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Assembly

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RaISe

Devolution reviews

1 Introduction

This briefing paper has been produced for the Assembly and Executive Review Committee (AERC). The Committee requested information on the following:

- an examination of the devolution arrangements in other devolved administrations; including an examination of the various reviews into devolution which have taken place in other parts of the UK.

The paper sets out a brief history of recent devolution in Scotland and Wales and comments on the reviews that have occurred in relation to the development of devolution over the last number of years. It also includes timelines setting out the key devolution milestones in relation to the Scottish Parliament and National Assembly for Wales.

2 The development of devolution

Devolution in the UK has developed in a manner that has been described as 'asymmetrical'. In evidence to the House of Commons Political and Constitutional Reform Committee in November 2014 (prior to the latest reforms in the Scotland Act 2016 and Wales Bill 2016), the Institute for Government outlined what it saw as the approach to devolution:

(The) differences (in the devolved settlements) reflect the UK's longstanding approach to constitutional design, which has been to respond differently to specific circumstances and pressures arising in each part of the country rather than seeking to design and implement a single consistent constitutional model. This remains the default position – as can be seen in the separation of the debates about the Scottish and Welsh devolution arrangements (while Northern Ireland is barely on the agenda) as well as the different models for local and regional governance being created in parts of England...

There are often good economic, cultural and historical reasons for constitutional asymmetry. For instance, fiscal devolution...is less attractive to Wales than Scotland due to Wales' weaker economic position. And Northern Ireland's distinct power-sharing devolution model is a product of devolution there being part of the peace settlement. As for England, its pre-eminence within the UK means that there has not been the perceived need to create separate English governance structures – Westminster and Whitehall are already predominantly focussed on English matters¹.

From 1998, both Scotland and Northern Ireland had quite different devolution arrangements compared to Wales. They enjoyed distinct executive and legislative arrangements with the legislature able to pass primary legislation. Wales only had executive and administrative powers but its Assembly could not pass primary legislation².

The Scotland Act 1998 and Northern Ireland Act 1998 did not list the powers that were devolved, but listed the matters for which the Scottish Parliament and Northern Ireland Assembly did not have legislative competence³.

¹ Written evidence from the Institute for Government to House of Commons Political and Constitutional Reform Committee Inquiry *The Future of Devolution after the Scottish Referendum*, March 2015

² Derek Birrell, *Comparing Devolved Governance* (2012)

³ As above.

3 Scotland

Pre-devolution

Scottish Constitutional Convention

In 1989 the Scottish Constitutional Convention (SCC) was formed to promote the principle (and detailed workings) of devolved government. The group was comprised of political parties, interest groups and civic and religious leaders. It proposed that:

The coming of a Scottish Parliament will usher in a way of politics that is radically different from the rituals of Westminster: more participative, more creative, less needlessly confrontational⁴.

The SCC was an attempt to steer a middle-ground between Conservative unionism and the Scottish National Party's (SNP) desire for independence⁵.

The election of a Labour government in 1997 with a commitment to devolution led to a referendum where there were significant majorities in favour of a Scottish Parliament and tax-raising powers for the new institution.

Consultative Steering Group

The Consultative Steering Group was established in November 1997 with the following remit:

- consider the operational needs and working methods of the Scottish Parliament;
- develop proposals for the rules of procedure and Standing Orders that it might be invited to adopt; and
- prepare a report to the Secretary of State by the end of 1998 on these matters⁶.

The Scotland Bill received Royal Assent in November 1998 and the Scottish Parliament assumed its powers in July 1999.

Reviews and legislative change

Steel Report - 2006

The Steel Commission was a Liberal Democrat initiative which was viewed as preparing the way for a second Constitutional Convention in 2009. The Commission was appointed in 2003 and headed by former Presiding Officer Sir David Steel. The report of the Commission, published in 2006, recommended: a new written constitution

⁴ Paul Cairney and Neil McGarvey, *Scottish Politics*, (2nd edition, 2013)

⁵ As above.

⁶ Alice Brown, 'Designing the Scottish Parliament', *Parliamentary Affairs*, (2000) 53: 542-556

for the UK, recognising Scotland's position within a modern union; increased policy and legislative powers for the Scottish Parliament; and a new finance system of fiscal federalism backed by a set of constitutional and fiscal principles that recognise Scotland's historic status in the UK.

National Conversation – 2007

In 2007 the SNP published a White Paper entitled *Choosing Scotland's Future*. It was described as an attempt to:

Promote independence pragmatically (partly given its minority position) by initiating a lengthy consultation process...appearing to open to the alternative of further devolution, and accepting the need for negotiations with the UK Government after a 'yes' vote (while arguing that Scotland has the right to self-determination)⁷.

A second White Paper, *Your Scotland, Your Voice: A National Conversation*, outlined the potential benefits of independence in substantive policy areas. It also included discussion around a possible referendum question on independence.

The Calman Commission

The success of the SNP in the Scottish Parliamentary elections of 2007 led to an initiative on the part of the three opposition party leaders and they responded by outlining the need for a further constitutional review. All three parties were in favour of maintaining the Union.

The Scottish Parliament subsequently passed a motion to establish what would become the 'Commission on Scottish Devolution', chaired by Sir Kenneth Calman. The Commission's Terms of Reference were:

To review the provisions of the Scotland Act 1998 in the light of experience and to recommend any changes to the present constitutional arrangements that would enable the Scottish Parliament to serve the people of Scotland better, that would improve the financial accountability of the Scottish Parliament and that would continue to secure the position of Scotland within the United Kingdom⁸.

