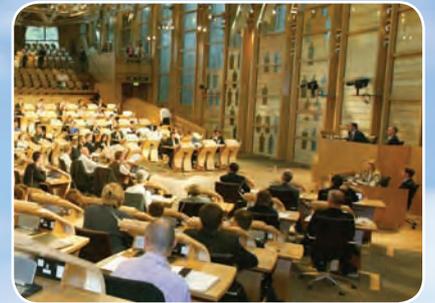


# Serving Scotland Better: Scotland and the United Kingdom in the 21st Century

Final Report – June 2009



Presented to the Presiding Officer of the  
Scottish Parliament and to the  
Secretary of State for Scotland,  
on behalf of Her Majesty's Government,  
June 2009

# Serving Scotland Better: Scotland and the United Kingdom in the 21st Century

It was a privilege to be asked to chair a Commission to consider how the Scottish Parliament could serve the people of Scotland better.

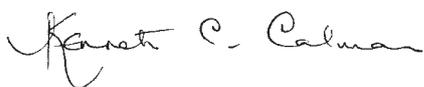
It is a task that has taken just over a year and seen my colleagues and me travelling the length and breadth of Scotland. It has been very hard work – but also very rewarding. Many of the issues are complex, but at the heart of this is our desire to find ways to help improve the lives of the people of Scotland. The reward has been in meeting so many people and discussing the issues with them – at formal evidence sessions, at informal meetings, and at engagement events across the country.

In introducing our Final Report I would like to thank a number of people. First and foremost, I would like to thank the other fourteen members of the Commission itself. We have worked hard together; all of our business has been conducted in a spirit of common purpose, and often with humour. Despite the differences in our backgrounds and starting perspectives, this Report is unanimous.

I would also like to thank all those who contributed to our work – whether by giving us evidence, attending our local events, or filling in our questionnaire. Your views have played a major part in shaping the final conclusions. Particular thanks are due to Professor Anton Muscatelli, and his colleagues on the Independent Expert Group, who provided us with invaluable advice on finance.

And lastly I would like to thank the Secretariat team who have so ably supported our work, and the other officials in the UK Government and the Scottish Parliament who have provided information and practical support.

The remit we were given was a challenging one but I am confident that this Report will fulfil it. On behalf of the whole Commission, I commend it to you.



Kenneth Calman

15 June 2009



Standing (left to right): John Loughton, Murdoch MacLennan, Iain McMillan, Matt Smith, Murray Elder, Mona Siddiqui, Jim Wallace, David Edward.  
Sitting (left to right): James Selkirk, Jamie Lindsay, Shonaig Macpherson, Ken Calman, Rani Dhir, Colin Boyd, Audrey Findlay.

## The Commission

- Rt Hon Lord Boyd of Duncansby QC (Colin Boyd) – former Lord Advocate and Labour peer
- Professor Sir Kenneth Calman KCB (Chairman) – Chancellor of the University of Glasgow
- Rani Dhir MBE – Executive Director, Drumchapel Housing Cooperative
- Professor Sir David Edward – retired Judge of the European Court of Justice
- Lord Elder (Murray Elder) – Labour peer
- Audrey Findlay CBE – former Leader of Aberdeenshire Council, Convener of the Scottish Liberal Democrat Party
- Lord Lindsay (Jamie Lindsay) – former Scottish Office Minister, Conservative peer and Chairman of the Scottish Agricultural College
- John Loughton – youth activist and former Chairman of the Scottish Youth Parliament
- Murdoch MacLennan – Chief Executive, Telegraph Media Group
- Shonaig Macpherson CBE – Chair of the National Trust for Scotland and of the Scottish Council for Development and Industry
- Iain McMillan CBE – Director, CBI Scotland
- Rt Hon Lord Selkirk of Douglas QC<sup>1</sup> (James Selkirk) – former Minister of State at the Scottish Office and Conservative peer
- Mona Siddiqui FRSE – Professor of Islamic Studies, University of Glasgow
- Matt Smith OBE – Scottish Secretary, UNISON
- Rt Hon Lord Wallace of Tankerness QC (Jim Wallace) – former Deputy First Minister and Liberal Democrat peer

<sup>1</sup> Lord Selkirk was known, when a Minister and MSP, as Lord James Douglas-Hamilton.

## Commission Secretariat

The Commission has been supported by a Secretariat consisting of officials seconded from the UK Government and the Scottish Parliament. The Secretariat has advised the Commission on all aspects of its work, and acted as a general contact point for enquiries and public engagement.

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## Website

The Commission's website is: [www.commissiononscottishdevolution.org.uk](http://www.commissiononscottishdevolution.org.uk).

The website contains further information about the Commission and all aspects of its work. In particular, it includes Commission minutes and other papers, transcripts and notes of oral evidence, written submissions and questionnaire responses. It is envisaged that arrangements will be made to ensure that the website is archived for long-term public access at (or from) the above web-address.

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Published separately to this report is the related document: *The Commission on Scottish Devolution: A Summary of the Evidence – June 2009*

# Serving Scotland Better: Scotland and the United Kingdom in the 21st Century

## An Executive Summary

### Introduction

1. The Commission on Scottish Devolution was established by the Scottish Parliament and the United Kingdom Government. The remit was agreed by the Scottish Parliament and is:  

**To review the provisions of the Scotland Act 1998 in the light of experience and to recommend any changes to the present constitutional arrangements that would enable the Scottish Parliament to serve the people of Scotland better, improve the financial accountability of the Scottish Parliament, and continue to secure the position of Scotland within the United Kingdom.**
2. Kenneth Calman was announced as the chairman of the Commission and the full membership is listed on page ii. The Final Report of the Commission was unanimously agreed.
3. In this summary we set out the most important points in our full Report, our main recommendations and the arguments which support them. A comprehensive description of the background, the evidence on which we based our conclusions and the reasoning which led us to them is in our Report.

### Our method of working

4. We began work in April 2008. Throughout our work we have been guided by evidence and by our engagement with the people of Scotland and elsewhere in the United Kingdom. We have sought to be transparent and accountable for how we went about our task. Communication has therefore been a high priority for us. Our website has been regularly updated and well used. We distributed 150,000 copies of an information leaflet about the Commission's work across Scotland. Over 900 people filled in our questionnaire. We held 12 local engagement events throughout Scotland and beyond, from Lerwick to Newcastle, and from Ayr to Aberdeen. We have received over 300 written submissions. We have held over 50 public evidence sessions and 27 private sessions, and published transcripts or notes of each. We have drawn on all of this evidence, and a large volume of other material, to reach our conclusions. On finance issues, we have been greatly assisted by an Independent Expert Group chaired by Professor Anton Muscatelli, whose evidence to us is published and can be found at [www.commissiononscottishdevolution.org.uk/papers.php](http://www.commissiononscottishdevolution.org.uk/papers.php).
5. In December 2008 we published a First Report which set out our progress and formed the basis for consultation. Our unanimous Final Report marks the conclusion of our work. Alongside the Final Report, we have published a summary of all our evidence, so that people can judge it for themselves.

## Background

6. The creation of the Scottish Parliament in 1999 was a very significant change in how Scotland is governed. Before that, although much of Government in Scotland was decentralised administratively, all legislative responsibility rested with the UK Parliament at Westminster, and the Ministers in the Scottish Office who ran much of Scotland's domestic policy were answerable to it.
7. Since 1999 Scottish Ministers have been accountable to a Scottish Parliament in Edinburgh, composed of 129 MSPs directly elected by the people of Scotland. The Parliament has the power to make laws across a wide range of domestic policy in Scotland – including crime and justice, education, health, agriculture and the environment, transport, economic development and local government. The powers of the Scottish Parliament are very wide, but some important matters remain reserved to the UK Parliament, most obviously defence and foreign affairs but also social security and other responsibilities. Scotland continues to be represented in the UK Parliament by 59 MPs.
8. The Budget devolved to the Scottish Parliament and Government is a large one. It amounts to over 60% of the public spending that is identifiably Scottish. The UK Government is responsible for the remainder: some of that is spending for the whole UK like defence, but the largest part in Scotland is social security spending. Public spending in Scotland is higher per head than in most other parts of the UK, but taxes collected are not, so that Scotland benefits from sharing in wider UK taxes. These UK taxes include those from North Sea oil and gas which go up and down very markedly from year to year, because of the volatility of world oil prices, and are likely to decline in future as production continues to fall.
9. Most of the Scottish budget comes from a block grant from the UK Parliament, paid for out of taxes collected from across the UK, including Scotland. This is calculated by a method called the Barnett formula. It has been used since 1978, long before devolution, and has carried on largely unchanged from that time. It relates changes in the Scottish Budget to changes in budgets for comparable services in England, or England and Wales. Scotland gets a share of the relevant change, based on population. So, for example, if the English health budget is increased by £1 billion a year in a review of UK Government spending, the Scottish budget is increased by £85 million, which means that the increase per head is the same in Scotland as in England. It is then up to the Scottish Government and Parliament to decide whether that extra money will be spent on health or on some other devolved policy area.
10. The Scottish Parliament has wide spending powers, but does not have many tax powers. Apart from local taxation (Scottish Ministers set the level of non-domestic rates and influence rates of council tax) the Scottish Parliament has only the power to vary the basic rate of income tax in Scotland by up to 3 pence in the pound, up or down (the "Scottish Variable Rate" or SVR). This power has not so far been used.

## Scotland's place in the United Kingdom

11. How Scotland should relate to England and the other nations of the United Kingdom has always been a very important question of Scottish politics. Scotland has been part of the United Kingdom since the Union of the Parliaments in 1707, and its relationship with England and its other neighbours has changed over that time. Our task has been to consider how that relationship might evolve in the early part of the 21st century.

12. There have always been some aspects of Scotland's national life which have been different from the rest of the UK. The distinctive Scottish legal system and the Scottish education system are good examples. In other respects, however, there is a continuity of approach between Scotland and the rest of the UK, for example in social security. The balance between these distinctive and shared elements, and how they have developed, has been determined by external circumstances, and by what Scottish people have aspired to. Empire, economic change, world wars, and social movements like the creation of the NHS have all played a part. For example, the growth of an integrated UK economy means the law affecting business and the taxation system is the same across the whole UK. On the other hand, many of the public services that have grown up over the 20th century have separate Scottish identities.
13. There have always been these two threads to Scotland's constitutional life. It has neither been absorbed into England, nor has it sought to cut itself off from the mainstream of British economic and social life. A Scottish Parliament in Edinburgh is the most recent step in the evolution of this relationship, and a very significant one. After 10 years of devolution we have been looking at how well it has worked, and how it should now change and develop further.

### **The success of devolution**

14. The first conclusion we have reached is that devolution has been a real success. The last 10 years have shown that not only is it possible to have a Scottish Parliament inside the UK, but that it works well in practice. Having a Scottish Parliament is in general popular with the people of Scotland, and they welcome the scope to have Scottish issues debated and decided in Scotland. The Scottish Parliament has embedded itself in both the constitution of the United Kingdom and the consciousness of Scottish people. It is here to stay.

### **Devolution inside a political Union**

15. In thinking about how devolution should develop further, we have looked very carefully at how it fits into the wider Union that is the United Kingdom. This is first of all a political Union, with a Parliament at Westminster where every part of the country is represented. Some things like defence and foreign relations can only be dealt with there if we are to have a Union at all. There should be no change in those. But we have considered what impact they have on matters that are now quite properly dealt with by the Scottish Parliament. For instance, working with the other members of the European Union critically affects agriculture and fisheries. This is an example of a recurring theme in our report – the different levels of government in the United Kingdom have to work more closely together.
16. The United Kingdom is an asymmetrical Union. Not only are the four nations very different in size, but devolution in Wales and Northern Ireland is different from devolution in Scotland, and there is no devolution for England. It is not our job to say whether this should change, or to make recommendations about how England is governed, but we cannot ignore the fact that the Parliament at Westminster is England's parliament as well as the Parliament for the whole of the UK. We can learn lessons from federal countries about how to help different levels of government to cooperate, but the tidy solutions that work where every part of a larger country can be governed in the same way cannot simply be applied here.
17. The UK Parliament still has, as a matter of law, the power to legislate for Scotland on devolved as well as reserved matters. But there is an important convention according to which it does not do so unless it has the agreement of the Scottish Parliament. This works very well in practice and is probably the best example of where Scottish and UK institutions already cooperate well together.

## Devolution in an economic Union

18. The UK is an economic Union with a very integrated economy, with goods and services traded within it all the time. We are absolutely clear that this economic Union is to Scotland's advantage and in considering how devolution should develop we have been very careful not to make recommendations that will undermine it. Many devolved powers are important for economic growth, and are most effectively run by the devolved bodies, but the Scottish Parliament and Government cannot run a separate macro-economic policy without threatening the benefits of this economic Union. This is also important for taxation, because the scope to have different rates of tax inside a single economy is limited.

## Devolution in a social Union

19. Scotland also forms what we have called a social Union with the rest of the UK. This is not so obvious an idea as the economic Union, but it too has significant implications for how devolution should develop. There are many social ties that bind the UK together: family, professional and cultural. But there are also some common expectations about social welfare. Social security payments are available and are paid on the same basis to people across the country, according to their needs. This principle of fairness should not be undermined, though some benefits may have to be adjusted where they intersect with devolved policies like housing.
20. We think that there are certain social rights which should also be substantially the same, even when it is best that they are separately run in Scotland. The most important of these are that access to health care and education should be, as now, essentially free and provided at the point of need. And when taxes are shared across the UK they should take account of that need. Our first recommendation is therefore that the Scottish and UK Parliaments should confirm their common understanding of what those rights are, and the responsibilities that go with them.

**RECOMMENDATION 2.1:** The Scottish Parliament and UK Parliament should confirm that each agrees to the elements of the common social rights that make up the social Union and also the responsibilities that go with them.

21. This understanding of how devolution and the Union fit together is what guides our recommendations on improving the financial accountability of the Scottish Parliament, on what functions and responsibilities the Scottish Parliament and Ministers should have, and on how the different levels of government in the United Kingdom should work together.

## Improving the financial accountability of the Scottish Parliament

22. We have been asked how to improve the financial accountability of the Scottish Parliament. As well as the evidence we have taken, we have been assisted by a panel of distinguished experts on the subject. They helped us especially to understand how other countries fund regional governments. Their most important advice to us was that the system of funding should support the constitutional relationship that we want to see between Scotland and the rest of the UK.
23. The present funding system has got the Scottish Parliament off to a good start. The Scottish budget has been stable and predictable, and it has helped that the first decade of devolution has been at a time of rising public spending. The freedom the Parliament has in how to spend the money it receives has been good for devolution in its early years.
24. But the present system also has shortcomings. In particular because so much of the budget comes by grant from the UK Parliament, the Scottish Government and

Parliament are not accountable to the Scottish electorate for how revenue is raised in the same way that they are for how it is spent.

25. The Parliament already has the power to vary the basic rate of income tax in Scotland by plus or minus 3 pence in the pound (the "Scottish Variable Rate"). If used to the full this could change the Scottish Budget by a little over £1 billion, compared with total spending of around £30 billion. But there is no obligation on the Scottish Parliament to make a tax decision. If it does nothing at all it will get its annual budget from the UK Parliament just the same. No other UK level of government is like that, and our expert advisors found the funding of most regional governments worldwide had some transparent connection to tax receipts.
26. We have looked at alternative mechanisms through which the Scottish Budget might be funded. There are three main ways it might be done. The first is a grant paid from central taxation, as now. This can be used to make sure that the distribution is fair across the different parts of the UK. The second is to assign a share of the proceeds of some taxes raised in Scotland to the Scottish Parliament, for example some of VAT. This can promote efficiency, as it links the budget of the Scottish Parliament to the fortunes of the Scottish economy. But it has disadvantages too: it would make the amount of money the Scottish Parliament gets less predictable from year to year, and the Parliament would be unable to alter tax rates to help manage this uncertainty. Assignment would add risk to the Scottish Budget, especially at a time of economic difficulty. The third mechanism is to devolve some tax powers to the Scottish Parliament so that it can, put simply, decide whether to increase tax and spend more, or decrease it and spend less. That provides financial accountability, but has to be balanced with efficiency and equity.
27. In an economic Union devolving taxation could introduce serious economic inefficiencies, and the UK tax system is comparatively administratively efficient for taxpayers and government. We do not want to undermine or distort the efficient UK single market or create undue compliance costs. In our report we analyse in detail the scope for devolving taxes without creating economic problems. There are several taxes which we recommend should be devolved, because they tax items which are less mobile, and so are unlikely to cause significant economic distortions. They are Stamp Duty on property transactions, the Aggregates Levy, Landfill Tax and Air Passenger Duty. These also provide useful additional fiscal levers to the Scottish Parliament.
28. A much more substantial way to provide financial accountability is through income tax. Income tax rates have a clear and direct impact on many family budgets, and so can be a significant factor in how people vote – this makes politicians who set those rates keenly aware of the implications of their decisions. Almost all income tax payers are voters. It is also the highest yielding tax, raising about £10 billion a year in Scotland and so is capable of making up a significant proportion of the Scottish Budget.
29. The Scottish Variable Rate (SVR) provides a basis on which to build. It already allows the Scottish Parliament to share with the UK in the revenues from income tax, albeit in a limited way, and the statutory framework already exists for collecting a different rate of income tax in Scotland from the rest of the UK.
30. At present, the SVR applies only to the basic rate of income tax, and not to the higher rates. Nor does it apply to the tax which is charged on savings income such as interest from bank and building society accounts. We believe that the Scottish Parliament should have access to income from all of the rates of income tax, but that it should not be able to change the nature or the structure of the tax. What income is taxable, the various reliefs and allowances, the different bands of income to which different rates apply, how many rates there should be and how different those rates should be from each other

should all be decided at a UK level. This is because income tax is a progressive tax: as well as raising revenue it is used as a tool of redistribution of resources across society. We believe this should remain a function of national government, because it is an aspect of the social Union to which Scotland belongs.

31. Our recommendation is that the Scottish Parliament should be able to determine a “Scottish rate” of income tax applying to all rates, but should not be able to change the difference between the rates. In principle this should apply also to tax on income from savings and distributions, but there are practical problems. Most of this tax is collected at source by banks and building societies at the same rate for all savings accounts, and sent directly to the tax authorities. So in general banks do not have to know anything about the tax position of their customers. (Arrangements are made for savers who are not liable to pay any tax.) If there were to be a different Scottish rate applied to savings, then banks and other institutions would have to identify which of their customers was liable to pay tax at the “Scottish rate” and account for it separately. This would be a disproportionate administrative burden in relation to a tax which yields only about one tenth of the total of income tax in Scotland.
32. Instead of a separate “Scottish rate” of income tax on savings, we believe the yield for this tax should be shared between the Scottish Parliament and the UK Parliament by being assigned, that is to say, shared out on a formula basis, without any scope for the Scottish Parliament to decide on the tax rate. This will mean that all of income tax in Scotland is shared between the Parliaments.
33. The SVR has not been successful in creating financial accountability. One significant reason why is that the Scottish Parliament does not have to take a tax decision at all. We recommend that the Scottish Parliament should take a tax decision when it makes its budget choices. To make that happen, devolved tax revenue should be substituted for some of the block grant from the UK Parliament. The UK Government should reduce the rate of income tax applying in Scotland, at all rates, by 10 pence in the pound, and then reduce the grant to the Scottish Parliament by an equivalent amount. This would, in practice, allow the Scottish Parliament to levy its own “Scottish rate” of income tax (applying to all rates) to reinstate at least some of that income, or to raise even more.
34. So if the Scottish Parliament set a Scottish income tax rate of 10 pence then Scotland’s overall income tax rates would be the same as the rest of the UK and its spending would be the same as it would have been if it had been funded wholly by grant. But the Scottish Parliament could also decide to set a higher or lower “Scottish rate” than 10 pence, and its budget would be affected accordingly. The same principle should be applied to the whole of the four taxes we have identified for devolution. This will mean that over one third of devolved current spending would be funded by taxes decided and raised in Scotland. In our view that provides real accountability.
35. Whilst this recommendation will substantially reduce the Scottish Parliament’s reliance on grant from the UK Parliament, the grant will still provide a significant share of the funding for the Scottish Parliament. We think that this is right because it reflects the principle of the social Union, that taxes are pooled together and shared out in the form of a grant according to need. This allows for fairness in the provision of those welfare services which are part of the social Union. UK taxation includes, of course, taxes levied and collected by the UK Government in Scotland.
36. At the moment, annual changes to the amount of grant paid to the Scottish Parliament are determined by the Barnett formula. These changes have some relation to need as they depend on Scotland’s population relative to England’s. But the Barnett formula is often criticised as not being properly linked to any agreed measure of need and as leading to an outcome which is over-generous to Scotland. Agreeing what is a fair

measure of need is difficult, and using it to determine a level of spending seen as fair is a highly political process. Nevertheless, in our view need is the only basis on which grant funding can be properly justified, and it should be need for the common welfare services that comprise the social Union.

37. That, however, would require a needs assessment applying across the whole UK: it cannot be done for Scotland alone. We are not set up to make such an assessment and have no remit in relation to the rest of the UK. So it is not for us to judge whether the present level of public spending in Scotland is appropriate or not. Until such time as a needs assessment is conducted, the Barnett formula, proportionately reduced to take account of devolved taxes, can continue to be used to determine the grant element in the Scottish Budget.
38. At present, the Scottish Parliament has powers only to borrow from HM Treasury in order to manage its cash flow. Its capital expenditure, like its current expenditure, is determined by the Barnett formula. The tax powers we recommend will give the Scottish Parliament some control over its total spending. But if it is to be accountable for its spending decisions it should be able to influence the total of its capital spending in any one year as well. So we recommend that the Scottish Government has the capacity to borrow for capital investment on a Prudential basis. Borrowing does not, of course, increase the total that is available to spend in the long run: it has to be repaid, with interest, and in the long run additional spending can only be met from additional taxation. But it provides useful flexibility for the Scottish Parliament and can be managed within the UK's overall macro-economic framework.
39. The Scottish Parliament should not be wholly dependent on grant, because that does not allow it to be accountable to the people of Scotland. Our recommendations will mean a big enough part of its budget will come from devolved taxation for it to be genuinely accountable. We can see an argument for going further than that and decreasing further the proportion that comes in grant from the UK Parliament, to make clearer the extent to which the Scottish Parliament is financed from Scottish tax receipts. The best way to do this would be to assign some of the proceeds of some other taxes. This carries considerable risks for the Scottish Budget as it would become dependent on a stream of income over which the Scottish Parliament had no real control. We are not recommending that in our Report. It is, however, something which can be considered for the future when our recommendations have bedded in, and the possibility of assigning several percentage points of VAT and a share of fuel duty should be considered for implementation then.
40. Our recommendations will be a big change, and they will have to be introduced carefully, stage by stage. Implementation will have to be very carefully managed. Especially at a time of economic uncertainty, we need to avoid instability in the public finances, and either windfall gains or adverse shocks to the Scottish Budget simply from changes in the system. Because the Scottish budget will depend more on tax raised in Scotland, it will be exposed to the risks that taxes are more or less than expected. When the system is being phased in, there may need to be limits on how much of that risk it should bear. There will also need to be changes in the oversight of tax collection so that Her Majesty's Revenue and Customs can work on behalf of Scottish Ministers in collecting devolved taxes.
41. Our full recommendations are therefore a combination of funding mechanisms that strikes the right balance between equity, accountability and efficiency. They will neither disrupt the economic Union between Scotland and the rest of the United Kingdom nor break the bonds of common social citizenship which we describe as the social Union.

**RECOMMENDATION 3.1:** Part of the Budget of the Scottish Parliament should now be found from devolved taxation under its control rather than from grant from the UK Parliament. The main means of achieving this should be by the UK and Scottish Parliaments sharing the yield of income tax.

- a. Therefore the Scottish Variable Rate of income tax should be replaced by a new Scottish rate of income tax, collected by HMRC, which should apply to the basic and higher rates of income tax.
- b. To make this possible, the basic and higher rates of income tax levied by the UK Government in Scotland should be reduced by 10 pence in the pound and the block grant from the UK to the Scottish Parliament should be reduced accordingly.
- c. Income tax on savings and distributions should not be devolved to the Scottish Parliament, but half of the yield should be assigned to the Scottish Parliament's Budget, with a corresponding reduction in the block grant.
- d. The structure of the income tax system, including the bands, allowances and thresholds should remain entirely the responsibility of the UK Parliament.

**RECOMMENDATION 3.2:** Stamp Duty Land Tax, Aggregates Levy, Landfill Tax and Air Passenger Duty should be devolved to the Scottish Parliament, again with a corresponding reduction in the block grant.

**RECOMMENDATION 3.3:** The Scottish Parliament should be given a power to legislate with the agreement of the UK Parliament to introduce specified new taxes that apply across Scotland. The new procedure we are recommending in Part 4 of our Report for the Scottish Parliament to legislate on reserved issues with the agreement of the UK Parliament could be used for this.

**RECOMMENDATION 3.4:** The block grant, as the means of financing most associated with equity, should continue to make up the remainder of the Scottish Parliament's Budget but it should be justified by need. Until such times as a proper assessment of relative spending need across the UK is carried out, the Barnett formula, should continue to be used as the basis for calculating the proportionately reduced block grant.

**RECOMMENDATION 3.5:** This system will require a strengthening of the inter-governmental arrangements to deal with finance.

- a. The present Finance Ministers' Quadrilateral Meeting should become a Joint Ministerial Committee on Finance (JMC(F)), and should meet regularly on a transparent basis to discuss not just spending but taxation and macro-economic policy issues.
- b. HMRC should advise Scottish Ministers in relation to those devolved taxes it is tasked with collecting and their responsibilities in relation to income tax and should account to them for the operation of these Scottish taxes. Scottish Ministers should be consulted on the appointment of the Commissioners of HMRC.
- c. All the relevant spending or grant calculations done by HMRC and HM Treasury should be audited by National Audit Office (NAO) which should publish an annual report on the operation of the funding arrangements, including reporting to the new JMC(F) and to the Scottish Parliament.

**RECOMMENDATION 3.6:** These changes should be introduced in a phased way, step by step, to manage the risks of instability in public finances and of windfall gains or adverse shocks to the Scottish Budget.

**RECOMMENDATION 3.7:** The Scottish Ministers should be given additional borrowing powers.

- a. The existing power for Scottish Ministers to borrow for short term purposes should be used to manage cash flow when devolved taxes are used. Consideration should be given to using the power in the Scotland Act to increase the limit on it if need be.
- b. Scottish Ministers should be given an additional power to borrow to increase capital investment in any one year. There should be an overall limit to such borrowing, similar to the Prudential regime for local authorities. The amount allowed should take account of capacity to repay debt based on future tax and other receipts. Borrowing should be from the National Loans Fund or Public Works Loans Board.

## Strengthening cooperation between Governments and Parliaments

42. A recurring theme in our work has been the need for the different levels of Government to work together. This has come up when we looked at finance, and at legislative and executive powers. Scotland now has two Parliaments (as well as a European one). Each has distinct responsibilities, but they both serve the Scottish people. Inevitably there will be political differences and competition between their members. In a democracy this is healthy, but the two levels of government should still be expected to cooperate together for the public good.
43. There is already a basis to build on. The Governments can and do work together. Dealing with civil contingencies, such as the present swine flu outbreak, is a good example. The best developed example of cooperation between both Governments and Parliaments is what is known as the Sewel Convention, where the UK Parliament legislates for Scotland on devolved matters with the agreement of the Scottish Parliament. This is regularly used and works well in practice.
44. Overall, however, we have been struck by how underdeveloped the inter-governmental and inter-parliamentary arrangements are. In other countries where there is more than one level of government these relationships tend to be better organised, and are seen as an important element of the constitution.
45. We therefore make a series of recommendations which are designed to emphasise the need for the two levels of government to work better together, in a transparent way, and to offer more opportunities for cooperation, which we think that the people of Scotland have a right to expect. The guiding principle is one of mutual respect, as each Parliament has its proper responsibilities, and each has its own democratic mandate. Part 4 of our Report contains our detailed consideration, and our recommendations are set out below:

**RECOMMENDATION 4.1:** In all circumstances there should be mutual respect between the Parliaments and the Governments, and this should be the guiding principle in their relations.

**RECOMMENDATION 4.2:** As a demonstration of respect for the legislative competence of the Scottish Parliament, the UK Parliament should strengthen the Sewel Convention by entrenching it in the standing orders of each House.

**RECOMMENDATION 4.3:** The UK Parliament and Scottish Parliament should have mechanisms to communicate with each other:

- a. There should be detailed communication about legislative consent motions (LCMs), and in particular if a Bill subject to an LCM is amended such that it is outside the scope of the LCM.
- b. A mechanism should exist for each Parliament to submit views to the other, perhaps by passing a motion where appropriate.

**RECOMMENDATION 4.4:** The UK Parliament should end its self-denying ordinance of not debating devolved matters as they affect Scotland, and the House of Commons should establish a regular “state of Scotland” debate.

**RECOMMENDATION 4.5:** A standing joint liaison committee of the UK Parliament and Scottish Parliament should be established to oversee relations and to consider the establishment of subject-specific ad hoc joint committees.

**RECOMMENDATION 4.6:** Committees of the UK and Scottish Parliaments should be able to work together and any barriers to this should be removed.

- a. Any barriers to the invitation of members of committees of one Parliament joining a meeting of a committee of the other Parliament in a non-voting capacity in specified circumstances should be removed.
- b. Any barriers to committees in either Parliament being able to share information, or hold joint evidence sessions, on areas of mutual interest, should be removed.
- c. Mechanisms should be developed for committees of each Parliament to share between them evidence submitted to related inquiries.

**RECOMMENDATION 4.7:** To champion and recognise the importance of interaction between the Parliaments and Governments:

- a. UK and Scottish Government Ministers should commit to respond positively to requests to appear before committees of the others’ Parliament.
- b. The UK Government Cabinet Minister with responsibility for Scotland (currently the Secretary of State for Scotland) should be invited to appear annually before a Scottish Parliament committee comprised of all committee conveners, and the First Minister should be invited to appear annually before the House of Commons Scottish Affairs Committee.

**RECOMMENDATION 4.8:** Shortly after the Queen’s Speech the Secretary of State for Scotland (or appropriate UK Government Cabinet Minister), should be invited to appear before the Scottish Parliament to discuss the legislative programme and respond to questions in a subsequent debate. Similarly, after the Scottish Government’s legislative programme is announced the First Minister should be invited to appear before the Scottish Affairs Committee to outline how Scottish Government legislation interacts with reserved matters.

**RECOMMENDATION 4.9:** Where legislation interacts with both reserved and devolved matters there should be continued cooperation:

- a. For any UK Parliament Bill which engages the Sewel Convention on a matter of substance, consideration should be given to including one or more Scottish MPs on the Public Bill Committee, who should then be invited, as appropriate, to meet the Scottish Parliament committee scrutinising the legislative consent memorandum.
- b. A Scottish Minister should as appropriate be asked to give evidence to the UK Parliament committee examining Orders made under the Scotland Act.

**RECOMMENDATION 4.10:** Either the Scottish Parliament or either House of the UK Parliament should be able, when it has considered an issue where its responsibilities interact with the other Parliament's, to pass a motion seeking a response from the UK or Scottish Government. The relevant Government in each case should then be expected to respond as it would to a committee of its own Parliament.

**RECOMMENDATION 4.11:** There should be a greater degree of practical recognition between the Parliaments, acknowledging that it is a proper function of members of either Parliament to visit and attend meetings of relevance at the other; and their administrative arrangements should reflect this.

**RECOMMENDATION 4.12:** The Joint Ministerial Committee (JMC) machinery should be enhanced in the following ways:

- a. The primary focus should be on championing and ensuring close working and cooperation rather than dispute resolution (though it will be a forum to consider the latter as well).
- b. There should be an expanded range of areas for discussion to provide greater opportunities for cooperation and the development of joint interests.
- c. There should be scope to allow issues to be discussed at the appropriate level including the resolution of areas of disagreement at the lowest possible level.

**RECOMMENDATION 4.13:** The JMC should remain the top level, and meet in plenary at least annually, but most importantly to a longstanding timetable. In addition:

- a. JMC(D) and JMC(E) should continue in much the same form, but with more regular meetings and to a longstanding timetable. There should be an additional JMC(Finance) which subsumes the role of the Finance Quadrilateral.
- b. Sitting below the JMC(D), JMC(E) and JMC(F) meetings should be a senior officials level meeting, JMC(O).

**RECOMMENDATION 4.14:** Where inter-governmental ministerial meetings are held to discuss the overall UK position in relation to devolved policy areas, the relevant Secretary of State should generally chair these meetings on behalf of the overall UK interest, with another relevant UK Minister representing the policy interests of the UK Government in relation to those parts of the UK where the policy is not devolved.

**RECOMMENDATION 4.15:** A new legislative procedure should be established to allow the Scottish Parliament to seek the consent of the UK Parliament to legislate in reserved areas where there is an interaction with the exercise of devolved powers.

**RECOMMENDATION 4.16:** In the development of the UK Government policy position in relation to the EU:

- a. Early and proactive engagement by the relevant UK Government department with its Scottish Government counterpart should be a matter of course.
- b. In addition Scottish Ministers and the relevant Scottish Parliament committee should become more proactive in identifying EU issues of interest to Scotland at an early stage, and taking the initiative accordingly.
- c. The JMC(E) should continue to be used to determine the UK Government position on EU matters.

**RECOMMENDATION 4.17:** To ensure Scottish Ministers are visibly engaged with EU business affecting their interests:

- a. When a request is received there should be a presumption that Scottish Ministers are accepted as part of the UK delegation where EU matters which cover devolved areas are for discussion;
- b. When Scottish Ministers request to speak in support of the agreed UK Government line there should be a presumption that this is granted wherever practicable.

**RECOMMENDATION 4.18:** Closer involvement between Scottish MEPs and the Scottish Parliament is needed, and Scottish MEPs should be invited to attend, and should attend, the Scottish Parliament European and External Relations Committee regularly on a non-voting basis. The Committee should schedule its meetings to facilitate their regular attendance.

**RECOMMENDATION 4.19:** The JMC process should be subject to greater Parliamentary scrutiny, and have greater public transparency:

- a. Agendas and timelines should be published in advance of each JMC, JMC(E), JMC(D) or JMC(F) meeting, and a communiqué from each should be issued.
- b. After each full JMC meeting the First Minister should make a statement to the Scottish Parliament, and the Prime Minister, or UK Government Cabinet Minister with responsibility for Scotland, should make a statement to the UK Parliament.
- c. An annual report of the JMC should be prepared, and laid by each Government before its Parliament, and it should be scrutinised by the new standing joint liaison committee of the UK Parliament and the Scottish Parliament.

**RECOMMENDATION 4.20:** Scottish MPs should actively demonstrate appropriate oversight and stewardship of the constitution by way of regular scrutiny of the shape and operation of the devolution settlement.

**RECOMMENDATION 4.21:** The responsibility for appointing, or approving appointments of, senior civil servants to senior posts in the Scottish Government should be delegated by the Prime Minister to the Head of the Home Civil Service, acting on the advice of the UK Civil Service Commissioners.

**RECOMMENDATION 4.22:** The Commission has heard of a lack of understanding of devolution within some UK Government departments, and this should be addressed by reinvigorated training and awareness raising programmes.

**RECOMMENDATION 4.23:** The Civil Service Codes should be amended to recognise the importance of cooperation and mutual respect.

## Strengthening the devolution settlement

46. The Scottish Parliament has very wide legislative powers. It can make law on anything that is not reserved to the UK Parliament. That enables it to deal with most domestic issues in Scotland – crime and justice, health, education, housing, transport and economic development, the environment, agriculture and fisheries and many other matters. Reserved issues include defence and foreign affairs, macro-economic management and social security.
47. The evidence we have had is that the division of responsibilities in the Scotland Act was well thought through and works well in practice. So we have not looked again at every element of these responsibilities, but instead at areas where there appear to be problems or pressures for change. These included: constitution and institutions; culture, charities, sport and gaming; employment and skills; energy; environment and planning; health and biosecurity; justice and home affairs; marine and fisheries; revenue and tax raising; science, research and higher education; social security; trade and commerce and others. Our detailed discussion of each of these is in Part 5 of our Final Report, and is not repeated here.
48. One important general theme in looking at these areas is that, although the split between devolved and reserved areas is well drawn at present, there will always be areas where the responsibilities of the different levels of government interact with one another. These are often the areas which are identified as areas for possible change. But it is clear that simply re-drawing the boundary will in many cases not solve the problem: there will always be interactions and overlaps wherever it is set. This emphasises that what is often needed is more effective arrangements for cooperation between the different levels of government.
49. Nevertheless we have identified a number of places where the boundary of the settlement – either the legislative powers of the Scottish Parliament or the powers of Scottish Ministers – should be adjusted. These include a number of matters which we think should be devolved. Each is discussed in detail in our Report, to which the numbering below refers. They are:

**RECOMMENDATION 5.1:** The powers of the Secretary of State for Scotland relating to the administration of elections to the Scottish Parliament should be devolved.

**RECOMMENDATION 5.4:** The responsibility for the appointment of the Scottish member of the BBC Trust should be exercised by Scottish Ministers, subject to the normal public appointments process.

**RECOMMENDATION 5.10:** Funding for policy relating to animal health should be devolved whilst responsibility for funding exotic disease outbreaks should be retained at a UK level.

**RECOMMENDATION 5.13:** The regulation of airguns should be devolved to the Scottish Parliament.

**RECOMMENDATION 5.14:** Responsibility for those aspects of the licensing and control of controlled substances that relate to their use in the treatment of addiction should be transferred to Scottish Ministers.

**RECOMMENDATION 5.15:** Regulation-making powers relating to drink-driving limits should be transferred to Scottish Ministers.

**RECOMMENDATION 5.16:** The power to determine the level of the national speed limit in Scotland should be devolved.

**RECOMMENDATION 5.17:** The effectiveness of the agreement [on marine planning] reached by the UK and Scottish Governments should be kept under review by the inter-governmental machinery, and nature conservation should be devolved to the Scottish Parliament at the earliest appropriate opportunity, taking into account the experience and evidence to be gained from the operation of the regime set out in the respective Marine Bills.

**RECOMMENDATION 5.21:** The Deprived Areas Fund should be devolved to the Scottish Parliament given the geographic nature of the help it is designed to provide and the fit with the Scottish Government's wider responsibilities.

**RECOMMENDATION 5.22:** As part of its considerations as to future reform of the Social Fund, the UK Government should explore devolving the discretionary elements of the Fund to the Scottish Parliament.

50. Similarly, there are a number of areas where we think that matters would be more effectively dealt with at a UK level. These are:

**RECOMMENDATION 5.2:** There should be a single definition of each of the expressions "charity" and "charitable purpose(s)", applicable for all purposes throughout the United Kingdom. This should be enacted by the UK Parliament with the consent of the Scottish Parliament.

**RECOMMENDATION 5.3:** A charity duly registered in one part of the United Kingdom should be able to conduct its charitable activities in another part of the UK without being required to register separately in the latter part and without being subject to the reporting and accounting requirements of the regulator in that part.

**RECOMMENDATION 5.11:** The Scottish Parliament should not have the power to legislate on food content and labelling in so far as that legislation would cause a breach of the single market in the UK by placing a burden on the manufacturing, distribution and supply of foodstuffs to consumers, and Schedule 5 to the Scotland Act should be amended accordingly.

**RECOMMENDATION 5.12:** The regulation of all health professions, not just those specified in the Scotland Act, should be reserved.

**RECOMMENDATION 5.23:** The UK Insolvency Service, with appropriate input from the relevant department(s) of the Scottish Government, should be made responsible for laying down the rules to be applied by insolvency practitioners on both sides of the border. This should be achieved by UK legislation.

51. In addition to these areas where we recommend adjustment to the boundary of the settlement, there are a number of matters where we think the issues we have considered can be addressed through closer working between the Parliaments and the Governments. These include:

**RECOMMENDATION 5.5:** In recognition of the close interaction of the Health and Safety Executive's reserved functions with areas of devolved policy, a closer relationship between the HSE in Scotland and the Scottish Parliament should be developed.

**RECOMMENDATION 5.6:** Whilst retaining the current reservation of immigration, active consideration (supported by inter-governmental machinery) should be given to agreeing sustainable local variations to reflect the particular skills and demographic needs of Scotland.

**RECOMMENDATION 5.7:** In dealing with the children of asylum seekers, the relevant UK authorities must recognise the statutory responsibilities of Scottish authorities for the well-being of children in Scotland.

**RECOMMENDATION 5.8:** The Secretary of State for Scotland should, in consultation with Scottish Ministers, more actively exercise his powers of direction under the Crown Estate Act 1961 and, having consulted Scottish Ministers, should give consideration to whether such direction is required immediately.

**RECOMMENDATION 5.9:** The appointment of a Scottish Crown Estate Commissioner should be made following formal consultation with Scottish Ministers.

**RECOMMENDATION 5.18:** Research Councils UK should re-examine its approach to funding so that Scottish institutions [such as the Scottish Agricultural College] delivering a comparable function to institutions elsewhere in the UK have access to the same sources of research funding, with the aim of ensuring that the effective framework for research that has been established across the UK is not jeopardised.

**RECOMMENDATION 5.19:** There should be scope for Scottish Ministers, with the agreement of the Scottish Parliament, to propose changes to the Housing Benefit and Council Tax Benefit systems (as they apply in Scotland) when these are connected to devolved policy changes, and for the UK Government – if it agrees – to make those changes by suitable regulation.

**RECOMMENDATION 5.20:** A formal consultation role should be built into DWP's commissioning process for those welfare to work programmes that are based in, or extend to, Scotland so that the views of the Scottish Government on particular skills or other needs that require to be addressed in Scotland are properly taken into account.

**RECOMMENDATION 5.24:** The interpretation provision in relation to "social security purpose" in the Scotland Act should be amended to make it clear that the reservation refers to social security purposes related to the type of provision provided by the UK Department for Work and Pensions.

## Strengthening the Scottish Parliament

52. Finally we have also considered how the Scottish Parliament itself works. The full detail of our consideration and recommendations can be found in Part 6 of our report.
53. In particular we have considered the robustness of the Scottish Parliament's procedures for scrutinising legislation. The main area where we were struck that the Parliament might be more effective was its scrutiny of Bills towards the end of the legislative process. Currently, the final opportunity to amend the Bill and the debate on whether to pass it are taken together in one stage (called Stage 3). As a result, MSPs have almost no time to reflect on the amendments they have just made before the Bill is passed into law. We have therefore concluded that Stage 3 should routinely be split into two separate stages, held on different days. Related to this was a concern that novel amendments could be made to a Bill at Stage 3, and as a result could receive insufficient scrutiny (particularly by interested stakeholders, who were otherwise very positive about the Parliament's legislative process). We therefore recommend that the Presiding Officer should have the power to identify in advance Stage 3 amendments which, in his view, raise substantial new issues. If the Parliament agrees to any such amendments, the relevant provisions should be referred back to a committee for further scrutiny before the Bill as a whole can be passed, unless the Bill's promoter can persuade the Parliament that this is not necessary.

The full detail of our consideration of these and other aspects of the Parliament's operation can be found in Part 6 of our Report. Our recommendations are:

**RECOMMENDATION 6.1:** In relation to the Parliament's committee system:

- a. The structure of dual-purpose committees established both to carry out investigative inquiries and to undertake the detailed scrutiny of legislation, should be maintained.
- b. The level of turnover of committee memberships during a session should be minimised, in order to enable committee members to build expertise.
- c. Committees should have the facility to establish sub-committees to address temporary problems of legislative overload, without this requiring the prior approval of the Parliament as a whole.

**RECOMMENDATION 6.2:** The current three-stage Bill process should be changed to a four-stage process, with Stage 3 becoming limited to a second main amending stage, taken in the Chamber, while the final debate on whether to pass the Bill would become Stage 4.

**RECOMMENDATION 6.3:** The Parliament should amend its rules so that any MSP has the right to propose, at the conclusions of the Stage 3 amendment proceedings, that parts of a Bill be referred back to committee for further Stage 2 consideration.

**RECOMMENDATION 6.4:** The Presiding Officer should be able to identify in advance of Stage 3 amendments that (in his view) raise substantial issues not considered at earlier stages. If, at the end of the amendment proceedings, any such amendment has been agreed to, relevant provisions of the Bill should be referred back to committee for further Stage 2 consideration unless the Parliament decides otherwise (on a motion that may be moved only by the member in charge of the Bill).

**RECOMMENDATION 6.5:** Section 31(1) of the Scotland Act should be amended to require any person introducing a Bill in the Parliament to make a statement that it is (in that person's opinion) within the Parliament's legislative competence.

**RECOMMENDATION 6.6:** The Explanatory Notes published with a Bill should give a general account of the main considerations that informed the statement on legislative competence under section 31(1).

**RECOMMENDATION 6.7:** Section 19(1) of the Scotland Act should be amended so as to loosen the requirement on the Parliament to appoint a Presiding Officer and deputies at the first meeting of a new session, and to enable additional deputies to be appointed if and when that becomes appropriate.

**RECOMMENDATION 6.8:** There should be a review of all other provisions in the Act that constrain the Parliament in terms of its procedures or working arrangements to ensure they are proportionate, appropriate and effective.

# Part 1: Our task

## Summary

In this introductory Part of our Report we explain how the Commission was established, our remit and membership. We describe how we have gone about our task and how we have engaged with people in Scotland. We also set out some of the historical background to the current devolution settlement, how it is designed and has operated in practice and how devolution to Scotland fits into the wider United Kingdom constitution.

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## Part 1–A: Introduction

### Establishment and remit of the Commission

- 1.1 The Commission on Scottish Devolution was set up by the Scottish Parliament and the United Kingdom Government. The remit of the Commission is:

**To review the provisions of the Scotland Act 1998 in the light of experience and to recommend any changes to the present constitutional arrangements that would enable the Scottish Parliament to serve the people of Scotland better, improve the financial accountability of the Scottish Parliament, and continue to secure the position of Scotland within the United Kingdom.**
- 1.2 This remit was agreed by the Scottish Parliament on 6 December 2007 when it resolved to support a motion calling for “the establishment of an independently chaired commission to review devolution in Scotland”.<sup>1.1</sup>
- 1.3 The motion not only set out a remit for the Commission, but also encouraged UK parliamentarians and parties to support it. The motion called on the Scottish Parliamentary Corporate Body to provide “appropriate resources and funding”. The motion was given a clear Parliamentary endorsement (by 76 votes to 46 with 3 abstentions). An amendment to the motion, which called for a referendum with independence as one of the options, was defeated (by the same margin).
- 1.4 The UK Government first indicated its support for the Commission in a Written Answer in the House of Lords on 31 January 2008.<sup>1.2</sup> It then pledged to provide resources to support the Commission’s work in a Written Ministerial Statement on 25 March 2008.<sup>1.3</sup>
- 1.5 The Commission is independent of any political party, and of our sponsors the Scottish Parliament and the UK Government. It reports to both, and it will be for them to consider how best to take forward the Commission’s conclusions and recommendations.

### Membership

- 1.6 Kenneth Calman was announced as the Chairman of the Commission on 25 March 2008, and the rest of the membership was confirmed on 28 April, the day on which the Commission first met at the Scottish Parliament.
- 1.7 Six of the fifteen members were nominated by the three political parties that supported the motion in the Scottish Parliament – two each by the Labour, Liberal Democrat and Conservative parties – and bring extensive experience of public life, both at devolved and UK level. The majority of the members, including the chairman, have no direct connection with any political party, but instead bring a wide range of skills and experience from the public, private and voluntary sectors.
- 1.8 The full membership is listed on page ii.

1.1 The full text of the debate, including the resulting resolution, is available on the Scottish Parliament’s website: <http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-07/sor1206-02.htm#Col4133>.

1.2 [http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/80131w0002.htm#column\\_WA145](http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/80131w0002.htm#column_WA145).

1.3 [http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080325/wmstext/80325m0002.htm#column\\_7WS](http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080325/wmstext/80325m0002.htm#column_7WS).

- 1.9 The Commission is supported in its work by a secretariat, including officials seconded from the Scottish Parliament and the UK Government, and based both in Edinburgh and London. It has also been able to draw on practical assistance and resources from both of these institutions. The Scottish Parliament has made available committee rooms and other facilities for meetings and oral evidence sessions, and provided access to research and information services, while the UK Government has provided meeting rooms, administrative support and assistance with media relations. The Commission is grateful to both institutions for all of this assistance.

## Structuring our work

- 1.10 From the outset, the Commission committed itself to producing a first report in 2008 and a final report in 2009. Meetings of the full Commission were held approximately once a month. Recognising the extent of the challenge involved in addressing its remit within that timescale, the Commission put in place a flexible structure of “Task Groups” which took forward the main strands of activity in between Commission meetings.
- 1.11 The Task Groups established were as follows:
- **Principles** – to consider the underlying principles by reference to which the Commission should develop its thinking and its conclusions. Chaired by Kenneth Calman, this group included David Edward, Jamie Lindsay and Matt Smith.
  - **Functions** – to consider the current boundary between the devolved responsibilities of the Scottish Parliament and the reserved responsibilities of the UK Parliament, and to recommend where that boundary might be moved or otherwise adjusted. Chaired by David Edward, this group included Colin Boyd, Jamie Lindsay, Shonaig Macpherson, Iain McMillan, Mona Siddiqui and Matt Smith.
  - **Engagement** – to consider how the Commission could communicate as widely and effectively as possible about its work, engage with the people of Scotland and gather the evidence and information it needs. Chaired by Murdoch MacLennan, this group included Rani Dhir, Audrey Findlay, John Loughton and James Selkirk.
  - **Financial Accountability** – to consider the current funding arrangements for the Scottish Parliament and the various alternative options, with a view to recommending ways in which the Parliament’s financial accountability can be improved. Chaired by Shonaig Macpherson, this group included Murray Elder, Iain McMillan, James Selkirk, Matt Smith and Jim Wallace.
  - **Inter-governmental Relations** – to consider how effectively Ministers, civil servants and parliamentarians at UK and Scottish levels engage with each other, both on domestic issues and in the context of Scotland’s relations with the European Union. Chaired by Jim Wallace, this group included Murray Elder, Jamie Lindsay, and Mona Siddiqui.
- 1.12 Because of the particular complexity of the financial aspects of its remit, the Commission invited Professor Anton Muscatelli, the Principal and Vice-Chancellor of Heriot-Watt University, to chair a group of academics with expertise in public finance and related subjects. The role of this Independent Expert Group was to provide the Commission with the best available information about funding options in a devolved context, informed by international comparisons. Their work is discussed in Part 3 of this report.

## The First Report

- 1.13 The Commission published its First Report on 2 December 2008. The First Report was an interim report to set out the progress the Commission had made and provide the basis for further dialogue and evidence gathering.
- 1.14 Shortly after the publication of the First Report, on 19 December 2008 the Commission published a short summary and consultation document, which was widely distributed. This document contained a number of questions – general and specific – across the range of the Commission’s work, and sought views on whether there were other areas the Commission should consider. The consultation is discussed further in Part 1-B, Engagement.

## This Final Report

- 1.15 This report is the culmination of the Commission’s work. Our aim is to set out our analysis of the issues and the conclusions we have reached, and to make recommendations to fulfil our remit. Our recommendations are intended to make clearer Scotland’s place in the Union and its relationship with the rest of the United Kingdom, develop the relationships between the Parliaments and the Governments, strengthen the financial accountability of the Scottish Parliament and enable it to serve the people of Scotland better. In a small number of areas we set out options for change where we believe further debate is needed, and draw evidence we have received to the attention of those bodies which are more appropriate to consider it.

## The conclusion of the Commission’s work

- 1.16 This report marks the conclusion of the Commission’s work, and it is for our two sponsors, the Scottish Parliament and the UK Government, to determine the next steps.
- 1.17 The Commission is grateful to all those who have supported and given evidence to us. In particular we thank the Scottish Parliament and the UK Government for providing us with the resources necessary to conduct this work, and most importantly each individual and organisation (listed at Annexe 1) that has provided evidence to us over the past 13 months.

## Part 1–B: Engagement: ensuring a wide evidence base

- 1.18 Devolution is a means to an end. Like all constitutional arrangements its purpose is to serve the people of the country and to make their lives better. So in order to understand how well it is working we have sought the widest possible evidence base through engagement with the people of Scotland (and those elsewhere in the United Kingdom) in gathering their views, including those with specialist expertise in the subjects we have been studying.

### Introduction

- 1.19 At the outset of its work, the Commission determined that it would operate throughout in an open and transparent manner, that it would be inclusive of all shades of opinion relevant to its remit, and that its approach would be rigorously based on evidence. Throughout its work, up to its final consultation and analysis stages, the Commission has given prime importance to engaging with the public. The Commission therefore committed to hearing from as many people as possible throughout its proceedings. This approach has best enabled it to produce recommendations for strengthening devolution to improve the lives of the people of Scotland that are rooted in their experiences and hopes.
- 1.20 The Commission therefore committed early to a wide-ranging, structured engagement programme.
- 1.21 The Engagement Task Group directed this programme by producing an engagement strategy and keeping it under constant review. This was designed to raise the profile of the Commission, to reach out to and listen to members of the public, and to identify and engage civic organisations and experts.

### Our programme of engagement

- 1.22 Details of the Commission's engagement approach during the first phase of work were published on the Commission's website<sup>1.4</sup> in September 2008 and in its First Report in December 2008. This section reiterates the key features of the first-phase engagement, as well as detailing those of the second phase.
- 1.23 Throughout, the Commission has determined to be accountable, and it believed that the best way to do this was through transparency. The Commission has therefore taken all practical steps to publish evidence received and deliver updates on its own deliberations. This has continued throughout the second phase of work.
- 1.24 The main modes of engagement used in the first phase were continued into the second. These included oral evidence sessions, local engagement events, written submissions, questionnaire responses, an on-line discussion forum, informal meetings and, as its main method of communication, a detailed and regularly updated website.

1.4 [www.commissiononscottishdevolution.org](http://www.commissiononscottishdevolution.org).

## The website

- 1.25 The website has been a vital engagement tool, and most people who have engaged with the Commission have done so through it, whether by reading evidence or other material posted on it, by emailing a written submission or by filling in the on-line questionnaire. And to ensure that the widest possible audience is reached, pages have also been made available in Gaelic, with the option of translation into other languages upon request also provided. The website has been very well utilised, with over 13,000 unique visitors and approximately 130,000 page visits over 13 months (early May 2008 to end of May 2009). This reflects the interest in their work that Commission members have personally experienced around the country, and feedback on the website itself and its content has been very positive.
- 1.26 The website used a variety of methods to convey information and promote feedback, including an on-line diary, a link to a Facebook forum, and webcasts of a number of oral evidence sessions. Users were given the opportunity to subscribe for regular updates, alerting them by e-mail to new material posted.<sup>1.5</sup>

## The Commission's leaflet

- 1.27 The Commission acknowledged at an early stage, however, that many do not have easy access to the internet and that others prefer not to make their views known on-line. We therefore took steps to provide information and promote engagement by more traditional means as well.
- 1.28 In particular, an information leaflet was widely distributed across Scotland – approximately 150,000 copies to around 7,000 premises – to raise awareness of the Commission's work.<sup>1.6</sup>

## The questionnaire

- 1.29 An important strand of the Commission's engagement strategy was a questionnaire, which was made available both on-line and in paper form (at engagement events and upon request from those responding to the leaflet) between 10 September 2008 and 30 March 2009. Multiple-choice questions allowed people to indicate their views on particular aspects of devolution, with space included to allow free-text contributions. Important quantitative evidence on the success of devolution to date was collected as a result, as well as useful qualitative material on specific issues which the Commission then considered. The questionnaire had a good response, with 424 on-line and 497 paper completions received. This indicates that it served its intended purpose well, that of allowing people to give valuable information relatively quickly and accessibly, whether or not they wished to follow up in more detail.
- 1.30 An analysis of the questionnaire data is available on the Commission website.<sup>1.7</sup> As respondents were entirely self-selecting the results, although interesting and valid for that group, constitute a non-random sample not necessarily representative of public opinion. (The overall picture appears, however, to be generally consistent with other public opinion surveys which have been carried out on a more representative basis.)

1.5 By 1 June 2009, 30 updates had been issued. The total number of subscribers by that date was over 190.

1.6 This is available on the Commission's website: <http://www.commissiononscottishdevolution.org.uk/uploads/2008-08-19-leaflet.pdf>.

1.7 <http://www.commissiononscottishdevolution.org.uk/engage/questionnaire.php>.

Around three-quarters of respondents believed devolution has produced better results for the people of Scotland. Respondents also indicated approval of the Scottish Government and Scottish Parliament, and favoured more functions being devolved to the Scottish Parliament. And respondents felt that the Parliament's tax powers, and the electoral system and number of MSPs, should be changed or at least re-considered, and did not consider inter-governmental relations to have been effective so far.

## Local engagement events and other public meetings

- 1.31 The Commission also completed an extensive programme of 12 local engagement events around the country, to consult directly and face-to-face with the people of Scotland and beyond.
- 1.32 In the autumn of 2008, events were held in Glasgow, Dumfries, Inverness, Dundee, Stornoway, Ayr and Newcastle, and then in spring 2009, further events were held in Stirling, Aberdeen, Lerwick and Kirkwall. In Dundee there were two events, including one specifically for pupils from Grove Academy, which was very well received by Commission members and delegates. The format of the events was designed to ensure that people's voices were heard, and that interactive dialogue took place between attendees and Commission members. The events were publicised through the Commission's website, local posters, articles in the press, local radio publicity, open invitations by local civic organisations and invitations from the Commission. Over 300 people attended these events.
- 1.33 The 2008 events enabled people to discuss their experience to date of devolution within the Union, how the financial accountability of the Scottish Parliament might be improved, how well functions and responsibilities are distributed across government, and how inter-governmental relations might be improved. A slightly different format was adopted at the Newcastle event to reflect the different perspective of those attending as neighbours of Scotland. The 2009 events had more focused themes tailored to the locations visited – intergovernmental relations in Stirling, the impact on business in Aberdeen, and the perspective from remoter parts of Scotland in Orkney and Shetland. Feedback forms showed largely positive responses to the events themselves. Notes of the main comments made by participants are available on the Commission's website.<sup>1.8</sup>
- 1.34 The Chairman and other Commission members undertook a number of other public engagements – for example, giving presentations on the Commission's work to local meetings of the Workers Educational Association (WEA), and speaking to professional bodies including the Chartered Institute of Public Finance and Accountancy (CIPFA).<sup>1.9</sup>

1.8 <http://www.commissiononscottishdevolution.org.uk/engage/events.php>.

1.9 A copy of the Chairman's presentation to CIPFA is available on the Commission's website: <http://www.commissiononscottishdevolution.org.uk/uploads/2009-03-26-sir-ken-calman-presentation-to-cipfa-20-march-2009.pdf>.

## Written submissions

- 1.35 Throughout its proceedings, the Commission made three calls for written submissions, starting very generally and gradually focusing on more specific issues. These were publicised on the website, and were supplemented by letters to a wide range of organisations across civic Scotland and beyond. A preliminary call for evidence asked for suggestions of topics that the Commission should consider. It was made on 22 May 2008, and ran until 13 June 2008. This was followed by a general consultation, running from 18 June to 3 September 2008, inviting responses to nine questions covering all aspects of the Commission's remit. A second general call for evidence was launched by the First Report on 2 December 2008 and by the Consultation Document published on 19 December 2008. The latter highlighted 45 specific questions raised in the First Report, but nonetheless clarified that the Commission was still welcoming evidence on any matter within its remit. It asked for responses by 27 February 2009, although later responses were accepted.
- 1.36 All the written submissions received have been published on the Commission's website (with a handful of exceptions that were outside the remit, or where confidentiality was requested).<sup>1.10</sup> The published submissions consist of 37 responses to the preliminary consultation, 66 responses to the first general consultation, 78 to the second general consultation and 116 miscellaneous submissions (not directly responding to any of the calls for evidence).
- 1.37 A full list of the individuals that made written submissions is set out in Annexe 1. It includes many organisations and professional bodies, politicians (MPs, MSPs, MEPs and councillors) and political parties, academics, lawyers, charities, public bodies and individuals. The UK Government made two submissions in November 2008 and April 2009, while the Scottish Government made two submissions in March and April 2009.
- 1.38 The Commission's consultation with organisations in Scotland included not only a considerable number of groups, but also a number of representative groups with large memberships, such as the Church of Scotland and the Scottish Trades Union Congress. The evidence from such groups can therefore be considered to be generally, although not wholly, representative of their respective memberships, rendering the scale of the exercise significantly wide.

