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REPORT

Scotland and the Constitution: Agreeing a way forward

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We shared a first draft with a range of figures from across the political spectrum and wider civil society in Scotland and we very much value their constructive engagement and feedback, some of which has been reflected in the paper. We offer this report not as the definitive word on Scotland's constitutional next steps, but as a constructive contribution, rooted in a spirit of collaboration and compromise, to the ongoing debate about Scotland's future.

Any errors of fact or interpretation of course remain our own.

“And whatever happens began in the past, and presses hard on the future.”

T.S Eliot, *The Family Reunion*



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Introduction

10 years ago, during the independence referendum, we were on different sides of the debate. Today, we are able to find a degree of overlap and agreement on a way forward.

We have not fundamentally altered our positions on independence or the Union, but for both of us the experience of the past ten years has been to step away from an either/or, black or white mindset to see if it is possible to conduct the conversation in a different way – starting not from what divides us but on the ground of what unites us. We begin this paper with individual reflections on the experiences which have brought us to this point.

After those more personal, introductory perspectives, this paper becomes more clearly a joint enterprise. It presents a collective view but does so recognising that if one or other had been sole author the arguments and emphases would almost certainly have landed in a different place. But we have sought to hold our constitutional positions lightly and have tried instead to put the primary focus on shared values and principles, on those elements that unite us and on which we can build. It is a collaboration, therefore, based not on the minimum that we can agree on, not on a lowest common denominator, but on a genuine search for something new.

We both want to see a flourishing Scotland, a Scotland that is happy and at peace with itself, a land of prosperity and sustainability, opportunity and social justice. For both of us, our ultimate goal is not one particular constitutional outcome or structure but rather what is best for this community that we call Scotland – a consideration that is, of course, an outward-looking one: we will flourish as a nation if our neighbours are flourishing too.

We believe that the constitutional conversation would be a more fruitful and more unifying one if it had this - what is best for the people of Scotland - as its purpose, with powers, relationships, government structures all considered as the means to that end.

The question we would ask people to consider is what relationships, responsibilities, structures do we need to deliver a flourishing Scotland?

Neither independence nor the Union offers complete or perfect solutions, indeed neither are absolutes, especially given the realities of this increasingly interdependent world. Both have strengths and weaknesses, both present challenges and opportunities. Our view of where the balance of advantage lies is different, but we can see beyond the binary and would invite you to do so too.

Our experiences of Scotland's constitutional journey

Kez's story

In early 2011, I was a key seat organiser for the Scottish Labour Party charged with defending Edinburgh Central and seeking to win Edinburgh Eastern. In January of that year Labour had a double-digit lead over the SNP in the polls and we believed a return to government was within touching distance. The weeks that followed saw that lead evaporate and the SNP storm to power with a majority and a mandate for an independence referendum. Scottish Labour lost both those marginal seats and I was elected myself as an MSP for the Lothians list.

I didn't enter politics to talk about the constitution. Yet, serving as a Labour MSP from 2011 to 2019 meant that my entire parliamentary career was defined by the constitutional question and my public profile aligned with it.

In the summer of 2014, I was Scottish Labour's Education Spokesperson under the leadership of Johann Lamont. Following my first outing on BBC Question Time, I was picked by the Better Together campaign to be one of three speakers for the 'No' campaign on the flagship STV Independence debate. Alongside lots of media work and campaigning, I was also part of the team that supported Alistair Darling as he prepared to take on Alex Salmond in the live TV debates. I would become Deputy Leader of the Scottish Labour party when Johann resigned after the referendum and Leader just six months later after Scottish Labour lost 40 of its 41 seats in the 2015 election.

What I perhaps hadn't appreciated then, which I understand now, is the extent to which the prospect of independence was everything to those fighting for it. For many 'Yes' activists, it was their political ideology, their dream and purpose. For those of us on the left or the centre left of the 'No' side, our fervour and political passions lay elsewhere. It's one of the reasons so many of us were and are so uncomfortable with the term "unionist".

I voted no because I believed and still believe that the United Kingdom offers the best mechanism to redistribute the power and wealth required to deliver the type of country I want to live in. One that's equitable, prosperous and progressive.

I travelled back to Edinburgh from Glasgow on the morning of the 19th of September 2014 having been up all night watching the result at the Hilton hotel where Better Together were based. I will never forget the stillness of the country that day. A sense that nothing and everything had changed. Looking back now, the divide in the country was not between those that won and lost, but between those experiencing grief or relief.

I understand the motivations and desires of those that voted 'Yes' far better today than I did then. I share many of them.

Towards the end of my parliamentary career, I grew really frustrated by the extent to which almost every political issue in the country was seen through the prism of the constitution and tried desperately hard to move away from it. I've resolved now that it simply has to be revisited. Not because I've changed my mind on independence, but because I want devolution to deliver on its promise.

Five years on from elected politics, but with still deep roots in public policy and campaigning, I strive for a political debate that starts with the question: "What will it take to eradicate child poverty?" I am content to determine what power sits where from the answer.

I believe that approach will be critical to answering equally big and "wicked" questions around climate change or adapting to the demands of an ageing population to name but two.

I also know that many of my opponents from 2014 are allies in this quest now. I can't ask them to join me in a process to advance devolution in order to address Scotland's many societal challenges without recognising their desire and Scotland's right to revisit the independence question should it so wish.

Evidence, dialogue, compromise and understanding. That's why I was motivated to write this paper with my then opponent, now friend, colleague and ally, Stephen Noon.

Stephen's story

I started my political journey in the immediate aftermath of the 1992 election, joining the cross-party campaign group Scotland United. I remember being outraged by the 'democratic deficit' that saw policies being imposed on Scotland against our expressed will.

It was through Scotland United that I first met people in the SNP, people

who became friends and who bit-by-bit persuaded me of the economic case for independence. For me, independence was not a question of identity but having the full range of tools we needed to make the most of the exceptional hand Scotland had been dealt and adequately address the many deep-rooted challenges.

Professor Sir Neil MacCormick contrasts “pure” and “utilitarian” nationalists in his seminal 1970 essay, ‘Independence and Constitutional Change’.¹ I see myself as very much the latter; passionate about independence, but not regarding it as an end in itself. If I thought independence would damage Scotland’s prospects, I would not support it.

I worked on policy and political strategy for the Scottish National Party from 2004 onwards before taking on the dream role of Chief Strategist for Yes Scotland, the official pro-independence campaign in the 2014 referendum. At that time, I did very much see people like Kez as opponents. I was suspicious and dismissive of those advocating for ‘No’, in particular because of my perceptions of their campaign approach. We were Hope, they were Fear. Them and us.

I had always imagined that Scotland would sing and dance its way to independence and so the best moments of the referendum campaign for me were those final weeks when people were literally singing and dancing in the streets of Glasgow. There was a buzz of anticipation and possibility. It seemed like the dawn of an exciting new phase in Scotland’s story. However, I realise now that what was joyful and inspiring for me, was frightening and threatening for others. We had, as a nation, been involved in two different conversations with sharply contrasting emotional undercurrents.

And then the vote was lost.

After the referendum, I left the world of politics to enter the Jesuits, a Roman Catholic religious order. My Jesuit formation took me to Canada and that experience has profoundly shaped my outlook on ‘the Scottish question’.

I was in community with men who had lived through the Quebec Referendum of 1995. Talk of that period still sparked powerful emotions of anger; they told me of the threat they had felt to their identity, to the country, Canada, that they loved. It was visceral and, through their words, I began to get some understanding, for the first time, of what our referendum in Scotland would have been like for those who believed in

¹ Neil MacCormick (ed.), 1970, *The Scottish Debate*, London: Oxford University Press, 52-64.

the UK.

Returning to Scotland in 2022, after leaving the Jesuits, I remember being quite shocked by the state of the debate. It was not only the rigidity and polarisation, but also the angry tone of much of the discourse. The sense of them and us had hardened, on both sides, and taken on sharper edges. A key lesson I brought back with me was the realisation that many things we regard as either/or choices are often better seen in both/and terms. Binaries do exist, but in the complexity of the real world the more common experience is that we balance competing, contrasting demands.

That is the belief that underpins this paper, and which has made working with Kez – and I echo her words, a former opponent who has become a friend – a source of creative not destructive tension.

I have always been comfortable with the idea that the people of Scotland have the right “to determine the form of Government best suited to their needs” (The Claim of Right, 1989)² – and that we have the collective wisdom to recognise what that is, what it should be.

Reflecting on Scotland’s constitutional journey to date, I believe there is an important distinction to be made between 1979 and 2014, which were ‘lost’, and 1997, which was ‘won’. The former had top-down propositions – created within government, even though there were commissions and consultations. For the latter, the proposition was one that had been built from the bottom up, in a process that was participative, policy-focused and which genuinely served to capture the will of the people at that time – something confirmed by the referendum itself, the holding of which was a controversial but ultimately correct decision.

The lesson for me, which also informs my hopes for this paper, is that successful constitutional change only happens when it reflects what the people want. If there is to be a further strengthening of the Scottish Parliament, in whatever form, and a confirmatory referendum, then let us do so in a unifying, open and deliberative manner which, while not seeking to replicate precisely the 1997 model, captures its essence and something of its spirit.

² A copy and signatories is available here: <https://researchbriefings.files.parliament.uk/documents/CDP-2016-0158/CDP-2016-0158.pdf>.

Executive Summary

As we look to the next decade, Scotland's political terrain will be shaped by the choices that we make as a nation.

We can regard constitutional questions as too difficult, too polarising, a distraction from the real policy questions, or we can accept them as critical elements that shape the big policy questions, part of a rounded conversation about the sort of Scotland we hope to build.

At the heart of this report is the belief that we are entering a new period in Scottish politics, and this should encourage us to be open also to new approaches.

With this in mind, we argue that:

- Scotland faces many policy challenges, from poverty and ill health, demographic and climate change, among many others. Our ability to address these challenges is profoundly shaped by the constitutional powers, resources and policy levers that the Scottish Parliament and Government have at their disposal.
- For the past decade policy decisions in Scotland have been viewed through the prism of the constitution. This is the wrong way round. For this reason, the review of the devolution settlement that we are proposing should start with, and be centred on, specific policy challenges.
- The 2016 settlement brought new powers to the Scottish Parliament, especially in tax and social security. These also brought new complexity to devolution in the interaction between devolved and reserved competences and an associated fiscal framework that lacks the flexibility and maturity that a 25-year-old parliament should have.
- Brexit also profoundly reshaped the environment within which our parliament operates, accompanied by new legislation, such as the UK Internal Market Act, that have added to the complexity and eroded the authority of the Scottish Parliament.
- These developments merit a re-examination of the 2016 settlement. They also pose a genuine question for all Scotland's political parties: is it possible for a future Scottish Government to address some of the fundamental and deep-rooted challenges that Scotland faces without looking at how the current constitutional settlement works, in particular in relation to the fiscal arrangements which shape Scotland's budget – a budget which, in turn, shapes every aspect of policy?
- The Scottish Government and Scottish Parliament, working with the UK government, should agree to the establishment of a Commission on the Constitution on a model influenced by the recent independent, cross-party and civic commission that took

place in Wales. This Commission would be tasked with reviewing the current devolution settlement with a focus on three areas:

1. How it has been impacted by Brexit.
 2. Whether, given the current policy challenges and opportunities, the boundary between devolved and reserved competencies is correct.
 3. How the fiscal arrangements are working in practice.
- The work of the Commission should include a range of civic and community engagement, as part of a deliberative process that goes beyond politicians and institutions.
 - Under current arrangements, the Scottish Government must balance its budget each year as a requirement of the Scotland Act. It can underspend but cannot overspend. As part of the review, consideration should be given as to whether there can be greater flexibility to balance budgets over the spending period of a parliament. This would enable front-loaded investment in prevention and public sector reform and serve a public policy purpose, given that both can unlock savings in the long term.
 - The operation of the 'no detriment' principle is another example of where a small change in the settlement could deliver significant policy results. If Scottish Government investment produces a saving for the Treasury, for example, if investment in social housing leads to a reduction in housing benefit costs, then that saving should be passed on to the Scottish Government to incentivise and support investment in a sector that is so important in terms of both tackling poverty and inequality and supporting economic growth.
 - In addition, we recognise that the issue of Scotland's future in or out of the Union was not resolved forever in 2014. If the Union is voluntary, upheld by consent and not just by law, there ought to be a recognised, legal and fair process to test, when appropriate, whether the people who live in Scotland can determine whether they want the country to remain in the Union or to transition to independence.
 - The existing mechanism for triggering a unification referendum in Northern Ireland should be the basis for agreeing a pathway to a future independence referendum in Scotland. This would mean that the key test becomes whether or not it is likely that a majority of people would vote for independence in such a referendum. Meeting this test should place a legal duty on the UK government to agree to a referendum.
 - The decision on whether the test had been passed would rest with the Secretary of State for Scotland, but within a set of criteria previously agreed with the Scottish Government. The threshold agreed would be such that it did not act as an insurmountable barrier but rather served to confirm the solidity of pro-independence support.

