Mr Ruairi Hipkin—Written evidence (UDE0002)

Introduction

1. This written evidence will touch on certain aspects of the Select Committee on the Constitution’s current inquiry into “The Union and Devolution”. This evidence will not deal with all questions posed in the original call for evidence. Instead, it will deal primarily with the current devolution settlement (questions 1-4) and what changes there could be thereto (questions 8 and 9). There are also four appendices. The first three reproduce examples of devolution in Canada and Australia, whilst the fourth appendix contains a broad outline of a single “Devolution Act” (see question 9).

2. It is appropriate to say some words about question 5. In my respectful submission, question 5 is nearly unanswerable because there is very little way of entrenching a provision in statute. This was so held in *Thoburn v Sunderland City Council*[^1] where Laws LJ made the point that Parliament cannot bind its successors[^2].

3. Devolution is not a new phenomenon in the modern world – indeed; the United Kingdom was one of the last countries to adopt it, having bestowed it upon its former territories of Australia and Canada. Indeed, as I will show in this evidence, having taught much to the Australians and the Canadians about how to establish a union with devolution settlements, it may be worthwhile the United Kingdom learning from those two countries how devolution has evolved and refined itself.

4. This Written Evidence will traverse much and varied ground – indeed, in the first question, we are required to traverse a complicated area of international law – the definition of the “nation state”.

Part I – The Union

Question 1 – What is a nation state?

5. Cicero defined a state as “a body political, or a society […], united together for the purpose of promoting their mutual safety or advantage by their combined strength”. Unfortunately, this definition no longer applies in its purest form, but segments of it can still apply. For example, that a state is a “society, united together”. The United Kingdom is a society, united together by the fact that we all reside in the landmass that is “Britain”.

6. However, legal thought has evolved since then, and Craven tells us that the main definition of a “state” comes from the Montevideo Convention on the Rights and Duties of States 1933[^3]. That convention restated a pre-existing customary definition of statehood, known as the Declarative theory of statehood[^4]. The Convention itself has also assumed a customary status, given that the Badinter Arbitration Committee, in its ruling as to the status of Croatia, Macedonia, and Slovenia after their secession from the Socialist Federal Republic of Yugoslavia, relied on the Montevideo definition. As the Badinter Commission was an organ of the EU, this must surely mean that any opinion on statehood as expressed by the Commission becomes official EU policy on statehood.

[^1]: [2003] Q.B. 151
[^2]: See paragraph 51 of *Thoburn*
[^4]: H Lauterpacht, *Recognition in International Law*, (Cambridge University Press 2012) 419
7. The definition set out in Montevideo, and now encased in customary international law, is as follows:
   - A permanent population
   - A defined territory
   - Government
   - Capacity to enter into relations with other states

8. It is quite clear that the United Kingdom constitutes a “state” in international law. The United Kingdom has a population. It is quite clear that the “permanent population” requirement does not require that the population be static. If that were the case, then migration in all its forms would lead to ordinary migration rendering a state non-existent. This, for obvious reasons, cannot be, otherwise this country would never have attained statehood.

9. The United Kingdom has defined territory. Leaving aside the dispute over the Falklands with Argentina, the United Kingdom has a defined territory in the British Isles.

10. The United Kingdom has a Government. We have regular elections, which, because of the Fixed Term Parliaments Act 2011, occur every five years, and our government exists through the Constitutional norm of the Queen-in-Parliament.

11. Finally, the United Kingdom clearly has the power to enter into relationships with other states. This is mostly to do with the power of signing treaties. This is evident because we have Treaties with other countries (whereby we exchange ambassadors), and we are members of several international organisations. We have acceded to those organisations by signing treaties.

Question 2 – What are the key principles underlying the Union? Are there principles that are unique to the UK’s Union?

