

# The vow delivered? Experts respond to the publication of the Smith Commission's recommendations

By Democratic Audit UK

The Smith Commission, the body tasked with recommending reforms to the governance of Scotland recently released its final report. Democratic Audit asked Scottish constitutional and political experts **John Curtice**, **Katie Boyle** and **Stephen Tierney**, and **Sionaidh Douglas-Scott** to respond. (Part 1 can be found [here](#)).

## **John Curtice, Professor of Politics, Strathclyde University**

The Smith Commission was, of course, the product of concern in the No camp that the referendum vote might be lost. By offering Scotland a firm promise of more autonomy within the framework of the UK, it was hoped voters would be persuaded they did not need to leave the UK after all.



But now that Smith has been unveiled, will voters be satisfied that they are in fact being offered the autonomy that they want?

At first glance this looks unlikely to be the case. Most polls find that a majority of Scots think that more or less every single aspect of their domestic affairs, including taxation and welfare benefits, should be handled in Holyrood, not London. Smith, in contrast, is simply proposing further partial devolution of tax and some seemingly limited devolution of welfare.

But there is also another side to public opinion north of the border. Voters are relatively disinclined to embrace the idea that income tax rates in Scotland might be different from those in England, while they certainly do not like the idea that the state pension might be different.

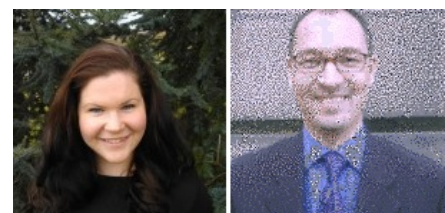
Equally, a clear majority believe that major welfare payments such as pensions and unemployment benefit should be paid for out of UK-wide taxes, not just out of revenues raised in Scotland.

In short, while Scots like the idea of Holyrood making its own decisions, at the moment at least they are less keen on some of the potential implications of more devolution.

Smith will give Scots an opportunity to see whether or not they can in fact live with the consequences of being responsible for their own affairs. If they find that they can, then doubtless there will be a demand that yet more tax and welfare be devolved. If not, then maybe this undoubted compromise will indeed come to be regarded as giving Scotland the 'best of both worlds'.

## **Katie Boyle, Postdoctoral Research Fellow at the University of Roehampton & Stephen Tierney, Professor of Constitutional Theory at the University of Edinburgh**

Twelve months ago [we predicted](#) that Scotland would face significant constitutional change regardless of the outcome of the referendum. We also highlighted the critical importance of process as well as substance in the post-referendum



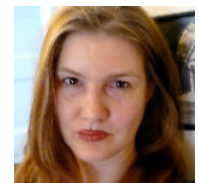
landscape. We referenced principles of deliberative democracy and emphasised that any constitutional change should be predicated with a deliberative process that ensures constitutional change is formulated in an open, deliberative and reflective environment. This is based on the principle that legitimacy of the process engenders legitimacy in the outcome. The remit of the Smith Commission was to “to convene cross-party talks and facilitate an inclusive engagement process across Scotland” with a view to delivering “more financial, welfare and taxation powers, strengthening the Scottish Parliament within the United Kingdom”.

The [Report of the Smith Commission](#) is based on a process that sought views from civic Scotland through consultation and brought together political parties to formulate agreed positions on the future of Scotland. Essentially it is the party political consensus which the Smith Commission Report comprises. It is not clear from the report to what extent the views of civic Scotland or the electorate actually informed the cross-party political negotiations in practice. This means the process and outcome of the Smith Commission relies on an elite-driven exercise in deliberation without any guaranteed mechanisms to ensure genuine inclusive engagement with civic society.

It has not helped that the short period during which these proposals were put together coincides with a highly-contested pre-election political environment. It was never going to be easy to ensure broad consensus of the Scottish electorate, nor to arrive at a package to be implemented by Westminster. But the result is policy-led constitutional change rather than a full exercise in due diligence to test the feasibility and popularity of the different proposals through proper deliberation and engagement with the electorate.

