

Scottish Green Party submission to Smith Commission on Devolution

Patrick Harvie MSP and Cllr Maggie Chapman, SGP Co-Convenors

Introduction

The Scottish Green Party welcomes the opportunity to contribute to the debate on the future of devolution, given that the people of Scotland chose by majority to vote No in the independence referendum.

Though we campaigned for a Yes vote in the referendum and are naturally disappointed at the result, we believe that a window of opportunity remains open for change. It is in the nature of Green politics to seek ways of working constructively with others; neither downplaying our differences nor allowing them to prevent us from finding common ground where possible. However it should be noted that this will not be an easy task on the timescale which has been imposed. If it is to be achieved then there will need to be willingness on both sides of the independence divide to give ground.

The scope for compromise

Those who campaigned for a Yes vote will need to accept that the current process will not realise our ambitions for independence. We respect the decision the majority of voters made, even if we regard it as a missed opportunity. Those who campaigned for a No vote will also need to acknowledge that the commitments made in the final stages of the referendum campaign went significantly beyond the proposals published by Labour, the Liberal Democrats and the Conservatives earlier in the year.

There is clear evidence from recent opinion polling that a majority in Scotland would support the devolution of “all areas of government policy except for defence and foreign affairs, which is sometimes referred to as devo max”. While that is clearly not the starting point in this debate for the Better Together parties, it does indicate that there is potential to unite those who voted Yes and many of those who voted No, behind a position somewhere between independence and the Better Together parties’ earlier proposals.

However compromise can be difficult for political parties, whose natural mode is to choose a distinctive position and advocate for it. We are therefore strongly of the view that the greatest chance of success in the current process will be achieved by means of the maximum public engagement, going beyond the positions and interests of political parties large or small.

The Smith Commission process

We recognise that the Smith Commission process is the agreed means by which this debate will begin to be progressed. The timescale which was committed to by the leaders of the three main parties at Westminster was offered on so clear a basis that it cannot now be ignored without betraying the trust of the electorate. However it puts severe constraints on the ability of the public to be involved.

With little over two weeks between the invitation to political parties to be involved and the deadline for our written submissions, and only a few more weeks for others to submit evidence, there is very limited scope for public participation prior to the Commission drawing up its report. We also remain unclear (at the time of writing) what process the Commission will use beyond its initial meeting; it seems that formal evidence sessions will not be held, or at least will not take place in public. There must however be some scope for the discussion to be on the record and open to public scrutiny.

There is also a concern over the lack of a clear democratic mandate. The 2015 UK election will determine which party or parties form the UK Government, but the political balance at that election in Scotland is highly unlikely to be the same as that across the whole UK. Will a mandate for new devolution proposals come from voters in Scotland only, or throughout the UK? In either case, legislation would need to pass in both Parliaments to have legitimacy. The 2011 Scottish Parliament election gave a clear mandate for the holding of an independence referendum, but cannot be taken as an endorsement of any political party's position on the current debate over the future of devolution.

Given the confused position with regard to a mandate, and the fact that meaningful public participation cannot take place on the timescale required for the Smith process, we believe that the Commission's report must set out clear recommendations for the subsequent process. Between the publication of the report and the passing of legislation there will be well over six months, and this time should be used creatively to allow the greatest public participation. The Commission's report, and any common ground between the political parties, should be seen as the starting point for the public debate, not as a "done deal" which satisfies those inside a political bubble.

It should be noted that the Scottish Parliament has already agreed, in a resolution passed after its debate on Wednesday October 8th, that a period of public participation should follow the Commission. We hope that this will be agreed by all sides.

This public participation phase should ideally use a range of mechanisms, including traditional public meetings and the use of new communications media. We also propose the use of citizens' assemblies, which would involve randomly chosen groups of citizens exploring particular aspects of the debate in depth to ensure that the proposals generated by politicians can be shaped by the wider public. It would be reasonable for both governments to come together to provide the modest funding which would be required to facilitate this.

Citizens' assemblies have not been used in Scotland or the UK to any great extent. However there are examples from Iceland, the Netherlands, Ontario and British Columbia which dealt with issues such as electoral systems and wider constitutional reform. Lessons may be drawn from any or all of these examples.

We therefore propose these key principles which should be addressed in the Commission's recommendations:

Beyond fiscal responsibility - there must be an acceptance that promises made during the referendum campaign went beyond previous devolution proposals, and that those promises cannot be fulfilled by a retreat to those earlier positions.

