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# Devolution Commissions in the Shadow of Whitehall: The Smith Commission and the Creation of a ‘Powerhouse Parliament’

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## **Abstract:**

In the UK it has become common for commissions to be convened to recommend changes to the devolved settlements in Scotland and Wales. The most recent of these commissions was the Smith Commission, convened in September 2014 to agree a new package of powers for the Scottish Parliament. In this article we investigate the Smith Commission, offering both a first cut history of a pivotal moment in the UK’s constitutional development, and a case study that sheds new light on the workings of such commissions, on the culture and practices of civil servants, and on power dynamics both within Whitehall and between Whitehall and devolved governments. We set down a marker for what we hope will be the further comparative study of such commissions.

**Keywords:** devolution; civil service; commissions; Treasury; intergovernmental relations

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## Introduction

Drawing on published documents and over 24 hours of research interviews<sup>1</sup>, this article explores the operation and outcome of the Smith Commission, established shortly after Scotland's independence referendum to determine what further powers would be transferred to the Scottish Parliament (Holyrood). We are interested in the Smith Commission both on its own terms and for what it can tell us about: (1) the work of devolution commissions; (2) the UK's system of intergovernmental relations (IGR), and; (3) the internal dynamics of Whitehall. The article is *both* a first cut history of a significant constitutional moment *and* a contribution to several strands of existing academic literature.

Devolution commissions – and commissions more broadly – have been under-researched (exceptions include McAllister 2005a, 2005b). In part, we offer this article as a first step towards building up a collection of comparative insights into the UK's various devolution commissions.<sup>2</sup> Whilst each commission differs from the others, research might consider the themes and issues explored herein, namely: the role and performance of the chair; the membership and the inter-personal dynamics created; the mix of political figures and outside experts comprising the commission and the reasons for that; the role played by civil servants and the importance of their knowledge and previous work in structuring the process; the capacity for policy divergence and competitive welfare federalism created by each deal; the interdepartmental dynamics that revising the devolution settlement creates in Whitehall; and the tension between devolution's inexorable progress and the inertia created by Whitehall, especially the Treasury. As commissions, which were politically sensitive in their day, fade further into history research interviews with the participants could help to build up a bank of insights about the factors that contribute to the success of commissions, the factors that hinder them, and the dynamics that persist amongst small groups often working under significant political and time pressures.

Research on UK devolution commissions necessarily relate to IGR, the theory about how levels of government use formal and informal mechanisms to manage their relationships. IGR theory derived from formalised and uniform multi-level structures has been adapted to the less formal and uniform patterns found in the UK (McEwen et al., 2012; Bolleyer et al., 2016). Although devolution commissions do not operate through the formal machinery of IGR, they operate in the shadow of established intergovernmental relationships. Recommendations reached by such commissions

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<sup>1</sup> A list of interviews is included as Annex A. After writing the article, and with a suitable amount of distance from the conclusion of the Commission's work, we were able to talk through our arguments and conclusions with two of our interviewees, both closely involved in the process. These discussions were conducted 'on background' and are referenced as 'private information'.

<sup>2</sup> Since 1999 two commissions – the Calman Commission (2008-2009) and the Smith Commission – have considered Scotland's devolution settlement. The Richard (2002-2004), Holtham (2008-2010), and Silk (2011-2014) Commissions have examined Wales' settlement.

need to be approved by two governments – the UK government and the relevant devolved government – and intergovernmental working is often required following commissions to implement agreed policy. Of interest are not only the dynamics *between* governments, but also the dynamics *within* the UK government. Revising the devolution settlement often involves the interaction of numerous Whitehall departments. A close examination of such processes can shed light on inter-department relations, and in particular the role of the Treasury both in relation to other Whitehall departments and the devolved governments (Deakin and Parry, 2000; Levitt, 2014).

We first draw out key propositions from the literature that we seek to explore, outline our core arguments, and briefly situate the Smith Commission in the history of Scottish devolution. We go on to examine the assembling of the Commission and the structuring of the negotiations by the civil servants seconded to the secretariat. Following that we look at the deal reached, with a particular focus on the key areas of taxation and welfare, and consider the significance of the new devolved powers. We then shift our attention to the UK government, revealing how UK ministers exerted influence over the process and the tensions between Whitehall departments. Our core arguments are: that the deal creates new possibilities for policy divergence and what Keating (2012) describes as competitive welfare federalism; and that to understand how the deal was reached it is essential to consider not only the negotiating dynamics within the Commission itself, but also the power and interests of various UK government departments and ministers.

## **Commissions, IGR, and Whitehall**

Commissions have become a common way of resolving, but also of controlling and slowing down, debates about expanding the scope of devolved powers. McAllister (2005a, 2005b) brought a unique perspective to her work on such commissions, having been member of the Richard Commission. McAllister's articles take the reader through the process of a commission, from inception and the appointment of the chair, through to report and efforts to implement the conclusions. She draws particular attention to the importance of the membership and the chair, both of which are 'crucial components in a commission's success ... [although] their selection often proves controversial'. The chair is 'clearly important, and criteria such as public profile, political status, relevant experience and relations with government all feature highly' (2005a, pp. 499-500). Beyond the need to carry the confidence of the commissions' key stakeholders, the chair has a role to play in fostering a good working environment amongst a small group of members. The tone that they create, their ability to strike a balance between authoritative and neutrality, and their ability to nudge participants towards compromise positions are often vital to the success of commissions.

McAllister (2005b) also draws attention to the membership of such commissions, which, in the post-Nolan environment, have more often been advertised. The Richard Commission, which considered the powers and electoral arrangements of the Welsh Assembly during 2002-04, appointed five of its ten members through a process of public advertisement and competitive interview (McAllister, 2005b). Even if not advertised, recent examples of devolution commissions (e.g. Calman and Silk) featured a mix of political and non-political members, with expertise sought in specific areas. Composition may, in part, reflect the motive of those who established the commission. For example, experts might be included if the aim of the commission is to enhance knowledge or educate the population. On the other hand, a more politically oriented membership might suit commissions geared towards facilitating political compromise, avoiding blame (by sharing it), or increasing support for a proposition (see Marier, 2009).