It also means that the powers and responsibilities recommended for further devolution do not necessarily enjoy the support of the majority of the people of Scotland; indeed it is not at all clear that people understand what is happening nor the possible ramifications of the proposed changes. For example, there are clearly significant changes proposed to the current operation of the Barnett Formula – in this light, the extension of powers relating to welfare provision and limited tax raising powers will require close scrutiny. These proposals should be treated as such allowing for a genuinely inclusive and transparent exercise in public engagement before any legislation is hastened through Parliament.

**Sionaidh Douglas-Scott, Professor of European and Human Rights law, University of Oxford**



The Smith report recommends that ‘UK legislation will state that the Scottish Parliament and Scottish Government are permanent institutions.’

Constitutional conservatives will not like this. Clearly, this recommendation is intended to allay fears that the Scottish Parliament could be abolished by UK legislation, as was the Greater London Council abolished by Margaret Thatcher. According to traditional theories of parliamentary sovereignty, the UK Parliament has the legal authority to enact, amend or repeal any law, and no other body has the legal authority to stop it so doing. Therefore, according to orthodox theory, attempts to create a permanent Scottish Parliament by UK statute would not bind future UK parliaments, which could simply repeal it.

Yet current constitutional developments (including judge created constitutional values, as well as the evolution of the British constitution under the influence of EU and human rights law, and devolution itself) suggest that the British Constitution may no longer be read in this simplistic way. So if Westminster legislation is adopted declaring the Scottish Parliament permanent, then for all intents and purpose it will be so. Significantly, the Smith report also describes its aim of an enhanced devolutionary settlement as, ‘Reflecting the sovereign right of the people of Scotland to

determine the form of government best suited to their needs.’ Contrast this to s28 Scotland Act 1998, which specifically declares the continued power of the UK Parliament to legislate for Scotland, thereby upholding the concept of Westminster’s absolute parliamentary sovereignty. But the Smith report seems to suggest that the Scottish Parliament enjoys sovereignty directly from the Scottish people (recalling long standing theories of Scottish popular sovereignty) and not just as delegated by Westminster.

Other significant constitutional consequences follow from Scotland’s relationship with the EU. EU law concerns many significant areas of devolved competence, such as family, criminal, succession and procedural laws, which can differ considerably from English law on the same subject. However, the Smith report recognises that ‘foreign affairs will remain a reserved matter.’ But it also notes that the implementation of the current Concordat on the Co-ordination of EU Policy Issues ‘should be improved,’ proposing that Scottish Ministers are fully involved in agreeing the UK position in EU negotiations relating to devolved policy.

This is a long way from the Scottish Government’s submission to Smith, which sought guaranteed rights for Scotland to engage directly with EU institutions in devolved areas; a statutory mechanism to enable Scotland to develop, influence and represent UK policy on broader EU matters such as treaty change; and that Scotland have competence to negotiate and ratify international agreements relating to devolved matters. Some such practices already exist in EU member states such as Belgium, Germany and Spain. The Scottish Government also submitted that the EU Coordination Concordats be put on a statutory footing.

In contrast, the Smith Commission is much more cautious. Part of the problem, as it recognises, is ‘the need to reflect fully the views of the other devolved administrations when drawing up any revised governance arrangements in relation to Scottish Government representation of the UK to the EU.’

However, the EU is a controversial area and continuing developments may bring these matters to a point of constitutional crisis. The system of opt-ins under EU Treaties has already created problems for devolved administrations, such as the recent decision by the UK Government to opt-out of criminal law and procedure aspects of EU law. More serious still could be the consequences of the Conservative party’s policy of holding an in-out EU referendum. The Scottish Government has requested its own referendum on this subject. The Smith report makes no provision for this. Should the UK vote as a whole to leave the EU, without Scotland being given a chance to hold its own referendum, the constitutional consequences could be severe. The UK is not a homogeneous nation, but composed of four different nations, so a simple majority in an EU exit referendum could be seen as inadequate. This raises the issue of national minorities and their protection, as well as the federal question, both largely ignored by the Smith report.

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