Independence, therefore, was not on the agenda.

The Commission produced two reports. The first report looked at the functions of the Scottish Parliament, how it was financed and its accountability to the Scottish people and how the new Scottish political institutions related to the rest of the UK⁹.

The second report has been described as performing two main functions:

⁷ Paul Cairney and Neil McGarvey, *Scottish Politics*, (2nd edition, 2013).

⁸ Terms of Reference for the Commission on Scottish Devolution (the Calman Commission).

⁹ House of Commons Library, *The Commission on Scottish Devolution – the Calman Commission*, June 2010.

First, it provides a narrative, to justify the continuation of the union, in terms of the idea of British social citizenship and a 'social Union with the rest of the UK'. It stresses the need to balance a degree of self-determination, leading often to policy divergence in key areas such as health and social care, with the common belief in fairness, which provides 'some common expectations about social welfare'.

Second, it recommends a series of, primarily financial, reforms. The most notable recommendation is further tax devolution, but it is here that we can see the most evidence of constraint. The report argues that it would be difficult to maintain the union if the UK Government granted 'full fiscal autonomy' to Scotland...¹⁰.

The response of the Scottish Government (the SNP) was to accept some recommendations of the Commission but reject others, describing the Commission as a 'missed opportunity'.

The UK Government published its white paper Scotland's future in the *United Kingdom: building on ten years of Scottish devolution*, which set out its response to the Calman Commission. The then Secretary of State for Scotland announced that the UK Government would take forward 39 of the 42 recommendations aimed at it and that it intended to introduce a Bill in the next Parliament to give effect to those recommendations.

As it turned out, the Labour Party produced its White Paper too late to pass legislation before the 2010 election, so it was left to the incoming Conservative-Liberal Democrat coalition government to legislate for the Calman recommendations.

Scotland Act 2012

Previous research has summarised the main provisions of the Scotland Act 2012 as follows¹¹:

Further devolution of tax and borrowing policy:	<ul style="list-style-type: none"> • Introduced an ability of the Scottish Parliament to vary income tax by 10p in the pound (up or down) and obliged the Scottish Government to announce the Scottish rate annually; • Devolves stamp duty land tax; • Devolves landfill tax; AND • Allows the Scottish Government to borrow, from the UK Government, up to £2.7 billion
Devolution of policy regarding:	<ul style="list-style-type: none"> • The administration of Scottish Parliament elections; • The administration of Scottish Parliament business, including the size of the Scottish Parliamentary Corporate Body, the election of deputy presiding officers, schemes on members' interests and the disqualification of MSPs; • Air weapons; • Issuing 'addicts licenses' to doctors prescribing controlled drugs in Scotland;

¹⁰ Paul Cairney and Neil McGarvey, *Scottish Politics*, (2nd edition, 2013).

¹¹ As above

	<ul style="list-style-type: none"> • Drink-driving limits; and • The Scottish national speed limit
The Act also:	<ul style="list-style-type: none"> • Formally renames the 'Scottish Executive' as 'Scottish Government'; • Puts a time limit (normally one year) on proceedings against Scottish ministers when they have allegedly breached the European Convention on Human Rights; • Requires Scottish Government agreement on the appointment of one member of the BBC Trust; • Makes the Scottish (not UK) Government responsible for payments to the Gaelic Broadcasting Fund; • Introduces a Crown Estate Commissioner with special responsibility for Scotland; and • Helps to clarify the role of the UK Supreme Court, regarding the role of Scottish law officers and the role of the High and Supreme Courts as courts of appeal

Referendum on Scottish independence and the Smith Commission

In the lead-up to the referendum the three largest UK political parties (Conservatives, Labour and Liberal Democrats) pledged to devolve further powers to the Scottish Parliament in the event of independence being rejected. The day after the referendum the Prime Minister invited Lord Smith of Kelvin to set up a commission (what became known as the Smith Commission) to take forward that commitment and produce specific recommendations for the devolution of further powers.

The subsequent *Report of the Smith Commission for further devolution of powers to the Scottish Parliament* contained a number of proposals aimed at delivering the commitments given by the three main parties. These included:

- The Scottish Parliament and Scottish Government to be made permanent;
- Increased borrowing powers, to be agreed with the UK Government, to support capital investment and ensure budgetary stability; and
- The Parliament to have the power to extend the vote to 16 and 17 year olds.

The Scotland Bill

On 22 January 2015 the UK Government published its Command Paper *Scotland in the United Kingdom: an enduring settlement*, setting out its response to the Smith recommendations, including draft clauses.

The Scotland Bill was subject to scrutiny by both the UK Parliament and Scottish Parliament. The Scottish Parliament's Devolution (Further Powers) Committee concluded that:

There are still some areas where we feel that the Scotland Bill continues to fall short of the spirit and substance of Smith, notably in relation to the devolution of employment programmes and also the future of the legislative consent provision. Nevertheless, the Bill has been improved during its passage

through our determined scrutiny and we welcome the fact the Secretary of State for Scotland has been prepared to listen we have presented and improved the Bill in other areas.

Therefore, on balance, we recommend that the Scottish Parliament gives its legislative consent to the Scotland Bill¹².

The major provisions of the Scotland Act 2016 are described overleaf.