Members of a commission also require support and, as McAllister notes (2005b, 41-2), it is common for civil servants to be temporarily seconded to secretariats established for such a purpose. Below we explore the role of the chair (in this case Lord Smith of Kelvin (Robert Smith)), the composition of the Commission, and how the secretariat made sense of the unusual and politically sensitive situation that they found themselves in. In doing so we contribute new insights that can sit alongside those of McAllister, building towards a deeper and comparative understanding of such commissions.

The sparseness of the literature on commissions can be contrasted with the wealth of literature on IGR. This is not the place to detail the formal mechanisms of IGR that have been developed in the UK since devolution (see Paun and Munro, 2015, pp. 63-80). Devolution commissions do not operate within that formal machinery but they do operate in the shadow of intergovernmental dynamics. The work of generating proposals to revise the devolution settlement might be outsourced to commissions but the reality is that the governments in question must agree in order for the settlement to have political legitimacy and be implemented successfully. It is also common for such commissions to arrive at broad conclusions, leaving much of the detail to be agreed in working groups connected to the formal IGR machinery.

The fact that the Smith Commission was convened to look at Scotland's devolution settlement just six months after the Silk Commission had issued its second report on Wales' settlement is a reflection of a central characteristic of UK IGR: asymmetry. Each devolved nation has a specific settlement and that asymmetry 'is conducive to bilateral and weakly institutionalised IGR' (Swenden and McEwen, 2016, p. 489). As a by-product, asymmetry entrenches the power of Whitehall as the devolved nations have weaker incentives to present a united front (see Gallagher, 2012, pp. 208-12).

Previous research has argued that IGR 'is conducted "in the shadow of hierarchy"'. In the context of any intergovernmental dispute, the UK government has the upper hand'

(Swenden and McEwen, 2016 p. 505). The reasons for this are numerous and include: control of UK-wide public expenditure and departmental budgets; management of the formal machinery of IGR; and constitutional supremacy of the UK government over the devolved governments. As Swenden and McEwen (2016, pp. 505-6) point out, these built-in advantages require qualification. A convention has arisen that the UK government will not act in areas of devolved policy competence without agreement, and UK governments face political constraints on the extent to which they can ‘flex their constitutional muscle against the devolved nations for fear of losing electoral support and legitimacy’. Despite this, the picture that emerges from studies of IGR in the UK is one of Whitehall dominance. We find confirming evidence of Whitehall dominance in our research; although not present at the Smith Commission negotiating table, Whitehall was able to set the political agenda and steer the process.

A further issue identified within IGR, and for which we find confirming evidence, is the trend towards ‘more decentralisation and competitive welfare federalism’ (Keating, 2012, p. 227). Observing a trend across Europe towards policy diversification within states, Keating (2012, p. 228) suggests that ‘experimentation and variety may be the best way’ forward for public policy and the ongoing search for ‘how to link labour markets, welfare, local planning, and economic development’. Taking issue with those who, driven by a fear – implied or explicit – of a race to the bottom, call for policy harmonisation, Keating embraces the shift from co-operative to competitive welfare federalism. In the UK context he identifies, if anything, a race to the top in Scotland and Wales: ‘devolution is not undermining provision or narrowing entitlement’ (Keating, 2012, p. 222). An environment in which policy differentiation is possible is the trend and, on a normative level, may well be desirable, creating the possibility of experimentation and policy learning.

A way in which such learning may take place, via bureaucratic channels rather than political ones, is the unified UK civil service. This aspect of the UK state has been researched in the context of IGR, with civil servants being identified as a form of ‘institutional glue’ (Parry, 2012). Civil servants in all UK administrations work to similar codes that lay down their responsibilities, especially political impartiality and a duty to serve their own ministers. Officials of the UK, Scottish and Welsh governments also have a common framework of pay and grading determination, and no barriers to transfer between administrations. This creates not a common policy orientation but a cultural replication of interdepartmental bargaining within the UK government (see Parry, 2011, 2016).

This bargaining gives a special place to the central budgetary and finance agency, the Treasury. In common with such agencies internationally, the Treasury has a long-standing wish for control over spending commitments and has often used targets and other performance management tools to exert control (Thain, 2009; Thain and Wright, 1995). Institutionally, the Treasury often forms somewhat naïve but confidently held views about the human behaviours underlying benefits spending. The Department for

Work and Pensions (DWP) is often caught in difficult relationships with the Treasury because its policies are about large and potentially uncontrollable entitlement expenditure.

The Treasury has long worried about the higher level of identifiable per capita expenditure in the devolved nations than in England, facilitated by their political resources (well documented up to 1979 by Levitt, 2014; see also Mitchell, 2003, ch.8 for tensions between the Treasury and the Scottish Education Department in the early part of the 20th century; and Mitchell, 2009, pp. 34-38). The 1998 devolution settlement removed most control on policy detail while reserving the big-ticket tax and welfare responsibilities. For purposes of UK economic management, devolved spending remained part of total managed expenditure, with the Treasury making assumptions about its trajectory.

In the context of commission exercises like Smith, the Treasury may have to sacrifice the short game of increased devolved powers, which are largely determined by politics, in the hope that in the medium-term the ball will be back in its court via the overall fiscal framework and more detailed negotiation of welfare transfers. The model is one of tension between the inexorable trend towards further devolution and the Treasury's continued taking of views on the substance of policies that might be a vehicle to drain the UK exchequer (Deakin and Parry, 2000, ch. 8).

## **Core Arguments**

We offer new and confirmatory evidence regarding a number of propositions emerging from the above literatures. Before proceeding, the core arguments that we develop are:

- The leadership of the Commission chair was vital, creating an effective working dynamic amongst the members of the Commission;
- Civil servants from the Scottish Government and the UK government worked effectively, together with Holyrood officials, to construct an intelligible process that established and maintained momentum and reached a conclusion by the agreed deadline;
- The deal reached creates the potential for policy divergence between Scotland and the rest of the UK, symptomatic of the shift to competitive welfare federalism, but those powers remain more constrained than they might appear;
- The UK government, whilst not formally present at the negotiations, exerted considerable control, feeding their policy preferences into the Commission and shaping an outcome that fit their preferences;
- From Whitehall, the short-term political agenda was driven by the Cabinet Office in service of a political agenda held by senior government ministers. The Treasury bowed to political realities in the short-term, confident of being

able to reassert itself in the more technical negotiations that would follow the Commission's conclusion.

