Written evidence submitted by Unlock Democracy

Summary

● The future of devolution must be decided by voters, not behind closed doors by politicians
● The next step for devolution should be a constitutional convention led by the public
● Any constitutional convention should have equal representation for the countries that make up the UK
● The “vow” timetable for devolution to Scotland is grossly unrealistic, but politicians can agree the form of a constitutional convention before the next election
● Devolution to England - in the form of an English Parliament or English votes for English laws - should not be seen as a substitute for devolution within England

Should England, Wales and Northern Ireland be offered the level of devolution that has been discussed in relation to Scotland?

1. While the Scottish referendum campaign has clearly opened the door to devolve more powers from Westminster, devolution should not be a one size fits all solution. The advantage of variable devolution is that it can respond to demand for different levels of powers in different areas. Devolution has always proceeded at different paces in different areas of the UK, and what is appropriate in Scotland is not necessarily appropriate elsewhere. The key is that where there is significant demand for powers to be devolved, there should be a mechanism for negotiating the transfer of powers which allows the public to express their view.

2. In principle, devolution should be available in all parts of the UK. However, devolution to England is complicated by its dominant position in the UK, with 85% of the population and 533 of the 650 MPs at Westminster. A devolved government in England on the same model as Scotland would rival Westminster, potentially reasserting the dominant influence in the UK that motivated devolution to Scotland, Wales and Northern Ireland in the first place.

If so, what should be the next stages to take forward devolution in a) Scotland, b) Wales, c) Northern Ireland, d) England?
3. There are many competing proposals for devolution in different parts of the UK. Scottish parties have submitted proposals to the Smith Commission, Welsh and Northern Irish parties have developed proposals for enhanced fiscal devolution. In England, proposals for devolution have taken two distinct paths, focusing on devolution to England as a constituent part of the UK, and on devolution within England to regions and local communities. Unlock Democracy recently published a pamphlet\(^1\) outlining a new approach to devolution in England, which would create a menu of powers for local communities to “draw down” from central government, rather than central government bestowing them on regions themselves.

4. There is no shortage of proposals, but so far the decisions have been left in the hands of politicians. While Scottish voters have had a referendum on independence, the wider UK public has yet to have a say on the future of devolution. The next step for devolution should be to set up a constitutional convention, led by the public, to consider the distribution of power between the component parts of the UK, and within those component parts. This is the only way of making decisions about the future of devolution that will command legitimacy. The convention should have a defined remit, taking existing proposals for changes in devolution as a basis for discussion. While the convention should be free to examine other options for resolving the issues surrounding devolution - such as reforming the House of Lords on an elected regional basis - it should not aim to address a shopping list of constitutional issues demanded by campaigners.

5. The recent Irish constitutional convention, which ran from 2012-14, provides a useful model. The convention included a two-thirds majority of ordinary citizens selected to be representative of the population as a whole, with the remainder made up from politicians nominated by their parties in proportion to their party’s representation in the legislature. The Irish convention was successful at fostering a deliberative environment to develop proposals for constitutional reform and achieving buy-in from political parties.

6. However, the dominance of England in the UK again complicates the composition of such a convention. If members of the convention were selected to achieve a membership proportional to the population of the different countries of the UK, the convention would be largely an English affair. We believe that the convention should include equal representation for each country of the UK. A constitutional convention will provide a more fertile environment for deliberation

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\(^1\) http://unlockdemocracy.org.uk/pages/publication/devolution-in-england-a-new-approach
on the future of devolution that zero-sum negotiations between governments of different political stripes.

To what extent is the Government’s timetable for considering the future of devolution realistic?

7. The arbitrary timetable for the “vow” to Scotland agreed in the heat of the referendum campaign means that complex decisions about the future of devolution will be examined in extreme haste. The timetable set by the government would be unrealistic even if the decision were one that only involved ministers and civil servants. It was determined purely by party political calculation and leaves the public no meaningful opportunity to contribute to the process. The impact the restrictive timetable will have on the decision-making process is already clear. The Smith Devolution Commission has invited the public to send in their individual views on the future of Scottish devolution, but they only have a window of 28 days to contribute². This process does not meet even the government’s own guidelines for consultations, which recommend significantly longer periods of consultation for more complex issues.³ After the consultation process, the Commission itself then has just one month to produce proposals. This is simply not enough.

8. Opening up the decision-making process on the future of devolution will be impossible within the timetable agreed in the “vow”. However, the first steps can be agreed before the general election. While a constitutional convention led by the public would necessarily be a lengthier process, the form of the convention could be agreed within the existing timetable. It is essential that the convention be given sufficient time to deliberate but involving the public in the process does not mean “kicking the issue into the long grass”. Putting into place an inclusive decision-making process before the next election would be more faithful to the vow timetable than producing rushed proposals without widespread public support, which may easily be rewritten by an incoming government.

What measures, such as a written constitution, could most effectively entrench future devolution settlements?