The Commission's work must be the starting point, not the end point of this debate. Clear opportunities for meaningful public involvement must follow, with clarity over the means of achieving a democratic mandate for constitutional reform.

Specific areas for further devolution

Written constitution

A clear commitment was given by the three parties in Better Together to establish the permanence of the Scottish Parliament, and it is difficult to see how this can be done except by means of a written constitution.

For many independence campaigners, the opportunity to create a written constitution was a consistent theme in the referendum. While it was natural to view this in the context of a potential Yes vote, it is worth considering that there are many examples of written constitutions for jurisdictions below the level of independent states.

The present situation is that changes to the Scottish Parliament's powers must be legislated by Westminster but require the consent of the Scottish Parliament. This should be updated, with the Scottish Parliament able to determine domestic aspects of the constitution such as the protection of local government decision making, voting systems, and the accountability of Ministers, while matters which are clearly UK-wide would remain at Westminster and changes to the balance of powers between the UK and Scotland should be subject to mutual agreement.

It would be a straightforward matter to amend the Scottish Parliament's standing orders to require a two-thirds majority for legislation of a constitutional nature.

An arrangement for periodic reviews of the relationship between the two levels of government would allow for adjustments to be made on a broad cross-party basis with opportunities for significant public engagement. Over the years the process has taken place on an ad-hoc basis, sometimes as a result of agreement between the two governments, sometimes on the basis of UK political parties' agreement only, and is now being considered by means of a five-party Commission. It would be reasonable to expect that the process could be regularised. A commitment to five-yearly reviews which involve both governments as well as opposition parties, civil society and the wider public would ensure that all views are heard.

There have also been changes within the UK which are of a constitutional example, but which have failed to take account of the role of devolution. As one example, the requirement for Parliamentary approval before the Government commits to military action. There is a strong case for such approval being needed from all national Parliaments and assemblies, instead of only from Westminster.

Legislative consent

In line with the commitment to establish a permanent basis for the Scottish Parliament, the relationship between the two parliaments should be clarified. Any permanent basis would offer the opportunity to

formalise the convention on legislative consent by which Westminster can seek, and Holyrood can offer or withhold, consent for legislation in a devolved area of competence.

This would clearly also offer a suitable opportunity to make the arrangement reciprocal. Where Scottish legislation touches on a reserved area, particularly in a minor way which might not justify a Section 30 order, a similar process of seeking legislative consent should be able to operate in the other direction.

Parliamentary and public scrutiny

With additional powers it will also be necessary to augment the scrutiny of the Scottish Government, in recognition of the fact that the Scottish Parliament as it currently stands has limited capacity. It may be possible to extend the number of sitting days, increase the number of committees, and introduce measures to enhance the independence of committees from the government of the day. However we would argue that this is also an opportunity to return to the aspiration of the Consultative Steering Group prior to the beginning of the Scottish Parliament, that MSPs would “share power with the people”. In that spirit, our earlier comments on the role of citizens’ assemblies, juries, and other participative mechanisms also apply to the need for scrutiny of the Scottish Government on an ongoing basis.

Decentralisation within Scotland

A further opportunity which would arise from a written constitution is the entrenching of local democracy in Scotland. There has been growing momentum on this issue over recent months, from the COSLA report on Renewing Local Democracy to policy papers from several political parties, including ourselves. While specific reform proposals will clearly require manifesto commitments in 2016, the opportunity to begin developing a framework which will protect the various levels at which decision-making takes place in Scotland could easily begin now, if the Scottish Parliament has the ability to begin a process to draft a written constitution.

Democratic process

It remains a bizarre anomaly of the current settlement that the Scottish Parliament is unable to make decisions regarding its own electoral arrangements and the aspects of its operational structure which are at present defined by the Scotland Act 1998.

A number of specific aspects have been raised: changes to Holyrood's voting system; the committee structure and the political balance on committees when the balance across the Chamber changes mid-term; the need to ensure that issues such as the criminal conviction of a sitting member can be dealt with quickly; the case for gender balance mechanisms in candidate selection; and the growing consensus for votes at 16 in elections, following the positive experience during the referendum.

We hope that there would be no dissent from the proposal to devolve these matters at least in relation to Holyrood and local government elections. However we would also make the case that there is no reason in principle why Scotland should not be able to choose to elect its representatives to the UK parliament on a proportional basis, even if other parts of the UK choose to keep the first-past-the-post system.