## **Devolution: A Process, Not an Event**

Following the initial devolution settlement in 1999, Holyrood assumed a range of devolved responsibilities including health, education, justice, and policing. Two significant things that were either not devolved, or only partially devolved, were taxation and welfare. On taxation, Holyrood was to be funded predominantly by a block grant from the UK government and revenue from a few small taxes. That situation gave rise to charges that Holyrood suffered an accountability deficit; it was responsible for spending money without being responsible for raising it (Mellett, 2009). Under the 1999 arrangements Holyrood was only responsible for about 7.5% of total Scottish revenues (GERS, 2014, p. 26). On welfare, virtually all policies and powers remained reserved to Westminster in 1999.

Further powers were transferred to Holyrood via the Scotland Act 2012, the product of the Calman Commission (2009), convened by the unionist parties at Holyrood largely in response to the SNP forming a minority government in 2007. The SNP did not participate in Calman, instead launching a parallel 'National Conversation' (Trench, 2009). The 2012 Act was designed to help close the accountability gap by forcing Holyrood to levy a Scottish Rate of Income Tax (SRIT). This was to be done by reducing the block grant to Scotland by the yield of 10 pence on income tax rates. The SRIT was designed in an inflexible way and did not allow the Scottish Government to create a more progressive income tax system (see Kenealy, 2012). Nevertheless, it increased the percentage of total Scottish revenue raised by Holyrood to around 17% (GERS, 2014, p. 26). The 2012 Act contained no substantial new powers in the area of welfare, part of a general tendency of the Calman Commission to defend the wisdom of nearly all existing policy reservations to the UK government. Neither the original ability to vary income tax by  $\pm 3$  pence, nor the SRIT as designed in 2012, was designed with a view to being usable. The Treasury was comfortable with them as symbolic assertions of devolved fiscal responsibility. When the Smith Commission convened, taxation and welfare remained the two policy areas that could be focused on if the aim was to deliver significant new responsibilities and spending powers.

The Conservatives, Labour and the Liberal Democrats made it clear that a 'No' vote in the referendum was a vote for further devolution. The Scottish Conservatives and Scottish Labour produced policy documents in 2014 committing to further devolution; the Liberal Democrats reiterated their commitment to federalist plans set out in 2012. Nine days before the referendum the three unionist parties firmly tied themselves to delivering further powers. Under pressure from tightening opinion polls the referendum was discussed at Cabinet on 2 September and two days later at the

Quad<sup>3</sup> (Interview 8). The Quad focused on how the risks of independence could be clearly and consistently communicated to Scottish voters in the closing stages of the referendum and how a clear signal about further powers for Holyrood could be sent. After a process that saw the Cabinet Secretary, Jeremy Heywood, coordinating with both David Cameron and former Prime Minister Gordon Brown (Interviews 8, 10), it was agreed that the commitment would be presented to Scottish voters as a ‘Vow’ – a mocked-up parchment on the front page of *The Daily Record* on 16 September.

The ‘Vow’ committed the unionist parties to an institutional process and an accelerated timetable designed to underline the credibility of that commitment: a broad package of powers was to be set out by 30 November 2014 with a draft bill by 25 January 2015. Until polls tightened the assumption in Whitehall was that work on further powers for Holyrood might be undertaken more leisurely, developing after the May 2015 general election (Interview 8). The timetable was adhered to with the Smith Commission report appearing on 27 November and the UK government producing a command paper detailing how Smith’s recommendations would be translated into law, and containing a set of draft clauses, on 22 January 2015 (UK Government, 2015).

## **The Commission**

The decision to appoint Lord Smith was taken prior to the referendum and he agreed on the provision that his name was not leaked in advance (Interviews 8, 9, 10). Following the result, Cameron consulted Scotland’s then First Minister, Alex Salmond, to ensure that Smith, and the broader process, had his support (Interview 8). At the end of the referendum, ‘the climate ... was one of mutual suspicion. It was therefore incredibly important that the P[rime] M[inister] identify the right person for the job – someone who was trusted and seen as a neutral, honest broker’ (Interview 8). With an impressive resume in business and experience working in public service roles, Smith was an ideal candidate and in keeping with McAllister’s (2005a, pp. 499-500) criteria. He was known and trusted by the Scottish Government from his time as chair of the Glasgow Commonwealth Games Organising Committee. The UK government was familiar with him from his chairmanship of the Green Investment Bank, an initiative closely associated with the Liberal Democrats. He had ‘a cache with Scottish elites’ (Interview 15). Lacking ‘the time or leisureliness of a Calman-style process ... Lord Smith’s name fit the bill, he had a reputation as a man who could deliver, the Commonwealth Games being the key example’ (Interview 10). Vitality, the SNP were comfortable with him: ‘we had access to him and we knew he was a straight shooter’ (Interview 18).

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<sup>3</sup> The Quad was the most senior political committee of the coalition government comprising the Prime Minister David Cameron, the Chancellor of the Exchequer George Osborne, the Deputy Prime Minister Nick Clegg, and the Chief Secretary to the Treasury Danny Alexander (and briefly, before him, David Laws). The Quad thus consisted of two Conservatives and two Liberal Democrats.

Before the formal negotiations began, Smith took the time to collect information on the key issues confronting the Commission. Both governments needed time to produce their analysis documents, allowing Smith to go ‘on the road. To sense check what the politicians might throw at him in the room’ (Interview 9). The secretariat organised a set of meetings between external stakeholders (e.g. third sector, business) and Smith, as well as a series of private technical briefings from civil servants (Interviews 8, 9, 16). Smith was thus able to secure an information advantage, learning for example that business opinion was not behind devolving corporation tax and that the intricacies of the UK welfare system might create problems if two governments were responsible for delivering it (Interview 9). Despite this, Smith was ‘at pains not to be a player in the negotiations ... He stood aside and that neutrality was crucial in allowing him to play the honest-broker role’ (Interview 17).

Almost all interviewees remarked upon the importance of Smith’s leadership style. He engaged in early shuttle diplomacy between the parties to secure agreement on the principles underpinning the process (Interviews 2, 17). Once negotiations were underway he established ‘a team ethos and sense of camaraderie’ (Interview 3). He was prepared to be forceful when needed, reminding Commission members that they had a responsibility to the Scottish people, that an agreement had to be reached, and that he would be prepared to identify obstructionists (Interview 2). As a result of the atmosphere Smith cultivated, ‘nobody wanted to be thought of as the person, or people, who undermined the effort. He created a team and he made it clear he would take a dim view of anyone who didn’t play as a team’ (Interview 17).