9. In theory, the devolution of powers within the UK can be repealed unilaterally by Westminster. So far this power has only been used in exceptional cases, such

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² Submissions from the public were invited on October 3; guidelines for submissions were published on October 10; the deadline for submission is October 31.
as the suspension of the Northern Ireland Assembly from 2002-7. In practice, the existing devolution settlement has become so entrenched in the political system that demanding the return of devolved powers would be politically impossible. Political rather than constitutional constraints ensure the persistence of devolved government. However, there is growing concern in devolved governments that their situation is untenable. As Carwyn Jones, Welsh First Minister, has said, “The idea that Parliament could abolish the [Welsh] Assembly or the Scottish Parliament next week without even a vote in law can’t be right for the 21st century…that’s why it’s important that we imbed devolution fully in the UK context.”

10. A written constitution could play a valuable role by making explicit the mechanisms by which more powers can be devolved. The existing system of devolution is set out in legislation by Westminster but underpinned by informal conventions between the UK and devolved governments. This allows devolved governments to seek additional powers more easily, but does not specify the process by which conflicts between governments can be resolved. This means that decisions about changes in devolution are often taken behind closed doors. This approach is exemplified by the negotiations between the Scottish and UK governments on the independence referendum, which excluded “devo max” as an option on the ballot paper as a condition for holding the referendum, and the piecemeal way in which further powers to Scotland were announced late in the referendum campaign. The informal approach to devolution allows quick changes when governments agree, but there is no guaranteed role for the public in decision-making and no agreed process for resolving conflict when governments disagree. A written constitution would formalise the process of negotiating changes in the devolution settlement. This would ensure a level playing field between Westminster and the devolved governments and require major decisions to involve the public.

11. While the UK government has so far proved reluctant to interfere with devolved national governments, the same cannot be said of local or regional government. Successive governments in Westminster have created, altered and abolished sub-national levels of government at will. London’s elected mayor and assembly has been the exception, carving out a policy niche and successfully lobbying for new powers. Under the coalition’s localism agenda local government’s opportunity to act has been expanded, while its capacity to act has been severely

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4 http://politicshome.com/uk/story/25097/carwyn_jones_preserve_devolution_with_written_constitution_.html
curtailed by conditions on central government grants, budget cuts, and CLG departmental activism. Previous attempts to codify the relationship between central and local government have proven ineffective. A written constitution or a statutory code for local government could limit the power of central government to make unilateral changes and put local government on a secure legal footing.

What implications does further devolution to Scotland have for how the House of Commons should deal with legislation that deals with only part of the UK?

12. The prospect of further devolution to Scotland has renewed demands for a solution to the West Lothian Question. Greater devolution will expand the policy areas in which Scottish MPs in Westminster can vote policy in England, but English MPs cannot vote on policy in Scotland. In the absence of widespread support for the creation of an English Parliament, debate has focused on proposals for English votes for English laws (EVEL).

13. There are various proposals for EVEL, most of which involve giving English MPs a veto over laws which only affect England. If a government is elected with a majority in Westminster but without a corresponding majority in England, this would effectively establish a rival English government at Westminster. In this situation, EVEL proposals which give English MPs veto power would produce divided government; the UK government would be able to deliver its policies in reserved policy areas, but would have to defer to the majority party in England on devolved issues. This would set up an English Parliament in all but name. While Scottish voters can hold the UK government accountable at Westminster elections and the Scottish government at Scottish Parliament elections, English voters would not be able to hold the UK government and the English majority to account separately.

14. Other versions of EVEL may avoid this but may not go far enough to address public demands to exclude non-English MPs voting on English matters. In 2013, the McKay Commission recommended that the House of Commons establish separate procedures for English MPs to articulate their views on English-only laws but stopped short of giving English MPs the power of veto over English-only laws. Rather, the Commission argued that English-only laws should normally be passed with a majority of English MPs. If a UK government ignored this convention, it would still be able to pass laws without a majority of English MPs but would likely face consequences at the ballot box. The McKay proposals would highlight instances where the UK government legislated in England without
a majority of English MPs, strengthening political incentives for governments to respect the views of English MPs.

15. While the McKay proposals might prove more workable in a situation where a UK government lacked an English majority, it is unclear that they would resolve the perceived unfairness of non-English MPs voting on English-only laws. In practice, such a government would regularly need to overrule English MPs in order to ensure the effective delivery of its policies. There would be significant pressure for stronger powers for English MPs. Instead of making devolution to England work within the Union, this would heighten separatist tendencies.

16. The identification of “English-only” laws is complicated by the Barnett formula, which distributes funding between the different countries of the UK. Because the formula is based on changes in the level public spending, legislation which affects public spending levels in England will also affect the rest of the UK. This limits the scope of EVEL while England-only measures affect spending elsewhere in the UK. Although unionist parties promised to retain the Barnett formula during the referendum campaign, increased fiscal devolution to Scotland and other parts of the UK would increase the proportion of funding raised locally, and therefore reduce the importance of the Barnett formula. This would expand the scope of English-only laws while removing one of the major sources of discontent towards devolution in England.

17. Wider devolution to regions within England is not addressed by EVEL, which primarily devolves power from MPs in Westminster to other MPs in Westminster. Distributing powers more widely throughout England may avoid creating a centralised power base which rivals Westminster in England. EVEL should not be seen as a substitute for wider decentralisation of power within England.

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