Introduction
1. This written submission addresses the following question: how do we entrench the concept of permanence with regard to the devolved Scottish institutions? In anticipation of my invited oral evidence at the Committee on 9 February 2015, I would like to provide some background information and analysis for PCRC members.

2. Clause 1 of the proposed Scotland bill is widely seen to fall short of the Smith Commission’s recommendations to make the Scottish Parliament permanent in UK legislation. Instead, the commitment is to “recognise” a Scottish Parliament as a permanent part of the UK’s constitutional arrangements, without containing sufficient provisions to actually render the parliament permanent, for instance by ensuring that any Act cannot be abolished, or amended without the mutual consent of both parties.¹

3. To that end, I will focus my written evidence on constitutional frameworks that could guarantee the ‘permanence’ of the devolved institutions, by comparatively drawing on a number of other constitutional models that have been employed by unitary states to entrench the autonomy of a smaller unit.

4. The chief part of the paper will focus on the “federacy” model, which has been employed by a number of other EU states (Denmark, Finland) to entrench the permanence of autonomous territories (Åland, the Faroes, Greenland).

5. I will also consider a second model of ‘freely associated statehood’ as an alternative way to entrench the autonomy of a substate territory. This model is often used with respect to former colonies (such as the West Indies Associated States in relation to the UK before they gained independence) and currently the Cook Islands in relationship to New Zealand. I have included this associate statehood model because the Secretary State of Scotland Alistair Carmichael has recently stated that he is open to considering entrenching the permanence of the Scottish Parliament through an Autonomy Act that contains a Charter of Autonomy for Scotland. Secretary of State Carmichael drew on the example of the Autonomy Acts employed to regulate the UK’s relationship with its former colonies.²

6. Interestingly, both of these models have been adopted with respect to islands. My previous research has shown that islands have forged some of the most innovative constitutional arrangements with larger states, and I remain of the opinion that other devolved arrangements have much to learn from them.³

¹ For a very astute and convincing account of the constitutional shortcomings of the current wording of the draft clauses on the issue of ‘permanence’ of the Scottish devolved institutions, please see Mark Elliott’s written submission to the Political and Constitutional Reform Committee.
² http://www.scotsman.com/news/politics/top-stories/colonial-deal-may-safeguard-scottish-parliament-1-3624743
Draft Scotland Clauses

7. Clause 1 of the proposed Scotland bill contains the statement that “A Scottish Parliament is recognised as a permanent part of the United Kingdom’s constitutional arrangements.” Other written evidence to this Inquiry by Dr Mark Elliott has rightfully questioned whether this declaration of permanence is actually sufficient to endow actual permanence on these institutions. The clauses do not, for instance, contain legally enforceable provisions to protect the permanence of Scotland’s devolved institutions, such as stating that they ‘cannot be abolished’ or they can only be abolished if ‘certain conditions are satisfied’.

8. Furthermore, there are questions as to whether such conditions would be legally enforceable. Lord Smith himself admitted that his proposal for the Scottish Parliament to be made permanent may contravene the constitutional principle than no government can bind any future government.

Constitutional Options

9. So how might the Scottish Parliament be made permanent when very little is ‘permanent’ in the UK constitution? It is useful at this point to remind ourselves that, to date, the primary constitutional models that have been considered by the Scottish people and the political parties of Scotland and the UK have been:

(a) independence (the full ‘exit’ of Scotland from the UK)\(^4\), which would guarantee permanence and sovereignty of Scottish institutions;

(b) federation (the sharing of sovereignty between the central-state level and substate regions across the whole of the UK), which would guarantee the permanence of all of the UK’s sub-state regions and shared sovereignty; and

(c) an enhanced form of (asymmetrical) devolution to particular sub-state regions in the UK – i.e. Scotland, Wales and Northern Ireland – whereby these devolved institutions could technically be abolished by the UK Parliament.