Human rights

Significant concerns are raised by the proposed repeal of the Human Rights Act. While the Scottish Parliament is unable to pass legislation and the Scottish Ministers unable to take action which directly conflict with Convention rights, the level of protection which applies to other public authorities would not be guaranteed. If the HRA were to be abolished, public bodies which operate in Scotland under the reserved functions of the UK Government would not be subject to it, and even devolved public bodies such as local authorities would no longer be obliged to respect the protections set out in the HRA. Even if the Scottish Parliament took all steps open to it to defend the principle of human rights, there is a clear danger that a fragmented landscape would emerge with different rights regimes operating with respect to different public bodies. This situation would clearly be unacceptable, and if the HRA repeal was to take place there would need to be a clear power for the Scottish human rights regime to be applied to UK bodies and agencies operating in Scotland.

Economic powers

Scotland should have new powers to create a jobs-rich, more equal and more locally-based economy. It is vital that the Scottish Parliament does not accept powers over taxation that only give it the responsibility to deliver the UK Government's economic policy. Rather it should have powers to set an economic and industrial policy designed for Scotland and its regions. Taxation is discussed here and industrial policy in a section below.

The Scottish Parliament and Local Authorities should have the power to design and raise the majority of their own taxes and therefore fund the majority of their own spending. This increases the accountability of politicians, gives the ability to shift the balance of taxation, and provides for taxes that better fit local circumstances. Under the Scotland Act 2012 Scotland will have control of only a small proportion of income tax and will have very limited powers on other taxes, with the bulk of its spending coming from the Scottish block grant as calculated by the Barnett Formula. Council Tax raises a declining proportion of the money local authorities spend on public services like schools, roads and nurseries. The bulk of their resources come from the Scottish Parliament, and over the last eight years Council Tax has been frozen, leaving many Councils under pressure to increase fees and charges for services.

While there is a clear need for the flexibility to design tax policies which meet local circumstances, it is also important not to set up a situation of direct tax competition across the UK. We believe that the devolution of a wide range of taxes, as opposed to a piecemeal approach, would be more likely to avoid promoting tax competition.

The case is strongest for the devolution of taxes which can most easily be made progressive, such as income tax, those which are based on immovable assets such as land and property, and those which are intended to achieve behaviour change such as environmental taxes and resource taxes. For clarity, we support the full devolution of income tax, as opposed to the assignation of revenue. The Scottish Parliament should be able to set rates, bands, reliefs and personal allowances.

Those taxes levied at a flat rate such as VAT and corporation tax could have a percentage of revenue assigned to Scotland.

However on corporation tax there is a particular danger of tax competition. The Greens did not support SNP proposals to cut corporation tax rates in competition with the rest of the UK, however it must be acknowledged that the UK's track record is very similar, with regular cuts to this tax leaving wealthy corporations paying little or nothing to the common good. These problems would be best addressed through EU-wide moves toward tax cooperation.

Given the emphasis placed by Better Together on the notion of "pooling and sharing resources", there will also be a need to retain the ability for transfer payments across the UK, so that richer regions can help finance poorer ones and guard against economic downturn in particular regions. One way to retain transfer payments is for the assignation of UK-wide taxes to be set at, say, half the population share (~5%), and use an agreed formula to allocate the rest via the block grant.

Wealth taxes

There has been increasing and welcome attention paid in recent years to inequalities of wealth as well as income, and the role that a wealth tax could play in addressing this. Ultimately, due to the mobility of wealth, this will be best addressed by cross-border co-operation. However the ability of individual jurisdictions to explore innovative ways of introducing wealth taxes should not be restricted.

Borrowing

In addition to taxation powers, it is clear that the Scottish Government needs the freedom to make its own borrowing decisions, without the need for approval given or limits set by the UK Government. Without this crucial power any Scottish Government will be left operating within a financial envelope set partly by the UK Government and partly by the year-to-year conditions of the economy.

Giving Scotland fiscal responsibility without the ability to make its own economic policy will only leave future Scottish Governments in the position of implementing the UK's economic policy on its behalf. Any meaningful devolution of tax and welfare powers must be accompanied by the freedom to make borrowing decisions.

Governance at a UK level

The Treasury, Bank of England, and HMRC all make economic decisions which affect Scotland. However Scotland's needs are not always represented in the governance of these important institutions. It is important that Scottish interests are formally represented on the management boards of the Treasury and HMRC.

Welfare and social security

Scotland should have the ability to design and fund a system of social security based on fairness, compassion and universal concern for the dignity of all people. As with economic powers, we do not accept an approach which would merely require the Scottish Government to deliver a system of social security designed elsewhere.