## Oral evidence

- 1.39 The Commission arranged 52 public oral evidence sessions to which it invited a wide range of representative bodies, civic organisations, industry and business groups, academic and professional associations, and experts on specific issues. These sessions were open for the public to attend, and those held at the Scottish Parliament were also broadcast live on the internet. Other evidence sessions were held in a committee room of the House of Lords and in Edinburgh Council rooms. In each case, a full transcript of the evidence was published on the Commission's website.<sup>1.11</sup>
- 1.40 The Commission also held 27 oral evidence sessions in private (either at the request of witnesses, or where public facilities were not available). For each session an agreed note of the discussion was published afterwards on the Commission's website.<sup>1.12</sup>

1.10 <http://www.commissiononscottishdevolution.org.uk/engage/submissions-received.php>.

1.11 <http://www.commissiononscottishdevolution.org.uk/engage/oral-evidence.php>.

1.12 <http://www.commissiononscottishdevolution.org.uk/papers.php>.

## Other sources

- 1.41 The Commission has drawn upon a range of other material in formulating its conclusions. In particular, it has benefited greatly from the work of the Independent Expert Group, chaired by Professor Anton Muscatelli, on financial accountability (which is discussed further in Part 3); a review of the experience of the first decade of devolution in Scotland from the Constitution Unit in the Department of Political Science at University College London; and a paper by the David Hume Institute on economic aspects of devolution.<sup>1.13</sup>
- 1.42 Commission members also undertook a significant number of informal meetings with a variety of people, including members of the public, politicians, government and parliament officials, academics and other experts.
- 1.43 The Commission also made use of a considerable number of other publications and evidence sources, and has attempted to cite any references to these where appropriate.

## Engagement through the media

- 1.44 The Commission worked directly with the media to raise its profile and highlight ways in which people could contribute their views. The Chairman undertook a number of press and television interviews to highlight and update on on-going work. The Commission also released updates through regional channels, including giving interviews and details of public events to regional newspapers and local radio stations. And the Commission's website also has a News page on which regular updates and announcements have been posted.<sup>1.14</sup>
- 1.45 The Commission were also glad to hold a specific evidence session with newspaper editors and commentators to receive their perspectives on devolution.
- 1.46 The Chairman has, to date, appeared twice before the House of Commons Scottish Affairs Committee to give evidence on the work of the Commission. The transcripts of these sessions are available on the UK Parliament website.<sup>1.15</sup>

## General messages from our evidence

- 1.47 The overwhelming balance of evidence the Commission has received is that Scottish devolution has been a success. This message has come through strongly both in the quantitative data from the public questionnaire and qualitatively in the vast majority of the oral evidence and written submissions.
- 1.48 The evidence is that people feel that the Scottish Parliament has delivered Scottish solutions to Scottish problems. They value the fact that devolved policy decisions reflect what is best for Scotland. And they feel particular Scottish circumstances and views on devolved policy areas are better considered by the new body politic in Scotland.

1.13 All are posted on the Commission's website (Papers page): <http://www.commissiononscottishdevolution.org.uk/papers.php>.

1.14 <http://www.commissiononscottishdevolution.org.uk/news/index.php>.

1.15 [http://www.publications.parliament.uk/pa/cm200809/cmselect/cmstotaf/uc254\\_i/uc25402.htm](http://www.publications.parliament.uk/pa/cm200809/cmselect/cmstotaf/uc254_i/uc25402.htm);  
<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmstotaf/704/8061101.htm>.  
 Links are also available on the Commission's website via the Links page.

- 1.49 People have reported the benefits of greater closeness to their elected politicians, not just in terms of geography and consequently accessibility, but in the level of understanding of Scottish issues. Accessibility is of course important, and people have welcomed the new legislators working in their midst. Some have visited the Scottish Parliament and participated in its committees, when they may not necessarily have made it to the UK Parliament. And they have noted the consistent focus of the Scottish media on Holyrood rather than Westminster proceedings.
- 1.50 This collective verdict of support has not been delivered to us unanimously or without criticism, and the Commission has heeded concerns on various points. For instance, some people are still concerned about the administrative cost of the new institutions, and about the extra layer of government. Some are concerned with the calibre of politicians filling the new posts. Some fear devolution is a one-way process towards more and more autonomy, leading ultimately to unwanted independence. And many say the political system is damagingly complex, with voters unsure of which politicians and institutions are responsible for which issues. These are all concerns which the Commission acknowledges. But they have generally been made by people who in their evidence still support devolution and wish to make it better.
- 1.51 Some criticism has been not of the design of the new politics, but of the competence of its delivery. The Commission has taken great care to distinguish these concerns, though they are not necessarily unrelated: implementation of a political system is of course a key consideration in its design.
- 1.52 Because the Commission's evidence has essentially given it a snapshot of views on devolution at present, it is not able to comment authoritatively on any trends in people's attitudes to devolution over time. There is however evidence, generally in text comments on questionnaires, of people who originally opposed devolution but then changed their mind having seen its implementation. This too is supported by opinion poll data.<sup>1.16</sup>
- 1.53 The Commission has itself received some criticism for not considering full independence as a constitutional option for Scotland. If it were to have done so, however, it would have been operating outside of its remit as democratically mandated by the Scottish Parliament.
- 1.54 The Commission has however welcomed engagement with many people who advocate independence. The content of these invariably positive exchanges, whether on degrees of autonomy or instances where institutions or processes could work better, has amounted to very important direct evidence or indirect context for the Commission's work.
- 1.55 Much of the Commission's evidence received relates to the core themes of its work, namely financial accountability, inter-governmental relations, distribution of powers and functions, and the working of the Scottish Parliament. This evidence is considered elsewhere, in the appropriate Parts of this report.

1.16 See for example the recent Populus poll for The Times Scotland, May 2009, available from: <http://www.populus.co.uk/the-times-the-times-scotland-poll-anniversary-of-devolution-may-2009-030509.html> and the declining number of people who do not wish for a Scottish Parliament at all in the Scottish Social Attitudes Survey data 1999 – 2007 available from: <http://www.esds.ac.uk/government/ssa/>.

## Conclusions

- 1.56 Because the ultimate purpose of devolution is to make life better for the people of Scotland, ascertaining their views and gathering expert evidence on the operation of devolution, have been vital to our work – and we believe we have been successful in our programme of engagement.
- 1.57 The Commission has conducted its proceedings in an open, transparent and, consequently, accountable manner.
- 1.58 It has through its comprehensive engagement programme successfully reached out to and heard a diverse range of opinions from a considerable number of people and organisations around the country.
- 1.59 The success of the Commission’s engagement has allowed it to conduct its analysis via an evidence-based approach, and consequently to deliver recommendations grounded in the needs of the people that devolution serves. This has resulted in the accumulation of an excellent evidence base, the vast majority of which has been published. This evidence consists of a substantial quantitative data-set gleaned from responses to the questionnaire, and a huge store of qualitative material from written submissions and oral dialogue records.
- 1.60 It is clear from the evidence that devolution has been a remarkable success, and that the Scotland Act has worked well.
- 1.61 Our evidence also shows that there are some particular concerns, and therefore opportunities to improve certain aspects of the settlement as it stands.
- 1.62 This situation would have not come about without the efforts of all the people who took the time to contribute to this work. Commission members are immensely grateful to all of these people, whose contributions have made their work not only possible, but extremely enjoyable and rewarding.
- 1.63 The companion publication to this report, *The Commission on Scottish Devolution: a summary of the evidence – June 2009*, contains an analysis of the evidence received and a structured synopsis of the main points raised in that evidence, grouped according to the main themes of the Commission’s remit. It also includes an index of written submissions and a list of all oral evidence sessions, which together form a basis for all references elsewhere in this report.

## Part 1–C: Background: some history

### The Union

- 1.64 Scottish devolution needs to be understood in the context of what preceded it – namely, Scotland’s transition from an independent nation, often in rivalry if not open conflict with its larger and more powerful southern neighbour, to a component nation within the United Kingdom<sup>1.17</sup>, and the subsequent development of how Scotland has been governed within the UK.
- 1.65 The first step in this transition was the Union of the Crowns in 1603, through which James VI of Scotland also became James I of England. But Scotland remained an independent country until the Treaty of Union in 1706 and its implementation the following year by two near-identical Acts of Union, passed by the Scottish and English Parliaments.<sup>1.18</sup> Together these Acts led to the creation of a new Parliament of Great Britain, sitting at Westminster, as the forum in which the people of Scotland were represented and decisions about its governance taken.
- 1.66 Although there was always a significant disparity of size and wealth between the two countries, this was a voluntary union and partnership, not a takeover. The United Kingdom has never been a unitary state in which the identities of its component nations have been entirely subsumed. In particular, Scotland has retained the distinctiveness of its legal system, having its own courts and prosecution service and a largely separate body of statute and common law. It has also maintained the structures and traditions of its education system, secured the entrenchment of its Presbyterian national church and in other ways retained a distinctive cultural identity.<sup>1.19</sup>
- 1.67 Although it had no separate parliament or government between 1707 and 1999, Scotland has long had a significant degree of administrative autonomy. For example, the emergence of the role of Lord Advocate in the 15th century, and its inclusion as an ex officio member of the Scottish Parliament before 1707, illustrates the very distinctive development of a Scottish system of criminal prosecutions, whilst the creation of a Scottish Education Department in 1839 points to an early recognition that elements of public policy in Scotland should be determined and implemented differently from other parts of the Union. The pre-devolution Scottish Office, established as a separate territorial department as far back as 1885, had responsibility for a wide range of functions matching those exercised by the main domestic departments of government in England and Wales, such as health, education, justice, agriculture, fisheries and farming. It was led by a Secretary (sitting in the Cabinet from 1892 and elevated to full Cabinet rank as Secretary of State in 1926), part of whose role was to represent Scottish interests within the UK Government and, in conjunction with the Scottish Law Officers, to ensure that Government legislation took proper account of Scottish circumstances. The Secretary of State assumed responsibility for key aspects of state provision in Scotland as these emerged over the 20th century, including the distinctly Scottish National Health Service.

1.17 First of Great Britain, then of Great Britain and Ireland, and finally of Great Britain and Northern Ireland.

1.18 Union with Scotland Act 1706 (c.11) (Act of the Parliament of England); Union with England Act 1707 (c.7) (Act of the Parliament of Scotland).

1.19 For example, in 1560 the Protestant reformer, John Knox, called for the establishment of a school in every parish.

## The process that led to devolution

- 1.68 After the initial controversy that surrounded the events of 1707, and apart from the Jacobite risings, the system of government for Scotland within the Union was largely accepted – in the Lowlands at least. However, from the late 19th century, there were moves to promote what was then normally referred to as “home rule”.<sup>1.20</sup> A Scottish Liberal MP introduced a Home Rule Bill for Scotland in 1913, but it did not progress beyond second reading.<sup>1.21</sup> This movement gained momentum in the mid-20th century in response to the rise of Scottish nationalism as an organised political force. The Labour Party was formally committed to home rule during the 1920s, but growing ambivalence in the party led to the formation of a strongly devolutionist Independent Labour Party in 1932 and Scottish National Party (SNP) in 1934.
- 1.69 During this time there were various developments in social provision by the state, such as the introduction of the basic state pension, then known as the “Old Age Pension”, which was introduced in the United Kingdom in January 1909. The Labour Exchanges Act was also passed in 1909, the first attempt to help the unemployed find work managed at a UK level. In the same year the Trade Boards Act laid the foundation of minimum wages in certain industries. These developments represented the ongoing move towards centralisation of provision of help for the poor and vulnerable, which had begun for England and Wales in 1834 as a result of the Royal Commission on the Poor Laws, and which reformed much of the existing system of relief based on parishes and local variation.
- 1.70 The National Insurance Act of 1911 created a compulsory health insurance scheme, bringing together a range of existing interests and making a contribution from the UK Exchequer on behalf of those not previously insured. The Act also introduced the world’s first contributory unemployment benefits. So began the development of the modern welfare state.
- 1.71 The 1934 Unemployment Assistance Act created a system of unemployment benefit that combined a contributory element with a means-tested benefit for the first time. This meant the UK Government, for the first time, determining an equitable subsistence rate in a variety of different circumstances across the country.
- 1.72 The work of Sir William Beveridge and the Inter-Departmental Committee on Social Insurance and Allied Services<sup>1.22</sup>, (published eponymously in 1942), brought together a series of disparate benefits, administered by nine separate departments, to create a single coherent framework wholly funded by the state. The Beveridge plan included the introduction of Family Allowances for second and subsequent children in any family regardless of means or circumstances – the first truly universal benefit. The plan also set out the basic assumptions of a National Health Service, which provided free health care to UK citizens. On 5 July 1948, the National Insurance Act, the National Assistance Act and the National Health Service Act came into force. The National Health Service (Scotland) Act came into effect on the same day and created a Scottish NHS accountable to the Secretary of State for Scotland, rather than to the UK Secretary of State for Health. This brought over 400 hospitals with accommodation for around 60,000 patients under the auspices of the Department of Health for Scotland.

1.20 Whilst we refer to home rule in the Scottish context, in the late 18th and early 19th century there were also Irish home rule proposals, as well as the Liberal Party’s proposals for “home rule all around”.

1.21 HC Debates 30 May 1913, vol. 53 cols. 471 – 551.

1.22 “Social Insurance and Allied Services”, a copy of which can be found here [http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/19\\_07\\_05\\_beveridge.pdf](http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/19_07_05_beveridge.pdf).

- 1.73 But as the British welfare state was developing, in 1948 a Scottish National Assembly was drawing up proposals for the establishment of a Scottish Parliament within the United Kingdom. This became the basis for the Scottish Covenant Campaign.<sup>1.23</sup> The proposed scheme listed matters to be dealt with exclusively by a Scottish Parliament, those to be reserved to the UK Parliament, and those to be dealt with jointly between the two. The reserved matters were to include the Crown, peace and war, defence, foreign affairs and extradition, treason and alienage (citizenship status), currency, coinage, legal tender, weights and measures and electoral law in so far as they related to the UK Parliament. The scheme also included fairly detailed proposals for the allocation of fiscal powers and tax revenues. The Scottish Covenant Campaign did not, however, make progress.
- 1.74 A by-election victory for the SNP in 1967 brought the issue of home rule back to prominence. At its 1968 conference, the Conservative Party adopted a pro-devolution position (the so-called Declaration of Perth), and a committee chaired by former Prime Minister Sir Alec Douglas-Home went so far as to recommend an elected assembly with legislative powers.<sup>1.24</sup> The following year, the Labour Government established a Royal Commission on the Constitution (with a remit covering all parts of the UK). This eventually reported in 1973, recommending in particular the creation of a devolved Scottish assembly (and a similar body in Wales).<sup>1.25</sup>
- 1.75 During 1974, with Labour in office as a minority government, devolution to Scotland (and Wales) narrowly became its official party policy (although many within the party remained hostile or unconvinced). A white paper with detailed proposals was published in September 1974, although it was not until 1978 that legislation to provide for Scottish (and Welsh) devolution was passed into law.<sup>1.26</sup>
- 1.76 The Scotland Act 1978 provided for the creation of a Scottish Assembly consisting of two or three members elected (by first-past-the-post) for each UK Parliament constituency. The Assembly was to have the power to legislate only on those devolved matters specified in a Schedule, and was to have no power to raise or vary taxes; it was to be funded by block grant. There was also to be a devolved Scottish Executive<sup>1.27</sup> led by a First Secretary and a substantial department of a (UK) Secretary of State.
- 1.77 The Act required at least 40% of the Scottish electorate to vote in favour of its other provisions in a referendum before they could take effect (the referendum requirement and the 40% threshold having been added by non-Government amendments during the passage of the Bill). When the referendum was duly held in March 1979, although a majority (51.6%) of those voting supported devolution, this amounted to only 32.9% of the electorate, well short of the 40% threshold required. The Government's attempt to repeal the Act in consequence of this outcome led to its defeat in a vote of confidence, and the subsequent election of a Conservative party by then opposed to devolution in principle.

1.23 See J.M. MacCormick, *The Flag in the Wind* (Birlinn 2008), especially Appendix One.

1.24 This pro-devolution policy was reversed by Margaret Thatcher, after she succeeded Edward Heath as Conservative leader in 1975.

1.25 Royal Commission on the Constitution 1969-1973, Report (Cmnd 5460), also known as the Kilbrandon report after Lord Kilbrandon who chaired the Commission from 1972.

1.26 In the interim, there was also a Scotland and Wales Bill, introduced in 1976 and defeated in 1977.

1.27 The Scottish Executive's devolved powers would have been slightly different to those now, and some were to be exercisable only with the concurrence or consent of a UK Minister.

- 1.78 During the 18 years of Conservative government to 1997, supporters of devolution gradually regrouped. A Campaign for a Scottish Assembly was formed to promote the cause of home rule, and to build a broad consensus on what it might involve, this in turn led to the creation of the Scottish Constitutional Convention. At its first meeting, in March 1989, the Convention members signed a “Claim of Right” which asserted “the sovereign right of the Scottish people to determine the form of government best suited to their needs”. This was signed by a large majority of Scottish MPs, MEPs and local authorities, together with many other organisations and individuals.
- 1.79 The main players in the Convention itself were the Labour Party, the Liberal Democrats, the Scottish Green Party, the Scottish Trade Union Congress, local government and the Church of Scotland. Many other churches, trade unions and organisations from across civic Scotland also participated. The Scottish National Party was involved in the early stages, before withdrawing in protest that independence was not being considered as an option.
- 1.80 The culmination of the Convention’s work was the publication in 1995 of “Scotland’s Parliament, Scotland’s Right”, a detailed blueprint for the composition and powers of a devolved Scottish Parliament.<sup>1.28</sup>
- 1.81 As a result, when Labour came to power in May 1997 on a manifesto commitment to implement devolution in both Scotland and Wales, much of the groundwork for the new Scottish Parliament had already been laid. Progress thereafter was rapid. A white paper, Scotland’s Parliament<sup>1.29</sup>, was published in July 1997, and a referendum held on its proposals in September of that year. (By contrast with the 1979 referendum, this one preceded the introduction of legislation and required only simple majority support.)
- 1.82 It was a two-question referendum, the first question on whether a Scottish Parliament should be created and the second on whether it should have tax-varying powers. The Labour, Liberal Democrat and Scottish National parties all campaigned for Yes-Yes votes in the referendum, while the Conservatives supported the rival No-No campaign. Many other organisations and individuals also played an active part in the debate. In the event, both questions were answered in the affirmative – the former by 74.3% and the latter by 63.5%, on a turnout of just over 60%.
- 1.83 Following the referendum outcome, a Consultative Steering Group (CSG) under the chairmanship of the then Minister of State, Henry McLeish MP, was appointed to make recommendations about how the new Parliament should operate in practice. The CSG’s first meeting was held in January 1998, the same month in which the Scotland Bill was introduced in the House of Commons, and its report was published in December of that year<sup>1.30</sup>, shortly after the Bill was passed into law as the Scotland Act 1998. As well as making specific recommendations for the Parliament’s standing orders and methods of working, the CSG report articulated four general principles to underpin the Parliament’s operation – power-sharing, accountability, accessibility and equal opportunities.

1.28 [http://www.almac.co.uk/business\\_park/scc/scc-rep.htm](http://www.almac.co.uk/business_park/scc/scc-rep.htm).

1.29 <http://www.scotland.gov.uk/government/devolution/scpa-00.asp>.

1.30 <http://www.scotland.gov.uk/library/documents-w5/rcsg-00.htm>.

## The Scotland Act 1998

- 1.84 In broad summary, the Act provides for the establishment of a Scottish Parliament with the power to make laws within certain parameters; the creation of a Scottish Executive to provide a devolved administration answerable to the Parliament; a framework for funding the Parliament; a power for the Parliament to vary within limits the basic rate of income tax; and a range of miscellaneous and consequential matters. The scheme of the Scotland Act is explained fully in Part 1–D.
- 1.85 The first elections to the new Scottish Parliament were held on 6 May 1999, and were contested by all the main parties in Scotland (Labour, Liberal Democrat, SNP and Conservative). One immediate impact of the new Parliament was that almost 40% of the MSPs elected were women, making it among the best in the world for the proportion of women directly participating in the legislature. The new MSPs first met on 12 May, in the Church of Scotland Assembly Hall on the Mound, Edinburgh – the Parliament’s temporary home for the next five years. Then, on 1 July 1999, the day on which the Parliament acquired its full legislative powers, it was officially opened by Her Majesty the Queen.

## The Scottish Parliament in operation

### Procedure, sitting pattern and types of business

- 1.86 From the outset, the Parliament had a complete set of standing orders covering all the main aspects of its business – initially in the form of an order under the Scotland Act, but subsequently converted into the Parliament’s own document that it can itself amend. The standing orders largely implemented the recommendations of the CSG report, many of which were intended to mark a departure from the Westminster model, bringing in best practice from other European legislatures. These include:
- giving responsibility for proposing the business programme to a cross-party Parliamentary Bureau, chaired by the Presiding Officer (a more accountable alternative to Westminster’s “usual channels”);<sup>1.31</sup>
  - committees with powers to conduct inquiries and scrutinise legislation (thus combining the roles of Westminster select and standing committees) and even introduce their own Bills;
  - giving members of the public the right to initiate parliamentary business directly by petition; and
  - deferring most votes to a “Decision Time” towards the end of each day’s Chamber business.
- 1.87 In the initial meetings of each session, the main business is the swearing-in of members and the election of office-holders and the First Minister. Committees must also be established and their members appointed before a more regular pattern of business can begin.

1.31 The “usual channels” is a term used to describe the working relationship of the Whips from the different parties and the leaderships of the Government and Opposition at the UK Parliament, who agree arrangements and reach compromises about the running of Parliamentary business behind the scenes.

- 1.88 The Parliament's normal sitting pattern involves committees meeting on Tuesdays (morning and afternoon) and Wednesdays (morning only) and plenary sessions in the Chamber on Wednesday (afternoon only) and Thursday (morning and afternoon). Mondays and Fridays are normally used by MSPs for constituency and party business.
- 1.89 Business in the Chamber consists of a mixture of debates, proceedings on Bills, questions to Ministers, statements and procedural items. Each week begins with a short address by an invited person, usually a faith leader ("Time for Reflection"), and each day's business concludes with Decision Time (usually at 5 pm), followed by a "Member's Business" debate (which is concluded without a vote). The half-hour First Minister's Question Time at noon on Thursday is the most high-profile regular event, at which the main opposition party leaders go "head to head" with the First Minister on the topical issues of the day.

## Legislation

- 1.90 Under the Parliament's rules, public Bills may be introduced by Scottish Ministers (Executive Bills), individual MSPs (Members' Bills) or by committees (Committee Bills).<sup>1.32</sup> All public Bills follow a three-stage scrutiny process. Stage 1 consists of consideration of the general principles of the Bill and a plenary decision on whether to proceed with the Bill or reject it. In most cases, the Bill is first referred to one or more of the Parliament's committees to consider and report on the Bill. Stage 2 is the main amending stage, and also takes place in a committee. All MSPs may lodge and move amendments to the Bill, but only members of the relevant committee may vote on them. Stage 3 is a plenary stage, and involves a further amending stage followed by a debate on whether to pass the Bill or reject it.
- 1.91 All Bills require to be accompanied on introduction by certain documents – the statements on legislative competence required by the Scotland Act (see paragraph 1.144 below), plus explanatory notes, a financial memorandum and, in the case of Executive Bills, a policy memorandum. In addition, Members' Bills can only be introduced once the member concerned has lodged a proposal, which is normally subject to a consultation process, and then requires the cross-party support of at least 18 other MSPs. Committee Bills can only be introduced if the Parliament first endorses a proposal presented by the committee concerned in the form of a report. (The Parliament's legislative process is further discussed in Part 6-D.)

## Committees

- 1.92 There are two main types of committees – mandatory committees (whose remits are set out in standing orders) and subject committees (whose remits are specified in the motions establishing them).<sup>1.33</sup> The mandatory committees all have specialised roles – Public Audit; Equal Opportunities; European and External Relations; Finance; Public Petitions; Standards, Procedures and Public Appointments; Subordinate Legislation.<sup>1.34</sup> The remits of the subject committees roughly follow the responsibilities of Ministers, and their work largely consists of inquiries that they choose to undertake, plus scrutiny of Bills, subordinate legislation and other business that is referred to them.

1.32 There are separate rules for private Bills introduced by non-MSPs. In the first two sessions, a significant number of private Bills were introduced, mostly to grant approval for the construction of railways or tram-lines. Since the passing of the Transport and Works (Scotland) Act 2006, which provides for a non-Parliamentary process for authorising such projects, private Bills are likely to be much less common.

1.33 Mandatory and subject committees are established for the duration of a session. Other committees are sometimes established on an ad hoc basis to consider particular Bills, or to carry out specific inquiries.

1.34 Until early in the current Session, the Procedures Committee and the Standards and Public Appointments Committee were separate.

- 1.93 Each committee has between five and fifteen members, whose party allegiance reflects broadly the political balance in the Chamber. Each has a Convener and Deputy Convener, and the distribution of these posts among the parties is similarly proportional (using the d'Hondt system).<sup>1.35</sup> Most committees meet either weekly or fortnightly, and conduct the large majority of their business in public. As well as their formal meetings, some of which take place outside Edinburgh, committees undertake a range of other activities, including commissioning research, undertaking fact-finding visits and organising seminars and other informal events. (The Parliament's committee system is further considered in Part 6-C.)

## Other Scottish Parliament activity

- 1.94 The Scottish Parliament provides MSPs with offices from which they can conduct a range of constituency and party business – both at the Parliament and in their local areas. Staff provide everything from procedural advice, research and information services through to IT support and catering. Holyrood is a venue for many events such as cross-party group meetings, receptions and seminars. It has also become a major visitor attraction, and is popular both with tourists and with Scots seeking to learn more about how they are represented, particularly school groups. Over 1.5 million people have now visited the Holyrood building since it opened. A large number of delegations from foreign parliaments also visit each year.
- 1.95 The Parliament has, in recent years, developed a number of initiatives to give it more of an international and public profile. These include sending a delegation to the annual Tartan Day (now Scotland Week) celebrations in New York, a successful annual Festival of Politics and the Scottish Futures Forum, aimed at promoting long-term non-partisan research on major social issues. It also hosts youth events, including plenary sessions of the Scottish Youth Parliament.

## Developments since 1999

### Session 1 (1999 – 2003)

- 1.96 The first Scottish Parliament elections, on a turnout of 59%, gave Labour the most seats (56), but no overall majority. The SNP was the second-largest party (35 seats), well ahead of the Conservatives (18) and Liberal Democrats (17). The Scottish Socialist and Scottish Green parties won one seat each, and there was one independent (Dennis Canavan).
- 1.97 Soon after the election, Labour entered into a coalition agreement with the Liberal Democrats, with the result that the Labour leader, Donald Dewar (then also Secretary of State for Scotland), became First Minister, while Jim Wallace, the Liberal Democrat leader, became his deputy. Donald Dewar's tenure in the Scottish Parliament came to a sad end with his death in October 2000, and he was succeeded as Labour leader and First Minister by Henry McLeish, who in turn resigned in November 2001 and was replaced by Jack McConnell.
- 1.98 Throughout the session, Sir David Steel (Liberal Democrat) was the Parliament's Presiding Officer. George Reid (SNP) and Patricia Ferguson (Labour) – later replaced by Murray Tosh (Conservative) following her appointment as a Minister – served as his deputies.

1.35 The d'Hondt system allocates places (e.g. convenerships) to political parties according to their share of the seats in the Parliament. The party with the largest number of seats gets the first place. In subsequent rounds, a new calculation is made in which each party's share is divided by 1 plus the number of seats it has already been allocated.

- 1.99 During the session, 62 Bills were passed and became Acts of the Scottish Parliament – 50 Executive Bills, eight Members’ Bills, three Committee Bills and one Private Bill. Some of the most important measures were the abolition of feudal tenure, land reform (including a right of responsible access, and community right to buy provisions), freedom of information and measures to provide for a graduate endowment (in place of up-front student fees) and to repeal section 2A of the Local Government Act 1986 (“clause 28”). Other Acts initiated by the Executive dealt with adults with incapacity, homelessness, housing, local government, mental health, transport and the water environment. Some of these Acts implemented recommendations of the Scottish Law Commission which had been waiting for translation into legislation for a number of years. The most significant (and controversial) Members’ Bills were those to abolish poindings and warrant sales, and to ban hunting with dogs. Significant new public offices were created, including an information commissioner, a commissioner for children and young people, a parliamentary standards commissioner, and a public services ombudsman.
- 1.100 Throughout the session, the project to build a new Parliament building at Holyrood became a major controversy as costs escalated and the project over-ran. The site, the design and the construction management process all came under intense scrutiny; during 2000, both the building’s principal architect, Enric Miralles, and his main supporter, First Minister Donald Dewar, passed away. By June 2001 the Parliament was forced to acknowledge that the cap of £195 million it had attempted to impose in April 2000 was ineffective, and costs continued to rise.

## Session 2 (2003 – 2007)

- 1.101 In the 2003 elections, on a reduced turnout of just over 49%, Labour retained its place as largest party, but with fewer seats (50), and the SNP retained its second place, also with fewer seats (27). The Conservatives (18) and Liberal Democrats (17) were unchanged, while the Scottish Green and Scottish Socialist parties dramatically increased their representation to 7 and 6 MSPs respectively. The Scottish Senior Citizens’ Unity Party won one seat, and there were 3 independents (Dennis Canavan, Margo Macdonald and Dr Jean Turner). Labour and the Liberal Democrats again formed a coalition Executive, with Jack McConnell continuing as First Minister and Jim Wallace as his Deputy (succeeded in 2005 by Nicol Stephen, when he became leader of the Scottish Liberal Democrats).
- 1.102 George Reid (SNP) was elected as Presiding Officer, with Murray Tosh (Conservative) and Trish Godman (Labour) as his deputies.
- 1.103 Of the 66 Bills enacted during the Session, 53 were introduced by the Executive, three by individual MSPs, one by a committee. Nine were private Bills, mostly for the authorisation of railway or tram works, promoted by local authorities. Major reforms included a ban on smoking in public places and new controls on anti-social behaviour. Other measures covered animal health and welfare, crofting reform, planning, licensing, the protection of children and school education.
- 1.104 At the beginning of the Session, former Lord Advocate Lord Fraser of Carmyllie was appointed to conduct an inquiry into the cost of the Holyrood building project. The inquiry reported in September 2004, shortly before the Parliament finally moved to its permanent new home.<sup>1.36</sup> By this stage, the total cost was estimated at £431 million, although this was later reduced to £414 million.<sup>1.37</sup> Following the official opening of the building in October 2004, the Parliament finally began to put the controversy over the project behind it.

1.36 The final report can be found at: <http://www.holyrood inquiry.org/>.

1.37 <http://www.scottish.parliament.uk/nmCentre/news/news-07/pa07-018.htm>.

## Session 3 (2007 –)

- 1.105 The May 2007 elections, with a turnout of 52%, saw the Scottish National Party become the largest party in the Parliament by just one seat – 47 seats to Labour’s 46 – after an election marred by controversy over large numbers of invalid votes and problems with electronic counting. The Conservatives won 17 seats and the Liberal Democrats 16. The Greens held onto only two of the seven seats they had had in Session 2, while the Scottish Socialists lost all 6 of the seats they had held previously (having split in 2006, with two of its MSPs, including former leader Tommy Sheridan, forming a new party, Solidarity). There was also one independent MSP (Margo Macdonald). Alex Fergusson (Conservative) was appointed the Parliament’s Presiding Officer, and Alasdair Morgan (SNP) and Trish Godman (Labour) as his deputies.
- 1.106 After failing to secure a coalition agreement with the Liberal Democrats, the SNP formed a minority administration, with Alex Salmond as First Minister and Nicola Sturgeon as his deputy. Legislation so far introduced by the new administration has been to remove bridge tolls and to abolish the graduate endowment, plus measures on public health (including tobacco advertising), criminal justice (including sexual offences), climate change, flooding, the marine environment and public service reform. The administration is also running a public consultation on its proposals for a referendum on independence, under the heading of “a National Conversation”. The consultation document, *Choosing Scotland’s Future*, also includes consideration of options for extending the devolution arrangements.<sup>1.38</sup>

## Scotland’s multi-level governance

- 1.107 While the creation of a new tier of devolved decision-making represents an important constitutional change, it also needs to be seen in the wider context of the multi-level governance of Scotland.

## Scottish representation in the UK Parliament

- 1.108 In particular, Scotland remains part of the wider United Kingdom, and continues to be represented in the UK Parliament at Westminster. The Scotland Act provided for a reduction in the number of Scottish constituencies from 72 to 59 (out of a total of 646), so that the ratio of electors to MPs is now roughly the same in Scotland as it is in England. Scottish MPs, like all other members of the House of Commons, are elected by the simple majority or “first-past-the-post” system. Their constituencies are no longer co-terminous with those used for electing constituency MSPs. There are currently 38 Labour MPs, 12 Liberal Democrats, 7 SNP and one Conservative, plus the Speaker of the House of Commons.
- 1.109 Scottish MPs have the right to participate fully in all Commons business, affecting all parts of the United Kingdom. It is a feature – some would say an anomaly – of asymmetric devolution that Scottish MPs are normally unable to vote on matters affecting Scotland that have been devolved to the Scottish Parliament, but able to vote on the same matters as they affect other parts of the UK. This is usually referred to as the “West Lothian Question” after Tam Dalyell (then MP for a West Lothian constituency), who raised it as an objection to devolution in the 1970s.

1.38 Information about the National Conversation can be found at: <http://www.scotland.gov.uk/topics/a-national-conversation>.

- 1.110 The House of Commons has a Scottish Affairs Select Committee which scrutinises in particular the UK Government's policies in Scotland on reserved matters. It is comprised largely but not wholly of MPs representing Scottish constituencies. There is also a Scottish Grand Committee, consisting of all the Scottish MPs, although this has been much less active than before devolution and has held no formal proceedings since 2003.
- 1.111 Within the UK Government, Scotland's interests are currently represented by the Secretary of State for Scotland and a Parliamentary Under-Secretary of State. Their role is to maintain the devolution arrangements and represent Scotland, within the UK Government, on reserved matters. In both roles, they are supported by officials in the Scotland Office, based in London and Edinburgh.

## Scottish local government

- 1.112 Scotland is divided into 32 local authority areas, each of which has a unitary council. This structure was put in place in 1996, replacing the previous system of nine regional authorities and 53 district councils (itself put in place in 1974). The current 32 councils are collectively represented by the Convention of Scottish Local Authorities (CoSLA). There is also a further tier of representation through community councils, whose role is to communicate the views of local people to councils and other public bodies. As part of its work, the Commission on Local Government and the Scottish Parliament (the McIntosh Commission) considered the relationships between local government and the Scottish Executive and Scottish Parliament.<sup>1.39</sup>
- 1.113 The local authority elections, held on the same day as the last Scottish Parliament election in May 2007, were the first to be held under the new system of single transferable vote (STV) introduced by the Local Governance (Scotland) Act 2004. This was a key factor that (along with the shifting sands of politics) resulted in a significant shift in the balance of political power, the main changes being a fall of 161 in the number of Labour councillors and a rise of 187 in the number of SNP councillors. As a result, the number of councils under Labour control fell from 13 to 3, while a much larger proportion now have no single party in control – up from 11 in 2003 to 26 today (of which 7 are governed by a minority single-party administration and 19 by a coalition or other multi-party arrangement).
- 1.114 The current Scottish Government negotiated in November 2007 a concordat with CoSLA, as part of which each council negotiates a "single outcome agreement" with the Scottish Government setting out how it will deliver locally on national priorities. The arrangement is intended to give councils both greater flexibility and more responsibility, and is accompanied by new funding arrangements, including a reduction in the amount of "ring-fenced" central funding and a commitment to freezing council tax rates.
- 1.115 Scottish local authorities receive around 80% of their funding from the Scottish Government, with the remainder raised mainly through the Council Tax.

1.39 Moving Forward Local Government and the Scottish Parliament, 22 June 1999.

## Scottish representation in Europe

- 1.116 Scotland is represented in the European Union as part of the United Kingdom. Scotland currently has 6 of the UK's 72 MEPs (reduced from 7 out of 78 prior to the June 2009 election). Scotland's MEPs are all elected for a single region (with seats allocated using the d'Hondt system of proportional representation).<sup>1.40</sup> The Scottish Parliament also nominates councillors for appointment by the UK Government to serve as part of the UK's representation in the EU Committee of the Regions and Economic and Social Committee. (The Parliament's electoral system is considered further in Part 6-B).
- 1.117 As the United Kingdom is the member state, it is UK Government Ministers that represent Scottish interests in the EU Council of Ministers, although the Scottish Government is routinely consulted on matters affecting Scotland, and Scottish Ministers take part in Joint Ministerial Committee (Europe) meetings. The Scottish Government also has its own office in Brussels which works closely with the UK's permanent representation to the European Union (UKRep).
- 1.118 Part of the remit of the Scottish Parliament's European and External Relations Committee is to scrutinise EU legislative proposals that relate to devolved matters. Both it and the Scottish Government receive copies of relevant EU documentation, together with the UK Government's explanatory memorandums.

<sup>1.40</sup> Under this system – similar to that used to elect regional MSPs, as explained in paragraph 1.126 above – seats are allocated to parties in a series of rounds, with the outcome of each round decided by dividing the number of votes polled for each party by the number of seats they have already been allocated, and adding one. In 2004, this resulted in Labour, SNP and the Conservatives each winning two seats, and the Liberal Democrats one. As this report was going to press, Scotland was voting for the MEPs to represent it for the next five years.

## Part 1–D: Devolution in Scotland, and the scheme of the Scotland Act

### What is devolution?

- 1.119 Devolution is a process of decentralisation, in which power and responsibility is moved outwards and downwards, and hence closer to the people.
- 1.120 The creation of the Scottish Parliament was part of a larger policy of devolution instituted by the Labour Government after its election victory in 1997. This was applied in different ways to Scotland, Wales and Northern Ireland – in each case by means of an Act of Parliament passed in 1998. In Scotland and Northern Ireland, although there were a number of important differences of detail, the basic model involved a legislature with the power to pass primary legislation, plus a separate administration formed out of members of the legislature and answerable to it. In Wales, the original model was different – an assembly combining parliamentary and executive functions, and with much more limited legislative powers – although this has since been altered to bring it more into line with Scotland and Northern Ireland, both in terms of structure and (over time) legislative powers. A separate but related process saw a form of devolution to London, with the creation of a directly-elected mayor and assembly.<sup>1.41</sup>
- 1.121 The result is that the United Kingdom now has a quite distinctive form of partial and asymmetric devolution – partial in that there has so far been no devolution to the largest component nation of the UK, England (other than to London); and asymmetric in that devolution differs in nature and extent in each of the nations and territories to which it has been applied. Although the Government’s programme of devolution marked a substantial change from the earlier Westminster-based status quo, it can also be seen within a longstanding tradition in the UK of making constitutional change organically in response to particular pressures, rather than by sweeping reforms. It is a means for the UK to provide varying degrees of regional autonomy to match the differing needs and circumstances of its component parts, without the more fundamental restructuring of the constitution that a move to a fully federal structure would entail.
- 1.122 Within Scotland, devolution has added a new layer of democratic representation between those existing in the House of Commons and at local government level.

1.41 Apart from the Scotland Act, the other main devolution statutes are the Government of Wales Acts 1998 (c. 38) and 2006 (c. 32), the Northern Ireland Act 1998 (c. 47) and the Greater London Authority Acts 1999 (c. 29) and 2007 (c. 24).

## The scheme of the Scotland Act

- 1.123 For our consideration it is important to note a number of the important features of the existing constitutional settlement in Scotland – for example how the Scottish Parliament is structured, derives its legislative competence, and goes about its business.

### The Scottish Parliament – elections and membership

- 1.124 Part I of the Act deals with the Parliament itself – in particular, establishing it as a unicameral legislature of 129 members (MSPs) elected on a regular four-year cycle of elections. The electoral system, based on the model negotiated in the Scottish Constitutional Convention, involves 73 constituency MSPs elected on the traditional “first-past-the-post” basis (as used for elections to the House of Commons) and a further 56 regional MSPs – 7 in each of 8 regions – elected by the “additional member” system.
- 1.125 Under this mixed electoral system, each elector has two votes, one for an individual to serve as a constituency MSP, the other (known as the regional or list vote) for an individual candidate or for a list of up to 12 candidates standing on behalf of a political party. Some of the candidates in a party list (or individual regional candidates) may also be contesting a constituency seat in the same region, but the same person may not otherwise have a dual candidacy.
- 1.126 To decide who are returned as the regional MSPs in a region, a sequence of calculations is made, using the “d’Hondt” system (which divides the number of regional votes cast for each political party by a figure one greater than the number of constituency or regional seats that party has already won in that region). This tops up the representation of parties whose shares of the constituency contests falls short of their shares of the vote across the region, thus ensuring a high degree of proportionality in the overall distribution of seats in the Parliament.

### The Scottish Parliament – office-holders

- 1.127 The Act also makes provision for the main office-holders in the Parliament. One MSP must be elected to serve as Presiding Officer and two others as deputies. A Scottish Parliamentary Corporate Body (SPCB) must be appointed, consisting of the Presiding Officer and four other MSPs chosen by the Parliament, to be responsible for running the domestic affairs of the Parliament; and it must appoint a Clerk of the Parliament, effectively a chief executive for the Parliament’s administration.

### The Scottish Parliament – powers, protections and responsibilities

- 1.128 Further provisions give the Parliament and its members a number of important legal powers, protections, and responsibilities. These include the power to summon witnesses and documents (s.23); requirements relating to the registration and declaration of members’ interests (s.39); and protection against certain legal proceedings – particularly claims of defamation or contempt of court (ss. 40-42). These provisions are important because the Scottish Parliament, as a creation of statute, lacks the inherent or assumed powers and privilege of the UK Parliament, and therefore needs some externally-guaranteed protected space within which it can carry out its role robustly without fear of legal challenge.
- 1.129 The most important of the powers conferred on the Parliament by the Act is the power to pass Bills which, when submitted for Royal Assent, become Acts of the Scottish Parliament (ASPs). This power may, however, be exercised only within the limits of the Parliament’s “legislative competence”, and to the extent that an ASP exceeds those limits, it “is not law” (s. 29(1)).

- 1.130 There are five criteria for the test of legislative competence – an ASP must apply only in or about Scotland; it must not relate to the “reserved matters” listed in Schedule 5; it must not breach certain restrictions set out in Schedule 4; it must be compatible with the “Convention rights” (those articles of the European Convention on Human Rights given statutory effect by the Human Rights Act 1998) and with European Community law; and it must not alter the basis of the Lord Advocate’s role in relation to criminal prosecution and the investigation of deaths. Schedule 4 lists various enactments – including the Human Rights Act and, with some exceptions, the Scotland Act itself – and other aspects of the law which cannot be changed by ASPs. Schedule 5 lists the reserved subject-matters, grouped under various heads, which fall within the UK Parliament’s exclusive legislative competence. A list of reserved matters is at Annexe 2.
- 1.131 The Act includes a number of mechanisms to help ensure that the limits of legislative competence are not exceeded. Firstly, the Presiding Officer is required to consider every Bill introduced and state whether it is, in his or her view, within the legislative competence of the Parliament; in addition, Scottish Ministers introducing a Bill must state that it is, in his or her view, within competence. Secondly, UK and Scottish Law Officers are given power to prevent a Bill passed by the Parliament from being submitted for Royal Assent if they believe it is outside competence, and may refer the issue to the Judicial Committee of the Privy Council (s.33).<sup>1.42</sup> The Secretary of State may also block a Bill on other grounds – for example that it might jeopardise national security or international obligations (s.35). Other provisions in the Act set out how the courts are to decide any question about legislative competence that may arise. (These mechanisms to ensure the Parliament does not legislate beyond its competence are further considered in Part 6-E.)
- 1.132 The Act expressly preserves “the power of the Parliament of the United Kingdom to make laws for Scotland” (s.28(7)). In other words, there are no matters that fall within the **exclusive** legislative competence of the Scottish Parliament.

## The Scottish Administration

- 1.133 As well as establishing a legislature, the Act creates “the Scottish Administration”. It consists of a First Minister, other Ministers and two Law Officers (the Lord Advocate and Solicitor General for Scotland) – who are referred to collectively as “the Scottish Executive” or “the Scottish Ministers”<sup>1.43</sup> – together with junior Scottish Ministers, non-ministerial office-holders and civil servants. Only MSPs may be appointed as First Minister, Ministers or junior Scottish Ministers, and these appointments, together with those of the Law Officers, require the Parliament’s approval.<sup>1.44</sup> Law Officers who are not MSPs may sit and participate in the Parliament’s proceedings, but may not vote. The staff of the Scottish Administration are members of the UK home civil service.
- 1.134 The Act also provides for the general transfer from UK Government Ministers to the Scottish Ministers of statutory and prerogative functions that fall within the Parliament’s “devolved competence”. In general, therefore, Scottish Ministers have “executive competence” wherever the Parliament has legislative competence. However, there is also provision for further executive devolution – either through the creation of shared powers jointly exercisable by UK and Scottish Ministers, or by the transfer to Scottish Ministers of specific powers in areas where the UK Parliament retains exclusive legislative control.

1.42 The jurisdiction of the Judicial Committee on devolution issues will shortly be taken over by the new Supreme Court.

1.43 The expression “Scottish Government” was formally adopted by the present administration, having previously been used informally in some contexts. As it has now gained almost universal currency, we use it, where appropriate, in this Report to refer collectively to those who exercise executive functions under the Act.

1.44 The current administration has adopted a different terminology, referring to Ministers as “Cabinet Secretaries” and junior Scottish Ministers as “Ministers”.

1.135 There is another important difference between the executive and legislative powers. Most powers of Scottish Ministers are exercised exclusively<sup>1.45</sup> and most powers to act are within the legislative competence of the Parliament. Later in our report, therefore, when we consider devolved and reserved functions it is mostly legislative competence that, for simplicity, we focus on.

## Financial provisions

1.136 Part III of the Act establishes a Scottish Consolidated Fund (SCF) as the repository for the Parliament's budget. The UK Government is required to make payments into the SCF "from time to time ... of such amounts as [the Secretary of State] may determine". In other words, there are no statutory limits on the frequency of payments, the amounts involved or the means of calculation of those amounts. The white paper that preceded the Scotland Bill made clear that actual payments would be made in the form of a block grant, with annual variations made using the same formula (the Barnett formula) that had been used since the late 1970s. This continues to be the system used today.

1.137 Other provisions in Part III of the Act give Scottish Ministers and other statutory bodies some limited borrowing powers for cash-flow purposes, require them to keep proper accounts, and subject them to audit by an Auditor General for Scotland whose nomination must be approved by the Parliament.

## The tax-varying power

1.138 Under Part IV of the Act, the Parliament is given the power, by passing a "tax-varying resolution", to increase or decrease the basic rate of income tax payable by Scottish taxpayers by up to 3 pence in the pound. (This is also commonly referred to as the Scottish Variable Rate.) Only a member of the Scottish Executive (Government) may move a motion for such a resolution. Supplementary provisions allow for subsequent changes in the UK income tax arrangements, and define more precisely who counts as a Scottish taxpayer.

## Other provisions

1.139 The Act covers numerous other matters. These include powers enabling devolution to be adapted to changing circumstances, in particular by varying the extent of the Parliament's legislative competence<sup>1.46</sup> or of the Scottish Ministers' executive competence.<sup>1.47</sup> Other powers include a facility for the UK Government to amend UK legislation in consequence of Scottish Parliament legislation.

1.140 The Scotland Act changes the rules that the Boundary Commission for Scotland must apply in relation to Scottish parliamentary constituencies, bringing the "electoral quota" (the average number of voters in each constituency) for Scotland into line with that in England. As a result, the number of Scottish MPs was reduced from 72 at the time of devolution to 59 by the time of the UK general election of 2005.

1.141 The Act creates the post of Advocate General for Scotland as the UK Government's chief legal adviser on matters of Scots law, taking over this function from the Lord Advocate and Solicitor General for Scotland (who become, under the Act, members of the devolved administration). Together with the other two UK Law Officers (the Attorney General and the Solicitor General), the Advocate General provides legal advice and opinions to UK Government departments on a wide range of issues, including human

1.45 As paragraph 1.132 explains, continuing legislative power for devolved matters is, as a matter of law, retained at Westminster.

1.46 Section 30 orders.

1.47 Section 63 orders.

rights, European and constitutional law. The Advocate General also has statutory functions in relation to the oversight of devolution, including helping to ensure that Acts of the Scottish Parliament are within its legislative competence.

- 1.142 The Scottish Administration assumed most of the functions of the pre-devolution Scottish Office, but a separate office, named the Scotland Office, was created (on a non-statutory basis) to support the continuing role of the UK Government in relation to reserved matters in Scotland (currently through a Secretary of State for Scotland and a Parliamentary Under-Secretary of State).

## The boundary between devolved and reserved matters

- 1.143 The legislative competence of the Scottish Parliament is very wide. Devolution is the default position, so unless the Scotland Act specifically reserves a function to the UK Parliament, it is devolved to the Scottish Parliament. This approach has advantages of simplicity and clarity. It implies, however, that where an issue arises that was not foreseen in the Scotland Act it would be devolved automatically, whether or not that would have been the intention in 1998. Despite the simplicity of the approach, the Scotland Act nevertheless has to provide mechanisms to manage the boundary between what is devolved and what is reserved, and hence the legislative competence of the Scottish Parliament. There are distinct roles for Scottish Ministers, for the Presiding Officer of the Parliament, for UK Ministers and for Scottish and UK Law Officers.
- 1.144 A Scottish Minister introducing a Bill, must “state that in his view the provisions of the Bill would be within the legislative competence of the Parliament”.<sup>1.48</sup> For all Bills, the Presiding Officer must “decide whether or not in his view the provisions of the Bill would be within the legislative competence of the Parliament and state his decision”.<sup>1.49</sup> In both cases, the statement is an opinion (albeit informed by legal advice) and is not an authoritative or definitive statement of the law.
- 1.145 Any one of three Law Officers (the Advocate General, the Lord Advocate or the Attorney General) may refer a question of a Bill’s legislative competence to the Judicial Committee of the Privy Council within four weeks of the passing of the Bill.<sup>1.50</sup> The Bill may not be submitted for Royal Assent within that period unless all three Law Officers have waived their right to make such a reference. This power has not been used to date.
- 1.146 Separately, the Secretary of State may prevent a Scottish Parliament Bill from being submitted for Royal Assent if it contains provisions which he or she “has reasonable ground to believe would be incompatible with any international obligations or the interests of defence or national security” or which would modify the law as it applies to reserved matters in ways that the Secretary of State considers would have an adverse impact on the operation of that law. Again, this power has yet to be used.<sup>1.51</sup>
- 1.147 The legislative competence of the Scottish Parliament has not remained static since 1998. It can be modified by an Act of the UK Parliament by an Order in Council under section 30 of the Scotland Act. Such an Order may extend the competence of the Scottish Parliament into a new area of responsibility currently reserved, or add an area to the list of reserved matters, thus taking it out of the Parliament’s control or preventing it coming within that control in the first place. The Order can modify the provisions of Schedule 4, which restrict the competence of the Scottish Parliament to legislate, or of Schedule 5, which list the reserved matters. Since the Scotland Act

1.48 Section 31(1).

1.49 Section 31(2).

1.50 Section 33. The jurisdiction of the Judicial Committee is to be transferred in due course to the new Supreme Court.

1.51 Section 35.

came into force, nine section 30 orders have been made, none of which “re-reserved” matters already devolved. Most have done little more than make minor adjustments or update references, following changes in other legislation or the creation of new public bodies. One substantial change was in 2002 when an Order devolved to the Parliament competence for “the promotion and construction of railways which start, end and remain in Scotland”. A section 30 order adjusting the legislative competence of the Scottish Parliament will, in the absence of any other provision, also change the powers of Scottish Ministers (executive devolution). Section 30 orders need to be approved by both the UK and Scottish Parliaments.

- 1.148 Similar powers are available under section 63 of the Scotland Act to amend the executive competence of Scottish Ministers, and these too have been used to add to the powers of the devolved administration. This power can be used to allow functions to be exercised concurrently as well as wholly transferred. Section 63 orders transfer to Scottish Ministers functions of a UK Minister which are not within the legislative competence of the Scottish Parliament but can be exercised differently in Scotland. There are powers to clarify whether any particular function can be exercised differently in Scotland. Orders can provide for functions to be exercised concurrently as well. Section 63 orders too require approval by both the UK Parliament and the Scottish Parliament.
- 1.149 Executive devolution orders under section 63 have been rather more common; by the end of 2008 there had been some 16 of them since 1999. The subject matter of executive devolution orders has been quite varied. There were some more substantial transfers immediately after devolution, mainly of functions which, although relating to reserved matters, had in practice been functions of the Secretary of State for Scotland and the old Scottish Office. Between 2006 and 2008, for example, they transferred to Scottish Ministers functions relating to energy conservation obligations, minor cross-border criminal justice functions, animal feeding stuffs, water rights for hydro-electric stations, welfare foods, and most significantly, electricity from renewable resources. Many recent transfers, however, have been minor adjustments for practical purposes, rather than having any major constitutional importance.
- 1.150 On occasion, executive devolution has been achieved by directly conferring functions, relating to a reserved matter on Scottish Ministers through primary legislation passed by the UK Parliament. Such provisions have sometimes been deprecated as avoiding the need for approval of the Scottish Parliament which exists in relation to a section 63 order. Published guidance to UK Government Departments, however, makes it clear that Bills containing provisions altering the executive competence of Scottish Ministers should be treated as subject to the Sewel convention and hence as requiring the consent of the Scottish Parliament.<sup>1.52</sup> A recent example of such a provision is in section 20 of the Dormant Bank and Building Societies Accounts Act 2008, which gives to Scottish Ministers certain functions relating to distribution of money in abandoned bank accounts, a matter reserved by the financial services reservation.
- 1.151 Another power which can only be utilised with the consent of both Parliaments is that in section 108 of the Scotland Act, which enables functions of Scottish Ministers to be transferred to a UK Government Minister. The power is a general one, and could be used, for example, to enable UK Government Ministers to exercise certain functions on a nationwide basis or in consequence of an order adding to the reserved matters in Schedule 5. In practice, the power does not appear to have been used.
- 1.152 Schedule 5 of the Scotland Act also describes limited circumstances in which Scottish Ministers can assist UK Ministers in the discharge of their functions, most notably in the field of international relations.

1.52 See paragraphs 4 and 6 of Devolution Guidance Note 10 (November 2005), available from: <http://www.justice.gov.uk/guidance/docs/dgn10.pdf>.

## Shared or concurrent Ministerial powers

- 1.153 In general the effect of the Scotland Act on executive powers was to transfer completely the existing functions of UK Ministers, whether statutory or common law, so far as they were exercisable within devolved competence. Such functions ceased to be exercisable by UK Ministers.<sup>1.53</sup> There are however exceptions to that general rule. Some specified functions<sup>1.54</sup> can still be exercised by UK Ministers as well as by Scottish Ministers. These shared or concurrent functions are not exercisable jointly – they must be exercised separately whether by a UK Minister or by Scottish Ministers.
- 1.154 The functions mainly relate to powers to provide financial support to industry, to the implementation of United Nations Security Council Resolutions and to the promotion of road safety; also some are concerned with sea fisheries and animal health. Although of some practical importance in particular subject areas, these are of limited significance within the generality of the devolution settlement.
- 1.155 There is however one concurrent function of more general significance.<sup>1.55</sup> It relates to the power to implement by subordinate legislation European Community obligations provided in section 2(2) of the European Communities Act 1972. The general function of observing and implementing Community law was transferred to Scottish Ministers by section 53; UK Ministers can still exercise this power in Scotland. This makes it possible, in practice after agreement with Scottish Ministers, for EU obligations to be implemented through a single piece of legislation having effect across the whole of the UK, rather than having separate regulations for Scotland. The flexibility also exists for the Scottish regulations in some areas to be different (for example a number of those related to Common Agricultural Policy implementation). In some areas this need for different regulations arises because of differences in Scots law.
- 1.156 There are also powers which allow Scottish and UK Ministers each to arrange for the other to carry out functions on their behalf.<sup>1.56</sup> Thus, for example, some minor cross-border criminal justice functions can be performed on an agency basis in England and Wales by the Secretary of State on behalf of Scottish Ministers, and in Scotland by Scottish Ministers on behalf of the Secretary of State. Some similar arrangements are made for certain animal health matters.
- 1.157 One other possible source of concurrent powers is the power to make Orders in Council in relation to bodies which are designated as cross-border public authorities, that is bodies whose remit falls partly within devolved legislative competence, either because they operate both in Scotland and elsewhere in the United Kingdom or because, although Scotland-only bodies, they operate in both reserved and devolved areas. Section 89 enables tailor-made arrangements to be put in place for such bodies, which could include the giving of concurrent powers and functions in relation to them to UK and Scottish Ministers. In practice, however, it seems to have been much more common either to put in place arrangements for consultation or to give separate powers exercisable by the Scottish Ministers in relation to Scotland.
- 1.158 Finally in this context mention should be made of the (never used) default power in section 58. This is not a concurrent power, but it would enable UK Ministers, in certain very narrowly defined circumstances, to intrude into the area within devolved competence which is otherwise the preserve of Scottish Ministers. Section 58(1) and (2) give a power to the Secretary of State, for the purpose of ensuring that international

1.53 Under section 53(1).

1.54 They are specified in section 56(1).

1.55 Under section 57(1).

1.56 Section 93.

obligations (other than EU and ECHR obligation which are dealt with by the Act as a matter of vires) are complied with, to direct that Scottish Ministers should act, or not act, in a particular way. Section 58(4) empowers the Secretary of State to revoke any subordinate legislation made by Scottish Ministers if he has reasonable grounds to believe it to contain provisions which are incompatible with such international obligations or with the interests of defence or national security; or if it modifies the law as it applies to reserved matters in an adverse way. Essentially, section 58(4) is an equivalent in relation to subordinate legislation to the power to intervene in relation to primary legislation which is found in section 35(1). It may be worth noting that, short of primary legislation, these are the only powers to intervene in devolved areas which the Act provides UK Ministers.

## The Sewel Convention

- 1.159 The various Orders under the Scotland Act and the scope for joint working that they set out are, however, much less significant than the joint working which arises because the UK Parliament retains as a matter of law the capacity to legislate in devolved areas. On the face of it, that might have provided opportunity for conflict, but in fact it has provided opportunities for cooperation. The Sewel Convention is a key mechanism through which the UK and Scottish Governments and Parliaments have worked together since 1999. The Convention ensures that the UK Parliament respects the legislative competence of the Scottish Parliament.
- 1.160 During the passage of the Scotland Bill, the then Parliamentary Under-Secretary of State, Lord Sewel, announced on behalf of the Government:
- “We would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland, without the consent of the Scottish Parliament.”<sup>1.57</sup>
- 1.161 The scope of the Convention has since been widened, so that it now covers any provision in a UK Parliament Bill that:
- falls within the devolved legislative competence of the Scottish Parliament;
  - alters the executive competence of Scottish Ministers; or
  - alters the legislative competence of the Scottish Parliament.
- 1.162 Where a provision in a Bill introduced in the UK Parliament falls within the scope of the Sewel Convention, Scottish Ministers may seek the consent of the Scottish Parliament through a “legislative consent motion” (LCM) – previously called a “Sewel motion”.<sup>1.58</sup> At the Scottish Parliament, all proposed LCMs are first considered by a subject committee, and then by the Parliament as a whole. If the motion is agreed to, the Parliament’s consent is conveyed to the UK Parliament. If the Scottish Parliament withholds consent, the Convention normally commits the UK Government to remove the provisions in question.<sup>1.59</sup> If the UK Parliament Bill is amended during its passage so as to take it beyond the scope of any consent already conferred by LCM, then a further process of seeking and securing consent by an additional LCM is required.

1.57 House of Lords, 21 July 1998.

1.58 The Scottish Parliament’s Standing Orders provide that any MSP may seek the Parliament’s consent in this respect. This covers a situation (which has not arisen) where Scottish Ministers in a minority administration are opposed to legislation by Westminster, but the majority of MSPs are, or may be, in favour.

1.59 In practice, with UK Government Bills, agreement with the Scottish Government is normally secured before the Bill receives clearance for introduction from the Cabinet Committee on Legislation.

