scott: I did not use the word “veto”.

Mr Turner: No, I know, but that is what you meant.

Professor Douglas-Scott: I said there would be problems currently, legally, in the constitutional set-up we have. Whether a moral or a political problem could arise is another matter. I think it is certainly worth considering that if you have two, possibly three, regions of the UK that want to go in one direction and the people of England want to go in another direction, simply to have the majority dragging along the others makes for a very unsatisfactory result and would incur bad feelings.

Q86 Mr Turner: Wouldn't it make more problems by being banned from going the way most of us want to go?

Professor Douglas-Scott: This again raises the whole question of why we have devolution.

Mr Turner: Well, the answer is apparently nothing for the English.

Professor Douglas-Scott: I am not going to get drawn into that—whether it is something for the English or not—but I think there is an acknowledgement that certain things, legally and educationally, are done differently in different parts of the UK. This leads to an acknowledgement of a certain status for that region.

Dr Hepburn: I accept the point you are trying to make. Why should England be driven by Scotland, Wales and Northern Ireland, which have more pro-European publics than England, but equally why should those other places be driven by the agenda in England? This is why, again, we come to this constitutional conundrum.

Mr Turner: Truthfully, the majority would be—

Chair: Andrew, just let Eve finish and then come in.

Mr Turner: Sorry.

Dr Hepburn: I was going to refer to another federacy model—that of Greenland. Greenland is a federacy in Denmark, and Greenland is the only part of the territory of the EU to have seceded from the European Union, in 1985. There is a question there—if we did have a different constitutional settlement, England, if the voters so desired, could secede from the EU, but why shouldn't the UK still be represented by Northern Ireland, Wales and Scotland? They could retain membership. Again, there is that need to think broadly about how all the different parts of the UK relate to each other.

Q87 Mr Turner: So we had better hold off before we sign any more documents, any more Acts, before we have sorted that out?

Dr Hepburn: I think there are a lot of political ramifications, and indeed there are a lot of political ramifications here in the draft clauses. These clauses should go to a broader consultation, not only in Scotland but in other parts of the UK, before we continue to enact legislation that meets incrementally small demands but does not radically overhaul the system, which is what I think we need.

Professor Keating: There is another EU implication too, because, short of leaving the EU, there is a proposal to renegotiate the UK's position and maybe repatriate some powers. Some of these powers are devolved, too, so there is a question of what role Scotland, Wales and Northern Ireland would have in those negotiations and in deciding what the final package was to be. That is completely unresolved at the moment. We do not know what the process will be.

Q88 Chair: If you believe in devolution as a principle, is it possible to only believe in it for Scotland?

Dr Hepburn: I am not sure I understand the question, because with devolution—

Chair: If you are sincere about believing in devolution—you in general, not you—then surely for other nations in the Union you must believe that equally strongly.

Professor Keating: Yes, but the thing about the United Kingdom is different parts of the United Kingdom have different aspirations. I think it is appropriate that they should be realised as far as possible. We do not necessarily have to have the same model in each. The principle should be as much devolution as possible depending on the way the people articulate it. The problem in England at the moment is that it is not quite clear how opinion is crystallising—whether there is a consensus on one particular model or another model—but when that consensus arises then, of course, it should be accommodated within the constitution.

Q89 Chair: You see, I sometimes have an interesting conversation with my nationalist friends in Scotland, because they just see their role as sorting out their view in relation to Scotland. I pose a question, which is: if you really believe in freedom, expressed either in nationalism or in devolution, in a sense you have to be internationalist; you have to proselytise; you have to take the word out. Or is it just a narrow, introverted, inward-looking philosophy that suits a particular set of political circumstances?

Professor Keating: I think it is a general principle that is realised differently in different circumstances.

Q90 Chair: But it is not being realised in some other countries in the Union, and in particular in England.

Dr Hepburn: That would require bottom-up mobilisation within England to create devolution there. I do not think that it is the job of the Scots to tell the English what to do. I would very much echo what Michael said earlier. You have to respect the local traditions and the local histories of each part of England, which is a very heterogeneous country. You might find some regions like Yorkshire or Cornwall seeking devolved assemblies; you might find other areas, such as Manchester or Liverpool, having a city region status; elsewhere you might see the strengthening of local government. I think all those forms of devolution are completely legitimate, but again the bottom line is that it has to come to the people. You have to engage civic actors to see what kind of devolution you want.

Q91 Chair: Even if the institution keeping you in thrall is the same one that is keeping them in thrall? You do not see there could be a unity of those people who wish to have a greater devolution

to the localities or the regions or the nations of a union? It is just something that can take place in one place—"It is our business, and if we want to do it and we have a grass-roots campaign, that is fine and damn the rest of you?"

Dr Hepburn: There were obviously attempts in 2004 to devolve competencies to the north-east of England. There were attempts to embed devolution across the whole of the UK, and it was rejected in that referendum in the north-east by about 80% to 20%. There are a number of reasons for that, but that should not preclude attempts being made again to try to meet the aspirations and needs of different peoples within England.

Chair: Sionaidh, did you have anything?

Professor Douglas-Scott: Just one short comment—those attempts were made, but I think the example of Wales is instructive, where there seemed to be a rather negative, ambivalent attitude towards devolution at first. Perhaps spurred along by certain happenings in Scotland, it seems to be taking off. I think that even if that grass-roots demand is not apparent at first, certain events can act as catalysts. I think certain more formal events, as the devolution we have in Scotland, can be that catalyst.

Professor Keating: I think something unfortunate happened first of all in the 1970s and then again from the 1990s: Scotland and the English regions were played off against each other. Back in the 1970s I remember there was a lot of opposition in the north-east of England to Scottish devolution, and then later on there was a realisation that we should not be opposing it, we should be demanding the same thing. Now there is much more common ground there and a lot of cross-border activity. There is, indeed, a movement in the north-east of England precisely to say, "We are in the same position, and if there is somebody to team up against it is against the central Government and its grasping of power". We always fall back into this notion that we are competing against each other, and that is good news for the centralisers, because of course they can play off the various nations and regions against each other.

Q92 Mr Turner: That is the problem. You seem to me to be arguing about the region. It is not the region, it is the English. It is the English people who have a view, or perhaps do not have a view. We are not arguing for regions; we are not arguing for Manchester. There has to be a decision for England or no decision. The people who are English have to make a decision one way or the other, because until that is done we cannot make any further steps. With these proposals for Manchester, it is all very well talking about Manchester, but does Manchester mean Manchester as part of England or does it mean Manchester as part of the UK?

Professor Keating: Yes, that is exactly right, and that is what I was trying to get to earlier on. There is an English question, which is mainly about legislation and the power of this Parliament to legislate for the whole of the UK, with Scottish Members participating in votes on English matters and so on, and then there is the question of the government of England. That is the internal government of England. These are two separate questions. They are both important, but they are two separate questions. In Scotland, both of those questions are answered in one. It is about Scottish self-government and it is about Parliament and so on, but these are separate in England. I think they are both legitimate questions, but they may have different and rather more complex answers.

Chair: Sionaidh, Michael, Eve, thank you so much for your time today. It has been very interesting. We are trying to move quite quickly. I think had we not chosen to move quickly, there would have been no pre-legislative scrutiny of the implications of what has happened with the Smith agreement. Thank you very much for coming down and giving us the benefit of your advice and opinions. I hope you will see that reflected in our final conclusions. Thank you for your time.