Housing policy is already devolved to the Scottish Parliament but housing benefit is not. The 'bedroom tax' is an example of a policy which was designed (however badly) for the more crowded south east of

England but which has nevertheless been implemented in Scotland. However the devolution of housing benefit has very clear implications for the wider system, including universal credit and all that it involves. Others have made the case for the devolution of the work programme, attendance allowance, winter fuel payments, Job Centre Plus, carer's allowance other aspects.

Clearly once any significant aspects of personal taxation are devolved, the interface between the tax and benefit systems will be affected, and a coherent approach to social justice and the fair distribution of wealth cannot be achieved if there is fragmentation between these systems. We would therefore advocate an approach which seeks clear justification for any aspect of the social security system remaining reserved; this may for example be the case in relation to pensions, but little else.

Industry and Employment

We are aware that the Scottish Labour Party has proposed a Scottish health and safety executive, employment tribunals and consumer advocacy. We see merit in these suggestions, and would add the case for the devolution of trades union legislation to allow the Scottish Parliament to enhance the role of unions in advocating for their members' interests.

Immigration & asylum

While fundamental changes to the immigration and asylum systems may not be agreeable to others, we would note that the experience of the Fresh Talent initiative from 2005 and some limited changes to the implementation of family removals and child detention in the asylum system the following year showed that some scope exists for variations.

With respect to asylum, concerns have continued to be expressed in Scotland regarding legal representation and practical support for applicants. Some asylum seekers are still at risk of destitution in Scotland, and at present the Scottish Government is unable to take action to remedy this.

With respect to immigration one of the most frequently cited issues relates to the withdrawal of post-study work visas for students, and the impact that this has had on Scotland's higher education sector.

Given the different demographic patterns and the varying impact of migration in different parts of the UK, we would make the case for the Scottish Parliament to be able to exercise a degree of flexibility in these areas. There is also a clear need to address the UKBA's unwillingness to engage with MSPs in any meaningful way, even on individual constituency casework. A degree of joint governance between the Scottish and UK administrations would help to achieve this.

External voice

While Scotland's ability to fully represent itself on the world stage would only come with independence, we would argue that the UK Government should be open to exploring the extent to which Scotland's voice in the world can be heard more fully than at present. A clear right to full participation in UK delegations where areas of devolved responsibilities are under discussion would be one positive step, as would an enhanced ability to contribute to the development of UK policy stances.

As one example the impact of the Transatlantic Trade and Investment Partnership could be dramatic, and it seems reasonable that Scotland's perspective on the negotiation of such international agreements should not only be heard in its own right, but be taken fully into account.

Scotland has shown an appetite for a greater role in international development, and since session two of the Scottish Parliament there has been a gradually growing scope for this to be agreed between the two governments. Most recently the Scottish Government has advanced arguments on climate justice, and has made a very positive contribution to global debate on this agenda. We believe as a point of principle that it is unhealthy for any level of government to be entirely focused on domestic affairs, and we argue for a greater sharing of responsibility for overseas engagement between the UK and the Scottish Governments.

Equality

We are aware of a wide range of equality organisations making the case for the devolution of equality law. They argue that the intersection of equality law with a range of already-devolved policy areas such as housing, health, education and justice, alongside the distinctive demographic and geographic circumstances of Scotland, all mitigate in favour of the devolution of equality law. Equality is already devolved in Northern Ireland, and the experience in the EU also shows that variations in equality law are common, with minimum standards agreed and individual jurisdictions able to establish additional protections above that minimum level. We would endorse this case.

Energy

Scotland should have the power to tackle fuel poverty, support renewable technologies and deliver community ownership. All of these can and should be delivered with a GB-wide electricity market.

Energy efficiency

While energy efficiency is a devolved competence (and a high priority given Scotland's climate and the nature of our housing stock) any additional spending in this area can risk losing out on the funding which comes from energy companies under regulations set at UK level. ECO is a market based energy efficiency scheme delivered by energy companies. The Scottish Government should have the power to direct and co-ordinate delivery of these activities to better align with Scottish needs and circumstances.

Power distribution

Under the current system the regulation of electricity transmission (high voltage long distance lines) and distribution (lower voltage) is reserved. It makes sense to retain transmission regulation at UK level but distribution (currently delivered by Scottish Power and SSE) should be devolved to allow community energy projects greater and more affordable access to the grid.