- Under our proposal, once such a referendum process is triggered, UK ministers would agree a section 30 Order to devolve the necessary competences to the Scottish Parliament, within an agreed framework, following the model of the 2012 Edinburgh Agreement.
- Victory in the referendum would be achieved on the basis of 50 per cent plus one of the votes, following the norm for constitutional referendums in the UK.

The next chapter of Scotland's story should start from where 'Yes' and 'No' supporters can agree. This is about a new conversation, rather than an attempt to revisit the old conversation. It starts with the opportunities and challenges that Scotland faces and only then moves to an assessment of the powers, relationships, government structures and financial arrangements that we need.

Yes

1. Reflections on 2011 - 2014

NO
THANKS



1.1. In many respects the 2014 independence referendum was an accidental referendum.³ As others have observed, in 2011, in being able to form a single-party majority government, the SNP “broke” a PR electoral system that was expected to deliver “permanent coalition government”, with the scale of the party’s victory described as “[flying] in the face of pre-election polling and much political commentary”.⁴

The UK government’s response was to acknowledge both the SNP’s victory and the party’s clear manifesto commitment to hold a referendum within the parliamentary term, and to seek to engage with the Scottish Government to deliver a referendum that was legal, decisive and fair.⁵ In time, that approach led to the Edinburgh Agreement, and the transfer of legal authority to the Scottish Parliament to enable it to legislate for a referendum on independence.

1.2. Our reflection on that period is that an independence referendum was not seen as posing any real threat to the UK. Indeed, it would seem that UK ministers were more focused on the risks associated with rejecting, or being seen to try to block, such a vote.⁶

Conversations that we had with journalists and political commentators at that time had as their starting point the assumption that the pro-UK side would win comfortably – a reasonable view given that polling in the days running up to the signing of the Edinburgh Agreement suggested support for the Union was at 58 per cent among those certain to vote, with independence backed by just 30 per cent of respondents.⁷

Along with the fear of making things worse by blocking a referendum, there was also a sense that the anticipated victory for the pro-UK side would put the question of independence to rest for a political generation. For UK ministers, these were powerful and persuasive incentives. Compared with the transformed political environment post-2014, with independence support sitting at or above 2014 levels and political positions more clearly drawn, agreeing to a referendum in 2014 seemed a significantly easier political choice for a UK government than it would be given current circumstances.

1.3. A multi-option referendum was considered as part of the consultation conducted by the Scottish Government on its referendum proposals. As that document set out, Scottish ministers were “willing to include a question about further devolution on the lines of ‘devolution max’” – which would leave responsibility for defence, foreign affairs, financial

3 As Ciaran Martin points out, in 2011 no preparation had been done in Whitehall on key questions related to a referendum, despite it being an SNP manifesto commitment, because the expectation was that while the SNP might emerge as the largest party, there would still be a pro-Union, anti-referendum majority in the Scottish Parliament. See Professor Ciaran Martin, “Resist, Reform or Re-Run: Short- and long-term reflections on Scotland and independence referendums”, Blavatnik School of Government (April 2021), 13: https://www.bsg.ox.ac.uk/sites/default/files/2021-04/Scotland_Referendum_final.pdf.

4 Daniel Kenealy, “Introduction: The SNP in Government, 2007-2016), Scottish Affairs 25.1 (2016), 1.

5 See, for example, the statement from David Mundell MP, Parliamentary Under-Secretary of State for Scotland, on 15th October 2012 (Hansard, vol. 551, col. 64) and the consultation document, ‘Scotland’s constitutional future’, Cm 8203, January 2012 (https://assets.publishing.service.gov.uk/media/5a74936b40f0b61938c7e906/Scotlands_Constitutional_Future.pdf).

6 See, for example, Ciaran Martin, “Resist, Reform, Re-Run”, 13: “The political risk was obvious: that the UK government would end up in court arguing that the Scottish people had no legal right to determine their own future despite having voted to do so. The political consequences of this, in terms of the UK as a voluntary union, would have been horrendous in the view of UK ministers”.

7 <https://www.ipsos.com/en-uk/support-independence-continues-fall-labour-narrows-gap-snp>.

regulation and currency with Westminster - if there was sufficient support for such a move.⁸

This reflects the 'big tent' strategy that had been adopted since 2007, with the Scottish Government's National Conversation being open to a range of constitutional options for the country, while clearly favouring independence.⁹ Some within the Scottish Government believed that including a third option would all but guarantee defeat for independence, although this was tempered by the realisation that even a partial victory would be better than no victory at all. Others suggested that having a broad range of voices beyond the SNP arguing for what was effectively economic and financial independence (devo-max or full fiscal autonomy) would make it easier for the Scottish Government to make the case for the small number of additional powers that would come with independence. The priority was getting a vote on independence, and the idea of a third option was always secondary to that core aim.¹⁰

Questions of support for a third option or strategic advantage were ultimately of little consequence, given the limited enthusiasm in the consultation responses,¹¹ and the United Kingdom government's clear preference for a single question, with this being described as a 'red line' for UK ministers.¹²

The outcome was a binary choice for or against Scotland becoming an independent country. This had the benefit of offering a clear and decisive question but masked the plurality of viewpoints among the electorate.

1.4. The circumstances in 2012 that led to the Edinburgh Agreement were unique and over the past decade the prospect of a future referendum has become politically more contested – indeed, the process and possibility have become, and remain, a source of dispute and division.

For the UK Government, the balance of risk has shifted, given substantially higher base levels of support for an independent Scotland in the post-referendum period compared with the years preceding the 2014 referendum.

It is possible that a second, single-party, pro-independence majority in the Scottish Parliament, with that government elected on a clear manifesto commitment to hold an independence referendum, would be sufficient to persuade the UK government to concede a second vote. Indeed, some have indicated to us that this would have been the case in 2021, if the SNP had won outright. That may reflect a majoritarian political culture that still pervades Westminster politics, where single party majorities are the norm. In proportional representation systems, as evident in the 25 years of devolution, such an outcome is clearly exceptional.

8 Scottish Government, "Your Scotland, Your Referendum", January 2012, 15.

9 See, for example, "Your Scotland, Your Voice: A National Conversation", Scottish Government (November 2009).

10 Author's observations.

11 Just under one-third of respondents to the consultation favoured the inclusion of a second question. See the analysis of responses at <https://www.gov.scot/publications/scotland-referendum-analysis-consultation-responses/pages/7/>.

12 Secretary of State for Scotland, "Scotland's Constitutional Future", January 2012 (Cm 8203), 19; Nicola Sturgeon MSP, evidence to the Referendum (Scotland) Bill Committee, Thursday 15th November 2012, col. 82.

Ciaran Martin, a former senior UK civil servant, has argued that whether the pro-independence majority is a single party or multiple parties “is of zero constitutional or legal significance. A majority is a majority, and ... no one has attempted to define a different threshold for a trigger for a referendum.”¹³ Following the 2021 Scottish Parliament election, there was a pro-independence majority of SNP and Green MSPs, but this was not recognised by the UK Government as constituting a mandate for a new independence referendum, despite the subsequent Scottish Parliament vote for such a referendum. Following Martin’s logic, this transformed the Union into one upheld by force of law rather than by consent.

The failure to recognise the mandate also indicates that the political and constitutional calculations at a UK level have changed fundamentally. That suggests to us that if there is to be a future constitutional referendum in Scotland, we cannot assume that it will be achieved on the same basis as in 2012.

Certainty on this issue is our preference. We believe that the lack of an agreed mechanism for a future referendum only serves to feed polarisation by leaving important questions unresolved. It means also that we spend too much time talking about the process of securing an independence referendum rather than the substance of Scotland’s constitutional choices - whether that is the pros and cons of independence itself or the possibility of further reform to the devolution settlement - making it a conversation for politicians rather than citizens and one too often separated from the wider policy debate.

1.5. We recognise also that there were very different experiences of the referendum itself (see box 1.1 for insights from Noon’s doctoral research). For some, it was a time of fear and uncertainty, with the prospect of independence viewed as something deeply threatening. For others, it was a time of engagement and empowerment, of confidence and possibility, as people reflected deeply on the sort of country they wanted.

¹³ Ciaran Martin, “Resist, Reform, Re-Run”, 5.

Box 1.1

“Over the past year, as part of my PhD research at the University of Edinburgh, I have been interviewing a range of politicians, academics, civil servants, advisers and journalists about the ‘promise’ of a new culture of politics that was to come with the creation of the Scottish Parliament in 1999.

When people spoke about their experience of the Constitutional Convention or the 1997 referendum campaign or the opening of the parliament itself, what struck me was the similarity of their emotional responses. The process that led to the creation of the parliament was one that increasingly brought people together, with a widening circle of inclusion from the Convention (civic Scotland, the Labour Party, Liberal Democrats - to use their current name - and the Scottish Greens) through the referendum (bringing in the SNP) to the opening of the parliament (now including also Scottish Conservatives). People from all political persuasions spoke with the same joy, warmth, and sense of history about the events, in particular, which marked the opening day. There was a unifying shared horizon, a common experience that in important ways transcended their political difference.

Turn to the post-2014 reflections and this unity of emotional experience has gone. People now spoke of two very different experiences. Pro-independence people viewed the referendum period as one of the best of their lives, a time of possibility and empowerment, while pro-UK interviewees saw it as one of the worst, something unpleasant, uncomfortable, not willingly repeated.”

- Stephen Noon

If some on the pro-independence side have failed to fully appreciate the genuine anxiety experienced by ‘No’ voters, then just as many on the pro-UK side have failed to take full account of the genuine experiences of agency and hope on the ‘Yes’ side. Both have a story to tell about how we approach constitutional processes in the future. One doesn’t trump the other. It is time we embraced and sought to learn from both realities.



2. Post-2014: The devolution journey

2.1. The post-referendum period began with a degree of consensus. Agreement was reached on a cross-party basis, through the Smith Commission, for an extension of the powers of the Scottish Parliament, especially in key areas of tax and social security. All key players also agreed that a second referendum was, for the time being, off the table.

From the perspective of the Scottish National Party, this acceptance was rooted in two principles, respect and democracy: respect for the reality of the 2014 pro-UK vote and the democratic recognition that a second referendum could only come when a significant number of 'No' voters had changed their minds, and independence had become the choice of a "clear majority" of people in Scotland.¹⁴ The SNP's manifesto for the 2016 election expanded on this position, stating that "the Scottish Parliament should have the right to hold another referendum if there is clear and sustained evidence that independence has become the preferred option of a majority of the Scottish people".¹⁵

This consensus was broken by the Brexit referendum result. The SNP Scottish Government made the argument that leaving the EU represented a material change in circumstances, justifying the holding of a second referendum sooner than had previously been anticipated.¹⁶ In response, "now is not the time" became not only the mantra of the UK Conservative government, but also its hardened policy position.¹⁷

2.2. The decade that has followed the 2014 vote has seen a series of pro-independence majorities in the Scottish Parliament and, until the most recent UK general election, pro-independence majorities among Scottish MPs. This has resulted in the Scottish Parliament mandating the Scottish Government to seek the powers to hold a second independence referendum, as well as a series of other Scottish Government initiatives aimed at securing an independence vote.¹⁸

However, there has only been one significant, sustained period of clear majority support for independence during this period, in the second half of 2020,¹⁹ when the Scottish Government had formally suspended its independence activity to focus on the Covid-19 emergency, as illustrated by this graph from What Scotland Thinks (below).²⁰

14 See Nicola Sturgeon, Opening Remarks to SNP Conference, 15th October 2015, <https://www.snp.org/snp15-nicola-sturgeons-opening-speech/>.

15 SNP Manifesto for the 2016 Scottish Parliament elections, 23.

16 "We believe that the Scottish Parliament should have the right to hold another referendum . . . if there is a significant and material change in the circumstances that prevailed in 2014, such as Scotland being taken out of the EU against our will." SNP Manifesto for the 2016 Scottish Parliament elections, 23.