Membership of the Commission was a gift in the hands of the political party leaders. Each of the five political parties was asked to name two nominees; nine of the ten were elected politicians (see table 1). While the SNP and the Scottish Greens operate only in Scotland, the other three parties are Scottish components of UK-wide parties. The decision to have the leaders of the Scottish parties, as opposed to the UK-wide parties, make the appointments was to ensure that the process was seen as ‘Scottish’ (Interviews 8, 10). None of our interviewees hinted at any effort by UK party leaders to interfere with the nominating process. Whilst the Scottish Government was present at the table in the form of John Swinney, the Cabinet Secretary for Finance, the UK government was formally absent, creating an asymmetry. Despite that, the UK government was a crucial player in, and a determiner of, the Commission’s outcome.

## **TABLE 1 ABOUT HERE**

Notably, all five parties represented at Holyrood – including the SNP who did not participate in Calman – agreed to participate. Immediately following the referendum the SNP ‘indicated that we’d have discussions, not that we’d take part. We needed to understand the scope. We discussed that with Lord Smith and he told us he wanted to

take a whole range of views into account’ (Interview 18). The SNP were realistic about what they could accomplish through the process but ‘political calculations ultimately drove us to the table. In the aftermath of the referendum we didn’t see a political way to explain *not* participating’ (Interview 17). In addition to their two nominees, each political party was permitted two aides. Typically, these were special advisers employed by the parties and were termed ‘Sherpas’. They were used to facilitate pre-negotiation, maintain momentum in the talks, and identify quick wins, allowing the majority of energy to be expended on the areas where agreement was most difficult to reach.

The Commission was supported by a secretariat. What was unusual in this case was that the secretariat consisted of staff from the UK government, Scottish Government, and Holyrood. As the referendum approached two senior civil servants, Philip Rycroft – then Director-General of the Deputy Prime Minister’s office in the Cabinet Office – and Ken Thomson – Director-General for Constitution in the Scottish Government – worked together to identify appropriate staff and build a secretariat (Interview 8). The tripartite structure was designed, in part, to bind the Scottish Government and the SNP into the process, with the costs of exit growing with every step taken. The SNP could not find an exit strategy and that was largely a result of how the process was constructed (Private information). There was also an element of ‘starting as we mean to go on’ given that ‘any agreement would require close joint working between the two governments to implement it’ (Interview 8). The secretariat’s staff was identified based on the required range of skills, both substantive (e.g. taxation and welfare) and procedural (e.g. experience of managing consultations) (Interviews 10, 14, 15).

In total 18 officials were seconded, organised into three teams responsible for ‘negotiation’, ‘analysis’, and ‘outreach’. The negotiation team choreographed the cross-party talks and prepared the papers ahead of the Commission’s plenary meetings. The analysis team was responsible for commissioning briefings from the two governments and for organising research presentations to the Commission. The outreach team was responsible for handling public submissions of evidence and for organising a small series of public and private evidence sessions.<sup>4</sup> Both governments felt the need to second their best experts to the secretariat (Interviews 9, 14) with those more senior also requiring ‘the political acumen to operate in this sort of context’ (Interview 15).

Two important figures were Jenny Bates – a Treasury civil servant seconded to head the secretariat – and Colin Faulkner – at the time the principal private secretary to the Secretary of State for Scotland. Both had experience of international negotiations:

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<sup>4</sup> The public engagement activities of the Commission were undertaken in good faith by the civil servants; all submissions were read and synthesised. Whilst not the focus of this paper it is important to note that the exercise failed to have any significant impact on the process and it was broadly criticised by representatives of Scottish civic life whom we interviewed. For more see Kenealy et al. (2017), pp. 89-93.

Bates in a G8/G20 context and Faulkner in a EU context. Both used those experiences to structure the process. Civil servants recognised a conscious learning from previous experience, employing stories and narratives that were familiar to them to help them make sense of the unfamiliar. Drawing on previous experiences, the Commission came to resemble a process of diplomacy *within* the state. The ‘Sherpa’ system was lifted directly from international negotiations. For those civil servants with experience of EU policymaking the political parties became akin to EU member states and Smith himself akin to the European Council president, using his position at the centre of the negotiations – and his familiarity with the positions of the parties – to bring the parties closer together. Square bracketing, a drafting practice common in EU negotiations, was used in the process to identify outstanding points of disagreement.

Faulkner was tasked with structuring the process and he quickly drafted a paper strategising how to get to an end point through a combination of plenaries and bilaterals. Each plenary would discuss a specific issue and, between them, intense bilateral working between the members of the Commission, facilitated by the secretariat and Sherpas, would identify possible deals and compromises (Interview 9). Smith’s initial instinct was to rely more heavily on bilaterals, and less on plenaries, perhaps an instinct from his business experience. Once it became clear that the ten members got on well around the plenary table ‘we had fewer bilaterals and more plenaries ... There was too much text in flux to handle it all through bilaterals’ (Interview 9). The secretariat ‘established it as an iterative process. The meetings were not short and the discussions were open ... It was a good process internally, a structured framework, but there was space for discussion’ (Interview 1). Plenaries were intense, lasting three hours with intensive cross-examination following 45-minute briefings from experts (Interview 2).

The Sherpas played an important role in the bilateral to-and-fro around the plenaries: ‘the secretariat-adviser link was crucial as it helped exchange and it allowed the Commission to really focus on the key areas. It helped the information to flow’ (Interview 3). The civil servants ‘wanted channels. So you had meetings of the Sherpas before the plenaries. As far as possible, officials would agree as much as they could to maximise the time available. So the big, substantive issues were left for the plenaries’ (Interview 17). The ‘Sherpas’ were thus a vital link between the Commission members and the secretariat.

The importance of the civil service as the institutional glue holding together the devolved UK state, oft remarked upon (Parry, 2012), was proven in this case. The institutional glue is sociological rather than organisational (see Parry, 2016). It takes the form of mutual understanding of roles, and acknowledgement that interlocutors may have difficult positions to defend. In a devolution context, the glue was often held to derive from common membership of the Home Civil Service; in fact it comes from the maintenance of traditional minister-civil servant roles, which secure politicians a loyal machine (Parry, 2016). Whilst ‘there was occasional friction’

between the civil servants ‘there was a lot less friction than I’ve seen before between Whitehall departments. People pulled together and made it happen. Civil servants know how to work with civil servants’ (Interview 9). One civil servant observed: ‘The ministers might not always agree but the civil servant supporting dialogue is about as good as it probably can be’ (Interview 14). The process won plaudits (see Paun and Munro, 2015, pp. 85-6) as an example of collaborative working that ought to be replicated more often.