- 1.163 Since 1999, 101 Sewel Motions or LCMs have been moved in the Scottish Parliament on a wide range of policy areas. For example, legislation which has been subject to a LCM has included the Proceeds of Crime Act 2002, the Health Act 2006 and the Dormant Bank and Building Societies Accounts Act 2008. All have been passed, although in some cases after amendment.
- 1.164 Both the Scottish Parliament Procedures Committee<sup>1.60</sup> and the House of Commons Scottish Affairs Committee<sup>1.61</sup> have considered the application of the Convention and concluded that it is a necessary requirement of devolved governance, and that it works well. The Scottish Parliament revised its internal scrutiny procedures following the Procedures Committee report, and the House of Commons and the UK Government also agreed some changes to procedures in the UK Parliament and UK Government.
- 1.165 The Commission notes the constructive way in which the Convention has been used. A recent example is the Climate Change LCM agreed on 20 December 2007.<sup>1.62</sup> The main purpose of the (UK) Climate Change Bill is to provide a statutory framework for actions to mitigate climate change by reducing emissions. The environment is a policy area that is (broadly) devolved in Scotland, but the UK Government and the present Scottish Government appreciated that it was sensible to work together in order to make a substantial impact on emissions, given the global challenge of climate change. The LCM enabled the UK Parliament to legislate to introduce targets, trading schemes and a new Climate Change Committee with a UK-wide remit.
- 1.166 The Commission notes that the Sewel Convention is the only Parliamentary mechanism that exists to oversee any element of the management of the devolution settlement, and discusses the Sewel Convention further in Parts 4 and 6 of this Report.

1.60 7th Report, 2005, The Sewel Convention (SP Paper 428), available at: <http://www.scottish.parliament.uk/business/committees/procedures/reports-05/prr05-07-vol01.htm>.

1.61 Fourth Report of Session 2005-06, The Sewel Convention: the Westminster Perspective (HC 983), available at: <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmselect/cmselect/983/98302.htm>.

1.62 <http://www.scottish.parliament.uk/business/legConMem/LCM-2007-2008/pdf/ClimateChange-LCM.pdf>.

## Part 1–E: Context: the Scotland Act and the UK constitution

### The Scotland Act and the constitution of the United Kingdom

1.167 Scotland occupies a unique place in the constitution of the United Kingdom. The Scotland Act plays a very important role in that. Understanding clearly what that place is, and how Scotland and its governance relate to the United Kingdom's constitution, is a very important piece of context for our work.

### The United Kingdom's constitution

1.168 It is often said that the UK does not have a written constitution. This is true in the strict sense that there is no single, authoritative constitutional text – as for example in the United States of America or Germany – which sets out all the elements of the country's constitutional system and how they relate to one another. The reason for this is that the UK's history is different from that of nations which have had the opportunity or the need to start from scratch and create a constitution for a new state, or renew one that had to be replaced. Instead the UK's constitution has developed incrementally or organically over time in response to particular circumstances – such as the shifting balance of power between the Monarchy and Parliament, the changing role of the House of Commons and the House of Lords and, notably for our purposes, the Union between Scotland and England.

1.169 But although there is not a single written constitution, much of the UK's constitution is in fact not just written but enacted, in Acts of Parliament. These include the Acts defining the succession to the Crown, the Acts of Union, which created the Parliament of Great Britain, and the Parliament Acts, which limit the powers of the House of Lord in relation to legislation. These constitutional Acts include more recent legislation such as the European Communities Act, the Human Rights Act and the Scotland Act itself.<sup>1.63</sup> In creating the Scottish Parliament that Act made a very significant change to the UK constitution.

### Constitutional conventions and Parliamentary sovereignty

1.170 The UK constitution also relies upon conventions, which are not set down in statute but can nevertheless be very important. These include, for example, the convention that the Queen will invite the party leader who can command a majority in the House of Commons to form a government. (By contrast, the procedure for forming a Scottish Executive after an election to the Scottish Parliament is set down in the Scotland Act.) For the governance of Scotland a very significant constitutional convention is the Sewel Convention, under which the UK Parliament will not legislate on devolved matters without the consent of the Scottish Parliament.

1.171 The Sewel Convention is the way of reconciling the doctrine of Parliamentary sovereignty (itself a convention) with the reality that legislative competence on devolved issues has been transferred to the Scottish Parliament. The Scotland Act specifically

1.63 The courts have explicitly recognized that some Acts of Parliament are constitutional in nature: see for example the judgment of the House of Lords in the case of *Somerville v. Scottish Ministers* which concerns the interaction of the Human Rights Act and the Scotland Act. [2007] UK HL 44 accessible at [www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd071024/somerv-1.htm](http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd071024/somerv-1.htm).

preserves the right of the UK Parliament to legislate in devolved areas, but the operation of the Sewel Convention means that it does not do so in practice, other than by agreement. The concept of Parliamentary sovereignty has its roots in English law, and forms what is sometimes called a “rule of recognition”; that is to say that the courts will recognise that an Act duly passed by Parliament is good law.<sup>1.64</sup> The Sewel Convention reflects the political and constitutional reality that the Scottish Parliament also has legislative competence. Indeed the UK Parliament operates the Convention in such a way as to apply it to changes to the powers and functions of the Scottish Parliament and Ministers, thus giving the Scottish Parliament a say in its own competence. It is another example of the UK constitution evolving to take account of need rather than being amended in the formal way that a written constitution has to be.

## The United Kingdom’s territorial constitution

- 1.172 The Scotland Act is part of the UK’s territorial constitution, which is markedly asymmetrical. The UK has always had a territorial constitution, though it has not always been recognised or described as such. It has always had more than one legal jurisdiction and for many years territorially differentiated administration. Since devolution the territorial constitution has involved decentralised political and legislative power in Scotland, Wales and Northern Ireland. Each of these, however, is different, with different legislative powers and different executive structures. In Northern Ireland the legislative scope of the Northern Ireland Assembly is potentially at least as wide as in Scotland, but the cross-community structure of the Northern Ireland Executive reflects the very particular needs and circumstances of Northern Ireland. The Welsh Assembly has limited legislative competence at present, though there is scope to broaden it after a referendum. Since the Government of Wales Act 2006 the role of Welsh Ministers and their relationship to the Assembly has been more similar to that of Scottish Ministers than when Welsh devolution started in 1999.
- 1.173 England, by contrast, has no devolved legislatures, though the creation of the London Mayoralty and Assembly is a form of devolution for the capital. All England’s laws are made by the UK Parliament, and the United Kingdom Government is the government for England also. The territorial constitution of the United Kingdom is therefore radically asymmetrical. This reflects the history and geography of these islands, and like many other aspects of the UK constitution has grown and developed rather than being designed.

## Multi-level governance

- 1.174 The combination of this asymmetry and the particular place of the UK Parliament, in the absence of a written constitutional document allocating some responsibilities exclusively to one level of government or another, is what differentiates the UK from federal countries. That means that systems which work well in such countries cannot always readily be transferred to the UK context. Nevertheless the UK, like federal countries, now has in its constitution what has been labelled “multi-level governance”. That is to say, there are a number of different levels of government each of which has some responsibilities in the UK. These include the European Union institutions, the UK Parliament and the UK Government, the devolved administrations and in addition local government. An inevitable consequence of having multi-level governance is that there has to be arrangements for the different levels of government to communicate

1.64 As the Scottish Parliament does not automatically benefit from this rule, the Scotland Act includes a provision that every Act of the Parliament “shall be judicially noticed” (section 28(6)).

and work together. In the UK these take various forms, which are of necessity different from those operated in federal countries. Later in this report we discuss how well the UK arrangements work in practice.

- 1.175 The fact that the United Kingdom is a member of the European Union is important for how devolution works and might develop. As a member state the UK is bound by EU law, and this constrains both the UK and devolved institutions. The Scotland Act deals with this by providing that no law passed by the Scottish Parliament or action of Scottish Ministers is legal if it is contrary to EU law. (There is a similar provision relating to legislation or executive action which is contrary to the Rights set out in the European Convention on Human Rights made part of UK law by the Human Rights Act.) In addition the particular EU rules relating to state aids (to industry and commerce) will be relevant to the scope for decentralising taxation powers with the UK. This too is considered later.

## Different forms of devolution

- 1.176 The Scotland Act creates devolution, a form of home rule or self-government for Scotland within the United Kingdom. As we note above, proposals for some form of devolution or home rule have been made at various times since the Union. But they have not all been for the same thing. The idea of what constitutes devolution has changed, in different ways, over time. The settlement of the Scotland Act is quite different even from the devolution legislation of the 1970s. It devolves a great deal more, and gives much greater autonomy to the Scottish Parliament and Ministers, than to the Assembly and Ministers which were to be created then. Nor is it the same as the ideas of the 19th century when “home rule all round” was advocated in the context of the future of Ireland, or as the sort of home rule advocated by the Scottish Covenant of the 1940s. The Scotland Act does not reserve only the core functions of the nation-state such as defence and foreign affairs. Some elements of domestic policy, notably social security, are reserved also. The nature of government, the contract between the citizen and the state, and the international obligations of the UK have changed radically since the 19th century, and even the circumstances of the 1940s are not those of today. The task of the Commission is to consider whether the present form of devolution, created in the circumstances of the 1990s, remains appropriate for the needs and aspirations of the early part of the 21st century. Our constitutional arrangements must give form to the relationship between Scotland and the rest of the United Kingdom in a way that meets the needs of the time. We go on to consider this in Part 2 of our report.

# Part 2: Understanding Scotland's place in the United Kingdom

## Summary

In this Part of the Report we seek an understanding of both Scotland's place within the United Kingdom and what this means for our considerations.

## Contents of Part 2

Understanding Scotland's place in the United Kingdom

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## Part 2: Understanding Scotland's place in the United Kingdom

### Devolution and the Union in the 21<sup>st</sup> century

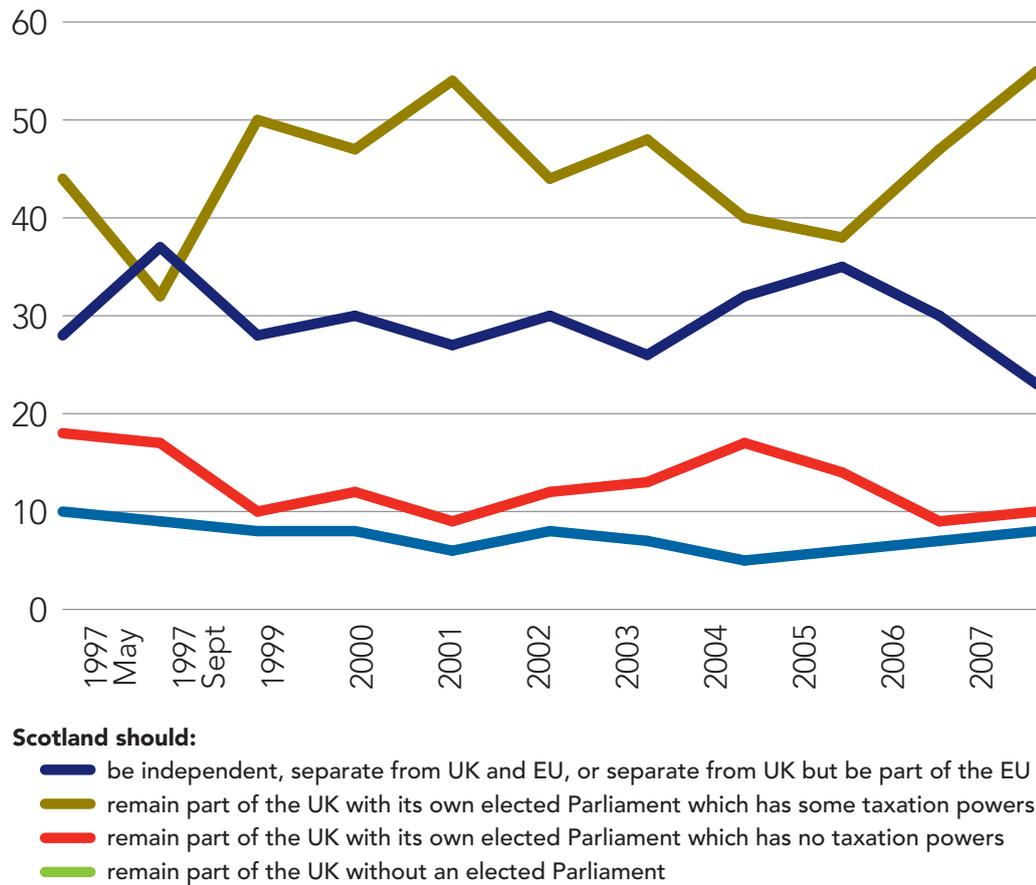
- 2.1 For the most part, people in Scotland care about the same political questions and issues as people elsewhere in Britain. How can we promote prosperity; what does fairness mean and how can it be achieved; what is the right balance between freedom and security and order in society; how should we balance economic activity with sustainability; how best do we educate our young people, or look after the sick or elderly; how do we manage public services to meet our needs and how can we secure the best quality of life for ourselves and our neighbours?
- 2.2 But there is one political question which has always had an especial significance in Scotland. How should this nation share these islands with its neighbours? Each of those neighbours has its own unique geography, history and identity. But most significantly one of them is ten times Scotland's size in population and economic scale. Scotland and England live together mainly on the one island sharing a border, and each benefits from a healthy and sustainable relationship with the other. What the best structure of that relationship is, and how it should develop, are the singular questions of Scottish politics.
- 2.3 The relationship has changed over time. It has been shaped by external factors like economic change, especially industrialisation and (in its different forms) globalisation, and by world wars and post-war tensions. It has been moulded also by the needs and wishes of the populations. In the 20th century the welfare state developed and altered the nature of the contract between citizen and state throughout the UK, and therefore how Scotland fits into the UK. Not all of these influences and changes have been welcomed; some changes have been gradual and others more turbulent, but since the Union of the Parliaments in 1707 there have always been two enduring threads. The first has been preserving and developing institutions reflecting Scottish identity and difference, and allowing decisions to be taken closer to the people they affect. The second has been giving effect to interests and values that are shared across the UK and relating them to Scottish institutions.
- 2.4 These two aims have sometimes been in conflict, but balancing unity and diversity in the circumstances of the time has always been at the heart of the question. The emphasis given to each has changed, as needs and priorities differ, but throughout this period Scotland's relationship with England has never become one of mere incorporation as "North Britain". Nor has it been one of separation, cutting Scotland off from the mainstream of British economic or social life. Consistently, that balance is what Scottish people have wanted, and it is what a large majority of them continue to want today (see Box 2.1). Precisely how to set the balance, and secure the relationship as a result, depends on the particular needs and priorities of people at any given time, as history shows.<sup>2.1</sup> This will be just as true in the 21st century with its new, ever changing and increasingly global challenges as in the centuries before.

2.1 See for example Professor Colin Kidd, *Union and Unionism: Political Thought in Scotland 1500 – 2000* (Cambridge University Press, 2008).

### BOX 2.1 – Constitutional preference for Scotland

Our own evidence is backed up by research into public opinion. As Figure 2.1 clearly shows, devolution within the Union has consistently remained the preferred constitutional model of the significant majority of people in Scotland. The most recent data, summarised in Table 2.1, also suggests this remains the case.

Figure 2.1: Constitutional preference for Scotland<sup>2.2</sup>



2.2 Source: Scottish Election Study 1997; Scottish Referendum Study 1997; Scottish Social Attitudes Survey 1999 – 2007.

**Table 2.1: Constitutional preference, May 2009<sup>2,3</sup>**

Thinking about Scotland's future, which of the following is closest to your view?	% of respondents
Scotland should become independent from the rest of the UK	21
The Scottish Parliament should have more powers than it does now, but short of full independence from the rest of the UK	41
The Scottish Parliament has the right level of powers and should retain them	26
The Scottish Parliament should have fewer powers than it does now	8
Don't know/none of the above	5

## How Scotland's relationship with the rest of the UK has changed

- 2.5 In the 18th and 19th centuries the separate Scottish legal system, educational system and established church were perhaps the most significant institutions of Scottish identity, while the Crown and Parliament reflected the wider Union. In the 19th and 20th centuries, Scotland shared in economic development and globalisation, within an integrated UK economy. Some public services, such as pensions, were made available uniformly across the UK, but many of the growing institutions of the state were created with a separate Scottish organisational identity. So by the last decade of the 20th century there was a substantially decentralised apparatus of Government in Scotland, headed by the Scottish Office.
- 2.6 Throughout the 20th century there was pressure for political as well as cultural and institutional expression to Scottish identity, which would give democratic oversight to that apparatus. The Scottish Covenant movement of the 1940s and 50s was followed by the proposals for a Scottish Assembly in the 1970s. Each of these was a creature of its time, each trying to secure Scottish autonomy within the Union. It was the cross-party work of the Constitutional Convention in the 1990s, involving much of civic Scotland, which paved the way for the most significant development of the Anglo-Scottish Union since 1707 – the creation of the Scottish Parliament in 1999.
- 2.7 What devolution did was to turn administrative decentralisation into the Home Rule envisaged by the Constitutional Convention, within a wider Union. This was not the Home Rule envisaged in the 19th century, nor the Home Rule advocated in the 1940s, but rather a form of self-government designed for the greatly altered needs and conditions of the time. Since 1999 the Scottish Parliament has provided a democratically elected expression of Scottish identity, responsible for the majority of domestic policy in Scotland (see Box 2.2). Most of Scotland's laws are now made at the Scottish Parliament, and most of Scotland's public spending choices are made in Scotland by elected Scottish politicians. Scottish Ministers are now accountable only to the Scottish people, through their MSPs. It means that democratic oversight of Scotland's public services is now substantially the job of elected Scottish politicians sitting in Edinburgh. But this sort of devolution within a Union also means that some decisions are taken at a UK level, where this makes sense to secure the interests of the people of Scotland as well as other UK citizens. And there are Scottish MPs who contribute to democratic oversight of these areas at the UK Parliament. We are clear – as we were in our First Report – that some aspects of that wider Union are essential for Scotland's interests, and continue to reflect the interests and values of Scottish people.

2.3 Populus poll for The Times Scotland, May 2009, available from: <http://www.populus.co.uk/the-times-the-times-scotland-poll-anniversary-of-devolution-may-2009-030509.html>. Percentages do not add to 100 due to rounding.

**BOX 2.2 – Devolved and reserved functions**

The Scottish Parliament and Scottish Ministers have a very wide range of functions. The Parliament can legislate, for example, on all of the following areas:

- health, including how the NHS is organised;
- education, including pre-school education, schools, colleges, universities and training;
- justice, including home affairs, courts, prisons, criminal and civil law;
- local government, its structure, organisation and finance;
- housing, planning and urban renewal, and many aspects of transport;
- the environment, agriculture and fisheries.

Those areas reserved to the UK Parliament include matters which are central to the political identity of the United Kingdom, such as the monarchy and the constitution; matters like defence and foreign relations which define the UK in global politics and international affairs; and critical aspects of the economic Union including such matters as the currency, macro-economic management and taxation.

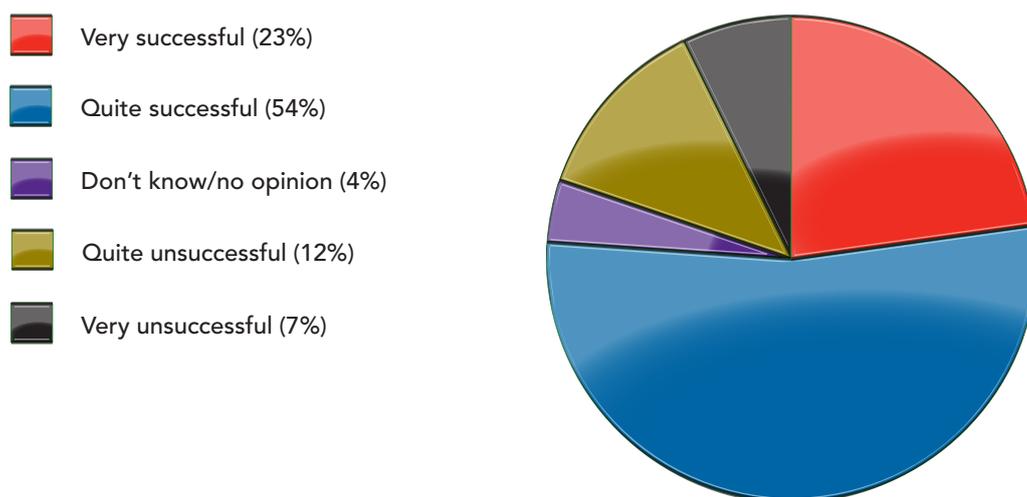
## Scotland in the UK in the 21st Century

- 2.8 It is clear to us that this balance of having such a range of devolved powers within a wider Union reflects the views and the needs both of people in Scotland, and indeed of the wider UK population too. The referendum of 1997 endorsed by a substantial majority devolving to a Scottish Parliament wide legislative competence, responsibility for public spending and public services, and some taxation powers. In public opinion survey data since then, this has remained the preference of a majority of Scottish people (see Box 2.1). The overwhelming view in the evidence we have seen and heard is that devolution has worked remarkably well in practice. It has proved possible to create not just administrative decentralisation but political devolution within a UK framework. The evidence confirms that it is possible to have a distinct Scottish political identity, and differing Scottish policy choices, without undermining the essential unity of the United Kingdom in relation to matters that are critical to all its people. Our conclusion is that devolution has been a real and substantial success. Home rule within a wider Union can work.
- 2.9 The Scottish Parliament is here to stay. It has embedded itself in both the consciousness of the people of Scotland and the constitution of the United Kingdom. But that is not to say that the 1999 settlement was perfect in all respects, or that it can evolve no further. Like all political institutions it must change and develop to meet the needs and challenges of the time, in response to experience and aspiration. The task for this Commission, in accordance with its remit, has been to consider what further development will enhance this settlement, and allow the Scottish Parliament to serve the people of Scotland better, within the wider Union.
- 2.10 It is our understanding of the relationship between Scotland and the rest of the UK required today that will guide our recommendations for change to strengthen both devolution and the Union in which it is embedded.

### BOX 2.3 – The success of devolution

The verdict of the people of Scotland is that the devolution settlement of 1999 has been a remarkable and substantial success. We draw this conclusion having listened to the people of Scotland (see Figures 2.2 – 2.4). Talking to many civic organisations and others, we have also found that that the devolution settlement is in practice operating successfully.<sup>2.4</sup> Of course many of those who gave evidence or registered a view said that they were happy about devolution because the Scottish Parliament pursued particular policies of which they approved. That in itself is not necessarily proof of success, and making judgments about individual policies, or whether overall the policies pursued by Scottish administrations have been the right ones, is not within the Commission’s remit. But allowing domestic public policy in Scotland to reflect more effectively the views and preferences of the population is clearly an objective of devolution, and it has manifestly been achieved. We also base this judgment on the evidence of the vast majority of respondents who praised the way in which the Scottish Parliament went about its business. We heard that the Scottish Parliament was closer to the people it served. The public, interest groups and others felt they had greater opportunity to meet relevant Ministers and MSPs, and so greater understanding and mutual respect had developed. Similarly, there was a great deal of praise for the transparency and openness of the Scottish Parliament – whether through its approach to committee inquiries, or its innovative use of the internet to make information available and accessible (particularly in the Parliament’s early days). The Commission also highlights, and agrees with, the evidence received that the Scottish Parliament has brought about far greater democratic scrutiny both of public life in Scotland and of legislative proposals than would otherwise have been possible.

Figure 2.2: Success of devolution: success of the Scottish Executive/Government\*

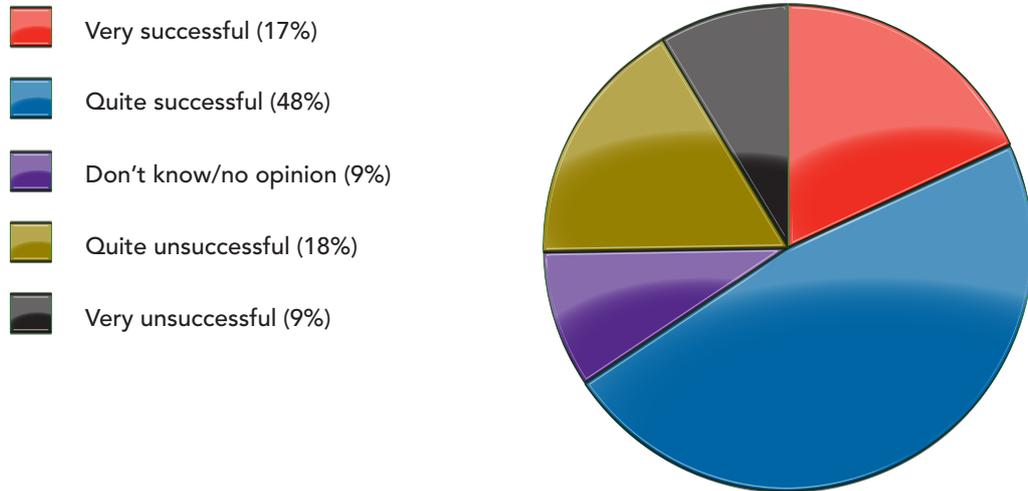


Total responses to Question 1: 919

\* See questionnaire analysis (Source: *Commission on Scottish Devolution*).

2.4 See for example the results of our questionnaire – some results are summarised in Figures 2.3 – 2.5, and the full data is available from: <http://www.commissiononscottishdevolution.org.uk/uploads/questionnaire-results.pdf>. As respondents were entirely self-selecting the results, although interesting and valid for that group, constitute a non-random sample not necessarily representative of public opinion. (The overall picture appears, however, to be generally consistent with other public opinion surveys which have been carried out on a more representative basis.)

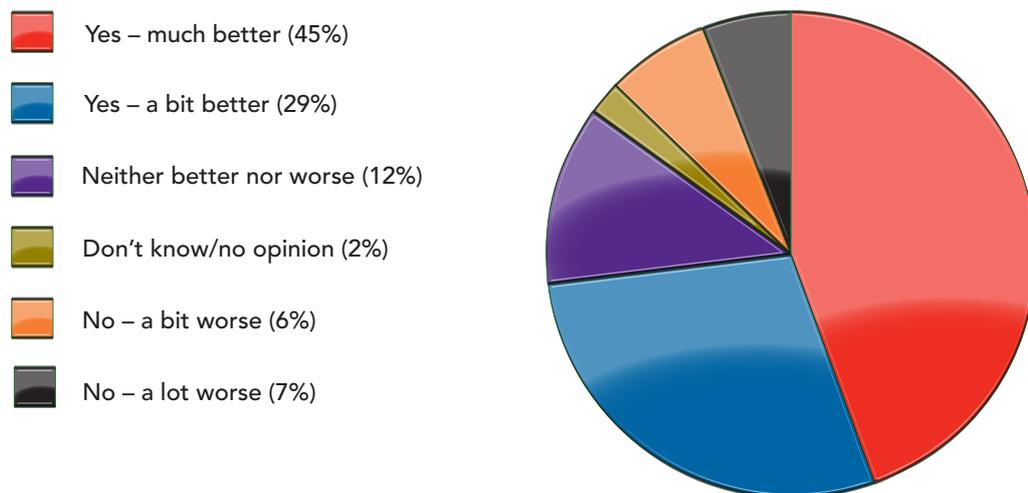
Figure 2.3: Success of devolution: success of the Scottish Parliament\*<sup>2.5</sup>



Total responses to Question 2: 919

\* See questionnaire analysis (Source: *Commission on Scottish Devolution*).

Figure 2.4: Has devolution produced better results for Scotland?\*<sup>2.5</sup>



Total responses to Question 3: 919

\* See questionnaire analysis (Source: *Commission on Scottish Devolution*).

2.5 Percentages do not add to 100 due to rounding.

## Scotland's place in a political Union: the UK's territorial constitution

- 2.11 Scotland's union with England is unique within the United Kingdom, and internationally. Within the UK the relationship of each of the nations with England and the rest of the UK is different – each reflects different histories, different aspirations and the different nature of each part of the UK. Internationally the UK's territorial constitution cannot be placed into a pigeon-hole alongside similar arrangements elsewhere. The UK is not a federal state like the US, Canada or Australia. Nor is it particularly like Spain, made up of different autonomous communities with differing levels of responsibility. (See the explanation in Box 2.4) The UK is, as has been said, not just a Union State, but a State of different unions: different unions which have formed between England and each of its three neighbours. Each of those unions has its own history, dynamic and likely path of further development.

### BOX 2.4 – Federalism

Comparisons are often drawn between Scotland's place in the United Kingdom and the place of a state or province in a federal structure. Indeed, we have received some submissions from people who would aspire to a federal system for the UK. Since any move to a federal system for Scotland as part of the United Kingdom would necessarily affect the constitutional position of England, Wales and Northern Ireland, consideration of such a system for the UK as a whole falls outside the Commission's remit. Nevertheless useful lessons can be drawn from such systems but to do so it is very important to understand clearly what the similarities and differences are.

The most obvious similarity is that Scotland enjoys a very substantial degree of autonomy under devolution, and relates to the UK Government in many of the same ways as a state government would to a federal one.

In a federal system there are (at least) two constitutionally established levels of government. There is at least one function where each level has exclusive competence, and each level is constitutionally free to exercise its competence without the consent of the other level (and, at the lower level, independently of the other states, regions or provinces). In most federations the same structure applies across the territory of the federation, and the governments at each level are accountable to the relevant electorates (i.e. regional or federal). The constitutional system of the United Kingdom is not federal. Most obviously there is no second level government for its largest sub-national region (England). But also as a matter of constitutional law there are no functions for which the devolved Parliaments or Assemblies have exclusive competence.

In most federal systems, not only is state- or provincial-level government operational in all parts of the country, but their powers tend to be broadly uniform, and so the powers of the federal government are uniform throughout its jurisdiction. The UK differs in this respect in that the powers of the Scottish Parliament, Welsh Assembly and Northern Ireland Assembly differ, in some respects substantially, one from another. Most federal systems will have some special arrangement for particular territories with special circumstances, but Spain is an interesting example of more asymmetrical federalism. The system of autonomous communities allows for considerable differences between the powers they all exercise. The autonomous communities do, however, enjoy some exclusive competences and there is now no part of Spain which does not enjoy some decentralised powers.

Devolution (in the sense in which we use the term) differs from these sorts of federalism since the devolving authority retains, at least as a matter of law, the power to alter the devolution settlement to impose new or different obligations or constraints on the devolved authorities, even within the scope of their competences. How the legal principle and political reality match we discuss below.

- 2.12 This unique asymmetry is not a problem. If anything, it is something to be proud of – Scotland's constitutional arrangements have grown or evolved in response to need, like many other aspects of the constitution of the UK. Their asymmetry reflects the underlying reality: Scotland is a small nation sharing islands, and a Union, with a much larger neighbour. The UK's territorial constitution reflects the radical asymmetry of its geography and demography. Not only do the smaller nations in the UK each have different levels of decentralised power; but there is no equivalent of devolved institutions for England. The UK Parliament at Westminster is also England's parliament, and the UK Government is England's government too.
- 2.13 It is not for us to discuss where or how power might be decentralised or devolved in England – whether, as has been proposed in the past, to regional level, or by giving more power to local institutions. Nor is it for us to discuss how England's laws should be made. But, however such ideas might be pursued, they will not affect the fact that England, though larger than Scotland, Wales or Northern Ireland, will remain a nation with a single political identity which it has maintained for at least as long as Scotland's. It is of course possible to divide the UK into "standard regions" for administrative and statistical purposes. Scotland is one of those regions, as are Wales and Northern Ireland. But the standard regions in England do not have the same sort of political identity as Scotland. This fundamental aspect of the Union will always remain, and must not be ignored in its territorial constitution.
- 2.14 Because our constitutional arrangements are unique, it does not make sense to take ideas or institutions from other countries and apply them directly here. Nevertheless it is possible to learn lessons from how other countries manage multi-level governance, how powers are divided and so on. The most important of all lessons seems to us to be found in how the different levels of government work together when their respective responsibilities overlap or interact with one another. This may be second nature in many federal systems but in the UK only 15% of the population live under devolved governments, so the territorial dimension of the constitution may too easily be overlooked or given insufficient consideration. Devolution to Scotland (and Wales and Northern Ireland) created political institutions that exercise many of the powers of central Government for a significant proportion of the UK. That inevitably has meant that the governance of the rest of the UK cannot continue unchanged.
- 2.15 It is not sufficient for Scots (or indeed Welsh or Northern Ireland citizens) to dismiss this as simply a problem for the English: the internal arrangements of the Union are a matter for all of us. The UK now has a territorial constitution, and it needs, in our view, to be more fully and clearly set out.
- 2.16 We have long passed the days when it made much sense to say that the UK had only an "unwritten constitution". If that was ever true, it is certainly not true now. Much of our constitution is set out in Acts of Parliament – notably, for our purposes, the Scotland Act, but also the Human Rights Act. But because there is not a single, comprehensive constitutional document, it is sometimes necessary to look quite hard to find all the elements of our territorial constitution.
- 2.17 Scotland now has two Parliaments – the Scottish Parliament at Holyrood as well as the UK Parliament at Westminster. And of course it has the European Parliament too. Each of the two national Parliaments has in fact well-defined responsibilities, with certain UK responsibilities reserved to the UK Parliament, and the vast majority devolved. But the doctrine of Parliamentary sovereignty means that, in principle, the UK Parliament at Westminster retains the right to legislate in devolved areas without recourse to the Scottish Parliament. Constitutional theory and practice can differ: and the practice is what matters most here. The practice is that only in co-operation with the Scottish

Parliament will the UK Parliament legislate in relation to devolved matters. This practice is very much in the public interest as it affirms the role of the Scottish Parliament as the legislature for devolved matters. It is a significant achievement of both institutions. In the words of one of our witnesses it is “the zenith” of co-operation between the institutions.<sup>2.6</sup> It is sometimes referred to as the Sewel Convention after Lord Sewel, then a Scottish Office Minister, who articulated the convention during the passage of the Scotland Bill.<sup>2.7</sup>

- 2.18 The Convention has in fact developed in practice. It has been used, for example, where a common UK approach to legislation is considered to be in the best interests of Scotland and the UK, or where separate legislation would create legal uncertainty or cause practical difficulties.<sup>2.8</sup> We discuss later in this report how it, and other inter-governmental and inter-parliamentary relationships, should be strengthened.
- 2.19 Our system of devolution within a wider political Union has some necessary implications for how powers are divided between the different levels of Government. Certain functions are integral to the effective functioning of the United Kingdom as a sovereign nation-state with international responsibilities. Devolution of these would be undesirable in principle because retaining them at UK level is fundamental to the very concept of Union. These comprise the monarchy, the UK constitution, defence, national security and foreign affairs.
- 2.20 National defence and security are irreducible functions of the State, and therefore of the Union. We believe that, in a world with rapidly changing and uncertain threats, all parts of the UK must remain joined together for defence and national security. There should be no risk of a lack of clarity over who is responsible for dealing with these. To say that is not of course to endorse any particular defence or security policy but rather to assert that these issues should be decided by the UK in the best interests of all its citizens.<sup>2.9</sup>
- 2.21 So too is this the case with foreign affairs. The United Kingdom is a State recognised in international law. We agree Scotland should have its own international profile. But it forms part of the United Kingdom, and we are clear that it is in Scotland’s interests for the UK to discharge the international functions and obligations of the sovereign State towards other States.
- 2.22 Some issues may, however, arise where these responsibilities impinge on devolved business. For example, a devolved nation like Scotland may wish to promote trade, tourism or cultural issues internationally, and in doing so will need to work closely with the UK and its responsibility for international relations. UK membership of the EU means that it carries member state responsibility for establishing a UK position and representing Scottish interest at EU level. That will impinge markedly on devolved responsibilities such as (for example), fishing or agriculture. For areas like these highly effective inter-governmental arrangements are needed and in these areas, in fact, devolved administrations are able to play a substantive role in EU discussions. These issues too are discussed later in the report.

2.6 Oral evidence from Members of Parliament, 22 April 2009.

2.7 21 July 1998, Lords Hansard, vol 592, col 791.

2.8 For example, the Scottish Parliament agreed a Legislative Consent Motion for the Proceeds of Crime Act 2002 on the basis that it was important to have consistency in the law on both sides of the Border and to avoid the inadvertent creation of loopholes.

2.9 A number of submissions to the Commission raising the issue of weapons of mass destruction (WMD) and whether Scotland should have the right to determine policy in this area. The Scotland Act treats such weapons separately from defence (although both are reserved matters), perhaps because WMD are the subject of international obligations. Whatever may have been the reason for reserving them separately, the Commission considers that policy on WMD must remain a reserved matter for the same reasons as defence.

## Scotland's place in an economic and social union

- 2.23 Scotland's union with the rest of the UK is more than just a confederation for the purposes of external relations and defence. As we noted in our First Report, it is a fact of economic life that Scotland's economy is deeply integrated with that of the rest of the UK as well as being situated in the European Union. There is a long-established UK single market in goods, labour, capital and knowledge. This can be seen across many sectors – manufacturing, finance, retail and services. Free trade across the UK, and a free flow of talent and skills, underpin economic growth throughout the country. Both Scotland and the rest of the UK would suffer if this profound economic union were breached. It is critical for the future prosperity of Scotland not just in the good times, but also in times of economic and financial uncertainty where the UK has the capacity to act in a way that Scotland alone could not. This economic union has implications for the allocation of powers – notably in relation to macro-economic policy and taxation which are reserved. But effective macro-economic management does not require complete uniformity, and economic development can often be best promoted by coordinated action at a devolved level. Similarly, to the extent that the Scottish Parliament exercises any fiscal responsibilities, it and the UK Government need to be able to discuss macro-economic issues. This interaction provides further proof of the need for effective inter-governmental relations.
- 2.24 Finally, there are areas where the people of Scotland have over many years shared rights and responsibilities, and pooled risks and resources, with the rest of the Union. These are areas of common welfare. The most notable is social security – old age pensions, benefits paid to people seeking work or those unable to do so, and allowances and credits supporting children and families. It is in principle possible to envisage a Union in which such rights and responsibilities are decentralised, and differ in different parts of the country – for example on the basis of what can be afforded there. Even in federal states, however, it is common (though not universal) for social protection of this kind to be a federal, rather than state or provincial, responsibility. This makes both economic and social sense: economic sense because one part of the country may be differently affected, or affected at different times, by economic change or shocks; social sense because providing people whose circumstances are the same with the same financial support wherever they are in the UK shows solidarity and mutual support.
- 2.25 At present social protection is financed by UK-wide resources. Tax revenues are pooled and shared out on the basis of need to individuals (and thus indirectly, to different parts of the UK). This seems to us to be a fundamental part of the Union, and the evidence is that Scottish people wish it to continue. The risks, and the resources to deal with them, are shared. It has a very explicit expression in the form of National Insurance, which is linked to benefit entitlements. But it is also seen in pooling other taxation like income tax or VAT and even in the pooling of windfalls like taxes from oil revenues and other natural resources.
- 2.26 But in this area too, Union-wide provision sits alongside the distinctiveness and flexibility that can be offered by devolution. Social security impinges very directly on certain devolved responsibilities. For example devolved responsibilities for training, housing or local taxation relate very closely to benefits like job seekers' allowance and housing and council tax benefits. Decisions in one area will have a direct impact on the other.

- 2.27 From its beginnings in the early part of the 20th century, the welfare state rapidly built up across Britain after the Second World War. But the welfare state is not all provided, like social security, on a uniform national basis of cash entitlements to individuals according to their circumstances. In general, where welfare is provided in the form of services, these were decentralised and are now devolved. There is good reason for this. The flexibility and responsiveness that devolution offers means that such services can be managed and governed better. Additionally some of those services, most notably education, have distinct and valued Scottish identities. Setting the balance, between the scope for variation provided by devolution and the common expectations shared across the UK of what the welfare state should deliver, is not easy. The Scottish population – like that of the rest of the UK – expresses a desire for both local sensitivity and national uniformity. We are clear that the advantages of a Scottish Parliament mean that services such as health should remain devolved, but are sensitive to the arguments that provision across the UK should be related to need in the different parts of the UK.
- 2.28 This has one obvious implication. If, in providing some devolved services, relative need across the UK is to be recognised, some level of grant from central to devolved government will be necessary. But it has a more profound implication too. There has to be a common understanding between the Parliaments in the Union about the services that constitute the welfare state – the most important of which will be health care, care for the elderly and education – and on what basis are they supplied – substantially free at the point of need. This common understanding already exists. It has been part of the inheritance of all the devolved administrations in the UK. Indeed it has been given some form in relation to a statement of principles of the NHS across the UK.<sup>2.10</sup> More important, it is a shared expectation of people across the UK. It is our recommendation that the Scottish Parliament and UK Parliament find a suitable forum to confirm that each agrees to the elements of those common social rights and also the responsibilities that go with them. This is not centralisation or uniformity, but a voluntary agreement to an expression of a common understanding which already exists and which can be clearly set out and committed to. In the shorthand of this report, we describe this as a “social Union”. An understanding of the social Union is a key to deciding which matters should be devolved and how they should be financed in future.

**RECOMMENDATION 2.1:** The Scottish Parliament and UK Parliament should confirm that each agrees to the elements of the common social rights that make up the social Union and also the responsibilities that go with them.

## Strengthening devolved responsibility

- 2.29 A principle which was widely supported amongst those who gave evidence to us was that in general responsibilities of government should be exercised at the level of government closest to the people, unless there are good reasons not to. This principle, subsidiarity, is one with which we wholly agree. It should be applied in setting the balance between devolved and reserved functions. It is in fact entirely consistent with the legal structure enshrined in the Scotland Act, under which matters are devolved unless explicitly reserved to UK Parliament.

2.10 On 3 July 2008, England, Scotland, Northern Ireland and Wales committed to a high-level statement declaring the principles of the NHS across the UK. This was to reaffirm that the underlying principles of the NHS across the UK remain the same, even as the way the NHS provides care may vary between the four countries, reflecting their different needs and circumstances.

- 2.30 The result is that the Scottish Parliament is already responsible for the majority of public services in Scotland, and has legislative responsibility for most of the law of Scotland (see Box 2.2). The powers of the Scottish Ministers to act are wide-ranging. The approach to devolution, together with the breadth of devolved competence, was described to us in evidence as “maximalist”.<sup>2.11</sup> The powers of the Scottish Parliament and Ministers have also been further extended since devolution. Section 30 of the Scotland Act provides for modifications to be made to reserved matters by an Order in Council.<sup>2.12</sup> An Order may extend the competence of the Scottish Parliament into a previously reserved area of responsibility or add an area to the list of reserved matters, thus taking it out of the Scottish Parliament’s control. Since the Scotland Act came into force, nine such Orders have been made, but none of them re-reserved matters already devolved to the Scottish Parliament.<sup>2.13</sup>
- 2.31 As a consequence, 60% of public spending in Scotland is the responsibility of the Scottish Parliament. Of the remainder the overwhelming proportion comprises social security benefits (which are, correctly in our view, not devolved). So the scope for substantial additional responsibilities to be devolved to the Scottish Parliament may be limited, as most domestic responsibilities are already devolved.
- 2.32 Nevertheless there may be scope for adjustment or changes at the boundary to strengthen devolved powers or, if there is evidence that shows a compelling need, to shift responsibility to UK Parliament for matters that ought to be uniform across the UK. In addition there may be some aspects of how the Scottish Parliament goes about its own business that, in the light of experience, may be able to be improved. The weight of evidence is that devolution is working well in practice. So we have not simply trawled mechanically through the reserved issues listed in Schedule 5 to assess them against the principles we have identified. Nor have we conducted an extensive review of every aspect of Scottish Parliamentary procedure. Instead we have chosen to concentrate on areas where evidence we have received has indicated that there is either an appetite for a change or that current arrangements are not operating as effectively as they might.<sup>2.14</sup>
- 2.33 The evidence that we have received covers a range of potential areas for change in the functions of the Scottish Parliament. Each is considered in detail in Part 5 of this report. In a number of those areas there is potential conflict between devolved and reserved responsibilities. In relation to any specific function where problems arise, it will always be appropriate to ask whether the boundary is in the right place. But it is clear from our analysis that such conflicts will not in general be resolved by reserving or devolving particular responsibilities. There will always be a boundary and any boundary will over time lead in practice to the possibility of disagreement. International experience shows that where there is more than one level of government in a country – still something of a novelty within the UK<sup>2.15</sup> – there are inevitably going to be issues where responsibilities overlap and interact with one another. Our analysis of Scotland’s place in a political, economic and social union (paragraphs 2.11 to 2.28) has identified a number of these areas. These are among the issues to be managed in the strengthened arrangements for inter-governmental and inter-parliamentary working discussed in Part 4 of this report. The scope for strengthening the operation of the Scottish Parliament itself is considered in Part 6.

2.11 Evidence session with Sir Muir Russell, 27 October 2008.

2.12 An Order in Council is a form of subordinate legislation, made by the Queen on the advice of Ministers.

2.13 An example of an Order increasing devolved competence was one gave the Scottish Ministers responsibility for “the promotion and construction of railways which start, end and remain in Scotland”.

2.14 Dissatisfaction with a policy, or arguing for it to be devolved or reserved in order to achieve a desired policy outcome, is not a principled argument for change. As the Church of Scotland made clear in its evidence in relation to nuclear weapons, it is possible to object strenuously to a particular policy whilst recognising that devolution is not an appropriate way to achieve change: Church of Scotland oral evidence, 10 October 2008, and written submission, 13 June 2008.

2.15 Although of course the UK has been represented in a directly elected European Parliament since 1979.

## Financing devolution: accountability, equity and efficiency

- 2.34 The Scottish Parliament has complete freedom over how to spend its budget. It is fully accountable to the Scottish electorate for the spending choices it makes, and for efficiency and value for money in the public services it controls. This matches the wide legislative freedom it has. It possesses, however, a remarkably high degree of spending freedom and accountability, much greater than that of many state or provincial governments in federal systems in other countries. We welcome this as entirely consistent with Home Rule. But the very wide spending powers that the Scottish Parliament has are not matched by its taxation responsibilities. Although the Scottish Parliament controls 60% of identifiable public spending in Scotland, it is responsible in practice for deciding only 10% of the taxation levied in Scotland. Its budget is determined overwhelmingly by the block grant from Westminster. We agree with the judgment expressed in the majority of the evidence received by us that this is not the right balance. It does not allow the Scottish Parliament to be sufficiently financially accountable for its decisions. In particular it does not make it accountable effectively for taking taxation and spending decisions together and, critically, for making the choice at the margin between them.
- 2.35 How to make a devolved parliament accountable for taxation decisions inside a wider economic and social union is a complex and difficult question. In considering it we have been greatly assisted by the Independent Expert Group on finance (see Part 3 for details of the work of the IEG).
- 2.36 Our aim is to improve accountability. But in any financing system which supports devolution, accountability cannot be the sole consideration. It must be balanced against considerations of equity and efficiency. In our analysis equity derives substantially from an understanding of the social Union, and efficiency follows from the reality of the economic Union. And we have borne in mind the need not to introduce instability into levels of public spending, taxation or services, especially at a time of great economic and financial uncertainty. Nevertheless our aim is to move towards a position where the Scottish Parliament has sufficient fiscal levers to be, and be seen to be, responsible for raising a significant proportion of its own budget on the basis of taxation decisions which are perceptible to the Scottish people. With the wide powers of the Scottish Parliament must come a commensurate degree of fiscal responsibility.
- 2.37 The Scottish Parliament should no longer be wholly dependent on a grant from Westminster. Supporting devolved public spending in part by taxes shared across the UK seems to us nevertheless both necessary and appropriate. It is necessary because the scope to devolve taxes within an economic Union is inevitably constrained by the need to avoid economic distortions. It is appropriate because sharing taxation resources across the UK allows for a degree of equity in level of public spending provision. Sharing tax in this way can, however, be justified ultimately only on the basis of equity, and on meeting needs which it is acknowledged should be met in all parts of the UK. We are not in a position to make an assessment of relative spending need across the different parts of the UK, and so of the level of grant that will be justified in such a mixed system. We are, of course, aware of arguments that have been put that Scotland does very well out of the present system of calculating grant<sup>2.16</sup> but we do not see it as part of our remit to make an assessment of whether the level of grant is the right one. This area is analysed more fully, and our detailed proposals set out, in Part 3.

2.16 The Barnett formula applied to changes in comparable spending in England.

## Conclusion

2.38 To sum up, devolution has been very successful in creating a model of Home Rule within the wider Union for Scotland. It has in general met the aspirations of the people in Scotland and is working well in practice. At the same time our diagnosis is that there are a number of areas where devolution within the Union can be developed to strengthen both devolution and the Union and to ensure that they meet the needs of Scotland and the rest of the UK in the 21st century. We see a need for change and development in four respects:

**First:** We need a better-articulated understanding of Scotland's relationship with the rest of the UK and its place in the Union, which will guide our recommendations in other areas. We have set out our analysis of this above and recommend that there is a clear statement of the principles, or social rights, which underpin the social union of the UK.

**Second:** We see a need to strengthen the financial accountability of the Scottish Parliament, through a better linkage between taxation decisions and spending decisions it makes, and a clearer understanding of how this is balanced with equity in public spending levels. This is discussed in Part 3.

**Third:** Much better developed and more robust relationships between the Parliaments and Governments are needed to ensure that, where devolved and reserved responsibilities overlap or impinge on one another, cooperation is strengthened and proper coordination and joint working are encouraged and supported, all properly scrutinised by the parliaments the governments are accountable to. This is discussed in Part 4.

**Finally:** Some adjustments are needed, firstly to devolved powers and secondly, to Parliamentary procedures, to strengthen the ability of the Scottish Parliament to serve Scotland – these are discussed in Parts 5 and 6.

# Part 3: Strengthening accountability in finance

## Summary

The Scottish Parliament is responsible for over half the public expenditure in Scotland, with the remainder the responsibility of the UK Parliament. In this Part, we discuss how public spending in Scotland is decided upon, controlled and managed, and recommend changes to fulfil our terms of reference.

Our work in this area has been greatly assisted by the evidence we have received, and in particular by the Independent Expert Group of economists, political scientists and others chaired by Professor Anton Muscatelli, Principal and Vice-Chancellor of Heriot-Watt University, which has reviewed and assembled the academic evidence on funding what they describe as “sub-national or regional” governments. Their first report to us was published on 17 November 2008, and they have subsequently published further papers they prepared for us on borrowing and natural resources, as well as a detailed response to our consultation questions.<sup>3.1</sup> Annex 3 lists the membership of the Group, and reproduces their conclusions and response to our consultation questions. We are very grateful to them, although of course the use made of their evidence and analysis is the Commission’s responsibility and not theirs.

Before addressing the questions of principle set out by the Independent Expert Group and the implications of our analysis in Part 2 of the nature of the devolution within the Union, we set out some of the factual background on public spending in Scotland, how it is determined and managed, and how it is paid for.

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3.1 All of the work of the Independent Expert Group is available at: <http://www.commissiononscottishdevolution.org.uk/papers.php>.

## Part 3–A: Background and context

### Public spending in Scotland

3.1 The Scottish Government and Parliament is responsible for the majority of public spending in Scotland, such as spending on health, schools, roads, law and order. Some of these public services are directly under the control of the Scottish Government, some are delivered by public bodies like Health Boards while others are actually run by local government, but supported by grants from the Scottish Government’s budget. The remainder of public spending in Scotland is the responsibility of the UK Government and Parliament. This includes expenditure which can be seen to benefit Scotland directly, the overwhelming part of which is social security payments such as state pensions, Child Benefit, Job Seekers Allowance, and Income Support. Additionally, there is public spending by the UK Government which is “non-identifiable” – that is, it cannot be split up and attributed to individual parts of the country as it benefits the UK as a whole.<sup>3.2</sup> This includes defence spending, the costs of the diplomatic service and debt interest. This sort of spending is on what economists term “public goods”, which cannot readily be decentralised inside the country,<sup>3.3</sup> but needs to be taken into account when considering Scotland’s overall fiscal position (which we discuss in paragraph 3.16 below). UK Government expenditure, including a share of the non-identifiable spending, accounts for 40% of all public spending in Scotland. All of this spending, devolved and reserved, is supported by taxes levied by the UK Parliament in Scotland and in the rest of the UK.

### The Scottish budget

3.2 When we refer to the Scottish budget or to the budget of the Scottish Parliament, we are in fact referring to the budget available to and administered by Scottish Ministers subject to the approval of the Scottish Parliament. This budget is made up from a number of elements. By far the largest element is set, normally for periods of three years, alongside the budgets of UK Government departments in the Spending Reviews of the UK Government. This is referred to as a Departmental Expenditure Limit (DEL), by analogy with a UK Government department. The DEL of the Scottish Parliament was £27.9 billion in a total budget of £33.2 billion in 2008/09.<sup>3.4</sup> It is with this element of public expenditure that we are principally concerned, and which we will refer to as the Scottish Government’s or Parliament’s budget. Some additional expenditure which is volatile or demand-led is classified as Annually Managed Expenditure (AME) and is set on an annual basis, but the budget for this is less significant for our purposes. An example would be the payment of teachers’ or NHS pensions from the superannuation vote.<sup>3.5</sup> The total budget is mainly financed by a grant paid by the Secretary of State for Scotland, from funds voted by the UK Parliament, to the Scottish Parliament. Funds are paid across during the year as expenditure needs arise.

3.2 When public spending is analysed on a territorial basis, most is “identifiable”, that is to say spending that can be identified as directly for the benefit of a particular region, such as spending on schools, hospitals or social security payments. The remainder is “non-identifiable”, about 13% of the total, and includes spending on overseas representation and international development aid, security and defence, the servicing of Government debts, the creation and regulation of financial markets (the Bank of England and the FSA), energy markets (Ofgem) and other market regulation activities.

3.3 The Independent Expert Group notes (in paragraph 1.1.2 of their first evidence) that these goods if decentralised may “tend to be underprovided since territories can gain the benefit without having to contribute”.

3.4 The full detail of the relationship between the DEL budget, Annually Managed Expenditure, and the overall budget controlled by the Scottish Parliament is set out each year in the Annual Report of the Scotland Office. The details of that calculation are not relevant to the main thrust of our discussion.

3.5 The Superannuation Vote covers pensions in payment and receives an income from employers and employees’ pension contributions, many of which will come from within the Scottish Parliament’s DEL Budget. Over time these should balance, and they are not considered further here. AME also includes income from non-domestic rates, set by Scottish Ministers.

- 3.3 The Scottish Government's budget is spent on the wide range of devolved functions and by many different bodies. In practice a relatively small proportion of spending is current expenditure directly at the hands of Scottish Ministers – such as the running costs of central administration and agencies such as the Scottish Prison Service. About one third is NHS spending, and another third is grants to local authorities, supporting services like schools and social work. The remainder includes many other elements, including the budgets of public bodies, grants to universities, etc. The budget includes capital spending on assets such as hospital building or new roads, and capital charges on existing capital assets. The Scottish Government is responsible for how it spends this budget. Its spending proposals have to be approved by the Scottish Parliament in a Budget Act, and it has to account to the Scottish Parliament for the expenditure incurred and the value for money it achieves.
- 3.4 In addition to the DEL budget, the Scottish Ministers have control or substantial influence over local taxation and local spending financed by it. Local taxation in Scotland amounts to nearly £4 billion a year, roughly £2 billion from business rates (taxation on non-domestic property, such as shops, offices or factories) and £2 billion from the council tax (on domestic property). Although these taxes are collected by local authorities, the level of business rates is decided by Scottish Ministers. Additionally, Scottish Ministers exercise a high degree of influence over the council tax, through their powers to fund local authority spending by grants, and in other ways.
- 3.5 The Scottish Government is also able to raise income by levying user charges, such as bridge tolls or prescription charges, although we recognise this goes against the chosen policies of the current administration.
- 3.6 Finally, the Scottish Parliament and Scottish Ministers have one additional degree of flexibility, which is known as the Scottish Variable Rate of income tax (SVR). As already noted in Part 1 of this Report, the Parliament has the power (under Part IV of the Scotland Act) to vary the basic rate of income tax applying in Scotland by up to plus or minus 3 pence in the pound. The resulting addition to or reduction from tax revenue is added to or subtracted from the Scottish budget. The SVR is limited to the basic rate of taxation on earned income. It does not apply to the higher rates of taxation or income from savings and distributions such as bank interest. There is no obligation on the Parliament to use the SVR, and if it does nothing the basic rate of income tax in Scotland remains unchanged, and so does the Scottish budget. The SVR may only be exercised on a motion by the Scottish Ministers, and no such motion has ever been proposed, either to increase or decrease income tax. (In 2008 a Scottish Liberal Democrat amendment, calling on the Scottish Government to reduce the basic rate of income tax by using the Scottish Variable Rate, was defeated.<sup>36</sup>) At the 2009 Budget, HM Treasury estimated that the Scottish Variable Rate would alter the Scottish budget by a maximum of about £1.05 billion a year.
- 3.7 Subject to the approval of the Scottish Parliament, Scottish Ministers have virtually complete freedom on how they spend the Scottish budget. The only substantial constraint imposed by the UK Government in passing over the grant is on the split between capital and current expenditure which is intended to help the UK meet its macro-economic targets for the economy as a whole. Otherwise the grant from the UK Government comes without "strings attached". This gives the Scottish Ministers and Parliament virtually unfettered discretion in spending decisions, to an extent which, as the Independent Expert Group notes, is much greater than comparable devolved or regional governments in other countries. The Auditor General for Scotland reports to the Scottish Parliament on how the money is spent, whether it has been properly used and proper value for money obtained.

3.6 Proposed amendment to Scottish Parliament motion S3M-2853 by Jeremy Purvis, MSP, taken in the chamber on 12/11/08.

## The Barnett Formula

- 3.8 The Scottish Government's DEL, and consequently the block grant from the UK Government which supports it, is set in Spending Reviews held by the UK Government. The way in which this total is calculated is by the same "block and formula" arrangements which set the budget of the Scottish Office before devolution. The formula in question is colloquially referred to as the Barnett formula, after Joel (now Lord) Barnett who was Chief Secretary to the Treasury when it was introduced in 1978, though formula-based approaches to deciding public expenditure in Scotland have a much longer pedigree than that. Since devolution, the way in which the Barnett formula works has been set out publicly in a Statement of Funding Policy<sup>3.7</sup> produced in each Spending Round by HM Treasury. It is important to note that the size of the current block grant is what it would have been had the Scotland Act never been enacted, as the Barnett formula has continued unchanged since devolution, although the costs of establishing and running the Scottish Parliament have been met from within it.
- 3.9 The Barnett formula is a very simple system for determining the Scottish budget. Just like a UK Government department, the Scottish Government has a "baseline", essentially the budget from the previous spending review. When spending is reviewed, a revised budget is calculated by adding, or subtracting, from the baseline an amount calculated using the Barnett formula. This amount is a population share of the change in "comparable" English<sup>3.8</sup> spending programmes. This forms the new budget for future years. The comparable programmes are spending on subjects like health which are devolved in Scotland. So if in a Spending Review the health budget in England is increased by £5 billion a year, the Barnett formula will add to the Scottish Budget a population share of that increase. There is, however, no requirement that this increase be spent on health in Scotland, as the block grant is unhypothecated.<sup>3.9</sup> A worked example of a Barnett formula calculation, provided by HM Treasury in its evidence to the Commission, is at Annexe 4.
- 3.10 The Barnett formula is deeply embedded in UK Government public expenditure management, alongside the arrangements for UK Government departments. This is hardly surprising as the formula is substantially the same as before devolution. All that differs is that the method of calculation is now publicly available. The inherited "baseline" is the largest single determinant of the budget and this has the effect that the Scottish budget is stable and substantially predictable. A contrast might be drawn with how grants to local government (by the Scottish or the UK Governments) are calculated: councils do not have a baseline and it is the total grant to them that is calculated in each review, rather than an increment. In consequence, the calculation often includes an element (such as a minimum increase on the previous year's grant) to provide stability. This is not needed under Barnett.
- 3.11 Table 3.1 below shows the growth of the Scottish Executive/Government's Departmental Expenditure Limit since devolution and identifies the largest elements of actual expenditure in Scotland on certain devolved areas.

3.7 The most recent Statement of Funding Policy can be found at [http://www.hm-treasury.gov.uk/pbr\\_csr07\\_statement\\_of\\_funding\\_policy.htm](http://www.hm-treasury.gov.uk/pbr_csr07_statement_of_funding_policy.htm).

3.8 In some cases English and Welsh.

3.9 That is to say it is not earmarked or hypothecated to be spent for any particular purpose, and the Scottish Parliament can choose to allocate as it sees fit within devolved responsibilities.

**Table 3.1 – Growth in Scottish Devolved Spending inside DEL 1999 to 2008<sup>3.10</sup> and actual spending in Scotland on principal devolved responsibilities.**

£ billion Outturn	Education & Training	Health	Total DEL
1999 – 2000	4.4	6.5	14.1
2000 – 2001	4.8	6.9	15.1
2001 – 2002	5.1	5.7	16.9
2002 – 2003	5.4	6.7	18.1
2003 – 2004	5.7	7.4	20.1
2004 – 2005	6.1	7.7	21.6
2005 – 2006	6.5	8.6	23.2
2006 – 2007	7.1	9.1	25.4
2007 – 2008 (estimated)	7.5	9.9	27.4

- 3.12 The Independent Expert Group noted that the block and formula arrangement, as a means of funding devolved government, is unique internationally. It provides stability and predictability and near-total spending autonomy, and facilitates the management of economic aggregates.
- 3.13 Its stability and predictability mean that there have been no wild fluctuations in financial provision. Additionally, the first ten years of devolution have been a time of substantially growing budgets, and (perhaps in consequence) little conflict between the Scottish Parliament and the UK Parliament about total spending levels. At the same time, the spending discretion allowed to the Scottish Parliament has enabled the new institution to develop its own policy and spending priorities without constraint from the UK Government or Parliament.
- 3.14 The content of the Statement of Funding Policy, and how it is applied, are matters for the UK Government, and there is no independent oversight of those decisions. The formula has not avoided all political concern about its application, for example in relation to the 2012 Olympic Games or new spending on prisons in England and Wales.

