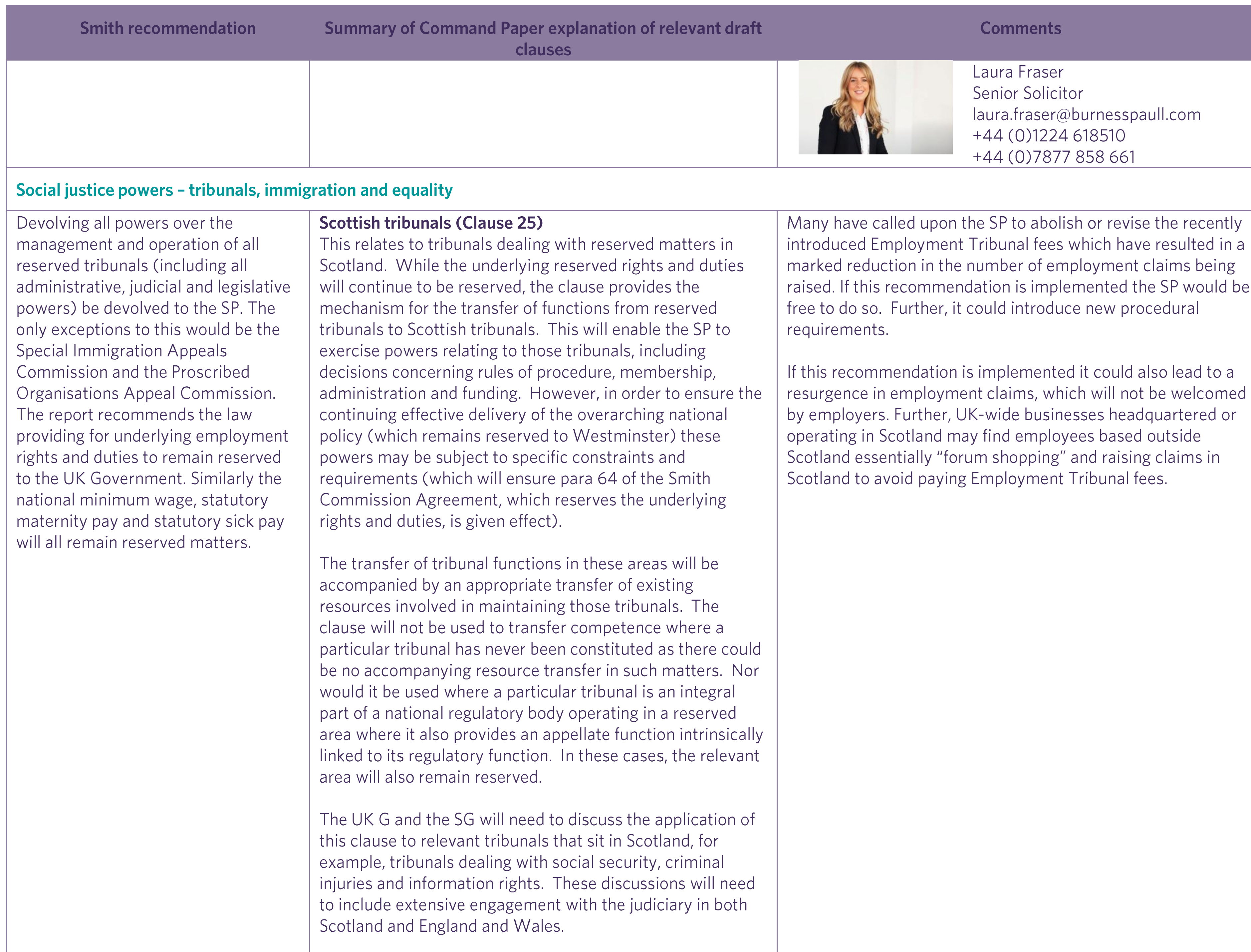
Smith recommendation	Summary of Command Paper explanation of relevant draft clauses	Comments
Financial powers – tax		
Income tax: (i) devolving full power over rates and thresholds (ii) keeping the tax-free personal allowance reserved, along with the taxation of savings and dividend income (iii) emphasising that income tax will remain a shared tax across the Scottish and UK Parliaments, including Scottish MPs continuing to vote on the UK's Budget	**Income Tax (Clauses 10, 11 and 12)** These will give the Scottish Parliament ("SP") the powers to introduce new rates and bands of income tax above the UK personal allowance. They will apply to income tax paid on non-savings and non-dividend income – in practice this includes income from employment, profits from self-employment, pensions, taxable social security benefits and income from property. They will apply to all Scottish taxpayers who during a tax year, are UK residents for tax purposes and their main place of residence is in Scotland for the majority of the year. The clauses also deal with a consequential issue relating to the interaction between Capital Gains Tax ("CGT") and income tax rates. Currently, individuals who pay income tax at the income tax higher rate also pay CGT at a higher rate of 28%. CGT will remain a reserved matter. To ensure that the tax applies equally to all UK taxpayers, the rate of CGT that applies to a Scottish income taxpayer will be calculated by reference to the UK income tax rate limits rather than the Scottish ones. So the CGT rate of 28 % will apply to a Scottish income taxpayer if their income exceeds the UK income tax higher rate threshold.	It remains to be seen whether a future SG would seek to increase, decrease or keep broad parity of the Scottish income tax burden of Scottish taxpayers with the rest of the UK. Given statements and increased spending promises already made it is most likely, however, that they would increase the burden and that the increase would fall most heavily on higher earners. If that were to happen, the attitude of these generally