The Scotland Act 2016

The Scotland Act 2016 received Royal Assent on 23 March 2016. It gives effect to the Smith Commission recommendations, transferring new powers to the Scottish Parliament.

Its main constitutional provision is the recognition of the Scottish Parliament as a permanent part of the UK political landscape, unless otherwise decided by the people of Scotland.

It also places the Sewel Convention (that the UK Parliament will not normally legislate on devolved areas without first consulting the Scottish Parliament) on a statutory footing.

The value of these two provisions have been questioned due to the fact that, in theory, the 2016 Act could be repealed by a future Parliament. Furthermore, the House of Lords Constitution Committee raised concerns that:

It is a fundamental principle of the UK constitution that Parliament is sovereign and that no Parliament may bind its successors. There is now a strong argument that Parliament is seeking to limit its own competence in a way that the courts may seek to uphold in future given that it rests on a requirement for popular consent. While we recognise that it is extremely unlikely that this will ever be tested in the courts, it is nonetheless symbolically important and we are concerned that these provisions, as currently worded, risk introducing uncertainty concerning the absolute nature of parliamentary sovereignty where there should be none¹³.

Other significant provisions of the Act include:

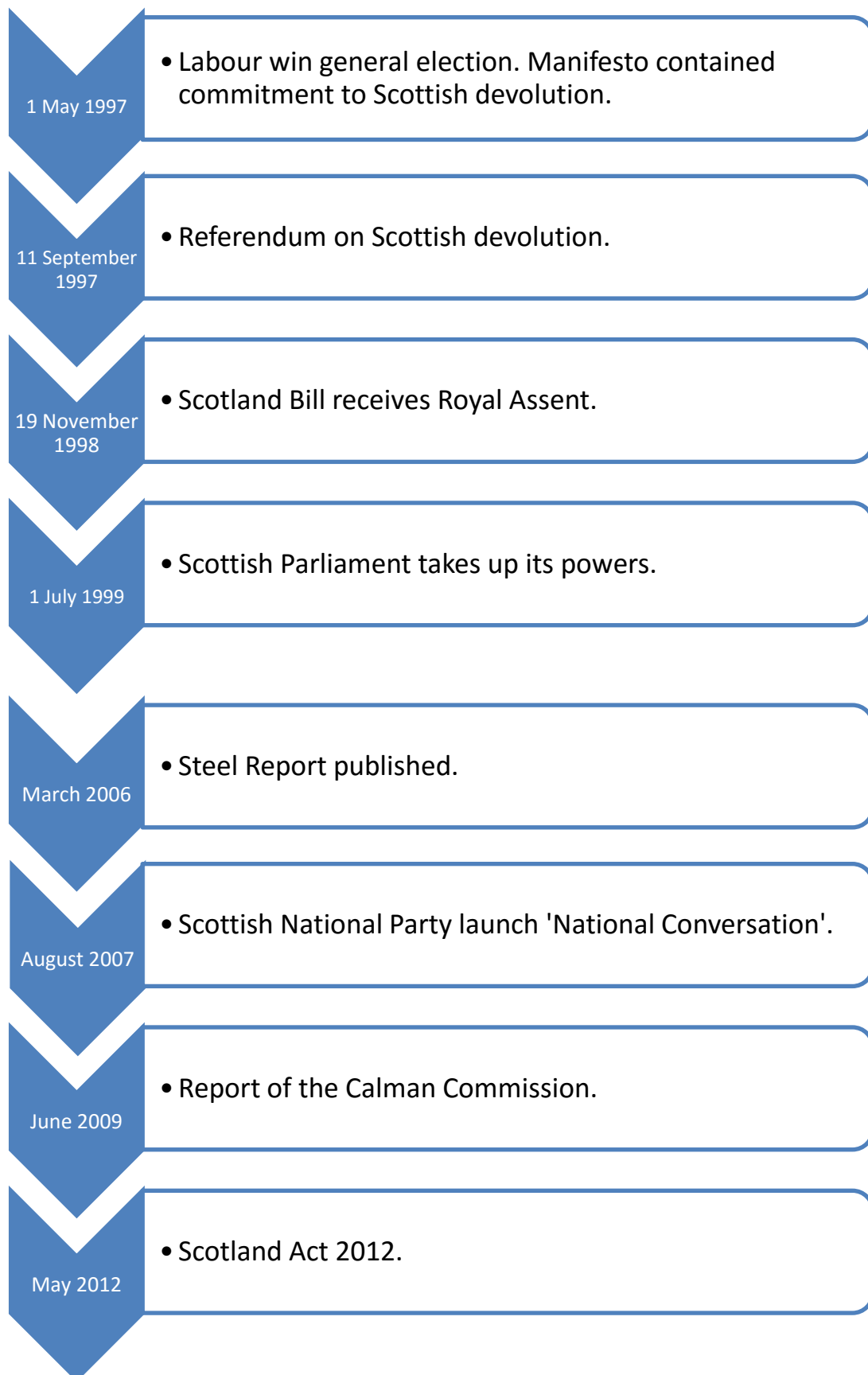
- Increased autonomy to the Scottish Parliament and the Scottish Ministers in relation to the operation of Scottish Parliament and local government elections in Scotland