## Levels of public expenditure across the United Kingdom

- 3.15 Levels of public spending in Scotland have been the subject of comment and some of this has been referred to in the evidence and submissions to the Commission. The Independent Expert Group noted discontent about Scottish levels of funding in other parts of the UK. Some commentators regard public spending in Scotland as excessive, either on the basis of unfairness in comparison with other UK regions with comparable or greater needs, or on the basis that the public sector is too large a part of the Scottish economy. Others draw attention to factors – such as high levels of urban deprivation and large rural areas with highly dispersed populations and services – which argue for higher relative spending levels in Scotland justified by need, or make the case for additional public spending to support economic activity. Overall per capita figures for public spending in the different regions of the UK are given in Table 3.2 below.

3.10 Sources: Scotland Office Annual Reports 2004 to 2008; HM Treasury Public Expenditure Statistical Analysis 2001 to 2008. New data will be available in June 2009 as the next editions of both documents are published.

**Table 3.2:**<sup>3.11</sup> Public spending per head in the UK

£/head	2002 – 03 (outturn)	2003 – 04 (outturn)	2004 – 05 (outturn)	2005 – 06 (outturn)	2006 – 07 (outturn)	2007 – 08 (plans)
England	5,522	6,026	6,442	6,802	7,076	7,535
Scotland	6,696	7,213	7,458	8,077	8,544	9,179
Wales	6,515	6,945	7,315	7,796	8,172	8,577
Northern Ireland	7,437	7,868	8,294	8,672	8,990	9,789
UK	5,726	6,225	6,624	7,012	7,308	7,790

## Scotland's fiscal position

- 3.16 A further relevant piece of background is the overall fiscal position of Scotland, that is to say the balance between taxation and public spending in Scotland. An exact calculation of this is not possible as taxation data is not separately collected for Scotland. HMRC collects tax on a UK basis, and of course Scotland is integrated into some UK expenditure programmes such as defence. Nevertheless regular estimates of Scotland's overall fiscal position have been made in the publication *Government Expenditure and Revenue in Scotland* (GERS). This has been published annually since 1992. The current edition at the time of writing, published in June 2008, incorporated various changes to the measurement of expenditure and some changes in the way the data was presented compared with previous editions.<sup>3.12</sup> The GERS publications have not been without controversy but are accepted (as the Independent Expert Group notes) as the best available assessment of Scotland's fiscal position.
- 3.17 The Independent Expert Group Report provides a detailed analysis of the GERS data. The Group noted that GERS provides only an imperfect guide to what the position would be for an independent Scotland, or one with greater taxation devolution. Within current UK structures (in which taxation revenues from oil and gas in the North Sea continental shelf are treated as assets of the whole UK and not assigned to particular regions), Scotland has a longstanding fiscal deficit. This is illustrated in Table 3.3 below. Even if a geographical share of North Sea revenues is attributed to Scotland, the fiscal balance largely remains in deficit, albeit at a lower level. Indeed, over a number of years associated with high oil taxation revenues during the 1980's, a surplus was estimated. But as the Independent Expert Group notes, these revenues are volatile – having varied in recent years from £1 billion to £12 billion a year. North Sea output is likely to continue to decline in future.

3.11 Source: HM Treasury Public Expenditure Statistical Analysis 2008.

3.12 GERS is published by the Scottish Government and meets the standards which allow it to be described as a National Statistics publication.

Figures in £,000	2002 – 03	2003 – 04	2004 – 05	2005 – 06	2006 – 07
<b>Estimated tax revenues</b> (excluding North Sea)	32,664	34,760	37,263	39,854	42,353
<b>Current expenditure</b> (including accounting adjustment and capital consumption)	38,815	41,829	43,852	46,566	49,079
<b>Net capital investment</b>	1,895	1,817	2,461	2,910	3,489
<b>Net fiscal balance</b> (surplus is positive, deficit is negative)					
excluding North Sea revenue	-8,046	-8,886	-9,050	-9,620	-10,215
including North Sea revenue (geographical share)	-3,813	-5,364	-4,722	-1,490	-2,652

## EU law and State Aid rules

- 3.18 EU law and State Aid rules impact upon possible changes to the financing mechanism for the Scottish Parliament as they potentially constrain the flexibility to apply different rates of tax within Scotland.
- 3.19 There is a growing body of case law around regions within EU member states applying different rates of corporation tax.<sup>3.14</sup> This specifically relates to whether a differential rate of corporation tax within one region may constitute State Aid, as defined in Article 87(1) of the EC Treaty. Recent decisions by the European Courts have applied three tests to determine the degree of tax autonomy of a region. If they are met, the differing rate of tax is compliant with EU State Aids rules. The three tests establish if the regional tax regime is associated with institutional, procedural and economic autonomy. That is to say, (1) the regional tax regime must be approved by a public body with political autonomy, (2) it must be approved without the interference from the central government in the approval process and (3) the financial effect must be borne by the regional government, without any financial compensation from the State authorities. In particular, the consequences of lower tax revenue collected as a result of a lower tax rate or any other tax break must be borne by that regional authority and not offset by transfers of funds from central government. In short, the region must both have the power to adopt the specific regional tax measures and bear their cost (or reap the benefits).
- 3.20 Taxes other than corporation tax are also potentially affected by EU law. For example, the current EU VAT directive requires a minimum rate of 15% to be applied, although member states may also apply one or two reduced rates of at least 5% and a number of further derogations exists, including the zero rate applicable within the UK. Similar directives apply to excise duties, including those relating to energy products such as petrol. These taxation directives are aimed at achieving a degree of tax harmonisation within the EU, and the European Commission clearly see regional variations as disruptive to the objectives of a single market, whilst also rejecting the application for a number of regional derogations on the basis they would constitute State Aid.

3.13 Source: Government Expenditure and Revenue in Scotland 2006 – 2007 (Scottish Government, 2008).

3.14 See European Court of Justice judgment in case C88/03 of September 2006 in relation to the Azores and judgement in Joined Cases C-428/06 to C-434/06 of September 2008 relating to the Basque Autonomous Community in Spain. Also, see European Court of First Instance judgement in Joined Cases T-211/04 and T-215/04 relating to Gibraltar of December 2008.

## Part 3–B: Recap of our First Report findings

### Introduction

- 3.21 The findings of our First Report were very much informed by the work of our Independent Expert Group. The first evidence from the Group considered the current funding arrangements in detail and the principles that relate to the analysis of funding the Scottish Parliament, and indeed sub national and regional governments across the world.
- 3.22 In paragraphs 3.12 and 3.13 above, we summarised the Independent Expert Group’s observation that the present system of funding the Scottish Parliament and Government has the advantages of simplicity, stability, and predictability. It offered, however, only limited fiscal autonomy and accountability. That is to say that, although the Scottish Parliament has a large budget and wide spending powers, it does not have to take responsibility for raising the money it spends through taxation, and is not able to use tax to influence behaviour. The Scottish Variable Rate of income tax could raise, at the most, about £1.05 billion (about 4% of the Parliament’s budget) but the Parliament is under no obligation to exercise it. Therefore other than in relation to local taxation, voters in Scotland are not necessarily exposed to the choice at the margin between additional spending and additional taxation and Scottish Ministers have little scope to influence the size of the total budget.
- 3.23 The Group also noted that the Barnett formula is not necessarily linked to any measurement of need and that public consent is important in ensuring the continued legitimacy of any system. Like the Commission, the Independent Expert Group was not set up or equipped to perform an assessment of relative spending need, or to say what would be an equitable spending level in Scotland relative to the rest of the UK or how that would compare with present levels. The Group also noted that the Barnett formula, unlike fiscal processes in other countries, was a purely administrative arrangement and was not enshrined in law or subject to any oversight. The legal basis of the present system is simply the section in the Scotland Act which allows the Secretary of State to make payments into the Scottish Consolidated Fund.<sup>3.15</sup>

### Principles of funding devolved government

- 3.24 The Independent Expert Group reviewed the international evidence on how sub-national or regional governments were funded. The Group concluded that this showed there was no ideal solution: most of the other systems considered involve a particular point on a spectrum of possibilities, recognising the trade-offs amongst competing principles. The Group identified these funding principles as follows:
- **Equity** – ensure fairness to all regions of the country;
  - **Autonomy** – allow the regional government choice on what and how much to spend, and potentially allowing the use of fiscal powers as policy instruments;
  - **Accountability** – ensure that the effect of decisions made at the regional level on tax bills is clear to taxpayers;

3.15 Section 64 of the Scotland Act. The Scottish Consolidated Fund is the fund through which revenues and expenditures in the devolved budget flow.

- **Stability/predictability** – enable public spending to be managed properly;
  - **Simplicity/transparency** – enable taxation and spending decisions to be readily implemented and the justification made evident;
  - **Efficiency** – avoiding creating economic distortions by incentivising movements of people and the factors of production.
- 3.25 We accepted the analysis provided by the Independent Expert Group and grouped these funding principles into three broad headings:
1. **Equity** – does the funding system allow levels of spending hence a distribution of public services that are accepted as fair?
  2. **Efficiency** – in both the economic and administrative senses: what are the effects of the funding system on the economy (does it impact on macro-economic management; does it introduce distortions into the economy; are its results stable and predictable) and is it simple or complex to administer and explain?
  3. **Accountability** – does the devolved body have the autonomy to make spending and taxation decisions for which the electorate can hold it accountable?

## Mechanisms for funding devolved government

- 3.26 The Independent Expert Group's report also helpfully sets out the main mechanisms used in funding systems for sub-national governments.
- 3.27 **Grant-based systems** have many practical advantages. They can be simple to administer and avoid creating economic distortions. They allow central government scope to allocate resources to different parts of the country in accordance with their priorities, such as the equitable provision of public services. Centrally collected taxation, allocated by government grant to different parts of the country, is a pooling of resources, to be used to meet needs and risks as they emerge at different times in different places. Indeed, it is an important point that the block grant paid to the Scottish Parliament comprises receipts from taxes in Scotland as well as elsewhere in the UK.
- 3.28 Grants may address issues of both "vertical" and "horizontal" fiscal equalization. That is to say, they can make up the "vertical" gap between a sub-national government's tax-raising powers and its spending responsibilities, which is seen in many nations, and they can also allow national governments to redistribute resources "horizontally" across a country to equalise the effects of differing taxable capacity or spending need. Grant-based systems are efficient in terms of tax competition, assist with macro-economic management, and allow sub-national governments predictable revenues. Grants may be unconditional, or unhypothecated, like the block grant which funds the Scottish Parliament, or may often also be conditional, tied to particular purposes or spending priorities. When compared against the broad principles set out above, a grant-based system can be used to deliver equity.
- 3.29 In almost all systems of finance worldwide, sub-national or regional governments tend to have greater autonomy over spending than over tax-raising. This is true even in systems which allow a larger degree of autonomy, because it is much easier to have variations in spending policies than in tax arrangements in different parts of one country. (Indeed experience internationally suggests that it is becoming increasingly difficult to maintain taxation differentials even between countries.) In the jargon, sub-national governments tend to have large vertical fiscal imbalances, and in most countries

these are wholly or partly made up by grants from central government. The Scottish Parliament is unusual in this context in that it has much wider legislative competence than many sub-national governments, but greater dependence on central grants than them.

- 3.30 Deciding on the amount of grant to allocate is however by no means easy, even within a broad general consensus about what needs are to be met. Relevant factors are likely to include relative need for services, often related to the size and composition of the population, and differing costs of providing services.
- 3.31 As we said in our First Report, it is no part of the Commission’s remit to make an assessment of this sort. Such judgements are always complex, and invariably seriously politically contested. Making them can be highly expensive and time-consuming. Perhaps the most developed example of such work is the Australian Commonwealth Grants Commission. Its mission is to put all the States and Territories in the same fiscal position, taking account of different tax resources and different needs, so that if they provide a typical level of services at an average level of efficiency they should have to levy the same rates of taxation. This is a major undertaking, and the Commission operates on a rolling five year cycle, and costs on average about A\$8 million a year to run.
- 3.32 **Tax assignment** involves allocating a share of tax revenues from some or all taxes to the sub-national governments. These would most obviously be the tax revenues raised in the relevant part of the nation. Tax assignment can provide funding in a way that supports economic and administrative efficiency. It does not make governments fiscally accountable as they cannot determine tax rates and it exposes them to risks of falling revenues that they have no capacity to manage.
- 3.33 Assigned revenues are used internationally to give regional governments a source of revenue independent of the decisions of central government. The nature of the tax base and tax rates are however normally decided centrally, and disagreements about or changes in the proportions of revenue to be assigned appear to be quite common, for example in Germany. An advantage of assigned revenues in a Scottish context is that they would give the Scottish Parliament a direct financial stake in the fortunes of the Scottish economy, and (at least in principle) a stronger incentive to promote economic growth.
- 3.34 Assignment does, however, face serious practical challenges. Most Scottish tax revenues are not separately identified. Some, in an integrated economy, are quite difficult to define – for example, should all the corporation tax revenue from a company based in Scotland be assigned to Scotland, even if profits are generated by business in England? Major challenges of estimation are involved and the breakdown of tax revenues in GERS shows the difficulties involved. Effort and cost would be involved in developing assignment systems. The complexity might be reduced by using simpler principles of assignment, such as population or other formula share, though that might dilute the incentive effect. The evidence as to whether assigning revenues produces an incentive effect that encourages elected politicians to give greater priority than they otherwise would to economic growth appears to be mixed.
- 3.35 **Tax devolution**<sup>3.16</sup> is when sub-national Governments set and raise at least some tax revenues and so exercise some fiscal responsibility. The devolution of some taxes has the scope to reduce vertical fiscal imbalances, and so dependence on grant.

3.16 The term fiscal autonomy is often used as shorthand for greater taxation powers, and sometimes also greater borrowing powers. For clarity we prefer to use the term tax devolution in this context. Full fiscal autonomy implies that devolved spending is wholly financed by taxation raised by the devolved body.

- 3.36 Tax devolution is the funding mechanism that can best deliver accountability. It should enable voters to see the effect of the Parliament's decisions on spending reflected in their tax bills, as well as on the services they receive. Additionally, flexibility in relation to taxation might be useful as a policy instrument. Tax devolution, however, produces relatively low predictability in resources for spending and so it is likely to require borrowing capacity to smooth over fluctuations in revenues. A consequence would be a need for a system for fiscal co-ordination inside the country, so that economic aggregates can be managed. It raises questions of equity, because spending levels across regions are influenced by the distribution of taxable capacity, rather than spending need, and of efficiency because differential tax rates may cause businesses or other taxpayers to take decisions based only on tax considerations.
- 3.37 The Scottish Parliament already has the power to vary the basic rate of income tax on earned income in Scotland by up to 3 pence in the pound (in either direction) – the Scottish Variable Rate.
- 3.38 Within Scotland, it is estimated that about 2.5 million people pay income tax, around 2 million of whom pay at the basic rate only. The vast majority of these tax payers will be among the four million or so voters in Scotland. Income tax is a readily perceptible tax, and rates of income tax are highly politically sensitive.
- 3.39 However, it is worth considering why the Scottish Variable Rate has not so far been used. First and most obviously there has never been a political consensus in the Parliament to exercise the power. Additionally, the first ten years of the Parliament's existence have been a time of rapidly growing public spending, and the challenges in managing the growth of that spending wisely may have suggested that further growth from additional taxation was unnecessary.<sup>3.17</sup>
- 3.40 There may however be other reasons. Evidence such as that from the Institute of Chartered Accountants in Scotland (ICAS)<sup>3.18</sup> that estimates that the cost, especially the start-up cost of using the SVR for the first time, would be quite substantial in comparison with the revenue that might be received, especially for variations of less than the full 3p in the pound. More profoundly, however, there is the nature of the power itself. Because the SVR is a power to alter a rate already set by the UK Government, a decision to do nothing has no effect on the budget of the Parliament. By contrast a local authority which does not take a decision to set a rate of council tax will not be able to levy a tax and would consequently lose the resultant revenue stream. The Independent Expert Group's survey of international practice found the funding of most regional governments worldwide had some transparent connection to tax receipts.
- 3.41 The SVR applies to the basic rate of income tax and not to the higher rate of income tax. Extending it to include the higher rate would increase the yield by about £65m for each penny,<sup>3.19</sup> though it might add to the administrative compliance costs of the system. Other considerations include what, if any, arrangements might be made for incomes from savings and distributions.

3.17 By 2007, the cumulative under spend of the Scottish Parliament amounted to £1.5 billion.

3.18 Oral evidence from ICAS, 12 September, 2008.

3.19 "A Fairer Way", report to Scottish Ministers by the Local Government Finance Review Committee, 2006, said that extending the SVR to the higher rate would increase its yield by 30%, but we accept HM Treasury estimates that each additional 1p on the higher rate yields approximately £65m per annum.

## Setting the balance in a funding system

- 3.42 It is clear that there are tensions between these funding principles, and different combinations of the funding mechanisms can be chosen. For example, allowing a devolved government discretion over a wide range of taxation decisions will increase its accountability and autonomy, but it may reduce efficiency by introducing economic distortions and adding to the cost of tax collection. Funding by grant may enable central government to determine spending levels that it sees as fair in different parts of the country but reduces the accountability of a devolved government to its electorate and limits its ability to use taxes as a policy instrument. Conversely, requiring a devolved government to rely on taxation raised in its own area may increase its accountability to its electorate but may not produce a spending level that is seen as fair across the whole country. On the other hand, a system which always ensures that budgets for a devolved government are seen as fair may reduce the incentives on that government to promote economic growth and so increase tax revenues to support its services.
- 3.43 Different countries have chosen to adopt different balances between these principles, and different combinations of funding mechanisms, because they have different political or constitutional objectives. Most of these are federal countries, and so it is not straightforward to transfer the mechanisms that they use into the UK context. But their different systems display the balance they have chosen (often for historical reasons) amongst these considerations. Australia, for example, has an elaborate system of equalisation which is explicitly intended to put each State or Territory into the same fiscal position, taking account of both different taxable capacities and different spending needs. Canada, on the other hand, places a higher value on fiscal autonomy and so has a system aimed mainly at the equalisation of taxable capacity among the Provinces, though there is some per capita equalisation of health spending. These means of funding depend on the history and the constitutional arrangements and objectives of the countries concerned. Such systems show where the balance amongst the competing principles is set, or to put it another way, what sort of federation they are seeking to create and sustain.
- 3.44 **The single most important conclusion from the Independent Expert Group’s work was that the balance between these conflicting principles and the combination of funding mechanisms to be used should be determined not by the technical considerations of funding mechanisms, but by the constitutional objectives that the funding system is designed to support.** We agree and we describe later how our understanding of Scotland’s place in the UK guides us to our conclusions.

# Part 3–C: Developing our recommendations: our approach

## Introduction

- 3.45 In this section we set out how we have gone about coming to our conclusions on the financial accountability element of our remit.

## Consultation

- 3.46 In our First Report of December 2008, we sought views on a number of questions relating to the principles and potential mechanisms that could apply to funding the Scottish Parliament, the potential impacts of devolving a number of specific taxes, considerations around the existing Scottish Variable Rate, how the Scottish Parliament might be required to make a tax decision and on borrowing. We received a substantial number of well-considered responses to this part of the consultation, and this was supported by many highly informed contributions on the subject at all of our public engagement events.
- 3.47 The views expressed on the general principles and mechanisms around possible alternative financing mechanisms served to highlight the tensions between the three key principles of equity, accountability and efficiency. For example, we received a number of contributions proposing a high degree of tax devolution to improve fiscal accountability whilst many others stressed the need for a continuing weighting to be given to equity and efficiency. In other words, whilst some submissions argued for tax devolution and even full fiscal autonomy, others highlighted the benefits of the current arrangements.
- 3.48 We also received a submission from the Scottish Government setting out Scottish Ministers' preferred options.<sup>3.20</sup> Whilst this clearly identifies independence as an ultimate aspiration, it puts forward a case for what is described as "devolution max" which involves the Scottish Government having the maximum policy discretion in relation to fiscal powers whilst economic policy remains reserved to the UK Government. In this document, the Scottish Government links substantive tax devolution with an "expanded devolved budget" but suggests that the "devolution max" model would "constrain long-term growth" compared to under independence.
- 3.49 We asked about the potential costs and benefits of allowing the Scottish Parliament to vary some indirect taxes such as excise duties. The responses received included those who highlighted the potential benefits from using a fiscal instrument to support existing devolved policies such as health and law enforcement. But we also received responses cautioning against on the basis that the behavioural response of consumers would lead to tax avoidance, that many indirect taxes were subject to EU law and that differing rates within the UK would also lead to increased compliance costs within the supply chains.
- 3.50 Our consultation also sought views on whether the creation of a Scottish rate of corporation tax would result in wasteful tax competition. Some replies recognised the potential for Scotland to use corporation tax as an economic development policy instrument, whilst others noted the consequences in terms of both compliance costs

3.20 Published as "Fiscal Autonomy in Scotland: The case for change and options for reform".

relating to businesses operating across the border and the creation of tax avoidance opportunities by the creation of a second corporation tax regime in the UK. The volatility of corporation tax receipts was highlighted and the impact of recent events affecting major banks based in Scotland on possible Scottish corporation tax receipts was also raised.

- 3.51 Our consultation questions asking if the Scottish Parliament should be able to vary other UK taxes or raise new taxes met similar responses. While some argued that such increased fiscal powers would both benefit the financial accountability of the Parliament and support other policy responsibilities, many others cautioned against the creation of separate tax regimes in Scotland. There was widespread support for retaining the reservation of National Insurance Contributions, although some questioned the extent of their hypothecation to the social security system.
- 3.52 Answers to our questions about extending the existing SVR suggested support for using income tax as the most suitable tax to be devolved, but many expressed concern about the potential administrative costs in, for example, extending the SVR to income from savings and distributions.
- 3.53 The responses to our consultation question on borrowing, in which we noted that a dependence on tax revenues would expose the Parliament to revenue risk and thus potentially necessitate borrowing powers as a means of managing that risk, were supplemented by a contribution from the Scottish Government. Whilst this submission notes the existing borrowing by the UK Government that Scotland benefits from, it presses the case for further borrowing powers in order to finance a fiscal stimulus for the Scottish economy.

## Working with the Independent Expert Group

- 3.54 Following the publication of its first report in November 2008, the Independent Expert Group (IEG) prepared extensive formal evidence to the Commission addressing our specific consultation questions and on borrowing and natural resource taxation. They have worked closely with us in a process of iteration and further analysis as options were identified. To have had the benefit of the advice of a group of such internationally acclaimed calibre has been a great help to us.

## Consideration of overseas models

- 3.55 We have also had the benefit of meeting a number of experts, representatives and practitioners from other countries and federations. This has complemented the advice we have received from Professor Muscatelli's group and allowed us to gain real insight into how sub-national and regional governments are financed elsewhere in the world.

### Canada

- 3.56 One of the overseas members of the IEG is Professor Robin Boadway of Queens University, Kingston, Ontario who, as well as being a recognised authority on territorial finance in Canada, is also an expert in the wider theme of intergovernmental fiscal transfers. Professor Boadway's input enabled the Independent Expert Group's first report to analyse the Canadian approach to territorial financing. However, our

understanding of the financial linkages between the Canadian federal and the ten provincial governments, including Quebec's, was further enhanced by Professor Francois Vaillancourt of the Université de Montréal, Canada, and a consultant to the World Bank.

- 3.57 The territorial financing arrangements within Canada might not be immediately applicable to Scotland and the rest of the UK, but we found some of their features of particular interest. In particular, we noted that:
- Many tax bases are shared between the federal and provincial governments, and have been since the 1950s.
  - Provinces are funded by a mix of transfers from the federal government, devolved taxation revenues and revenues from taxes shared with the Federal Government.
  - The principal grants paid to provinces are designed to achieve certain minimum standards (of healthcare, social provision and education) and are paid on a per capita basis so deliver equal per capita transfers to all provinces, equating to around 2 to 3% of GDP.
  - Additionally, there is an equalization grant paid to Provinces, equating to around 1% of GDP, calculated on the basis of equalising fiscal capacity rather than any assessment of need.
- 3.58 One of the more striking things about the Canadian federal financing arrangements is the established practice of levels of government sharing the same tax base with a common (usually Federal) collection authority. In effect, the Scottish Variable Rate, if it were invoked, represents a modest example of such an arrangement, but we found it interesting to see that such a system can operate successfully within a highly diverse and prosperous economy.

## Germany

- 3.59 We were also pleased to meet Wolfgang Moessinger, the German Consul General in Scotland, who confirmed the Independent Expert Group's description of the German Federal financing system. The Consul General in Scotland also described in detail how the linkages between the governments of the Länder and the Federal Government operate in practice.
- 3.60 Whilst some of the German Federal structures appear rather cumbersome from a United Kingdom perspective, they are established and broadly uncontested within Germany. However, we do recognise some of the criticisms of the German territorial financing arrangements set out in the Independent Expert Group's first report, in particular the potentially perverse incentives they create within both poorer and the richest Länder. We also note the criticisms that have been made that the financing arrangements lack transparency and that the Länder Governments lack accountability to voters for significant taxation decisions.

## Australia

- 3.61 The Independent Expert Group's work includes a comprehensive description of the Australian financial system, The Commission also had the opportunity to meet Alan Morris, the Chairman of the Australian Commonwealth Grants Commission (CGC), the body at the heart of a system frequently cited as the "Rolls Royce" of territorial finance equalisation systems.

- 3.62 The Australian territorial financing system is based on equalisation of both revenue capacity and expenditure “disabilities”, or need. In other words, the system transfers more to those states with weak tax bases than to those with strong tax bases and it transfers more to those with high expenditure needs than to those with low expenditure needs. The definition of “need”, and its assessment, is complex and the CGC operates on a five-year cycle, with annual operating costs of around A\$8 million. In other words, each needs assessment might be said to cost A\$40 million.
- 3.63 Contrasting with Canada, there was little tax sharing or “piggy-backing” in Australia. The states have access to 18 tax revenues, including those on mining, land and gambling whilst the Commonwealth government levies major taxes including those on income, companies and customs. As a result most revenues go to the Commonwealth government. One striking element of the Australian equalisation system was that it could, like that in Germany, provide a disincentive for a state to promote economic growth, as increased tax revenues accruing to it would be “equalised away” and redistributed.

## Spain – the Basque Country

- 3.64 The Basque Country in Spain is often held as an example of a devolved region enjoying complete fiscal autonomy within a unitary state and hence, at first glance, may offer a solution that could be applied to Scotland. In addition to receiving the advice of the IEG we were therefore extremely pleased to be able to meet Professor Joxerramon Bengoetxea, Professor of Jurisprudence at the University of the Basque Country and a former Deputy Minister in the Government of the Basque Autonomous Community.
- 3.65 The relationship between the Basque Country and the rest of Spain differs in a number of important ways to that between Scotland and the rest of the United Kingdom. First of all, Spain has a constitution which includes an article which requires all of the Autonomous Communities of Spain to recognise the indivisible unity of the Spanish nation. The Constitution is supplemented by an Economic Concordat or Agreement, that has statutory force, between the Historic Countries of Spain and the central Government stating that “The Historical Territories shall run their tax affairs in a way that respects the progressivity of the central government system, and maintain an overall fiscal pressure equivalent to that in force in the rest of the State”. This provision potentially restricts the financial autonomy of the Basque Autonomous Community, although its precise meaning has not been tested in court.
- 3.66 The Basque Country’s fiscal powers in fact reside with the Provinces (of which there are three in the Basque Country). Reflecting past practices, each province is sovereign in the collection and management of taxes, resulting in five tax systems operating in Spain, one for each of these provinces, one for the Province of Navarra and one applying to the rest of Spain – the “Common Regime”. We were told that this creates a number of compliance costs to companies operating across the jurisdictions, and we also heard some evidence of companies exploiting these differences to reduce their tax liability. The Spanish corporation tax rate was 35%, but two Basque provinces had set the rate at 28% and one at 30%. The tax liability of a company operating across jurisdictions was largely determined by where the company was registered, or had its “seat”. There had, we were told, been instances of companies moving “seats” in order to reduce their tax burden even when this was not associated with moving production or economic activity. (This precipitated the unsuccessful legal actions of other Autonomous Communities who argued the tax variation breached EU State Aids Rules.)

- 3.67 There are a number of other differences with Scotland. The Basque Country is not a net beneficiary from the territorial financing system, but a net contributor to the Spanish government, contributing a “cupo”, which is the Basque Autonomous Community’s contribution to the central government for services provided at the national level. This is calculated on an empirical basis, but there is a perception held in other parts of Spain that the Basque Country does not contribute its “fair share”. This view might derive from some resentment of the Basque Country’s relative prosperity, but it might also be associated with the strong negotiating position of the Basque Government in its relations with the central government. A number of minority governments in Madrid have depended on the support of the Basque nationalist parties. These circumstances, and a number of other factors, have placed sufficient pressure to force an ongoing process of reform to the Spanish territorial financing system.
- 3.68 The Social Security system in Spain, although it has substantial differences from the UK’s, operates on a national basis and thus provides a degree of equalisation across the Spanish Autonomous Communities. Consequently, there is a significant fiscal linkage between the Basque Country and the central government, with estimated contributions from the Basque Country to the national social security fund representing about 33% of the taxes and other levies paid by the population of the Basque Country.
- 3.69 Our analysis of the systems operating in other countries, whilst indicating a number of successful and less successful policies, confirms that all, including those in Scotland, have evolved from and been influenced by historical circumstances. All offer lessons or insights but none can simply be transferred to Scottish circumstances. The funding system for the Scottish Parliament must be tailored for Scotland, and support the relationship between Scotland and the UK that is appropriate for the 21<sup>st</sup> century.

## Part 3–D: The funding solution for devolution in the United Kingdom

### Introduction

3.70 The key consideration for us is how to improve the financial accountability of the Scottish Parliament, while preserving the economic Union and the social Union which define Scotland's relationship with the rest of the UK. In other words how do we balance the accountability which tax devolution can offer with the principles of efficiency and equity?

### The funding solution for devolution – the implications of economic Union

3.71 In Part 2 of this Report we set out our understanding of the economic union which Scotland forms with the rest of the UK. This UK single market has particular implications for the scope of tax devolution. Taxation promotes accountability, and can be used as a policy tool to give incentives for or to discourage particular behaviours (for example, to encourage business growth or to discourage smoking). But as the Independent Expert Group notes, goods, capital and services are constantly being traded across the United Kingdom's internal borders. Tax devolution has the potential for disruption to that trade. We regard the preservation of the economic Union as in the interest of Scotland and the rest of the UK. There may nevertheless be scope for some tax devolution within it, and we consider later the scope for devolving individual taxes. First, however, we consider macro-economic management issues in an economic Union, the present economic situation and its implications for our recommendations, and finally the implications of the unified UK taxation system.

### Macro-economic management

3.72 The Scottish Parliament has powers that have a direct and significant influence on the performance of the Scottish economy, but it is UK-wide institutions, notably HM Treasury and the Bank of England, which are responsible for the management of fiscal, economic and monetary policies for the economic Union of which Scotland is part. So these institutions must have knowledge of, and some influence over, any decisions of the Scottish Parliament that impact upon the UK's fiscal totals. The present system achieves control of these totals in virtually the same way as it did in advance of devolution: the Scottish Budget is in effect determined by UK Government decisions, the balance between capital investment and current spending is set by HM Treasury, and the only short-term borrowing powers available to the Scottish Ministers are from HM Treasury.<sup>3.21</sup> At present, apart from local taxation, the main exception to this is the Scottish Variable Rate of income tax, which if exercised would alter the total of UK public spending, though not overall UK public borrowing.

3.21 Local authorities have powers to borrow on their own account, under a prudential regime secured on local revenues, although most of this borrowing is also from HM Treasury.

- 3.73 Any increased tax devolution for the Scottish Parliament would impact upon these macro-economic policies, and, any new powers would have to be allocated so as to allow these UK responsibilities to continue to be exercised. Any new taxation or borrowing powers have to be exercised within a UK macro-economic framework, which must include structures to assist inter-governmental working in this most crucial of areas. We return to this later in this Part and in Part 4 of this Report.

## The present economic climate

- 3.74 The economic climate of 2009 is radically different to that of spring 2008 when we began our work. Annual Scottish GDP growth was 2.1% for the first quarter of 2008 and the unemployment rate, at 4.7%, was near to a historic low. Interest rates were at 5% and the UK Government was able to say that it was meeting its self imposed rules constraining indebtedness, and that the long term stability of the public finances was assured. Overall levels of public spending had seen a sustained rise over the previous decade.
- 3.75 Now as we enter the summer of 2009, the Scottish and UK economies show the effects of recent major shocks to the global economy and are in recession<sup>3.22</sup>; the Bank of England base rate is 0.5% and unemployment is rising. The dramatic changes in economic circumstances are reflected in the public finances, with the UK Government forced to suspend its fiscal rules and the national level of debt forecast to reach 79% of the United Kingdom's Gross Domestic Product. It is far beyond the remit of the Commission to make any judgement on the appropriateness or efficacy of the policy responses from either the UK or Scottish Government to these changed circumstances. But it is very clear that the climate in which we consider the financial relationship between the Scottish and UK Parliaments has changed dramatically, with all credible forecasters predicting significant constraints in public spending or the need for increases in taxation, or some combination of the two, over the coming decade.
- 3.76 This context has not affected our analysis of the principles surrounding the economic Union between Scotland and the rest of the United Kingdom; indeed if anything it has brought the issues into a much sharper focus. But the likely constraints on public spending, and the potential resilience of the Scottish economy to any destabilising effects, mean that we have had to give careful consideration to the likely impacts of any proposals for change and how they are implemented. A key implication is that change will have to be implemented carefully and in stages so as to avoid instability in the public finances.
- 3.77 Whilst we highlight these changed circumstances, we also recognise that the policy instruments available to tackle the challenges facing Scotland's economy lie both in the Scottish and the United Kingdom Parliaments. Many of the policy instruments to promote economic growth are already devolved. In particular, education, land use planning, economic development, transport, enterprise and skills training all directly influence productivity and hence are major determinants of economic growth. Many other devolved policies, such as health and justice, will also relate to the performance of the Scottish economy.

## The unified UK tax system

- 3.78 The principle of efficiency is important in both the economic and administrative sense. Economic efficiency relates to the potential distortionary effects of taxation systems. But administrative efficiency – for public bodies and taxpayers – is important too.

3.22 The widely accepted definition of a recession being two consecutive quarters of negative growth.

- 3.79 At present, the UK has a unified tax system. All national taxes are collected by HM Revenue and Customs (HMRC).<sup>3.23</sup> Consequently, all individuals and businesses across the UK are subject to exactly the same national taxes, and subject to the same administrative procedures and rules. This is efficient for both taxpayers and HMRC. Were different tax systems to operate in Scotland compared to the rest of the United Kingdom, an overall increase in the governments' total administrative costs would be created as two tax systems would have to be operated. It would also create new compliance costs to individuals and businesses operating across both tax jurisdictions as they would have to separate and determine their liabilities in those two tax systems. In other words, a unified UK tax system represents an existing administrative efficiency. The evidence is that the administrative costs associated with the tax system in the UK compare favourably with international competitors.<sup>3.24</sup>
- 3.80 The unified tax system also supports overall economic efficiency. The creation of a second tax system with potentially differing tax bases and rules would create opportunities for individuals and businesses to exploit those differences in order to reduce their overall tax burden. This would mean that the tax systems themselves would influence behaviours and could thus be described as creating economic distortions. One example cited by the Independent Expert Group described the impact of Luxembourg having applied lower rates of fuel duty than neighbouring states, resulting in consumers travelling, for example, from Germany to Luxembourg in order to fill up their cars and then returning, resulting in a lower overall level of tax receipts across the two jurisdictions but at greater environmental and personal opportunity costs. A different example might be if a firm relocated to a tax jurisdiction with lower corporate or payroll taxes which would result in a lower total exchequer return but no change in overall economic activity. The Independent Expert Group's response to the questions raised in our First Report explores this in more detail. We set out later, in considering the scope for tax devolution, how we want to avoid creating such economic and administrative inefficiencies.
- 3.81 Around 80% of income tax revenues<sup>3.25</sup> across the UK are in fact made by businesses on behalf of individuals under the "pay as you earn" (PAYE) system. The PAYE system is a withholding tax, meaning that it is retained on behalf of individuals by their employers. As such, it offers particular administrative efficiencies as it allows HMRC to deal with a smaller number of larger remitters who, for other reasons, have sophisticated record-keeping and accounting systems. To operate the PAYE system, employers need to calculate how much tax to withhold (they may not know age, disability or income from other sources, for example). HMRC provides employers with a summary of this information in the form of a tax code, one for each job (or pension) of each individual. The creation of a separate rate of income tax applicable to Scottish residents would create additional requirements within this system. However, if the Scottish Parliament chose to use its existing tax varying power, these changes would need to be implemented. In other words, it is already possible for the Scottish Parliament to require the current income tax collection arrangements to identify and apply a different rate to Scottish taxpayers. This is an important building block for our recommendations.

3.23 With the exception of Vehicle Excise Duty, which is collected by the Driver and Vehicle Licensing Authority and local taxes, which are collected in Great Britain by local authorities.

3.24 Such as PricewaterhouseCoopers LLP and The World Bank, "Paying Taxes 2008 – The Global Picture" and the Report of a Commission on Reforming the Tax System for the 21st Century, chaired by Sir James Mirrlees.

3.25 See [www.hmrc.gov.uk/stats/tax\\_receipts](http://www.hmrc.gov.uk/stats/tax_receipts).

## The funding solution for devolution – the implications of social Union

- 3.82 The extent to which the UK is a social Union has, as discussed in Part 2, quite profound implications for the balance chosen between equity and accountability in the design of a financing system. In our First Report we discussed a range of possibilities, including a model in which Scotland exercised much greater autonomy and had essentially its own welfare system. Accordingly, power over taxation would be devolved to the maximum practical extent. Tax assignment would also be used, so that domestic spending was linked to domestic resources, even where for other reasons, such as economic efficiency, tax devolution was not possible. Grant would be justified only to the extent that there was any residual need for equalisation.
- 3.83 Alternatively, Scotland might remain part of a common UK welfare state, with broadly the same understanding of social rights, such as entitlement to similar free health care and education, as in the rest of the UK. This sets a higher value on equity across the UK, and implies that the Scottish Parliament's spending is more likely to be supported by pooled UK taxation and so, in practice, by a substantial proportion of grant from the UK Parliament.
- 3.84 Our understanding of Scotland's place in the UK does include a commitment to a broad common understanding of the welfare state, and so, a common social citizenship. As we recommend in Part 2, this common understanding should be agreed between the two Parliaments. It also means a significant degree of grant funding. The grant can only be justified on the basis of equity, though it is important to understand that grant is supported by Scottish taxes pooled at a UK level, along with taxes from elsewhere in the UK.

## The elements of a funding solution

### Block Grant

- 3.85 Preserving the social Union must imply pooling of some UK taxation across the country and redistributing on the basis of a common understanding of need. The conduit for doing this is a block grant from the UK Government to the Scottish Parliament.
- 3.86 We are very well aware of criticisms that the present block grant is not well related to need and so the resultant spending levels are not in practice equitable. We do not however consider that our remit extends to our assessing whether the current means of calculating block grants to the devolved administrations across the UK correctly address need. This would require us to consider spending elsewhere in the UK. What constitutes need can be contested, and any assessment exercise would necessarily be resource intensive and lengthy, but supporting the social Union through pooled taxation makes it clear that need is the principle which must justify block grant funding. The present system of calculating block grant by the Barnett formula is not well related to need, but is stable and predictable and could continue as a proxy for need until a thorough assessment were done across the UK.
- 3.87 Funding by block grant alone, however, means that while the Scottish Parliament is completely accountable for the spending of its budget, it is not accountable for the total of that budget or how it is raised; it has no fiscal powers that can be used as policy instruments and it does not have a direct financial stake in the performance of the Scottish economy.

## Tax assignment

- 3.88 Tax assignment has some similarities to block grant. It does not introduce economic distortions: tax rates do not vary across the country as control of the tax rates and bases would rest with the UK Government. The Independent Expert Group pointed out that taxes assigned on the basis of agreement or formula could enable the continuing efficiencies of the unified UK tax system to be preserved. (Calculating and assigning actual receipts would be administratively burdensome.)
- 3.89 Tax assignment would make clear the extent to which the Scottish Parliament is financed (as of course it is, in effect, already) by taxation raised in Scotland and that the Scottish Parliament was not dependent wholly on grants from Westminster. We recognise that it offers a measure of accountability, in that it would link the revenues of the Scottish Parliament with the overall performance of the Scottish economy.<sup>3.26</sup> Tax assignment would not, however, allow there to be a choice of a different “mix” of public services and taxation to be determined democratically – the electorate would not be confronted with direct choices linking the tax burden and the level of public services in Scotland. Nor does it deliver equity, as it is unlikely that the need for public services and the tax yield would be the same in different parts of the country.
- 3.90 One major disadvantage of tax assignment is that it would import the revenue risk associated with tax receipts to the Scottish Parliament but not provide the Scottish Parliament with the policy authority to change those taxes. In other words, tax assignment is potentially inflexible; the Parliament might have to take the pain of changes in tax receipts without the power to do anything about them. Conversely, it might benefit from windfall gains, and be unable to return them to taxpayers by reducing rates. In the present economic circumstances, and at a time of some uncertainty in the flow of tax revenues, we do not think that tax assignment should play more than a minor role in the funding solution we will recommend, though there may be scope for it to grow at a future date.

## Tax devolution

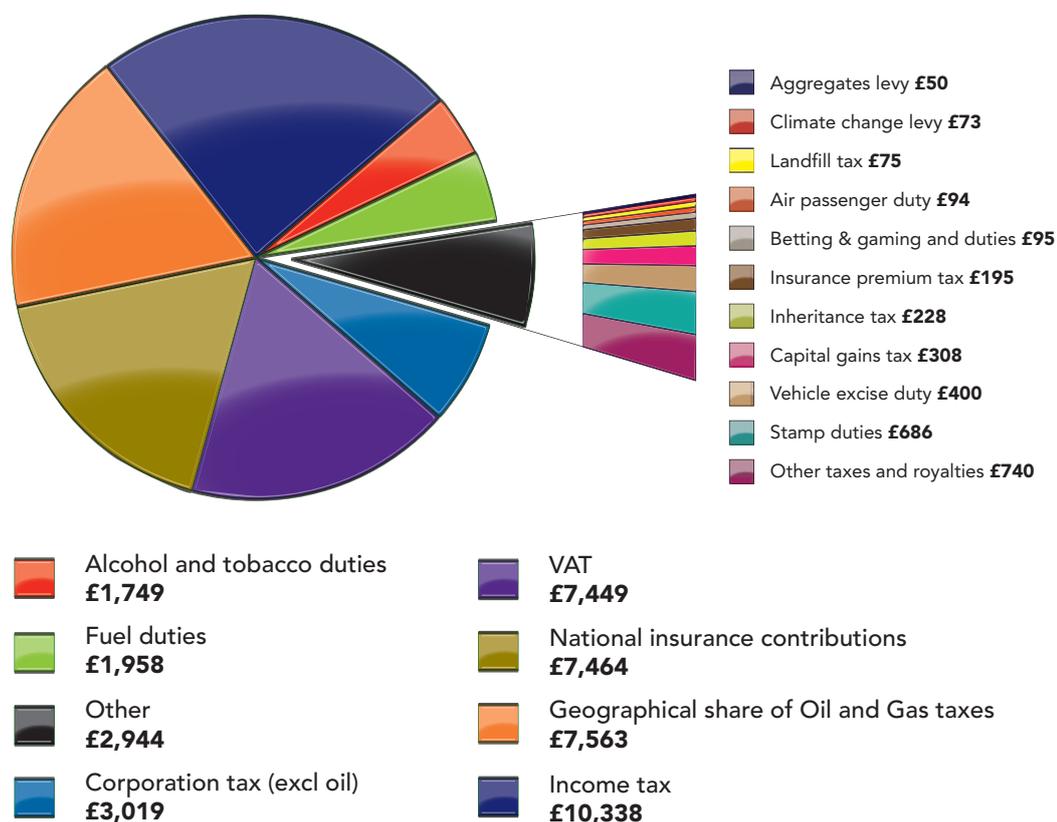
- 3.91 Tax devolution can provide accountability. We concluded in our First Report that the devolution of **all** taxes to the Scottish Parliament would not be consistent with the maintenance of the Union, and this remains our view.
- 3.92 In considering the scope to devolve particular taxes, we were greatly assisted by the work of the Independent Expert Group. In its response to the Commission’s First Report, the group cautioned against the devolution of taxes where the tax base is mobile, such as taxes on goods or capital, as this would create opportunities for tax avoidance and harmful competition which might ultimately result in the under provision of public services. Nevertheless, devolving some taxes represents the best means of delivering financial accountability and is a key element of the funding solution for the Scottish Parliament. Chart 3.1 depicts the estimated revenues from all UK taxes in Scotland and is very much a starting point in our consideration of the options and the scope for devolving particular taxes.

3.26 We note that in terms of supply side investment in the economy the Scottish Parliament has considerable powers.

## Specific taxes

**Chart 3.1: Estimated Revenue from UK Taxes in Scotland**

Estimated revenue  
(£ billion, 2006 – 07)



Source: *Scottish Government GERS (2008)*

## Income tax

3.93 Income tax is probably the tax that is most evident and transparent to the electorate. It is the tax with the largest revenue in Scotland: the total for all rates of income tax was estimated at £10.5 billion in 2006-07.<sup>3.27</sup> The Independent Expert Group noted that the location decisions of individuals might be influenced by regions having different tax and expenditure systems, but the scope for variation in personal taxes is greater than for other more mobile tax bases.

3.94 Indeed the electorate endorsed the (albeit limited) possibility of Scotland having a different rate of income tax to elsewhere in the United Kingdom in the 1997 referendum. Income tax potentially already includes a devolved element in the form of the SVR. Because it has never been exercised, there remain a number of as yet unanswered implementation issues in relation to it.

3.95 Our first concern would be to ensure that it would not undermine the efficiencies of the PAYE system, but we understand that this is largely achievable. We have also considered the interaction between income tax and the tax credit system,

3.27 GERS 2008.

introduced since the SVR was defined in the Scotland Act. Working and child tax credit entitlements, although administered by HMRC, are in effect social protection payments, and would be unaffected by Scottish variations because entitlement is assessed on gross, rather than net, income. A different approach would be needed for pensions tax credit, however, which is administered by the Department for Work and Pensions (DWP) with entitlement being assessed against net income. However, if the clear principle that the Scottish Parliament should not be able to influence tax credits is to be upheld, then the possible impact of variations in income tax in Scotland and pensions tax credit payments would require an existing clause in the Statement of Funding Policy<sup>3.28</sup> to be invoked. This states that:

“[where] action taken by a devolved administration in a devolved area has repercussive costs for the United Kingdom Government or vice versa. The devolved administration will be able to make or receive payments to departments of the United Kingdom Government directly in respect of such costs.”

- 3.96 We also recognise that there will be a number of more detailed concerns, such as the treatment of charitable giving, which might be complicated by a Scottish Variable Rate being implemented. Nevertheless the practice of different levels of government sharing a tax base, with a common collection agency, is a well established practice in other countries.
- 3.97 Presently, the Scottish Variable Rate applies only to the basic rate of income tax. The basic rate applies to incomes up to £37,400 (for 2010 – 11), after taking account of the personal allowance (currently set at £6,475) and any other allowances. It is presently 20%.<sup>3.29</sup> The higher rate of income tax, presently 40%, applies to taxable income over £37,400. In 2010 – 11 and after, taxable income over £150,000 will be subject to a new higher rate of tax of 50%.
- 3.98 When it addressed the question in our First Report of whether the SVR should be extended to the higher rate of income tax, the Independent Expert Group noted:
- “We feel there are reasonably firm arguments for extending the SVR to the higher rate of income tax. First and foremost, this would make the Scottish tax power more progressive. We also recognise those who note the Scottish Parliament’s tax raising power is subject to decisions made by the UK Government on the structure of the income tax regime, a point demonstrated by the creation and abolition of the 10 pence tax rate and thresholds. Extending the SVR to the higher rate would, however, merely extend this dependency.
- Extending SVR to the higher rate(s) of income tax would be associated with additional implementation costs, and those with a higher income are associated with a higher propensity to minimise their tax liability. Overall, the benefits, in terms of both the yield and the fulfilment of policy objectives, should be assessed against the implementation costs before progressing such a course.”
- 3.99 Similarly, the SVR specifically excludes income from what is described in the Scotland Act as income from “savings and distributions”. This is income from savings and share dividends which have been estimated to account for around 8% or 9% of UK income tax liabilities, although the Review of Local Government Finance in Scotland of 2006 estimated the figure was less in Scotland.<sup>3.30</sup>

3.28 Section 9.4 of the Statement of Funding Policy, HM Treasury, 2007.

3.29 The Personal Allowance varies according to age and other factors, including certain investment expenditures. The figure given is for a single person of working age. Budget 2009 announced an intention to apply reductions in the personal allowance for individuals of incomes over £100,000.

3.30 The Local Government Finance Review Committee, Edinburgh 2006, <http://www.scotland.gov.uk/Publications/2006/11/06105402/0>.

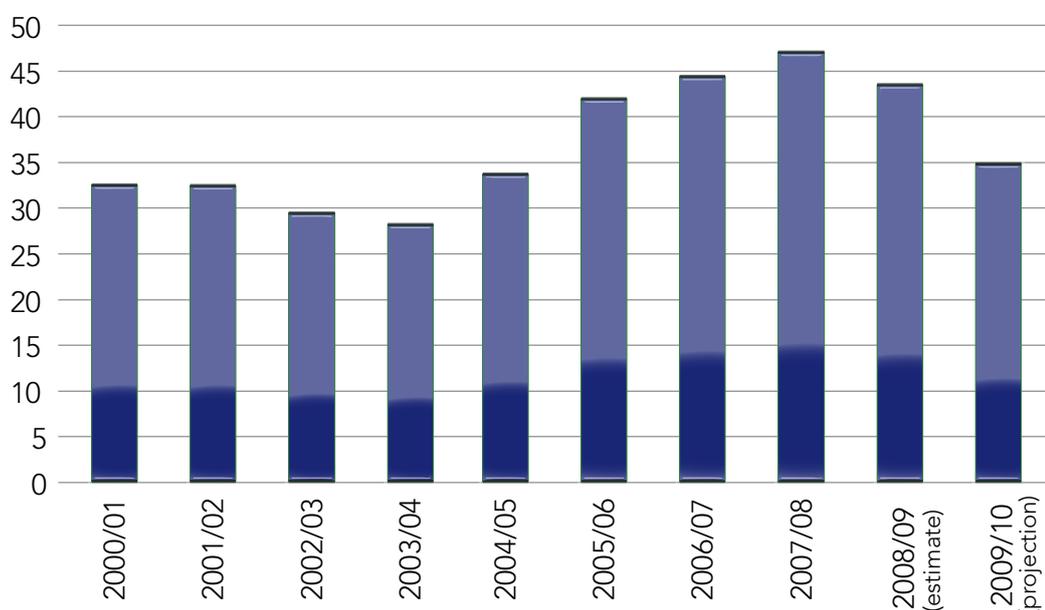
- 3.100 The same review also considered the scope for extending an SVR-type tax onto such income. It noted:
- “In relation to savings interest, financial institutions currently deduct a 20% flat rate for all taxpayers, while a tax credit of 10% is currently deducted from company dividends, which eliminates any basic rate liability. In both cases, higher rate taxpayers pay additional liability via Self-Assessment returns. Collection arrangements for a local income tax on interest on savings and investment income would have to match income to individuals (which could be difficult, e.g. in relation to nominee and joint accounts).”
- 3.101 During the gestation of the Scotland Act, this was also considered, but it was concluded that:
- “savings and dividend income should in future remain exempt from any income tax variation power, in order to ensure that such income is taxed on a consistent basis throughout the UK, thus avoiding economic distortion”. (*Scotland’s Parliament, 1997*)
- 3.102 Contrastingly, in their response to the Commission’s first report, the Independent Expert Group noted that:
- “We would see the attractions of extending the SVR to unearned income and income from investments, but suggest the administrative costs of this would need to be assessed against the potential yields before progressing such a course”.
- 3.103 We see income tax as the prime candidate for tax devolution, a view supported from a number of sources including the Chartered Institute of Taxation. Income tax has a number of features that underline this suitability. First and foremost, there is already scope in statute (the Scotland Act) and by democratic mandate (the 1997 referendum) for the basic rate of income tax to be varied in Scotland. We understand that applying different rates of income tax in Scotland would be associated with compliance costs to both employers, employees and to HMRC, but we think it is important to recognise that these costs could be incurred at present by a decision of the Scottish Parliament.
- 3.104 We do not think that there is a case for devolving to the Scottish Parliament the structure of the income tax system. Although in some jurisdictions sub-national authorities have scope to alter tax allowances and reliefs, little of the evidence we received suggested doing so. It would create two problems. First the efficiency of the tax system would be seriously reduced, creating problems of compliance and administrative cost for employers and the tax collection authorities. Secondly, it would not in our view be consistent with the social Union as income tax is, as well as a revenue-raising device, also an instrument of redistribution. A progressive tax system redistributes proportionately more resources away from higher earners and such decisions have effects that are redistributive across different parts of the UK as well as between different individuals. Such decisions, and therefore the structure of the tax system, are properly taken at the UK level.
- 3.105 We are persuaded that devolution should apply to all rates, though not to the thresholds for each rate nor to the difference in the rates between each band of taxable income. We also think it should in principle apply to income tax on savings and distributions, but since this is clearly not administratively or financially practical, we suggest that this component of income tax would be a candidate for tax assignment. Income tax devolution at the basic and higher rates is therefore a key component of the funding solution for the Scottish Parliament. We discuss later the scale of such devolution and how it should be achieved, and how decisions on the Scottish Parliament’s influence over the basic and higher rates should be linked.

## National Insurance Contributions

- 3.106 In our First Report, we noted that National Insurance Contributions (NICs) raise substantial sums – estimated at £7.5 billion in 2006 – 07 – the second largest tax revenue. We also noted they are closely linked to benefit entitlements (for such contributory benefits as state pensions and Job Seekers Allowance) which are reserved and they are mostly paid by employers rather than employees, so the scope for direct accountability is reduced. Furthermore, the UK National Insurance Fund is not subsidised by general taxation, suggesting that the yield from NICs is closely hypothecated to UK social spending. We specifically invited further evidence on our initial view that these linkages to reserved functions mean that NICs are not a good candidate for devolution.
- 3.107 In its response, the Independent Expert Group gave qualified support to this view, suggesting that the linkage between NICs and the social security system was “more perceived than real” but that “so long as the social security system remains UK wide, the greater part of NICs, as a notionally hypothecated tax (there is also a notional link to NHS funding) should remain reserved to the UK Parliament.”
- 3.108 The Independent Expert Group also noted that NICs are a payroll tax, so their devolution might lead to differing rates in Scotland and the rest of the UK, thus potentially creating economically distorting behaviours if companies made location decisions on the basis of different tax burdens.
- 3.109 We have therefore rejected the devolution of NICs and see little advantage in their assignment.

## Corporation tax

- 3.110 Corporation tax receipts were estimated to be worth around £3 billion in Scotland in 2006 – 07. In our First Report, we identified corporation tax as a possible candidate for devolution, but sought views on the potential for harmful tax competition this might create.
- 3.111 The Independent Expert Group provided an extremely detailed response to this question, drawing on a wide range of literature and international experiences. This work raised a number of issues, with their summary stating:
- “We recognise that devolving corporation tax would represent a shift in increasing the financial accountability of the Scottish Parliament, although arguably other taxes have a closer connection to the electorate. In terms of answering the specific consultation question, we think the scope for substantive reductions in the possible rate of corporation tax in Scotland are limited if it is desired to maintain comparable levels of public services, unless the Scottish Government is able to increase revenues from other sources. That is to say, we are not convinced that allowing the Scottish Parliament to determine a Scottish rate of corporation tax would produce harmful tax competition because the scope to vary the rate is, in effect, constrained. Even so, the potential for differing rates of corporation tax across the UK would create economic inefficiencies as firms react to tax considerations rather than commercial factors. We also think the potential administrative impacts of such a move are significant.”
- 3.112 We have received other evidence that broadly supports this analysis from bodies such as the Scottish Retail Consortium, CBI Scotland and the Chartered Institute of Taxation.

**Chart 3.2: Evolution of UK corporation tax receipts****UK Corporation Tax Receipts**  
(Nominal cash values)

Source: HM Treasury

3.113 Overall, we therefore reject the devolution of corporation tax. Nor, especially in view of its volatility (see Chart 3.2) from one year to another, do we see it as a candidate for tax assignment.

### Natural resource taxation

3.114 In their First Report to us, the Independent Expert Group recommended that the economics and politics of natural resource taxation were given further detailed consideration. The group has delivered this in a comprehensive report, principally authored by Professor Alex Kemp of Aberdeen University who is widely recognised as the expert in the economics of the North Sea oil and gas exploitation, and who is also the official historian of North Sea oil and gas. The group's findings are summarised at Annexe 3. We have given careful thought to its report as revenues accruing from oil and gas exploitation in the North Sea (and in other Scottish waters) are significant in relation to Scotland's estimated fiscal balance and to public expenditure in Scotland.

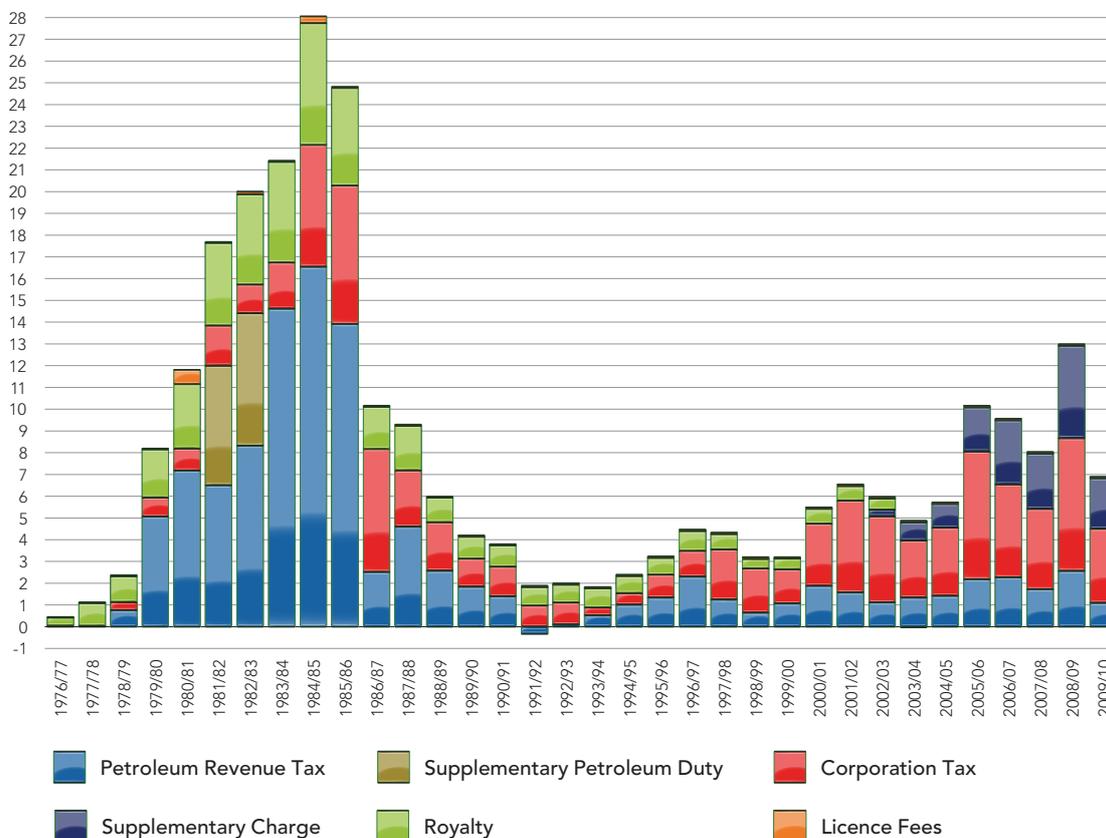
3.115 We were struck by the volatility of these tax receipts both historically and in forecasts. These revenues, which have varied between £1 billion and £12 billion in cash terms in the past couple of decades, are heavily correlated to the oil price, which is not influenced by either the UK or Scottish Governments, but rather fluctuates markedly because oil is a globally traded commodity. Chart 3.3 below shows the evolution of oil and gas tax receipts in real terms since the North Sea resource was first exploited.