10. However, these three options are not the only possibilities for securing an ‘enduring settlement’ for Scotland’s relationship with the UK. This paper will focus on two other federal-type models that have been largely overlooked in UK politics, which may constitute alternative constitutional pathways for realising the ‘vow’ made for extensive new powers for Scotland: federacies and associate statehood.

Contrasts with devolution

11. These models were chosen because federacies and associate states are similar to situations of asymmetrical devolution, in that they depict a relationship between a smaller territorial unit and a larger state, “in which the smaller unit shared the benefits of association with the larger polity but retains internal autonomy and self-government”\(^5\). Thus, in these arrangements, there are exclusive powers of the substate

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\(^4\) Though the SNP-led Scottish Government also emphasised the continuation of several ‘unions’ with the rest of the UK, including a currency union and a social union.

territory, exclusive powers of the state, and shared powers, some of which may eventually be transferred to the federacy/associate state by mutual agreement.

12. However, federacies and associate statehood models differ from devolved arrangements, in that the ability to dissolve the relationship between the units is not only restricted to the larger state (in the sense that the UK Parliament has the ability to dissolve the Scottish Parliament), but also that the substate unit may also dissolve the relationship, either by mutual consent – in the case of federacies – or unilaterally – as in the case of associate states. This feature is what entrenches the permanence of the substate autonomy.

**Contrast with federalism**

13. Furthermore, federacies and associate states share many features with federal systems, in that the substate unit and a larger state are linked in a federal relationship in which the substate unit has constitutionally guaranteed autonomy, but also has certain rights of participation in the governance of the state. Similarly, the division of powers between substate units and larger states resembles the federal model in that competences over defence, currency and foreign policy may be reserved to the centre.

14. However, the main difference between a federal model and a federacy/associate state is that each of them offers a way to make the autonomous institutions of a substate territory in an otherwise unitary state permanent, but without the necessity of dividing the rest of the state into separate substate political units, and therefore ‘federalizing’ the rest of the country.

15. In addition, these models were chosen for analysis as they satisfy the Council of Europe’s recommendation of the need to entrench the permanence of autonomous substate entities within larger states:

“In order to provide the right conditions for its permanence and stability, every autonomous entity must be integrated into a legal framework. A local autonomy status can be established by a constitution, a law, a regional statute or an international treaty.”

**Federacies**

16. How might we define a federacy? One of the leading theorists of federalism, Daniel Elazar states that a federacy exists ‘whereby a larger power and a smaller polity are linked asymmetrically in a federal relationship in which the latter has substantial autonomy and in return has a minimal role in the governance of the larger power…the relationship between them can be dissolved only by mutual agreement’.

17. In order to underscore the citizenship rights of residents of the substate unit within the larger states, this paper adopts Stepan et al’s revised definition:

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‘a federacy is a political-administrative unit in an independent unitary state with exclusive power in certain areas, including some legislative power, constitutionally or quasi-constitutionally embedded, that cannot be changed unilaterally and whose inhabitants have full citizenship rights in the otherwise unitary state.’

18. In a federacy situation, similar to a devolved arrangement, substate units often enjoy substantial legislative autonomy over health, education, housing, economic development and so on, while the central-state government retains power over foreign affairs, defence, and currency. However, the act of autonomy made to secure the federacy arrangement “could not be unilaterally altered without exceptional majorities on both sides.” To that end, according to Stepan et al:

“federacy arrangements would be much more binding on the central government of the unitary state than devolution or decentralisation. The latter two may be unilaterally reversed by parliamentary majorities, whereas a constitutionally embedded federacy can only be changed by mutual exceptional majorities.”

19. As examples, both Finland and Denmark have passed Autonomy Acts to constitutionally enshrine the self-governing powers of some of their sub-state units, including the Åland Islands, the Faroe Islands and Greenland. In each case, the central-state is unable to dissolve or alter the constitutional autonomy of the sub-state units without the agreement of the other party. Åland, the Faroes and Greenland can veto any competence transfer away from them and thus escape the constitutional uncertainty of their powers being revoked, as so happens in the case of devolved states which endure a hierarchical relationship with the centre, which is Scotland’s current status in the UK state. I will, for the sake of brevity, now consider how autonomy is entrenched in the case of the Åland Islands. It should be noted that Greenland and the Faroes have very similar relations with Denmark.