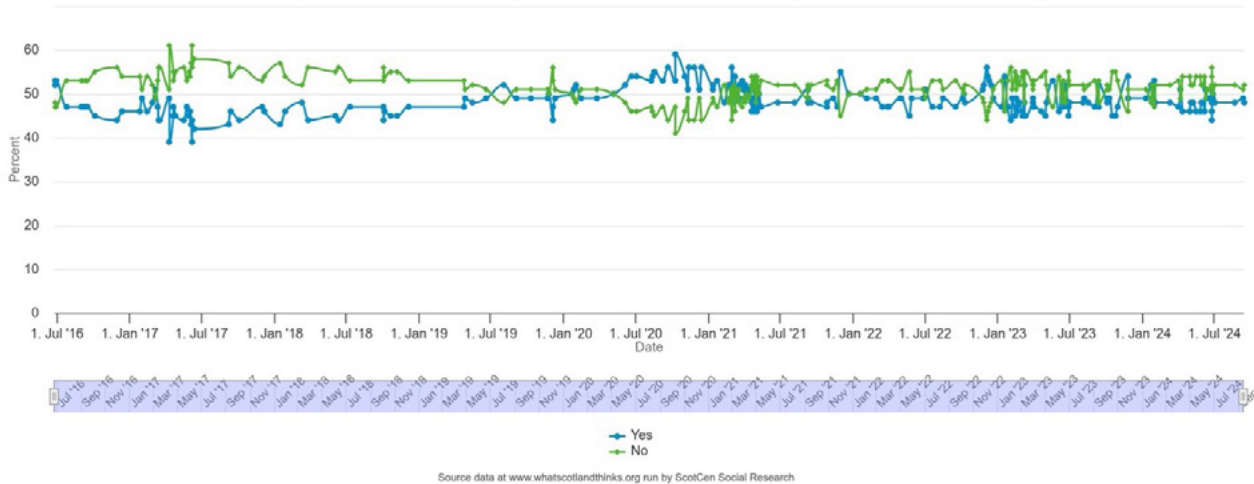
17 See, for example, the ways this phrase was deployed under the Premierships of both Theresa May and Boris Johnson, in Monika Brusenbauch Meislová, "Not now! Construction of the 'now-is-not-the-time' discourse of Theresa May and Boris Johnson vis-à-vis the second Scottish independence referendum", *British Politics*, vol.18 (2023), 321–341.

18 For example, on 28th March 2017, the Scottish Parliament voted by a majority of 10 to mandate the Scottish Government to seek the necessary transfer of powers so that an independence referendum could be held before the UK left the EU in 2019, <https://www.parliament.scot/chamber-and-committees/official-report/search-what-was-said-in-parliament/meeting-of-parliament-28-03-2017?meeting=10869&iob=99475>.

19 There was another, shorter period following the premiership of Liz Truss, raising the possibility of a connection between perceptions of the UK government and its competence and levels of independence support. See the collated independence poll results provided by What Scotland Thinks, <https://www.whatscotlandthinks.org/questions/how-would-you-vote-in-the-in-a-scottish-independence-referendum-if-held-now-ask/>.

20 <https://www.whatscotlandthinks.org/questions/how-would-you-vote-in-the-in-a-scottish-independence-referendum-if-held-now-ask/?removed>.

How would you vote in a Scottish independence referendum if held now? (asked after the EU referendum)



It is worth noting an important shift in emphasis over this period in what might be called the democratic justification for a second referendum. Initially, securing sustained majority support for independence was seen as the key to unlock a second vote. The argument then centred on the electoral mandate achieved by the pro-independence parties. Both carry democratic weight, but as we will set out in more detail later, we believe that greatest weight should be given to levels of independence support.

2.3. While developments such as Brexit, and the perceived comparative performance of the UK and Scottish governments in relation to Covid-19, were important in terms of the politics of the post-referendum period, there can be little doubt that the most significant constitutional development in this period has been the reference made by the Lord Advocate to the Supreme Court, asking whether the Scottish Parliament has the “power to legislate for the holding of a referendum on Scottish independence”, with the central question being whether or not such a Bill would relate to a reserved matter.²¹

The Supreme Court’s answer was clear. The judges had “no doubt” that such legislation would be outwith the parliament’s competence because a Bill that made provision for a referendum on independence would plainly relate to reserved matters.²² What this means is that under current constitutional arrangements, a legal path to a future Scottish independence referendum must in some way pass through Westminster.

2.4. There is a very clear sense of a before and after in Scottish politics in relation to the Supreme Court judgment.

Until the question of legislative competence had been decided, there was always the

²¹ The question posed by the Lord Advocate, as set out at para. 12 of the judgment, was: “Does the provision of the proposed Scottish Independence Referendum Bill that provides that the question to be asked in a referendum would be ‘Should Scotland be an independent country?’ relate to reserved matters? In particular, does it relate to: (i) the Union of the Kingdoms of Scotland and England (paragraph 1(b) of Schedule 5); and/or (ii) the Parliament of the United Kingdom (paragraph 1(c) of Schedule 5)?” See the full judgment at <https://www.supremecourt.uk/cases/docs/uksc-2022-0098-judgment.pdf>.

²² See in particular, paras. 82 and 83 of the judgment, <https://www.supremecourt.uk/cases/docs/uksc-2022-0098-judgment.pdf>.

perceived possibility of a Scotland-only path to a referendum.²³ The option of a Holyrood-only pathway to an independence referendum opened up choices for the SNP government, and for the wider Yes movement, which no longer exist. This new reality has not escaped the attention of voters.

It has also required a rethink on independence strategy by the SNP and the Yes movement. As we will argue, independence should happen, and should be enabled to happen, if it commands the clear and consistent support of a majority of people in Scotland. This is the pathway to independence, or indeed to any other constitutional change. The phrase 'settled will' can be overused, and misused, but those living through the creation of the Scottish Parliament in the 1990's knew what it meant. The people had decided that they wanted a devolved parliament, a reality that shaped and guided the political response.

Until recently, this element – the central importance of clear and consistent majority support for the proposition – has been somewhat lost in a policy debate within the SNP and wider independence movement that has ranged from using the 2024 Westminster election as a de facto referendum to seeking an early "plebiscite election" at Holyrood, via competing understandings of electoral mandate and what such mandates would actually trigger.

2.5. We believe that if Scotland is to become independent, the success of an independent Scotland, in particular in the initial period, will be strongly influenced by the nature of the processes leading up to independence.

If Brexit has taught us anything, reaching good outcomes is most likely if negotiations are marked by cooperation, mutual trust and goodwill. There is also the important question of loser's consent, something made more likely if the procedures adopted are inclusive, seen as fair and accepted as legitimate by all sides.

A process that has the consent of a clear majority of people in Scotland, and which is taken forward in partnership with the rest of the UK, will create a more advantageous starting point for a newly independent country than actions that are unilateral and politically divisive.

²³ As Ciaran Martin sets out, in the aftermath of the SNP victory in the 2011 election, the UK government "considered a range of scenarios about the sort of vote Edinburgh might be able to hold that could potentially withstand a legal challenge – including some of the very things that have now emerged in the Scottish government's 11-point plan (published in January 2021)", Martin, "Resist, Reform or Re-Run", 14.



3. The political context 2014 - 2024



3.1. The decade since the independence referendum has seen a series of significant developments constitutionally, socially, economically, and politically.

Over the past seven years, in particular, there has been a series of shocks to the system – Brexit, the Covid-19 pandemic and its aftermath, sharp energy price rises as a result of war in Europe, and a subsequent cost-of-living crisis. Politics has become harsher and more polarised across the globe, with disinformation and more radical and populist voices amplified through social media platforms. It has been a tough and torrid period for many.

Reflecting on where Scotland stands today, as compared to a decade ago, we have the clear sense that the country is moving into a new phase politically – one that is still only in embryonic form – a development that we hope leads not to the end of constitutional conversation but, rather, to a better, more collaborative and consensual constitutional debate.

3.2. Over this past decade, and across hundreds of polls, after excluding “don’t knows”, support for independence has consistently been above the 45 per cent achieved in 2014 and often close to or over 50 per cent. Polling companies use different methods, which can affect the results. In order to control for this, and to observe trends, we focus on those from two companies.

Ipsos Mori have asked the same question as was posed in the referendum, “Should Scotland be an Independent Country”, 28 times over that period.²⁴ On every occasion since the referendum took place in September 2014, support for ‘Yes’ has been greater than the 45 per cent achieved on referendum day, peaking at 58 per cent in October 2020. Support for ‘No’ has not matched the referendum vote of 55 per cent over the same period and reached a low of 42 per cent in the same October, which it should be noted was in the middle of the second lockdown. The most recent Ipsos Mori poll has ‘Yes’ on 51 per cent and ‘No’ on 49 per cent, the product of a narrowing of the ‘Yes’ lead which has taken place since December 2022.²⁵

YouGov have also asked the referendum question consistently since early 2012, polling 70 times over the period.²⁶ Their most recent poll has support for ‘Yes’ and ‘No’ at effectively the same levels as in September 2014 – 44 per cent and 56 per cent. Pro-independence support has only exceeded 50 per cent on a small number of occasions, including for a few months at the end of 2014 and beginning of 2015 and, as with Ipsos Mori, towards the end of 2020, peaking at that point at 53 per cent. The YouGov polls also show a similar movement towards ‘No’ in recent months.

3.3. The general elections of 2015, 2017 and 2019 were very much dominated in Scotland by the constitution, if not the constitutional question.

²⁴ <https://www.ipsos.com/en-uk/uk-opinion-polls/scotland-trends> - Note that Ipsos Mori include 16 and 17 year olds.

²⁵ Ibid.

²⁶ The data is set out in graph form in an article on YouGov’s website, “Scottish Independence: 10 years on” with a link to an excel spreadsheet: <https://yougov.co.uk/politics/articles/50536-scottish-independence-10-years-on>.

The first general election since the independence referendum was held on the 7th of May 2015. Scottish Labour lost 40 of their previously held 41 seats to the SNP. Likewise, the SNP took 10 of the Scottish Liberal Democrats' 11 seats, leading them to a historic total of 56 Westminster seats. This wasn't an exclusively urban or rural phenomenon. The SNP won in every corner of the country and achieved a national vote share just shy of 50 per cent.²⁷

A number of significant factors led to this result. The first occurred in the immediate aftermath of the referendum when David Cameron, the then Conservative Prime Minister committed himself to a "devolution revolution" which included proposals to introduce English only votes for English only laws and suggested that any future devolution of powers to the Scottish Parliament was dependent upon this.²⁸ Our sense from the time is that this did not land well either with independence supporters or with some of those who had been swayed to vote 'No' on the basis of their preferred constitutional option being further devolution for Scotland, or the maximum devolution offered by Gordon Brown in what was commonly referred to as the Vow.²⁹ Indeed, the Labour Party was described as reacting "coolly" to the proposals.³⁰

3.4. Nicola Sturgeon succeeded Alex Salmond as Scotland's First Minister in November 2014 and her personal popularity soared, in part due to her performances in the UK-wide election debates. By May 2015 she had a positive approval rating of 56. To put this in context, John Swinney's approval ratings have so far peaked at -2 whilst Keir Starmer in the same poll achieved -12.³¹

The SNP campaigned under the banner of Stronger for Scotland and converted many Labour voters who had voted 'Yes' into SNP voters.³²

3.5. The 2017 General Election took place less than 12 months after the United Kingdom voted to leave the European Union. Initially Labour hoped that its leader, Jeremy Corbyn, and his left-wing prospectus would attract votes from the SNP across Scotland's central belt.

Whilst Labour's seat tally rose from one to seven, demonstrating a degree of recovery, five of Labour's six gains came from constituencies with convincing 'No' votes in their respective local authority boundary. Given this was the basis for how the referendum results were announced, it is not possible to determine how the voters of the seventh, Glasgow North East, cast their preferences but Glasgow itself voted 'Yes'.³³

What seems clear from all seven seats, and a further ten where Labour came within 2000

27 <https://www.bbc.co.uk/news/election/2015/results/scotland>.

28 <https://www.theguardian.com/politics/2014/sep/19/david-cameron-devolution-revolution-uk-scotland-vote>.

29 <https://www.dailyrecord.co.uk/news/politics/david-cameron-ed-miliband-nick-4265992>.

30 <https://www.theguardian.com/politics/2014/sep/19/david-cameron-devolution-revolution-uk-scotland-vote>.

31 <https://www.ipsos.com/en-uk/labour-strengthens-position-scotland-ipsos-poll-shows-close-race>.

32 "Individual-level data from the Scottish Election Studies tell us that over 95% of these Labour to SNP switchers were Yes voters, and the vast majority of these went on to vote for the SNP in the 2015 UK election." Ailsa Henderson, Robert Johns, Jac M. Larner and Christopher J. Carman, 2022, *The Referendum that Changed a Nation: Scottish Voting Behaviour 2014–2019*, Palgrave Macmillan.

33 <https://www.glasgow.gov.uk/article/9136/Scottish-Independence-Referendum-2014>.

votes of the SNP, is that Labour were considered to be the party best placed in those seats to defeat the SNP on constitutional lines³⁴. The SNP suffered a net loss of 21 seats and just under 1/3rd of their vote share compared with 2015. With 35 MPs, however, they remained by far the largest party among Scottish MPs and crucially retained their status as the 3rd largest party in the United Kingdom, with the Liberal Democrats 4th with just 12 seats.³⁵

3.6. This polarisation of voting behaviour also dominated the 2016 Scottish Parliament elections with the Scottish Conservatives keen to exploit Labour's perceived weakness on the constitution by pitching themselves as Scotland's foremost Unionist party. The experience of a binary choice referendum, followed by an election dominated by the constitution, served to confirm and solidify the constitutional battle lines. It suited both the Conservatives and the SNP to be each other's main opponent on the national stage, irrespective of the fact that relatively few constituency battles were SNP/Conservative marginals.

With the constitution a dominant issue in the campaign, reinforced by Conservative and SNP messaging, it is not surprising that the Labour Party, which needed to win votes from both 'Yes' and 'No' voters in order to rebuild its vote share, struggled to cut through, subsequently dropping to third place.