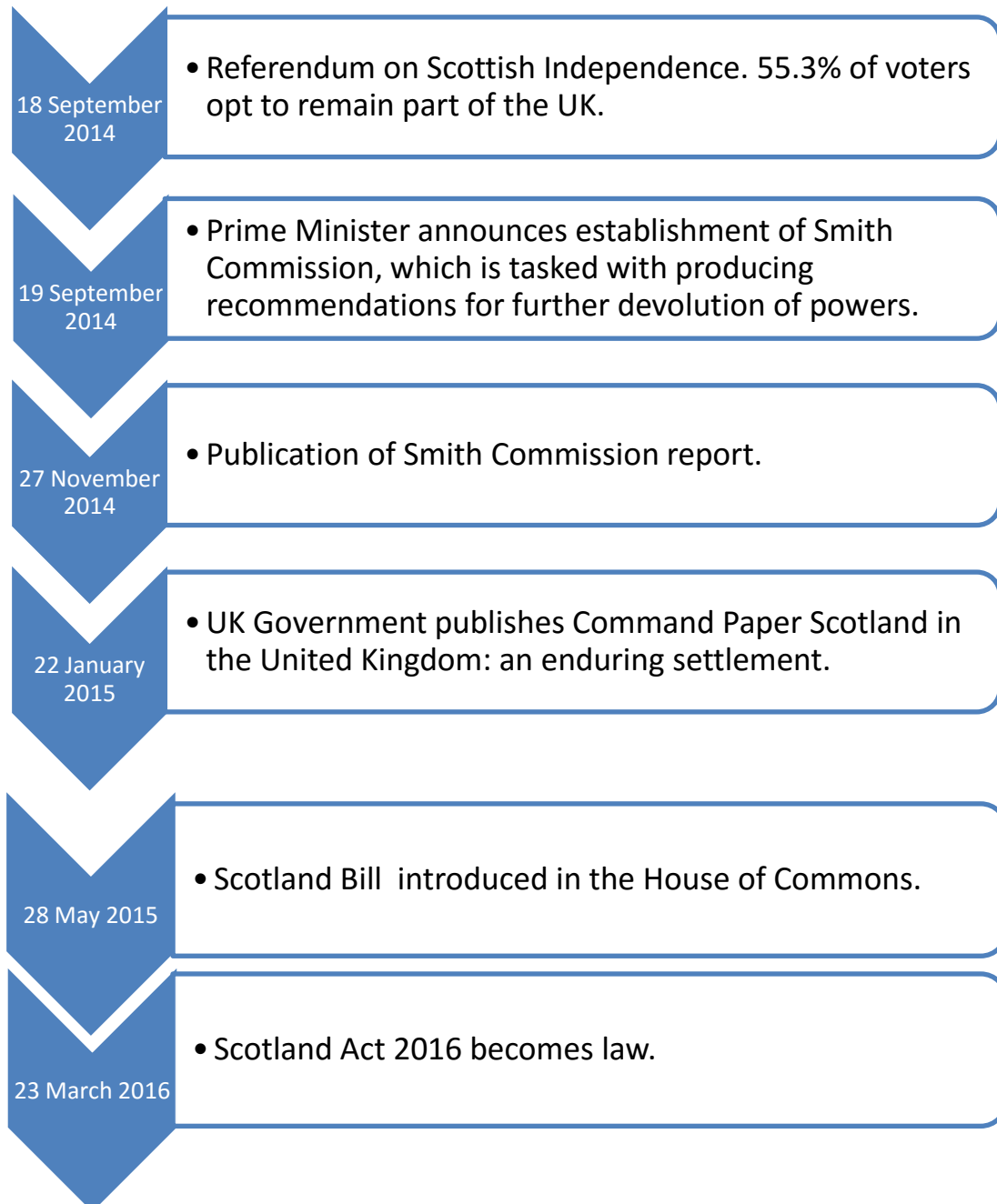
¹² Scottish Parliament Devolution (Further Powers) Committee report *New Powers for Scotland: Final Report on the Scotland Bill*, 3rd Report, 2016

¹³ Public Law for Everyone: The 'permanence' of the Scottish Parliament and the Sewel Convention: The House of Lords Constitution Committee's Report on the Scotland Bill', November 2015

- Increased financial accountability of the Scottish Parliament through devolution of the rates and bands of income tax, Air Passenger Duty and Aggregates Levy, and assignment of VAT revenues
- Increasing responsibility of welfare policy and delivery in Scotland through the devolution of welfare powers to the Scottish Parliament and/or the Scottish Ministers
- Giving significant responsibility to Scotland for areas such as road signs, speed limits, onshore oil and gas extraction, consumer advocacy and advice amongst others by devolution of powers in relation to these fields to the Scottish Parliament and the Scottish Ministers
- Increased scrutiny for the Scottish Parliament of specific bodies and increases the ability of the Scottish Government to design schemes relating to energy efficiency and fuel poverty by the devolution of functions to the Scottish Ministers

Timeline of devolution milestones – Scotland





4 National Assembly for Wales

The manifesto of the Labour Government elected in 1997 contained a commitment to hold a referendum on the creation of a Welsh Assembly. Proposals were outlined in the White Paper *A Voice for Wales* and the referendum was held on 18 September 1997, with a narrow majority voting in favour of devolution.

The Government of Wales Act 1998 established the National Assembly for Wales (NAfW), but it was different to the model of devolution proposed for Scotland and Northern Ireland. In Wales, the executive and the legislature would operate as one (a body corporate) and the 1998 Act limited the Assembly to making of secondary legislation only when authorised by the UK Parliament. The powers of the Assembly were comparable to those previously held by the Secretary of State for Wales.