more mobile people and their ability to manipulate their position under the tax residence rules as between Scotland and the rest of the UK to their advantage could have an effect on the money actually raised by such an increase in Scottish income tax - it could at the extreme mean a fall in income tax revenue for Scotland.
Assigning Scottish revenues of the first ten percentage points of the standard rate of VAT to Holyrood's budget (equivalent to 50% of current VAT receipts)	**Value Added Tax (Clause 13)** This will assign to the Scottish Government's ("SG") budget the first 10% of the revenue attributable to Scotland from the standard rate of VAT. With the agreement of the SG, the UK Government ("UK G") proposes to go slightly further and additionally assign the first 2.5% of the revenue attributable to Scotland from the 5% reduced rate. VAT rates will continue to be set at a UK-wide level as recommended in the Smith Agreement.	The effect of this measure on Scottish finances will depend on the performance of the Scottish economy relative to the economy in the rest of the UK. If the part of the Scottish economy that generates VAT payments (this excludes certain sectors such as finance and insurance) performs well, relative tax revenues for Scotland should increase. On the other hand a relatively poor performance by such Scottish sectors would mean a relative decline in tax revenues.

Smith recommendation	Summary of Command Paper explanation of relevant draft clauses	Comments
Devolving air passenger duty ("APD")	**Air Passenger Duty (Clause 14)** This will give the SP the power to charge a tax on air passengers departing from Scottish airports. It includes provision for the date when APD will be switched off in relation to Scotland and the new tax will be introduced.	Perhaps the main uncertainty over this measure is the extent to which any diversion of air traffic business to Scotland at the expense of the rest of the UK as a consequence of any favourable changes to APD in Scotland could be covered by the principle that devolution should cause "no detriment" to the other side.