The Åland Islands in Finland
20. The Aland Islands are a Swedish-speaking archipelago of 6500 islands in the Baltic Sea, which enjoy a federacy status within the otherwise unitary Finland. The Aland Islands were granted this status in 1920, after the League of Nations intervened in a conflict between Sweden and Finland over which country the islands rightfully ‘belonged’ to. After extensive (peaceful) negotiations, it was decided that Aland was to remain part of Finland but that it should be granted extensive autonomy.

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21. The autonomy of the Åland Islands is enshrined in the Finnish Constitution (Article 120) in accordance with the Act of the Autonomy of Åland, which has been passed by the Finnish parliament and may only be amended or revised by a joint decision of the Finnish parliament and the parliament of the Åland Islands. This means that each of the two parties can veto any changes it does not accept. Furthermore, it means that the autonomy arrangements are dynamic in the sense that they are always open to negotiation and reform. For instance, the Autonomy Act has been revised twice. It was originally passed in 1920, amended in 1951, and amended again in 1991. There is currently a third ongoing revision.

22. The relevant section of the Constitution of Finland relating to the federacy arrangement is ‘Section 120 – Special Status of the Åland Islands’:

The Åland Islands have self-government in accordance with what is specifically stipulated in the Act on the Autonomy of the Åland Islands.

23. The relevant sections of the Act of the Autonomy of Åland (1991 – this being the most recently revised version) guaranteeing the autonomy are as follows:

Section 1
_Autonomy of Åland_
The Åland Islands are autonomous, as hereby enacted.

Section 69
_Amendment of the Autonomy Act and the enactment of an Act of Åland by qualified majority_
This Act may be amended or repealed, or exceptions to it may be made, only by consistent decisions of Parliament of Finland and the Åland Parliament. In the Parliament of Finland the decision shall be made as provided for the amendment and repeal of the Constitution and in the Åland Parliament by at least a two thirds’ majority of votes cast. (28 January 2000/75)

24. Åland’s relationship with Finland therefore means that its competences are constitutionally guaranteed. As a federacy, Åland has entrenched policy autonomy and a direct say in competence (re)allocation, which is guaranteed by the Autonomy Act. In this way, Åland very much resembles confederations or federalised systems, in that it can defend its decision-making capacity in the terms set out by the autonomy arrangement, and moreover, it can veto international treaties undertaken by Finland if such treaties directly threaten Åland’s competences.

25. Intergovernmental relations are largely based on asymmetrical bilateral structures. Åland has one seat in the Parliament of Finland, Finland is represented on Åland by a Governor, and there is a common dispute resolution mechanism (Åland Delegation).

26. Despite the lack of extensive shared institutions between Finland and Åland, scholars have argued that relations between Helsinki and have been largely harmonious, and indeed that a degree of consensus and reciprocity were built into the Autonomy Act. This is evident in the joint agreement of the Governor and the balanced composition of the Åland Delegation, the dispute resolution body.
Freely Associated Statehood

27. Let us now briefly consider a second model of federal-type autonomy, which has been put forward by some politicians as a potential solution to the ‘permanence’ issue of the Scottish Parliament: that of freely associated statehood. This was the status granted to several islands in the West Indies by the UK Government, whose status changed from colonies to freely associated states through the Associated Statehood Act 1967. Other prominent, and enduring, examples of freely associated statehood are the relationship of the Cook Islands to New Zealand, and the relationship of several small islands, including Palau and the Marshall Islands, to the USA.