The constitutional arrangements set out in the 1998 Act came in for some criticism: “Many commentators pointed to the relatively low level of legislation passing through Cardiff, and to the very limited scope that the Assembly enjoyed for influencing the statutory framework for Wales”¹⁴.

There were also concerns that the formal lack of separation between the Executive and Assembly led to confusion over the role of each, with Assembly committees scrutinising the work of the Executive being serviced by civil servants employed by the UK Government. Internal measures were adopted to address the confusion, with the First Secretary being renamed as First Minister and the Assembly’s Executive Committee renamed as the Welsh Assembly Government.

Richard Commission and the Government of Wales Act 2006

In 2002 the First Minister, Rhodri Morgan, established a *Commission on the Powers and Electoral Arrangements of the National Assembly for Wales*. It was chaired by Lord Richard and the Commission began its work in September 2002¹⁵ and reported in March 2004. Its recommendations included: abolishing the body corporate status of the Assembly, creating an 80-member Assembly elected by Single Transferable Vote and a timetable for the transfer of primary legislative powers by 2011.

During the debate on the report of the Richard Commission, the NAfW passed a motion calling on the First Minister to:

Urge the Secretary of State for Wales to bring forward proposals to amend the Government of Wales Act 1998 for the following purposes:

(a) to effect a formal separation between the executive and legislative branches of the Assembly

¹⁴ House of Commons Library, *Government of Wales Bill 2005*, December 2005.

¹⁵ As above.

(b) to reform existing electoral arrangements in order to anomalies

(c) to enhance the legislative powers of the Assembly

A commitment to reform the National Assembly for Wales was included in the Queen's Speech in 2005¹⁶ and set out in the UK Government's White Paper, *Better Governance for Wales*. The subsequent Government of Wales Act 2006:

Represented a major constitutional change in Welsh devolution and devolved powers. The Act ensured that the Assembly as a separate legislature had the power to make laws, known as Measures. The process for the passage of Measures was complex requiring an order-in-council, called a Legislative Competence Order (LCO), to be initiated by the Assembly and then approved by the Assembly and both Houses of Parliament. The LCO inserted a matter on to a list of 20 fields which largely corresponded to the areas of policy devolved for executive and administrative purposes. The Assembly thus acquired the power to pass a Measure in one or part of one of the fields¹⁷.

The 2006 Act also provided a mechanism for the Assembly to gain full law-making powers in the 20 defined areas through a 'Yes' vote in a referendum. The coalition government of Labour and Plaid Cymru and their programme of *One Wales* sought to proceed to a successful outcome of a referendum for full law-making powers. This process included the establishment of an All Wales Convention, "mainly to assess the level of public support for giving the Assembly law-making powers and reporting to the government with recommendations relevant to the holding of a referendum"¹⁸.

It was not until March 2011 that the referendum was held when the people of Wales were asked: 'Do you want the Assembly now to be able to make laws on all matters in the 20 subject areas it has powers for?' 63.5% of the electorate voted 'Yes'.

Holtham Commission

The Independent Commission on Funding & Finance for Wales (Holtham Commission) was established in 2008 to review the Welsh Assembly's funding and to consider further devolution of fiscal powers¹⁹:

Two reports were produced by the Holtham Commission, the first covering the pros and cons of the existing formula-based approach and a final report on possible alternative funding mechanisms...The (second) Holtham report returned to the details of a needs-based formula examining the use of a

¹⁶ House of Commons Library, *Government of Wales Bill 2005*, December 2005.

¹⁷ Derek Birrell, *Comparing Devolved Governance* (2012).

¹⁸ As above.

¹⁹ House of Commons Library, *Holtham Commission*, November 2012.

complex methodology from allocations operating in England for health and schools²⁰.

The Commission criticised the Barnett Formula and recommended its replacement with a needs-based formula: “In the May 2010 Coalition Agreement, the Government commented on the Commission’s work and agreed to establish a “Calman-like” commission to consider Welsh Assembly funding, but stated any reform must wait until the public finances had stabilised”²¹.

Silk Commission

In October 2011 the Secretary of State for Wales established the Commission on Devolution in Wales, chaired by Sir Paul Silk. Its task was to review devolution of fiscal powers and increased accountability and the Assembly’s powers generally. The Commission produced two reports.

Its first report proposed that:

Wales should raise part of its budget by its own devolved tax raising powers. Business rates, stamp duty land tax, landfill tax, aggregates levy, and (in stages) Air Passenger Duty should be devolved. Wales should also share income tax, as in Scotland, with a rate set 10 pence in the pound below the English rate, the block grant reduced, and the Assembly able to make good the diminution. The Assembly should be able to vary all rates separately. These arrangements should be conditional on:

- (a) inter-governmental agreement on ‘fair funding’, addressing the complaint of Welsh disadvantage under present arrangements; and
- (b) a positive referendum in Wales²².

The Commission envisaged that income tax would thus be partially devolved by 2020. It also recommended that the Welsh Government should be given additional borrowing powers to finance capital investment, and to issue bonds.