12. The key principles of the Union are:
   - Union under a central government
   - Union under the Crown
   - The ability for recognised regional majorities (that is, Scots in Scotland, or the Welsh in Wales) to decide on matters that would affect them exclusively
   - With overall supervision for the devolution, and powers and interests common to all constituent nations in the United Kingdom, remaining in Westminster

13. This is not unique to the United Kingdom. Indeed, in the Preamble to the Constitution Act 1867 (previously known as the British North America Act), it is expressly noted that “Dominion of Canada [would have a] Constitution similar in principle to that of the United Kingdom”. This must mean that the notion of union under the Crown, with powers delegated to regions or other constituent elements, was a “principle of the United Kingdom’s constitution”, and is a key principle underlying the Union today.

Question 3 – On what principles are the UK’s devolution settlements based, or on what principles should they be based? Have principles emerged through the process of devolving power, or as power has been exercised by the devolved nations and regions?

14. The UK’s devolution settlements are based on the division of powers between Westminster and the various devolved administrations. It is also quite reasonable to believe that devolution occurs to allow those who are “in situ” to govern the affairs of their area of the United Kingdom. That is, as the Northern Irish are more aware of their
societal, cultural and historical background than Westminster would be, it is sensible to
devolve powers relating to – for example – abortion – to the Northern Irish
administration. Abortion is a good example of this, as Northern Ireland is still deeply
divided, in some social aspects, on religious grounds. Another example is the devolution
of justice matters to Scotland. Scots law has evolved differently to that of the remainder
of the United Kingdom, and Scots judges and lawyers are better versed in their own legal
system, and its proper administration, than the Westminster government. The general
point, in these two examples, appears to be that Westminster devolves powers to the
devolved administrations where they are better placed to deal with the specific issues
raised by those powers.

Question 4 – Are there any applicable examples from other states with multilevel
governance?
15. As I noted in the introduction, the United Kingdom is one of the latter comers to
devolution. It is useful to look at the constitutional arrangements in Canada and
Australia. Whilst it is true that the United States is a country with much devolution, its
constitution is designed differently.
16. Canada’s constitution explicitly sets out what the Federal Government may do⁵, and
what is devolved to the Provinces and territories⁶. These two separate lists are very
strict in determining what each constituent part of the Federation can do.
17. With the exception of subsections 26-29 (dealing with marriage and divorce⁷, the
criminal law⁸, and the management of prisons⁹), it appears that Section 91 provides a
very easy comparison with the current devolution settlement. This is because much of
the matters listed in section 91 are also reserved matters in the United Kingdom.
Exceptions are drawn in respect of criminal law, marriage, and divorce and prison
management, because in this country, the reverse has occurred, in that the main aspects
of responsibility for those areas has been devolved in some way (the specific
arrangements vary between the devolved administrations). Section 91 is set out in
Appendix 1.
18. Section 92 of the Canadian Constitution Act, however, differs from the devolution
settlement in the United Kingdom, because there are fewer powers devolved to the
Canadian Provinces and Territories, than there are devolved to the various
administrations in the United Kingdom. Section 92 finds comparison in Schedule 7,
paragraphs 1-20 of the Government of Wales Act 2006, which specially sets out what
the Welsh administration can do, just like Section 92 of the Canadian Act. However,
there are fewer powers devolved to the Welsh administration than there are to the
Canadian provinces. Section 92 is set out at appendix 2.
19. Section 51 of the Australian Constitution, conversely, is similar to the arrangements in
Scotland. Section 51 lists powers that are reserved to the Federal Parliament in
Canberra. The similarity arises because Schedule 5 of the Scotland Act 1998 lists powers
that are reserved to the Westminster Parliament. Indeed, Schedule 5 of the Act nearly
mirrors the provisions of Section 51 of the Constitution. For example, Schedule 5 of the

⁵ Section 91 Constitution Act 1867
⁶ Section 92 Constitution Act 1867
⁷ Section 91(26)
⁸ Section 91(27)
⁹ Section 91(28)
Act provides that the powers relating to “international relations, including relations with territories outside the United Kingdom” are reserved to Westminster. Likewise, the Australian Constitution expressly reserves the “external affairs power” to the Federal Parliament, and Australian jurisprudence has interpreted this power to refer to relations with “countries outside Australia [and] other international persons”, or where Australia has signed international treaties that require implementation in Australian domestic law. Section 51 is set out in Appendix 3.