28. Associate states enjoy a similar relationship to federacies, in that the smaller unit enjoys a high degree of internal self-determination and the autonomy of the smaller unit is constitutionally guaranteed in a federal-like relationship. However, where they differ is that in the associate statehood model, the relationship “can be dissolved be either of the units acting alone on prearranged terms.”

29. A definition of freely associated statehood has been provided by Michael Reisman, who states that

“a relationship of association in contemporary international law is characterized by recognition of the significant subordination of and delegation of competence by one of the parties (the associate) to the other (the principal) but maintenance of the continuing international status of statehood of each component.”

30. In particular, the “most striking constitutional safeguard” of the freely associated state, unlike the federacy model, is the unilateral withdrawal from its partnership with the larger state. Thus a territory is freely associated’ if it can freely withdraw from relations with the larger state.

31. In the associate statehood model, the substate unit has substantial autonomy over a range of competences (indeed, often more extensive than those of the federacy), whilst the larger power often assumes control for foreign policy and defence. Furthermore, the smaller unit frequently enjoys preferential rights within the larger structure, such as citizenship of the larger unit or preferential market access.

West Indies Associated States

32. The UK Government passed the Associated Statehood Act in 1967 to grant full internal self-government to its former colonies of Anguilla, Antigua, Grenada, St Kitts and Nevis, St Lucia and St Vincent and the Grenadines, whilst maintaining responsibility for defence and some aspects of foreign affairs on behalf of these units.

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33. Under the Associated Statehood Act, the internal self-government of the islands was secured through individual constitutions. The British monarch remained Head of State, while a Governor – who was often a local inhabitant of the island - was appointed in each associated state to represent the UK Government.

34. In most of the cases of the West Indies Associated States, each island over the subsequent decades moved to the status of sovereign independence – Grenada was the first to withdraw from its associated statehood status with the UK in 1974, and others followed. The only islands not to seek independence are Anguilla within the former St Kitts and Nevis, which remains a British Overseas Territory.

35. As the ‘associate’ has the right to unilaterally withdraw from its relationship with the larger state, “the stability of these arrangements is less secure” than federacies.18

**The Cook Islands and New Zealand**

36. The Cook Islands entered into a relationship of free association with New Zealand in 1965, after several decades of being a ‘dependent territory’ of NZ. The Cook Islands passed an act of self-determination whereby it became self-governing in free association with New Zealand. The Cook Islands adopted its own constitution, and the relations between New Zealand and the Cook Islands were formalized in an Exchange of Letters between the Prime Minister of New Zealand Norman Kirk and Premier Albert Henry of the Cook Islands in 1973, which “set out the fundamental principles underpinning the relationship between the two States”.19 The Head of State is the Queen, who is represented in the Cook Islands by the Queen’s representative.

37. This “relationship of partnership and free association between the Cook Islands and New Zealand as equal States independent in the conduct of their own affairs” was reinforced by the 2001 Joint Centenary Declaration between the Cook Islands and New Zealand. The Joint Centenary Declaration of 2001 confirms the following:

   “in accordance with the Cook Islands Constitution the Cook Islands has full and exclusive powers to make its own laws and adopt its own policies”20

   “the relationship of partnership requires that all issues affecting the two countries should be resolved on a cooperative and consultative basis”21

   “The people of the Cook Islands will retain New Zealand citizenship...the Government of the Cook Islands will accord New Zealand preferential consideration in respect of entry into and residence in the Cook Islands”22

   “the Government of New Zealand will continue to assist the Government of the Cook Islands with the defence of the Cook Islands as may be requested from time to time by the Government of the Cook Islands”23

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19 Joint Centenary Declaration between the Cook Islands and New Zealand, 2001.
20 Preamble, Joint Centenary Declaration between the Cook Islands and New Zealand, 2001.
21 Clause 1, Joint Centenary Declaration between the Cook Islands and New Zealand, 2001.
22 Clause 2, Joint Centenary Declaration between the Cook Islands and New Zealand, 2001.
23 Clause 7, Joint Centenary Declaration between the Cook Islands and New Zealand, 2001.
38. Thus, NZ acts on behalf of the Cook Islands in foreign affairs and defence, but only when requested to do so by the Cook Islands. At the same time, the Cook Islands has developed a strong international profile. Furthermore, Cook Islands residents enjoy New Zealand citizenship and can receive NZ government services, though the reverse is not true. As Lapidoth observes, “the associate is interested in the relationship in order to enhance its security and its economic viability.”