Almost all recommendations were given effect in the Wales Act 2014:

A power was created to reduce income tax by 10 pence in the pound and introduce a Welsh rate of income tax to replace the 10 pence reduction. The 2014 Act allowed these powers over income tax to be devolved only if they were approved in a referendum, the calling of which was to be subject to UK Parliamentary approval and a two-thirds majority in the Assembly. **This has subsequently been removed by the 2016 Bill.**

²⁰ Comparing devolved governance, p.36

²¹ House of Commons Library, *Holtham Commission*, November 2012

²² Constitution Unit, *Devolution in the UK*, 2015

The 2014 Act also changed the term of the Assembly to five years, allowed candidates to stand in constituencies and regions at the same time, and removed the possibility of sitting both in the Assembly and in the House of Commons.²³

The second report of the Silk Commission dealt with legislative issues and proposed replacing the 2006 Act's 'conferred powers' with a reserved powers model:

1. The existing conferred powers model should be replaced by a reserved powers model. The two Governments should agree a process and timetable for developing and agreeing the new legislation setting out the powers reserved to Westminster.
2. There should be a general transfer of pre-devolution Minister of the Crown powers to Welsh Ministers, subject to any necessary exceptions. In the meantime, consideration of potential Minister of the Crown powers in National Assembly Bills should be done promptly by the UK Government and with a presumption of consent²⁴.

The Silk Commission's principles for devolution

Referring to what it perceived to be a 'piecemeal' approach to Welsh devolution up to that point, the Silk Commission established a set of principles which it hoped would inform future adjustments to the settlement. It could be argued that the principles have a broader application in the context of the wider devolution settlement within the UK:

Figure 1: Silk Commission principles for further devolution

Accountability – voters should be able to hold the responsible institutions to account for delivering policies in a transparent way.
Clarity – voters should understand where decisions are made and the settlement should be straightforward to operate.
Coherence – the National Assembly should have freedom and autonomy to use devolved policy and legislative levers within a coherent framework of powers.
Collaboration – the Welsh and UK Governments should work constructively together.
Efficiency – the arrangements should be affordable and provide value-for-money to the taxpayer, and should not place undue burdens on individuals or business.
Equity – fundamental standards and rights should be enjoyed by citizens across the United Kingdom.
Stability – the settlement should be well founded, sustainable and predictable in its operation, and meet the needs of current and future generations.
Subsidiarity and localism – decisions should be made as close as possible to the people they affect, consistent with addressing the relevant matter effectively, thus promoting empowerment.

Speaking in relation to the Wales Bill 2016, but also more broadly in terms of devolution, The Constitution Unit supported a principles-based approach to further

²³ Commons Library Wales Bill 2016-17

²⁴ Commission on Devolution in Wales (the Silk Commission), 2nd report, 'Empowerment and Responsibility: Legislative Powers to Strengthen Wales', March 2014.

changes. It argued that such a set of principles could help avoid disputes by providing the courts a basis from which to infer Parliament's intentions, in circumstances where they are on to adjudicate on legislative and executive powers. It went on to say that:

They (the principles) would also help to expose differences between the different devolution settlements on the UK, to be justified or removed, by broadly based political agreement. This more ambitious exercise will surely be needed sooner or later, looking at Wales, Scotland, and Northern Ireland all together. But it will have to wait for a later phase of constitutional maturity in the UK²⁵.

St. David's Day process

Following the commitment by the Prime Minister to establish the Smith Commission in the wake of the Referendum on Scottish independence, the Secretary of State and the political parties in Wales entered into negotiations on the future of Welsh devolution (in what came to be known as the St. David's Day process):

Its aim was to determine where political consensus lay in implementing the recommendations of Sir Paul Silk's Commission on Devolution in Wales second report (Silk II) on the powers of the Assembly. The process also looked at whether there was political consensus to implement for Wales any elements of the Smith Commission proposals for Scotland²⁶.

In February 2015 the Government published the Command Paper *Powers for a purpose: Towards a lasting devolution settlement for Wales*.

The St. David's Day Agreement had accepted the majority of recommendations of the second Silk Commission report. Of the 14 recommendations on which there was no consensus, many related to policing and criminal justice.

The Wales Bill (October 2015)

The Wales Bill 2015 was intended to deliver the commitments outlined in the St. David's Day Agreement. However, the Bill attracted criticism for its perceived flaws:

On 13 January 2016, in a debate described by Presiding Officer Dame Rosemary Butler as 'unprecedented' in the history of the National Assembly, elected representatives from across the political spectrum voiced their concerns. The First Minister Carwyn Jones stated that in important respects 'the draft Bill is not fit for purpose'²⁷.

Criticism centred around two key areas: the reserved powers and the necessity tests:

²⁵ The Constitution Unit: *The Wales Bill 2016: a marked improvement but there are fundamental questions yet to be resolved*, July 2016

²⁶ Draft Wales Bill, October 2015.

²⁷ The Constitution Unit, 'Challenges and Opportunities: The Draft Wales Bill 2015', February 2016

- **Reserved powers:** there was criticism that the reservations went further than the non-devolved subjects in the model it was aiming to replace.
- **Necessity tests:** these tests would have required the Welsh Government to prove that certain legislative provisions were 'necessary', in particular when making provisions to enforce Assembly legislation.

In February 2016 the Secretary of State announced a pause on the Bill to allow changes to be made. The changes announced by the Secretary of State were aimed at addressing some of the concerns expressed by House of Commons Welsh Affairs Committee, including the scaling back of the necessity tests²⁸.

The Wales Bill 2016

The Wales Bill 2016-17 was introduced in the House of Commons on 7 June 2016. In terms of constitutional arrangements, the Bill changes the status of the devolution settlement in Wales from a 'conferred powers' model to a 'reserved powers' model by amending the Government of Wales Act 2006.