3.116 The Independent Expert Group discussed the concept of intergenerational equity in relation to revenues from oil and gas exploitation, noting that:

"Established economic theory suggests that, in order to achieve intergenerational equity, sufficient revenues from oil/gas taxation should be invested to at least maintain the nation's total capital stock. This reflects that the exploitation of reserves now means that they will not be available to future generations."

**Chart 3.3: UK oil and gas taxation receipts in real terms**

**Government revenues from UK oil and gas production**  
(£ billion, 2008 – 09 prices)



Source: *Department of Energy and Climate Change*

3.117 This suggests that receipts from such a windfall should not be used solely for funding current expenditure. The way in which they have in fact been used over the years by successive UK Governments has been controversial. And whilst it is attractive to speculate how these revenues might in some way be added to the existing Scottish budget, the reality is they have represented a contribution to the pooling of risks and resources discussed in Part 2. Scotland has over the years contributed these revenues into a general UK pot, from which it has drawn to finance Scottish public spending. In some years that has meant that Scotland’s tax revenues, including a geographic share of oil taxation, have contributed more to the UK than it has received as a share of public spending, but in most years it has not. That seems to us to have been an example of the pooling of risk and resources that is represented by the social Union, and we do not think at this stage that it should be altered for the future. Additionally, as the Independent Expert Group conclude, the assignment or devolution of these revenues would be associated with a corresponding reduction in the block grant. This would then expose a large proportion of the Scottish budget to very high levels of volatility<sup>3.31</sup> driven by the market price of a globally traded commodity rather than the Scottish Parliament’s decisions. Such volatility can be accommodated and such fluctuations absorbed more readily in the larger and more broadly based UK economy. It is also not evident how the assignment or devolution of these revenues would increase the financial accountability of the Scottish Parliament.

3.31 As noted above, the Scottish Share of oil revenues has fluctuated between £1 billion and £12 billion whereas the budget available to the Scottish Parliament is currently around £30 billion.

3.118 We therefore reject either the devolution or assignment of oil and gas taxation receipts to the Scottish Parliament, although we recognise that they will continue to contribute to the overall UK revenues and so in turn will continue to contribute to the overall level of public spending in Scotland, so long as this is supported by a block grant from the UK Government.

## VAT

3.119 Value added tax (VAT) was estimated to raise £7.5 billion in Scottish receipts in 2006 – 07, around the same as NICs. VAT has potential to deliver accountability given its significant yield and the transparency to the population. VAT receipts are also directly related to the performance of the economy. However, devolution of VAT to Scotland is precluded by EU law, which requires all member states to apply a common rate of VAT within their jurisdictions.

3.120 Because of this, it is clearly not possible to devolve VAT to the Scottish Parliament. The very direct relationship of VAT to economic growth suggests that some share of it might be a good candidate for tax assignment, were that desired. Assignment would have to be on a formula basis as it would be expensive and disruptive to identify separate Scottish tax receipts.

## Alcohol and tobacco excise duties

3.121 Alcohol and tobacco duties combined were estimated to raise around £1.7 billion in Scotland in 2006 – 07. In our First Report, we specifically asked about the potential costs and benefits of allowing a Scottish variation of these indirect taxes.

3.122 We received strong evidence from the retailing and production sector to this question, identifying the potential compliance costs and also the scope for tax avoidance given the mobility of these goods. We also received persuasive evidence from the Independent Expert Group confirming this view and strongly emphasising the scope for tax avoidance this would create. However, the Group also noted the potential benefit of devolving excise duties to the Scottish Government in order to provide a closer alignment between existing devolved policy responsibilities (such as public health, social welfare and public order) with the fiscal system.

3.123 Despite the potential attractiveness as policy tools, we recognise the significant costs and economic distortions that might be associated with devolving alcohol and tobacco excise duties to the Scottish Parliament and therefore think they should remain reserved to the UK Parliament.

## Fuel duty

3.124 In 2006 – 7, the Scottish Government estimated that fuel duties paid in Scotland amounted to £1.96 billion. Cases have been made in the past for lower rates of fuel duty to apply in certain parts of the Highlands and Islands area of Scotland and we have received anecdotal evidence supporting the continuing need for this. The French government was recently granted a derogation that allowed a lower rate of fuel duty to be charged in some remote rural areas of France, in particular Corsica.

3.125 Fuel duties are levied at the point of production which, for the greater part of Scotland, occurs at Grangemouth, although it also serves parts of the north of England. However, these arrangements are solely based on logistical convenience and commercial practices. The EU Energy Products Directive (EPD) (Council Directive 2003/96/EC of

27 October 2003) requires fuel duty rates to be set nationally, with a single duty rate for each fuel type across the whole of each member state. Hence devolving fuel duty to the Scottish Parliament would require a derogation to be granted from the EPD. We do not believe that such a derogation would be likely, but we do recognise that there is a case for the UK and Scottish Governments to cooperate and pursue a derogation limited to the outlying parts of the Highlands and Islands.

- 3.126 Overall, we do not think fuel duty is a suitable candidate for devolution, although we note the potential relationship between fuel duties and existing devolved policy responsibilities. It might be capable of assignment if the administrative problems of identifying the proportions related to Scotland could be overcome.

### Vehicle Excise Duty (VED)

- 3.127 Vehicle Excise Duty – colloquially known as road tax – is paid by the registered keepers of vehicles. Although it is sometimes referred to as the “road fund” licence, the road fund was wound up in 1956. VED is collected by the Driver and Vehicle Licensing Authority. In Scotland it raises £200m a year.
- 3.128 VED is a tax that is visible to individuals and it might be practically possible to vary VED according to whether the registered keeper of a vehicle has an address in Scotland. But the registered keeper is not necessarily the legal owner or user of a vehicle, and having differential rates might result in vehicles being registered in Scotland or England for tax purposes, creating significant scope for avoidance – particularly for fleet vehicles – as presently happens in France.
- 3.129 We have therefore concluded this is not a strong candidate for devolution, although it might be a suitable candidate for assignment.

### Capital gains tax

- 3.130 Capital gains tax is paid by individuals who are resident in the UK and is also paid by executors or administrators – personal representatives responsible for a deceased person’s financial affairs or trustees of a settlement. Liabilities for capital gains tax arise if an individual sells, gives away, exchanges, or transfers all or part of an asset or receives a capital sum, such as an insurance payout for a damaged asset.
- 3.131 Common assets that attract capital gains tax when they are sold or disposed of include land, buildings (for example, a second home), personal possessions (for example, a painting) worth more than £6,000, shares or securities and business assets (for example, business premises or goodwill). Individuals in a business partnership must pay capital gains tax on their share of any gain when they sell or otherwise dispose of partnership assets. For limited companies, capital gains form part of the total taxable profits of the company on which they pay corporation tax.
- 3.132 The Government Expenditure and Revenues in Scotland publication uses an estimate (£308 million in 2006 – 07) for the Scottish receipts of capital gains tax based on the size of the Scottish economy relative to the UK.
- 3.133 The potential administrative complexities and the scope for tax avoidance led us to conclude that capital gains tax is not a suitable candidate for tax devolution and the difficulties of estimation suggest that it is not a good candidate for assignment.

## Stamp duty

- 3.134 Stamp duty is levied on the sales of securities and shares and on property sales. In particular, Stamp Duty Land Tax (SDLT) is payable by the purchaser on the purchase or transfer of property or land in the UK where the amount paid is above a certain threshold.
- 3.135 The rates currently set start at 1% for transactions over £175,000 and rise to 4% for transactions over £500,000. Concessions exist in relation to designated areas in the form of Disadvantaged Areas Relief, so SDLT can already be seen to operate in a way differentiated by location. In 2006 – 7, HMRC data shows that SDLT paid in Scotland amounted to £425 million.
- 3.136 Devolving stamp duties paid on transactions of shares and securities would create significant inefficiencies, and they are not suitable for devolution. Property, on the other hand, is the archetype of an immobile tax base and the devolution of SDLT could be administratively readily achieved. It is therefore a strong candidate for tax devolution.

## Betting, gaming duties

- 3.137 We have rejected the devolution of betting and gaming duties as their devolution would create the potential for significant avoidance as a consequence of transactions being conducted by telephone and over the internet.

## Air Passenger Duty

- 3.138 Air Passenger Duty (APD) is an excise duty which is charged on the carriage, from a UK airport, of chargeable passengers on chargeable aircraft. It is paid by the aircraft operator.
- 3.139 Presently, there are four rates of duty, depending on the destination of the flight and the class of travel ranging from £10 to £80 per passenger. The 2008 Pre-Budget Report announced reforms to APD from a two-distance band regime to a four-distance band regime, set at 2,000 mile intervals from London, with destinations categorised on the distance from London to the capital city of the destination country or territory.
- 3.140 APD is not payable on flights departing from airports in the Scottish Highlands and Islands. Flights from other areas of the UK to airports in this region are liable to APD at the appropriate rate.
- 3.141 In 2006 – 07, the Scottish Government estimated that APD relating to flights originating in Scotland amounted to £94 million.
- 3.142 Assuming the devolution, and thus the potential application of different rates in Scotland than elsewhere in the UK, did not conflict with EU law, we think the devolution of APD would not be associated with administrative or economic inefficiencies and is therefore potentially achievable.

## Landfill Tax

- 3.143 Landfill Tax is a tax on the disposal of waste. It aims to encourage waste producers to produce less waste, recover more value from waste, for example through recycling or composting and to use more environmentally friendly methods of waste disposal.
- 3.144 It applies to all waste disposed of by way of landfill at a licensed landfill site on or after 1 October 1996 unless the waste is specifically exempt.

- 3.145 The tax is charged by weight and there are two rates. Inert or inactive waste is subject to the lower rate of £2/tonne, with an escalator applying annual increases of £3/tonne to other waste, rising to a maximum of £35/tonne. Landfill tax is paid by the operators of licensed landfill sites, who can claim tax credits for contributions made to approved environmental bodies.
- 3.146 In 2006 – 07, the Scottish Government estimated that Landfill Tax paid in Scotland amounted to £75 million.
- 3.147 Landfill Tax is clearly related to an immobile tax base, and is closely connected to devolved responsibilities and hence we believe it would be suitable for devolution.

### Climate change levy

- 3.148 The levy is part of a range of measures designed to help the UK meet its legally binding commitment to reduce greenhouse gas emissions. It is chargeable on the industrial and commercial supply of taxable commodities for lighting, heating and power by non-domestic users. Its aim is to provide an incentive to increase energy efficiency and to reduce carbon emissions. As such, it can be seen as a proxy for a carbon tax.
- 3.149 The levy is charged on the supply of commodities deemed to be taxable, including electricity, natural gas as supplied by a gas utility, petroleum and hydrocarbon gas in a liquid state, coal and lignite and coke.
- 3.150 All revenue raised through the levy is recycled back to business through a 0.3% cut in employers' national insurance contributions, introduced at the same time as the levy, and support for energy efficiency and low carbon technologies.
- 3.151 The Scottish Government estimated that the Scottish share of climate change levy paid in 2006 – 07 was £73 million. The nature of the energy supply chains within the UK mean that an actual, rather than estimated, figure for Scottish liabilities is fairly easily obtained, suggesting the climate change levy could be a potential candidate, in administrative terms, for devolution.
- 3.152 However, potentially creating a separate Scottish climate change tax system and schedule would create economic distortions that would be readily facilitated by the integrated nature of the UK energy supply networks. The climate change levy is closely associated with energy policy which, as set out elsewhere in this Report, we believe should continue to be reserved to the UK Parliament. We therefore reject climate change levy as a tax that might be devolved.

### Aggregates Levy

- 3.153 The Aggregates Levy is a tax on the commercial extraction in the UK of rock, sand and gravel. Anyone who is responsible for commercially exploiting aggregate in the UK is liable, and the levy is based on weight, currently set at £1.60/tonne. The Aggregates Levy came into effect in 2002, and was introduced to address, by taxation, the environmental costs associated with quarrying operations (noise, dust, visual intrusion, loss of amenity and damage to biodiversity). It is also intended to reduce demand for aggregate and encourage the use of alternative materials where possible.
- 3.154 The levy is usually applied to quarry operators, but it can be shifted to customers or users of the aggregate – the key distinction being where it is commercially exploited. The Aggregates Levy also applies to aggregates drawn from the seabed in UK territorial waters and to imports.

- 3.155 At the time of its introduction, it was envisaged that the Aggregates Levy would not represent a gain to the UK Exchequer because it would be offset by a 0.1% reduction to employer NICs and payments to devolved Aggregates Levy Sustainability Funds. A number of concessions to the Aggregates Levy apply in Northern Ireland, and it might be said to already operate differently within a particular geographical area.
- 3.156 In 2006 – 07, the Scottish Government estimated that the total of Aggregates Levy paid in Scotland amounted to £50 million.
- 3.157 Like Landfill Tax, the Aggregates Levy clearly accesses an immobile tax base, and hence we believe it would be suitable for devolution.

## Inheritance tax

- 3.158 Inheritance tax is levied on:
- the assets (less deductible liabilities) of deceased persons transferred on death if the value of the deceased's estate exceeds the inheritance tax threshold (£325,000 in 2009 – 10, although following the 2007 budget, married couples and those who have formed civil partnerships are permitted to combine their allowance);
  - gifts made within 7 years of death or, made at any time, when there is a reservation of benefit which continues within 7 years of death: such transfers become chargeable at the time of death;
  - gifts made by individuals to discretionary trusts (exceeding the £325,000 threshold) or other relevant property trusts, or to companies.
- 3.159 Inheritance tax in respect of a deceased person's assets not held in trust is usually paid by the executor or personal representative. The money generally comes from the deceased person's estate and the tax must be paid within six months of the deceased's death and before the grant of confirmation estate can be issued.
- 3.160 Inheritance tax on transfers into trust is only necessary if the total transfer amount is above the inheritance tax threshold. It is usually payable by the person making the transfer(s) – known as the 'transferor' – not the trustees. If for some reason the executor or the trustees cannot pay the inheritance tax, the beneficiaries or 'donees' (recipients of gifts made during a person's lifetime) may have to pay it.
- 3.161 The Government Expenditure and Revenue in Scotland publication uses an actual figure for inheritance taxes paid in Scotland supplied by HMRC. This was £228 million in 2006 – 07.
- 3.162 Although inheritance tax is a personal tax, we recognise that already substantial efforts are made by individuals to reduce liabilities under the current UK wide arrangements. This would therefore suggest that establishing a separate inheritance tax system in Scotland would further incentivise tax avoidance. On that basis, we do not think it suitable for devolution.

## Insurance premium tax

- 3.163 Insurance premium tax is a tax on premiums received under taxable insurance contracts. "Premium" means all payments receivable under the contract of insurance by an insurer such as the risk insured, administrative costs charged to the policyholder, commission (paid to or retained by brokers or other intermediaries), tax (premiums are tax inclusive) and interest (where credit arrangements allow for payment in instalments).

- 3.164 There are two rates – a standard rate of 5% and a higher rate of 17.5%. The higher rate applies to insurance sales in trading sectors where insurance is sold in relation to goods and services which are subject to VAT such as sales of motor cars, domestic appliances and sales of travel insurance. Some insurance contracts are exempt, such as reinsurance, life insurance and permanent health insurance and all other “long term” insurance except medical insurance, commercial aircraft and ships, export finance, commercial goods in international transit and risks located outside the UK.
- 3.165 The Scottish Government estimated that the Scottish share of insurance premium tax in 2006 – 07 amounted to £105 million.
- 3.166 We do not think insurance premium tax would be suitable for devolution. It is paid by companies and intermediaries, and its devolution would be administratively complex and incentivise significant avoidance and create economic distortions.

## Summary: taxes suitable for devolution

- 3.167 Our analysis of individual taxes therefore suggests that taxes suited for devolution are income tax, and certain relatively small taxes – the Aggregates Levy, Landfill Tax, Air Passenger Duty and Stamp Duty Land Tax. Of these, income tax is by far the most significant, both in terms of yield and in relation to its direct connection with the population. It is a highly perceptible tax and although not all voters are taxpayers, almost all taxpayers will be voters, unlike for example, those paying corporation tax or fuel duties. (Of course unincorporated businesses such as partnerships will pay income tax rather than corporation tax). Together with the small taxes and with the local taxation already within the devolved powers of the Scottish Parliament, these have the capacity to fund a substantial proportion of the Scottish Parliament’s budget from taxation which it determines, and so to deliver real financial accountability.

## The scope for devolution of income tax

- 3.168 The complete devolution of income tax to the Scottish Parliament would correspond to around £10.3 billion out of a resource Departmental Expenditure Limit of £26 billion (2006 – 7 figures). However, there are strong arguments against the Scottish Budget being so heavily dependent on one single tax. The Independent Expert Group’s First Report noted that governments seek to operate a broad tax base in order to mitigate variations in one particular component of that tax base. Income tax alone would represent around 40% of the Scottish Parliament’s revenues. Such a heavy dependency would run counter to this logic. Equally importantly, income tax is a very important means of direct accountability for the UK Government and Parliament also. Both UK and devolved institutions should share in the accountability provided by this tax base.
- 3.169 These circumstances point towards using the substantial – but not total – devolution of income tax as a potential instrument to increase the financial accountability of the Scottish Parliament. Our conclusion is therefore that income tax is a base which should be shared between the two Parliaments, with the UK setting the tax base and the Scottish Parliament having a say in the basic and higher tax rates, and sharing in the proceeds of taxation on savings which it is not practicable to devolve.

## New taxes

- 3.170 Taxation is reserved under the Scotland Act to the United Kingdom Parliament. As it is closely allied to macro-economic policy, we can see strong reasons for this. The Scottish Parliament, however, has legislative competence in relation to local taxation and can legislate to replace or amend “local taxes to fund local authority expenditure (for example, the council tax and non-domestic rates)”.<sup>3.32</sup> Proposals have been made for legislation to reform local tax. The Burt Committee proposed reform of the council tax.<sup>3.33</sup> The present Scottish Government had proposed to replace the council tax with a local income tax. One MSP had proposed a local plastic bag tax, though it is clear that his policy aim was to reduce plastic bag use, rather than to reform the local taxation system.<sup>3.34</sup>
- 3.171 Thus we have an arguably anomalous situation that if the Scottish Parliament wishes to tax some activity for policy reasons it can do so, but only through the “back door” of local authority taxation. If it does so, however, the UK Parliament will have no power to intervene, even if there are implications for aspects of the UK tax system. This is an example of the wider issues which we discuss in Part 4 of our report, where devolved and reserved issues impinge on one another. There we recommend that such problems are addressed by mutual respect and better developed cooperation. In this context, however, we see no reason why the Scottish Parliament should not be able to legislate to create new taxes that affect the whole of Scotland uniformly and not just via local taxation, if it does so with the agreement of the UK Parliament. In Part 4 we recommend (Recommendation 4.15) the creation of a new mechanism under which Westminster can make a temporary addition to the legislative competence of the Scottish Parliament for a particular agreed purpose and we think that this mechanism should be able to be used to allow both Parliaments to agree to Scottish legalisation on new taxes in Scotland only. It is not a power we envisage will be used to a great extent, but it should be available.

## Making a tax decision

- 3.172 Through the Scottish Variable Rate, the Scottish Parliament already has access to the income tax base. But it does not have to use this power and if it does nothing, its budget is unaffected. As we considered how the devolution of income tax might be used to increase the financial accountability of the Scottish Parliament, we were struck by the evidence of Professor Francois Vaillancourt<sup>3.35</sup>, who observed that it is a shortcoming of a system of territorial finance if a sub-national government’s budget is unaffected by “doing nothing” and avoiding making any tax decisions.
- 3.173 One way of addressing this perceived shortcoming would be to extend devolved tax-raising powers and at the same time apply a substantially lower default rate of tax in Scotland, with a corresponding reduction in the block grant.<sup>3.36</sup> The Scottish Government would then be obliged to use its tax-raising powers in order to add to the (reduced) revenue from the block grant. Tax sharing is common in a number of federal countries across the world, and most notably Canada, where the reduced payments from the federal to the provincial governments were compensated by the federal government giving the States what is termed “tax room” on a number of shared tax bases. As an

3.32 Schedule 5, Part II, Section A1, exception to reservation.

3.33 The Local Government Finance Review Committee, Edinburgh 2006, <http://www.scotland.gov.uk/Publications/2006/11/06105402/0>.

3.34 Environmental Levy on Plastic Bags (Scotland) Bill introduced by Mike Pringle MSP in 2004 (withdrawn in 2005).

3.35 Refer to paragraph 3.56. Professor Vaillancourt is a Professor at the Department of Economic Science at the University of Montreal and an internationally recognised expert on sub national governance.

3.36 See the Independent Expert group’s response to the consultation questions of the Commission’s first report and the minute of Commission meeting with Prof Vaillancourt of 15/10/08.

illustration, the proposed default, lower, rate of income tax might be half of the national rate. It would mean, under current circumstances, the Scottish “default” basic rate of income tax would be 10 pence rather than the 20 pence currently in force. This would correspond to a reduction in the block grant of £3.5 billion if it applied to the basic rate alone. The Scottish Parliament would then be obliged to reinstate the rate of income tax to make up the reduction in its budget, or set a different rate if they wished to spend more or less.

3.174 This arrangement should be applied to Scotland. If the Scottish Parliament is to be fully financially accountable to the Scottish people, it should be dependent for a significant proportion of its revenues on tax decisions which it is obliged to make. This revenue should be substituted for block grant from the UK Government, and UK taxes (in this case income tax) should be reduced by the corresponding amount. The Scottish Parliament would then be obliged to make a real and serious tax decision.

3.175 We have already said that it is not the responsibility of the Scottish Parliament to determine the structure of the income tax system. This in our view includes the difference between the rates applying to each band. In our view therefore the same reduction in UK income tax should be applied in relation to each band and the Scottish Parliament should be able to apply one single “Scottish” rate of income tax to each of them. So if the present UK basic and higher tax rates of 20 pence and 40 pence were each reduced by 10 pence for Scottish taxpayers to become 10 pence and 30 pence,

and the Scottish Parliament chose to apply a Scottish rate of only 9 pence, the basic rate for Scottish taxpayers would be 19 pence and the higher rate 39 pence. Scottish public spending would as a result be nearly £0.5 billion lower.

### Block grant, devolved taxes and “tax room”

3.176 In essence, if applied to Scotland, this process would mean that the Scottish Parliament would be substituting income from its devolved tax powers for some of the block grant. In our view, rather than the Scottish Parliament being allowed the power to *vary* income tax, it should be required to *levy* income tax and receive the associated revenues. To facilitate this, the UK tax rates would be reduced (as would the block grant) to create the tax room for the Scottish Parliament to exercise this power.

3.177 The key feature of this model is that it would require the Scottish Parliament to make a tax decision unless it sets no rate of income tax and bases its budget on considerably reduced revenues. This would represent a very significant step from the current arrangements and we think it would introduce substantial financial accountability to the Scottish Parliament.

3.178 We also identified four further tax measures (Aggregates Levy, Landfill Tax, Air Passenger Duty and Stamp Duty Land Tax) as being suitable candidates for devolution. Combined, these were estimated to yield “Scottish” revenues of £774 million in 2006 – 07. This is a relatively small proportion of the Scottish budget, but each of these instruments has a direct linkage to policies already devolved to the Scottish Parliament. Hence their devolution could strengthen those existing powers with the addition of fiscal levers.

3.179 Devolution of these taxes should be associated with a commensurate reduction in the block grant, rather than simply allowing the Scottish Parliament the power to vary them. As with income tax, the Scottish Parliament would be required to levy them in order to receive the associated revenues.

## The balance of equity, accountability and efficiency

- 3.180 If the Scottish Parliament is funded in this way for a significant proportion of its budget it will have real financial accountability. Just what proportion is significant enough is a matter of judgement. We have not received clear evidence suggesting there is a point at which funding from devolved taxes begins to deliver increased accountability. The Independent Expert Group's advice was that the main effects from accountability on economic decision-making operate at the margin, and not at the average; accountability was either an inherent part of the system or not.
- 3.181 We have considered an option which seems to us to meet the test of delivering real accountability in a way that sets a good balance with the need to allow for a substantial degree of equity in the provision of public services. If UK income tax rates were reduced by 10 pence and the four other taxes identified were wholly devolved, and a commensurate reduction made in the grant, then we are clear that real financial accountability is achieved. Taking into account the local taxes already devolved to the Scottish Parliament, the total of current spending supported by taxes decided in Scotland would be something over a third (35%), as table 3.4 below shows. It is important to understand that the exact percentage figure is not relevant. It might vary from year to year and will be affected by tax and spending decisions, but we are quite clear that a proportion of this scale would meet the test of creating real devolved financial accountability.

Table 3.4: Estimated current spending supported by taxes decided in Scotland	
Estimated tax receipts 2006 – 07 <sup>3.37</sup>	£ million
Income tax basic rate (based on HMT 2009 Budget forecast)	3,500
Income tax higher rate	650
Income tax on savings and distributions <sup>3.38</sup>	500
Aggregates Levy	50
Landfill Tax	75
Stamp Duty Land Tax <sup>3.39</sup>	555
Air Passenger Duty	94
Non-domestic rates	1,884
Council tax	1,812
Total devolved tax revenues	9,120
Relevant budget (SE resource DEL plus NDR & Council Tax)	26,049
% relevant budget from own sources	35%

- 3.182 To consider whether this is enough financial accountability, it is instructive to consider the marginal case. In one year, the Scottish Parliament might set a rate of income tax so it receives 30% of its receipts from its own sources and the remaining 70% from grant paid by the UK Government. The next year, it might set the same rate of income tax and the block grant might be unchanged. But changes in the Scottish economy could cause income tax receipts to fall or to rise, such that the proportion of its own-source revenues in consequence fell or rose – say to 28% or 32% of its total income. This would not mean that the Scottish Parliament was less or more financially accountable in the

3.37 Sources: HM Treasury, Scotland Office Annual Report, HMRC and Scottish Government GERS publication.

3.38 Estimated.

3.39 2007 – 08 data.

second year, even though the proportion of its revenues derived from its own hand had changed. Rather, this example suggests that the proportion of “own – source” revenues is not a perfect way of measuring financial accountability.

- 3.183 The taxes which are capable of devolution raise enough revenue and are perceptible enough to create real accountability. If it were felt necessary to increase the proportion of the Scottish budget raised from “own source” revenues beyond these, it would be necessary to look to use assigned tax revenues to add to them. Whether it is desirable or necessary to do so is also a question of judgement. We recognise the force of the argument that it is desirable that a Parliament should not be seen to be wholly dependent on grant from another. Of course this is in a sense a presentational point, as ultimately all the resources that Parliaments allocate come not from them, but from the public as taxpayers. But it is an important point nonetheless.
- 3.184 The recommendation we are making to achieve financial accountability is a significant one, and we are very conscious that it carries risks of importing financial instability into the Scottish budget. We discuss below the need for transitional arrangements and stage by stage implementation. But until it is implemented and bedded down we cannot recommend going further to increase the dependence on “own source” revenues that the Scottish Parliament has. Nevertheless there may be a case for going further in future so that the Scottish Parliament was and was seen to be increasingly reliant on such revenues, perhaps even to the extent that it was no longer predominantly dependent on grant.
- 3.185 The most obvious candidates for assignment, on a formula basis, are several percentage points of the VAT yield and a share of fuel duty or Vehicle Excise Duty. At present we do not recommend this, not least because of the economic circumstances into which our report is launched, but it should be considered for implementation, alongside the risks it carries, at a later stage.

## Borrowing

- 3.186 Having identified taxes that might be devolved in order to increase the financial accountability of the Scottish Parliament, the possibility of conferring borrowing powers on the Scottish Parliament should also be considered. We have received a number of representations relating to this, including a substantial report from the Independent Expert Group summarised at Annexe 3. We also had a submission of evidence from the Scottish Government.<sup>3.40</sup>
- 3.187 The Independent Expert Group identifies three reasons why governments borrow:
- to manage short term cash balances as receipts and expenditure often flow in and out at different times;
  - to finance policies that smooth the economic cycle, maintaining public service provision during a downturn but ideally maintaining inter-generational equity over the economic cycle, reflecting the view that there should be no net borrowing to fund revenue expenditure over an economic cycle;
  - to finance capital projects, thereby protecting capital investment during times of public expenditure constraint and distributing the payments of those investments across all of the generations who will benefit from it.

3.40 Written submission from the Scottish Government, <http://www.commissiononscottishdevolution.org.uk/uploads/2009-03-11-scottish-government.pdf>.

- 3.188 The detailed evidence from the Independent Expert Group highlights the implied “Scottish” share of borrowing by the United Kingdom Government reflected in both the block grant and also the expenditure by the UK Government in Scotland. We agree with the Group’s conclusion that this borrowing is significant (the estimated Scottish share of debt repayments for 2006 – 07 being £2.4 billion<sup>3.41</sup>) but not widely appreciated. This has been a significant part of our considerations in relation to borrowing and we similarly concur that the financial accountability of the Scottish Parliament would be increased if this existing relationship was more transparent.
- 3.189 The Independent Expert Group considered three broad scenarios in relation to the funding of the Scottish Parliament. If funding continues to be almost wholly made up from a block grant (with the associated implied borrowing), the Group recommended that allowing some additional limited borrowing in relation to capital expenditure directly from HM Treasury would be justified. This is on the basis that UK Government departments negotiate their budgets, including the capital proportion, directly with HM Treasury but the Scottish Government does not – rather, it has to accept the result of applying the Barnett formula. A new borrowing power such as this would increase the financial autonomy of the Scottish Parliament, not by increasing the size of its budget in the long term as debts have to be repaid ultimately, but by allowing it some choice over the time at which those investments are made.
- 3.190 The second scenario under which the group considered borrowing assumed a proportion of the Scottish budget being comprised partly of “own source” revenue replacing some of the existing block grant. Under these circumstances, the group concluded that a formalised borrowing power for capital expenditure was justified, and cited the apparent success of the Prudential Code that provides the basis of local authority borrowing for capital expenditure as a blueprint for a suitable framework. Additionally, the Group observed that a degree of tax devolution or assignment would expose the Scottish Parliament to a revenue risk. The existing short term borrowing powers in sections 66 and 67 of the Scotland Act should provide an adequate tool to manage the related cash flow problems, although the existing £500 million cap would need to be reconsidered depending on the proportion of the Scottish budget deriving from assigned or devolved tax revenues.
- 3.191 Under these circumstances the balance of view in the Independent Expert Group was that it was not appropriate for Scottish Ministers to be able to borrow to fund revenue expenditure. This is because the continuing contribution of the block grant to the Scottish budget includes a component of borrowing by the UK Government to counter the economic cycle. As the group point out, there should ideally be no net borrowing over the economic cycle to finance current or revenue expenditure. Hence, decisions on “counter cyclical” borrowing relate to macro economic policy management and this proposed arrangement is therefore consistent with the macro economic policy responsibilities of the UK Government.
- 3.192 The third scenario under which the group considered borrowing assumed a more radical change to the financing mechanism with the greater part of the Scottish Parliament’s revenues accruing from assigned or devolved taxes. Under these circumstances, they considered that there would be a case for borrowing powers to extend beyond finance for cash flow management and capital expenditure. Their logic was that the contribution of the block grant within the Scottish budget would be diminished, hence reducing the relative importance of the component of borrowing by the UK Government to counter the economic cycle implied by that block grant.

3.41 Government Expenditure and Revenue in Scotland, Scottish Government (2008).

- 3.193 In this scenario, the Independent Expert Group highlighted the need to integrate any new borrowing powers conferred on Scottish Ministers with the reserved macro economic policy management responsibilities of the UK Government, including providing Scottish Ministers with a formal means of influencing macro economic policies.
- 3.194 The Independent Expert Group, however, voiced two notes of caution. Specifically, they concluded that:
- “borrowing does not represent “new” money to an administration, rather it changes the time at which money becomes available. At some time debts have to be paid, whilst borrowing itself incurs charges”;
- and:
- “The economic down turn, along with the bail out of major financial institutions has meant that the UK is facing levels of debt greater than seen for a number of years. When combined with the possible impact of transferring a number of debts associated with PFI sourced assets to the balance sheet, the scope for additional public borrowing by any UK body is likely to be constrained for the foreseeable future.”
- 3.195 In its submission to the Commission, the Scottish Government placed great emphasis on the potential benefits of the Scottish Government being allowed to borrow as a policy instrument to address current economic circumstances. The submission proposes borrowing powers that would be used in relation to capital expenditure, but links that capital investment, in effect, with expenditure that would serve to smooth the business cycle.
- 3.196 We broadly accept the analysis of the Independent Expert Group of these issues. Borrowing and taxation powers are intimately linked. Dependence on unpredictable tax receipts requires access to borrowing, but tax receipts also create the capability to service debt, and give lenders security that it will be repaid. As we are recommending that the Scottish Parliament should be more dependent on “own source” tax revenues than at present, we think it likely that Scottish Ministers will need to make use of short term borrowing powers, and that the limit in the Scotland Act on them, set in 1998, may need to be increased (provision to do this by Order under the Scotland Act already exists).
- 3.197 We also think that just as taxation powers give the Scottish Parliament responsibility for setting the total of the Scottish devolved budget or current spending, if it is to be fully accountable it should be able to borrow to determine the total of capital spending in any one year. It would be perverse if the Scottish Parliament could increase taxation above UK levels to finance additional current spending, but not use that resource to support additional borrowing. We do not, however, think that the Scottish Parliament or Government should be able to borrow for counter-cyclical reasons and so have the scope to attempt to run a separate macro-economic policy from the rest of the UK. The UK Government is responsible for managing the effect of the economic cycle on public spending in Scotland, through its own direct spending and grant to the Scottish Government.
- 3.198 As we explain in paragraph 3.73, borrowing does require to be undertaken within a UK macro-economic framework. Our recommendation is therefore that the Scottish Parliament (or more exactly the Scottish Ministers) should be able to borrow on a Prudential basis for capital expenditure from HM Treasury, through the National Loans Fund or the Public Works Loan Board. By a Prudential basis we mean one where the

Treasury has the ability to set conditions and a cap on the amount of borrowing, for macro-economic reasons, and where the amount Scottish Ministers might borrow in any one year should be constrained by their overall indebtedness and their capacity to repay from tax and other receipts. We have considered recommending a total limit for such borrowing but have concluded that we do not have at present enough information to enable us to do so, but it should be one which enables the Scottish Parliament to increase its capital budget in any one year – currently something over £3 billion – by a reasonable proportion.

## Institutional arrangements

- 3.199 The present arrangements for funding devolved public spending in Scotland are deeply embedded in the public spending management system of the UK Government. This is an inevitable result of their having been developed and based upon the pre-devolution arrangements for funding a government department. This has had great strengths and, as we note elsewhere, got the Scottish Parliament off to a good start, but the institutional arrangements which underpin it are unlikely to be suitable when our recommendations are implemented.
- 3.200 In general, we do not think that current institutional arrangements between the Governments and Parliaments are suitable for use in future and we make recommendations about this in Part 4. This is particularly true in relation to finance, and will become acutely so under the scheme we are recommending. First of all, HMRC as a revenue department, will now be serving the Scottish Ministers even more directly than it would at present if the SVR were implemented. We think it appropriate that there should be a direct “line of sight” from Scottish Ministers to HMRC, which is a non-Ministerial department. An obvious mechanism could be for Scottish Ministers to be consulted on the appointment of Commissioners, and to get regular reports from them on the Scottish taxes they administer and advice in relation to those which are wholly devolved. Commissioners and senior officials from HMRC should be able to give evidence to committees of the Scottish Parliament in respect of their responsibilities associated with devolved or assigned taxation.
- 3.201 In addition, the inter-governmental arrangements relating to the public spending system remain at present too like those which operated within one government rather than between governments. That too will be inappropriate under our recommendations. We do not think that it is necessary to create new bodies or institutions that will referee on disputes between different governments or Parliaments, but rather our judgment is that a combination of good working relations, embedded in firmly grounded and transparent inter-governmental institutions, will be needed. To that end we recommend that the present Finance Ministers’ Quadrilateral Meeting be reconstituted as a Joint Ministerial Committee on Finance. It should meet regularly, to a pre-determined timetable, and its agenda should include discussion of macro-economic and taxation issues as well as spending ones.
- 3.202 Transparency is very important in inter-governmental arrangements. Meetings should be announced and a proper public account given of the issues discussed. Additionally, there should be full transparency in tax and spending calculations and the information on which decisions are based. We do not think that it is necessary for these matters to be taken out of the responsibility of Government and run by an independent body, but we do believe that all the relevant spending or grant calculations done by HMRC and HM Treasury should be audited by the National Audit Office (NAO). While the Barnett formula is operated this regime should apply to the calculation of formula

consequential<sup>3.42</sup> by it. We think the NAO should publish an annual report on the operation of the funding arrangements, including reporting to the new Joint Ministerial Committee on Finance. In an exception to the normal arrangements, this NAO report should also be laid before the Scottish Parliament.

## Risk and transitional arrangements

- 3.203 The changes which we envisage will be significant ones. In essence, we are recommending that the Scottish Parliament's Budget should be less dependent on grant, and more on tax raised in Scotland, over which it has control. This introduces risk into the budgetary process to a greater degree than at present. In the present system the Scottish Budget's dependence on taxation revenues is limited to local taxes of around £4 billion a year. The UK Government carries all the other revenue risk and the risks of producing unplanned instability in public spending levels need to be managed. The new system should be introduced step by step, bearing in mind economic circumstances and the risks.
- 3.204 A significant risk is that, despite the estimates that have been made in GERS since 1991, there are in many cases no reliable data for Scottish tax revenues. Obviously this would have a particular importance if a significant proportion of tax assignment were recommended, but it remains an issue, especially for income tax, under our recommendations. Because of the existence of the SVR, there can already be a requirement to identify Scottish taxpayers separately, but this has never been done in practice and we are aware that a significant number of implementation issues remain unaddressed. As a result there is likely to be some considerable uncertainty in the precise yield of income tax in Scotland and major preparatory steps that will have to be taken before introduction. It would be a serious error to base a new system on estimates which later turned out to be wrong and subjected the Scottish budget to windfall gains or adverse shocks.
- 3.205 We therefore recommend a staged implementation process, beginning with shadow operation to improve the quality of data and develop the necessary systems of tax collection and budgetary decision making and then the stage by stage implementation of tax devolution and assignment. The new powers and devolved taxes should be introduced step by step, managing the risks. In the initial years we suggest some limits be set on the gains or losses the Scottish Budget should make from devolved taxes until the system beds down.

3.42 These "consequential" are the Barnett formula derived changes to the Scottish budget arising from changes in comparable English spending. See Paragraph 3.9 for a further description and Annex 4 for a worked example.

## Part 3–E: Our recommendations

3.206 In this section we bring together our recommendations for a new financing solution for the Scottish Parliament to increase its financial accountability in a way that is consistent with our vision for Scotland’s place in the United Kingdom. We recommend a combination of funding mechanisms that strikes the right balance between equity, accountability and efficiency.

**RECOMMENDATION 3.1:** Part of the Budget of the Scottish Parliament should now be found from devolved taxation under its control rather than from grant from the UK Parliament. The main means of achieving this should be by the UK and Scottish Parliaments sharing the yield of income tax.

- a. Therefore the Scottish Variable Rate of income tax should be replaced by a new Scottish rate of income tax, collected by HMRC, which should apply to the basic and higher rates of income tax.
- b. To make this possible, the basic and higher rates of income tax levied by the UK Government in Scotland should be reduced by 10 pence in the pound and the block grant from the UK to the Scottish Parliament should be reduced accordingly.
- c. Income tax on savings and distributions should not be devolved to the Scottish Parliament, but half of the yield should be assigned to the Scottish Parliament’s Budget, with a corresponding reduction in block grant.
- d. The structure of the income tax system, including the bands, allowances and thresholds should remain entirely the responsibility of the UK Parliament.

**RECOMMENDATION 3.2:** Stamp Duty Land Tax, Aggregates Levy, Landfill Tax and Air Passenger Duty should be devolved to the Scottish Parliament, again with a corresponding reduction in the block grant.

**RECOMMENDATION 3.3:** The Scottish Parliament should be given a power to legislate with the agreement of the UK Parliament to introduce specified new taxes that apply across Scotland. The new procedure we are recommending in Part 4 of our Report for the Scottish Parliament to legislate on reserved issues with the agreement of the UK Parliament could be used for this.

**RECOMMENDATION 3.4:** The block grant, as the means of financing most associated with equity, should continue to make up the remainder of the Scottish Parliament’s Budget but it should be justified by need. Until such times as a proper assessment of relative spending need across the UK is carried out, the Barnett formula, should continue to be used as the basis for calculating the proportionately reduced block grant.

**RECOMMENDATION 3.5:** This system will require a strengthening of the inter-governmental arrangements to deal with finance.

- a. The present Finance Ministers Quadrilateral Meeting should become a Joint Ministerial Committee on Finance (JMC(F)), and should meet regularly on a transparent basis to discuss not just spending but taxation and macro-economic policy issues.

- b. HMRC should advise Scottish Ministers in relation to those devolved taxes it is tasked with collecting and their responsibilities in relation to income tax and should account to them for the operation of these Scottish taxes. Scottish Ministers should be consulted on the appointment of the Commissioners of HMRC.
- c. All the relevant spending or grant calculations done by HMRC and HM Treasury should be audited by the National Audit Office which should publish an annual report on the operation of the funding arrangements, including reporting to the new JMC(F) and to the Scottish Parliament.

**RECOMMENDATION 3.6:** These changes should be introduced in a phased way, step by step, to manage the risks of instability in public finances and of windfall gains or adverse shocks to the Scottish Budget.

**RECOMMENDATION 3.7:** The Scottish Ministers should be given additional borrowing powers:

- a. The existing power for Scottish Ministers to borrow for short term purposes should be used to manage cash flow when devolved taxes are used. Consideration should be given to using the power in the Scotland Act to increase the limit on it if need be.
- b. Scottish Ministers should be given an additional power to borrow to increase capital investment in any one year. There should be an overall limit to such borrowing, similar to the Prudential regime for local authorities. The amount allowed should take account of capacity to repay debt based on future tax and other receipts. Borrowing should be from the National Loans Fund or Public Works Loans Board.

- 3.207 In our view these recommendations will give the Scottish Parliament real financial accountability, and will do so in away which will neither disrupt the economic Union between Scotland and the rest of the United Kingdom nor break the bonds of common social citizenship which we describe as the social Union. They set the right balance between accountability, equity and efficiency for Scotland in the United Kingdom today and we warmly commend them to both the Scottish Parliament and the United Kingdom Government.
- 3.208 Once implemented, these arrangements will make clear that the Scottish Parliament is not wholly dependent on grant from another Parliament and now has the responsibility for raising a significant proportion of its own revenue in a manner accountable to the electorate.
- 3.209 The Commission believes it is highly desirable that the Scottish Parliament should not just be accountable in this way, but also that it is seen not to be dependent on grant alone. These recommendations transfer substantial revenue raising authority to the Scottish Parliament and represent a significant step. They would see the Scottish Parliament raise as much as is currently practical of its own spending through devolved taxation.
- 3.210 The Commission recognises that once these arrangements are implemented and established it may then be desirable to increase the proportion of revenues from the Parliament's own sources further. This would result in the Scottish Parliament being increasingly reliant on such resources and perhaps at some point predominantly so,

though we remain of the view that block grant to reflect the pooling of resources in the social Union with the rest of the United Kingdom must always be a significant part of the funding system. The best way to do this would be to assign some of the revenues from taxes that it is not practicable or possible to devolve. The Commission considers the most appropriate taxes to be assigned would be fuel duty and Vehicle Excise Duty, which if devolved, might have been useful policy tools and several percentage points of the Scottish yield of VAT. This would give the Scottish Parliament a very direct stake in the future of the Scottish economy.

- 3.211 We do not however think that the time is right for this as our recommendations are already a very substantial package, and introduce a lot of potential uncertainty into public finances. They should, however, be considered for implementation, alongside the risks that they would introduce, at a later stage.

## Examples of how the proposed financing mechanism would affect the Scottish budget

### The Base Case

For the purpose of the scenarios that follow, it is assumed that the year before implementation is used as a “base case”.<sup>3.43</sup> In that year, receipts from Scottish taxpayers accruing from 10p of income tax (at basic and higher rates) are estimated to be £4.15 billion. Additionally, receipts from Stamp Duty Land Tax, the Aggregates Levy, Landfill Tax and Air Passenger Duty combined total £774 million.

Half of the income tax from Scottish taxpayers on savings and distributions amounts to £500 million.

In this year, the block grant from the UK Government is £30 billion, so the devolved tax receipts correspond to  $(£4.15 + £0.774) \text{ billion} / £30 \text{ billion}$  or 16.4% of the block grant.<sup>3.44</sup>

3.43 This is shown for simplicity – it would be preferable to use an average from a number of years rather than using the figure from one year only.

3.44 Income from local taxation would be unaffected by and is not a feature of this calculation

### Scenario 1

In the first year of operation, the block grant from the UK Government is calculated as it would have been (currently by the block and Barnett formula arrangement) and then reduced by 16.4%.

So if the block grant this year would otherwise also have been £30 billion, the actual figure paid is  $£30 \text{ billion} - 16.4\% = £25.08 \text{ billion}$ .

In this scenario, the Scottish Government then chooses to apply a tax rate resulting in the total income tax rates being exactly the same as elsewhere in the UK. Hence the “Scottish” rate of income tax applying to basic and higher rate tax payers is set at 10p and exactly the same tax rates apply to the four devolved taxes.

This means, in the first year of operation, and all other things being equal, the Scottish revenues from these taxes is £4.92 billion, exactly the same as for previous years. Hence the Scottish budget is unchanged at £30 billion.

## Scenario 2

As in Scenario 1, the block grant would otherwise have been £30 billion, and the 16.4% reduction reduces this to £25.08 billion.

However, in this scenario, the Scottish Government elects to apply a rate of income tax in Scotland resulting in Scottish taxpayers paying 2p less than in the rest of the UK. So the total (Scottish plus UK) basic rate becomes 18p rather than 20p in the rest of the UK, the total higher rate becomes 38p rather than 40p in the rest of the UK and the total new highest rate becomes 48p instead of 50p in the rest of the UK. The remaining four devolved taxes are unchanged.

The lower rates of income tax in Scotland result in lower receipts and, combined, now yield £3.32 billion (as opposed to £4.15 billion). When added to the block grant and the yield from the other four devolved taxes, this results in a Scottish budget of £29.17 billion, as opposed to the £30 billion it would have been had the Scottish Government applied an income tax rate that would have meant Scottish tax payers paying the same as those elsewhere in the UK.

This shows that by applying a lower rate of income tax in Scotland than in the rest of the UK, the Scottish budget is reduced.

## Scenario 3

As in the previous two scenarios, the block grant would otherwise have been £30 billion, and the 16.4% reduction reduces this to £25.08 billion.

As in Scenario 1, the Scottish Government's policy is for income tax rates to be exactly the same in Scotland as elsewhere in the UK. Hence the "Scottish" rate of income tax applying to basic and higher rate tax payers is 10p and exactly the same tax rates apply to the four devolved taxes.

However, in this year, the Scottish economy grows faster than the rest of the UK economy, and Scottish income tax yields are 2% higher than they would otherwise have been. As a result, the yield from Scottish income tax becoming  $1.02 \times £4.15$  billion = £ 4.233 billion, and the yield from the four other devolved taxes increases by 2% also. Hence the total revenue from all of the devolved taxes becomes  $£4.233$  billion +  $(1.02 \times £744$  million) = £5.022 billion.

This scenario also assumes that the assigned revenues from half of the income tax paid in Scotland on savings and distributions also rise because of the higher level of economic growth. In the previous scenarios, this was unchanged as the Scottish Government had no power to change the rates, and hence had no impact. But as this scenario assumes a higher rate of growth in the Scottish economy, the assigned revenues will now increase by 2% from the previous figure of £500 million to £510 million.

Combined, these effects result in the Scottish budget being £25.08 billion (reduced block grant) + £5.022 billion (devolved tax revenues) + £10 million (increased assigned revenues from income tax paid on savings and distributions) = £30.112 billion. In other words, a higher rate of economic growth in Scotland will directly feed into the budget available to the Scottish Government.

## Examples of how the proposed financing mechanism would affect Scottish taxpayers

### The Base Case

In the year before implementation, the basic rate of income tax in Scotland, as elsewhere in the UK, is 20p in the pound, the higher rate 40p in the pound.

Income on savings is taxed at 10p in the pound.

Mr A earns £20,000 a year and has a normal single person's allowance of £6,475, meaning he pays 20% of  $(£20,000 - £6,475) = 20\%$  of £13,525 = £2,705 in income tax.

Miss B earns £45,000 a year and has a normal single person's allowance of £6,475, meaning she pays income tax at 20% on earnings between £6,475 and £37,400 and 40% on the remaining £7,600 of her salary = £6,185 + £3,040. Thus she pays a total of £9,225 in income tax.

Mrs C has no income from employment but, in addition to state pension and pensioners tax credits, receives interest from investments of £3,000 per annum, net of tax equal to £750 which is deducted and paid by the bank directly to HMRC.<sup>3.45</sup>

3.45 Savings Income is usually taxed at 20% at source, although for annual savings income below £2,440, a starting rate of 10% applies

### Scenario 1

In this scenario, the Scottish Government's policy is for income tax rates in Scotland to be exactly the same as elsewhere in the UK. Hence the "Scottish" rate of income tax applying to basic and higher rate tax payers is 10p.

Mr A earns £20,000 /year and has a normal single person's allowance of £6,475 meaning he pays 10% of  $(£20,000 - £6,475)$  as UK income tax and 10% of  $(£20,000 - £6,475)$  as Scottish income tax. His total income tax payment is therefore unchanged at £2,705.

Miss B earns £45,000 / year and has a normal single person's allowance of £6,475, meaning she pays 10% UK income tax (= £3,092.50) and 10% Scottish income tax (= £3,092.50) on earnings between £6,475 and £37,400 and 30% UK income tax (= £2,280) and 10% Scottish income tax (= £760) on the remaining £7,600 of her salary. Hence her total tax bill is unchanged at £9,225.

Mrs C has no income from employment, but in addition to state pension and pensioners tax credits, receives interest from investments of £3,000 per annum, net of tax equal to £750 which is deducted and paid by the bank directly to HMRC.

## Scenario 2

In this scenario, the Scottish Government's policy is for Scottish tax payers to pay 2p less than in the rest of the UK. Hence, the basic rate payable in Scotland becomes 18p, compared with 20p in the rest of the UK; the higher rate in Scotland becomes 38p, compared with 40p in the rest of the UK, and the new highest rate becomes 48p, compared with 50p in the rest of the UK.

Mr A earns £20,000 /year and has a normal single person's allowance of £6,475 meaning he pays 10% of (£20,000 – £6,475) as UK income tax and 8% of (£20,000 – £6,475) as Scottish income tax. His total income tax payment is therefore £1,352.50 + £1,082 = £2,434.50.

Miss B earns £45,000 / year and has a normal single person's allowance of £6,475, meaning she pays 10% UK income tax (= £3,092.50) and 8% Scottish income tax (= £2,474) on earnings between £6,475 and £37,400 and 30% UK income tax (= £2,280) and 8% Scottish income tax (= £608) on the remaining £7,600 of her salary. Hence her total tax bill is £8,454.

Mrs C has no income from employment, but in addition to state pension and pensioners tax credits, receives interest from investments of £3,000 per annum, net of tax equal to £750 which is deducted and paid by the bank directly to HMRC.

## Scenario 3

The Scottish Government chooses to apply a tax rate resulting in the total income tax rates being exactly the same as elsewhere in the UK. Hence the "Scottish" rate of income tax applying to basic and higher rate tax payers is 10p.

Mr A, Miss B and Mrs C all pay exactly the same taxes as in the base case and scenario 1.

1 Sources: HM Treasury, Scotland Office Annual Report, HMRC and Scottish Government GERS publication.

2 An estimate.

3 2007–08 data.

# Part 4: Strengthening cooperation

## Summary

Scotland, like most countries, now has more than one level of government. That creates a need for the democratic representatives and institutions of Scotland and the United Kingdom to work together effectively. In this Part of our Report we consider how this is achieved at present and recommend changes to allow these institutions to serve the people of Scotland better and secure Scotland's place within the United Kingdom. Our primary focus is the relationships between the United Kingdom Parliament and the Scottish Parliament, and between the United Kingdom Government and the Scottish Government. Our analysis also considers the interaction with the European Union.

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## Part 4–A: Introduction

### Introduction

- 4.1 Devolution to Scotland, Wales and Northern Ireland means that the United Kingdom now has a number of national administrations, as well as local government and membership of the European Union. The responsibilities of each government differ, but they inevitably overlap and interact with one another. This is true in virtually all countries in the world as most have more than one level of government, but it has over the last 10 years assumed greater importance in the United Kingdom as the new devolved institutions have taken on their full responsibilities. There is a need for cooperation between these levels of government in the interests of all the citizens of the UK.
- 4.2 Between the UK and Scottish Parliaments and Governments issues regularly emerge that require discussion, coordination or joint action. On some occasions this may involve disagreements about policies or priorities. On others there may be broad political consensus but a need to ensure that joint interests are coordinated, information is properly shared, the impact of the choices at one level on the responsibilities of the other are recognised, or different circumstances or institutional background are taken into account.
- 4.3 European Union membership adds an important dimension to this. The UK Government carries member state responsibility at EU level, but a number of devolved responsibilities, such as fisheries, are significantly shaped by EU decisions. So the UK Government needs to consult the devolved administrations in formulating its positions for negotiations in Brussels, and the Scottish Administration needs the opportunity to contribute to UK thinking in these areas.
- 4.4 Accordingly a vital element of the success of any devolution settlement is the strength of the relations, both formal and informal, between Governments, Parliaments and the other democratic representatives and institutions of the state.

## Background

- 4.5 The Commission has therefore examined how relationships have developed and been maintained, how joint interests have been developed, and how disagreements between Governments have been discussed and resolved. We have considered whether the formal mechanisms put in place in the late 1990s have proven sufficiently robust given the new challenges and changes to the UK's political landscape over the last ten years. The Commission has also looked at the way in which the Scottish and UK Parliaments interact, taking into account sensitivities around their respective functions and accountabilities.
- 4.6 The Commission has also heard evidence in relation to specific functions where problems have arisen. In these areas we consider whether the reserved/devolved boundary is in the right place. However there will always be a boundary and there must be mechanisms such as those we discuss here to manage issues that arise around it. These mechanisms are particularly relevant to some of the specific functions discussed in Part 5.
- 4.7 The First Report of the Commission discussed the existing relations and the evidence received in relation to six categories – relations between the Parliaments; relations between MPs, MSPs and MEPs; relations between the Governments; the civil service; relations among UK-wide bodies and agencies; and international representation, particularly at the European Union. The First Report went on to seek evidence in a range of areas, in particular whether there was a need for further formal relations, what form these might take, and how transparency might be improved.
- 4.8 Finally, whilst our remit does not make any specific reference to local government, we recognise that the good governance of Scotland also crucially depends on an effective relationship between the Scottish Parliament and Government and Scotland's 32 local authorities. In particular, we were reminded at our public engagement sessions in each of the three islands areas of the importance of decentralisation of power within Scotland. Whilst we make no specific recommendations with regard to relationships between these two tiers of government, we do endorse the view that the Scottish Parliament and Scotland's councils should work closely together, each respecting the powers and responsibilities of the other. This relationship was considered in some detail by the McIntosh Commission which reported in 1999, and many of its conclusions remain valid today.<sup>4.1</sup>

4.1 Moving Forward Local Government and the Scottish Parliament – The Report of the Commission on Local Government and the Scottish Parliament (Edinburgh, 1999).

## Part 4–B: Existing arrangements

### Existing arrangements

- 4.9 The Commission has examined the existing relations between the Parliaments, Governments and other democratic representatives and institutions, and the arrangements for managing these.

### The “Sewel Convention”

- 4.10 The Sewel Convention is perhaps the most formal mechanism through which the UK and Scottish Governments and Parliaments have worked together since 1999. It is certainly one of the most frequently used mechanisms, and one widely considered to be effective. It is also the only significant mechanism that exists between the Parliaments.
- 4.11 The Convention ensures that the UK Parliament respects the legislative competence of the Scottish Parliament. In Part 2 we observed that the doctrine of Parliamentary sovereignty means that in principle the UK Parliament retains the right to legislate in devolved areas without recourse to the Scottish Parliament, but that principle and practice differed, and the Sewel Commission governed the practice.
- 4.12 In Part 1-D we describe the origin of the Convention and its basic features, but in short the Convention was developed as a way of managing the overlap of legislative competence between the Scottish and UK Parliaments. The creation of a Scottish Parliament with law-making powers in devolved areas did not remove the legal competence of the UK Parliament to make laws for Scotland in devolved as well as reserved matters. The UK Government recognised, however, that it should not normally do so without the consent of the Scottish Parliament – a doctrine that became known as the Sewel Convention.
- 4.13 The Convention was formalised by the UK Government, both in the Memorandum of Understanding with the devolved administrations (see paragraphs 4.18 to 4.21 below), and then in various departmental guidance notes. These involved extending the Convention from its original scope – in relation to UK Parliament legislation on devolved matters – to cover also UK Parliament legislation changing the extent of the Parliament’s legislative competence, or the executive competence of Scottish Ministers. The Convention was consolidated further following reports by the Scottish Parliament Procedures Committee in 2005 and the House of Commons Scottish Affairs Committee in 2006.<sup>4.2</sup>
- 4.14 In 2005, the Scottish Parliament agreed the report by its Procedures Committee, as a result of which its own process, for scrutinising UK Parliament Bills that invoke the Convention and deciding whether to give consent, was formalised within its standing orders. In particular, the new rules put a responsibility on the Scottish Executive (now Scottish Government) to alert the Parliament via a memorandum on every occasion when a UK Parliament Bill invokes the Convention (either on introduction or at a later stage), and this triggers a referral to a relevant Scottish Parliament committee for scrutiny.

4.2 Scottish Parliament Procedures Committee Seventh Report 2005 The Sewel Convention ([www.scottish.parliament.uk/business/committees/procedures/reports-05/pr05-07-vol01.htm](http://www.scottish.parliament.uk/business/committees/procedures/reports-05/pr05-07-vol01.htm)), and Scottish Affairs Committee Session 2005-06 Fourth Report The Sewel Convention: the Westminster perspective ([www.publications.parliament.uk/pa/cm200506/cmselect/cmscotaf/983/98302.htm](http://www.publications.parliament.uk/pa/cm200506/cmselect/cmscotaf/983/98302.htm)).

- 4.15 A number of standing orders of the Scottish Parliament govern its operation of the Convention.<sup>4.3</sup> It is worth noting in particular that:
- there are different tests applied, depending on the type of Bill, for when a UK Parliament Bill “triggers” the need for a “legislative consent memorandum”;
  - although it has so far only been Ministers who have lodged legislative consent motions (LCMs), other MSPs also have the right to do so provided they first lodge a memorandum (in addition to the one lodged by the relevant Minister);
  - committee scrutiny and a report is required in every case, but a debate in the Chamber is optional;
  - if a Bill is amended during its passage to create a need for consent for the first time, or to take it beyond the scope of consent previously conferred, this will trigger the need for a further LCM.
- 4.16 There are no equivalent arrangements at the UK Parliament.
- 4.17 During Session 1 (1999-2003), 39 Sewel motions were passed<sup>4.4</sup>; and during Session 2 (2003-07), a further 38 were passed.<sup>4.5</sup> So far during Session 3 (2007-), 16 have been passed.<sup>4.6</sup>

## Inter-governmental arrangements

### The Memorandum of Understanding

- 4.18 The Memorandum of Understanding (MoU) between the UK Government and the devolved administrations underpins the day-to-day operation of the devolution settlement and sets out the principles that underlie relations between them. It is a statement of political intent, and is not binding in law. It sets out principles for good communication and cooperation between the administrations. The most recent Memorandum was presented to the UK Parliament in December 2001 and to the Scottish Parliament in January 2002.<sup>4.7</sup>
- 4.19 Cooperation is the key principle enshrined in the Memorandum. This includes the possibility that administrations may choose to undertake activities on behalf of one another and the pledge that each administration will seek to supply information reasonably requested by another within certain limits. How cooperation works in practice is a matter for interdepartmental Concordats and for the overall management of relations between the UK Government and Scottish Government.
- 4.20 Although dispute resolution procedures are not laid out in the Memorandum itself the terms of reference of the Joint Ministerial Committee (JMC) (see paragraphs 4.26 to 4.33) allow for the consideration of “disputes between ... administrations”. The Secretary of State for Scotland is also charged with “the promotion of good relations” and ought to be consulted “in any significant area of disagreement”. Nevertheless, there exists no definitive or legally binding means of resolving differences of opinion or approach between administrations, aside from the procedures in the Scotland Act which deal with legislative competence. (The JMC has committed to consider dispute resolution further – see paragraph 4.33.)