Can we apply these models to Scotland?

39. Our next question is: are these political and constitutional arrangements are appropriate for a multinational society such as the UK, where there is substantial evidence that Scottish people seek considerably enhanced self-government?

40. Hypothetically, the federacy model would be much easier to implement than associate statehood in Scotland. Based from the comparative analysis, creating a federacy status would principally involve including a clause guaranteeing that Scotland’s devolved status could only be amended or repealed with the mutual consent of both Scotland and the UK, for instance through qualified majorities in both the Scottish Parliament and the UK Parliament. It might also involve the creation of an ‘Autonomy Act’ for Scotland, which would be recognised in UK legislation.

41. The free associate statehood model would require a greater untangling of competences between Scotland and the UK, granting Scotland more extensive powers of internal self-government. It would also require a constitutional provision that Scotland could voluntarily and unilaterally end its relationship with the UK.

42. Both models may also get round the constitutional hurdle of Westminster being unable to bind its successors, if the UK instead renounces part of its sovereignty (i.e. by recognising the role that a substate unit may have in dissolving or amending its relationship with the UK). This is, as we know, something that the UK has already done in the past, with regard to the West Indies Associated States.

43. Ultimately, it is up to UK constitutional lawyers to decide if either of these models would be feasible and compatible with the UK constitution. What I have tried to provide is a more comparative political analysis. But a significant issue, not only of whether the implementation of these is federal-type models would be possible with regard to Scotland-UK relations, but also if they would be desirable. Recent public opinion surveys have indicated that the Scottish people are in favour of a greater degree of internal self-government. However, deeper, more extensive consultation is highly recommended to determine whether either of these models would be attractive to Scottish citizens. This is underlined by the federal theorist Ronald Watts, who states that the type of constitutional arrangements chosen need to give “adequate expression to the desires and requirements of the particular society in question.”

44. Finally, these models are not without their weaknesses. In particular, both the federacy and associated statehood model have traditionally given the substate territory extensive self-rule, but very little shared-rule. In other words, substate units have very limited influence over the affairs of the central-state. Given Scotland’s current

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24 Lapidoth op cit, p54.
25 Watts (2001), op cit, p32
representation within UK bodies, it is questionable whether having more limited access to decision-making in London would be an attractive option.

45. Having said that, as Watts himself observes, states often create their own ‘hybrid’ constitutional models that combine certain aspects of self-rule and shared-rule. It might therefore be an option for Scotland to adopt a federacy model, whilst retaining greater representation in the House of Commons and access to central decision-making than, for instance, Åland currently enjoys in relation to Finland.

Conclusion
46. This paper has examined two alternative federal-type constitutional models that may be useful and appropriate to the asymmetrically devolved UK state, which appears to be – at least in present circumstances – unlikely to undertake a more profound and radical process of federal reform across the entire territory.

47. A federacy model would guarantee the permanence of the Scottish devolved institutions, by including a clause that states that the relationship may only be amended or repealed subject to mutual consent. An associate statehood model would potentially push Scotland further along the path of autonomy by creating a free, voluntary relationship between Scotland and the UK that would extend Scotland’s internal self-government and which could be unilaterally dissolved by Scotland.

48. However, in order to assess whether these models are either plausible or attractive to the people of Scotland, it would in my opinion be necessary to engage in a broad process of public engagement, including soliciting the opinions of representatives of civil society and the public at large – to decide on an issue as significant as Scotland’s future constitutional relationship in the UK.

6 February 2015