Ultimately devolving the aggregates levy	**Aggregates Levy (Clause 15)** This devolves the power to charge tax on the commercial exploitation of aggregate in Scotland to the SP. This will take place once the current legal issues (which relate to unresolved challenges to the lawfulness of the levy dating back to 2002) have been dealt with. At that time the clause will enable the Aggregates Levy to be turned off for aggregate commercially exploited in Scotland (including from Scottish territorial waters), giving the SP power to make its own arrangements for the design and collection of any replacement tax on the commercial exploitation of aggregate in Scotland. This will be subject only to the requirement that any tax so introduced fully complies with EU law. The UK G will work with the SG to ensure double taxation is avoided. This may require changes to the way the Aggregates Levy operates in the rest of the UK. If required, these consequential changes will be made following resolution of the legal challenges, further discussion with the SG and consultation with the quarrying sector. They are therefore not included in this draft clause.	It is probably too early to speculate on the effect of such devolution of this relatively minor tax given the uncertainties, save to say that Scotland's geographical share of the UK's total aggregates levy take is disproportionately high by reference to the respective populations. John Finnick Tax Manager john.finnick@burnesspaull.com +44 (0)131 473 6191 +44 (0)7525 038 511
Financial powers – Crown Estate and fracking		
Devolving management and revenue generated from the Crown Estate in Scotland (including the seabed, urban assets, rural estates, mineral rights, fishing rights and the foreshore) to the SP and ultimately to relevant local authorities	**The Crown Estate in Scotland (Clause 23)** This provides for the management and revenue of Crown Estate ("CE") assets in Scotland to be transferred to the SP, for management responsibility to be further devolved within Scotland, and a MoU between the Scottish and UK Gs to protect strategic UK-wide critical national infrastructure (such as defence & security and oil & gas and energy). The CE is an independent commercial public body with	Such devolution could enliven the development of Crown assets within Scotland which may have been previously overlooked in favour of the Crown's prime urban assets (particularly those in London). It will also enable better integration, both in terms of policy decision-making and in terms of administration, of the planning, consenting and leasing aspects of marine renewable energy developments. Additionally, the SG could further devolve such management

Smith recommendation	Summary of Command Paper explanation of relevant draft clauses	Comments
	responsibility for managing and turning to account Crown property forming part of the estate. Under present law, the management of the CE is a reserved matter, with the SP unable to legislate in relation to it. New powers will be given to the SG by a transfer scheme (the "scheme"), transferring in a single transfer the CE Commissioners' (the "Commissioners") functions of managing wholly-owned Scottish property assets currently forming part of the CE (the "Scottish assets"). It will remain possible for the CE to make investments in Scotland and the management of any such investment by the CE in property in Scotland after the transfer will remain a reserved matter. Defence will also remain a reserved matter and current and future Defence utilisation of Crown property assets will be given legal protection. The transfer of responsibility for management of the Scottish assets will include control of any revenues arising from them as well as responsibility for managing all liabilities relating to them, including responsibility for ensuring the decommissioning of offshore renewable energy installations in Scottish waters under the Energy Act 2004 and declaring safety zones in Scottish waters and the Scottish Renewable Energy Zone. UK G will consider further the most appropriate means to achieve this and whether to make provision in the Scotland Bill or on an order under the Scotland Act 1998.	and revenue to local levels, and could fulfil its commitment of passing on 100% of net income received from seabed activities to the local communities who are affected by such developments and who may not currently benefit (as favourably or at all) in terms of the current UK-wide Coastal Community Fund. Lynette Purves Senior Solicitor lynette.purves@burnesspaull.com +44 (0)131 473 6908 +44 (0)7850 004 837