Part II – How could the Devolution settlement be improved?

Question 8 – What other practical steps could be taken to stabilise or reinforce the Union?

20. Throughout this written submission, I have cited various parts of the Australian and Canadian Constitutions that expressly list the powers reserved to the Federal Government, and (in the case of Canada) the powers devolved to the Provincial and Territorial legislatures. The fact that all the powers are set out in one central document is instructive. This is because in all circumstances, the devolved powers are set out in one “central” document. This would be an improvement in the setup in the United Kingdom, where all the various devolution settlements are different in nature, and spread across many Acts of Parliament. Such a proposed Statute is contained at Appendix 4. It does not violate the Thoburn principles set out in the introduction, because it is not entrenched and can be amended.

Question 9 – Is the UK’s current constitutional and legal structure able to provide a stable foundation for the devolution settlement? What changes might be necessary?

21. After the comprehensive settlements established in the various Act devolving powers, there are still disputes over what the powers actually are. For example, in AXA General Insurance Company v HM Advocate, the appellant insurance company challenged an Act of the Scottish Parliament that would have imposed liability on insurers for pleural plaques. The Supreme Court was required to review, in some detail, the powers of the Scottish Parliament, considering the reserved powers set out in Schedule 5 of the Scotland Act.

22. This means that there should be reform as to how one determines what powers are devolved or reserved. An outline for the proposed single “Devolution Act” in appendix 4 can relieve part of this.

23. Another potential reform is the following. There is a pre-existing power under the Government of Wales Act 2006, the Scotland Act 1998, and the Northern Ireland Act 1998 to refer questions relating to the validity of legislation the Supreme Court. However, Devolved legislation can also be challenged in the ordinary courts, which leads to uncertainty in the validity of legislation as the related challenge works its way through the judicial system, and even then, the Supreme Court is not required to grant leave to take the resultant appeal. Indeed, there are more challenges in ordinary litigation than there are in reference questions under the various Acts. In order to avoid any such uncertainty, it may be worthwhile vesting the Supreme Court with original exclusive

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10 Scotland Act 1998, Schedule 5, section 7(1)
11 Section 51(xxix) Constitution of Australia
12 Koowarta v Bjelke-Peterson (1982) 153 CLR 168
13 New South Wales v Commonwealth (1975) 135 CLR 337 (“The Sea and Submerged Lands Case”)
14 [2012] 1 AC 868
jurisdiction in matters relating to devolution. This would lead to a final determination, quite early in the life of the devolved legislation that is susceptible to challenge, as to its validity.

24. More generally, in respect of the actions of the Devolved administrations, it may be worthwhile enlarging the Supreme Court’s reference jurisdiction to take any reference question as to the compatibility of actions of the devolved administrations with obligations set out in national or international law. For example, during the Scottish independence referendum, there were many questions relating to the role of the Monarchy, the currency, and membership of the European Union after independence. If the Supreme Court had a general reference jurisdiction in relation to devolution, either the Central government at Westminster, or the devolved government in Scotland, could have put the following reference questions to the Supreme Court:

a) Could Scotland retain the monarchy after independence? If not, what, if any, legal requirements must be fulfilled for Scotland to be a monarchy?

b) Could Scotland retain the Pound Sterling after independence? If not, what are the legal requirements for this to be possible?

c) What would an independent Scotland’s status be in international law? Would it be able to become a member of the European Union or any other international organisation?

25. The reference jurisdiction envisaged above is not new. The Supreme Court of Canada, pursuant to Section 53 of the Supreme Court Act, already has a wide jurisdiction to consider any matter relating to the interpretation of the constitution, or the validity of federal or provincial legislation

26. In conclusion, if the options and proposals for reform set out above are adopted, then there are two ways of resolving disputes relating to devolution. First, anyone who wishes to challenge the validity of legislation enacted by the devolved legislatures must sue in the Supreme Court, thereby reducing the ability for doubt and uncertainty whilst the challenge works its way through the intermediate court system. Secondly, the Government will have a wider and broader power to refer questions relating to devolution, or actions of the devolved governments, to the Supreme Court. In both cases, the Supreme Court, as arbiter of legal questions that affect the entirety of the UK, can deal quickly and efficiently with such pressing issues.