3.7. The five years between 2014 and 2019 were particularly difficult for the Scottish Labour Party both in terms of electoral results and its internal harmony as a party.

Differences in party position between the Scottish Labour Party and the UK Labour Party are too readily dismissed as divisions between a more left wing and radical party under Jeremy Corbyn and a historically more moderate or centrist Scottish Labour Parliamentary party. Whilst there is merit to that divergence, it is an overly simplistic analysis of what played out during this period which is perhaps more appropriately understood as a battle over constitutional positions.

3.8. As Scottish Labour's vote share for both Holyrood and Westminster declined, its parliamentary groupings and arguably its voter base became more unionist in its outlook. Traditional Labour supporters who were either pro-independence or at least agnostic had long since left the party. The Labour for Independence movement had no formal relationship with the Party and any activists within that grouping were regularly sidelined, ridiculed or had the authenticity of their party membership questioned.³⁶

3.9. In addition, the politicians who consistently won their seats did so running campaigns which were substantially pro-Union in their outlook. Ian Murray MP, for example, won the constituency of Edinburgh South in 2010 with a majority of 316, but by 2017 that majority was 15,514. A combination of being both a personal vote for a popular MP and a coalescing

³⁴ The Seats of Airdrie and Shotts, Dunfermline and West Fife, Edinburgh North & Leith, Glasgow Central, Glasgow East, Glasgow North, Glasgow South West, Inverclyde, Motherwell and Wishaw, Na h-Eileanan an Iar were all won by the SNP by a margin of 2000 votes or less with Labour second.

³⁵ 2017 General Election: full results and analysis - House of Commons Library Report <https://commonslibrary.parliament.uk/research-briefings/cbp-7979/>.

³⁶ <https://www.heraldscotland.com/news/13067287.yes-scotland-wins-support-labour-rebel-group/>.

of the dominant “No” vote in Edinburgh. Labour’s sole remaining MSP from the 1999 intake, Dame Jackie Baillie, who served as a Director of Better Together during the referendum campaign, won the seat of Dumbarton in 2016 with a majority of 109 rising to 1483 in 2021.

In short as the party became smaller its pro-Unionism became more concentrated, a fact compounded by the continued success against the prevailing trend of its most vocal pro-Union politicians.

3.10. Jeremy Corbyn, keen to attract SNP supporters, less seasoned by recent Scottish election results and with attitudes to Scottish independence shaped by his longstanding support for a united Ireland,³⁷ regularly found himself advocating a different if not more equivocal position on the Scottish constitutional question.³⁸

At the same time, some of Corbyn’s strongest supporters within the Scottish Parliamentary Labour party were also those most closely aligned with a trade union movement deeply uncomfortable with the constitutional status quo and angry at Scottish Labour’s alliance with the Scottish Conservatives in the official Better Together campaign.³⁹

These factors together led to endless split stories between and within the Scottish and UK parliamentary parties, which fed a sense of a party in conflict, disarray and a long distance from power.

3.11. In the 2019 General Election, Labour suffered its worst political defeat since the 1930s, returning just 202 MPs across the United Kingdom and just 1 in Scotland. The SNP gained 13 seats taking them to a tally of 48, with the Conservatives on 6 and the Liberal Democrats on 4. The SNP secured 45 per cent of the vote share, its second highest ever, while Scottish Labour’s vote share fell to just 18.6 per cent.⁴⁰

3.12. The Scottish Parliament elections of 2021 saw the SNP gain 1 seat but fall 1 seat short of a majority. They secured 48 per cent of the vote, with the Scottish Conservatives on 22 per cent and Scottish Labour third on 21.6 per cent. The Liberal Democrats came 4th with 6.9 per cent of the vote and the Greens 5th, with 1.3 per cent.

3.13. There was very little prospect of a power-sharing agreement between the SNP and any of the 3 unionist parties, leaving the Greens as the sole realistic partner.

Signed in August 2021 by then First Minister Nicola Sturgeon and the co-leaders of the Scottish Green Party, Patrick Harvie and Lorna Slater, the two parties’ formal power sharing deal, referred to as the Bute House Agreement, gave the dominant governing party, the SNP, confidence that it had the votes to pass a budget whilst also appointing two Green MSPs to ministerial posts for the first time.

³⁷ <https://www.politicshome.com/news/article/jeremy-corbyn-still-supports-united-ireland-but-backs-good-friday-agreement>.

³⁸ <https://www.thenational.scot/news/15316048.labour-in-turmoil-as-jeremy-corbyn-says-yes-to-indyref-talks-days-after-kezia-dugdale-said-no/>.

³⁹ <https://www.scotsman.com/news/politics/scottish-independence-no-case-disappoints-stuc-1544428>.

⁴⁰ <https://researchbriefings.files.parliament.uk/documents/CBP-8749/CBP-8749.pdf>.

The agreement also contained a commitment to hold a referendum on Scottish independence after the Covid-19 pandemic had passed and within the 2021 – 2026 Parliamentary session.⁴¹

It was a deal which, until brought to an end by First Minister Humza Yousaf in April 2024, delivered greater stability for the Scottish Government than otherwise might have been the case. However, it also served to reinforce the binary constitutional divide in the parliament, the frame through which the vast majority of domestic public policy was being discussed.

3.14. This electoral pattern of constitutional position dominating voting behaviours, party campaigns and even the formation of administrations was a central feature of every domestic electoral contest from September 2014 until July 2024, when it would break. On May 23rd, just two weeks after John Swinney was sworn in as Scotland’s First Minister, Prime Minister Rishi Sunak announced that the 2024 General Election would be held on July 4th.⁴²

Labour would go on to win by a landslide across the United Kingdom, securing 411 seats. The SNP lost 39 of their 2019 tally of 48 - crucially, 37 of them to the Scottish Labour Party, reversing that party’s post-referendum pattern of decline.

3.15. What was so different about the 2024 election contest?

Firstly, it was clear that “getting rid of the Tories” was the primary frame of the campaign and Labour successfully prosecuted their position as the best placed party to do this in Scotland, despite the SNP advocating a similar message. The idea that you could either “send a message by voting SNP or send a government”⁴³ by voting Labour was particularly powerful - hitting home in 2024 in a way it had not when previously deployed in 2015, 2017 and 2019.

One important difference was the salience of the constitution in voters’ minds.⁴⁴ In 2019, 34 per cent of Scots said that Independence was a “very important” issue in deciding who to vote for. In 2024, this had fallen to just 17 per cent.

41 <https://www.gov.scot/news/agreement-with-scottish-green-party/>.

42 <https://www.electoralcommission.org.uk/media-centre/uk-parliamentary-general-election-called>.

43 <https://www.facebook.com/KeirStارmerLabour/videos/tomorrow-dont-just-send-a-message-send-a-government-vote-labour/858666439172641/>.

44 <https://www.centreonconstitutionalchange.ac.uk/news-and-opinion/how-scotland-voted-2024-uk-general-election>.



In the same polling the issue of Brexit had been considered as very important by 55 per cent of Scots in 2019, falling to just 4 per cent in 2024.

In 2019 the SNP had built a coalition of voters angry about Brexit and hungry for independence, but with the salience of both issues dipping, that recipe for electoral success could not be repeated.

3.16. Two further factors contributed to Labour's revival. First of all, a growing sense that Labour could and would win that was absent from all three previous elections. Keir Starmer's Labour party had been consistently ahead in the polls from November 2021 with a minimum of 36 per cent of the vote share in Ipsos Mori. There was substantially more variance in the same polling trends during both Ed Miliband and Jeremy Corbyn's tenure as leader. In fact, the Conservatives were often ahead in the polls particularly in the period from 2015 to 2019 and just before the Covid-19-19 pandemic.⁴⁵

Secondly, the period between the Scottish Parliament election of 2021 and the 2024 election saw the SNP experience significant turmoil, most notably with the resignation of First Minister Nicola Sturgeon and the ongoing police investigation into SNP finances. The party had three leaders in three years, creating a sense of instability, and there was growing public dissatisfaction with key public services, most notably the NHS.⁴⁶

3.17. It is too early to properly assess the significance of the general election result in Scotland, but we can point to a few key consequences for the SNP as a result of its Westminster group falling from 48 to just 9 MPs.

First, losing its previously held position as the 3rd largest parliamentary party significantly reduces the frequency of its Westminster leader's appearances at Prime Minister's Question time and the associated media profile that comes with that.

The reduced number of MPs also leads to a much smaller pot of "short-money" - public funds available to the SNP's Westminster parliamentary group, adding to the financial challenges facing the party. Furthermore, the party's entitlement to representation in committees, including the Scottish Affairs Committee, is substantially curtailed. The Chair of the Scottish Affairs Select Committee will no longer be an SNP MP, impacting on the party's capacity to influence that committee's programme of investigations. Altogether the SNP's impact in Westminster is likely to be diminished.

3.18. Labour surpassed its own best expectations in 2024. Its goal had been to regain its status as the largest Scottish parliamentary grouping and ideally to win half of the country's 57 seats.⁴⁷

Winning 37 seats means that the party now holds a swathe of seats across the central belt,

⁴⁵ <https://www.ipsos.com/en-uk/uk-opinion-polls/voting-intention-polls-and-trends>.

⁴⁶ <https://www.gov.scot/news/scottish-social-attitudes-survey-2023/#:~:text=Support%20for%20redistribution%20of%20wealth,who%20are%20less%20well%2Doff>.

⁴⁷ <https://www.bbc.co.uk/news/uk-politics-68166148>.

from Inverclyde to East Lothian as well as three quarters of the Fife seats. Of particular significance to the party is its success in winning all 5 Glasgow seats, not least because the city came to be seen as a 'Yes' heartland in the referendum and beyond. Scotland's second 'Yes' city Dundee, came within 675 votes of returning a Labour MP.

3.19. A version of the potted history we have offered for the past decade could be repeated for other periods in Scotland's political history.

We had the ups and downs and challenges facing all the parties in the 1970s as Scotland edged towards a decision on the first devolution scheme – a referendum that saw majority support for a Scottish Assembly, but which failed to meet the threshold set in legislation, and which also failed to inspire the public.

In the aftermath of the 1979 referendum, there were crises within the SNP, splits within the Labour Party and a steady decline in support for the Conservatives in Scotland. Scottish voters reacted against the approach and policies of Margaret Thatcher and Scottish society experienced a range of deep and transforming crises. And yet, amidst the campaigners' gloom following the 1979 vote emerged the elements which would lead eventually to the successful devolution referendum in 1997 and beyond.

3.20. With this in mind, we believe it would be a mistake to conclude from the 2024 result that the constitutional conversation in Scotland is over, or that politics in Scotland will return to something more akin to the pre-referendum period.

It is our view that the 2024 result charts the beginnings of a new phase, the contours of which remain unclear, but one that is significantly informed by the experience of the referendum rather than defined by it.

It is a political terrain that will also be shaped by the choices that we make as a nation. We can regard constitutional questions as too difficult, too polarising, a distraction from the real policy questions, or we can accept them as critical elements that shape those policy questions and inform a rounded conversation about the sort of Scotland we hope to build.



4. The status of the further devolution debate



4.1. This year marks the 25th anniversary of the Scottish Parliament as well as 10 years since the independence referendum. It is an appropriate moment to ask, ‘where stands devolution today?’. How well is the parliament working and, based on by now considerable experience of the new arrangements brought in by the Scotland Act 2016, is there a need to reconsider aspects of that settlement, in particular in light of significant subsequent developments such as the UK’s departure from the European Union?

4.2. It can be argued that each stage of further devolution of powers to Scotland has been initiated by politicians in response to an unexpected event, political shocks even, rather than being driven by the same civic demand that led to the devolution referendum of 1997 and the Scottish Parliament’s creation two years later.

With some of the heat now taken out of the post-2014 debate, an opportunity presents itself to buck this trend and return to a more consensual and reflective assessment of the powers, financial flexibility and partnerships that Scotland needs.

4.3. The Calman Commission,⁴⁸ for example, was established in late 2007 after the SNP had won its first Scottish Parliament election and took office as a minority administration. It was secured following an opposition debate led by Labour, supported by the Conservatives and Liberal Democrats but opposed by the SNP, and was also supported by the UK Government. It sat for around 14 months between April 2008 and June 2009. Its recommendations led to the Scotland Act of 2012, which introduced new tax powers to the Scottish Parliament with the intention of increasing its financial and spending accountability.

The Smith Commission⁴⁹ was established in the immediate aftermath of the 2014 vote in response to a much closer than expected referendum result and “the Vow,” as detailed above, which promised “extensive new powers” for the Scottish Parliament.⁵⁰ It involved all political parties represented in the Scottish Parliament, and sat for an astonishingly short period of just 6 weeks, making recommendations that led to the Scotland Act 2016. That Act included a significant increase in the powers and responsibilities of the Scottish Parliament, especially in tax and social security.

4.4. Both of these initiatives were cross-party endeavours. The Labour Party however has had two further periods where it has considered advancing devolution across the UK, including Scotland.