Devolving onshore oil and gas licensing, but keeping offshore oil and gas licensing reserved	The licensing of onshore oil and gas extraction (Clause 31) So far as onshore oil and gas is concerned, the clause will devolve to Scottish Ministers the current regime for the licensing of exploration and extraction of oil and gas. Also, the clause will transfer to the SP legislative competence for the licensing of onshore oil and gas exploration and extraction. The licensing of offshore oil and gas extraction however is and will remain reserved. Scottish Ministers and the SP already have substantial control of onshore oil and gas activities through planning controls and environmental regulation, which are fully devolved. This enables Scottish Ministers to set the framework of consideration of all planning applications for	Devolving responsibility for onshore oil and gas licensing to the SP places the controversial issue of unconventional hydrocarbon extraction through hydraulic fracturing ("fracking") firmly in hands of Holyrood. To date, the SG has taken a more cautious view to fracking than the UK G. Whilst Scotland's onshore oil and gas industry is currently very small, Scotland does have good prospects for shale gas, shale oil and coalbed methane, albeit that many of these prospects are in close proximity to population centres, which has led to considerable public opposition. By giving Scotland jurisdiction over onshore oil and gas licensing, the SG would, in principle, have the power to ban fracking. Given the extent of public opposition and the fact that taxation of oil and gas receipts will remain a reserved issue, the SG would appear to have no strong

Smith recommendation	Summary of Command Paper explanation of relevant draft clauses	Comments
	oil and gas projects onshore; to refuse permission for activities which are not acceptable in the specific locations proposed; and to impose appropriate controls to prevent pollution and protect the environment in respect of proposals which do receive permission. To give effect to the Smith Commission Agreement, the clause defines a 'Scottish onshore area' in which Scottish Ministers will be able to exercise powers under Part 1 of the Petroleum Act 1998, currently held by the Secretary of State, for the licensing of the exploration for and extraction of petroleum. These will include powers to grant licences, and to make further provisions in respect of licences within the Scottish onshore area. Scottish Ministers will also benefit from information sharing powers and will gain powers of inspection, and powers to make Regulations setting out Model Clauses to be incorporated into licences. However, the power to require consideration, which may take the form of a royalty, in return for the grant of a licence, will remain reserved as requiring a royalty would, in effect, levy an additional tax on onshore projects. This meets the clear intentions that administration of existing licences and the issue of future licences should be matters for the SP while all aspects of the taxation of oil and gas receipts should remain reserved, as set out in paragraph 83 of the Smith Agreement.	incentive to permit fracking. Any potential ban would, however, have to be considered in light of the fact that several onshore licences have already been awarded in central Scotland. The Smith Commission proposals also raise the question of how the SG is planning to administer its new onshore oil and gas jurisdiction. Following the Wood Review the UK G suggested that the new Oil and Gas Authority (OGA) would take over both offshore and onshore oil and gas licensing in the UK. However, the Smith Commission proposals mean that the Scottish onshore system would no longer be part of the UK wide oil and gas system. Would the OGA administer the new Scottish onshore system separately from the UK system and report to the SG? Or would the SG set up a separate body for onshore licensing? These are issues still to be addressed. And finally, is the devolution of onshore oil and gas licensing the first step to complete oil and gas devolution? Given the strong opposition from the majority of oil and gas companies to Holyrood control at the time of the referendum, is this something that can or will be endorsed by the industry?
Devolving mineral access rights for underground onshore extraction of oil and gas (such as fracking)	**Mineral access rights (Clause 31)** Clause 31 also addresses mineral access rights for onshore extraction of oil and gas. In line with the transfer of legislative competence with regards to licensing onshore oil and gas extraction, the clause confers legislative competence on the SP in relation to access rights for onshore oil and gas and transfers executive functions to the Scottish Ministers in relation to access rights for onshore oil and gas. It will not confer legislative competence for health and safety legislation or the inspection and enforcement of that, including the Borehole Sites and Operations Regulations 1995.	One of the controversies with fracking, is the proposal by the UK G to allow developers access rights to drill for shale gas under private property (including residential properties) without the need to obtain consent of the relevant landowners or (where such consent cannot be obtained) the permission of the Courts. This change had been sought by the industry, amid concerns that obtaining consent from every affected party (which could run into the 100s or even 1000s) or the Courts would make it very difficult, if not impossible, to operate. Following the devolution of such access rights, it will be for the SG and Parliament to decide if those rights of access will be available in Scotland.