4.3 Chapter 9B of Standing Orders of the Scottish Parliament, 3rd Edition (3rd Revision) (April 2009).

4.4 See <http://www.scottish.parliament.uk/business/research/factsheets/documents/SewelMotionsSession1.pdf>.

4.5 See <http://www.scottish.parliament.uk/business/research/factsheets/documents/SewelMotionsandLegislativeConsentMotionsSession2.pdf>.

4.6 See <http://www.scottish.parliament.uk/business/legconmem/index.htm>.

4.7 <http://www.justice.gov.uk/docs/odpm-dev-600629.pdf>. We understand a revised version is under discussion at present.

4.21 The Memorandum also discusses matters which are not the subjects of formal Concordats. These include the freedom for devolved legislatures to debate non-devolved matters, as well as the UK Government's responsibility to represent Scotland's interests in matters which are not devolved. In such cases, the Scottish Government agreed to provide to the UK Government any relevant factual information and expert opinion available to them.

## Concordats

4.22 There are extensive informal, bilateral contacts between UK departments and the devolved administrations, at ministerial and official level. As indicated above, one of the underpinning principles of devolution set out in the Memorandum of Understanding is that:

"The UK Government and the devolved administrations believe that most contact between them should be carried out on a bilateral or multi-lateral basis, between departments which deal on a day-to-day basis with the issues at stake."

4.23 In evidence to the Commission, the UK Government Cabinet Office drew our attention to the fact that there are a number of examples of bilateral and other relationships that exist between UK Government departments and the Scottish Government which are not part of any formalised mechanisms.<sup>4.8</sup>

4.24 Bilateral relations between the UK Government and the devolved administrations are also underpinned by a series of departmental concordats. A concordat is a guide to the working relationship between Ministers and officials. It is not an exhaustive description of the relationship. Some concordats – on cooperation on European policy issues, on financial assistance to industry, international relations and statistics – are supplementary to the Memorandum of Understanding. Others have been reached bilaterally between UK Government departments and the Scottish Government. They tend to share common features in terms of placing an emphasis on cooperation and information sharing, rather than formalising relationships.

4.25 Some concordats are clearly out-of-date and may not properly reflect the political or administrative changes that have taken place since they were agreed. For example, a number of UK Government departments and their functions have changed since the concordats were concluded and, although provision is made for regular reviews of concordats, this does not appear to have been made use of.

## The Joint Ministerial Committee

4.26 The MoU provides for a Joint Ministerial Committee (JMC) consisting of UK Government, Scottish, Welsh and Northern Irish Ministers, to provide some central co-ordination of the overall relationship.

4.27 The terms of reference for the JMC are:

- a. to consider non-devolved matters which impinge on devolved responsibilities, and devolved matters which impinge on non-devolved responsibilities;
- b. where the UK Government and the devolved administrations so agree, to consider devolved matters if it is beneficial to discuss their respective treatment in different parts of the United Kingdom;

4.8 Written submission from the UK Government (no.2).

- c. to keep the arrangements for liaison between the UK Government and the devolved administrations under review; and
  - d. to consider disputes between administrations. It should be noted that the MOU makes no provision for the resolution of such disputes: it merely provides a forum at which they can be aired.
- 4.28 The JMC has not met as regularly as was originally envisaged. (Until the meeting on 25 June 2008 the most recent plenary JMC meeting took place in 2002.) As discussed later in this Part, this gap may reflect the political composition and overlapping aspirations of the devolved and UK administrations in the early years of devolution. In line with the Memorandum of Understanding, the majority of cooperation between the administrations has been on a bilateral or multi-lateral basis, e.g. the Finance Quadrilateral between Finance Ministers.
- 4.29 During the time the Commission has been sitting, we have observed one interesting example of cooperation on a multilateral basis between the devolved administrations and one United Kingdom Government department, overseen by and discussed at the Joint Ministerial Committee. Both institutions were concerned to promote regulation of the marine environment. For Scotland, the distribution of devolved and reserved responsibilities between the Scottish and UK Parliaments is complex and interlocking. The Scottish Parliament has competence in relation to fisheries matters throughout the waters off Scotland, but the UK has responsibilities for such issues as oil and gas extraction, sea transportation and nature conservation beyond the 12 nautical mile limit. The JMC discussed the problems which arose because both the UK and Scottish Governments proposed bills to regulate the marine environment. This has led to a solution which is intended to provide to those who use the sea for various purposes a single and integrated marine spatial planning system. It is not for the Commission to endorse the detail of the two bills – both of which are yet to proceed to enactment. Indeed we consider in Part 5 whether there might be advantage in some readjustment of the responsibilities of each level of government in this area. But there will always be a need for levels of government to come to arrangements like this where responsibilities overlap, and using the JMC process to oversee bilateral discussion, as in this case, is a valuable and necessary process.
- 4.30 At the meeting of the JMC on 25 June 2008, an additional format for meeting, the JMC(Domestic), was established.<sup>4.9</sup> The JMC(D) is intended to provide a forum for discussion of non-European issues in which the governments have a shared interest. The JMC(D) met for the first time on 12 March 2009, and the primary item for discussion was welfare; the second meeting was held on 13 May 2009 and considered migration. No information about these meetings was published in advance, and no conclusions or public statements followed them.
- 4.31 While domestic JMCs were in abeyance for some time, the Committee has continued to meet regularly in its European format, JMC(E), to agree the UK position in negotiations at European Councils. A concordat on co-ordination of European Union policy issues forms part of the Memorandum of Understanding. Again, the fundamental principle here is for issues to be dealt with bilaterally or via correspondence, without automatic recourse to JMC(E).
- 4.32 JMC(E) usually meets in advance of the major European Council meetings (generally four times a year). The meetings are attended by UK Government departments as well as the devolved administrations in order to discuss and agree lines for the UK to adopt. All scrutiny documents are shared with the devolved administrations to allow them to participate fully in preparatory discussions.

4.9 Press release CAB/065/08 issued after JMC on 25 June 2008 ([www.cabinetoffice.gov.uk/newsroom/news\\_releases/2008/080619\\_joint\\_committee.aspx](http://www.cabinetoffice.gov.uk/newsroom/news_releases/2008/080619_joint_committee.aspx)).

- 4.33 The JMC is currently reviewing its provision to consider disputes. Following the JMC meeting on 25 June 2008, a request was made to consider the arrangements for dispute resolution, amplifying the provisions of the Memorandum of Understanding.

### Cabinet Office co-ordination

- 4.34 The UK Government charges the Cabinet Office with co-ordinating the UK Government's own policy on devolution. Devolution strategy is part of the remit of the Ministry of Justice. Perhaps the most important element of the role of the Cabinet Office is to provide (together with counterparts in devolved administrations) the Secretariat for the JMC, JMC(D) and JMC(E). Additionally, the Cabinet Secretary and Head of the Home Civil Service chairs a weekly meeting to which the Permanent Secretaries of the devolved administrations are invited.

### UK emergency co-ordination arrangements

- 4.35 There are well developed arrangements for emergency planning and co-ordination in matters such as civil contingency and pandemic flu planning. Devolved administrations are invited to attend the UK Government Cabinet Committees that are responsible for overseeing planning. Emergencies of this sort may of course often involve the need for very rapid decision-taking, and the emergencies being dealt with may not respect borders. Evidence received by the Commission suggests that this pragmatic approach has generally worked well.<sup>4.10</sup>
- 4.36 These arrangements have been tested in responding to a number of crises over the past ten years, including foot and mouth, the fire service strikes, the 9/11 aftermath and the petrol crisis. Most recently we have seen the outbreak of the Influenza A virus (sub-type H1N1), referred to as swine 'flu, about which we have heard informally from both the UK Government and Scottish Government. The Cabinet Office told us of the inclusion of the Scottish Health Minister and Scottish Government officials in, respectively, the ministerial committee and officials-level Cabinet sub-committee for pandemic response planning.
- 4.37 The response itself has been co-ordinated by the UK Ministerial Committee for Civil Contingencies (CCC) and in Scotland by the Scottish Government Resilience Room (SGoRR). CCC has held regular meetings in which ministers from devolved administrations have participated by telephone conference, upon invitation to do so by the UK Government. The Scottish Government has its own cabinet sub-committee. Both CCC and SGoRR are supported by official committees which also work with one another. The UK Government has negotiated supplies of vaccines with the pharmaceutical industry on behalf of the whole of the UK, while NHS Scotland has released some of its stock of facemasks to other parts of the UK.

### A unified civil service

- 4.38 The position of the civil service in Scotland was explicitly considered as part of the 1997 white paper *Scotland's Parliament*. It concluded that maintaining a united Home Civil Service across Scotland, England and Wales was important for a number of reasons. These included safeguarding common standards of professionalism and political neutrality, securing an integrated approach to policy making and ensuring good lines of communication.

4.10 For example see oral evidence from the National Farmers Union Scotland (19 September 2008) and from former senior civil servant David Crawley (10 March 2009) relating to the foot-and-mouth outbreaks.

- 4.39 The “civil service of the state” remains a reserved matter under the Scotland Act, and officials serving the Scottish Government remain part of the unified Home Civil Service. The unified civil service ensures that there are common standards of professionalism, and the same relationship between devolved Ministers and officials as in the UK Government.
- 4.40 Most civil service management is, however, delegated to the Scottish Government. Appointments are subject to oversight by the Civil Service Commissioners who ensure that appointments and promotions are made on merit using open competitions as appropriate. The Permanent Secretary (and other very senior level appointments) of the Scottish Government are, however, appointed, or approved, by the Prime Minister after consultation with the First Minister. The Prime Minister has this responsibility as he is also Minister for the Civil Service.
- 4.41 Both the UK and Scottish Governments stress the need for strong cooperation between the officials of the two administrations, and for ensuring that regular exchanges of information take place, within an environment which fosters a mutual understanding of working practices and policy objectives at official level between the administrations. For example, the Cabinet Office published guidance for civil servants working in UK Government Departments in July 2008<sup>4.11</sup> and the Scottish Government provides extensive internal guidance to its officials.

## The role of the Secretary of State for Scotland

- 4.42 The Secretary of State retains certain limited executive functions under the Scotland Act. He is responsible for financial transactions between the UK Government and the Scottish Government, in effect paying over the block grant, and has responsibilities in relation to parliamentary elections. Scotland Office Ministers are also responsible for making orders under the Scotland Act, including orders to alter the legislative competence of the Scottish Parliament or the executive competence of Scottish Ministers. Around 200 such orders have been made so far. The Scotland Office has an important role in facilitating the delivery of the work of the Scottish Government and the UK’s legislative programme through the operation of the Sewel Convention.
- 4.43 The Secretary of State also has the power under section 35 of the Scotland Act to prevent a Scottish Parliament Bill being submitted for Royal Assent in certain circumstances (this was discussed in more detail in Part 1). This power has never been exercised.
- 4.44 Under current UK Government arrangements, the Secretary of State for Scotland has a number of non-statutory elements to his role.<sup>4.12</sup> The primary role is to promote the devolution settlement and to act as guardian of it. The Secretary of State promotes partnership between the UK Parliament and the Scottish Parliament, and the UK Government and the Scottish Government. He also continues to represent Scottish interests within the UK Government, dealing with any distinctive Scottish issues that arise on reserved matters and explaining UK Government policies in Scotland. The Scotland Office, which supports the Secretary of State, was established on 1 July 1999, following devolution. The Scotland Office maintains working relationships with the Scottish Government, but is entirely separate from it, remaining part of the UK Government.

4.11 <http://www.cabinetoffice.gov.uk/media/121707/workingwiththedevelopedadministrations.doc>.

4.12 The Commission notes that these functions are non-statutory and could therefore change. The statutory functions of the Scotland Act conferred upon the Secretary of State may be exercised by any Secretary of State. There is therefore no requirement for a Secretary of State for Scotland as such, though there must always be a Cabinet Minister with responsibility for Scotland. The Commission considers such arrangements are rightly a matter for the Prime Minister of the day and notes that there are differing views amongst political parties on this matter.

## Areas of shared competence

- 4.45 There are some very limited areas of shared competence, and these are perhaps better described as concurrent competence – as they are areas where functions can be exercised by UK Government Ministers or Scottish Ministers separately – not jointly. These have been described in Part 1 of our Report.

## Other inter-governmental mechanisms

- 4.46 There are other formal structures in which the UK Government and the devolved administrations also participate. The British-Irish Council (BIC) and its various sub-groupings were identified by the UK Government as making an important contribution to cooperation among the devolved administrations of the UK, even though representatives from outside the UK attend. The BIC was created under the Agreement reached in the multi-party negotiations in Belfast in 1998 to promote positive, practical relationships among its members, those being the UK and Irish Governments, the UK's devolved administrations, and the governing executives of Jersey, Guernsey and the Isle of Man.<sup>4.13</sup> Discussions have taken place on areas such as e-health, transport, the environment, misuse of drugs and minority and lesser used languages.
- 4.47 Cooperation outside formal structures has also taken place at high levels, in particular through ad hoc meetings of Ministers. This includes the recent example of the Prime Minister's meeting on 25 February to discuss the response to current economic issues with senior Ministers of the devolved administrations.

## Scotland's interests in the EU

- 4.48 It is the responsibility of the UK Government to determine and promote the UK policy on developments in the EU. In doing so the UK Government has a responsibility to ensure that the interests of the devolved administrations are fully represented on EU matters which relate to (or have an effect on) devolved responsibilities. The process by which UK policy is formulated is discussed in the evidence to the Commission from the UK Government, and involves regular consultation through informal and formal routes, culminating in the JMC(E) process discussed at paragraphs 4.31 and 4.32.<sup>4.14</sup>
- 4.49 The UK Representation to the EU (UKRep) is responsible for promoting UK policy on the EU through influencing, negotiating and lobbying so that decisions made in the EU reflect UK interests. UKRep works closely with the Scottish Government's EU Office in Brussels (SGEUO), which was established in 1999 in order to assist UKRep's activities in areas of particular interest to Scotland. SGEUO and UKRep maintain close working relations with regular dialogue and formal meetings. Scotland also benefits from Scotland House in Brussels where the Scottish Government and a number of other Scottish organisations and representative groups work together.
- 4.50 With the agreement of UKRep and the relevant lead UK Government department, Scottish Ministers can, and do, attend Council or other Ministerial level meetings in the EU as part of a UK delegation, and undertake other lobbying or negotiating activities, often pursuing specifically Scottish interests within the framework of an agreed UK policy position.

4.13 See <http://www3.british-irishcouncil.org/> for further details of the BIC.

4.14 HM Government Evidence to the Commission on Scottish Devolution, Chapter 6 – Foreign and Commonwealth Office, paragraphs 15 – 29.

- 4.51 The Scottish Parliament European and External Relations Committee also plays a role in scrutinising EU legislation on devolved matters as it applies to Scotland. The Committee's remit in the Parliament's standing orders is to consider and report on: proposals for European Communities legislation; implementation of such legislation; any European Communities or European Union issue; development and implementation of the Scottish Administration's links with countries and territories outside Scotland, the European Communities and their institutions, and other international organisations; and co-ordination of the international activities of the Scottish Administration. It has recently renewed its approach to focus scrutiny on early intervention in EU matters by the Scottish Government.<sup>4.15</sup>

## Inter-parliamentary arrangements

### Inter-parliamentary – general

- 4.52 Other than the Sewel Convention, relatively few inter-parliamentary mechanisms, and arguably insufficient formal mechanisms for communication exist between the Parliaments. As the evidence we received from the House of Commons itself notes, "there is no single authorised channel of communication between the House of Commons and the Scottish Parliament, and there is no central oversight of those relationships which do exist".
- 4.53 As well as the Sewel Convention, there are a number of informal arrangements and relationships between the Parliaments which the Commission has identified. In doing so the Commission is grateful for the input from both Houses of the UK Parliament<sup>4.16</sup> and from the Scottish Parliament.<sup>4.17</sup>
- 4.54 At official level within the Parliaments, there are some informal arrangements which bring staff together, but no formal mechanisms for regular (or even irregular) exchanges of information. These arrangements consist of the annual meeting of clerks of the UK, Ireland and the Crown Dependency legislatures, and the participation of staff who serve the committees in each jurisdiction in the biannual UK Committee Secretariats Network.
- 4.55 Another forum of interest is the British-Irish Parliamentary Assembly (BIPA), which brings together for regular meetings members of the UK and Irish Parliaments, the UK devolved legislatures and the UK Crown Dependency legislatures. Representation includes 25 MPs or peers from the UK Parliament and five MSPs from the Scottish Parliament. The Assembly holds two plenary sessions a year and is supported by a number of specialist committee meetings. There is also a Scottish Parliament Branch, comprising four MSPs, of the Commonwealth Parliamentary Association.
- 4.56 The Treaty of Lisbon, if it comes into force as it currently stands, may have implications for inter-parliamentary consultation within the UK on EU matters. The Treaty would introduce new powers for national parliaments to challenge legislative proposals, either from the European Commission or from member states. It sets out a timing mechanism whereby national parliaments must make any reasoned opinion on why it considers draft legislation does not comply with the principle of subsidiarity within eight weeks. If a third (or a quarter in some cases) of the national parliaments object in this way, the proposals must be reviewed – this is dubbed a 'yellow card'. If half of the national parliaments

4.15 'Future scrutiny of EU issues', European and External Relations Committee; [www.scottish.parliament.uk/s3/committees/europe/documents/2008.11.4-EUScrutinyWorkProgramme.doc](http://www.scottish.parliament.uk/s3/committees/europe/documents/2008.11.4-EUScrutinyWorkProgramme.doc).

4.16 Written evidence from the House of Commons, and from the House of Lords.

4.17 Written evidence from the Scottish Parliament.

object, the proposals can then be struck down if either the Council of Ministers or the European Parliament agrees – this is dubbed an ‘orange card’. In respect of its response, each national parliament gets two votes, in the UK’s case one going to each House of (the UK) Parliament. Consulting the devolved legislatures in this respect is an issue for the UK Parliament<sup>4.18</sup> (the Treaty<sup>4.19</sup> states “it will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers”).

## The role of Parliamentary committees

- 4.57 House of Commons select committees (and their sub-committees) can, with minor exceptions, exchange evidence with the committees of the devolved legislatures. In its evidence to us, the House of Commons notes it is not aware of this power having ever been used.<sup>4.20</sup>
- 4.58 The Scottish Affairs Committee is given explicit responsibility for relations with the devolved legislature, the Scottish Parliament.<sup>4.21</sup> In the case of the Scottish Affairs Committee this responsibility has been most evidenced by its June 2006 report on the Sewel Convention. The House of Commons does not direct the Scottish Affairs Committee on the nature of its responsibilities for relations with the Scottish Parliament, and therefore any view expressed by it to the Scottish Parliament would be its own, not that of the Commons as a whole.
- 4.59 The Scottish Affairs Committee has not established any particular way of fulfilling this responsibility. The Committee has visited Scotland on a regular basis in the course of its work, but it does not hold frequent or regular meetings with Scottish parliamentarians or committees. The Committee has informally met the Conveners Group of the Scottish Parliament and other committees occasionally, and we heard that “the Scottish Affairs Committee does not specifically co-ordinate its work with the subject committees of the Scottish Parliament”.<sup>4.22</sup>
- 4.60 The Scottish Affairs Committee has taken evidence from Scottish Ministers, and took formal oral evidence from members of the Scottish Parliament’s Procedures Committee in Session 2005-06, as part of its inquiry into the Sewel Convention – though this appears to be an isolated example. Other committees have also taken evidence from Scottish Ministers, which is discussed further below. The Scottish Government has both submitted evidence and made responses to reports of the Scottish Affairs Committee.
- 4.61 More generally, relationships between other Commons select committees and their Scottish counterparts have been characterised as “quite active but generally on an informal and fairly irregular basis”.<sup>4.23</sup> One example of regular contact between committees that the Commission is aware of is between the Chairs of the respective European scrutiny committees of the two Houses of Parliament and those of the devolved Parliament and Assemblies.

4.18 Scottish Parliament Information Centre (McIver, I), The subsidiarity protocol in the Treaty of Lisbon (research briefing) (Edinburgh, 2008).

4.19 Treaty of Lisbon: Protocol on the application of the principles of proportionality and subsidiarity; Article 6.

4.20 House of Commons, Standing Order No. 137A(1).

4.21 House of Commons, Standing Order No. 152 (which spells out the remit of each of the departmentally-related select committees).

4.22 Written evidence from the House of Commons.

4.23 Written evidence from the House of Commons.

- 4.62 House of Lords select committees have no formal arrangements with committees of the devolved legislatures – there are no formal arrangements to exchange evidence and there is no provision to invite members of those legislatures to participate in Lords committee meetings. In its evidence, the House of Lords indicated that even “if it were thought desirable for a Lords committee and a committee of the Scottish Parliament to meet together this would under present conditions need to be done informally. Any formal meeting, for example to hear evidence or to deliberate, would require amendment to Lords Standing Orders”.<sup>4.24</sup>
- 4.63 The Commission notes that UK Parliament committees when visiting Scotland have generally not used Scottish Parliament facilities, although exceptions to this include the Commons European Scrutiny Committee in March 2002 and Treasury Select Committee in February 2003. It may be that the UK Parliament committee clerks have often in such circumstances considered presentational aspects and chosen to use other facilities. The Scottish Parliament’s committees cannot meet outside of Scotland and there are no formal arrangements in place for fact-finding visits by its committees to the UK Parliament.
- 4.64 UK Government Ministers have appeared before Scottish Parliament Committees. For example Peter Hain MP, when Minister for Europe, appeared before the Scottish Parliament’s European and External Relations Committee on 5 November 2001.<sup>4.25</sup> However it is rare for UK Government Ministers to do so. They are of course accountable not to the Scottish Parliament but to the UK Parliament. We are also aware of a few cases where Scottish Ministers have appeared before UK Parliament Committees. For example, Wendy Alexander MSP, then Minister for Communities, appeared before the Scottish Affairs Select Committee on 22 March 2000.<sup>4.26</sup> A number of Scottish Ministers gave evidence to the House of Lords Select Committee on the Constitution, during its inquiry into *Devolution: Inter-Institutional Relations in the United Kingdom* (Session 2002-03). More recently, on 26 February 2008, the Deputy First Minister, Nicola Sturgeon MSP, and the Minister for Parliamentary Business, Bruce Crawford MSP, appeared before the House of Commons Justice Select Committee as part of its inquiry into *Devolution: A Decade On*.<sup>4.27</sup>

4.24 Written evidence from the House of Lords.

4.25 <http://www.scottish.parliament.uk/business/committees/historic/europe/or-01/eu01-1402.htm>.

4.26 <http://www.publications.parliament.uk/pa/cm199900/cmselect/cm Scotaf/59/0032201.htm>.

4.27 <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmjust/uc75-iv/uc7502.htm>.

## Part 4–C: Evidence and analysis

### Evidence to the Commission

- 4.65 The Commission received a wealth of evidence on issues associated with the relations between the governments in particular, but also on those between the parliaments and between parliamentarians and ministers themselves, and on those relevant to Scotland's representation at EU level. This evidence is included in our companion publication *Commission on Scottish Devolution: A Summary of the Evidence, May 2008 – June 2009*.
- 4.66 The Commission's Inter-governmental Task Group, chaired by Jim Wallace, has led on this area of work, making recommendations to the Commission as a whole. The Commission has considered the evidence and submissions received, as well as drawing on earlier work such as the House of Lords Constitution Committee's 2002 report, *Devolution: inter-institutional arrangements in the United Kingdom*.<sup>4.28</sup> Later in our work we were also able to consider the Report of the Justice Committee of the House of Commons, *Devolution: A Decade On*.<sup>4.29</sup>
- 4.67 Relevant and valuable evidence has been received from individuals involved in the drafting of the Scotland Act, former ministers and officials at the Scottish and Scotland Offices, current and former parliamentarians and ministers, members of the public, academics, business groups and other civic organisations that operate in both Scotland and the wider UK as well as at a European level.
- 4.68 This evidence has related to the multitude of different relations between the various relevant democratic representatives and institutions. Most relates either to inter-governmental relations (that is, between administrations), inter-parliamentary relations, the civil service or representation at EU level. Although the groupings are by no means mutually exclusive, the evidence can be usefully considered under these headings.

### Inter-governmental relations

- 4.69 The Secretary of State for Scotland outlines his primary role as promoting the devolution settlement and acting as guardian of it. The Commission has heard some calls for the abolition of this specific post, but notes that a UK Cabinet Minister is statutorily required to undertake certain responsibilities under the Scotland Act, and that it is essential for the national government to have a Minister – ideally at Cabinet level – responsible for devolution and relations with the devolved government and Parliament. Such responsibilities are common in federal states.
- 4.70 The Scotland Act did not create a statutory system of inter-governmental interactions, but concentrated more on the new institutions and their responsibilities. This point has been made by people closely involved with the formulation and implementation of the devolution settlement. For example Henry McLeish felt "when the Parliament was established in 1999, there was a great deal of familiarity and political kinship and we did not give enough importance to the machinery of government that we had established".<sup>4.30</sup>

4.28 House of Lords Constitution Committee, Second Report, Session 2002-03, *Devolution: inter-institutional relations in the United Kingdom* ([www.publications.parliament.uk/pa/ld200203/ldselect/ldconst/28/2801.htm](http://www.publications.parliament.uk/pa/ld200203/ldselect/ldconst/28/2801.htm)).

4.29 House of Commons Justice Select Committee, Fifth Report, Session 2008-09, *Devolution: A Decade On* ([www.publications.parliament.uk/pa/cm200809/cmselect/cmjust/529/52902.htm](http://www.publications.parliament.uk/pa/cm200809/cmselect/cmjust/529/52902.htm)).

4.30 Oral Evidence from the Rt Hon Henry McLeish, 12 September 2008.

- 4.71 Consequently, it was suggested, there has been a large premium on informal relations, and mixed reviews as to how successfully these have contributed to inter-governmental working. The recurring theme has been that informal relations are a necessary and important but, by themselves, insufficient means of conducting inter-governmental affairs.
- 4.72 Overall the evidence suggests that the formal (though not legally binding) mechanisms put in place, including the Memorandum of Understanding (MoU), concordats and Joint Ministerial Committee (JMC), have not proved wholly satisfactory. Indeed the Memorandum and various concordats were rarely cited in evidence, and then usually only in passing or to criticise them as unused, unclear or out of date, rather than to accord importance to them.
- 4.73 Some evidence suggested that the JMC has been prone to being sidelined when there were close individual relationships between the UK and Scottish Governments. Problems have also been identified with establishing a useful JMC agenda, Lord Norton noting that its agendas for plenary discussion have been too general.<sup>4.31</sup> The JMC has also been criticised for being used as an event rather than a process, David Crawley noting that “No.10 was keen to use the JMC as a way of demonstrating the success of devolution and so did not want problems or differences to be put on display”.
- 4.74 Many people have told the Commission that greater formalisation of relations, or at least increased availability of formal structures, may be beneficial. Some, such as the Royal Society of Edinburgh, have suggested these be set in statute, but most evidence has rejected this level of formalisation.<sup>4.32</sup> Other options suggested for increased formalisation include greater regularity and timetabling of meetings, an expanded hierarchy of meetings with cumulatively wider agendas, transparency of agendas and discussion, more expectation on key players to participate, and an updated and more regularly invoked MoU and concordats. Others, though, have in evidence been wary of more formal structures. Baroness Quin, for instance, noted: “It’s difficult to have formal machinery, so that protagonists might be cajoled or manipulated to behave in certain ways.”<sup>4.33</sup>
- 4.75 Some evidence received advocated the resumption of arrangements followed in previous meetings on agriculture ahead of European Council.<sup>4.34</sup> These were chaired by a UK Government Cabinet Minister who took a UK wide view, whilst another UK Government Minister represented English interests, with Scottish, Welsh and Northern Irish Ministers also attending. This approach was reported to have worked well, unlike those instances reported to us of UK Government Ministers having difficulty distinguishing between speaking on behalf of the UK and on behalf of England. The Commission heard that this practice appeared to be determined by UK Government Ministers’ preferences, with Ross Finnie MSP and others noting that this period of collegiate and productive relations between respective agriculture ministers and officials came to an end with a change of UK Government Ministerial responsibilities.<sup>4.35</sup>
- 4.76 There has been limited evidence on the issue of shared competence. Most of those who gave evidence have been wary of any expansion of it. One witness noted “One suggestion has been for some sort of UK “common interest committee” to lead on particular issues that cut across devolved and reserved responsibilities – but I am not convinced it would justify the effort that would be involved”.<sup>4.36</sup> Others told us that shared powers would lack accountability, and citizens might struggle to know who has responsibility for what.<sup>4.37</sup>

4.31 Oral Evidence from Lord Norton, 18 March 2009.

4.32 Written submission from the Royal Society of Edinburgh.

4.33 Oral Evidence from Baroness Quin, 11 March 2009.

4.34 See for examples the written submission from National Farmers Union Scotland (NFUS).

4.35 Oral Evidence from Ross Finnie MSP, 9 September 2008. See also oral Evidence from David Crawley, 10 March 2009.

4.36 Oral Evidence from David Crawley, 10 March 2009.

4.37 See for example, Oral Evidence from Lord Sewel, 15 July 2008.

- 4.77 There have however been calls for improved inter-governmental working on issues of mutual concern. These have tended to accompany criticism of unconstructive engagement between and political posturing by administrations bedevilling the progress of inter-governmental affairs. Enthusiasm for expanded working on mutual interests or concerns has generally been tempered by doubts about meetings having sufficient business to attend to and wariness over creating new bureaucracy. A separate concern, voiced by one witness, is that any joint policy-making “where the idea is to have common standards with some local variation” might amount to a recentralising move, countering what he calls the ‘spirit of devolution’.<sup>4.38</sup>
- 4.78 Many people have identified conflicting use of powers as a problem not being satisfactorily resolved. Although consideration of disputes between the administrations is in the remit of the JMC, there is not a definitive resolution procedure or arbiter. An oft-cited problem is the suggestion attributed to the current Scottish Government that, as they oppose new-build nuclear power facilities, they might use devolved planning powers or devolved executive powers under the Electricity Acts to frustrate reserved energy policy. Some have acknowledged the difficulties in trying to institute dispute resolution procedures. Professor Vernon Bogdanor noted that “there is no institutional way to stop disagreements”, adding “the UK Parliament is sovereign, and won’t accept an arbitrator, which would therefore itself be sovereign”.<sup>4.39</sup> This situation is analogous to the fears which some may have had that the Scottish Government would use marine planning powers to influence reserved issues, and it is interesting that that issue seems to have been capable of resolution through inter-governmental mechanisms.
- 4.79 Calls have also been made for greater transparency and formal scrutiny of inter-governmental affairs. Lord Norton, who chaired the House of Lords Constitution Committee inquiry on inter-institutional relations under devolution, said that he still favoured periodic reporting on inter-governmental relations.<sup>4.40</sup>

## Inter-parliamentary relations

- 4.80 The Commission has heard about the inadequacy of formal channels of communication between the UK, Scottish and European Parliaments, and the often scant informal relations between members. The House of Commons advised that “there is no single authorised channel of communication between the House of Commons and the Scottish Parliament, and there is no central oversight of those relationships which do exist”.<sup>4.41</sup>
- 4.81 In devolution’s early days, there were a considerable number of relationships and networks already in place between parliamentarians in Edinburgh and London. As well as party links, some MPs and peers were elected to the Scottish Parliament and even held concurrent memberships. The evidence shows this is less so now, with a more distinct separation now evident between the two Parliaments. Anecdotal evidence from Wendy Alexander MSP and others supports this impression of lapsed familiarity between the two institutions. Indeed, Lord Norton noted the beneficial coincidence at the advent of devolution of all three devolved legislatures’ Presiding Officers being in the House of Lords, and wondered whether those in post might automatically be made peers to re-establish this link.<sup>4.42</sup>

4.38 Written submission from Professor Michael Keating.

4.39 Oral Evidence from Professor Bogdanor, 16 March 2009.

4.40 Oral Evidence from Lord Norton, 18 March 2009.

4.41 Written submission from the House of Commons.

4.42 Oral Evidence from Lord Norton, 18 March 2009.

- 4.82 The issue of mutual respect between the UK and Scottish Parliaments has been raised. At the simplest level, one manifestation of this, which we heard from MSPs, has been the lack of reciprocal arrangements for MSPs and Scottish MPs to access each other's Parliaments.<sup>4.43</sup> From the Scottish Parliament's perspective, MPs can have a 'regular visitor' pass for the Scottish Parliament if sponsored by an MSP. These passes afford general access (but not signing-in rights) to the complex, excluding the Members' Block (which requires an appointment and accompaniment). Current policy is to issue specific MEP's passes with these rights upon application.
- 4.83 There have been calls for closer working on topics of mutual concern between the two Parliaments' committees. The Scottish Parliament's Local Government and Communities Committee recently published a report calling for collaboration between the Scottish and UK Government to address child poverty.<sup>4.44</sup> Suggested changes in other evidence have ranged through exchange of information, joint evidence sessions and meetings, forming ad hoc joint committees or task groups, or a permanent joint standing committee. These could either focus on specific policy areas or review inter-governmental relations. Some however advocated against formally instituted joint committees. Professor Michael Keating warned against "entangling the three parliaments with joint committee membership", but acknowledged "scope for ad hoc joint task forces at ministerial, parliamentary and civil service levels".<sup>4.45</sup>
- 4.84 The Commission has heard that there is a generally low level of contact between MPs and MSPs and received calls, including at its public meetings, for closer links and working between them and also with MEPs. Inter-parliamentary relations seem understandably dominated by party links, but it was suggested, for example, that the good party-level liaison between Conservative MEPs and MSPs could well be emulated at a non-party level.<sup>4.46</sup> It was also suggested that relevant information from the UK Parliament could be included in the Scottish Parliament's business bulletin.<sup>4.47</sup> We heard that MPs and MSPs meet informally at briefings held by local authorities and health boards<sup>4.48</sup>, but also heard of systematic exclusion from certain local events by rival parliamentarians.<sup>4.49</sup> And we were advised that Scottish MEPs have attended the Scottish Parliament's European and External Relations Committee, such attendance being possible by invitation.<sup>4.50</sup>
- 4.85 The Commission has heard calls for greater participation at the Scottish Parliament by UK Government Ministers. Most expressed views that such attendance should not be compelled, but that reasonable requests from committees to appear before them should generally be accepted by UK ministers.<sup>4.51</sup> One suggestion made was for a regular appearance by the UK Secretary of State for Scotland at the Scottish Parliament. The Welsh Secretary makes an annual address and takes questions on the Welsh impacts of the UK legislative programme following its announcement in the Queen's Speech. Annabel Goldie MSP was concerned this might 'muddy the waters' in the two separately elected chambers, but acknowledged it could be done by invitation, citing an address by the previous Prime Minister, Tony Blair.<sup>4.52</sup> The Commission also considered the need for symmetry in this respect, in terms of Scottish Ministers appearing at the UK Parliament. The suggestion was made that the First Minister could be called to appear in front of the House of Commons Scottish Affairs Committee.

4.43 Oral evidence from MSPs, 31 March 2009.

4.44 Scottish Parliament's Local Government and Communities Committee Tenth Report, Session 3, *Report on Child Poverty in Scotland*.

4.45 Written submission from Professor Michael Keating.

4.46 Oral Evidence from Struan Stevenson MEP, 3 April 2009.

4.47 Oral Evidence from Richard Baker MSP, 31 March 2009.

4.48 Oral Evidence from David McLetchie MSP, 31 March 2009.

4.49 Oral Evidence from MPs, 22 April 2009.

4.50 Oral Evidence from Elspeth Attwooll MSP, 3 April 2009.

4.51 Written submission from David Mundell MP (offering his own and the Scottish Conservatives' perspective), 13 May 2009.

4.52 Oral Evidence from Annabel Goldie MSP, 31 March 2009.

4.86 The Commission has heard little evidence on the implications for devolution of the Lisbon Treaty coming into force. The Law Society of Scotland did voice concern at the short timescales set out for any consultation that the UK Parliament might undertake in meeting future obligations under the Treaty. Any consultation the UK Parliament chose to undertake with devolved legislatures on the principle of subsidiarity regarding draft EU legislation would have to be completed within the UK Parliament's own eight-week response time (see paragraph 4.56). The Society also queried procedures for dealing with any disagreement between the UK and Scottish Parliaments in this respect.<sup>4.53</sup>

## The Sewel Convention

4.87 Evidence on the Sewel Convention has generally been supportive of it. Views have been mixed as to whether the Convention should be further entrenched, for example in statute. The Law Society of Scotland were concerned however that "legally entrenching the Sewel Convention would involve a fundamental shift in the relationship between the courts and the UK Parliament"; a perceived breach by the UK Parliament could be challenged, resulting in a court striking down its legislation.<sup>4.54</sup>

4.88 Lord Sewel told us that the Scottish Parliament has taken advantage of the Convention to duck out of legislating in some controversial areas.<sup>4.55</sup> This view was echoed elsewhere, including at the Grove Academy engagement event.

4.89 Others in evidence raised concern at the lack of direct Parliament-to-Parliament communications regarding legislative consent motions (LCMs).<sup>4.56</sup> There was also concern over amendments to UK Parliament Bills being made after an LCM had been passed, raised at the Stirling engagement event and by the Law Society of Scotland.

4.90 The Commission also heard suggestions, for example from the Royal Society of Edinburgh, about how the reverse of an LCM might be beneficial, that is whereby the Scottish Parliament could legislate on a reserved matter with the express prior consent of the UK Parliament.<sup>4.57</sup>

## A unified civil service

4.91 The evidence on the civil service has overwhelmingly been to retain a unified service. Common working practices, staff secondments and ease of communication were cited in support of the status quo, in particular the shared values of integrity, honesty, objectivity and impartiality.<sup>4.58</sup>

4.92 At the Inverness public meeting, the suggestion was made that formal mechanisms should be set up between officials working for the two different administrations. David Crawley<sup>4.59</sup> argued that there was already a 'de facto separation' between the two administrations' civil servants, noting that the number of secondments of officials between the two administrations had dropped, though he still advocated retaining a unified service. Ross Finnie<sup>4.60</sup> and Sir Jon Shortridge<sup>4.61</sup> both felt that civil service, and in particular Whitehall, understanding of devolution had weakened since 1999.

4.53 Written submission from the Law Society of Scotland.

4.54 Written submission from the Law Society of Scotland.

4.55 Oral Evidence from Lord Sewel, 15 July 2008.

4.56 See for example, Oral Evidence from Lord Steel, 19 September 2008 or from Lord Norton, 18 March 2009.

4.57 Written submission from the Royal Society of Edinburgh.

4.58 See the Civil Service code for UK Government Civil Servants: [http://www.civilservice.gov.uk/Assets/cs\\_code\\_tcm6-2444.pdf](http://www.civilservice.gov.uk/Assets/cs_code_tcm6-2444.pdf) and the equivalent for Scottish Government Civil Servants: <http://www.scotland.gov.uk/Resource/Doc/923/0030758.pdf>.

4.59 Oral Evidence from David Crawley, 10 March 2009.

4.60 Oral Evidence from Ross Finnie MSP, 9 September 2008.

4.61 Oral Evidence from Sir John Shortridge, 18 November 2008.

- 4.93 The Commission has heard some calls for a Scottish Civil Service. Professor Bogdanor did have concerns that Scottish officials in a unified service might be wary of damaging their promotion prospects by antagonising anyone in London, not least because the Prime Minister has responsibility for appointing the Scottish Government Permanent Secretary.<sup>4.62</sup>
- 4.94 Concerns have been expressed about how Scottish Government civil servants relate to Members of Parliaments. One member for example told us that he tried to ask officials for factual guidance on a constituency matter, only to be told that they were not permitted to communicate with a backbench MP.<sup>4.63</sup>

## Representation in the EU

- 4.95 The Commission has taken evidence on how Scottish interests are represented at EU level, especially on policy areas which are devolved within the UK but nevertheless reserved to the UK as member state for EU negotiations.
- 4.96 The evidence from those who have been closely involved in formulating the UK policy line for European Council meetings indicates that the UK Government, via UKRep (the UK's permanent diplomatic representation to the European Union), generally does represent Scottish interests effectively and that Scottish Ministers are sufficiently consulted and involved. Indeed, Jack McConnell MSP felt Scotland had disproportionately strong influence for what is, in the EU member state context, a devolved region.<sup>4.64</sup>
- 4.97 However, the Commission also received representations that Scotland's interests were not adequately represented in the EU. Some concern has focused on the fact that Scottish ministers generally do not 'sit at the table' at European Council meetings; that is, they do not normally directly represent the UK even if the issues are particularly Scottish or ministers' personal experience or subject knowledge might exceed that of their UK counterparts. This has not always been the case. Ross Finnie MSP, as Scottish agriculture and fisheries minister, made numerous trips to Brussels to be on hand to brief UK ministers and officials before and during Council sessions, and on occasions, represented the UK Government in the Council.
- 4.98 Struan Stevenson MEP felt there were opportunities for influencing European legislation that were not necessarily being taken. Scottish Ministers and MSPs do not have particularly close links with the European Commission but should have, given that the latter is accessible, offers considerable policy expertise and instigates legislation to which only MEPs can make amendments before it goes to Council.<sup>4.65</sup> Elspeth Attwooll MEP made the related point:

"Because the implementation of many areas of European legislation is devolved to Scotland, it is important that there is a mechanism that will ensure that, when Westminster becomes aware of a European Commission proposal for legislation that will impact on a devolved area or perhaps more generally, it alerts the Scottish Parliament, because the Scottish Parliament will have to feed back to Westminster in an extremely short timeframe."<sup>4.66</sup>

4.62 Oral Evidence from Professor Bogdanor, 16 March 2009.

4.63 HC Deb 2 April 2009 col 1106-07.

4.64 Oral Evidence from Jack McConnell MSP, 10 October 2008.

4.65 Oral Evidence from Struan Stevenson MEP, 3 April 2009.

4.66 Oral Evidence from Elspeth Attwooll MSP, 3 April 2009.

- 4.99 A wider concern, raised repeatedly at the Commission's public meetings and also by other organisations, has been over the visibility and understanding of the process by which Scottish interests are considered.<sup>4.67</sup> The general view expressed to the Commission by individuals who have worked either in or with the system, rather than merely observing it, is that the processes generally work well but are not necessarily publicised or explained adequately.
- 4.100 There is also concern, raised by the National Farmers Union, Scotland (NFUS) and others, about the level of Scottish Parliament consideration of impacts of EU directives, and scrutiny of their implementation. The Scottish Environment Protection Agency (SEPA) advised that 90% of environmental legislation stemmed from Europe, and stressed the importance of early consideration by bodies such as itself.<sup>4.68</sup>
- 4.101 The European Members Information Liaison and Exchange (EMILE) is run by the Scottish Government with a secretariat made up of officials from the Scottish Parliament, Scottish Executive and European Parliament and European Commission offices in Scotland. The Commission has heard it has some value, but some noted it suffered from a limited agenda and lack of decision-making powers.<sup>4.69</sup>

## Scrutiny of inter-governmental relations

- 4.102 There have been some calls for increased scrutiny of inter-governmental relations. Alan Trench for example felt that scrutiny regarding Scotland was patchy, although in an international context it was relatively active.<sup>4.70</sup> Michael Clancy similarly spoke of the need for adequate parliamentary scrutiny.<sup>4.71</sup> Professor Richard Simeon told us that inter-governmental agreements in Canada had suffered from a perceived democratic deficit due to a lack of parliamentary scrutiny.<sup>4.72</sup>

## International experiences – evidence

- 4.103 The Commission has also looked at the processes for inter-governmental relations found in other countries with devolved or federal systems.
- 4.104 The Commission notes that older federations based on a Westminster model such as Canada and Australia have tended not to build inter-governmental structures formally into their constitutions, preferring to allow them to remain flexible, not enshrined in legislation and not judicially enforceable.
- 4.105 The Commission has looked at the example of the Council of Australian Governments established in 1992 to oversee collaboration between state, territory, local and central governments. The Council's role is to initiate, develop and monitor the implementation of policy reforms that are of national significance and which require cooperative action by Australian governments (including, interestingly, reform of Commonwealth and State/Territory roles in environmental regulation, the use of human embryos in medical research, counter-terrorism arrangements and restrictions on the availability of handguns). The Group met four times in the course of 2008, and is supported by a standing secretariat based within the Department of the Prime Minister and Cabinet. The Commission has also already taken evidence from the Australian Commonwealth

4.67 See for example, Oral Evidence from Scottish Environment Link, 10 October 2009.

4.68 Written submission from SEPA.

4.69 See for example Oral Evidence from Struan Stevenson MEP, 3 April 2009 and from Michael Aron, 26 March 2009.

4.70 Oral Evidence from Alan Trench, 15 July 2008.

4.71 Oral Evidence from Michael Clancy, Law Society of Scotland, 20 February 2009.

4.72 Oral Evidence from Professor Simeon, 15 April 2009.

Grants Commission which exists to make recommendations as to the allocation of federal resources to states and territories based on need, thus putting a key aspect of inter-governmental relations on a formal and quasi-independent basis.

- 4.106 Professor Richard Simeon gave us useful evidence on inter-governmental relations in Canada, where they were not specifically built into the Canadian constitution, although there is a Minister of Intergovernmental Affairs. The Canadian provinces had separate civil services, resulting in ‘silo’ working, and little personnel movement between them. There were irregular first minister conferences which had only been held sporadically when politically convenient. A number of inter-governmental agreements had been struck, for example on trade, social union, health and training, but they had no legal status and are reliant on political goodwill; some have weak dispute resolution mechanisms built in. The agreements were made without parliamentary scrutiny, contributing to a perceived democratic deficit. The Provinces had recently established the Council of the Federation, which engaged with the federal government. The Supreme Court of Canada had a major role in shaping the constitution, playing an important balancing role after the Charter of Rights and Freedoms was introduced in 1982.<sup>4.73</sup>
- 4.107 European examples looked at by the Commission include Spain, where a Conference of Presidents brings together the heads of government of the seventeen autonomous communities of Spain, the leaders of the cities of Ceuta and Melilla and the head of the Spanish Government. The aim of the meeting is to encourage cooperation and to adopt agreements, but there is no defined scope or formal processes. Sitting below these high level meetings are legally enshrined Sectoral Conferences, made up of the relevant Spanish Government minister and his 17 counterparts, which aim to achieve cooperation in specific policy areas.
- 4.108 Professor Joxerramon Bengoetxea, a former Basque deputy minister, noted that the Spanish Constitution does not define the Autonomous Communities, although it does refer to ‘Historic Countries’. By the end of 1984, 17 Autonomous Communities had been established. As an example of the asymmetric nature of Spanish devolution, Professor Bengoetxea told us that prisons are devolved to some of the Autonomous Communities, but not to the Basque Country. The central government at the time of defining the Basque Country’s powers had retained the reservation of powers relating to prisons, in response to the perceived terrorism threat from Basque Nationalists. He also described some of the issues surrounding shared and contested competence, and noted a tendency of the Constitutional Court to favour centralisation. Regarding dispute resolution procedures relating to the economic and financial arrangements, Professor Bengoetxea suggested that these were inadequate, as disputes often became ‘judicialised’.<sup>4.74</sup>
- 4.109 Federal states such as Germany and Belgium tend to have more formal structures and safeguards written into their constitutions or basic laws. In Germany the second chamber of the federal legislature, the Bundesrat, represents the interests of each of the 16 German Länder. There are also contacts at executive level through the Conference of the Heads of Government of the Federation and the Länder which has a legal basis in the standing orders of the federal Government. In Belgium, conflicts over the distribution of powers of the federal Government, Regions and Communities are settled judicially either through the Council of State or in the Court of Arbitration. Conflicts of interest (as opposed to points of law) are officially dealt with by a linguistically balanced Concertation Committee – composed of the federal prime minister, five ministers of the

4.73 Oral evidence from Professor Simeon, 15 April 2009.

4.74 Oral evidence from Professor Joxerramon Bengoetxea, 31 March 2009.

federal government and six members of the regional and community governments – which has 60 days to reach a consensus. This option is rarely exercised and, in practice, such disputes are generally dealt with informally by the parties concerned.

- 4.110 The German Consul General in Scotland told us that the structures in Germany might appear complicated, but are widely accepted and seldom contested. He noted a number of structures whereby the Länder Governments work together, such as bilateral or multilateral treaties, and that the Länder Governments interact directly with EU institutions, resulting in their buying in to EU policies. He reported beneficial exchanges of civil servants between the Länder and Federal Governments, and advised the ultimate dispute resolution mechanism is the Constitutional Court.<sup>4.75</sup>
- 4.111 The Commission's Inter-governmental Task Group noted with interest the COREPER<sup>4.76</sup> system whereby issues are escalated through a number of levels before reaching European Council meetings. This allows easily resolvable issues to be dealt with by officials, with any outcomes or decisions subsequently 'rubber-stamped' at Council. Thereby only the more problematic or sensitive issues go to Council meetings, unresolved, for consideration.
- 4.112 COREPER is the designation of the two working groups/committees of officials whose task is the preparation of meetings of the European Council of Ministers. COREPER comprises the Permanent Representatives of the member states (i.e. ambassadors to the EU) and their deputies. COREPER is divided into two committees: COREPER I, which comprises the deputies of the ambassadors to the EU, and COREPER II, which comprises the ambassadors themselves and is therefore the more important of the two.
- 4.113 COREPER II normally concerns itself with the matters dealt with by the European Council as well as matters within the remit of the Councils for General Affairs and External Relations, Economic and Financial Affairs, and Justice and Home Affairs. COREPER I prepares general matters within the remit of the other Council configurations.
- 4.114 Within COREPER, officials discuss the political issues on the agenda for the next Council meeting, ahead of the meeting itself, and attempt to reach agreement on the matters wherever possible. Decisions are also taken within COREPER as to whether matters should be submitted to the Council of Ministers for decision or whether they can be placed on the agenda as so-called 'A points'. An 'A point' is submitted to the Council for adoption without debate, helping to manage the workload.
- 4.115 The Commission observes with interest the various ways in which other jurisdictions resolve difficulties and coordinate policy and recognises that the mechanisms employed reflect the political and cultural peculiarities of different nation states and regions. Whilst we are keen to learn from good practice elsewhere, we appreciate that the mechanisms underpinning inter-governmental relations in the UK must suit the needs and histories of the domestic institutions concerned.

4.75 Oral evidence from German Consul General in Scotland, Wolfgang Moessinger, 31 March 2009.

4.76 Committee of Permanent Representatives, Comité des Représentants Permanents.

## Evidence – conclusions

- 4.116 Inter-governmental relations are fundamentally important in a constitutional system with different levels of government. All the international evidence backs this up. The evidence we have received leads to a number of important conclusions and forms the basis of our recommendations. It has shown that, whilst there are some examples of good practice, much better developed and more robust relationships between the Parliaments and Governments are needed, particularly where devolved and reserved responsibilities overlap or impinge on one another.
- 4.117 In setting up the new Scottish institutions, mechanisms for interaction between the democratic representatives and institutions were given lesser priority. Also, the powers that were to be exercised at a UK level were given rather less attention by many in Scotland. It may also be that insufficient attention was given to the implications of devolution for the wider UK constitution. This has had considerable bearing on the relations, both formal and informal, that have developed since the creation of the Scottish Parliament in 1999.
- 4.118 An inherent political problem of inter-governmental relations is that of asking politicians often in direct political competition to cooperate or find consensus, often on acutely sensitive political issues.
- 4.119 Since devolution, inter-governmental relations have been good in some important respects, often driven by necessity. Examples include the way in which agreement is reached prior to EU discussions and the successful civil contingencies arrangements. There is a good deal of effective cooperative working, some of it simply a continuation of pre-devolution arrangements.
- 4.120 But, overall, inter-governmental arrangements are underdeveloped. The overarching machinery has not operated in any systematic way, and the systems in place for working-level discussions to clarify issues often fail to do so before they escalate to more senior and political forums, or indeed spill out into a public debate. Moreover, the regularity of Joint Ministerial Committee meetings is insufficient and too ad hoc.
- 4.121 There appear to be several reasons for this, including the continuity of personnel at both official and ministerial levels as devolution was implemented, and thereafter having the same party in government in both administrations for eight years (albeit in coalition at the Scottish Parliament). This meant that informal and party-level contacts, and pre-existing relationships, shouldered the burden that would otherwise have relied on more formal arrangements. Such informal working is a necessary but insufficient way of conducting inter-governmental affairs and is not a solution for the long term.
- 4.122 Another reason is that, while devolution produced very significant changes to the Government of Scotland (and indeed Wales and Northern Ireland), it resulted in less immediately obvious change in the institutions of the UK Parliament and UK Government, even though much of what had previously been the business of the UK Government and Parliament had now been placed under new management.
- 4.123 The electorate legitimately can expect the different levels of government to work together in the public interest, and of course they often do. But political conflicts and rivalries are an inevitable and healthy part of a democratic system of government. No formal machinery for inter-governmental relations can guarantee to prevent disagreements. As Lindsay Roy MP told us, “whatever structures you put in place, relations between MPs and MSPs will not work without goodwill and a recognition that

we have a common role to serve the people of Scotland”<sup>4.77</sup> But formal systems can provide the framework and the opportunity for cooperation to take place, and also for disagreements to be raised, clarified and worked through. It is inevitable that where the responsibilities of different levels of government interact with one another such issues will arise and we do not have sufficiently robust machinery to deal with these.

- 4.124 Increasingly, important issues need to be dealt with by different levels of government working together. This is true internationally, in the EU and now also within the UK. It is inevitable that inter-governmental processes should allow for some scope for discussion and, where need be, for agreements to be reached with a degree of confidentiality. But it is also important that inter-governmental arrangement can be scrutinised by parliaments and the public. At present the UK’s arrangements are weak in both these respects.
- 4.125 Much of the emphasis has been on relationships between governments as these are where most issues arise. But relationships between the legislatures of the UK are also weak. There are no formal arrangements for MPs and MSPs to work together, to communicate or to share information. In our evidence-gathering, we have been struck by the distance between them. Nor are there any formal arrangements for the views of one Parliament on an issue to be conveyed to the other, except in relation to the views of the Scottish Parliament on a UK Bill which touches on devolved matters via the Sewel Convention. But even in this respect, the message comes via one government to another and from the UK Minister to the UK Parliament.
- 4.126 Arrangements whereby the UK Government, as coordinated by UKRep, consults the Scottish Government on a devolved matter in the formulation of the position to take as a member state at a Council (of the European Union) appear to work well. Any problems that do arise appear to be largely due to a poor understanding of devolution in Whitehall or the late notice of issues, rather than bad faith – although we have heard of instances, for example from Sir Iain Anderson, where cooperation did not meet acceptable standards.<sup>4.78</sup> Views expressed to the Commission tended to fall into two categories. Those who worked within or were familiar with the mechanisms in question reported that arrangements generally worked well, indeed some commenting that Scotland’s influence was disproportionately high. Those unfamiliar with the system felt it lacked transparency, and tended therefore to worry about whether Scotland had a sufficient voice in proceedings that they saw as being behind closed doors. This latter feeling is likely to be exacerbated by the sparse level of parliamentary scrutiny afforded to Scottish EU representation. The Commission therefore feels that the main issues to be addressed here are ones of perception and transparency.
- 4.127 To summarise, the Commission has heard evidence of problems with the existing mechanisms, and with gaps in existing arrangements, but relatively few proposals for solutions. The evidence equally demonstrates a very strong sense that inter-governmental and inter-parliamentary relationships are extremely important and considerably more emphasis should be placed upon them.

4.77 Oral evidence from MPs, 22 April 2009.

4.78 Sir Iain Anderson cited Defra as unnecessarily delaying elements of the response to the 2007 foot-and-mouth outbreak, in his oral evidence of 9 September 2008.

## Part 4–D: Our recommendations

4.128 We have recognised that there are inevitably going to be issues where responsibilities overlap and interact with one another. Our analysis of Scotland’s place in a political, economic and social Union in Part 2 identified a number of these areas, and we go on to consider a number of function-specific issues in Part 5. Our evidence has told us that the current arrangements for inter-governmental and inter-parliamentary working are not sufficient. A much better developed and more robust framework between parliaments and governments is needed to ensure that, where devolved and reserved responsibilities overlap or impinge on one another, proper coordination and joint working are more fully encouraged and supported, with appropriate scrutiny by the parliaments to which the governments are accountable. This is what our recommendations in this section seek to achieve.

### Our consideration

4.129 Having discussed the range of existing mechanisms, and having reviewed the main messages from the evidence, the Commission has sought to understand whether the existing mechanisms are suitable, if changes or new mechanisms are needed, and to make recommendations accordingly.

4.130 In considering these relations we start from our remit, and in particular how to “enable the Scottish Parliament to serve the people of Scotland better” and “continue to secure the position of Scotland within the United Kingdom”. In a United Kingdom, with shared interests and a shared sense of citizenship, the Commission believes that the Governments within the Union should work together in partnership for the good of all citizens. The Commission therefore believes that effective and transparent relations between the Parliaments, Governments and the institutions of the state are of the utmost importance. As a starting point the Commission therefore believes the following points must be acknowledged:

- There should be an expectation of joint working in the interests of the good governance of all UK citizens.
- Political competition between the Governments is an inevitable fact of democracy, and crucially a sign of healthy democracy. The challenge is to ensure that this political competition is based on mutual respect between Governments and can therefore be anticipated and accommodated within these relationships, with space for genuine differences of opinion.
- The UK’s arrangements for managing decentralised government are relatively underdeveloped when compared with other countries.

4.131 Reviewing the existing mechanisms, it is clear that some of the complexity arises because some of the institutions involved have more than one responsibility. The UK Government can act as the government of all of the UK (for example when participating in the EU), or as just the government of England, or as both (for example when participating in the JMC). Similarly, the UK Parliament can legislate for all of the United Kingdom (when legislating in reserved areas), or only for parts of it (when legislating for England or in devolved areas).

- 4.132 The Commission notes that neither the Speaker of the House of Commons nor the Presiding Officer of the Scottish Parliament has expressed an interest in representing his institution in any formal way beyond ceremonial roles.<sup>4.79</sup> The apolitical nature of their roles has been offered as an explanation of this view, and we recognise this will be the case in most circumstances.
- 4.133 Against this backdrop we have considered how the existing mechanisms work, where there are gaps, and what changes or new mechanisms should be recommended. In doing so we have considered who is representing whom and in what capacity, and whether all interests – but in particular those of the people of Scotland – are properly represented within these arrangements.

## The guiding principle

- 4.134 Each institution involved has its own competences and responsibilities, and its own democratic mandate. In working together, the different levels of representation and government have to recognise this and behave accordingly. We recognise the political reality that participants will often be of different political colours and beliefs, but nevertheless all involved should operate on the basis of an expectation of and commitment to cooperation.
- 4.135 The nature of the settlement emphasises flexibility and responsiveness rather than legislating for formal mechanisms. We agree that this is right, but it places a premium on cooperation on the basis of mutual respect. Our first recommendation is therefore that:

**RECOMMENDATION 4.1:** In all circumstances there should be mutual respect between the Parliaments and the Governments, and this should be the guiding principle in their relations.

- 4.136 The primary purpose of such mechanisms should be to foster and support cooperation between the institutions, and their focus should be on achieving better results for the people of Scotland through closer working. Whilst the mechanisms may have a role in resolving disputes this should be their secondary function.
- 4.137 To be effective these mechanisms must be responsive to changes in priorities and circumstances. They should not therefore be overly prescriptive or entrenched such that they cannot evolve and adapt.
- 4.138 Whilst formal mechanisms are essential to ensure effective inter-governmental relations, they should not be at the cost of informal exchanges and discussions, which are extremely valuable. We especially recognise that in both formal and informal exchanges there must be a space for political discussion and negotiation: to do otherwise would be naïve, and more importantly a failure to do so would risk rendering formal mechanisms impotent.

4.79 See for example written submission from Scottish Parliament.

## Strengthening inter-parliamentary links

- 4.139 The Commission notes that relations between the Parliaments are a matter for the Parliaments themselves.
- 4.140 The only links that currently exist between the Parliaments are informal, with limited links between Committees and regular but informal meetings between the Speaker, the Lord Speaker and the Presiding Officer. The Commission recognises that there is scope

to enable closer relations, such as those between the chairs of the European scrutiny committees.

- 4.141 Each Parliament should positively (rather than by omission) demonstrate mutual respect for the other's competence. In particular, changes should be made to the UK Parliament's procedures so that they more fully recognise the existence of the Scottish Parliament. We therefore recommend:

**RECOMMENDATION 4.2:** As a demonstration of respect for the legislative competence of the Scottish Parliament, the UK Parliament should strengthen the Sewel Convention by entrenching it in the standing orders of each House.