The first was in 2017 when Jeremy Corbyn appointed the Labour MP Jon Trickett to lead a constitutional commission for the Labour Party. A group of senior Labour figures met in Cardiff in March of that year to discuss the scope of the work. The group included the then Welsh First Minister Carwyn Jones, Labour’s candidate for Mayor Andy Burnham and Lord John Prescott who had advocated for further English devolution for much of Labour’s last term in office.

⁴⁸ [Commission on Scottish Devolution \(archive.org\)](#).

⁴⁹ [\[ARCHIVED CONTENT\] The Smith Commission \(nationalarchives.gov.uk\)](#).

⁵⁰ Then Prime Minister David Cameron, Labour leader Ed Miliband and Liberal Democrat leader Nick Clegg, Daily Record, 16th September 2016.

The product of this work was supposed to provide a detailed proposal for Labour's 2017 General Election manifesto, but in the absence of a plan, Labour committed itself instead to a constitutional convention⁵¹ in its manifesto.⁵²

"During the Trickett Review, I was leader of the Scottish Labour Party and part of the group established to consider and lead the constitutional commission.

Despite initial significant promise, this project never got off the ground in large part due to the lack of an academic partner, but also because its Chair Jon Trickett MP had some very hard and set views about the extent of the reform he was prepared to consider. For example, he was very uncomfortable with the functioning of the Barnett formula, believing that his constituents in the North-East of England were suffering as a consequence of greater per capita public spending in both Scotland and Wales and wanted it reviewed as part of the process.

Equally he was unprepared to countenance further powers to Scotland if he didn't get anything for the communities he represented in return.

He was not alone in this view and since this period there's been a growing demand within English politics to address the democratic deficit that much of England is faced with in the absence of comprehensive regional devolution.

The idea that new powers for Scotland could be traded or leveraged against what was right for England in the confines of an internal Labour party meeting felt completely against the spirit of how these deliberations should be done."

- Kezia Dugdale

4.5. In 2020, as Leader of the Opposition, Keir Starmer asked Gordon Brown to examine the future of the Union and produce plans to devolve further power, wealth and opportunity throughout the UK. The Brown report was published in 2022,⁵³ and would at least in part inform Labour's constitutional offer for the 2024 General Election.⁵⁴

4.6. What's important to note about the debates ignited by Jeremy Corbyn and Gordon Brown respectively is that both were rooted in a UK-centric approach to devolving further power. In other words, questions about what was right for Scotland were offset or balanced against what was right for the regions of England or indeed compared to the devolution

⁵¹ <https://www.theguardian.com/politics/2017/may/15/labour-ponders-federalism-in-bid-to-win-back-scottish-voters>.

⁵² See page 102 of Labour's 2017 general election manifesto <https://manifesto.deryn.co.uk/wp-content/uploads/2021/04/Labour-Manifesto-2017.pdf>

⁵³ <https://labour.org.uk/wp-content/uploads/2022/12/Commission-on-the-UKs-Future.pdf>.

⁵⁴ Labour's 2024 General Election manifesto <https://labour.org.uk/wp-content/uploads/2024/06/Labour-Party-manifesto-2024.pdf>.

demands of Wales. This was a reasonable approach for a UK party. However, neither represented distinctly “Scottish solutions to Scottish problems” the famous argument deployed by Donald Dewar in Scotland’s very first legislative programme.⁵⁵

4.7. The Brown Commission report, for example, does not recommend significant new powers for the Scottish Parliament but instead advocates for a new second chamber – an Assembly of the Nations and Regions – which would have the power to block the UK Parliament from legislating in devolved areas without the consent of the devolved legislatures. This was intended to strengthen the convention that despite having the sovereign authority to do so, the Westminster Parliament will not normally do so without the consent of the devolved legislatures. That convention, commonly known as the Sewel Convention, had been eroded during the Conservative administration.

4.8. This idea made it into Labour’s 2024 manifesto as a “Council of the Nations and Regions” whilst the manifesto went on to state that in addition to strengthening the Sewel convention, Labour would “protect and respect devolution and reset relations between governments”. The party would also seek to “strengthen Scottish democracy and devolution, championing Scotland at home and abroad”. In addition, an incoming Labour government would aim to “ensure the devolution settlement for Scotland enables collaboration on Labour’s national missions for government”.⁵⁶

4.9. The story Labour tells itself about why it lost and the route it pursued to win again is critical to understanding how it views the future of devolution.

Over the past ten years large, powerful swathes of the Labour Party have come to the conclusion that talking about further devolution to the Scottish Parliament is equal to ceding ground to those that support independence. They believe that any suggestion that the current constitutional make up is not working or could be improved only serves to benefit those supporting independence. They would argue that greater divergence between Scotland and the rest of the United Kingdom is a threat to the Union rather than a practical solution to the Scottish problems recognised by Donald Dewar at the dawn of the Parliament.

4.10. Following its emphatic victory in the 2024 general election, there will be many people in the Labour Party in Scotland, and beyond, who will celebrate this success not just because it paved the way to political power but because they believe it will draw the curtains on a period of Scottish political life during which they were often sidelined and which they found deeply scarring and painful.

As outlined already, the party of devolution has spent much of the past decade squeezed by what it regards as parties of unionism and nationalism. Given this experience, it is understandable that many in the Labour Party wish to turn the page on this period and seek to move on from the ‘distraction’ of yet more constitutional discussion.

⁵⁵ <https://www.parliament.scot/chamber-and-committees/official-report/search-what-was-said-in-parliament/meeting-of-parliament-16-06-1999?meeting=4168&iob=26619>.

⁵⁶ page 109 *ibid*.

4.11. However, we believe that this would be a short-sighted choice, especially if their ambition is to become Scotland’s government.

There is a genuine question to be asked: is it possible for a future Scottish Government to address some of the fundamental and deep-rooted challenges that Scotland faces without looking at how the current constitutional settlement works? This question is most pertinent in relation to the fiscal arrangements which shape Scotland’s budget – a budget which, in turn, shapes every aspect of policy. But it asks us also to reflect more broadly on the realities of multi-layer government - including the central role of local government within Scotland - and to consider the sorts, and quality, of partnerships we need in order to deliver on voters’ expectations.

4.12. The Labour Party in Wales has previously come to a different conclusion about the benefits and necessity of reflecting on the Welsh devolution settlement.

An independent Commission on the Constitutional Future of Wales was established by the Welsh Government in 2021 with two broad objectives: first, “to consider and develop options for fundamental reform of the constitutional structures of the United Kingdom, in which Wales remains an integral part” and, second, “to consider and develop all progressive principal options to strengthen Welsh democracy and deliver improvements for the people of Wales”.⁵⁷

Chaired by two widely respected figures, Professor Laura McAllister and former Archbishop of Canterbury, Rt Hon Dr Rowan Williams, the commission contained figures from the main parties in Wales as well as a range of voices from academia and civil society. It undertook an extensive programme of engagement across Wales and, importantly, did not exclude any constitutional proposal from its consideration.

Its interim report, published in November 2022, concluded that there were “three viable future constitutional options for Wales”, entrenched or enhanced devolution,

⁵⁷ <https://www.gov.wales/independent-commission-constitutional-future-wales/about-us>.



federal structures and independence.⁵⁸

The Commission's final report, published in January 2024, included a series of recommendations on strengthening democracy in Wales and improving inter-governmental relations, while also identifying "areas where new devolved powers are essential to protect the current settlement, and others where the voice of Wales could and should be strengthened through shared governance mechanisms". Such changes, it added, "are urgently needed to put the settlement on a stable and secure footing".⁵⁹

4.13. Throughout this report, we draw on examples from Wales and Northern Ireland. We do so not to suggest that these can and should be precisely replicated in Scotland, but rather to show what is possible within a UK context in circumstances of negotiation, agreement and goodwill.

4.14. As we mark the 10th anniversary of the independence referendum, it is worth noting that, in many respects, the Scotland Act 2016 is the sole concrete outcome of that vote. We believe, as part of our collective reflections on both the first quarter century of devolution and the 10th anniversary of the referendum vote, that it is appropriate to review the settlement as it stands.

We would encourage the Scottish Government and Scottish Parliament to begin a process, modelled on the independent and deliberative process undertaken by the Independent Commission on the Constitutional Future of Wales, and engaging also the United Kingdom Government, to consider three aspects of the settlement:

1. How it has been impacted by Brexit.
2. Whether, given the current policy challenges and opportunities, the boundary between devolved and reserved competencies is correct.
3. How the fiscal arrangements are working in practice.

⁵⁸ Interim report by The Independent Commission on the Constitutional Future of Wales, 5: <https://www.gov.wales/sites/default/files/publications/2022-12/independent-commission-the-constitutional-future-of-wales-interim-report-december-2022.pdf>.

⁵⁹ Final Report by the The Independent Commission on the Constitutional Future of Wales, 3: <https://www.gov.wales/sites/default/files/publications/2024-07/independent-commission-on-the-constitutional-future-of-wales-final-report.pdf>.



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The post-Brexit arrangements

4.15. Alongside this paper, the Centre for Public Policy will also be publishing a report on the design, operational impact and potential for reform of the United Kingdom Internal Market Act. Passed in 2020, it is one of the most controversial pieces of post-Brexit legislation that has significantly challenged the authority of the devolved institutions and the operation of devolved powers.

As the report sets out, the Act was intended to provide legislative underpinning to the UK's domestic market after the UK left the EU internal market. Its market access principles limit the reach of some laws passed by the devolved parliaments such that most goods and some services that originate in or are imported into another part of the UK can trade freely within Scotland without having to comply with relevant Scottish regulations. The Act has come to symbolise the new approach to devolution adopted by the previous UK Government, and it was passed in the face of fierce opposition not only from the devolved governments but also from most opposition parties within the devolved parliaments.

4.16. Given the new UK government's desire to reset relationships between central government and the devolved administrations, we agree with the report's authors that reconsidering the controversial elements of the UK Internal Market Act would represent a "significant opportunity to rebuild trust between the administrations and work towards more cooperative and productive relationships".

Devolved and Reserved Competencies

4.17. The 1998 Scotland Act – the founding legislation of the Scottish Parliament – offered a relatively clear division between responsibilities that were to be exercised at a UK level and those that were to be exercised at a Scottish level. In many respects, this represented a democratisation of the existing Scottish Office. Responsibilities that had been exercised by a small team of Scottish Office ministers, with limited scrutiny and few legislative opportunities at Westminster, were now in the hands of a team of ministers, who were based in Scotland, and answerable in a much more comprehensive way to the new parliament, its committees and the Scottish electorate. The boundary between reserved and devolved matters, while never absolute, was reasonably clearly defined.

4.18. Over the years, this position has changed, most noticeably as a result of the devolution of additional tax and social security powers in the Scotland Act 2016. The settlement has become more complex, with these policy levers sometimes being pulled in contrary directions, diluting or undermining their intended effect.

Combined with growing and increased pressures on public finances the Scottish Government's ability to respond is increasingly restricted. In the past, it chose to introduce the innovative Scottish Child Payment⁶⁰ and to pay for it within existing budgets, just as it chose to design a very different way of delivering disability payments at a justifiable but increased cost to the public purse⁶¹. Yet decisions taken at a UK level on social security, still have a significant impact on devolved policy choices. This has been evident in the recent UK government decision to narrow the eligibility for winter fuel payments to pensioners. With only one significant tax lever, income tax, limited borrowing capacity, a tight budget, and effectively no notice of the policy change, the Scottish Government had few options but to replicate the UK decision.

4.19. Across a range of other policy areas, from immigration to employment rights, concern has been expressed about the limited flexibility Scottish ministers have to respond to "Scotland's particular needs and circumstances".⁶²

Scotland's demographic challenge is significant, and an immigration policy designed for Scotland's specific economic, financial and social needs, would be different from a policy designed to meet the needs of the UK as a whole. What are the different arrangements that Scotland, ideally, would like to implement in relation to immigration? How might this be achieved? Is it flexibility within the existing UK arrangements, along the lines of the Fresh Talent Initiative launched in 2004, or something more substantial?

A similar policy-centred focus can take place in relation to maximising Scotland's economic

60 Introducing the £26.70 a week Child Payment policy to eligible children cost £429 million in 2023/4 according to the Scottish Fiscal Commission. <https://fiscalcommission.scot/explainers/social-security/>.

61 For example, Scottish Fiscal Commission explainer describes the change in appeals and review process from PIP to ADP leading to rising cost of overall policy <https://fiscalcommission.scot/explainers/social-security/disability-assistance/>.

62 This phrase has been used by the STUC in relation to the devolution of employment law to Scotland, which "would allow the strengthening of employment, health and safety and aspects of equalities to match Scotland's particular economic, social and political circumstances": <https://www.stuc.org.uk/campaigns-workersrights/>.

opportunities, or to creating a co-ordinated approach to addressing the drivers of child poverty in the country.

4.20. Recent political and legal judgments have also raised questions about the scope of devolution and devolved legislation.