Smith recommendation	Summary of Command Paper explanation of relevant draft clauses	Comments
		 Laura Fraser Senior Solicitor laura.fraser@burnesspaull.com +44 (0)1224 618510 +44 (0)7877 858 661
Social justice powers – tribunals, immigration and equality		
Devolving all powers over the management and operation of all reserved tribunals (including all administrative, judicial and legislative powers) be devolved to the SP. The only exceptions to this would be the Special Immigration Appeals Commission and the Proscribed Organisations Appeal Commission. The report recommends the law providing for underlying employment rights and duties to remain reserved to the UK Government. Similarly the national minimum wage, statutory maternity pay and statutory sick pay will all remain reserved matters.	**Scottish tribunals (Clause 25)** This relates to tribunals dealing with reserved matters in Scotland. While the underlying reserved rights and duties will continue to be reserved, the clause provides the mechanism for the transfer of functions from reserved tribunals to Scottish tribunals. This will enable the SP to exercise powers relating to those tribunals, including decisions concerning rules of procedure, membership, administration and funding. However, in order to ensure the continuing effective delivery of the overarching national policy (which remains reserved to Westminster) these powers may be subject to specific constraints and requirements (which will ensure para 64 of the Smith Commission Agreement, which reserves the underlying rights and duties, is given effect). The transfer of tribunal functions in these areas will be accompanied by an appropriate transfer of existing resources involved in maintaining those tribunals. The clause will not be used to transfer competence where a particular tribunal has never been constituted as there could be no accompanying resource transfer in such matters. Nor would it be used where a particular tribunal is an integral part of a national regulatory body operating in a reserved area where it also provides an appellate function intrinsically linked to its regulatory function. In these cases, the relevant area will also remain reserved. The UK G and the SG will need to discuss the application of this clause to relevant tribunals that sit in Scotland, for example, tribunals dealing with social security, criminal injuries and information rights. These discussions will need to include extensive engagement with the judiciary in both Scotland and England and Wales.	Many have called upon the SP to abolish or revise the recently introduced Employment Tribunal fees which have resulted in a marked reduction in the number of employment claims being raised. If this recommendation is implemented the SP would be free to do so. Further, it could introduce new procedural requirements. If this recommendation is implemented it could also lead to a resurgence in employment claims, which will not be welcomed by employers. Further, UK-wide businesses headquartered or operating in Scotland may find employees based outside Scotland essentially "forum shopping" and raising claims in Scotland to avoid paying Employment Tribunal fees.

Smith recommendation	Summary of Command Paper explanation of relevant draft clauses	Comments
The report recommends that, whilst the Equality Act 2010 should remain reserved to the UK Government, the SP should have the power to introduce gender quotas in respect of public bodies in Scotland.	**Equal Opportunities (Clause 24)** This relates to the role of the SP in relation to equalities. The clause will devolve the power to legislate on equalities in respect of public bodies in Scotland, which will include but not be limited to the introduction of gender quotas and the consideration of socio-economic inequality when making strategic decisions. This power will enable the SP, by imposing new requirements on public bodies in Scotland, to introduce new protections for employees and customers of those bodies with regards to their devolved functions. However, the SP will not be able to lower the protections found in the Equality Act 2010.	This would go beyond the existing positive discrimination provisions within the Equality Act 2010. As is the case now, the SP would be unable to make any mandatory changes to anti-discrimination legislation.