- 4.142 The Parliaments should have mechanisms which allow them to communicate, both on matters of procedures, and on matters of substance where a view can be expressed or a request made.
- 4.143 A protocol could be established to ensure that when a legislative consent motion (LCM) is passed in the Scottish Parliament the confirmation received by the Clerk is communicated to the relevant House by the Clerk or Speaker, prior to the House's consideration of elements of a Bill which extend to Scotland in devolved areas. We note that at present it is a UK Government Minister who informs the relevant House of this and do not believe this to be the most appropriate form for a Parliament-to-Parliament communication to take.
- 4.144 We believe a number of straightforward mechanisms are needed to improve this. For Bills before the UK Parliament which are subject to the Sewel Convention, once confirmation that a legislative consent motion (LCM) has been passed is received from the Scottish Parliament, a notice should appear in both Houses' order papers setting out the terms of the LCM, and noting any relevant report from a Scottish Parliament committee; and such a report should be available in both Houses. The Explanatory Notes for such a Bill should record whether the Sewel Convention is engaged and, once any LCM has been passed, should include its terms and references to relevant Scottish Parliament debates. Finally, if a Bill subject to an LCM is amended such that it is outside the scope of the LCM, this should be brought to the attention of the House and the Scottish Parliament should be informed.
- 4.145 A channel is needed by which the UK Parliament can be informed of the views of the Scottish Parliament, and vice versa, in areas where legislation by one could affect areas within the competence of the other.

4.146 We therefore make the following recommendation:

**RECOMMENDATION 4.3:** The UK Parliament and Scottish Parliament should have mechanisms to communicate with each other:

- a. There should be detailed communication about legislative consent motions (LCMs), and in particular if a Bill subject to an LCM is amended such that it is outside the scope of the LCM.
- b. A mechanism should exist for each Parliament to submit views to the other, perhaps by passing a motion where appropriate.

4.147 The Commission is struck by the self-denying ordinance of the UK Parliament in not debating devolved matters as they affect Scotland. The Commission understands the reason for this was that, because the UK Government is no longer responsible for devolved matters in Scotland, there would be no Minister in a position to respond on behalf of the Government to such a debate. The Commission believes that the Secretary of State for Scotland, or whichever Cabinet Minister has responsibility for Scottish devolution, would be well placed to hear the views of the UK Parliament and communicate them to the Scottish Parliament, perhaps by formally notifying the Clerk of the Scottish Parliament that a debate has taken place.

4.148 The Commission is also struck that, whilst there is an annual “state of Wales” debate in the House of Commons, there is no equivalent for Scotland, and we recommend that one is established.

4.149 The Commission notes that the Scottish Parliament has conducted debates on reserved matters without requests for UK Government ministers to reply and, on a number of occasions, without any Scottish Minister replying,<sup>4.80</sup> and believes that the absence of a Minister to reply should not curtail the opportunity for a Parliament to debate such matters. The debate would be a matter of public record and form part of the political discourse on a given topic.

**RECOMMENDATION 4.4:** The UK Parliament should end its self-denying ordinance of not debating devolved matters as they affect Scotland, and the House of Commons should establish a regular “state of Scotland” debate.

4.80 See for example the debate on the war in Iraq (Official Report of the Scottish Parliament, 13 March 2003, cols 19425-19496).

## Parliamentary committees

- 4.150 We have noted with interest the formal arrangements for Welsh Assembly members to participate by invitation in meetings of the House of Commons Welsh Affairs Committee. Whilst acknowledging the Welsh settlement is different to Scotland's we believe this practice to have been a positive one, and that Scottish arrangements should learn from these.
- 4.151 In areas of mutual interest there should be mechanisms to allow the committees of the UK Parliament (whether committees of either House or joint committees) and committees of the Scottish Parliament to work effectively together, and in support of this we make the following recommendations.

**RECOMMENDATION 4.5:** A standing joint liaison committee of the UK Parliament and Scottish Parliament should be established to oversee relations and to consider the establishment of subject-specific ad hoc joint committees.

**RECOMMENDATION 4.6:** Committees of the UK and Scottish Parliaments should be able to work together and any barriers to this should be removed:

- a. Any barriers to the invitation of members of committees of one Parliament joining a meeting of a committee of the other Parliament in a non-voting capacity in specified circumstances should be removed.
- b. Any barriers to committees in either Parliament being able to share information, or hold joint evidence sessions, on areas of mutual interest, should be removed.
- c. Mechanisms should be developed for committees of each Parliament to share between them evidence submitted to related inquiries.

- 4.152 Where committees of the Scottish Parliament are considering areas which interact with reserved areas, UK Government Ministers should commit to respond positively to requests to appear before these committees, although it should not be possible to compel them to do so. Similarly, where committees of the UK Parliament are considering areas which interact with devolved areas, Scottish Ministers should commit to respond positively to requests to appear before these committees.
- 4.153 This issue also arises in relation to UK-wide organisations which deal with areas where there are close interactions between devolved and reserved powers (see for example Recommendation 5.5 regarding the Health and Safety Executive). Where regulators or other public bodies fulfil functions which are reserved but interact closely with devolved policy areas we believe it is good practice for them to formally lay annual reports before the Scottish Parliament, and commit to respond positively to requests from Scottish Parliament committees to give evidence.
- 4.154 Scottish Ministers are accountable to the Scottish Parliament, and UK Ministers are accountable to the UK Parliament. However there should be opportunities for each to communicate with the other Parliament as devolved and reserved responsibilities interact. For three of the first four First Ministers this was not an issue as they were also members of the House of Commons.<sup>4.81</sup> In future this will not necessarily be the case, and therefore to achieve this, there should be a way in which the First Minister may speak before the UK Parliament. Similarly, there should be a way in which a UK

4.81 Henry McLeish, though, did not contest his House of Commons seat at the 2001 general election, and therefore was only an MP for around half of his First Ministership.

Government Cabinet Minister can speak before the Scottish Parliament. We therefore recommend that:

**RECOMMENDATION 4.7:** To champion and recognise the importance of interaction between the Parliaments and Governments:

- a. UK and Scottish Government Ministers should commit to respond positively to requests to appear before committees of the others' Parliament.
- b. The UK Government Cabinet Minister with responsibility for Scotland (currently the Secretary of State for Scotland) should be invited to appear annually before a Scottish Parliament committee comprised of all committee conveners, and the First Minister should be invited to appear annually before the House of Commons Scottish Affairs Committee.

4.155 This is particularly important in areas where devolved and reserved legislative competences overlap. The Queen's Speech, which sets out the UK Government's legislative programme will almost always contain legislative proposals which relate to devolved matters to some extent, and a number of Bills which may require a legislative consent motion. Similarly, the Scottish Government's legislative programme may contain Bills which have implications for reserved matters, and we therefore recommend:

**RECOMMENDATION 4.8:** Shortly after the Queen's Speech the Secretary of State for Scotland (or appropriate UK Government Cabinet Minister) should be invited to appear before the Scottish Parliament to discuss the legislative programme and respond to questions in a subsequent debate. Similarly, after the Scottish Government's legislative programme is announced the First Minister should be invited to appear before the Scottish Affairs Committee to outline how Scottish Government legislation interacts with reserved matters.

4.156 This should not be the end of cooperation, and in relation to relevant Bills, we make the following recommendation:

**RECOMMENDATION 4.9:** Where legislation interacts with both reserved and devolved matters there should be continued cooperation:

- a. For any UK Parliament Bill which engages the Sewel Convention on a matter of substance, consideration should be given to including one or more Scottish MPs on the Public Bill Committee, who should then be invited, as appropriate, to meet the Scottish Parliament committee scrutinising the legislative consent memorandum
- b. A Scottish Minister should as appropriate be asked to give evidence to the UK Parliament committee examining Orders made under the Scotland Act.

4.157 We recognise that there may be occasions where the Scottish Parliament wishes to convey views to the UK Government, and the UK Parliament to the Scottish Government, namely where legislation or proposals by one could have an effect on areas within the competence of the other. We recommend a mechanism is developed to manage this. We would not envisage this mechanism being subject to frequent use, and an appropriate threshold to activate it would need to be developed.

**RECOMMENDATION 4.10:** Either the Scottish Parliament or either House of the UK Parliament should be able, when it has considered an issue where its responsibilities interact with the other Parliament's, to pass a motion seeking a response from the UK or Scottish Government. The relevant Government in each case should then be expected to respond as it would to a committee of its own Parliament.

- 4.158 We believe that some simple practical and administrative steps could make a positive difference to supporting stronger relations between the Parliaments. These are best described as the two Parliamentary authorities providing for suitable recognition of the members of the other. We therefore recommend:

**RECOMMENDATION 4.11:** There should be a greater degree of practical recognition between the Parliaments, acknowledging that it is a proper function of members of either Parliament to visit and attend meetings of relevance at the other; and their administrative arrangements should reflect this.

- 4.159 These practical steps should include the UK Parliament authorities ensuring that MSPs are provided with a suitable degree of access to the UK Parliament for attending meetings, either by recognition of their Scottish Parliament passes or by issue of a suitable UK Parliament pass. The Scottish Parliament authorities should ensure that Scottish MPs (and UK Government Ministers with responsibility for Scotland if not Scottish MPs) should be provided with a suitable degree of access to the Scottish Parliament, either by recognition of their UK Parliament passes or by issue of a suitable Scottish Parliament pass (and we note in this context that Scottish MEPs already enjoy such access). We consider that the UK Parliament and Scottish Parliament authorities should make reciprocal provision for the use of accommodation (e.g. committee rooms) and services (e.g. the Official Report or transcription services) by committees of each Parliament when meeting or taking evidence in London or Edinburgh respectively whenever practical.

## Improving inter-governmental relations:

- 4.160 We recognise that the JMC format, as recently restored, is effective but we believe it needs to be developed, to ensure issues find the right level and there is a greater commitment to its role. We are also concerned that some existing forums seem disconnected from the JMC process.
- 4.161 The Commission does not believe that the creation of new bureaucracy will be a sensible approach, and instead has approached its recommendations for inter-governmental relations from the perspective of building on what works now and developing this in response to the evidence put to us, rather than proposing new or complex structures. Our aim is to ensure a greater focus on cooperation.
- 4.162 The JMC process rightly encompasses all of the devolved administrations, and whilst our recommendations are focused on the inter-governmental relations between the UK Government and the Scottish Government, the Commission does not believe this should change. We do, however, believe that some of the supporting machinery proposed should be flexible enough to handle areas where liaison between just the UK Government and Scottish Government is necessary.

- 4.163 The Commission has been concerned that inter-governmental relations have been viewed from the perspective of 'dispute resolution' rather than cooperation driven by shared interests or objectives. It would be naïve to suggest disputes can be avoided, but a focus on cooperation brings two clear benefits – firstly, it places emphasis on genuine joint working for the benefit of all citizens, and secondly, it ensures that when disputes do arise they are dealt with by a group of individuals who have built a relationship focused on cooperation.
- 4.164 Existing informal mechanisms for cooperation work effectively in a number of areas but are disconnected from the JMC structure. Similarly, we have heard examples of more formal official and ministerial level mechanisms operating effectively, but again disconnected from the JMC structure. In other areas both informal and formal mechanisms have either fallen into disuse, are ineffective or never existed in the first place.
- 4.165 We believe that even where there is a clear separation of responsibilities there will always be areas of disagreement, dispute or conflict. It is therefore essential that space is available for meaningful discussions and negotiations within the inter-governmental machinery rather than having to rely on political posturing and grandstanding outside the machinery. This requires any mechanisms to recognise and allow for political discussions and resolutions, both formally and informally.
- 4.166 We welcome the restoration of the Joint Ministerial Committee machinery. We also believe the following improvements are needed to enhance it, and effective informal discussions must also continue as both are essential.

**RECOMMENDATION 4.12:** The JMC machinery should be enhanced in the following ways:

- a. The primary focus should be on championing and ensuring close working and cooperation rather than dispute resolution (though it will be a forum to consider the latter as well).
- b. There should be an expanded range of areas for discussion to provide greater opportunities for cooperation and the development of joint interests.
- c. There should be scope to allow issues to be discussed at the appropriate level, including the resolution of areas of disagreement at the lowest possible level.

- 4.167 We have found the COREPER model instructive, and have drawn on this in developing recommendations for how this cooperation can be achieved. We propose the JMC machinery is developed in the following ways:

**RECOMMENDATION 4.13:** The JMC should remain the top level, and meet in plenary at least annually, but most importantly to a longstanding timetable. In addition:

- a. JMC(D) and JMC(E) should continue in much the same form, but with more regular meetings and to a longstanding timetable. There should be an additional JMC(Finance) which subsumes the role of the Finance Quadrilateral.
- b. Sitting below the JMC(D), JMC(E) and JMC(F) meetings should be a senior officials level meeting, JMC(O).

- 4.168 The JMC(D), JMC(E) and JMC(F) meetings should also determine the agenda for JMC meetings, supported by JMC(O). Membership of JMC(D) in particular would vary to ensure the appropriate lead Ministers attended for items, but would include lead coordinating Ministers from the UK Government (in the Chair) and each devolved administration. The membership for JMC(O) would adapt to include a (D), (E) or (F) format.
- 4.169 Below the JMC mechanisms, we consider that the merits of more working level machinery might be examined, and that at least existing mechanisms should be more closely aligned with the JMC structures. For example, below JMC(O), could be a more working level official group (Directors) which oversees area by area forums (which are based on the existing bilateral arrangements and bringing them within the JMC machinery<sup>4.82</sup>). In parallel to this working level official group could be a political level group, comprising Special Advisers.
- 4.170 We believe the arrangements for the Secretariat of the JMC, co-ordinated by the Cabinet Office and with representatives of the Devolved Administrations, should continue.
- 4.171 In addition to changes to this core machinery, we would also recommend some changes to general working arrangements between Edinburgh and London involving the Governments, and note a simple regard to the benefits of practicalities, for example greater use of video- and tele-conferencing facilities, can go a long way. We also recommend a substantive change to improve the running of inter-governmental meetings at a Ministerial level:
- RECOMMENDATION 4.14:** Where inter-governmental ministerial meetings are held to discuss the overall UK position in relation to devolved policy areas, the relevant Secretary of State should generally chair these meetings on behalf of the overall UK interest, with another relevant UK Minister representing the policy interests of the UK Government in relation to those parts of the UK where the policy is not devolved.
- 4.172 The related issues of scrutiny and transparency are considered below, at paragraphs 4.189 to 4.194.

## Inter-governmental relations and competence

- 4.173 The Commission does not propose any new areas of formal 'shared competence' for the Scottish and UK governments, but in Part 5 we recommend a number of areas where reserved and devolved responsibilities are closely related to one another, and where there should be opportunities for enhanced formal cooperation. This is set out in relation to the specific recommendations, but there are areas which we recommend are formally overseen by the relevant part of the JMC machinery, for example the consultation arrangements in relation to Welfare to Work and the development of Scottish-specific immigration policies to address skills gaps (such as Fresh Talent). In Part 5 we consider the interaction of the housing and council tax benefits system with the devolved responsibilities for housing and local taxation policy. Because these areas are so closely related, it could be that changes are needed to reserved matters as they affect Scotland as a result of the policy pursued in devolved areas.

4.82 The area forums, should be based upon existing department-to-department relationships, with an initial review conducted for any gaps. The membership would be flexible to suit the issues and would include relevant Ministers and officials.

- 4.174 There may be times when these connections apply in relation to legislative changes. The Sewel Convention allows for the UK Parliament to legislate with the consent of the Scottish Parliament in devolved areas. But the way in which the settlement is designed means that there is no equivalent mechanism to enable the Scottish Parliament to legislate with the consent of the UK Parliament on a reserved matter – the only option is for the UK Parliament to amend Schedule 5 so that the matter in question is no longer reserved.<sup>4.83</sup>
- 4.175 Just as it is possible for the Scottish Parliament to consent to the UK Parliament legislating on its behalf in devolved areas, so we believe it should be possible for the UK Parliament to consent to the Scottish Parliament legislating on its behalf in reserved areas. Therefore we believe it is desirable for there to be a mechanism that would enable the UK Parliament, by order made by statutory instrument, to give authority to the Scottish Parliament to legislate on matter that continues to be reserved (i.e. without this involving any amendment to Schedule 5). The power conferred by such an order would be time-limited and granted for a specific defined purpose: once it had been exercised for that purpose the Parliament would have no further power to legislate in that reserved area. In practice, we envisage such an order being made by the UK Government only in response to proposals put forward by the Scottish Government (or Scottish Parliament), and normally only in situations where a legislative or policy change in a devolved area gave rise to a case for change in a related reserved area, or where it was agreed that exercise of the power by the Scottish Parliament would be consistent with the devolution settlement. This mechanism could also be used where it is agreed the Scottish Parliament can levy new taxes (see paragraphs 3.170 and 3.170). We also expect any formal proposal for the use of this mechanism to be preceded by discussion and agreement in the inter-governmental forums outlined in paragraphs 4.160 to 4.172.
- 4.176 Any order made would have to specify the reserved matter in relation to which the authority to legislate applies, and set any additional parameters within which the Scottish Parliament must legislate – which should be determined by the UK Parliament. The subject-matter would remain reserved in Schedule 5, but the terms of the order would provide a legal exception to the relevant reservation. This would be limited to a single use in the sense that the Scottish Parliament would have authority only to pass one Act, perhaps within a specified timescale – but it would be made explicit that later revocation of the order would not have the effect of repealing any Act of the Scottish Parliament made by virtue of it.
- 4.177 This mechanism would give the Scottish Parliament the ability to change the law in an area that would otherwise be beyond its competence with the consent of the UK Parliament. The UK Parliament would have the power to set limits, in advance, on what that legislation could do, and maintain in the longer term its exclusive right to legislate on that matter for the whole UK.
- 4.178 This approach may be thought of as roughly equivalent to the Sewel Convention in reverse – i.e. it would enable the UK Parliament to consent in advance to the Scottish Parliament legislating on reserved matters (whereas the Sewel Convention enables the Scottish Parliament to consent in advance to the UK Parliament legislating on devolved matters).<sup>4.84</sup> What it provides is a further opportunity for cooperation, in this case between the two Parliaments.

4.83 There are powers for UK Ministers to make changes to reserved law by Order to tidy it up after Acts of the Scottish Parliament, but the only way in which legislative competence can be given to the Scottish Parliament is by shifting the reserved/devolved boundary.

4.84 The difference from the Sewel Convention is, of course, that it requires a statutory mechanism (an order) to make it work, whereas the Sewel Convention requires only a non-statutory mechanism (a Parliamentary motion). This reflects the asymmetry in the devolution settlement, whereby the UK Parliament is legally entitled to legislate on devolved matters, but the Scottish Parliament is not so entitled to legislate on reserved matters.

- 4.179 The approach taken by the UK and Scottish Governments in relation to the Somerville case sets a helpful precedent.<sup>4.85</sup> Here a section 30 Order was made which transferred to the Scottish Parliament the power to introduce a one-year time limit for appeals against the actions of Scottish Ministers under the European Convention of Human Rights. This section 30 Order (as any other) gave the Scottish Parliament competence by permanently changing the extent of its legislative competence (in this case through amendment to Schedule 4). Uniquely in this case (as far as the Commission can establish) a parallel agreement was reached by the UK and Scottish Government that this power was given to the Scottish Parliament on the understanding that the UK Parliament would then legislate subsequently in this area on a UK-wide basis, repealing the legislation passed by the Scottish Parliament and ensuring a UK wide approach. This approach was taken in this case in the interests of expediency in resolving the problem, and it illustrates what can be achieved through a combination of the existing powers and effective inter-governmental cooperation.
- 4.180 It is therefore clear that, in the absence of a formal mechanism for the temporary or limited transfers of powers, the combination of existing section 30 powers and effective inter-governmental relations allow the same outcome to be achieved.
- 4.181 Formalising such a mechanism would require some amendment to the Scotland Act to give a clear general authority (i.e. a new order-making power) for the new procedure. It would add some complexity to the scheme of the Act, and in the meantime the use of existing powers and effective inter-governmental cooperation provides some initial scope for cooperation in this way.

**RECOMMENDATION 4.15:** A new legislative procedure should be established to allow the Scottish Parliament to seek the consent of the UK Parliament to legislate in reserved areas where there is an interaction with the exercise of devolved powers.

- 4.182 Obviously if the changes to reserved legislation promoted by the Scottish Parliament have financial consequences (whether up or down) then the block grant element of the financing of the Scottish Parliament should be adjusted accordingly.<sup>4.86</sup>

## Representation in the EU

- 4.183 The Commission recognises that there are both problems of perception and substantive points that must be addressed.
- 4.184 In the development of the UK Government position we recommend the following steps are taken to mitigate this perception, and also ensure the continued early involvement of the Scottish Government in the development of UK approaches to the EU:

4.85 At the time of this Final Report going to press, the Draft Scotland Act 1998 (Modification of Schedule 4) Order 2009 was awaiting approval by the Privy Council, as a result of successful working between the UK and Scottish Governments, and consultation with the Scottish Parliament Justice Committee and with this Commission. As its Explanatory Note explains ([www.opsi.gov.uk/si/si2009/draft/ukdsi\\_9780111004562\\_en\\_1](http://www.opsi.gov.uk/si/si2009/draft/ukdsi_9780111004562_en_1)), the Order amends Schedule 4 to the Scotland Act by adding a new paragraph 4A. The new paragraph 4A enables the Scottish Parliament to modify the Scotland Act so as to provide that certain proceedings have to be brought before the end of a limitation period. The proceedings are those brought (other than by specified Law Officers) in any court or tribunal against the Scottish Ministers or a member of the Scottish Executive, by virtue of the Scotland Act, on the ground that an act of the Scottish Ministers or of a member of the Scottish Executive is incompatible with 'the Convention rights' (a term which under the Scotland Act has the same meaning as in the Human Rights Act 1998). The amendment enables the Scottish Parliament to provide that the period within which such proceedings must be brought is the period of one year beginning with the date on which the act complained of took place or such longer period as the court or tribunal considers equitable having regard to all the circumstances. It also enables the Scottish Parliament to legislate so that the provision it makes may have effect subject to any stricter time limit applicable to the procedure in question.

4.86 See paragraph 10.4 in: Funding the Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly: Statement of Funding Policy available from: [http://www.hm-treasury.gov.uk/d/pbr\\_csr07\\_funding591.pdf](http://www.hm-treasury.gov.uk/d/pbr_csr07_funding591.pdf).

**RECOMMENDATION 4.16:** In relation to the development of the UK Government policy position in relation to the EU:

- a. Early and proactive engagement by the relevant UK Government department with its Scottish Government counterpart should be a matter of course.
- b. In addition Scottish Ministers and the relevant Scottish Parliament committee should become more proactive in identifying EU issues of interest to Scotland at an early stage, and taking the initiative accordingly.
- c. The JMC(E) should continue to be used to determine the UK Government position on EU matters.

4.185 Scottish Ministers must currently request to attend as part of the UK delegation in the EU, and must seek permission from the UK Government Minister leading the delegation to speak at the European Council of Ministers.

**RECOMMENDATION 4.17:** To ensure Scottish Ministers are visibly engaged with EU business affecting their interests:

- a. When a request is received there should be a presumption that Scottish Ministers are accepted as part of the UK delegation where EU matters which cover devolved areas are for discussion.
- b. When Scottish Ministers request to speak in support of the agreed UK Government line there should be a presumption that this is granted wherever practicable.

4.186 The Commission very much advocates the earliest possible engagement by the Scottish Parliament with EU matters. In this regard, it endorses the decision of the Parliament's European and External Relations Committee to refocus its scrutiny on early intervention by the Scottish Government.<sup>4.87</sup>

4.187 The Commission also notes that interactions between Members of the European Parliament and their counterparts both in the UK and Scottish Parliaments do not appear to be as developed as in some other member states. For example, the Commission has heard that German MEPs regularly sit as full (but non-voting) members of parliamentary committees in their respective sub-national parliaments, allowing them better to represent the interests of their constituents and giving the parliaments a greater insight into proceedings in Brussels. Struan Stevenson MEP suggested that this had helped Germany achieve a better outcome from Common Agriculture Policy negotiations.<sup>4.88</sup>

4.188 The Commission can see advantages in facilitating greater participation by MEPs in deliberations with a European dimension at the Scottish Parliament, thereby enhancing scrutiny and Scotland's representation at EU level.

**RECOMMENDATION 4.18:** Closer involvement between Scottish MEPs and the Scottish Parliament is needed, and Scottish MEPs should be invited to attend, and should attend, the Scottish Parliament European and External Relations Committee regularly on a non-voting basis. The Committee should schedule its meetings so far as practicable to facilitate their regular attendance.

4.87 'Future scrutiny of EU issues', European and External Relations Committee; [www.scottish.parliament.uk/s3/committees/europe/documents/2008.11.4-EUScrutinyWorkProgramme.doc](http://www.scottish.parliament.uk/s3/committees/europe/documents/2008.11.4-EUScrutinyWorkProgramme.doc).

4.88 Oral evidence from Struan Stevenson MEP, 3 April 2009.

## Scrutiny of inter-governmental relations

- 4.189 There are no formal mechanisms for the scrutiny of inter-governmental relations. Currently, each Parliament can hold its Government to account in relation to its role in the exercise of relations. The Commission has not seen any evidence of note that either Parliament takes any particular interest in the exercise of inter-governmental relations.
- 4.190 Information on the meetings of the JMC and its sub-groups is not routinely published. It would appear on occasion a press notice is issued before and after the meetings though this has tended to be from the perspective of one participant rather than an agreed statement.<sup>4.89</sup> The near complete absence of scrutiny of inter-governmental relations at present is indefensible. Much of the evidence we have heard highlights how formal mechanisms for cooperation fell into disuse. A greater level of scrutiny would perhaps have provided momentum for change earlier, and illustrates the need for any revised mechanisms to have proper Parliamentary oversight, as well as greater public visibility and transparency.
- 4.191 As a principle it is the whole system of inter-governmental relations that should be subject to scrutiny rather than the individual elements. Therefore the Commission believes it would be sensible that the primary scrutiny should be on an annual basis and, we would recommend, tied in with the annual JMC meeting, with an additional outcome of the JMC being an agreed annual report on inter-governmental relations.
- 4.192 We recommend that each Government should lay the annual report before its respective Parliament for scrutiny. We would suggest that the standing joint liaison committee of the UK Parliament and the Scottish Parliament proposed in Recommendation 4.5 consider this report and take evidence from UK and Scottish Government Ministers as it sees fit.
- 4.193 We believe public visibility and transparency are crucial, but this does not mean mechanisms should operate in a completely public way. We would be concerned that too much transparency could have a negative effect on the operation of inter-governmental machinery as it could be used to promote public positions rather than discussion. A balance is therefore needed, and we recommend that, in addition to the parliamentary scrutiny proposed, the JMC process is given greater visibility by way of publicly available timelines, agendas, and summaries of the issues discussed.
- 4.194 In conclusion we therefore make the following recommendations to improve the visibility and transparency of the JMC process.

4.89 See for example the press notice following the 25 June 2008 meeting of the JMC, available at: [www.cabinetoffice.gov.uk/newsroom/news\\_releases/2008/080619\\_joint\\_committee.aspx](http://www.cabinetoffice.gov.uk/newsroom/news_releases/2008/080619_joint_committee.aspx).

**RECOMMENDATION 4.19:** The JMC process should be subject to greater Parliamentary scrutiny, and have greater public transparency:

- a. Agendas and timelines should be published in advance of each JMC, JMC(E), JMC(D) or JMC(F) meeting, and a communiqué from each should be issued.
- b. After each full JMC meeting the First Minister should make a statement to the Scottish Parliament, and the Prime Minister, or UK Government Cabinet Minister with responsibility for Scotland, should make a statement to the UK Parliament.
- c. An annual report of the JMC should be prepared, and laid by each Government before its Parliament, and it should be scrutinised by the new standing joint liaison committee of the UK Parliament and the Scottish Parliament.

## Disputes over funding

- 4.195 The inter-governmental arrangements relating to the public spending system are insufficient at present, and would be inappropriate under our recommendations for changes to the financing of the Scottish Parliament set out in Part 3. The Joint Ministerial Committee on Finance (JMC(F)) that we recommend (Recommendation 4.13) should meet regularly, to a pre-determined timetable, and its agenda should include discussion of macroeconomic and taxation issues as well as spending ones.
- 4.196 JMC(F) should also provide the facility for inter-governmental discussions and oversight of the operation of the proposed financing arrangements. In order to fulfil this function there is a need for transparent and accurate information to be shared, with relevant spending or grant calculations audited by the National Audit Office (NAO). The JMC(F) will be the forum which considers the impact of changes at UK level of taxes assigned to the Scottish Parliament, and consequential changes to the block grant that may result. Similarly, while the Barnett formula is operated this regime should apply to the calculation of formula consequentials by it.<sup>4.90</sup>

## The role of Scottish MPs

- 4.197 We believe the role of an MP for a Scottish constituency is of the utmost importance, particularly in the scrutiny of legislation that extends to Scotland as well as recognising that the UK Parliament effectively determines the size of Scotland's annual block grant. Such legislation is of course not confined to reserved matters, but also involves the significant number of Bills which are subject to LCMs. By way of an example, all of the 11 new Bills announced in the Queen's Speech on 3 December 2008 extend to Scotland in varying degrees.<sup>4.91</sup>
- 4.198 Our earlier recommendations propose measures to ensure that Scottish MPs are included as members of the Public Bill Committees for all Bills that engage the Sewel Convention.

4.90 See Part 3 for an explanation of the operation of the Barnett formula.

4.91 There have been a number of other Bills in this Parliamentary session extending to Scotland that were not included in the Queen's Speech.

- 4.199 Even legislation that does not extend to Scotland can have an indirect effect on Scotland.<sup>4.92</sup> Currently decisions which affect UK Government departments' spending can have a consequential implication for the funding flowing to Scotland via the Barnett formula. In addition all funding to Scotland flows through the estimates and appropriations procedure subject to scrutiny by the UK Parliament, and all taxation matters are currently dealt with by the UK Parliament. If our recommendations in Part 3 are implemented, the Scottish Parliament will have a greater role in financial matters; however, a block grant will remain and the above considerations will therefore remain relevant.
- 4.200 The role of Scottish MPs in providing Parliamentary scrutiny of the devolution settlement itself can also not be understated, as the constitution is a reserved matter. It is Scottish MPs that must act to scrutinise the constitutional settlement to ensure it reflects the needs of their constituents, and to champion such changes as they believe their constituents would wish. Apart from its inquiry into the Sewel Convention, the Scottish Affairs Committee has generally not addressed constitutional issues.

**RECOMMENDATION 4.20:** Scottish MPs should actively demonstrate appropriate oversight and stewardship of the constitution by way of regular scrutiny of the shape and operation of the devolution settlement.

## Civil service

- 4.201 The Commission believes that a unified civil service is a desirable component of a political Union. It is fundamental to the relationship between politicians and permanent officials and ensures that this relationship is consistent across the Union. The Commission also accepts the evidence that has been submitted arguing that the close working relations between civil servants working for different administrations are assisted by being subject to similar cultures and expectations. In particular the Commission notes that the unified civil service ensures that there are common standards of professionalism, and that there is the same relationship between Scottish Ministers and their officials as exists between UK Government Ministers and their officials. The Commission, therefore, is not in favour of devolving the civil service in Scotland.
- 4.202 The Commission has, however, considered the unusual arrangement by which the most senior civil service appointments in Scotland supporting Scottish Ministers are made, or approved by, the Prime Minister. This approval is given by the Prime Minister acting as the Minister for the Civil Service. The Commission does not suggest that the appointment of, for example, the Permanent Secretary of the Scottish Government would be made against the wishes of the First Minister or with any political motivation. The purpose of the approval by the Minister for the Civil Service is to ensure the maintenance of the highest standards of the civil service, and is conducted by a Minister to provide Parliamentary accountability. However, there is a problem of perception, and the Commission sees no reason why the Prime Minister could not delegate this function to the Head of the Home Civil Service, acting on the advice of the UK Civil Service Commissioners, in the cases of senior appointments to the Scottish Government. This would remove the anomaly and any associated problem of perception.

4.92 Scottish MPs have the right to participate fully in all Commons business, affecting all parts of the United Kingdom. A feature of asymmetric devolution is therefore that Scottish MPs are unable to vote on matters affecting Scotland that have been devolved to the Scottish Parliament, but are able to vote on the same matters as they affect other parts of the UK - the "West Lothian Question". (The West Lothian Question affects all of the UK, and is a matter for the UK Parliament, not a matter for the Commission.)

**RECOMMENDATION 4.21:** The responsibility for appointing, or approving appointments of, senior civil servants to senior posts in the Scottish Government should be delegated by the Prime Minister to the Head of the Home Civil Service, acting on the advice of the UK Civil Service Commissioners.

- 4.203 In relation to the civil service we have been concerned at the mixed evidence of the level of awareness amongst officials, and believe a new focus on devolution training is needed. In addition, in supporting our recommendations on enhanced inter-governmental mechanisms, we also propose the Civil Service Codes are amended to include a 'cooperation' clause in relation to effective working between each devolved administration and the UK Government.

**RECOMMENDATION 4.22:** The Commission has heard of a lack of understanding of devolution within some UK Government departments, and this should be addressed by reinvigorated training and awareness raising programmes.

**RECOMMENDATION 4.23:** The Civil Service Codes should be amended to recognise the importance of cooperation and mutual respect.

## Conclusion

- 4.204 The recommendations set out in this Part are intended to address the gaps in the existing mechanisms, to provide a basis for the reinvigoration of the machinery that fell into disuse, or to amend arrangements that have not proved to be fit for purpose.
- 4.205 Whilst mechanisms and arrangements of the kind that we have set out will significantly help to address the problems we have identified, the critical factor will be the willingness of those involved to work together constructively and with mutual respect. The interests of both the people of Scotland and the UK as a whole will be the beneficiaries.

# Part 5: Strengthening the devolution settlement

## Summary

In this Part of the Report we consider a range of specific issues where there may be a case for changing the allocation of legislative or executive responsibility within the devolution settlement.

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## Part 5–A: Context of our consideration

### Introduction

- 5.1 We discussed in Part 2, Understanding Scotland’s place in the United Kingdom, the main aspects of the split of powers and functions between the UK Parliament and the Scottish Parliament. In summary it is the view of the Commission that the powers conferred on the Scottish Parliament and Scottish Ministers through the Scotland Act and subsequent legislation encompass most of the key policy levers that directly affect the lives of the people of Scotland. For example, the Parliament can legislate on matters relating to health and wellbeing, education, justice, local government, housing and the environment.
- 5.2 Equally, certain functions are integral to the effective continuation of the United Kingdom as a sovereign nation-state with international responsibilities. These areas, where devolution would be incompatible with the Union and the benefits it bestows upon the people of the United Kingdom, include the monarchy, the constitution, defence, national security, foreign affairs, currency and the coinage as well as aspects of management of the UK economy.
- 5.3 There will always be a boundary between what is reserved and what is devolved and in Part 4 we make recommendations about how disputes along that boundary might be managed. In this Part the Commission has considered not simply whether the boundary is correct (i.e. should a particular function be dealt with solely by the UK or Scottish Parliament) but whether a more effective way forward might be through managing joint responsibilities better. In the course of its deliberations, the Commission has also become increasingly aware of the difficulties in disentangling some functions which might sensibly be exercised at a UK level from the existing Scottish framework within which they have always operated.

### Reviewing the powers and functions of the Parliament

- 5.4 A Task Group of the Commission, chaired by David Edward, has led work on examining functions and making recommendations to the Commission as a whole. We have considered evidence and submissions from a wide range of individuals and organisations, as well as drawing on earlier work such as the report of the Steel Commission.<sup>5.1</sup>
- 5.5 In the First Report the Commission identified twelve broad themes within which areas of concern or questions as to the effectiveness of arrangements under the current settlement arose. These were:

5.1 <http://www.scotlibdems.org.uk/files/steelcommission.pdf>.

**Constitutional and institutional issues, including:**

- the administration of elections to the Scottish Parliament
- the electoral system for the Scottish Parliament
- the Home Civil Service
- the role of the Lord Advocate

**Culture, charities, sport and gaming, including:**

- charities
- broadcasting
- the National Lottery

**Employment and skills, including:**

- employment policy and industrial relations
- health and safety
- migration (particularly in so far as this concerns the labour market)

**Energy, including:**

- energy policy
- links with the planning process

**Environment and planning, including links with energy and other reserved policy areas**

**Health and biosecurity, including:**

- animal health
- food standards and labelling
- reserved aspects of health policy
- regulation of the health professions

**Justice and home affairs, including:**

- firearms
- misuse of drugs
- aspects of road traffic regulation
- tribunals

**Marine and fisheries, including:**

- marine environment
- the Crown Estate
- fisheries and the European Union

**Revenue and tax raising**

**Science, research and higher education, including:**

- university funding
- the Research Councils

**Social security**

- Council Tax Benefit and Housing Benefit
- welfare to work
- Attendance Allowance and Disability Living Allowance
- Social Fund
- welfare foods

**Trade and commerce, including corporate insolvency.**

- 5.6 In its First Report, the Commission outlined the functions currently exercised by the Scottish Parliament and Scottish Ministers and summarised the evidence that had been submitted by experts, interest groups and members of the public, as well as work carried out as part of other reviews, regarding whether these functions were sufficient, whether more powers should be devolved or whether, in fact, powers would be better exercised at a UK level.
- 5.7 The First Report (and associated consultation document) went on to pose specific questions around the key issues on which substantial or significant evidence had been received and where there appeared to be a plausible case for further consideration as to the most appropriate level at which to exercise a particular function. The Commission also invited further evidence on issues that appeared important but where insufficient evidence had been received to reach an informed conclusion at that stage in our deliberations.
- 5.8 Since publication of the First Report, the Commission's Functions Task Group has considered these issues in depth. It has considered them in the context of the principles outlined in Part 2 of this report as well as taking into account how they work within the context of the relationship between the Scottish Parliament and Government and their UK counterparts. On a number of issues, the Commission has received additional evidence and submissions. In all instances, and in reaching its final recommendations, the Commission has considered how individual functions can best be exercised in the interests of the people of Scotland and of their place in the wider United Kingdom.
- 5.9 Part 1-E set out the details of how functions are conferred on the Scottish Parliament and Scottish Ministers, as well as the details of the existing arrangements. In this Part, we consider the distribution of functions between the Scottish Parliament and the UK Parliament and between Scottish and UK Ministers.
- 5.10 In addition to specific issues, the Commission has also considered areas in which it has been suggested the current devolution settlement gives rise to uncertainties or anomalies or where specific recommendations have been sought. These include matters such as definitions of certain reserved areas in the Scotland Act, the power of the Scottish Parliament to summon judges to give evidence and the way in which decisions of the Scottish Ministers are reviewed for compliance with the Human Rights Act.
- 5.11 The following sections set out our consideration of the specific powers and functions and the recommendations we make. The sections are ordered by way of the themes set out at paragraph 5.5.

## Part 5–B: Constitution and institutions

### Introduction

- 5.12 Within this theme the Commission has considered the electoral system of the Scottish Parliament and its administration, the home civil service, and in response to a submission from the judges of the Court of Session, the operation of section 57(2) of, and Schedule 6 to, the Scotland Act (relating to the resolution of devolution issues and the role of the Lord Advocate). How the Scottish Parliament itself works is considered in Part 6.
- 5.13 Although the Commission believes that the constitution of the United Kingdom as a whole must remain a reserved matter (as discussed in Part 2), there are aspects of the constitutional arrangements in Scotland (as laid out in the Scotland Act) and the institutions that support it that merit re-examination after ten years of devolution.

### The Scottish Parliament electoral system

- 5.14 The electoral system for the Scottish Parliament is reserved. The electoral system established in the Scotland Act is briefly described in Part 1-B of this report (see paragraphs 1.124 to 1.126) and in greater detail in Part 6.
- 5.15 In the context of the Parliament's powers and functions, the Commission has to address two questions. The first is whether the legislative responsibility for the Scottish Parliament's electoral system should be devolved to the Scottish Parliament itself. In this context, "electoral system" is most usefully understood as the package made up of the following inter-connected elements, the size of the Parliament (129 members), its unicameral (single-chamber) nature, the method by which its members are elected, and the fixed cycle of ordinary general elections every four years. The second question is whether the administration of elections should be devolved.

### The electoral system itself

- 5.16 The Commission recognises the argument that any self-respecting Parliament should be able to determine the method by which its members are elected, and that most national parliaments would take this power for granted. On the other hand, it can be argued that it is the essence of devolution that the powers of the sub-national parliament are exercised within a framework provided by the national legislature, and that the electoral system is an integral part of that framework. It might further be argued that it is only of necessity that national parliaments usually have power over their electoral systems (because there is no appropriate superior authority to decide<sup>5.2</sup>), and that it is in principle better to separate those who have a direct interest in the outcome of elections from those with responsibility for designing the electoral system.

5.2 In some cases, the electoral system is set out in a written constitution, which has higher authority than the legislation of the national parliament. This provides additional safeguards against it being too easily altered by parliamentarians, especially where constitutional changes require to be supported in a referendum.

- 5.17 It is clear that this question raises issues of constitutional importance. Moreover, the Commission does not feel that it has been able to take sufficiently detailed evidence in this complex area. On the evidence before it, the Commission is not persuaded that legislative responsibility for the electoral system should be devolved.
- 5.18 The Commission has nevertheless considered whether to make recommendations to the UK Government and UK Parliament about how the electoral system of the Scottish Parliament might be changed. We set out in Part 6 a summary of the representations and evidence we have received.
- 5.19 The Commission considers that the Arbuthnott Commission was better equipped to consider the options available, and notes in particular the recommendation of that Commission that there should be a further review of the electoral system after the 2011 Scottish Parliament election. We endorse that recommendation.

## The administration of elections to the Scottish Parliament

- 5.20 Schedule 5 to the Scotland Act reserves to the UK Parliament “elections for membership of the House of Commons, the European Parliament and the Scottish Parliament”. Scottish Ministers are responsible for local government elections and for elections to such bodies as National Park Boards.
- 5.21 The Commission did not receive any evidence to suggest that the administrative arrangements for general and European elections should be changed. Indeed, the Commission believes that, given the nature and purpose of these elections, administration of these elections is best decided at a UK level.
- 5.22 On the other hand, on the strength of initial evidence and representations, it appeared to the Commission that the way in which elections to the Scottish Parliament are conducted, which is currently reserved and administered by the UK Scotland Office, could be a strong candidate for devolution.
- 5.23 In considering this issue the Commission acknowledges the recent reports by Ron Gould<sup>5.3</sup> and Arbuthnott Commission<sup>5.4</sup> which have dealt with this area in some detail. The majority of those giving evidence to the Commission argued that electoral administration should be the responsibility of the Scottish Government. These included UNISON Scotland, the Church of Scotland and Scottish Episcopal Church, and the Royal Society of Edinburgh. A contrary view was put forward by Jack McConnell MSP who argued that the conduct of elections in Scotland could and did have an impact on the conduct of elections across the UK and therefore should be subject to the same supervisory regime.<sup>5.5</sup> The UK Government also argued that there was no need to change current arrangements but did not make a positive case for why this reservation should be retained.<sup>5.6</sup>

5.3 *Make My Vote Count* – available at [http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/23\\_10\\_07\\_votereport.pdf](http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/23_10_07_votereport.pdf).

5.4 *Putting Citizens First: Boundaries, Voting and Representation in Scotland*, available at: <http://www.scotlandoffice.gov.uk/scotlandoffice/files/Final%20version%20of%20report.pdf>.

5.5 Oral evidence, 1 October 2008, <http://www.commissiononscottishdevolution.org.uk/uploads/transcript-1-October.pdf>.

5.6 <http://www.commissiononscottishdevolution.org.uk/uploads/2008-11-10-hmg.pdf>.

- 5.24 Given that responsibility for local elections is devolved, the case for reserving administration of elections to the Scottish Parliament is not immediately apparent. Divergence in approach is, perhaps, more likely if the administration of elections were to be devolved but the Commission has already accepted that some divergence is an inevitable consequence of devolution and is not, indeed, an argument for reservation or, in itself, undesirable. Whilst it is important that citizens understand the process involved in voting, the Commission has not heard a compelling argument that processes have therefore to be uniform throughout the UK and notes that in fact they are not, even within current arrangements. The Commission believes that it is for responsible authorities at whatever level to engage fully with citizens to ensure processes are as simple and comprehensible as possible.
- 5.25 The Secretary of State for Scotland has order-making powers which include powers over the rules for running (and combining) elections, candidate expenses and the use of public buildings. All these powers could be exercised by Scottish Ministers equally effectively.
- 5.26 The UK Parliament provides a sum of money annually to provide a budget for the Scottish Government and fund the operation of the Scottish Parliament. This is paid to the Secretary of State for Scotland, who, in return makes grants to the Scottish Government as set out in the Scotland Act 1998. Provision for the Scotland Office, the Office of Solicitor to the Advocate General and funding for elections to the Scottish Parliament are also found from within these resources. If the administration of elections to the Scottish Parliament was to be devolved then the latter would be added to the grant paid to the Scottish Government
- 5.27 The Commission believes that devolving those elements of responsibility for the administration of elections currently vested in the Secretary of State for Scotland is consistent with its principle that matters should be decided at the level closest to those affected unless there are good reasons for determining them at a UK level. The Commission is unconvinced that there are strong constitutional or practical arguments against doing so, and therefore recommends that the administration of elections and the related order-making powers currently residing with the Secretary of State for Scotland should be devolved. This demonstrates both the maturity of the Parliament and devolution settlement and accords with the principle that matters that effect Scotland should be decided in Scotland so far as it benefits the people of Scotland, and is possible and practicable.

**RECOMMENDATION 5.1:** The powers of the Secretary of State for Scotland relating to the administration of elections to the Scottish Parliament should be devolved.

## The Home Civil Service

- 5.28 As discussed in Part 4, the Commission believes that a unified civil service is a desirable component of a political Union, that it is fundamental to the relationship between politicians and permanent officials and ensures that this relationship is consistent across the Union. The Commission, therefore, is not in favour of devolving the civil service in Scotland. The Commission does, however, believe that the anomaly whereby the most senior staff serving the Scottish Ministers are appointed by, or with, the approval of the Prime Minister, should be addressed – see Recommendation 4.21.

## Section 57(2) of and Schedule 6 to the Scotland Act and the role of the Lord Advocate

- 5.29 The Scottish Judiciary has raised an issue about section 57(2) of the Scotland Act as it applies to acts of the Lord Advocate in her capacity as head of the system of prosecution in Scotland. Further issues have been raised as to the role of the Lord Advocate and, in particular, the combination of functions as head of the prosecution system, as legal adviser to the Scottish Government and as a member of the Scottish Executive.
- 5.30 A separate, though related, issue has been raised with us about the effect of the *Somerville* case<sup>5.7</sup> in the House of Lords. *Somerville* established that human rights challenges to the acts of Scottish Ministers, including the Lord Advocate, can be brought at any time.

## Section 57(2) and the *Somerville* case

- 5.31 Section 57(2) of the Scotland Act provides that “a member of the Scottish Executive has no power to ... do any ... act, so far as the ... act is incompatible with any of the [European Convention on Human Rights] Convention rights.” Under section 44, the Lord Advocate is ex officio a member of the Scottish Executive. With only limited exceptions which are not relevant here, acts of the Lord Advocate in prosecuting an offence fall within the prohibition in section 57(2).
- 5.32 Under section 98 and Schedule 6, if an act of the Lord Advocate is alleged to be incompatible with an ECHR Convention right, that is a “devolution issue” that can be brought before the Judicial Committee of the Privy Council (JCPC) or, after October 2009, the Supreme Court of the United Kingdom. The Act prescribes no time limit within which such proceedings must be brought.
- 5.33 There is no right of appeal from the Scottish courts in criminal matters to the House of Lords or the JCPC. However, the effect of the Scotland Act is to create an indirect right of appeal to the JCPC where it can be shown that an aspect of criminal procedure can be characterised as an “act” of the Lord Advocate or subordinate prosecuting authorities, or of Scottish Ministers, that it is incompatible with Convention rights and is therefore a “devolution issue”. Leave is required to bring such an appeal: either the Scottish appeal court gives leave to appeal to the JCPC or the JCPC, on application, gives special leave. In either case the JCPC jurisdiction extends only to determination of the devolution issue, and not to any other aspect of the criminal proceedings.
- 5.34 Section 129(2) of the Scotland Act provides that, “if [section 57] comes into force before the Human Rights Act 1998 has come into force (or come fully into force), [it] shall have effect until the time when that Act is fully in force as it will have effect after that time”. This provision suggests (and there are other indications to the same effect) that it was envisaged that, once the Human Rights Act (HRA) came into force, claims based on breaches of Convention rights would be brought under the HRA, rather than as devolution issues under section 57(2) of the Scotland Act.

5.7 *Somerville v Scottish Ministers*, 2008 SC (JL) 45

- 5.35 It is possible also that, in passing the Scotland Act, Parliament did not foresee either (i) that section 57(2) could become the vehicle for a wide range of ECHR-based challenges to criminal prosecutions, or criminal convictions, in Scotland, or (ii) that, as the House of Lords decided in *Somerville*, such challenges would be possible at any time. Challenges under the Human Rights Act must normally be brought within one year of the act complained of.<sup>5.8</sup>
- 5.36 Because the issue needed to be resolved quickly, the Secretary of State for Scotland asked the Commission for an urgent view on the issues raised by *Somerville*. We were happy to give that, and advised that it was our view that the same time limit should apply whether an issue was raised via the Scotland Act route or under the Human Rights Act.<sup>5.9</sup> An order under section 30(2) of the Scotland Act has been made to allow the Scottish Parliament to legislate to remove the anomaly and provide for a consistent approach to challenges under the ECHR.<sup>5.10</sup> The submission from the Judiciary in the Court of Session raised more complex issues.<sup>5.11</sup> The crucial point raised by the Scottish judiciary is that the boundary between the jurisdiction of the JCPC (soon to be that of the Supreme Court) in relation to criminal proceedings in Scotland and the jurisdiction of the Scottish courts gives rise to uncertainty and the drawing of artificial distinctions between the acts of the prosecution and other aspects of criminal procedure.
- 5.37 This issue comes within the scope of the Commission's remit, since it concerns the working of the Scotland Act. The Commission acknowledges the importance of this issue, and considers (as with the problem of time-limits raised by the *Somerville* case) that it is an issue that deserves urgent reconsideration. It has, however, come to the conclusion that it raises wider questions that do not come within its remit. The underlying question is whether, and if so to what extent, Scottish criminal law and procedure should in future be subject to review by the Supreme Court of the United Kingdom. So far as the role of the Lord Advocate is concerned, the Commission considers that the issue of who should be the prosecutor in Scotland does not come within its remit. The Commission therefore feels that it would be inappropriate to make any recommendation limited to the terms of section 57(2) of the Scotland Act.

5.8 Human Rights Act 1998, section 7(5).

5.9 See letter to the Secretary of State for Scotland from Sir Kenneth Calman on behalf of the Commission dated 18 March 2009, available from <http://www.commissiononscottishdevolution.org.uk/uploads/2009-03-19-chairman-to-sos-scotland---somerville-180309.pdf>.

5.10 Scotland Act 1998 (Modification of Schedule 4) Order 2009.

5.11 Written submission from the Judiciary in the Court of Session, available from <http://www.commissiononscottishdevolution.org.uk/uploads/2008-10-20-judiciary-in-the-court-of-session.pdf>.

## Part 5–C: Culture, charities, sport and gaming

- 5.38 Within this theme the Commission has considered issues of broadcasting, lotteries and charities.
- 5.39 In its First Report, the Commission invited specific views on whether the current arrangements concerning broadcasting were sustainable and whether the responsibilities of Scottish Ministers in respect of broadcasting might change. The Commission also noted that charities were subject to separate regulatory regimes in Scotland and England and questioned whether an accommodation could be reached to reduce the administrative burden on charities and ensure a greater degree of consistency between regimes operating in Scotland and elsewhere. The Commission also invited views on the operation of the National Lottery.

### Charities

- 5.40 It should be noted that the discussion that follows concentrates on charities in Scotland on the one hand and England and Wales on the other. There is a separate regime in Northern Ireland which adds a further dimension to the problems we discuss.

### Historical background

- 5.41 Until the passing of the Charities and Trustee Investment (Scotland) Act 2005 (for brevity, “the Scottish Act”), there was no statutory system of regulation of charities in Scotland. The interpretation of deeds of gift or benefaction, and decisions as to the administration and disposal of charitable funds and assets were a matter for the Scottish courts, giving rise to a substantial body of case law. The Lord Advocate could bring proceedings before the courts where mismanagement, misfeasance or fraud was suspected. The Scottish Act created a new system of regulation of charities in Scotland and a new regulator – the Office of the Scottish Charity Regulator (OSCR).
- 5.42 In England and Wales, the Court of Chancery (later the Chancery Division of the High Court) exercised a wide jurisdiction over charities. The Charity Commission was first established in 1853 and exercises a regulatory jurisdiction over some, but not all, charities in England and Wales. There are several statutes in force relating to charities, of which the most recent is the Charities Act 2006 (for brevity, “the English Act”).
- 5.43 Until the passing of the Scottish and English Acts, there was no statutory definition of the expressions “charity” and “charitable purpose(s)” in Scotland or in England and Wales. The Scottish courts gave the expressions a narrow interpretation as referring only to the relief of poverty<sup>5.12</sup>. The Chancery courts adopted a broader approach on the basis of the “Statute of Elizabeth”<sup>5.13</sup>. This was summarised by Lord Macnaghten in *Pemsel’s Case* (see further below) as follows:

“Charity” in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads”<sup>5.14</sup>.

5.12 *Baird’s Trustees v. Lord Advocate*, (1888) 15 Rettie, page 682.

5.13 *Statute of Charitable Uses*, (1601) 43 Eliz. cap.4.

5.14 *The Commissioners for Special Purposes of the Income Tax v Pemsel*, [1891] Appeal Cases, page 531.

- 5.44 The differences in approach between the Scottish and English courts became important for the interpretation of taxing statutes. Beginning with the Income Tax Act of 1842, exemption from various UK taxes was granted to trusts established “for charitable purposes”. In 1888, the Court of Session held that a trust for the promotion of religion and the mitigation of spiritual destitution among the poor and working population of Scotland was not entitled to tax relief because it was not a trust for the relief of poverty.<sup>5.15</sup>
- 5.45 In *Pemsel’s Case*, the English courts had to decide whether a trust to maintain missionary establishments of the Moravian Church “among heathen nations” was entitled to tax relief. The case went to the House of Lords in 1891 (three years after the Scottish decision). The judges unanimously agreed that the taxing statute must receive the same interpretation throughout the United Kingdom. The issue was whether Parliament, in enacting taxing statutes from 1842 onwards, intended that the expression “for charitable purposes” should be interpreted in the narrow sense preferred by the Court of Session or in the wider sense developed by the Court of Chancery. The House of Lords, by a majority (including the Scottish Law Lord, Lord Watson), decided in favour of the latter solution.
- 5.46 Lord Macnaghten’s formulation of what constitutes a “charity” thus became (and remains) the accepted statement of the law of the United Kingdom as to what constitutes a charity for tax purposes.
- 5.47 The Scottish and English Acts of 2005 and 2006 contain, for the first time, new definitions of the expressions “charity” and “charitable purposes”. Unfortunately, these correspond neither with each other nor with Lord Macnaghten’s formulation in *Pemsel’s Case*. The Scottish Act, being an Act of the Scottish Parliament, could not, of course, alter the law of the United Kingdom and the English Act, although an Act of the UK Parliament, did not do so. HMRC (Her Majesty’s Revenue and Customs) therefore continues to apply the law as stated in *Pemsel’s Case* and the Commission has no reason to think that it is in error in doing so.
- 5.48 Consequently, there are now three definitions of the expressions “charity” and “charitable purpose(s)”, two for regulatory purposes in Scotland and in England and Wales respectively, and one for tax purposes applicable throughout the United Kingdom.
- 5.49 The Commission has received a number of representations about the uncertainties and practical difficulties created by this state of affairs. It could lead to a situation in which a body could be registered as a charity in one jurisdiction although it could not be so registered in the other, while its tax status would be determined by yet another body according to different criteria. Difficulties that have arisen in securing tax exemption for Scottish charities appear to have been sorted out by negotiation with HMRC, but it cannot be guaranteed that this will always be so.

## The regulatory regimes established by the Scottish and English Acts

- 5.50 The regulatory regimes established by the Scottish Act of 2005 and the English statutes are different in material respects, quite apart from those that arise from differences between Scots and English law. (Scots law does not make the distinction between law and equity which underlies much of English charity law.) There are two principal differences.
- 5.51 First, as already noted, the definitions of what constitutes a charity are different. Thus, for example, the English Act speaks of “the advancement of amateur sport”, whereas the Scottish Act speaks of “the advancement of public participation in sport” and also includes “the provision of recreational activities” which the English Act does not.

5.15 *Baird’s Trustees v. Lord Advocate*, above.

Conversely, the English Act includes “the promotion of the efficiency of the armed forces of the Crown, or of the efficiency of the police, fire and rescue services or ambulance services” which the Scottish Act does not. There are also some additional hurdles in Scotland that do not exist in England and Wales:

- the constitution of a charity must not allow Ministerial control of its activities (although, in practice, Scottish Ministers can exempt named charities from this requirement);
- the constitution of a charity may not allow it to distribute or otherwise apply any of its property to a purpose that is not a charitable purpose (this can have particular implications for charities in existence prior to 2005 whose constitution refer to the use of property for purposes that are charitable in the context of tax law. OSCR has recommended to Scottish Ministers that the 2005 Act be amended to include a provision deeming all references to “charity” and “charitable” in pre-2005 constitutions to be interpreted to include the 2005 Act).

- 5.52 Second, OSCR acts as registrar and regulator of all charities operating in Scotland, including non-Scottish charities unless they do not occupy any land or premises in Scotland and do not carry out activities in any office, shop or similar premises in Scotland. There is no comparable all-embracing requirement in the English Act. The effect appears to be that a charity registered in England that wishes to operate in Scotland from an office or shop in Scotland must comply with all of OSCR’s reporting and accounting requirements, while the same does not apply to Scottish charities wishing to operate in England. A substantial number of “cross-border” or “UK” charities are subject to dual regulation because their main base is in England (usually London).
- 5.53 The issue of dual regulation of UK charities has been raised with the Commission by a number of organisations. In particular, it has been suggested that the requirement of dual regulation may deter or constrain the activities of such charities in Scotland. The Commission notes, in this connection, that Scottish universities and research institutes derive substantial funding from such charities.
- 5.54 Both the Charity Commission and OSCR recognise that, where a charity is already reporting on the full range of its activities to the Charity Commission, it is undesirable to subject it to an additional (and similar) burden in Scotland. OSCR has recently closed its consultation on proposals for a modified reporting and monitoring regime. The proposals are intended to ensure that charities meet OSCR requirements whilst aiming to place considerable reliance on the Charity Commission as lead regulator, and not duplicate additional monitoring information which is made available to the Charity Commission.
- 5.55 The Commission notes and welcomes this approach, but notes also that OSCR has no power to dispense altogether with compliance with the requirements of the Scottish Act. So, while the burden of dual regulation may be mitigated by co-operation between OSCR and the Charity Commission, it cannot be removed entirely without primary legislation.
- 5.56 There is a further important consideration to be borne in mind. While much of the discussion of charity law centres on the question of tax exemption, charities may be a vehicle for misrepresentation and fraud, and charitable funds may be dissipated through deliberate misfeasance or negligent mismanagement. Effective regulation of charities is vital to maintain public trust. This was one of the motives behind the passing of the Scottish Act and the establishment of OSCR.

- 5.57 Effective regulation of thousands of small charities operating in Scotland almost certainly requires the attention of a separate Scottish regulator. So, while it might have been possible to include charities amongst the matters reserved to the UK Parliament by Schedule 5 to the Scotland Act, there were good reasons for not doing so. Moreover, it would not have been feasible simply to apply the English Charities Acts to Scotland and place Scottish charities under the regulatory jurisdiction of the Charity Commission. New legislation would, in any case, have been necessary for Scotland. The problems that have now been identified illustrate the potential for unforeseen consequences that aspects of the devolution settlement, perfectly reasonable in themselves, may produce.
- 5.58 Finally, it should be remembered that, although there is no evidence that the risk has materialised as yet, uncertainty of definition and regulation is liable to create loopholes of which the fraudster can take advantage.