Whilst the creation of the Scottish Parliament brought substantive law-making powers, these were framed within the context of the continued sovereignty of the UK parliament. Section 27 (8) underlined that the UK parliament could continue to make laws for Scotland, including in areas that are devolved. This was largely understood as a symbolic affirmation of Westminster parliamentary sovereignty which, from the outset, was constrained by the convention that the UK parliament would not normally pass laws in devolved areas without the consent of the devolved institutions.

The Sewel Convention held until 2016 and was an effective tool for UK-wide legislation in devolved areas where it made sense or was practicable to have a pan-UK approach. But since 2016, numerous UK laws that affect devolved matters have been passed in the UK parliament despite the consent of the devolved legislatures being withheld. The damaging impact this has had on the authority of the devolved institutions – and the need to address it – was recognised by the Brown Commission and, at least implicitly, in the Labour manifesto.

4.21. Less recognised have been the impact of recent legal judgments that interpret the Section 27 (8) restrictions on devolved competences that have introduced an “additional – and wholly unexpected – limit on Holyrood’s law-making power.”⁶³

This includes the Supreme Court judgment following the referral by UK Law Officers of Scottish Parliament legislation to incorporate the United Nations Convention on the Rights of the Child (UNCRC) into Scots law. The Court held that section 28 (7) preserved the unqualified authority of the UK parliament to make laws for Scotland. As a result, any law passed by the Scottish Parliament that imposed restrictions, duties or conditions on UK laws would be beyond its power, even where those UK laws covered matters that are devolved.⁶⁴

A UNCRC law was passed, but one that was much narrower in scope than originally envisaged as a result of the Supreme Court ruling, and much more complex. The abandonment of plans to introduce a Human Rights Bill this year is at least in part related to these legal uncertainties. More broadly, McCorkindale and McHarg suggest that the Supreme Court ruling has “significantly narrowed the control that the devolved institutions have over the devolved statute book, and has rendered the devolved statute book incoherent, instable and unworkable in light of the volume of UK legislation that ... continues

63 See Prof. Aileen McHarg, “Incorporating International Human Rights: The Implications of the UNCRC (Incorporation) (Scotland) Bill Reference for the Scottish Human Rights Bill”, 5 <https://www.hrcscotland.org/file-download/54/Final-Aileen-McHarg-Implications-of-UNCRC-Reference-for-Scot-Human-Rights-Bill-April-2024.pdf>.

64 See, <https://ukconstitutionallaw.org/2021/10/15/mark-elliott-and-nicholas-kilford-devolution-in-the-supreme-court-legislative-supremacy-parliaments-unqualified-power-and-modifying-the-scotland-act/>.

to occupy devolved policy areas.”⁶⁵

The Supreme Court’s ruling on this and similar cases (e.g. the Continuity Bill) has generated uncertainty about the scope of the Scottish Parliament’s law-making powers, and that has far-reaching implications.

4.22. That said, not every public policy challenge Scotland faces requires a conversation about what further devolution is necessary or is even a question about what powers sit where across multi layers of government. Many are products of political decisions already made with existing powers and driven by politicians choosing to spend taxpayers’ money according to their political priorities. Many of devolution’s successes and failures should be viewed as such, and thus outwith this conversation about the constitution.

Separately, even if the Scottish Government had all the powers, resources and policy levers at its disposal to meet the big challenges of the future, it could not do so alone and it is important to acknowledge the role of institutions and communities, including local government in delivering that change. That is why their role in developing the next stage of Scotland’s constitutional journey is so important.

To borrow a phrase from an earlier period, this is about powers for a purpose. Constitutional arrangements understood as one aspect of a wider mix of policy levers that can be pulled, and constitutional arrangements understood not only as powers accruing to Holyrood, but powers exercised at the most appropriate level, whether that is at a community or local level, or indeed at a UK or European level.

The Fiscal Framework

4.23. The Scotland Act 2016 made the necessary legislative changes that flowed from the Smith Commission. The Fiscal Framework was agreed alongside it by the Scottish and UK governments as a means by which Scotland’s tax and social security powers would be managed and implemented. It sets out specific mechanisms that allow the Scottish Block Grant to be adjusted in line with how those powers are used and it is widely accepted that these mechanisms are incredibly complex.

When the framework was reviewed at the five-year point, it was agreed that the Index per Capita method would be permanently used to calculate these block grant adjustments.⁶⁶ In practice, it means that if devolved tax revenues grow per person quicker in Scotland than they do for the rest of the UK, Scotland’s budget will be better off than it would have been without tax devolution. Meanwhile if the tax revenues per person grow more slowly than the rest of the UK, Scotland will be worse off.

⁶⁵ See, Chris McCorkindale and Aileen McHarg, “The Territorial Constitution and the 2024 UK General Election”, <https://ukconstitutionallaw.org/2024/06/20/chris-mccorkindale-and-aileen-mcharg-the-territorial-constitution-and-the-2024-uk-general-election/>.

⁶⁶ The agreement between the Scottish Government and the United Kingdom Government on the Scottish Government’s fiscal - 5 year review published August 2023. <https://www.gov.scot/publications/fiscal-framework-agreement-between-scottish-uk-governments/>.

4.24. The additional tax powers also create opportunities for the Scottish Government to raise more taxes by setting different rates and thresholds. This has led to policy choices that have raised additional revenues from middle and higher earners. But the amount of revenues raised have been adversely affected by the relatively slow growth of the Scottish economy. The most recent update from the Scottish Fiscal Commission found that the Scottish Budget was £624 million lower than it would have been had Scottish economic performance matched the rest of the UK since tax devolution.⁶⁷

The ability to raise additional revenue, especially from higher earners, is also affected by the fact that only non-savings, non-dividend income tax is devolved; taxes on savings remain reserved to the UK Parliament. This opens up the prospect that higher earners asked to pay additional taxes on their earned income may shift more of that income to savings or dividends, where tax rates are lower and where revenues flow to the UK Government. The Scottish Fiscal Commission estimated that the introduction of the top rate of 48 per cent on the highest earners, which arithmetic alone suggests would raise an additional £53 million in 2024-25, would raise just £8 million because of changes in the behaviour of high earners. Of the £147 million that could theoretically be raised by setting an advanced rate of 45 per cent on earnings over £75k, half was forecast to be ‘lost’ to behavioural changes.

£ million	2024-25	2025-26	2026-27	2027-28	2028-29
Total policy					
Total	82	88	96	104	114
Static costing	199	215	232	251	273
Behavioural costing	-118	-127	-136	-147	-159
Advanced rate of 45 per cent from £75,000					
Total	74	80	87	95	105
Static costing	147	159	172	187	205
Behavioural costing	-73	-79	-85	-92	-100
Top rate of 48 per cent					
Total	8	8	8	9	9
Static costing	53	56	60	63	67
Behavioural costing	-45	-48	-51	-55	-59

Scottish Fiscal Commission, 2024, table 4.13 ⁶⁸

These complexities and interdependencies limit the ability of any Scottish Government to raise additional revenue through income tax – the centrepiece of the Smith Commission proposals. This presents a challenge to all those involved in the Smith Commission, regardless of constitutional position or views on further devolution to Scotland.

4.25. In reality, for Scotland’s budget to be better off, either Scotland’s economic growth needs to exceed that of the rest of the United Kingdom, or it needs to increase taxes. But its ability to do either of these is limited by the nature and complexity of the constitutional settlement.

4.26. Meanwhile, evidence by the Scottish Fiscal Commission indicates that there is a

67 Page 10, Scottish Fiscal Commission Fiscal Update August 2024 <https://fiscalcommission.scot/publications/fiscal-update-august-2024/>.

68 <https://fiscalcommission.scot/wp-content/uploads/2023/12/Scotlands-Economic-and-Fiscal-Forecasts-December-2023-Revised-April-2024.pdf>.

growing fiscal imbalance in Scotland, with projected expenditure already outstripping revenues and the gap set to widen further.

In March 2023, the SFC published its first long-term fiscal sustainability report which demonstrated that if Scotland's public services continue to be delivered as they are today, then spending over the next 50 years will "exceed the estimated funding available by an average of 1.7 percent each year". They go on to argue that if the UK Government actively addresses its deficit, this fiscal tightening could lead to gap between what Scotland has and what it spends as large as 10.1% a year.⁶⁹

4.27. There is an enormous and ultimately very political challenge facing all future Scottish Governments. They either need to dramatically reduce what Scotland spends on its public services, further increase taxes, including on lower and middle-income workers – two options with significant political implications – or grow its economy faster than the rest of the UK's, using the limited range of fiscal and economic levers, to grow its tax base.

4.28. Separately, there is the very practical matter of how the fiscal framework responds to shocks. The recent sky rocketing inflation is a case in point.

Recent years have seen sustained periods of rising inflation, peaking at 11.1 per cent in October 2022, which have placed extraordinary pressure on Scotland's finances, most notably on its spending power and wage bills.⁷⁰ This inflationary period has had clear consequences for Scottish spending, with the Scottish Government introducing emergency protocols in order to reduce in year spending, mostly recently in late August 2024.⁷¹

4.29. Scottish Government choices have contributed to this – both the cumulative impact of policy choices on revenue, notably the council tax freeze and on spending, including in social security, e.g. the flagship Scottish Child Payment, and public sector pay deals.⁷²

SNP ministers have been very proud of their recent record in avoiding long periods of industrial unrest thanks to more generous pay deals for public sector staff in Scotland compared to their English counterparts. But many of these pay deals have been settled at sums higher than the Scottish Government's own pay policy,⁷³ which underpinned what it budgeted for.⁷⁴

The public sector in Scotland is larger than the public sector in the rest of the United Kingdom, adding further pressure. The current public sector pay bill is currently over half of

69 Page 7, Fiscal Sustainability Report – March 2023, Scottish Fiscal Commission. <https://fiscalcommission.scot/wp-content/uploads/2023/03/Fiscal-Sustainability-Report-March-2023.pdf>.

70 United Kingdom Inflation Trends <https://tradingeconomics.com/united-kingdom/inflation-cpi>.

71 Scottish Government press release detailing emergency protocols <https://www.gov.scot/news/urgent-action-taken-to-balance-budget/>.

72 See <https://ifs.org.uk/articles/immediate-response-scottish-finance-ministers-announcement-year-spending-cuts>.

73 Scottish Government pay policy is for a 2 per cent increase to apply from April 2024 and a further 1 per cent increase to apply from January 2025, this is a cumulative 3 per cent increase but equates to 2.3 per cent increase in-year <https://www.gov.scot/publications/scottish-government-public-sector-pay-policy-2024-25/>.

74 Page 5 of the Fiscal Update, Aug 2024 from the Scottish Fiscal Commission details offers of 4.27% for Local Government workers and 5.5% for nurses and other NHS workers. <https://fiscalcommission.scot/wp-content/uploads/2024/08/Fiscal-Update-%E2%80%93-August-2024.pdf>.

all Scottish Government resource funding at around £25 billion.⁷⁵

This, naturally, is a recurring issue, with a growing financial gap each year because of the compound effect. There will be significant pressure for future percentage-based pay increases agreed by the new UK Government for public sector workers elsewhere in the UK to be at the very least matched in Scotland, but it will cost significantly more to do so because of the higher base line and larger public sector.

All that said, having to cut in year spending six months after a budget process has been completed speaks to a financial system lacking in both flexibility and maturity, as well as raising questions about planning.⁷⁶

4.30. We believe that we have sufficient experience of the fiscal framework in operation and that the time is now right for a more fundamental review of how it is working in practice.

Such a review should include questions around its flexibility to respond to economic shocks, such as high inflation, or public health crises like the pandemic. It should also consider a larger Scotland reserve, which would allow the Scottish Government greater flexibility to manage its finances over multiple years and consider extending borrowing powers. Alongside that it should also explore mechanisms which would encourage, with financial underpinning, multi-year pay deals for public sector staff, and for other bodies such as local government. Such deals would provide greater financial security, certainty, less likelihood of strike action and in public policy terms could enable difficult questions of reform.

In practical terms it should also examine budget cycles and resolve the now frankly untenable situation where there is just three months between a UK government budget and the need for the Scottish Government to set a budget, a period that includes Christmas and New Year, whilst block grant adjustments, in their hundreds of millions of pounds, take three years to reconcile.⁷⁷

4.31. The Scottish Government must balance its budget each year as a requirement of the Scotland Act. It can underspend, and often faces significant criticism for doing so, but cannot overspend. We believe it is also time to consider whether there can be greater flexibility over the spending period of a parliament.

In public policy terms, for example, it will cost enormous sums to reform NHS and Social Care services now in order to save in the long term. There is a strong case for financial systems that are flexible enough to recognise that reducing demand on key public services, and the process of reform designed to increase efficiency, often require frontloaded public

⁷⁵ Page 14 - August 24 Fiscal Update, Scottish Fiscal Commission <https://fiscalcommission.scot/wp-content/uploads/2024/08/Fiscal-Update---August-2024.pdf>.

⁷⁶ The Fraser of Allander points to a lack of planning by Scottish Government here <https://fraserofallander.org/weekly-update-putting-the-brakes-on-spending-and-a-gentle-uptick-in-inflation/>.