Immigration powers – The report does not recommend devolution of any immigration powers to the SP. However, it notes that the parties have agreed to explore the possibility of introducing formal schemes to allow international higher education students graduating from Scottish further and higher education institutions to remain in Scotland and contribute to economic activity for a defined period of time. Parties will explore the possibility of allowing MSPs to submit concerns to the UK immigration authorities on devolved matters affecting their constituents.	**Immigration Powers** Initial discussions are scheduled to occur over the coming weeks on this and various other considerations, with productive conversations taking place between officials and Ministers on the scope and shape of future work between the two governments. In some cases, these discussions are exploring the possibility of devolution, elsewhere they are focused on improving working practices within the existing devolution settlement.	Many interested parties prepared submissions for the commission calling for devolution of certain immigration powers to the SP. Whilst Scotland does have a separate shortage occupation list, it is otherwise subject to UK-wide immigration rules. This has been a source of frustration for many, particularly in the higher education and technology sectors, who recognise that Scotland's economic and demographic needs are distinct to the rest of the UK. The UK G has now abolished the former Post-Study Work route, which was the key route for international students to live and work in Scotland following their studies. The removal of the route has been a source of frustration for Scotland's higher education sector and businesses, with many arguing it has made Scotland, and the wider UK, less attractive for prospective international students. With no firm recommendation or commitment in this regard, and a general election looming, it is hard to see any substantive changes in UK immigration policy being implemented which may increase net migration to the UK. Joanne Hennessy Senior Associate joanne.hennessy@burnesspaull.com +44 (0)141 273 6988 +44 (0)7525 038 532

Smith recommendation	Summary of Command Paper explanation of relevant draft clauses	Comments
Social justice powers – infrastructure		
Devolving responsibility for rail franchise bids by public sector operators (effectively allowing the re-nationalisation of railways)	**Rail franchising (Clause 37)** This relates to the powers related to rail franchising. Currently, public sector operators are precluded from bidding and operating rail franchises in Great Britain. The clause will lift this existing prohibition with regards to passenger rail services that both start and end in Scotland and certain cross border services where Scottish Ministers are the 'appropriate franchising authority'.	Although public sector operators are currently precluded from bidding for franchise contracts, the East Coast mainline franchise has been operated by the public sector since 2009 – when the then franchisee effectively handed back responsibility for running the franchise to the state. There are a number of supporters who point to the apparent success of the publicly operated franchise – it paid £225m to the Treasury for the year to March 2014 – and are calling for it to remain in public hands. In Scotland, there is likely to be considerable political pressure for rail services to be operated by public sector entities. However, given that the ScotRail franchise is being renewed on 1 April 2015 and does not have a break point until its fifth anniversary, it will be 2020 at the earliest before a public sector operator could take over the ScotRail franchise. Graeme Palmer Director graeme.palmer@burnesspaull.com +44 (0)141 273 6738 +44 (0)7879 893 176
Determine how supplier obligations are designed and implemented in relation to energy efficiency and fuel poverty in Scotland	**Energy efficiency & fuel poverty (Clauses 38 and 39)** These relate to powers concerning the design and implementation of supplier obligations relating to energy efficiency and fuel poverty in Scotland. They will transfer executive competence to Scottish Ministers to empower them to design and implement supplier obligations in Scotland. This is achieved through amendments to the Gas Act 1986, Electricity Act 1989 and Energy Act 2010 (the "2010 Act").	The powers afforded to the Scottish Ministers for design and implementation of supplier obligations relating to energy efficiency and fuel poverty are helpful, and formally recognise that the Scottish institutions have legitimate interest in the operation of the regulatory system. However, it will be interesting to see how this will work in practice as it is important to note that Great Britain benefits from a single energy market, where costs are spread over the GB consumer base, and the current regimes are designed to match energy supply and demand across the whole of GB. Energy is, and for the most part remains a reserved matter. The concessions afforded to the SP complement existing practices to enforce co-ordination of energy policies and consultation between the respective governments. Yet, despite the ability of the SG to take a more active role in

<table>
<tr><th>Smith recommendation</th><th>Summary of Command Paper explanation of relevant draft clauses</th><th>Comments</th></tr>
<tr><td></td><td></td><td>design and implementation of specific policies and obligations, responsibility for the manner in which funds are raised, including the scale, costs and apportionment of the obligations will remain reserved, and crucially, the policies must be implemented in a manner that will not disadvantage other regions of GB and consumers, or impact on the UK Government's obligations on energy efficiency and climate change. This may therefore limit the use of new powers afforded to the SG and what they can achieve and implement.</td></tr>
<tr><td colspan="3">Constitutional powers – funding and borrowing</td></tr>
<tr><td>Maintaining the Barnett Formula and making adjustments to the block grant for any savings or additional costs as a result of newly devolved powers</td><td>Barnett formula
Consistent with the commitment made by all three main UK-wide party leaders, the Barnett Formula will continue. As a result of further devolution, the SG's funding model will need to be updated so that it comprises block grant from the UK G determined by:
the Barnett-based block grant;
block grant deduction in relation to tax devolution/assignment;
addition to the block grant in relation to welfare programmes that are being devolved;
devolved/Assigned Scottish tax receipts;
SG cash reserve; and
SG borrowing.