It also amends the 2006 Act by declaring the permanence of the devolved institution, except in circumstances where the people of Wales vote to abolish it in a referendum. The 2006 Act is also amended to put the Sewel Convention on a statutory footing, again, in line with the Scotland Act 2016.

The revised Explanatory Note (13 September 2016) lists some of the other areas that will be devolved to the Assembly:

- Devolving greater responsibility to the Assembly to run its own affairs, including deciding its name;
- Devolving responsibility to the Assembly for ports policy, speed limits, bus registration, taxi regulation, local government elections, sewerage and energy (with some caveats in this last area);
- Devolving responsibility to Welsh Ministers for marine licensing and conservation and energy consents in the Welsh offshore region; and extending responsibility for building regulations to include excepted energy buildings;
- Devolving power over all elements of Assembly elections; and
- Devolving powers over the licensing of onshore oil and gas extraction.

Concerns raised by the House of Lords and the National Assembly for Wales

²⁸ For a further discussion on the 'necessity tests' see: <http://www.centreonconstitutionalchange.ac.uk/blog/take-2-wales-bill>

Two reports released in October 2016 highlighted concerns with some aspects of the Bill.

The House of Lords Select Committee on the Constitution commented that there was no evidence of a clear rationale underlying the scope of the powers devolved by the Bill, and that it would welcome an explanation from the Government as to the principles underpinning the settlement as set out in the Bill. It went on to say that constitutional legislation, such as the Wales Bill, should be as clear as possible. There was a lack of clarity, the Committee said, which increased the likelihood of “demarcation disputes regarding the extent of the Welsh Assembly’s powers, and thus risks not only future litigation but the need for further legislation to clarify the Welsh devolution settlement”²⁹.

The Constitutional and Legislative Affairs Committee of the NAW, while welcoming some aspects of the Bill, for example the move to a reserved powers model, was critical of the complexity of the Bill: “Our overall assessment of the Bill is that it is a complex and inaccessible piece of constitutional law that will not deliver the lasting, durable settlement that people in Wales had expected”³⁰. It suggested that the way the reserved-powers model is expressed is complex and in places impenetrable.

The complexity issue derives from the number of reserved areas contained in the Bill (around 200) and the legal tests that must be applied to determine whether the Assembly has exceeded its powers³¹.

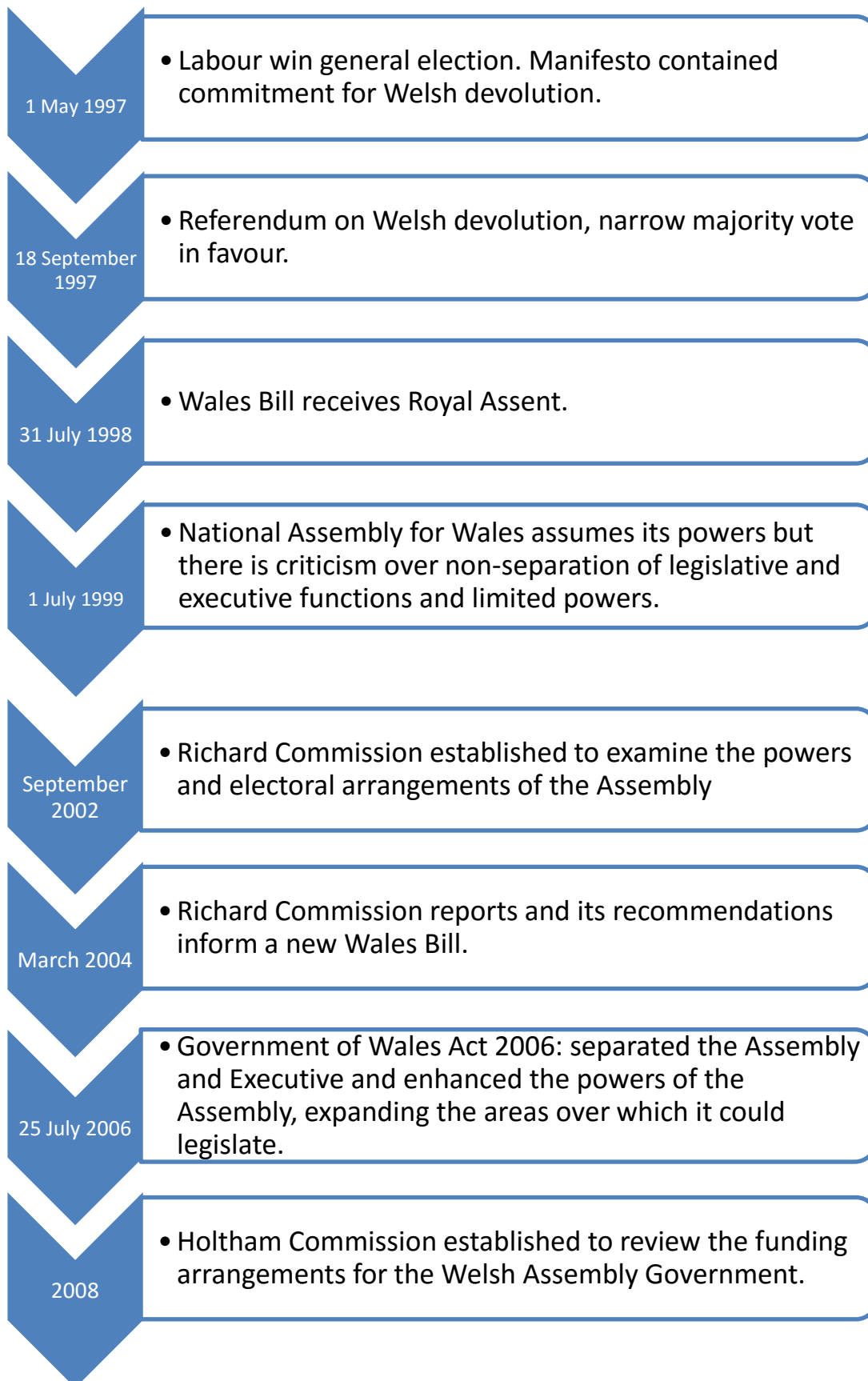
The Wales Bill 2016 is currently at Committee Stage in the House of Lords (as of 21 November).