## **The Deal**

Given that a UK general election hovered on the horizon in May 2015, and given that any recommendations of the Commission would have to be implemented by both Scottish and UK governments, it was essential that Labour, the Conservatives, the Liberal Democrats and the SNP supported any deal. The Conservatives, Labour and the Liberal Democrats all entered the Commission with pre-existing proposals for further devolution. In the weeks following the referendum the SNP endorsed a paper produced by the Scottish Government and the Scottish Greens produced a paper. Unsurprisingly, the SNP position was the one involving the most devolution, calling for maximal devolution (Scottish Government, 2014, pp. 8-10), which largely restated their position from a 2009 white paper (Scottish Government, 2009). The SNP were seeking full fiscal autonomy: that is the retention of all taxes raised in Scotland, and full autonomy over how that money is spent, with a remittance paid to the UK government for shared services such as the Bank of England, intelligence and diplomatic services, and the armed forces (Scottish Government 2014, pp. 11-13). As a model for devolution it would allow the most autonomy for Scotland to do things differently, including constructing an entirely different welfare system, with the crucial exception of pensions, which would continue to be arranged on a UK-wide basis. The SNP leadership were well aware that they would not secure their preferences but wanted to lay down a marker to pressure their negotiating partners into making concessions (Interviews 17, 18).

Compared to the SNP the other parties’ proposals were less radical. Table 2 presents the main negotiating positions of the parties in the key areas of taxation and welfare.<sup>5</sup> Cells in table 2 are highlighted if the outcome of the Commission reflected the preference of the party. A glance at the table makes it clear that the outcome most closely reflected the preferences of the Conservative party. Both Conservative members of the Commission claimed to us, in interviews, that they had successfully ‘delivered Strathclyde’ (the Conservative’s devolution proposals were the result of an internal party commission that was informally named the Strathclyde Commission, after its chair). The Conservatives – a party who opposed Scottish Home Rule through to the 1960s and Tony Blair’s devolution proposals in the 1990s – had managed to find a middle ground between the maximalist position of the SNP and Labour’s

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<sup>5</sup> Taxation and welfare were not the only issues under negotiation but they were the issues that dominated and that most exercised Whitehall departments given their political economy implications.

proposals, which blended some fairly ambitious welfare proposals with more modest tax proposals (Scottish Labour, 2014, pp. 11-17). The party had, as Convery and Lundberg (2016, p. 1) put it, linked ‘their market liberalism to a justification for decentralization’. Not only were the Conservatives in the middle ground of the proposals put forward, they possessed an intellectual argument rooted in enhancing the responsibility of Holyrood (Interview 2).

## **TABLE 2 ABOUT HERE**

Further devolution of income tax was seen as a way to build on Calman and, given that it makes up 22.6% of total non-North Sea revenues raised in Scotland (GERS, 2016), to enhance Holyrood’s accountability. Labour’s modesty on income tax (see table 2) emanated from Gordon Brown’s concern that the full, or near full, devolution of income tax would lead to calls to bar Scottish MPs at Westminster voting on finance and budget bills (Interviews, 19, 20). There was a concern that this was a ‘Tory trap’ designed to make it more difficult for future Labour Prime Ministers to govern. Although Brown made attempts to retake the initiative during the course of the Commission’s work – suggesting that Labour’s written proposals could be expanded upon – the party found itself in a difficult position, with its Scottish leader resigning abruptly on 24 October. Throughout, it remained unclear who was steering Labour policy, with Brown intervening from the sidelines and Ed Miliband not fully engaged (Interviews 19, 21).

Labour, despite lobbying of Commission members by Brown (Interviews 2, 19), had to accommodate the income tax preferences of the Conservatives and Liberal Democrats because they found themselves in a minority of one. As one Commission member put it: ‘If Labour hadn’t budged on income tax, we’d have all hit them publicly’ (Interview 3). Labour managed to extract a concession on EVEL, forcing an insertion into the final report, asserting the right of all UK MPs to ‘continue to decide the UK’s budget, including income tax’ (Smith Commission, 2014, para. 75; Interview 19). The Conservative team negotiated language with Labour’s two representatives necessary to ‘keep Labour in the room behind the tax proposals’ (Interview 2). The language on EVEL was consistent with the McKay Commission, which had reported in March 2013. Labour waited until the eleventh hour to gain maximum leverage, and thus the best chance of securing their desired addition to the Smith Commission report (Interview 5). The Conservatives recognised the report would carry no legal weight and were content to make the deal.

VAT was another significant component of the Smith settlement, with a decision reached to assign half of the total VAT take of Scotland to Holyrood’s budget. Whilst Labour and the Liberal Democrats entered the process opposed to such a move, the Conservatives indicated a willingness to consider some assignment to Holyrood. The

SNP's general preference for as much devolution as possible – and thus the assignment of VAT in full – combined with the Conservatives' arguments about the responsibility of Holyrood formed solid support for the deal. The argument that devolving VAT and income tax collectively would significantly enhance the proportion of Scottish revenues that were the responsibility of Holyrood, feeding into an overarching narrative of a 'powerhouse' Holyrood, helped to broker the deal (Private information).

In the area of welfare it was, once again, the SNP and the Greens who adopted the most maximal position, preferring to see a package of powers that would allow Scotland to craft its own welfare and social security policies, with the exception of pensions, which were never seriously considered for devolution. At the other end of the spectrum was the Liberal Democrats' (2012, p. 40) federal model that would see 'social protection, pensions and welfare payments ... allocated to the UK (and subsequently federal) level'. It was within the context of the UK coalition government – where senior Conservatives and senior Liberal Democrats could negotiate policy – that the Conservatives were able to persuade the Liberal Democrats to move towards their welfare preferences, a point to which we return below.