⁷⁷ Page 9, Scottish Fiscal Commission Fiscal Update August 2024 demonstrates that Scotland's 2025/6 budget will have a positive provisional reconciliation of £447 million based on 2022/3 tax revenues. <https://fiscalcommission.scot/publications/fiscal-update-august-2024/>.

spending to drive the required change that leads to savings. This understanding was at the heart of the landmark Christie Commission work on public services reform.⁷⁸

Given what the Scottish Fiscal Commission tells us about rising costs of the health service just to stand still, the imperative to act now is enormous.⁷⁹

4.32. All of these questions seek to address some of the challenges that finance ministers face in their immediate inbox, regardless of which party is in power. However, they do not even begin to consider what financial mechanisms would be required to tackle some of the big social challenges that are poorly served by services funded and or delivered across multiple spheres of government.

4.33. The example of housing is illustrative. Scotland is in the middle of a housing emergency with record levels of people and children in particular living in temporary accommodation for long periods of time.⁸⁰ The cost of this is enormous, in addressing emergency housing needs but also to the education system, the health service, police and justice services.

The answer to much of Scotland's housing emergency is the need to build substantially larger numbers of social housing. The ambitions of the Scottish Government in this regard are limited by the extent of its borrowing powers, but there is also a question about incentivisation or indeed the greatest benefit it can realise in the context of competing demands for the same capital spend.

Put another way, if building vast swathes of social housing costs the Scottish Government but saves the UK Treasury in the form of a substantial reduction in the housing benefit bill, why would Scottish ministers prioritise building housing over a new generation of community health facilities, the benefits of which can be seen quickly in the Scottish Government's own budget bottom line?

4.34. There is a strong case to be made for a new approach to the "No detriment" principle, which was at the heart of the Smith Commission report.

The principle means that if a Scottish Government policy creates costs for the UK government, then those costs can be recovered from the Scottish budget. Equally, if a Scottish Government public policy produces savings for the UK government – for example, additional social housing investment reducing the amount of money the UK government needs to spend on housing benefit in Scotland – then we believe that saving should accrue to the Scottish budget. In this way, investment in a new generation of social housing is incentivised because it produces a knock-on positive impact on the Scottish budget,

⁷⁸ Christie Commission, June 2011 <https://www.gov.scot/publications/commission-future-delivery-public-services/>.

⁷⁹ Fiscal Sustainability Report, March 2023, Scottish Fiscal Commission shows that Scottish spending on health will rise from 35% of devolved spending in 2027-8 to 50 percent by 2072-3 <https://fiscalcommission.scot/wp-content/uploads/2023/03/FSR-March-2023-Visual-Summary-1.pdf>.

⁸⁰ The Scottish Government declared a housing emergency in May 2024 <https://www.bbc.co.uk/news/articles/c4n-11j180lzo>.

additional revenue which can be reinvested.⁸¹

4.35. This is just one example of how a review of the current fiscal arrangements could encourage a new partnership approach between ministers north and south of the border. It would require a step beyond the highly transactional and actuarial demands of the current arrangements, a fiscal system that we believe is struggling to adapt to the increasingly complex public policy challenges all governments face.

4.36. Whether you are a supporter of the Union or independence, it is important that we have a devolution settlement that works as effectively as it can to deliver the day-to-day services that people rely on.

There are clear question marks over aspects of the current settlement, which can and should be addressed regardless of any wider constitutional conversation.

It seems logical to us that any UK Government interested in making the Union work, and in making the devolution settlement work, should be willing to engage constructively in a review of the 2016 settlement based on an assessment of how it has worked in practice.

81 Page 37 of Tipping the Scales from IPPR Scotland demonstrates that over the 2010s tenants in Scotland alone saved the UK Treasury £240million in benefits because they were in social housing rather than the private rented sector <https://ippr-org.files.svdcdn.com/production/Downloads/tipping-the-scales-may23.pdf>.



5. An agreed path to a future referendum



5.1. As we have seen, there are some very practical issues to be considered in relation to the sustainability of the current settlement. These, if not dealt with, will impact negatively on the ability of future Scottish Governments, regardless of party, to deliver the most effective policy solutions for the country.

Instability also exists in relation to the unresolved question of a future independence referendum. Failure to address it as part of an honest and wide-ranging review of where devolution stands today would be a mistake. By leaving this question unsettled, we are left with a running sore in Scottish political discourse which is not healed by either ignoring it or hoping it will go away. It also leaves us with a Union, as Ciaran Martin puts it, that is upheld by the force of law rather than one sustained by the consent of the people of Scotland.⁸²

Some principles drawn from international examples

5.2. Our starting point is a belief that the United Kingdom is a voluntary union, an understanding of the nature of the UK that is widely held.⁸³

To be voluntary, the partners in the Union must have the ability to choose to leave it.⁸⁴ As we will discuss, that pathway has been set out for Northern Ireland to leave the UK in order to reunite with Ireland, should that be the expressed will of the population. We believe the time is now right for a comparable pathway to be agreed in relation to Scotland.

5.3. Scotland's situation does not map precisely onto any other international or domestic example, and we recognise the very different history of constitutional debate and conflict in Northern Ireland. However, there are lessons to be learnt by looking at the considerations that have been deemed important in comparator countries.

In this regard, we have drawn, in particular, on the Canadian Supreme Court's judgment in the Quebec Secession Reference,⁸⁵ the report of the Academic Council for the Clarity

⁸² See Martin, "Repeat, Reform, Re-Run", 6.

⁸³ In a paper published by the Bennett Institute and the Institute for Government in February 2024, Ciaran Martin describes the "important and more recent late-20th-century UK-wide consensus that, in principle, any constituent part of the UK is allowed to leave if a majority of voters within it so wish. This is an important consensus even if, outside of the 1998 Belfast/Good Friday Agreement for Northern Ireland, it is only informally expressed", Ciaran Martin, "The Union and the State: Contested visions of the UK's future", Review of the UK Constitution: Guest Paper (February 2024), 7: <https://www.bennettinstitute.cam.ac.uk/wp-content/uploads/2024/02/The-union-and-the-state.pdf>.

⁸⁴ See, for example, the evidence provided by the Institute of Government in September 2015 to the House of Lords Select Committee on the Constitution's inquiry into "The Union and Devolution": "The Union can now be said to embody the principle that was explicit in 1707: that this is a voluntary union of nations. In the Northern Ireland Act 1998 and the Edinburgh Agreement of 2012 (the accord that paved the way for the Scottish independence referendum), the UK government accepted the principle that a vote for Irish reunification or Scottish independence at a free and fair referendum would be respected", (10th Report of Session 2015-16 (25 May 2016), HL Paper 149 (<https://publications.parliament.uk/pa/ld201516/ldselect/ldconst/149/14902.htm>) and the Welsh Government: "If, as this first proposition maintains, the UK is conceived of as a voluntary association of nations, it must be open to any of its parts democratically to choose to withdraw from the Union. If this were not so, a nation could conceivably be bound into the UK against its will, a situation both undemocratic and inconsistent with the idea of a Union based on shared values and interests." (Reforming our Union: Shared Governance in the UK, June 2021, 9 - <https://www.gov.wales/sites/default/files/publications/2021-06/reforming-our-union-shared-governance-in-the-uk-june-2021-0.pdf>, accessed August 2024).

⁸⁵ <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/1643/index.do>.

Act in Catalonia,⁸⁶ and the work of the Constitution Unit's Working Group on Unification Referendums on the Island of Ireland.⁸⁷

5.4. We regard the judgment in the Quebec Secession Reference as illustrative not because of its direct application to Scotland, but because of the general approach it advocates, drawing on core constitutional principles - in the Canadian context these are: democracy, rule of law and constitutionalism, federalism and the protection of minorities – but also understanding that a constitution is more than the bare words on the page. Of central importance in the judgment is the recognition that no one principle trumps the others and that each has to be understood in a way that harmonises with the others.⁸⁸ Put in more political terms, there are various rights and responsibilities in play, and these have to be considered in the round.

As the Canadian court sets out, the principle of democracy is fundamental, but it does not stand on its own.⁸⁹ Of equal significance is their recognition that “the reconciliation of the various legitimate constitutional interests is necessarily committed to the political rather than the judicial realm precisely because that reconciliation can only be achieved through the give and take of political negotiations”. In a mature democracy like the UK, this sort of constitutional conversation should not be outwith the bounds of possibility.

5.5. What we regard as most noteworthy in the Catalan case is the process that was adopted. In an effort to find agreement on a constitutional path forward, the Catalan government sought advice from a group of academics, from “a plurality” of disciplines, backgrounds and “political sensitivities” in order to “outline the characteristics and content of a potential agreement aimed at resolving the dispute over Catalonia’s political future.”⁹⁰ While the Canadian Supreme Court reference came from the federal government, the Catalan exercise was less formal and, therefore, had no legal and limited political weight. However, it did provide some useful insight into possible paths to resolve a debate that has been protracted, divisive and extraordinarily challenging to Catalan-Spanish relations.

Drawing on the Canadian Supreme Court judgment, the Catalan report sought to balance competing rights and interests. Catalonia should not act unilaterally, and Spain should not exercise “a unilateral veto”. Instead, the preferred option was for a joint mechanism to be agreed.⁹¹ Consensus and accommodation were emphasised, and it was recognised that processes that observe the principle of equality of positions and which include citizen participation and informed deliberation were more likely to be “effective and stable”.⁹²

86 Report on the Clarity Agreement, October 2023, https://acordclaredat.cat/wp-content/uploads/2024/02/InformeAcord-Claredat_EN.pdf.

87 <https://www.ucl.ac.uk/constitution-unit/research-areas/elections-and-referendums/working-group-unification-referendums-island-ireland>.

88 See the useful discussion of this “harmonisation and non-hierarchisation” in the Catalan Report on the Clarity Agreement, 12.

89 As the judgment states: “Democratic rights under the Constitution cannot be divorced from constitutional obligations. Nor, however, can the reverse proposition be accepted: the continued existence and operation of the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada.”

90 Report on the Clarity Agreement, 6.

91 Report on the Clarity Agreement, 16.

92 Report on the Clarity Agreement, 29-30.

5.6. In the case of Northern Ireland, the constitutional change in question would be unification with the Republic of Ireland. Northern Ireland would be leaving the United Kingdom but not to become independent. This, as well as the particular history of Northern Ireland and its peace process, does create undoubted difference with Scotland. However, what is most important about the Northern Ireland example is that it offers a mechanism for an agreed referendum within the UK constitutional context, albeit one underpinned by an international treaty.

Academics from across the UK and Ireland have undertaken an extensive exploration of the provisions on a unification referendum, as set out in the Belfast/Good Friday Agreement and subsequent UK legislation. Alongside the provisions for a referendum, which we will explore in more detail below, they also offer a series of criteria against which to judge potential referendum processes. These are: clarity, inclusivity, informed choice, procedural legitimacy and stability.⁹³

5.7. Procedural legitimacy is discussed in terms of the law and in the eyes of the public. If the process is legal and seen to be fair, then it is more likely that “participants on all sides [would be] willing to accept the result, even if it is not their preferred outcome”.⁹⁴ This was achieved in Scotland in 2014, as a result of the agreement reached between the two governments.

Inclusivity requires processes that are “shaped by a broad and diverse range of people”. This was achieved in a Scottish context in and through the Scottish Constitutional Convention that informed the proposal for a Scottish Parliament on which the 1979 vote was based.⁹⁵

In our view, these sorts of criteria would be more difficult to achieve through mechanisms such as plebiscite elections. An agreed referendum, connected to a process of meaningful public deliberation, is for us the gold standard.

The Northern Irish model

5.8. Beyond these broad criteria, the Working Group also explored the detail of the specific provisions that could lead to a unification vote in Northern Ireland.⁹⁶

The referendum provisions in the Northern Ireland Act 1998 are without parallel in UK law,⁹⁷ although as the report points out, there is a requirement for a confirmatory referendum

⁹³ See, for example, the descriptions offered in the Final Report of The Working Group on Unification Referendums on the Island of Ireland, 82-83.

⁹⁴ See, for example, the descriptions offered in the Final Report of The Working Group on Unification Referendums on the Island of Ireland, 83.

⁹⁵ See, for example, the descriptions offered in the Final Report of The Working Group on Unification Referendums on the Island of Ireland, 86.

⁹⁶ A parallel unification referendum would also take place in the Republic of Ireland, in a manner determined by the Irish government in line with provisions in the Irish constitution.

⁹⁷ Final Report of The Working Group on Unification Referendums on the Island of Ireland, 34.

before either the Scottish Parliament or Welsh Senedd could be abolished.⁹⁸

“Consent for unification in the North can only be expressed through a referendum”,⁹⁹ as set out in Section 1 of the Northern Ireland Act.¹⁰⁰

1. Status of Northern Ireland

(1) It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1.

(2) But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty’s Government in the United Kingdom and the Government of Ireland.