Renewable incentives (CfD, RHI, FITs)

The Scottish Government recently lost the power to vary the level of renewable incentives for specific technologies. Under the new energy market arrangements the 'strike price' set by DECC sets the incentive levels for different (large scale) technologies. Scotland should have control over a population-share of the cash available for renewable incentives and use this to top-up or trim the 'strike prices' for Scottish generation. A similar case can be made for Scottish control of Feed-in-Tariffs and the Renewable Heat Incentive, given the particular circumstances of available renewable energy resources in Scotland.

Energy supply

This is another area in which a degree of devolution would open up new policy options which would help to achieve not only renewable energy and climate change targets, but other aspects of the Scottish Government's performance framework which enjoy broad cross-party support.

The case for local energy companies has been made from several quarters, and some local authorities such as Glasgow are already taking steps in this direction. However the regulation of the retail, business and industrial market currently sits with OFGEM and does not offer positive opportunities for local energy companies.

Fossil fuels

Given that the Scottish Parliament has responsibility for many of the environmental consequences of the use of fossil fuel, including greenhouse gas emission levels and clean-up after the opencast industry's abandonment of sites it has destroyed, we see no reason in principle why the regulation and licensing of the extractive industries should not be devolved.

There has also been ambiguity about the Scottish Parliament's ability to set emission performance standards for energy generation. Any barriers to this should be removed.

Unconventional gas

Additionally, there has been widespread public concern over UK Government decisions to license search areas for hydraulic fracturing (fracking) and other unconventional gas extraction, and the proposal to legislate to allow such developments to proceed without the consent of householders and landowners. Such developments are essentially economic in nature, and give rise to significant environmental and land use concerns. While the Scottish Government is already able to use planning and environmental regulation to a certain extent in this area, there is clear public demand for the power to decide on licensing and on the matter of consent.

The devolution of power in all these areas of energy policy would allow for the more rapid advance toward renewable energy targets, climate change targets, and community control of local economic decisions.

Broadcasting

Debate over the future of the BBC is not confined to SNP proposals during the independence debate (to which the Scottish Greens did not subscribe) but resurfaces from time to time at UK level. Our proposal for a renewed BBC Charter and Agreement to create a shared governance relationship between UK and Scottish Governments, rather than just the Secretary of State at UK level, would still be relevant in the context of deeper devolution within the UK.

This could perhaps be extended to include the Welsh and Northern Ireland Assemblies and would create a number of advantages:

an additional level of protection for the principle of public service broadcasting;

a structural incentive for the Corporation to take its different audiences seriously;

retaining the scale of the biggest news-gathering machine on the planet.

Transport

While most transport services and infrastructure is devolved already, a number of issues remain reserved creating an anomalous situation and limiting the scope of Scottish transport policy. As argued by Transform Scotland, further devolution would be beneficial in areas such as: the legislative framework for railways; the Traffic Commissioner's role in relation to bus route registration and operation; speed limits on restricted roads; signage; and powers of tax relief for public transport.

Betting, gaming and lotteries

There remains significant concern over the operation of recent gambling legislation in Scotland, with a particular call for local authorities to have the power to put limits on the number of Fixed-Odds Betting Terminals in their areas. The devolution of betting, gaming and lotteries would allow this and other matters to be dealt with either in Scottish legislation or at local community level.

Land reform

While much of the land reform agenda is devolved already, problem of competence arose in relation to efforts to use the land registration system to address the issue of land registered in tax havens. We would argue that it is important for the Scottish Parliament to be able to take steps to tackle the abuse of land ownership for the purpose of tax avoidance.

There have been many, including the Scottish Affairs Select Committee at Westminster, who have argued for the devolution of the Crown Estate and powers of the Commissioners. We support this, and would seek to strike a balance between local control of assets and investment decisions, and the need for a coherent approach to issues such as renewable energy and the marine environment.

Anomalous reservations

While the health and justice systems are almost entirely devolved, two reserved issues stand out as anomalous. Devolved services deliver services relating to sexual and reproductive rights and health, however the law on abortion was held back at the time of devolution. While this position may have been taken in the light of prevailing social attitudes at the time, it may now be appropriate to recognise that the progressive, human rights based agenda make it unlikely that Scotland would take actions which restrict women's reproductive rights.

Similarly the range of criminal justice, health, housing and social services which come into contact with problem drug users are largely devolved. However the legislation in this area remains reserved. While there may be less political consensus about the way forward here, it should be questioned whether a strong basis remains for this reservation.