Welfare spending in the UK can be divided into three broad categories: pension related spending (state pensions and pension credit); six means-tested benefits for people of working age that are to be rolled into a single payment, Universal Credit (UC)<sup>6</sup>; and other smaller benefits targeted at the elderly, the disabled, carers, etc. (Hood and Keiller 2016, pp. 11-13). With pensions off the table, the general principle with which both Labour and the Conservatives approached welfare was that of 'linkage'; namely, if a cash benefit was linked to a devolved policy competence then it should be considered for devolution (Scottish Labour, 2014, p. 11; Scottish Conservatives, 2014, p. 17). For example, because housing, social care and health are devolved responsibilities it would make sense to devolve Housing Benefit and Attendance Allowance.<sup>7</sup> It was relatively easy to agree to the devolution of a series of fairly small – in terms of total spend – benefits<sup>8</sup> that were not going to be rolled into UC. With uncertainty about how much could be done in the UC space it was imperative, to support the powerhouse Holyrood narrative, to 'get some decent numbers around the welfare offer and so we had to go for some cash benefits that, together, would add up' (Interview 8). Benefits worth almost £2.8 billion (GERS, 2016) – a large amount but only around 17% of total welfare spending in Scotland – were devolved.

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<sup>6</sup> Those six benefits are: Working Tax Credit; Child Tax Credit; Income Support; Jobseeker's Allowance; Housing Benefit; and Employment and Support Allowance.

<sup>7</sup> Attendance Allowance is a benefit to help people pay for personal care because they are physically or mentally disabled and over the age of 65.

<sup>8</sup> Specifically, they were: Disability Living Allowance; Attendance Allowance; Winter Fuel Payments; Carers Allowance; Industrial Injuries Disablement Allowance; Severe Disablement Allowance; Discretionary Housing Payments; Sure Start Maternity Grants; and Funeral Payments. In total they comprise a little under £2.8 billion of expenditure in 2015-16 (GERS, 2016).

The ‘linkage’ argument ended up clashing with the Conservatives’ commitment to preserve the integrity of UC. Housing Benefit was a particular example; housing is devolved but the benefit was one of those to be rolled into UC. The Scottish Conservative (2014, p. 17) submission suggested that ‘it is likely to be administratively highly complex (and expensive) to disentangle the housing benefit element of UC for Scottish recipients ... [but] if it can be done, there is a case for devolving housing benefit’ During the negotiations Labour staged a failed attempt to get other parties to back a call to extract Housing Benefit from UC (Interviews 1, 2). A compromise was struck that would allow Holyrood to vary the housing element component of UC without diluting UC overall.

The bigger question was the extent to which UC could be devolved. By September 2014, UC was behind schedule, over budget, and becoming a political liability for the coalition (Seldon and Snowden, 2016, pp. 295-305). UK government analysis papers submitted to the Commission, which the DWP had played a lead role in writing, suggested the possibility of significant flexibility and ‘substantial devolution of working-age benefits’ (UK Government, 2014, p. 72). The analysis came as a surprise to many involved with the Commission (Interviews 13, 16, 18). Our interviewees reported that, until late the negotiating process, the possibility of devolving significant flexibilities within UC – with Scotland being able to vary the rules, rates and tapers – was on the table (Interviews 2, 5, 16, 18).

The Conservative members of the Commission were reigned in over the final weekend. A financial concern, on the part of the Treasury, about the prospect of devolved welfare leading to more generous entitlements and thus higher public expenditure combined with a concern about further challenges to the already struggling UC programme, on the part of the Iain Duncan Smith (then Secretary of State for Work and Pensions), to scotch substantial devolution. Several interviewees remarked that, in the closing stages of the welfare negotiations, the two Conservative members were left with little autonomy and were taking instruction over the telephone from Whitehall (Interviews 1, 16; Private information). The situation was the result of a fast-moving negotiation environment and the fact that the DWP’s political leadership were somewhat disengaged from the Commission’s work. It was not a conscious effort to offer something only to revoke it in the closing stages (Private information).

The final piece of the welfare puzzle was to grant Holyrood the broad power to top-up any reserved benefits and to create new benefits in areas of devolved responsibility. The idea emanated from the Scottish Conservatives (2014, p. 16) and quickly won support from the SNP as a ‘better than nothing’ solution. As with the details surrounding the devolution of income tax, the devil remained in the detail. Whilst the powers were agreed in principle at the Commission negotiating table, significant work

would be required to translate them into workable propositions after the Commission had concluded.

The technical success of the Smith Commission – in that it reached an outcome by the agreed deadline – came at the expense of ambition and detail. In order to secure a minimum level of agreement in a short space of time, certain contentious or complicated issues remained unresolved. The result was a terse report with a low level of analysis and argument. The devolution of welfare was not sufficiently explored and thought through, and the discussion was ultimately cut short not only by the time pressures – limiting the extent of the engagement by Scotland’s academic and third sector – but also by Whitehall intervention. The report relied on abstract concepts – such as the principle of ‘no detriment’ (Smith Commission, 2014, pp. 25-6)<sup>9</sup> – that required subsequent intergovernmental negotiation to give it substance. Those negotiations are still ongoing at the time of writing. Whilst a short-term fiscal framework was agreed in February 2016, it will need to be revisited in the future and intergovernmental working continues on welfare devolution.

Taken together the newly devolved powers over taxation and welfare further entrench the move towards competitive welfare federalism noted by Keating (2012). Also, as noted by Keating (2012, p. 222) ‘devolution appears to have sparked something of a race to the top’. Far from arguing over how to dilute social citizenship for Scots, the argument of the Scottish Government was that these powers would be used to craft a more progressive taxation system and a less punitive welfare system compared to those implemented and supported by the UK government. Subsequent policy development shows that the desire for generosity is inherent in welfare devolution but that expansive powers might be limited in practice and will be rolled out cautiously. The first enhanced benefit, an increase to Carers Allowance to the level of Jobseekers Allowance, is planned to start in 2018 after the establishment of a Scottish Social Security Agency. This is in contrast to income tax, where the UK-wide HM Revenue and Customs will be used. Smith brings into play full command over income tax rates and thresholds. The tax powers are far more usable than those associated with the original devolution settlement and with the 2012 Act. However, already the possibility of higher earners shifting their residency to avoid higher tax rates in Scotland – or shifting their income into savings to the same end – has demonstrated that the interconnected nature of the UK economy acts as a constraint on the use of these powers.

