

The Future of Scottish Devolution within the Union:
Consultation response from the Federal Trust for Education and Research

The Federal Trust is a think tank that studies the interactions between regional, national, European and global levels of government. We are currently engaged in the study of the possible applicability of federal structures; and as part of this work we take an interest in the current devolution settlement, in particular for Scotland.

Please find below our response to the consultation of December 2008 by the Commission on Scottish Devolution.

Our general view is that the adoption of federal structures for the United Kingdom as a whole should be considered as a possible means of attaining the Commission's objective of strengthening Scottish devolution within the Union.

Such an approach could help provide institutional expression for a dual sense of Scottish and British nationality held by many within Scotland. It could make for a clearer, firmer settlement than the one provided for at present under the *Scotland Act 1998*, while retaining the undoubted successful features of this legislation, which has become an important part of the un-codified UK constitution. We provide a more detailed account of our position in responding to selected questions from the Commission below.

Q1. Should any changes in devolution presume a continued common UK legal and political citizenship?

We believe that there should be a basic level of citizenship within the UK, entailing uniform rights and responsibilities. This would provide a 'floor' below which individual components of the UK, including Scotland, could not go. However, there should be a presumption that Scotland might wish and should be able to build upon existing consequences of citizenship, for instance through the introduction of a bill of rights, that may include provision *inter alia* for economic and social rights. Some precedent for this approach exists in Northern Ireland, where a process that may lead to a specific bill of rights is underway.

Scotland participates in international affairs, defence and security as an integral part of the UK, but with an international profile of its own. The Commission regards this as in Scotland's interests. (Paragraphs 4.34 to 4.42)

Q2. Are the UK's constitutional arrangements sufficiently flexible to allow devolved interests to be taken properly into account when they impact on these reserved matters?

We would regard a federal structure for the UK as making it easier to answer this question. Under such an arrangement, there would be a clearer delineation of which tier of governance was responsible which policy. Some would be exercised entirely at federal level, others entirely at sub-federal level; and others, such as the Common Fisheries Policy, would be regarded as shared between different tiers of governance. Under our suggested structure of the United Kingdom, it would be necessary to establish formal mechanisms for the exercise of joint responsibilities.

The Commission takes the view that the economic Union of the UK is greatly to Scotland's benefit. (Paragraphs 4.43 to 4.48)

Q3. Is the Commission right in concluding that, when changes in powers or finance are considered which might allow the Scottish Parliament to serve the people of Scotland better, they should not run the risk of significantly undermining the economic aspect of the Union?

In terms of the location of government economic and fiscal powers, the UK is amongst the most centralised countries in the world. There is ample scope of the transfer of responsibilities from London without risking the economic cohesion of the UK. For instance, states such as the US and Germany demonstrate that it is possible to have the considerable devolution of fiscal policy (as well as policy in many other areas) without undermining national unity.

Q4. Should there be scope for much greater differences in social provision, and in consequence greater reliance on Scottish tax resources? Alternatively, should devolution be in the context of a common social citizenship across the UK and, if so, should the elements of that citizenship be articulated in some way?

We anticipate that within a federal settlement, there would be scope for greater differences in the extent of social provision as between different component parts of the UK. It may be, however, that the federal tier of governance would seek to establish a 'floor', that is a minimum level of social provision, upon which sub-federal tiers could choose to build more provision if they chose. This 'floor' could be provided for in terms of simple legislation and policy; or might be established as part of a future bill of rights, something upon which the government is at present consulting.

Equally, component parts of the UK, including Scotland, might choose to expand upon basic UK levels of social provision through introducing their own distinctive policies; or might choose to introduce sub-federal bills of rights which could include in them reference to economic and social rights.

We consider it essential as a matter of principal and political necessity that additional costs incurred by such changes should be met from within the component of the UK that is introducing them. To make this fiscal approach viable it would be necessary to decentralise fiscal policy considerably; and draw a clear distinction between revenues raised within particular components of the UK; and those raised at UK level, which would be distributed according to a new needs-based formula, replacing the existing 'Barnett Formula'. We note that the terms of reference of the current House of Lords inquiry into the Barnett Formula rule out consideration of the devolution settlement.

Powers and functions (Chapter 5)

This section in the consultation paper addresses a series of detailed policy areas from the perspective of where best responsibility for them should lie. We believe that the federal approach can offer a broad set of principles that can help unpick this complex set of issues.

First it is necessary, as the Commission has done, to identify powers which must be retained at the centre in order to preserve the integrity of the UK state. These may include such areas as defence, national security and monetary policy; and basic citizenship rights and responsibilities.

Second, powers should be identified which should be considered as joint responsibilities – possibilities here include aspects of EU policy.

Third, all those powers that remain should be transferred to sub-UK level, including Scotland, unless strong reasons – such as the benefits of economies of scale – can be found for pooling them at a higher level, a decision that must be assented to at sub-UK level.

Using this approach, we have identified policy areas that are currently reserved and controlled from London that could at least in part be shifted to become joint responsibilities, or entirely sub-federal responsibilities:

- the fiscal and economic system
- trade and industry, including customer protection
- social security
- Broadcasting
- the civil service
- energy
- employment
- equal opportunities

Finally, we urge that, in the consideration of which tiers of governance should hold particular responsibilities, the role of the lowest tier, local authorities, should not be overlooked, since there is a danger of their being marginalised both by central and regional/national governance.

Relationships between Parliaments and Governments (Chapter 7)

Q5. What are the options for improved inter-governmental mechanisms to resolve potential disputes? What more radical approaches might be considered in relation to shared or concurrent competence?

We believe that a federal structure would make it easier to address the question of what mechanisms are needed to resolve potential disputes between different tiers of governance, since they would enable to determine which tier a particular responsibility belonged to, or whether it was shared. This approach would assist day-to-day functioning, as well as providing means of resolving more serious breakdowns. We believe that the ultimate arbiter of disputes between UK and sub-UK institutions should be the UK Supreme Court, when fully operational. In order for this arrangement to function effectively, certain changes would be necessary. The powers of various tiers of governance and the basic rights (and possibly

responsibilities) of UK citizens (and others present within the UK) would have to be set out in a document that could not be overturned by simple majority votes in the UK Parliament. When using these documents to rule on disputes, the Supreme Court would have to be able to strike down primary legislation issued by the UK Parliament (as well as sub-UK legislation). In order to ensure that sub-UK institutions of governance, including those based in Scotland, were given a voice in UK-level decisions, consideration should be given to including within a reformed House of Lords representatives of the different regions and nations of the UK.

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