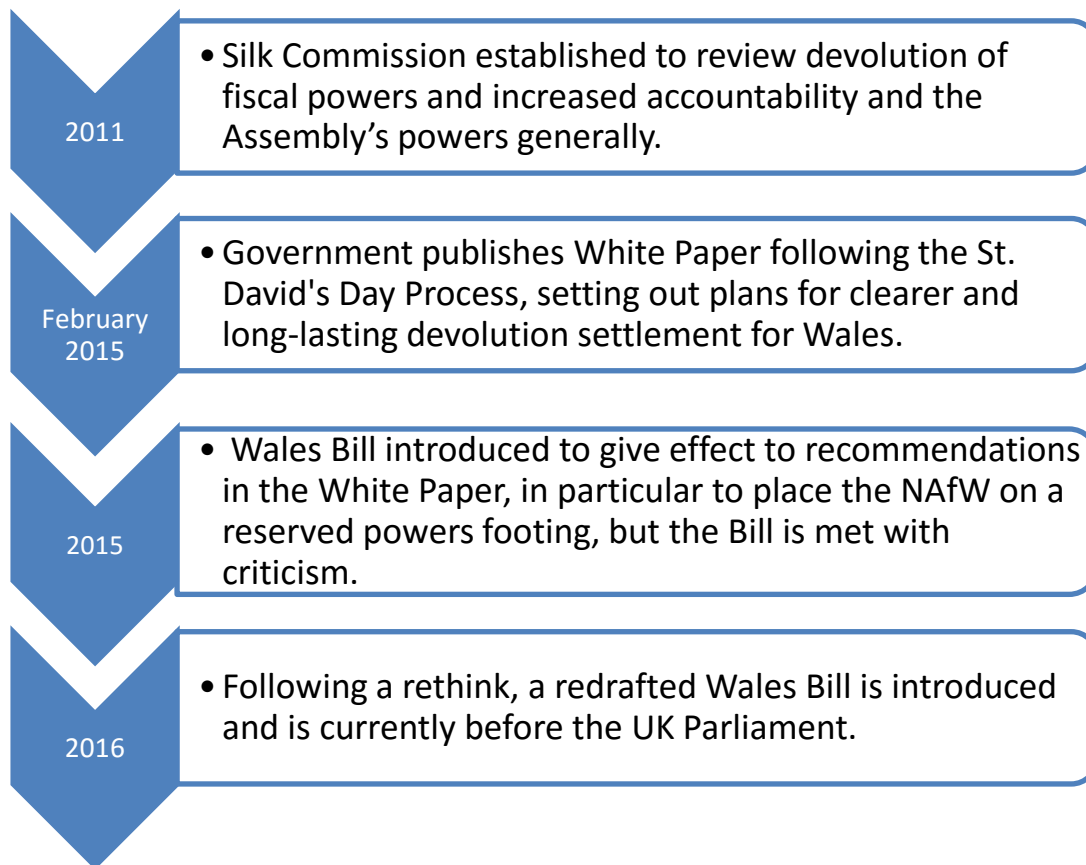
²⁹ House of Lords Select Committee on the Constitution, The Union and devolution, 10th Report of Session 2015-16, October 2016.

³⁰ National Assembly for Wales Constitutional and Legislative Affairs Committee, ‘Report on the UK Government’s Wales Bill’, October 2016.

³¹ For a further discussion on the complexity of the Bill see the National Assembly for Wales’ Legal and Research briefing: <http://www.assembly.wales/research%20documents/16-051/16-051-web-english.pdf>.

Timeline of devolution milestones – Wales





5 Conclusion

The late Secretary of State for Wales, Ron Davies, coined the phrase that 'Devolution is a process, not an event', and the various commissions, agreements and constitutional legislation discussed in this paper are evidence of this.

The overall trend has been for a growth in powers and activities of the devolved institutions, particularly in relation to the demands for new financial powers³². What has been less clear is a coherent strategy in relation to devolving powers and this has been a concern raised, for example, by the House of Lords Constitution Committee. For example, it cited evidence it had heard that "devolution policy was often driven as a response to particular events—such as the election of a minority Scottish National Party (SNP) government in 2007 or the Scottish independence referendum in 2014—without any attempt to develop a longer-term strategy"³³.

It remains to be seen to what extent the Scotland Act 2016 and Wales Bill 2016 will limit the desire or requirement for further constitutional change.

³² Birrell p.245

³³ House of Lords The Union and Devolution