## **Whitehall**

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<sup>9</sup> The Smith Commission report (2014, p. 25) suggested that the new powers should result in ‘no detriment as a result of the decision to devolve further power: the Scottish and UK Governments’ budgets should be no larger or smaller simply as a result of the initial transfer of tax and/or spending powers’. It went on (p. 26) to call for ‘no detriment as a result of UK Government or Scottish Government policy decisions post-devolution’. The report thus suggested a complex reimbursement mechanism for decisions of either government, the details of which required significant negotiation.

As negotiations progressed, the UK government and Whitehall made their presence felt in numerous ways. Our findings are interesting for what they reveal about the communication links between the Conservative and Liberal Democrat members of the Commission and senior government ministers in the Quad, and for what they reveal about interdepartmental dynamics within Whitehall, specifically between the Cabinet Office and the Treasury. Though informal, the Quad was where the coalition set political strategy, often proving vital to the governing process, allowing the most senior ministers to reconcile party differences, especially on issues related to taxation and public expenditure (Seldon and Snowdon, 2016, pp. 38-40, 239-41). Further devolution to Scotland had implications in this space but it was the political sensitivity of the Commission that put it on the Quad's agenda (Interview 8). The Quad had met before the Commission convened to agree that the Liberal Democrats were happy to move in the direction of the Conservative proposals, particularly on welfare. Liberal Democrat ministers recognised that the political situation had progressed in such a way that a significant offer on both taxation and welfare would be necessary. The Quad also discussed Commission developments on at least two occasions, to approve the developments at the highest political level, and to check the process was running to time (Private information).

At a day-to-day level, monitoring and oversight of the Commission was in the hands of Danny Alexander and Andrew Dunlop (Interviews 8, 10). Alexander, although not the Secretary of State for Scotland, was the key Scottish political adviser to Nick Clegg, the Liberal Democrat Deputy Prime Minister (Seldon and Snowdon, 2016, p. 129). The key to understanding Alexander's role vis-à-vis Smith has less to do with his ministerial position and more to do with the confidence in which Clegg held him, allowing him to exercise authority over Michael Moore and Tavish Scott. Dunlop was a special adviser on Scotland to Cameron and maintained close links to the Prime Minister, the Chancellor, and the Conservative's Smith Commission team throughout (Interview 8). The third person who was vital day-to-day was Philip Rycroft, a senior Cabinet Office official, who was serving as Director-General of the Deputy Prime Minister's Office (DPMO). Rycroft made sense, not only given his familiarity with devolution (he had held positions in the Scottish Government), but also because the DPMO had held responsibility for constitutional reform since 2010 (Hazell and Yong, 2012, p. 157). Rycroft led the establishment of the tripartite secretariat (working with Ken Thomson in the Scottish Government and Paul Grice in at Holyrood), identified Jenny Bates for the lead role, and was her line manager throughout the process (Private information). As one civil servant put it, 'nothing was done independently without Danny, Number 10 [Dunlop] and Phil Rycroft on board' (Interview 10).

On assuming responsibility for the process, Rycroft confirmed with the Treasury's two most senior civil servants that the Cabinet Office would provide the policy lead (Private information). That this role did not go to the Treasury followed the precedent of devolution planning in the 1970s and 1990s; the issue was in the last resort constitutional rather than financial. Within the Quad, Osborne and Alexander sought

neither to defend nor advance the departmental view of the Treasury vis-à-vis devolution in terms of avoiding tax competition or new powers with significant public expenditure implications (Private information; Interview 8). Osborne's and Alexander's roles in the Quad were not *ministerial* but rather *political*. Interestingly, several of our non-Whitehall interviewees described the process as 'Treasury dominated' (Interviews 16, 18) but those closest to the process at Whitehall presented a different narrative.

The inexorable logic of devolution mandated that further powers were devolved in the areas of taxation and welfare. It was hard to imagine a way of creating a powerhouse Holyrood that did not involve devolving *both* spending power *and* tax power. Although the Treasury was uncomfortable with the possibility of tax competition within the UK and with the public expenditure implications of devolving welfare powers, there was little that the institution could do in the face of a political momentum that was endorsed at the highest level by the Quad (Interview 12; Private information). The Treasury thus ceded short-term control over the negotiations to the Cabinet Office but, playing a longer game, knew that some form of control would return to them when the Smith Commission's broad recommendations had to be transformed into workable policies and mechanisms. That process required the negotiation of a fiscal framework between Scotland and the UK government, to determine how Scotland's block grant would be adjusted to account for the new tax powers, and the creation of new IGR machinery in the area of welfare and social security. Treasury officials looked forward to that point, where they would be able to retake some control over the process, 'to shape the implementation of policy ... The devil will be in the details and that's when the Treasury's analysis will play a role' (Interview 12; Private information).

Insofar as the Treasury had a role in the negotiations it was in sounding notes of caution about the complexity of the task ahead and in shaping the input of the delivery departments and agencies such as HMRC and the DWP (Interview 11). The Treasury was 'controlling ... the broad flow of paper, and so on, but they were not controlling the process' (Interview 8). The Treasury has been managing devolved fiscal relations since 1999 through its Nations and Regions Team and has a keen sense of the interconnections between parts of the picture that might be less present in other departments (DWP officials had to learn quickly, for example, as the department had engaged less than many others with devolution given the lack of significant welfare devolution to Scotland and Wales). Treasury expertise remained a valuable commodity in this process. But, our evidence reveals that policy decisions that have significant implications for public expenditure and taxation can be placed beyond Treasury control if they are politically charged enough, despite the wealth of evidence showing how the Treasury exerts control over other Whitehall departments (Thain, 2009; Thain and Wright, 1995; Deakin and Parry, 2000).

## **Conclusion**

The Smith Commission was a political fix in the guise of an investigation. Its pre-determined task, which it accomplished, was to put together a package of powers that could be presented as delivering a ‘powerhouse’ Holyrood. This neutralised the heat of the referendum battle by creating some legitimacy and consensus around the next stage of Scotland’s devolution journey. Its report was a checklist of agreed points and mentions of unresolved issues. The contrast with Calman is clear: that too was a response to political events – the proposals of the SNP government after they came to power in 2007 – but it took more time, engaged in more research, and had a more diverse membership. In the comparative contexts offered by Hunter and Boswell (2015) and Maurier (2009), the Smith process provides important UK-based evidence of the way that commissions can provide urgent propulsion to policy rather than a reflective consideration of it. We offer this research as a first step in the process of building a comparative understanding of such commissions, as well as a first cut history of an important point in the development of devolution.