The SG's aggregate spending will therefore be determined by UK G funding plus SG tax receipts and borrowing (subject to the agreed borrowing limits).</td><td>The need for the reduction in the block grant component to dynamically and mechanically reflect changes in tax foregone by the UK G over time is something the Smith Agreement indicated would involve the adjustment being "indexed appropriately". However, the Agreement did not suggest what the index should be. The Command Paper says there are a range of indexation options which SG and UK G have started to discuss and need to develop but does not suggest a preferred approach. It does highlight the approach previously agreed for the Scottish rate of income tax created by the Scotland Act 2012 which involved two elements (in Year 1 the block grant is reduced by the amount of tax generated by 10p of income tax in Scotland and in Year 2 the adjustment is indexed against growth in the UK income tax base (ie taxable income after personal allowances, reliefs etc are removed)).</td></tr>
<tr><td>Increasing capacity for borrowing by the SP (building on the powers already due to come into effect in April 2015), which will need to be agreed between the two Governments</td><td>Borrowing
The Command Paper explains that sufficient additional borrowing powers will depend on a number of factors and will be subject to discussion between SG and UK G. However, it is clear from international best practice that a set of fiscal rules and robust institutional arrangements will need to be in place to ensure that the overall UK public finances remain sustainable.</td><td></td></tr>
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Smith recommendation	Summary of Command Paper explanation of relevant draft clauses	Comments
Constitutional powers – Parliament and elections		
Implementing UK legislation to state that the SP and SG are permanent institutions, as well as creating a statutory basis for the Sewel Convention	**Permanence of SP and SG (Clause 1)** This delivers the call for UK legislation to state that the SP and SG are permanent institutions. The statement that "There shall be a SP" set out in the original 1998 Act, is retained and it is recognised that a SP and a SG are permanent parts of the United Kingdom's constitutional arrangements. **Sewel Convention (Clause 2)** This covers the Sewel Convention being put on a statutory footing. The convention is that the UK Parliament will not normally legislate with regard to devolved matters in Scotland without the consent of the SP. As explained, the UK Parliament and the UK G have observed the convention since the start of devolution, and the clause reflects the wording of the convention. The clause maintains the current position whilst placing the convention on a statutory footing.	These clauses attempt to entrench the SP and the Sewel Convention. The principle of parliamentary sovereignty means that, in theory, legislation cannot bind a future parliament. However, as recognised in 2004 by a Joint Committee of the House of Commons and the House of Lords, in practice there are certain constitutional Acts of Parliament (such as the Parliament Acts of 1911 and 1949, asserting the supremacy of the House of Commons) which a future legislature would encounter significant opposition in attempting to repeal. The Scotland Act is recognised as one of the "fundamental parts of constitutional law" in the UK.
Devolving most powers in relation to SP and local elections, including the ability to broaden the franchise to 16 and 17 year olds – although use of these powers would require the support of a two-thirds majority in the SP	**Super-majority for certain SP legislation (Clause 4)** This requires certain types of electoral legislation to be passed by a two-thirds majority of the SP. This applies to legislation amending the franchise, the electoral system or the number of constituency and regional members for the SP. **Conduct of elections (Clause 5)** This relates to the administration and conduct of SP and local government elections in Scotland. Clause 6 provides for legislative competence in relation to the franchise for elections to the SP and local government elections in Scotland to be devolved.	The super-majority clause takes account of the unicameral nature of the SP. This would prevent the significant constitutional powers being devolved being exercised by a party with a bare majority. The conduct of elections powers aim to give greater flexibility to the SG over how SP and local elections are run, including the ability to provide 16 and 17 year olds with the right to vote. Charles Rogers Solicitor charles.rogers@burnesspaull.com +44 (0)131 473 6112 +44 (0)7508 091 720