Under Schedule 1, the Secretary of State has the discretion to hold a unification referendum at any point. However, the Secretary of State is required to call a referendum “if at any time it appears likely to him that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland.”¹⁰¹

We believe that it is significant that the referendum process is triggered not when there is majority support for the holding of a referendum, or indeed a majority in the Northern Irish Assembly for such a vote, but rather when it is believed that unification would win majority support among the electorate if a referendum were held. This puts the level of support for the proposed constitutional change centre stage, rather than the mechanism for implementing that change. It places substance before process. It is a higher bar, but not an insurmountable one. If the people of Northern Ireland express a clear and consistent view in favour of unification, they will have the opportunity in law to vote on that proposition.

5.9. Another key consideration here is the role of the Secretary of State and the nature of the duty that is placed on them.

There are two distinct provisions. Under the first, the “discretionary power”, the Secretary of State **may** call a referendum on unification. The Working Group concluded that a poll could be called on this basis under a range of circumstances, in particular “if the state of public opinion was uncertain, or the Northern Ireland Assembly had voted for one, or it was

⁹⁸ Final Report of The Working Group on Unification Referendums on the Island of Ireland, 34.

⁹⁹ Final Report of The Working Group on Unification Referendums on the Island of Ireland, 69.

¹⁰⁰ Section 1 of the Northern Ireland Act 1998, <https://www.legislation.gov.uk/ukpga/1998/47/section/1>.

¹⁰¹ Schedule 1 of the Northern Ireland Act 1998, <https://www.legislation.gov.uk/ukpga/1998/47/schedule/1>. See discussion in the Working Group Report, 69.

judged to be in the public interest”. However, they added that “calling a referendum in order to defeat or delay the possibility of unification would be problematic”.¹⁰²

Under the second, the “mandatory duty”, the Secretary of State **must** call a vote on unification. This is a decision for the Secretary of State to take, but within limits. As the Working Group details, these have been given some consideration in *McCord v Secretary of State for Northern Ireland*, at the Northern Ireland High Court and the Court of Appeal.¹⁰³

In relation to both duties, the judgment on appeal “repeatedly made clear that, in the discharge of functions under the Act, the Secretary of State must not only act honestly” but also with “rigorous impartiality”.¹⁰⁴

Under the discretionary duty, the assessment is “whether directing the holding of a border poll is in the public interest”, something which “involves political judgment”.¹⁰⁵ The assessment to be made under the mandatory duty is different. Instead of the public interest, it is “the likely majority of those voting”.¹⁰⁶ In more political terms, under the mandatory duty, the Secretary of State is under an obligation to call a referendum based not on personal view or political preference, but rather on an honest and impartial assessment of whether or not a majority vote for unification is the likely outcome.

Chapter 8 of the Final Report of the Working Group offers a detailed assessment of what this means in practice, including an extensive exploration of the range of evidence, and its relative weighting, that the Secretary of State could consider in making a decision. Drawing on the judgments, and also material provided to the court by the UK government, the Working Group suggests that this would most likely include election results, opinion polling, including specific polling commissioned by the government, and votes in the Northern Ireland Assembly, as well as more qualitative evidence.¹⁰⁷

In relation to the mandatory duty in particular, while the decision is in the hands of the UK government, UK ministers have not been given *carte blanche*.

In both cases there is a “seven-year rule” preventing a referendum being called within 7 years of a previous unification vote.¹⁰⁸

An agreed path to a future Scottish referendum

5.10. We believe that there are lessons to be learnt from these examples as we consider options for Scotland.

102 See the Final Report of The Working Group on Unification Referendums on the Island of Ireland, xix.

103 The Court of Appeal judgment is available at <https://www.judiciaryni.uk/files/judiciaryni/decisions/Raymond%20McCord%E2%80%99s%20Application%20Border%20Poll.pdf>.

104 Final Report of The Working Group on Unification Referendums on the Island of Ireland, 132.

105 *McCord*, para. 71. See also paras 68-73 for the court’s fuller considerations of the discretionary duty.

106 *McCord*, para. 76. See also paras 74-82 for the court’s fuller considerations of the mandatory duty.

107 Final Report of The Working Group on Unification Referendums on the Island of Ireland, 138 & 140.

108 See the Final Report of The Working Group on Unification Referendums on the Island of Ireland, xix and 130 and Schedule 1 of the Northern Ireland Act 1998, <https://www.legislation.gov.uk/ukpga/1998/47/schedule/1>.

The suggestions we make here are offered as a starting point for discussion, no more. The core proposal, to model a Scottish process on the mechanism already in place for Northern Ireland, would require compromise across the board, with the Scottish Government and pro-independence voices agreeing to a central role for the UK government, and the UK government and pro-UK voices agreeing a pathway to a possible future independence vote.

5.11. Following the Canadian Supreme Court, we believe that beginning from a position of constitutional principles is essential.

In this regard, and drawing on the Canadian example, we would emphasise the principles of democracy, the rule of law and constitutionalism, while offering a UK-specific principle, unionism, as an alternative to Canada's federalism.

Democracy certainly means respecting mandates achieved in elections, however, we echo the Canadian Supreme Court's statement that democracy "means more than simple majority rule". A world reduced to competing mandates can quickly become a zero-sum game, a cul-de-sac, when what is most important to democracy is understanding and delivering on the will of the people. We have some experience of this in Scotland where the 'settled will' of the Scottish people in relation to devolution was confirmed by a process that included civic deliberation, election results, and a referendum, in addition to a swathe of other confirmatory material, including opinion polls, surveys and public campaigns.

The rule of law and constitutionalism, principles that are fundamental whether in a UK or Scottish context, should rule out unilateral, extra-constitutional paths to independence – a view that might be seen as limiting Scotland's options in the face of UK opposition. However, the principle of unionism - in essence a statement that the UK is a union rather than unitary state¹⁰⁹ and, flowing from this, that it is a partnership by consent,¹¹⁰ a voluntary union - would require a UK government to engage in good faith with a genuine Scottish desire for independence.

There has been some academic reflection already on the sorts of principles that do, or should, underpin the UK's constitutional arrangements. For example, the Bingham Centre for the Rule of Law has proposed a series of constitutional principles for what it describes as a new Charter for the Union. These include confirmation that the UK is a voluntary union, which is "expressed through informed and democratic processes", as well as principles such as autonomy and subsidiarity for what they describe as "the UK nations and parts", and "democracy, the rule of law, equality and the protection of human rights and freedoms"

109 See, for example, Professor Michael Keating's "State and Nation in the United Kingdom: The Fractured Union" (Oxford, OUP, 2021). In the preface, Professor Keating describes this union/unitary distinction as the "core argument" of his book: "the United Kingdom must be understood as a union rather than a unitary state. The principle of union, properly understood, precludes a single, consistent narrative about the constituent people (demos), its historic trajectory and purpose (telos) and its special values (ethos). Unions are sites of contested sovereignty and borders".

110 As Professor Keating argues, the "concept of contract" is a central feature of union states, "in which adherence to union is, ultimately, voluntary". "Unions are also characterized" he adds "by divided sovereignty, as the constituent units never entirely surrender their original authority even if they choose not to secede" (Keating, "State and Nation in the United Kingdom: The Fractured Union", 2.

for the UK as a whole.¹¹¹

5.12. Drawing on these principles, and given that it forms part of the existing UK constitutional arrangements, we believe that the Northern Irish mechanism, in particular the mandatory duty, contains the elements around which a possible agreement could be reached in the Scottish context.

5.13. On this basis, the Secretary of State for Scotland would have a legal duty to permit a referendum if it looked likely that independence would secure majority support in such a vote.

As with Northern Ireland, that assessment would be left to the Secretary of State. However, the formal criteria for making the decision should form part of any agreement between the two governments.

We believe that the likelihood of a majority vote for independence should be assessed using a range of measures, from opinion polling to election results, to votes in parliament. The broad weighting given to each one should also be subject to agreement.

While some might wish that the debate on independence would simply go away, or argue that it has effectively gone away thanks to the Supreme Court decision and the recent UK election result, we would offer an alternative view. This proposition is as much about the nature of the Union as it is about independence, or indeed any measure of constitutional change short of full independence. If this is a voluntary union, there should be a mechanism for the constituent nations to leave the union. That is a principle that should stand regardless of whether political pressure for independence is high or non-existent.

The advantage of an agreed mechanism, centred on levels of support for independence, is that it can bring to an end a debate on process that has entangled Scottish, and in some ways also British, politics over these past years. The conversation can become one about policy and substance.

5.14. Clear majority support would have to be sustained over a period of time, in order to give confidence that a vote for independence was likely if a referendum were to be held. But once that clear and consistent majority support had been achieved, the UK government would be under a legally enforceable duty to allow a referendum in Scotland to take place.

Following the precedent of 2014, we believe that this would be best expressed through the passing of a Section 30 Order to enable the Scottish Parliament and Scottish Government to take forward arrangements for the vote, within the parameters agreed between both governments.

5.15. As with Northern Ireland, we believe that a vote of 50 per cent plus 1 would be

¹¹¹ The Draft Charter can be found at Annex B of the House of Lords Select Committee on the Constitution's report "The Union and Devolution" (10th Report of Session 2015-16 (25 May 2016), HL Paper 149, <https://publications.parliament.uk/pa/ld201516/ldselect/ldconst/149/14902.htm>).

sufficient for victory in the referendum. This has been the norm for all recent constitutional referendums in the UK.¹¹² However, a higher threshold for independence support would be reasonable before the Secretary of State was required to trigger a vote.

The required level of support would be subject to agreement between the two governments, but it is important to emphasise that any threshold to trigger a referendum should not act as an insurmountable barrier but, rather, serve to confirm the solidity of the public's view on the question. We see value to having an element of independent, expert advice or assessment as part of this process.

5.16. Again, following the Northern Ireland model, we believe that it is appropriate to require a minimum period between referendums. A vote for Scotland remaining part of the UK is just as much an expression of Scotland's right to self-determination as a vote for independence. A vote to remain in the UK should be recognised and respected.

5.17. With this proposal, we offer a model that could please nobody. However, we hope instead that it can help break some of the political logjam on this question.

It is offered in outline and would certainly require more detailed discussion and agreement between the two governments. More fundamentally, it would also require compromise and concessions on both sides. The pro-independence camp is being asked to accept the UK government as the decision-maker in the process. The pro-UK camp is being asked to accept a legal duty on the UK government to agree to a referendum on independence if there is clear and consistent majority support for independence.

5.18. Is there anything to suggest that either side is ready for compromise or that an agreement in such a contested area is in any way a realistic prospect? After all, the general election result has, for many, marked the end of a period dominated by constitutional division. In response, we would argue that it is often in times when the political heat is lowered that space is created to explore new ways forward.

We also believe that while the Supreme Court decision has taken much of the heat out of this debate, it has not in any way resolved the question. Indeed, it has shone a light on the very nature of the Union partnership. It has left us with a very clear constitutional loose end to be tied. If the Union is a voluntary one, then there surely must be a fair, legal and constitutional path for Scotland to leave it.

¹¹² As Ciaran Martin argues, the so-called 40 per cent rule in the 1979 devolution referendum was the result of a "wrecking amendment" to the legislation (Martin, "Resist, Reform, Re-Run", 26) and, as a result, stands out as a noticeable exception to the range of UK plebiscites on EU membership, devolution, independence and the voting system.

Conclusion



6.1. We recognise that the last thing some people want to do, ten years on from the referendum, and after a decade dominated by constitutional disagreement, whether independence or Brexit, is to simply repeat the arguments of the past.

That is what we have been trying to avoid. We have laid out the major political events and developments of the past decade in order to establish the context that we now find ourselves in. And while the events of the past will certainly shape the path forward, they do not determine it. Indeed, if we reflect on earlier phases of Scotland's constitutional conversation, no one precisely matches another.

6.2. This is a paper rooted in the world as we find it, but also one that is alive to the multiple complexities of the world we know is coming. We have experienced a series of significant challenges since the financial crisis in 2008/2009, including what has been described in recent years as a near perma-crisis, with almost every aspect of our lives impacted.

The years to come will bring new challenges, in particular around the effects of climate change, economically, socially and environmentally, but there are also huge opportunities, and it is our collective responsibility to prepare Scotland as best we can for what is to come. That inevitably means asking hard questions about agency, decision-making, delivery, about where powers best lie and how they are best used.

6.3. It is a paper that contains challenges for advocates of the Union and of independence. It is the product of a collaboration - rooted in dialogue, compromise and evidence - between two people with central roles in the 'Yes' and 'No' campaigns in 2014.

Our work together has been conducted in a spirit of friendship and common endeavour. We have aimed to make our difference a source of creative tension, in part because what unites us rather than what divides us has been our starting point. We stand together on a broad common ground of shared values and goals - shared not only by us but we believe by the vast majority of Scots, whether they voted 'No' or 'Yes' in 2014.

6.4. We hope that our ideas, drawn from the experiences and reflections of others at home and abroad, are both thought-provoking and refreshing. They are presented not as the perfect solution, delivered as though on tablets of stone, but in the hope that they will spark a constructive conversation, one conducted in the spirit of our own deliberations.

About this report

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