8 September 2015
Appendix 1 – Section 91 of the Constitution Act 1867 (Canada)

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say:

[...] (1A) The Public Debt and Property;
(2) The Regulation of Trade and Commerce;
(2A) Unemployment insurance;
(3) The raising of Money by any Mode or System of Taxation;
(4) The borrowing of Money on the Public Credit;
(5) Postal Service;
(6) The Census and Statistics;
(7) Militia, Military and Naval Service, and Defence;
(8) The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada;
(9) Beacons, Buoys, Lighthouses, and Sable Island;
(10) Navigation and Shipping;
(11) Quarantine and the Establishment and Maintenance of Marine Hospitals;
(12) Sea Coast and Inland Fisheries;
(13) Ferries between a Province and any British or Foreign Country or between Two Provinces;
(14) Currency and Coinage;
(15) Banking, Incorporation of Banks, and the Issue of Paper Money;
(16) Savings Banks;
(17) Weights and Measures;
(18) Bills of Exchange and Promissory Notes;
(19) Interest;
(20) Legal Tender;
(21) Bankruptcy and Insolvency;
(22) Patents of Invention and Discovery;
(23) Copyrights;
(24) Indians, and Lands reserved for the Indians;
(25) Naturalization and Aliens;
(26) Marriage and Divorce;
(27) The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters;
(28) The Establishment, Maintenance, and Management of Penitentiaries;
(29) Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces;

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature.
comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces

Appendix 2 – Section 92 of the Constitution Act (1867)

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

(1) Repealed;
(2) Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes;
(3) The borrowing of Money on the sole Credit of the Province;
(4) The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers;
(5) The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon;
(6) The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province;
(7) The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals;
(8) Municipal Institutions in the Province;
(9) Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes;
(10) Local Works and Undertakings other than such as are of the following Classes:
   o (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
   o (b) Lines of Steam Ships between the Province and any British or Foreign Country:
   o (c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.
(11) The Incorporation of Companies with Provincial Objects;
(12) The Solemnization of Marriage in the Province;
(13) Property and Civil Rights in the Province;
(14) The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts;
(15) The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section;
(16) Generally all Matters of a merely local or private Nature in the Province;
Appendix 3 – Section 51 of the Constitution of Australia

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(i) Trade and commerce with other countries, and among the States
(ii) Taxation; but so as not to discriminate between States or parts of States;
(iii) Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth;
(iv) Borrowing money on the public credit of the Commonwealth;
(v) Postal, telegraphic, telephonic, and other like services;
(vi) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth;
(vii) Lighthouses, lightships, beacons and buoys;
(viii) Astronomical and meteorological observations;
(ix) Quarantine;
(x) Fisheries in Australian waters beyond territorial limits;
(xi) Census and statistics;
(xii) Currency, coinage, and legal tender;
(xiii) banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money;
(xiv) Insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned;
(xv) Weights and measures;
(xvi) Bills of exchange and promissory notes;
(xvii) Bankruptcy and insolvency;
(xviii) Copyrights, patents of inventions and designs, and trademarks;
(xix) Naturalization and aliens;
(xx) Foreign corporations and trading or financial corporations formed within the limits of the Commonwealth;
(xxi) Marriage;
(xxii) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants;
(xxiii) Invalid and old-age pensions;
(xxiiiA) The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances;
(xxiv) The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States;
(xxv) The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States;
(xxvi) The people of any race for whom it is deemed necessary to make special laws;
(xxvii) Immigration and emigration;
(xxviii) The influx of criminals;
(xxix) External affairs;
(xxx) The relations of the Commonwealth with the islands of the Pacific;
(xxxi) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;
(xxxii) The control of railways with respect to transport for the naval and military purposes of the Commonwealth;
(xxxiii) The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State;
(xxxiv) Railway construction and extension in any State with the consent of that State;
(xxxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State;
(xxxvi) Matters in respect of which this Constitution makes provision until the Parliament otherwise provides;
(xxxvii) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law;
(xxxviii) The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia;
(xxxix) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