## **Annex: List of Interviews**

1. Smith Commission member 1
2. Smith Commission member 2
3. Smith Commission member 3
4. Smith Commission member 4
5. Smith Commission member 5
6. Smith Commission member 6
7. Smith Commission member 7
8. Senior civil servant, UK Government 1
9. Senior civil servant, UK Government 2
10. Senior civil servant, UK Government 3
11. Senior civil servant, UK Government 4
12. Senior civil servant, UK Government 5
13. Senior civil servant, UK Government 6
14. Senior civil servant, Scottish Government 1
15. Senior civil servant, Scottish Government 2
16. Senior civil servant, Scottish Government 3
17. SNP official 1
18. SNP official 2
19. Scottish Labour official
20. Scottish Labour MSP 1
21. Scottish Labour MSP 2

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**Table 1.** Smith Commission members

<b>Party</b>	<b>Nominee</b>	<b>Rationale</b>
<i>Conservatives</i>	Annabel Goldie	MSP; former leader with credibility/seniority; spokesperson on constitutional issues.
	Adam Tomkins	Constitutional lawyer at Glasgow University; senior adviser to party on devolution issues; technical expertise; gender balance.
<i>Scottish Greens</i>	Maggie Chapman	Local councillor; credibility/seniority as party co-convener.
	Patrick Harvie	MSP; credibility/seniority as party co-convener; gender balance.
<i>Labour</i>	Iain Gray	MSP; former leader with credibility/seniority.
	Gregg McClymont	MP; spokesperson on pensions; Westminster/Holyrood balance.
<i>Liberal Democrats</i>	Michael Moore	MP; former Secretary of State for Scotland with knowledge of devolution; close to Nick Clegg and Danny Alexander.
	Tavish Scott	MSP; former leader with seniority/credibility; spokesperson on relevant issues; Westminster/Holyrood balance.
<i>SNP</i>	Linda Fabiani	MSP; backbencher with links to party's left; devolution knowledge from chairing Holyrood committee on 2012 Scotland Act.
	John Swinney	MSP; senior government minister with knowledge of devolution; party seniority; gender balance.

*Source:* Interviews 1-7, 17-21.

**Table 2.** The Smith Commission: Preferences and Outcomes.

	<b>Conservatives</b>	<b>SNP</b>	<b>Labour</b>	<b>Lib Dems</b>	<b>Outcome</b>	
<b>Taxation</b>	Income tax	Devolve control over rates and bands of personal income tax; reserve control over income tax on investments, dividends and savings, the personal allowance, and definition of income.	Devolve in full.	Widen variation of personal income tax from 10p (Scotland Act 2012) to 15p; introduce new progressive income tax rates so Holyrood can increase rates but not decrease higher/additional bands.	Devolve control over personal income tax; reserve income tax on investments, dividends and savings but assign proportion of receipts to Scot budget.	Devolve control over rates and bands of personal income tax; reserve control over income tax on investments, dividends and savings, the personal allowance, the definition of income, and tax reliefs.
	VAT	Given EU law, examine case for assigning share of revenues to Scot budget.	Given EU law, VAT in Scotland to be set at UK level with revenues assigned to Scot budget.	Reserve.	Reserve.	Receipts from the first 10% of standard VAT assigned to Scot budget.
	Air Passenger Duty	Devolve.	Devolve.	Further consideration of environmental impact and potential tax competition before devolving.	Devolve.	Devolve.
	Aggregates Levy	<i>N/r</i>	Examine best way forward given EU dispute.	<i>N/r</i>	Devolve subject to outcome of EU dispute.	Devolve once legal issues with EU clarified.
	National Insurance	Reserve.	Devolve.	Reserve.	Reserve.	Reserve.
	Inheritance Tax	Reserve.	Devolve.	Reserve.	Devolve.	Reserve.
	Capital Gains	Reserve.	Devolve.	Reserve.	Devolve.	Reserve.

	Corporation Tax	Reserve.	Devolve.	Reserve.	Reserve but assign revenue to Scot budget.	Reserve.	
	Fuel duties	Reserve.	Devolve.	Reserve.	<i>N/r</i>	Reserve.	
	Excise duties	Reserve.	Set at UK level but assign revenues raised to Scot budget.	Reserve.	Reserve.	Reserve.	
Welfare	Universal Credit (UC)	Integrity of UC to be preserved across the UK; flexibilities to be explored to allow policy differentiation.	Halt rollout in Scotland so as not to compromise practical ability to devolve individual benefits.	<i>N/r</i>	Social protection and welfare should be a UK responsibility; strategic planning of welfare services could be considered for joint working between UK and devolved governments.	Reserved but devolved powers to alter frequency and nature of payments; devolved power to vary housing cost elements.	
	Attendance Allowance	Consider devolving.	Devolve.	Devolve.		Devolve.	
	Housing Benefit	Devolve if flexibility can be found within UC.	Devolve.	Devolve.		Devolve.	Power to vary housing costs within UC devolved.
	Supplementing UK benefits	Examine case for Holyrood supplementing UK benefits.	Not relevant, party seeks near full devolution of welfare.	<i>N/r</i>		Devolved power to create new benefits in areas of devolved responsibility and to supplement UK benefits.	
	Job Centre Plus and Work Programme	<i>N/r</i>	Fully devolved.	Work Programme delivery devolved to local government with Holyrood providing strategic oversight.		Scottish Government to act as Whitehall's agent in this policy space.	Job Centre Plus reserved; employment support programmes devolved once existing commercial contracts expire.

*N/r = not explicitly referenced in document submitted to Smith Commission.*

**Note:** the Scottish Greens submitted a document to the Smith Commission setting out broad principles but typically not making specific commitments. On taxation and welfare they were broadly of the view that the default position should be to devolve powers, unless a compelling case could be made to reserve them to the UK government. They have been omitted from the table to allow a clearer presentation.

**Note:** The Commission agreed to devolve a set of benefits outwith UC (see endnote 7) but party submissions typically did not deal explicitly with them, hence they are excluded from the table.

**Source:** Scottish Conservatives (2014); Scottish Labour (2014); Scottish Liberal Democrats (2012); Scottish Government (2014); Scottish Greens (2014).