Appendix 4 – Outline for a proposed Devolution Act
Devolution Act 2015
Part I – Devolution and powers of the devolved legislatures
Chapter I Devolution
1. There shall be a Scottish Parliament, a Welsh Assembly, and a Northern Ireland Assembly, hereafter referred to as “The devolved legislatures”. The details of the devolved legislatures and the resultant devolved administrations shall be as provided in the Scotland Act 1998 (as amended), the Government of Wales Act 1998 (as amended) and the Northern Ireland Act (as amended)
2. Each devolved legislature shall only exercise the powers that have been expressly devolved to it by this Act, or that have not been expressly reserved or excepted by this same Act. Those powers shall be listed in sections 3, 4 and 5.
Chapter II - Powers of the devolved legislatures
3. In respect of the Scottish Parliament, the Scottish Parliament shall have power to legislate on all matters that are not listed as “generally reserved” matters as detailed below, or “specifically reserved” matters, as listed in Schedule 1.
[Insert Schedule 5, Parts 1 of the Scotland Act 1998 as subsections (1) to (10)]
[Insert Schedule 5, Part 2, of the Scotland Act, as Schedule 1]
4. In respect of the Welsh Assembly, the Welsh Assembly shall have power to legislate on all matters that are specifically devolved thereto, as listed in subsections (1) to (20) below. Matters not listed below shall be considered reserved or excepted to the United Kingdom Parliament, and may only be devolved to the Welsh Assembly by specific enactment of the United Kingdom Parliament.
[Insert Schedule 7, Part 1, paragraphs 1-20 of the Government of Wales Act 2006]
5. In respect of the Northern Ireland Assembly, the Northern Ireland Assembly shall have power to legislate on all matters that are not reserved or accepted, such reserved or
excepted matters being detailed in subsections (1) to (64) below. Such excepted or reserved matters may only be devolved by specific enactment of the United Kingdom Parliament. [insert Schedules 2 and 3 of the Northern Ireland Act as subsections (1) to (64)]

**Part II – Disputes relating to powers of devolved legislatures**

**Chapter I – Jurisdiction of the Supreme Court**

6. The Supreme Court shall have jurisdiction as set out in subsections 1 and 2, namely:
   (1) To consider and hear any Reference Questions, submitted by the Devolved administrations’ law officers (defined as the Counsel General for Wales, the Attorney-General for Northern Ireland, or the Lord Advocate), or the Attorney-General for England and Wales as to the powers and actions of the devolved legislatures or administrations. The Supreme Court shall also have jurisdiction in respect of any other question that, in the opinion of the referrer, touches on the devolved legislature or administration. The Supreme Court shall have original compulsory jurisdiction in such cases. “Compulsory” jurisdiction shall mean that the Court is required to take such cases as envisaged in this subsection.
   (2) Any suit bought as a judicial review, seeking to challenge any act of the Devolved legislatures for want of compatibility or competence in terms of sections 3-5 above. In such suits, the Supreme Court shall have original exclusive jurisdiction to consider and hear such suits. Notwithstanding the preceding, the provisions of Section 40(6) (the requirements for leave), and any rules made thereunder, shall apply to such suits.

7. The President of the Supreme Court may make such rules as he or she thinks fit in respect of proceedings envisaged under subsections (1) and (2) above

**Part III – Repeals and Transitional Provisions**

8. Schedule 5 of the Scotland Act 1998 is repealed in its entirety
9. Schedule 7 of the Government of Wales Act 2006 is repealed in its entirety
10. Schedules 2 and 3 of the Northern Ireland Act 1998 are repealed in their entirety
11. The provisions of Part II shall not have any effect on any proceedings instituted before the commencement of this Act.

N.B This proposal is not meant to be a word-for-word representation of any “Devolution Act”, but is meant to provide a guideline as to what potential legislation could look like.