### The Commission's conclusions

- 5.59 The Commission has come to two firm conclusions. First, as the House of Lords said in 1891, UK taxing statutes must receive the same interpretation throughout the UK. It would not be tolerable that, where two bodies undertake exactly the same activities, one in England and the other in Scotland, one of them should benefit from tax exemption while the other does not.
- 5.60 Moreover, it is highly undesirable that there should be three separate definitions of the expressions "charity" and "charitable purposes".
- 5.61 The Commission considers that the only acceptable solution is that there should be a single definition for all purposes, applicable throughout the United Kingdom.<sup>5.16</sup> This would have to be enacted by the UK Parliament. In so far as it had the effect of altering the definition in the Scottish Act, a legislative consent motion (under the Sewel Convention) would be necessary.
- 5.62 Second, concurrent regulation of UK charities by two regulators is unnecessary and potentially damaging both to the charities and their intended beneficiaries. Such charities should be subject to the reporting and accounting requirements of one regulator only. Appropriate mechanisms for co-operation between regulators are likely to be more effective in detecting and sanctioning misfeasance and fraud than concurrent regulation by both of them and such mechanisms should be put in place to ensure effective regulation of charities in all parts of the UK.

**RECOMMENDATION 5.2:** There should be a single definition of each of the expressions "charity" and "charitable purpose(s)", applicable for all purposes throughout the United Kingdom. This should be enacted by the UK Parliament with the consent of the Scottish Parliament.

**RECOMMENDATION 5.3:** A charity duly registered in one part of the United Kingdom should be able to conduct its charitable activities in another part of the UK without being required to register separately in the latter part and without being subject to the reporting and accounting requirements of the regulator in that part.

5.16 In reaching this conclusion Commission acknowledges that it has not considered the position of charities operating in Northern Ireland.

## Broadcasting

- 5.63 The subject matter of the Broadcasting Act 1990 and the Broadcasting Act 1996, and the BBC, are reserved. In its First Report, the Commission noted that the Scottish Government has called for broadcasting to be devolved and acknowledged the contribution to the debate made by the Scottish Government's own Scottish Broadcasting Commission.<sup>5.17</sup> The Commission observed that the Scottish Broadcasting Commission's conclusions – that there should be a greater focus on Scotland and a greater role for the Scottish Parliament and Ministers as regards broadcasting, within a UK framework – were broadly consistent with the evidence received in the first phase of its work.
- 5.64 The Commission has received evidence from broadcasters, the broadcasting regulator and other providers of broadcasting services, including the BBC<sup>5.18</sup> and OFCOM.<sup>5.19</sup> In its first phase, especially, the Commission heard concerns about the continued viability of locally orientated content (particularly around news and current affairs). The Commission concluded that this represents a problem for the whole UK, rather than simply for Scotland, and is not something that could be satisfactorily addressed within its remit.
- 5.65 The focus of the Commission's attentions in the second phase of its work has been to satisfy ourselves that the current framework and arrangements for broadcasting are sustainable in the long term and in the interests of the people of Scotland.
- 5.66 As would be expected, the Scottish Broadcasting Commission was able to devote more time to, and consult more specifically on, the subject of broadcasting in Scotland. The Commission has not heard evidence arguing that the Scottish Broadcasting Commission's recommendations on accountability are inappropriate. Indeed, the consensus appears to be that, if implemented, the recommendations will secure a role for the Scottish Parliament and Ministers in broadcasting, providing a better outcome for Scottish audiences whilst preserving the advantages that accrue from being part of an overarching UK framework for broadcasting. The Commission acknowledges that the Scottish Broadcasting Commission was better placed to consider these issues and was able to consult with the industry more widely, but has no views on its other recommendations about the broadcasting sector.
- 5.67 The Commission has therefore focused its attentions on whether recommendations on accountability are likely to be followed. The evidence the Commission has taken from key players such as the BBC and OFCOM indicate a willingness and an enthusiasm from national broadcasters for both greater involvement and consultation with representatives of the Scottish people in order both to understand their preferences and to reflect them better.

5.17 The Scottish Broadcasting Commission, established by the First Minister in August 2007, was asked to conduct an independent investigation into television production and broadcasting in Scotland, and to define a strategic way forward for the industry. Its final report can be found at <http://www.scottishbroadcastingcommission.gov.uk/about/Final-Report>.

5.18 Oral evidence, 3 April 2009 <http://www.commissiononscottishdevolution.org.uk/uploads/transcript-3-April.pdf> and written submission <http://www.commissiononscottishdevolution.org.uk/uploads/2009-02-25-bbc-trust.pdf>.

5.19 Oral evidence, 5 November 2008 <http://www.commissiononscottishdevolution.org.uk/uploads/transcript-5-November.pdf> and written submissions <http://www.commissiononscottishdevolution.org.uk/uploads/2008-09-12-ofcom.pdf>, <http://www.commissiononscottishdevolution.org.uk/uploads/2009-04-21-ofcom-advisory-committee-for-scotland.pdf> and <http://www.commissiononscottishdevolution.org.uk/uploads/2009-04-21-office-of-communications.pdf>.

- 5.68 OFCOM is now generally recognised to have established effective links with the Scottish Government and Parliament and in evidence states that it has embraced and adapted to the current devolution settlement. The Commission welcomes, and is impressed by, OFCOM's ongoing commitment to engagement with the Scottish Parliament and Government and hopes that the latter will take advantage of the proposals OFCOM makes to increase scrutiny of broadcasting in Scotland by Scottish institutions.
- 5.69 Representatives of the BBC have explained to the Commission how the Corporation has restructured in the wake of Anthony King's first accountability report to ensure that all BBC journalists appreciate the nature of the devolution settlement and reflect this in their reporting. The Director-General of the BBC has undertaken to appear before Scottish Parliamentary committees if invited to do so and the Corporation lays its annual report (and a separate Scottish annual report) before the Scottish Parliament. The Corporation argues that its reporting lines are laid out in its Charter which is determined by the UK Parliament and that, if the Charter were to be altered to place different reporting requirements upon it, it would gladly respond to them.
- 5.70 While welcoming the measures that have been taken, the Commission considers that they should be supplemented by transferring to Scottish Ministers the UK Secretary of State for Culture, Media and Sport's current responsibility for the appointment of the Scottish member of the BBC Trust, subject to the normal public appointments process. This is consistent with the recommendation of the Scottish Broadcasting Commission. The Commission notes the work of the Scottish Broadcasting Commission and does not feel it necessary to comment further on broadcasting in Scotland.

**RECOMMENDATION 5.4:** The responsibility for the appointment of the Scottish member of the BBC Trust should be exercised by Scottish Ministers, subject to the normal public appointments process.

## The National Lottery

- 5.71 The Scotland Act reserves “betting, gaming and lotteries” and, in its First Report, the Commission, whilst arguing that current arrangements for the administration of lotteries and the allocation of lottery revenues appeared sensible, acknowledged that there was a question mark over whether, and why, the reservation of lotteries should continue.
- 5.72 The majority of the evidence that the Commission has received is broadly supportive of current arrangements, although some have argued for retaining the regulation of the Lottery at a national level whilst devolving more power over distribution. The UK Government has told the Commission that current arrangements allow for efficiency both in terms of operating the Lottery and in terms of distributing unspent funds.
- 5.73 The principle underpinning the National Lottery, when it was established in 1993 by the National Lottery etc. Act, was that it is a UK-wide endeavour with tickets sold to (and therefore the chances of winning based on) the maximum possible customer-base. The Commission believes that this principle remains relevant today.
- 5.74 The six Lottery distributors operating in Scotland are either wholly Scottish agencies or have a distinct Scottish presence, with responsibility for policy and distribution of funds in Scotland being devolved in each case. Even where, as with the Big Lottery Fund, the distributor is a UK-wide organisation, Scottish Ministers have responsibility for high level policy direction in Scotland and are consulted on key Scottish appointments.
- 5.75 Whilst, in practical terms, there may not be a compelling reason why responsibility for the National Lottery (and lotteries more generally) could not be devolved, the Commission has found that the arguments in favour of devolution are outweighed by the compelling benefits of Scotland’s participation in a UK-wide lottery in terms of scale and the opportunities that this offers. The Commission believes that Scottish needs are properly reflected under current structures and, because they are part of a UK-wide lottery, these structures have access to much greater funds than is likely to be the case in a Scotland-only lottery. Decisions on applications for funding to the Heritage Lottery Fund in Scotland, for example, are largely delegated to a Scottish committee made up of local people recruited through open advertisement. Scotland receives a population-based share of awards under £1 million whilst competing for awards of over £1 million. This has resulted in Scotland receiving a disproportionate amount of funding from the Heritage Lottery Fund (in per capita terms, £97 compared to £72 across the UK as a whole).
- 5.76 The Commission has therefore concluded that the lack of forceful evidence in favour of devolution, and the potential disadvantages, militate against any change to the current reservation.

## Part 5–D: Employment and skills

### Employment policy and industrial relations

- 5.77 The Commission has argued that Scotland derives considerable benefits from being part of a wider economic and social Union. The viability of this economic union is dependent on the free flow of capital, goods and labour throughout the UK and the Commission therefore does not propose to recommend changes to the current reservation of employment and industrial relations. The Commission has, however, considered in greater detail the issues of health and safety and migration policy in so far as this concerns the labour market. The Commission’s conclusions on the related issue of welfare to work programmes can be found under the theme of “Social Security”.

### Health and safety

- 5.78 The subject matter of Parts I and II of the Health and Safety at Work etc. Act 1974 is reserved. The Health and Safety Executive (HSE) is responsible for protecting the health and safety of people at work across Great Britain.
- 5.79 The Health and Safety Executive (HSE) is a non-departmental public body sponsored by the UK Department of Work and Pensions (DWP). The HSE is the regulatory authority inspecting and enforcing compliance with the law in Scotland. Unlike England and Wales, it is the Crown and not the HSE which is the prosecuting authority in Scotland. Accordingly, breaches of the law which may constitute a criminal offence are referred to the Procurator Fiscal. The HSE has around 270 staff in Scotland, based in offices in Edinburgh, Glasgow, Aberdeen and Inverness. The HSE maintains some specialist units within Scotland (for example the Executive’s Offshore Division is based in Aberdeen). Other units, such as the Nuclear Safety Directorate, are based outside Scotland but cover Scottish installations.
- 5.80 Although the HSE’s parent department is the UK Department for Work and Pensions, it is the HSE in Scotland (rather than DWP) which liaises with the Scottish Government and local authorities on a day to day basis. In 2005 Scottish and UK ministers agreed to the creation of a body to co-ordinate the work of the HSE with Scottish stakeholders – the Partnership on Health and Safety in Scotland (PHASS). Its remit is to advise on delivering the HSE’s strategy in the context of Scotland’s economy, industrial make-up and culture and to manage effectively the overlapping interests of reserved and devolved interests. Its membership includes the HSE, the Scottish Government’s Health and Well-being Division, CBI Scotland and local authorities.
- 5.81 Northern Ireland has its own Health and Safety Executive which works closely with, and draws heavily on the expertise of, the GB HSE.
- 5.82 A number of submissions to the Commission called for a greater Scottish dimension to the implementation of health and safety law. These ranged from calls for full devolution to greater flexibility in the direction of enforcement and prioritisation. Other submissions made a strong case for retaining the current reservation. The Commission has noted all these views and observes that much of this currently reserved area is already dealt with on a day to day basis by devolved supervisory agencies (in particular local authorities) and enforced through the Scottish legal system. The Health and Safety Executive itself,

in oral evidence to the Commission, argued that devolving health and safety would be a retrograde step which could lead to a lack of consistency of approach within Great Britain as well as unnecessary duplication of function and waste of resources.

- 5.83 The Health and Safety Executive appears to have worked to reflect Scottish needs and concerns in its work in Scotland, including by seconding staff to the Scottish Government and working with it on a number of high-profile initiatives including the creation of a free Safe and Healthy Working Advisory Service. The creation and development of PHASS, as well as the co-location of HSE officials and those from the Crown Office in order to better facilitate decisions on prosecutions, appear to the Commission to be good examples of an agency exercising reserved powers taking into account the views of, and working with, those involved in the process.
- 5.84 Inspectors in Scotland already follow the HSE's published guidance on when and how to enforce, thus providing a degree of consistency of approach across Great Britain. However, decisions on whether to institute criminal proceedings are taken by the Crown Office and Procurator Fiscal Service (COPFS) in Scotland (rather than by inspectors themselves) thus providing an additional 'Scottish' element to health and safety enforcement. The Commission accepts that the HSE is continuing to work with COPFS to build expertise and ensure the system works as effectively as possible.
- 5.85 The existence of a separate Executive for Northern Ireland demonstrates that health and safety can be devolved. However, the Commission notes that the risk profile in the Province (which does not, for example, have nuclear power stations or comparably hazardous offshore activities) is very different to that on the mainland and that, in any case, the HSE of Northern Ireland still depends very much on the expertise and support of GB HSE (which benefits from the consolidation of expertise and experience in a single agency for England, Scotland and Wales).
- 5.86 The Commission recognises that there is no reason in principle why health and safety (or elements of enforcement) could not be devolved. Nevertheless, the Commission questions whether this would appreciably improve matters for the people of Scotland. At present expertise in a particular field can be concentrated geographically, often where it makes most sense to be (i.e. offshore in Aberdeen), but is available across Great Britain. The creation of a separate Scottish HSE could lead to duplication of effort (in both primary and support functions) as well as a deterioration in expertise on both sides of the Border.
- 5.87 Having said that, the Commission does believe that the HSE in Scotland could go further in establishing a more effective relationship with the Scottish Parliament and Ministers, given their responsibility for the Scottish criminal justice system and public health and well-being. This should include offering evidence to committees and laying reports before the Parliament as a matter of routine, rather than on request. Whilst the Commission would not wish to see duplication of established lines of accountability, strengthening the relationship between the HSE in Scotland and the Parliament would enable the latter to discharge its devolved functions more effectively. It would also complement, and give a Scottish dimension to, the scrutiny of health and safety issues by the UK Parliament.

**RECOMMENDATION 5.5:** In recognition of the close interaction of the HSE's reserved functions with areas of devolved policy, a closer relationship between the HSE in Scotland and the Scottish Parliament should be developed.

## Migration policy

- 5.88 In its First Report the Commission addressed concerns that had been expressed regarding the demographic challenge Scotland faces, and its consequent distinct labour market needs, and the question whether Scotland should have a greater role in determining migration policy. The Commission noted previous and existing flexibilities in the law governing immigration, as well as the role of the Migration Advisory Committee which is charged with considering the needs of Scotland separately in advising the UK Government.
- 5.89 The Scotland Act specifically reserves “immigration, including asylum and the status and capacity of persons in the United Kingdom who are not British citizens” and the “free movement of persons within the European Economic Area”.
- 5.90 The majority of submissions the Commission has received have called for greater flexibility and more responsibility for the Scottish Parliament and Government within an overall UK framework on immigration. CBI Scotland, whilst favouring the existing reservation, calls for the UK Government to give substantial weight to the needs of Scotland when developing policy and to adopt a distinctively Scottish dimension within an overall UK approach.
- 5.91 The Scottish Government has drawn the attention of the Commission to a number of managed migration schemes around the world which include regional flexibility to meet the needs of different regions (although the success of some of these programmes is not entirely evident). The Scottish Government also points to a number of initiatives it already has in place (in accordance with its devolved responsibilities) to encourage and support migrants. In its evidence the UK Government maintains that the most effective way to address Scotland’s needs is by recognising local variation within a single, coherent national immigration strategy.
- 5.92 The Commission has been struck by what appears to be a fair degree of consensus around the desirability of an over-arching framework for immigration that offers the flexibility to reflect local needs. The Commission recognises the historic status of Scotland as a nation which has historically experienced a greater degree of emigration than of immigration and acknowledges the difficulties in addressing this challenge without putting burdens on local and social services, as well as the social security system, elsewhere in the UK.
- 5.93 On the other hand, the nature of the UK and the freedom of movement and employability that its citizens enjoy mean that changes in the law in one part of the UK could have a significant and unintended impact elsewhere. The UK is already strengthening immigration controls between countries already sharing its common travel area (the Republic of Ireland and Crown dependencies) in order to guard against any part of border security becoming a ‘weaker link’. Autonomy for Scotland in this area would undermine this approach. The Commission therefore does not recommend that legislative competence for immigration should be devolved.
- 5.94 The Commission believes, rather, that the UK and Scottish Governments should build on the examples of co-operation (such as the Fresh Talent Initiative) that have already demonstrated that Scottish concerns can be adequately reflected in a reserved policy area. Similar initiatives currently in operation include flexibilities within the points-based system to allow Higher National Diplomas as a qualifying criterion for graduates who wish to work in the UK after graduation and the Scotland Shortage Occupation List which makes it easier for Scottish employers with identified shortages that exist only in Scotland to recruit outwith the European Economic Area.

- 5.95 The Commission recommends retaining the current reservation for immigration but believes that agreed, justifiable local variations are sustainable and should be actively considered by the UK Government in consultation with Scottish Ministers. There should be a dialogue with Scottish Ministers as part of the development of migration policy and effective use made of the inter-governmental mechanisms proposed in Part 4 to reach agreement on approaches that best meet the needs of Scotland whilst protecting the interests of the UK as a whole.
- 5.96 The attention of the Commission has been drawn to the treatment of children of asylum seekers held in immigration detention centres. The Commission is aware that this is an issue which has provoked a considerable degree of controversy in Scotland, particularly with regard to the Dungavel detention facility. This is an area in which reserved functions (in this case the UK Home Office's responsibilities for asylum and deportation) can come into conflict with devolved responsibilities (the statutory duties of local authorities to look after the interests of children and the Scottish Government's responsibility for public well-being).
- 5.97 The Commission considers that control of the UK's borders and overall responsibility for determining policy on who may settle here are best placed with the UK Government and it recognises that the treatment of the children of asylum seekers is not just a Scottish issue. Nevertheless the UK authorities should not ignore the statutory responsibilities of the Scottish authorities at Scottish and local level. At the very least, full use should be made of inter-governmental mechanisms to ensure that the respective responsibilities of the UK and Scottish authorities are mutually understood and given appropriate consideration in decision-making.

**RECOMMENDATION 5.6:** Whilst retaining the current reservation of immigration, active consideration (supported by inter-governmental machinery) should be given to agreeing sustainable local variations to reflect the particular skills and demographic needs of Scotland.

**RECOMMENDATION 5.7:** In dealing with the children of asylum seekers, the relevant UK authorities must recognise the statutory responsibilities of Scottish authorities for the well-being of children in Scotland.

## Part 5–E: Energy

- 5.98 Within this theme the Commission has considered both overarching energy generation and supply issues, and specific concerns raised with the Commission relating to transmission charges.

### Energy generation and supply

- 5.99 Energy policy is largely reserved in relation to Great Britain. Schedule 5 to the Scotland Act lists reserved energy matters including electricity, oil and gas, nuclear energy and energy conservation. In its First Report the Commission considered that the case for a single UK energy market for generation, transmission, distribution and supply of electricity was strong but acknowledged the role of Scottish Ministers, particularly in relation to renewable energy and the UK's approach to the challenges posed by climate change.
- 5.100 Although energy is generally reserved, some energy matters have been executively devolved to Scottish Ministers. These are the Renewables Obligation in Scotland, responsibility for consent for power stations of over 50 MW onshore, and over 1 MW offshore (under section 36 of the Electricity Act 1989) and responsibility for consents for overhead power lines of more than 20 KV (also under the Electricity Act). Responsibility for consents for power stations below this threshold have also been devolved as part of town and country planning legislation (for onshore consents), and under the Food and Environment Protection Act 1985 (for offshore consents). Much of this reflects the role of the Secretary of State for Scotland prior to devolution.
- 5.101 In its approach to considering responsibility for energy policy, the Commission has been mindful of claims that the Scottish Government is prepared to use, or perceived to be prepared to use, devolved powers in order, it is said, to frustrate policy in a reserved area (in this instance planning powers and the elements of nuclear power in the UK Government's energy strategy). This is not an issue confined to the field of energy policy and is discussed in greater detail in Part 4. The analysis of the issues around energy policy that follows therefore concentrates on whether the current allocation of responsibility is appropriate and in the best interests of the Scottish people.
- 5.102 The Commission has received submissions calling for energy to be devolved. Those that argue devolution is an appropriate response to the challenges that lie ahead for Scotland and as a reflection of the nature of the Scottish energy industry and market include the Scottish Green Party, UNISON Scotland, the Scottish Council for Development and Industry and the Church of Scotland. These calls were balanced by submissions from CBI Scotland and the Scottish Association for Public Transport acknowledging the cross-border nature of the energy network and the need for a coherent UK-wide energy strategy. The UK Government emphasised the challenges posed to the country as a whole by climate change and the need to ensure a clean, affordable energy supply. Its evidence expressed the strong view that these challenges are best addressed at a UK level.
- 5.103 The Commission has not received evidence making a positive or detailed case against the current reservation of energy (as opposed to general calls for devolution). The Commission has noted that reservation has facilitated initiatives such as the establishment of the British Electricity Trading and Transmission Arrangements (BETTA), which created a single wholesale electricity market across Great Britain leading to greater competition in the generation and supply of electricity, economies of scale

in transmission system operation and the avoidance of separate arrangements for interconnection between the transmission systems in England and Wales and in Scotland. It has enabled the costs of the upgrades to the transmission system needed to accommodate new renewable generation to be spread across all GB users of the system. In the absence of BETTA, the entire cost of network upgrades in Scotland would otherwise have fallen on local users – which would have been substantial. Generators in Scotland have also benefited from the abolition of the former Anglo-Scottish interconnector fee in 2005. National Grid keeps the charging methodology under continuous review, and is responsible for recommending any changes to the regulator, OFGEM.

- 5.104 The Commission has also been made aware of the belief that the current transmission charging methodology discriminates against renewable energy generators in the Highlands and Islands. The Commission has taken note that transmission charging is an issue for many of those people with whom it has engaged but does not believe that it is an issue that falls within the Commission's remit.
- 5.105 The Commission believes that a UK-wide approach is essential for ensuring a continuing national supply, that international targets and obligations are met and that consumers have access to a competitive and modern energy market. Whilst current arrangements rely upon, and to that degree, encourage close working and cooperation between the UK and Scottish Governments both of which exercise competence in areas consistent with their responsibilities under the devolution settlement, it is appropriate for the UK Government to retain reserved powers over energy.
- 5.106 The Commission concludes that current arrangements remain appropriate and provide a balance between powers appropriately exercised at devolved and reserved levels. The Commission emphasises the importance of effective inter-governmental relations and an ongoing process of engagement to ensure that the best interests of the people of Scotland within the United Kingdom are properly realised.

## Part 5–F: Environment and planning

5.107 Within this theme the Commission focused on the non-marine environment, and planning. The marine environment is discussed at Part 5–I.

### Environment – general

5.108 Environmental issues in general are devolved and the Commission sees no reason to recommend that this is altered.

5.109 Increasingly “green taxes” are an important policy lever in relation to environmental issues and, in keeping with our analysis for improving financial accountability we recommend that environmental taxes are devolved. We have therefore recommended that Air Passenger Duty, Landfill Tax and the Aggregates Levy be devolved.

### The Crown Estate

5.110 In its First Report the Commission included consideration of the role and future of the Crown Estate in Scotland under the broad theme of “Marine and Fisheries”, as the majority of submissions made on the subject were concerned with the marine environment and fishing. The Commission acknowledges that the Crown Estate also has an important role to play in connection to other important areas of devolved policy such as renewable energy and as a key player in the management of the coasts and seas around Scotland.

5.111 The Crown Estate consists of the Crown property, rights and interests managed by the Crown Estate Commissioners. In Scotland this comprises ownership of the Scottish seabed out to the 12 nautical mile limit, property rights over the continental seabed out to the 200 mile limit (except for oil, gas and coal) and ownership of around half the length of the foreshore. There are other rights to salmon fishing, naturally occurring oysters, gold and silver mining and ownership of urban and rural land. Some of the Crown Estate’s rights have been granted out and are exercised by others. The Crown Estate in Scotland is estimated to produce around 5% of the Estate’s annual income from the UK-wide estate. The bulk of the income generated in Scotland is net surplus revenue which goes to HM Treasury and is, ultimately, invested back across the UK.

5.112 The Scotland Act reserves the Crown Estate Commissioners’ administration of the property rights of the Crown in Scotland and their revenues, meaning that ministerial responsibility remains with the Chancellor of the Exchequer and the Secretary of State for Scotland.

5.113 The Scottish Parliament can, however, legislate over the property rights of the Crown in Scotland, legislate to regulate the use of land and property rights and issue guidance on good management.

5.114 The position of the Crown Estate in Scotland has been raised in submissions from the Highland and Shetland Islands Councils. The latter calls for a ‘review’ of the Crown Estate’s role given the ‘crucial’ importance of its management of the foreshore and seabed. The former goes further, calling for the repeal of para 2(3) of Part I of Schedule 5 (which reserves the management of the Crown Estate) to enable the Crown Estate to be made more accountable and to help ensure that its Scottish assets are managed in Scotland’s interests. Similar concerns have also been frequently raised at the Commission’s public engagement events.

- 5.115 It has been argued that the current management of the Crown Estate focuses too narrowly on securing revenue, leading to unnecessarily high charges, and that this surplus is not fully re-invested back into Scotland. Around 80% of surplus is returned to HM Treasury which, some claim, demonstrates a lack of re-investment which would be less likely to occur if the Scottish Government played a greater role in the management of the Estate.
- 5.116 An important counter-argument to this, however, is the benefits that the Crown Estate in Scotland derives from being part of a much wider (and more profitable) Estate, encompassing properties elsewhere in the UK. The Crown Estate has the flexibility to make investments in Scotland using capital raised from assets outside Scotland which has been a key enabler, for instance, in its ability to work in partnership with the Scottish Government to invest in the development of offshore renewable energy. Crown Estate profits which flow to the UK Treasury are also used for the benefit of all UK taxpayers.
- 5.117 The increasing involvement of the Scottish Government in the overall management of the marine environment (as exemplified by the recent agreement on the Marine Bill) and its responsibility for the promotion of renewables in Scotland (as well as for Scotland's economic development more generally) might be argued to sit uneasily with the role of the Crown Estate Commissioners and prompts questions as to whether the Estate could be better integrated into the wider infrastructure of marine management.
- 5.118 On the other hand, the Commission has been made aware of many instances where the Crown Estate does work closely with the Scottish Government, local authorities and other partners such as the Scottish Wildlife Trust in order to ensure that investment in Scotland addresses real concerns and problems. Initiatives of this kind have included the Marine Stewardship Fund which supports a variety of initiatives around Scotland, investment in ports and harbours and contributions to the Pentland Firth wave and tidal programme.
- 5.119 In addition to its Scottish Liaison Group, representatives of the Crown Estate have appeared before the Rural Affairs and Environment Committee of the Scottish Parliament and reported to the Scottish Government through a variety of advisory groups including the Marine Energy Group, the Sustainable Seas Task Force and the Marine Spatial Planning Group. The Crown Estate publishes an annual Scottish Report and issues regular updates to interested parties, including MSPs.
- 5.120 The interests of the Crown Estate in Scotland encompass far more than the marine environment for which there is the most obvious case for closer integration into Scottish and local government activity. The Commission has not received specific calls for devolution of the Estate's other responsibilities in Scotland, although some of these (particularly recently purchased urban properties) make up a significant proportion of the Estate's revenues (and therefore its ability to make investments across its portfolio). It would be difficult to separate out the elements of the Estate in Scotland in any change to the current arrangements.
- 5.121 The Commission has considered the role that the Crown Estate plays in Scotland and has noted the increased efforts it has made in recent years to engage with local communities, interest groups and the Scottish Parliament and Government. The Commission recognises the level of ongoing investment that the Crown Estate in Scotland is able to make by virtue of being part of a wider, diverse Crown Estate encompassing interests across the United Kingdom. The Commission does not consider that the revenues from the Crown Estate would be an appropriate way of funding the Scottish Parliament.

5.122 The Commission does not consider that legislative competence for the Crown Estate in Scotland should be devolved. However, the Commission takes note of the strength of feeling in the evidence submitted that the Crown Estate in Scotland has given too great a priority to maximising income with what might be a disproportionate impact on some Scottish businesses. The Commission therefore recommends that the Secretary of State for Scotland should more actively exercise his powers of direction under the Crown Estate Act 1961, with the additional requirement for formal consultation with Scottish Ministers in doing so, to ensure that the Crown Estate Commissioners, in discharging their statutory duties, have due regard to Scottish interests and the wider context within which the Crown Estate in Scotland operates. The Commission recommends that there is consultation with Scottish Ministers to determine whether there is a need for direction immediately, and on a regular basis thereafter. Furthermore, the Commission believes that it would be appropriate for the recommendation as to the appointment of a Scottish Crown Estate Commissioner to be made following formal consultation with Scottish Ministers.

**RECOMMENDATION 5.8:** The Secretary of State for Scotland should, in consultation with Scottish Ministers, more actively exercise his powers of direction under the Crown Estate Act 1961 and, having consulted Scottish Ministers, should give consideration to whether such direction is required immediately.

**RECOMMENDATION 5.9:** The appointment of a Scottish Crown Estate Commissioner should be made following formal consultation with Scottish Ministers.

## Other

5.123 The Commission has taken evidence about the way in which planning powers (which are devolved) may come into conflict with powers exercised by the UK Government relating to areas that are reserved (for example the siting of nuclear power stations). The Commission recognises that the devolution settlement as it stands will always give rise to situations where the boundary between devolved and reserved powers gives rise to tension and urges that effective use is made of the mechanisms outlined in Part 4 to arrive at outcomes that are in the best interests of Scotland and of the United Kingdom as a whole.

5.124 The Commission does not consider that there is any case for reserving planning powers.

## Part 5–G: Health and biosecurity

5.125 The Commission has considered issues of both animal and human health under this theme. Whilst most aspects of health policy in these areas is devolved, the Commission invited views on the remainder – policy on areas such as abortion, embryology and xenotransplantation. The Commission also posed the question of how the health professions in the United Kingdom should be regulated and how food standards and labelling should be treated. In relation to animal health, the Commission addressed the apparently anomalous position whereby although animal health policy is devolved, the funding for it is not.

### Animal health

- 5.126 In its First Report, the Commission noted that, whilst the approach to animal health that has emerged since devolution appears to be working reasonably well, there is a need to ensure, first, that there is effective co-ordination and co-operation between Governments particularly during instances of UK-wide emergencies and, second, that animal health issues are funded at the appropriate level. The Commission is grateful to a number of experts and interested parties who have informed the Commission's deliberations. The Commission also acknowledges a debt to the Scudamore Review (which looked into the handling of the foot-and-mouth disease outbreak in 2007).<sup>5.20</sup>
- 5.127 Whilst animal health and welfare are devolved (by virtue of not having been named as exceptions in Schedule 5 to the Scotland Act), funding arrangements were not set out in that Act or in the subsequent concordats between the UK and Scottish Governments. This means that the UK Department of the Environment, Food and Rural Affairs (Defra) continues to fund the majority of animal health and welfare measures across Great Britain from its delegated budget. Defra has told the Commission that it is currently examining the potential for devolving an appropriate proportion of the GB-held budget to Scotland but has not provided any further detail. The Scottish Government has confirmed that preliminary discussions have been held with a view to devolving a share of the GB budget by April 2010.
- 5.128 Defra has recently published a consultation<sup>5.21</sup> in which the creation of a new independent body to take on Defra's responsibilities for animal health is proposed. The proposals are mainly in respect of England but it is envisaged that any new organisation will assume Defra's GB and UK functions. Whilst the organisation will receive public funds, it will also raise money from a levy on livestock keepers (which, it has been argued in some evidence to the Commission, could fall disproportionately on Scottish farmers given the nature of Scottish farming). The impact of the proposals on Scotland is mentioned briefly, with a reference to ongoing dialogue on devolving budgets. From this the Commission surmises that the proposals involve devolution of most budgetary responsibility, including the contingent liability for the costs of exotic disease outbreaks. The Commission does not consider this lack of clarity to be satisfactory, given the existing (devolved) responsibilities of the Scottish Parliament and Government.
- 5.129 The UK Government does not make ongoing provision for exotic disease outbreaks (diseases originating outside the UK such as bluetongue, swine fever and foot-and-mouth disease). Whilst a major outbreak is likely to require a call on the national Contingency Reserve, all other outbreaks are funded by Defra from its existing budget

5.20 A copy of the review's report can be found here <http://www.scotland.gov.uk/Publications/2008/06/23130049/0>.

5.21 Details of Defra's consultation can be found here <http://www.defra.gov.uk/corporate/consult/new-independent-body-ah/index.htm>.

wherever they occur. Given the nature of outbreaks of exotic disease and the UK Government's responsibility for the integrity of the UK border the Commission considers that it would be appropriate for control of such diseases to continue to be resourced at a national level. It is true that Northern Ireland has budgetary responsibility for animal health and welfare, including paying for tackling exotic disease outbreaks. However, comparisons with the situation on the mainland are not appropriate given that Northern Ireland has a land border with the Republic of Ireland, while Scotland has a land border with England.

- 5.130 Apart from the special case of exotic disease, the Commission has not been made aware of any objections to devolving funding for the day to day implementation of animal health policy. The Commission does not consider it is sustainable for budgetary responsibility in this area not to be aligned to policy responsibility and can see no reason for this funding not to be devolved to, and priorities determined in, Scotland.

**RECOMMENDATION 5.10:** Funding for policy relating to animal health should be devolved whilst responsibility for funding exotic disease outbreaks should be retained at a UK level.

## Food standards and labelling

- 5.131 Food standards and labelling (including diet and nutrition matters, food labelling, trade descriptions in relation to food, misleading and comparative advertising in relation to food and food contact materials) are devolved. The Scotland Act explicitly excepts regulation of trade descriptions in relation to food from the general reservation of consumer protection issues, as well as the subject matter of section 16 of the Food Safety Act 1990 (which deals with food safety and consumer protection).
- 5.132 This arrangement respects, to a great extent, the situation prior to devolution when these matters fell within the remit of the Secretary of State for Scotland, reflecting the link between the responsibilities for food safety, standards and labelling and wider public health policy.
- 5.133 The Food Standards Agency (FSA) is a UK-wide non-Ministerial government department set up by Act of Parliament in 2000 to protect the public's health and consumer interests in relation to food. Although a UK body, it operates under devolved competence in Scotland and is accountable to Scottish Ministers for its work there. Scotland is (statutorily) represented at Board level with these appointments being made by Scottish Ministers. The Agency employs around 10% of its staff in Scotland and of its annual funding of around £160 million just over £10 million comes from the Scottish Government.
- 5.134 The Agency is the UK's competent authority in terms of dealing with the European Union on food safety matters and has told the Commission that the vast majority of the food law with which it has to deal and implement emanates from Europe. In negotiating at EU level the Agency represents the UK Government but seeks to take into account the views of all devolved administrations in reaching an agreed UK negotiating line.
- 5.135 In evidence to the Commission, the Chief Executive of the FSA conceded that, whilst current arrangements seem to have worked it might be better if the Agency was able to be sure that the potential for policy divergence was eliminated and that the same information was available to consumers throughout the UK<sup>5.22</sup>. This echoed evidence

5.22 Oral evidence, 5 November 2008 <http://www.commissiononscottishdevolution.org.uk/uploads/transcript-5-November.pdf>.

from the Royal Environmental Health Institute of Scotland which indicated that a divergence of policy on food standards or labelling in Scotland might cause difficulties for businesses (but that such divergence could be justified on the grounds of public safety)<sup>5.23</sup>. In his evidence, Professor Savill of the University of Edinburgh's College of Medicine and Veterinary Medicine expressed disquiet at the prospect of different standards within the UK but thought that, in practice, devolved powers had not led to disharmony and need not do so.<sup>5.24</sup>

- 5.136 The Commission has not been made aware that current arrangements are leading to problems in practice. The FSA is satisfied that it operates effectively in Scotland, works closely with the Scottish Parliament and Ministers and that Scotland is able to feed in to the overall approach to food standards and labelling endorsed by the Agency at a UK level. Whilst the devolved competence of the Scottish Parliament could, in theory, lead to divergence in policy and practice, the Agency appears confident that its evidence-based approach to policy recommendations means that this is unlikely to occur and that the current settlement gives flexibility to address the particular concerns and priorities of different parts of the UK.
- 5.137 The Commission has considered whether the advantages of a certain and consistent approach to an area concerned with public safety might mean that re-reservation is a logical and viable option. The Commission recognises that there are strong arguments that food standards and labelling should have been reserved when the Scotland Act was originally drafted, given their links to consumer protection and the undesirability of divergence in an area that could affect the functioning of the UK as a single market (in terms of the potential for additional burdens to be placed on producers). The Commission also recognises that food standards and labelling are closely aligned to public health, an area that has been very successfully devolved, and that no problems appear to have arisen with the current arrangements over the past ten years.
- 5.138 The Commission notes the existing powers of the Scottish Parliament for the promotion of foodstuffs in Scotland and does not recommend any change to these. The Commission would not want to see any diminution of the ability of the Scottish Parliament and Government to encourage and support the promotion of Scottish food or to see the Scottish food industry placed at a disadvantage. The Commission also considers that the Scottish authorities must have appropriate powers to deal with dangers to public health at a national or local level. In the opinion of the Commission what matters is that divergence in policy and practice in this area should not produce incoherent results and should not affect the functioning of the UK by creating a situation which would breach the single market or create a burden on the manufacturing, distribution and supply of foodstuffs to consumers.

**RECOMMENDATION 5.11:** The Scottish Parliament should not have the power to legislate on food content and labelling in so far as that legislation would cause a breach of the single market in the UK by placing a burden on the manufacturing, distribution and supply of foodstuffs to consumers, and Schedule 5 to the Scotland Act should be amended accordingly.

5.23 Oral evidence, 6 October 2008 <http://www.commissiononscottishdevolution.org.uk/uploads/transcript-6-October.pdf>.

5.24 Oral evidence, 20 February 2009 <http://www.commissiononscottishdevolution.org.uk/uploads/transcript-20-February.pdf>.

## Reserved aspects of health policy

- 5.139 The Scotland Act reserves abortion, xenotransplantation (the transplantation of living cells, tissues or organs from one species to another), embryology, surrogacy and genetic, medicines, medical supplies and poisons and welfare foods (the latter is dealt with under the theme of “Social Security”). Some aspects of genetics, mainly those relating to the funding of research and of service provision in the National Health Service (NHS) are devolved. Powers to approve places where termination of pregnancies can be carried out, make regulations to require certification of doctors’ opinions prior to a termination and to notify terminations to the Chief Medical Officer have been executively devolved to Scottish Ministers. Scotland also has responsibility for the provision of abortion services as part of its management of the NHS in Scotland. With the exception of abortion, the Commission has received very little evidence about these reservations.
- 5.140 Given the specialist nature of much of the work around genetics and xenotransplantation and no indication that current arrangements are not functioning effectively, the Commission recommends maintaining the status quo. Arrangements for providing appropriate UK-wide oversight and coordination through such structures as the UK Genetic Testing Network, the Genetics Commissioning Advisory Group and the Gene Therapy Advisory Committee appear to operate effectively across the Border and the Commission is aware of effective links at official level across all of these policy areas. The Commission believes that these specialist nature of the means that advisory or co-ordinating networks are best organised on a UK-wide basis to avoid the proliferation of bodies and the dilution of specialist oversight within a more general body across all four home countries. In some cases, like the Human Genetic Commission (the UK Government’s advisory body on new developments in human genetics and how they impact on individual lives), reports are made directly to Scottish Ministers where appropriate.
- 5.141 The Commission is aware that the use of genetic screening and gene therapy is increasing and will continue to do so. Recent developments include the birth of the first baby without the inherited gene for breast cancer following screening, and the possibility of screening for autism. Such matters raise fundamental ethical issues as well as issues relating to academic research. These issues go beyond national boundaries and affect people similarly wherever they live in the UK. The Commission is persuaded of the merit of maintaining a single legal framework for these issues. A UK-wide approach serves the interests of the people of Scotland and the wider UK and it is difficult to see how the people of Scotland would benefit from these responsibilities being devolved to the Scottish Parliament. In addition, fragmenting responsibility in specialised and highly skilled areas could lead to a diminishing of expertise in the UK as a whole.
- 5.142 The Commission has received a small number of submissions pointing out that it is anomalous for the Scottish Parliament not to be able to legislate on abortion which should logically fall, it is argued, into the fields of health or criminal justice policy for which the Parliament already has responsibility. The Commission has considered the arguments for devolving abortion but concluded that, in the absence of compelling evidence to the contrary, the reservation should continue.

## Regulation of the health professions

- 5.143 The Scotland Act reserves the regulation of health professions. These are defined in the interpretation paragraph as those regulated by various (listed) enactments. These include doctors, dentists, dental auxiliaries, opticians, pharmacists, nurses, midwives, health visitors, chiropodists and veterinary surgeons amongst others. Consequently, legislative and executive competence for regulation of any new profession in the health area is automatically devolved.
- 5.144 This means that the professions which have emerged and been subject to regulation subsequent to the Scotland Act are not reserved in a manner consistent with similar, previously recognised professions but, in fact, devolved to the Scottish Parliament. According to the UK Department of Health this means that currently the regulation of operating department practitioners, dental nurses, dental technicians, clinical dental technicians and orthodontic therapists is devolved, and this could be expected to increase as regulation is extended to further professions.
- 5.145 Currently, the UK Government Department of Health seeks to place new professions into the existing machinery for the regulation of the health professions. This involves an order under section 60 of the Health Act 1999 and, where such an order makes regulations which apply to a profession where competence is devolved, there is a requirement for the order to be ratified by the Scottish Parliament, as well as the UK Parliament. This process can be time-consuming and cumbersome and gives the Scottish Parliament some influence over reserved professions.
- 5.146 In written evidence to the Commission both the Royal College of Physicians and Surgeons of Glasgow and the Royal College of Physicians of Edinburgh suggest that regulation of the health professions should not be devolved because, although some flexibility in approach is to be welcomed, a potential fragmentation of standards is not in the best interest of patients. The Commission has considerable sympathy with this view.
- 5.147 The Commission believes that it is important that there should be a common approach to regulation of the health professions to ensure that there is clarity for patients as well as an assurance of common standards irrespective of the location in which they find themselves in need of care or advice. Similarly, for practitioners, a consistent approach to regulation helps to ensure that mobility within Great Britain is straightforward and that relevant continuing professional development is recognised.
- 5.148 The Commission agrees that there should be a common framework for the regulation of the health professions and has considered whether this is most effectively achieved through cooperation and the existence of UK-wide regulatory bodies or through ensuring that the regulation of all new health professions is the responsibility of the UK Parliament. The Commission has concluded that it is in the public interest and in the best interest of the people of Scotland for responsibility for legislation to regulate all health professions to return to the UK Parliament. The Commission therefore recommends that regulation of the health professions is reserved without exception and that the drafting method by which the reservation of health professions in Schedule 5 to the Scotland Act is achieved should therefore be changed.

**RECOMMENDATION 5.12:** The regulation of all health professions, not just those specified by the Scotland Act, should be reserved.

## Part 5–H: Justice and home affairs

5.149 The Scottish Parliament already has legislative competence for a large swathe of matters relating to justice and home affairs including the criminal justice system. Notable exceptions include firearms, the misuse of drugs and aspects of road traffic regulation. Views on the most appropriate way in which powers in this fields should be exercised were invited in the Commission’s First Report.

### Firearms

- 5.150 The Commission acknowledges the body of opinion in Scotland that holds that powers to control the acquisition, retention and use of firearms in Scotland might more effectively be exercised at a Scottish level. These range from the Scottish Government’s call for the devolution of competence for all firearms, air weapons and replica weapons to a suggestion from the Association of Chief Police Officers in Scotland (ACPOS) that, although there is a need for a Scotland-specific solution in relation to firearms, this does not necessarily have to be achieved through further devolution.
- 5.151 The Scotland Act reserves the subject-matter of the Firearms Acts 1968 to 1997, although powers over the sale of other offensive weapons are devolved. The Scottish Parliament already has powers over offensive weapons not covered by these Acts. Controls over firearms were first imposed in 1920 and have remained common across Great Britain ever since. Northern Ireland has separate legislation.
- 5.152 The Commission has balanced the arguments in favour of reservation – which maintain that consistency of approach across Great Britain is necessary to avoid complexity and confusion, to minimise inconveniencing those who wish to shoot (legally) on both sides of the border by being subject to differing licensing regimes and to allow a coordinated approach to the misuse of firearms – against those for devolution, which claim that current arrangements are themselves confusing and difficult for the police to enforce and the public to understand. The Commission has also been mindful of its principle that power should be exercised at the level closest to those it affects unless there are good reasons to do otherwise.
- 5.153 The Commission accepts that devolving competence on firearms would be in line with the Scottish Parliament’s wider responsibilities for the criminal justice system and that it might allow the Parliament and Government to respond more effectively to the concerns of the people they represent. However, the Commission also notes that the current control framework for firearms already allows Scottish circumstances to be taken into account and is already largely operated at a local level. Chief police officers determine whether individuals are fit to be granted a firearms certificate and it is for local police forces to enforce firearms legislation having regard to policing priorities and specific problems.
- 5.154 The Commission has also taken account of the concerns expressed by a number of sporting associations (and the UK Government) that a different regime for firearms control in Scotland could inhibit the free movement of legally held weapons used for sporting purposes (both in terms of hunting and target shooting). At present, authorities under the Firearms Acts are valid across Great Britain (as are certificates issued in Northern Ireland, although not vice versa) and whilst there are understandable concerns that different regimes could introduce an additional layer of complexity and greater bureaucracy, it is not inconceivable that some sort of mutual-recognition arrangement

could be reached that would allow firearms certificates issued in one jurisdiction to be accepted in another (providing safeguards were felt to be adequate), especially given the economic importance of shooting in Scotland.

- 5.155 The UK Government has argued that any ban on a firearm which it is currently legal to possess would need to be underpinned by a compensation scheme. It argues that where such firearms are currently unregulated (e.g. air guns), it would be difficult to prevent them being legally and cheaply acquired in one jurisdiction and passed off for compensation in another which had introduced a ban. This is not an argument against devolution itself as much as it is a caution to a devolved administration making difficult policy decisions it believes to be in the best interests of its citizens. Whilst there would undoubtedly be practical considerations and potential difficulties in any divergence of approach to firearms control they do not preclude the development of robust mechanisms for managing cross-border problems, information sharing and good communications.
- 5.156 The Commission has not been convinced that there is a general problem with firearms in Scotland that is any worse than, or different to, that facing other parts of the UK. Whilst the Commission does not consider it necessary for there to be a demonstrable problem that needs to be addressed as a prerequisite for devolution, it does believe that in the instance of firearms and their potential for misuse there are strong arguments for maintaining control at a UK level. The Commission believes that there are advantages in having common offences relating to the misuse of firearms across Great Britain and that there could be serious disadvantages in having different, uncoordinated policies and therefore does not recommend devolving generally the subject of the Firearms Acts.
- 5.157 The Commission is persuaded, however, that there may be merit in devolving legislative competence for air weapons about which the Scottish Government has made particular representations to the UK Home Office. It appears to the Commission that if there is appetite to deal with air weapons differently in Scotland than south of the border then the advantages of enabling the Scottish Parliament to do so outweigh the disadvantages. The Commission notes that air weapons have been clearly defined in legislation and recommends that powers over weapons of this kind are devolved to the Scottish Parliament. This could be achieved through an Order under the Scotland Act.

**RECOMMENDATION 5.13:** The regulation of airguns should be devolved to the Scottish Parliament.

## Misuse of drugs

- 5.158 It is important to distinguish between the criminal law in relation to misuse of drugs and drugs trafficking; and the licensing and control of controlled substances in relation to their use in the treatment of drug addiction.

### The misuse of drugs and drugs trafficking

- 5.159 The Scotland Act reserves the criminal law in respect of the misuse of drugs and the proceeds of drug trafficking. The Scottish Parliament does have responsibility for matters relevant to the misuse of drugs including education, health, the police and the operation of the criminal justice system. Scotland has its own drug and substance misuse strategy and is subject to the international obligations to which the UK agreed and for which the UK Government remains responsible.

- 5.160 The Commission has received conflicting evidence on the desirability of devolving competence over the misuse of drugs. ACPOS has argued that it would be useful to have the ability to legislate in Scotland but that problems might arise if there were to be substantial differences in approach on either side of the border.<sup>5.25</sup> UNISON Scotland argues that devolution of responsibility for the law relating to the misuse of drugs would be consistent with the more general devolution of health and the criminal law.<sup>5.26</sup> The Scottish Government maintains that giving the Scottish Parliament responsibility to classify drugs in Scotland would enable the Parliament to take its own view on the appropriate level of classification and so to take into account specific Scottish patterns of drug consumption, law enforcement and criminal justice policy.<sup>5.27</sup>
- 5.161 The UK Government maintains that, given the fluidity of movement within the United Kingdom, it remains essential to have a single robust, consistent and stable legislative framework for dangerous or otherwise harmful drugs. It argues that devolution would not help the UK's position in EU and international negotiations and could present opportunities for drugs traffickers and drugs tourism. Furthermore, the UK Government points out that Scotland can already adopt a local, tailored approach to enforcement and sentencing and is represented on the British-Irish Council (which provides a forum for joint working and information sharing on policy and practice) and on the Advisory Council on the Misuse of Drugs.<sup>5.28</sup>
- 5.162 The Commission recognises that Scotland already has full legislative competence over the sale and control of alcohol, a legal drug which can also create social problems which can, it is recognised, be particular to Scotland and which can benefit from being addressed by the Scottish Parliament and Government. As with other aspects of the criminal justice system, whilst changes to the law on illegal drugs in Scotland might mean citizens having to understand that certain behaviours might be treated differently in Scotland to elsewhere in the United Kingdom, the same can already be said to apply in a number of devolved areas (as, for example when Scotland introduced a smoking ban ahead of the rest of Great Britain).
- 5.163 The Commission can see that a markedly more relaxed approach to the cultivation and possession of drugs in Scotland could pose problems for the rest of the UK by making it easier to obtain or to supply drugs that remained illegal elsewhere. But the Commission notes that local variations already exist with local police forces determining the priority they will give to anti-drugs activity which may, in turn, be a determining factor in individual decision-making. The Commission has had to consider whether this potential disbenefit to the UK as a whole outweighs the advantages to Scotland of determining its own law and policy and how – and to what extent – this differs from other areas where divergence in approach can occur.
- 5.164 The Commission acknowledges that this is an emotive and high -profile area and whilst a case can be made for the Scottish Parliament (and Ministers) to determine how the law on drug misuse should apply in Scotland, the Commission is strongly of the belief that this cannot sensibly be divorced from what happens in the rest of Great Britain or from the UK's international obligations and the responsibility of the UK Government for determining what can legally be brought into the country. The Commission believes the potential ramifications of different regimes applying in different parts of the country to be so severe that divergence (beyond that which may already exist) should be avoided. The Commission also believes that local police forces and the court system already allow issues arising from the misuse of drugs to be dealt with appropriately in the community which is affected by it.

5.25 Oral evidence 26 September 2008 <http://www.commissiononscottishdevolution.org.uk/uploads/transcript-26-September.pdf>.

5.26 <http://www.commissiononscottishdevolution.org.uk/uploads/2008-08-04-submission-unison-scotland.pdf>.

5.27 [http://www.commissiononscottishdevolution.org.uk/uploads/2009-04-06-scottish-government-\(no-2\).pdf](http://www.commissiononscottishdevolution.org.uk/uploads/2009-04-06-scottish-government-(no-2).pdf).

5.28 <http://www.commissiononscottishdevolution.org.uk/uploads/2008-11-10-hmg.pdf>.

## Licensing and control of controlled substances in the treatment of addiction

- 5.165 The Commission believes that there is scope for executive devolution of the powers of UK ministers to allow some controlled drugs to be legally prescribed by doctors (and therefore held and used legally) for the purpose of treating addiction. As this power relates to issues of health, rather than the criminal justice system, the Commission considers that these powers (under section 7 of the Misuse of Drugs Act 1971) which must involve consultation with the UK Advisory Council on Drugs, would be more appropriately exercised in Scotland by Scottish Ministers. Devolving responsibility for the licensing regime under which doctors operate and report on their prescribing of controlled drugs (such as heroin) would be commensurate with the responsibilities Scottish Ministers already have for public health and drug rehabilitation.
- 5.166 The Commission therefore recommends no change to responsibility for the classification of drugs and the approach subsequently taken to misuse, but recommends that responsibility for those aspects of the licensing and control of controlled substances that relate to their use in the treatment of addiction should be devolved to the Scottish Ministers as part of their responsibility for health and well-being.

**RECOMMENDATION 5.14:** Responsibility for those aspects of the licensing and control of controlled substances that relate to their use in the treatment of addiction should be transferred to Scottish Ministers.

## Aspects of road traffic regulation

- 5.167 In its First Report the Commission invited views on the implications of devolving responsibility for drink-driving limits and, insofar as these are not already devolved, speed limits. Whilst helpful evidence on these matters was proffered by bodies such as the Association of Chief Police Officers in Scotland (ACPOS), the Commission considers it unfortunate that it did not receive evidence from major motoring organisations representing a Great Britain-wide viewpoint.

### Drink-driving limits

- 5.168 There is a range of offences related to drink driving in the Road Traffic Act 1988 which contains a substantial body of road traffic law and applies throughout Great Britain. The subject-matter of the 1988 Act is reserved to the UK Parliament, almost without exception, by the Scotland Act 1998. Road safety information and training are not reserved. Scottish Ministers have been campaigning for a reduction in the legal alcohol limit and the introduction of police powers for random breath-testing.
- 5.169 The enforcement of road traffic law generally is for the police, the prosecuting authorities and the courts as part of a devolved criminal justice system. Scottish authorities enforce rules that apply throughout Great Britain but resourcing and priorities are a matter for the relevant Scottish authorities. ACPOS has told the Commission that there is a need for a Scotland-only solution to drink driving but that this need not necessarily mean devolution of powers.<sup>5.29</sup>
- 5.170 In practical terms, Scotland already has a great deal of responsibility for drink driving in terms of prevention, detection and punishment. It lacks, however, the freedom to adopt a distinct policy approach which could, it is argued, reflect peculiarly Scottish concerns

5.29 Oral evidence, 26 September 2008 <http://www.commissiononscottishdevolution.org.uk/uploads/transcript-26-September.pdf>.

or problems. Given the responsibility of the Scottish Parliament for other aspects of the criminal law, responsibility for setting different limits in Scotland does not appear unreasonable to the Commission.

- 5.171 The Commission has considered whether having different rules applying to different parts of a shared road network with respect to the drink-driving limit might create confusion among motorists. Changes to this system would require some re-education for existing GB licence holders to minimise any confusion surrounding differing limits in Scotland and the implications of these in terms of application and enforcement but devolution already means that different rules can apply in Scotland in a wide variety

of areas (for instance the early introduction of a smoking ban) about which visitors have to be made aware. If the Scottish Parliament believed that different rules would be in the interests of the people of Scotland then any disparity this creates with rules in the rest of Great Britain would have to be explained and managed.

- 5.172 It is likely that the impact on the police, prosecuting authorities and courts of administering a different limit would be minimal. Any burden would fall primarily on the police, who have indicated that such an approach could be easily managed as many (indeed almost all) other criminal justice measure are.
- 5.173 The Commission believes that devolving powers over drink-driving limits would be consistent with Scottish responsibility for the criminal justice system, and other policies in relation to alcohol, and can see no overwhelming reason why the Scottish Parliament and Ministers should not have the ability to decide what level of bloodstream alcohol is acceptable for those using the roads in Scotland.
- 5.174 Under section 5 of the 1988 Act, an offence is created if a person drives or attempts to drive, or is in charge of, a motor vehicle after consuming so much alcohol as to exceed the prescribed limit. The limit itself (35mcg/100ml of breath and equivalent proportions in blood and urine) is in section 11. This section also provides that the prescribed limit can be changed by regulations made by the Secretary of State.

**RECOMMENDATION 5.15:** Regulation-making powers relating to drink-driving limits should be transferred to Scottish Ministers.

## Speed limits

- 5.175 A considerable degree of flexibility for local variation in speed limits already exists in Scotland with local authorities having powers to set their own limits and special authorisation for traffic schemes devolved to Scottish Ministers. The national speed limit and penalties for speeding, however, remain reserved.
- 5.176 It has been argued that different national speed limits in Scotland and elsewhere in the UK could cause confusion for drivers. Whilst this is potentially the case, the Commission does not consider this to be an insurmountable difficulty and one which could be addressed through education and clear signage. Devolving responsibility for the level of penalties for speeding would allow the Scottish Parliament and Ministers to be more responsive to the wishes of the Scottish people.
- 5.177 The Commission does recognise that a question arises as to the consequences of speeding (and drink driving) for driver licensing and disqualification, an area which falls under a number of EU Directives. The Commission does not believe it would be practicable to confine disqualification consequences to one jurisdiction given the

unhindered nature of the road system which would mean that any disqualification arising from an offence committed in Scotland (under devolved legislation) would need to be recognised elsewhere in Great Britain. The Commission has therefore concluded that responsibility for deciding the penalties for speeding should remain reserved.

- 5.178 Whilst recognising that different rules of the road may present challenges in terms of driver awareness the Commission believes that any divergence in permissible speed limits in Scotland is manageable. Those responsible for enforcement have not indicated that devolution of speed limits would present particular difficulties. The Commission therefore recommends that remaining powers to determine the level of the national speed limit are devolved.

**RECOMMENDATION 5.16:** The power to determine the level of the national speed limit in Scotland should be devolved.

- 5.179 The Commission is aware that, having considered two aspects of road traffic regulation, speed limits and drink driving, it would be illogical not to have examined whether there was a case for devolving other aspects, such as the law relating to driving under the influence of drugs or the law relating to dangerous driving. The Commission can see that there are objective differences in the approach to the limits imposed on speed and the volume of alcohol that can be consumed by road users which make them more suitable for devolution than others. For example, the law relating to drink driving is comparatively simple in that an objective test can be used to determine whether an individual is breaking the law (the amount of alcohol in their breath, blood or urine). This limit is determined by Ministers based on what is deemed acceptable and set down in section 11 of the Road Traffic Act 1998. If a person is over the prescribed limit when tested then they have committed an offence.
- 5.180 However, whilst section 4 of the Road Traffic Act establishes a separate offence of driving when “unfit to drive through drink or drugs” (the latter defined as “any intoxicant other than alcohol”) it is for the courts to determine whether a driver is unfit. Equally, judgments around whether driving is dangerous, careless or carried out without reasonable consideration are subjective matters for the courts. Whilst there are definitions in the Road Traffic Act there is no single test that can be applied to determine whether the law has been broken.
- 5.181 The Commission believes that there are certain national standards for using the integrated road network of Great Britain that should be maintained at a UK level. These include driver licensing and the standard of driving expected from those using the roads. Thus, whilst limits for speed and for driving having taken alcohol can be devolved fairly straightforwardly, the manner in which people are expected to drive should remain common throughout the road network. Local police forces and courts already enforce the law in Scotland as they see fit and the Commission is not convinced that further devolution would be appropriate.

## Tribunals

- 5.182 A tri-partite system for administrative justice operates in Scotland. Great Britain-wide tribunals (for which policy responsibility lies with the UK Government) are supported variously by the Tribunals Service and by the Scottish Government with the Lord President and Scottish Ministers retaining a key role in appointments to some (reserved) GB-wide tribunals. Scottish tribunals set up by UK legislation before 1998 are generally the responsibility of either Scottish Ministers or local authorities, whilst policy responsibility for Scottish tribunals established after devolution falls to the Scottish Government. There is no equivalent of the Tribunals Service to provide overarching support and co-ordination to these Scottish tribunals. This has resulted in a tribunal system characterised as “extremely complex and fragmented.”
- 5.183 The difficulties that these arrangements have created have been recognised and the system was reviewed by the Administrative Justice Steering Group chaired by Lord Philip, which published a first report, *Options for the Future Administration and Supervision of Tribunals in Scotland*, in September 2008.<sup>5.30</sup> The Commission acknowledged in its First Report the work done by Lord Philip’s group.
- 5.184 The Commission has received no evidence that contradicts the findings of the Administrative Justice Steering Group that Scottish tribunals are not sufficiently independent of the Scottish Government, that there are inconsistencies in the system of appointment to tribunals in Scotland and that the lack of a coordinating body for Scottish tribunals may lead to a narrowness of outlook, inhibit the development of substantive and procedural law and create inefficiencies and a lack of value for money.
- 5.185 The Commission observes that the current system of tribunals in Scotland does not appear to be functioning in the best interests of the people of Scotland and notes and endorses the direction of travel outlined in the report of the Administrative Justice Steering Group. The Commission notes the importance of the Tribunal Service in providing support to those tribunals for which it does not have direct responsibility but believes that it is not within the Commission’s remit to make recommendation as to particular options for change, and looks forward to Lord Philip’s conclusions.

5.30 A copy of the report can be found here [http://www.ajtc.gov.uk/docs/Tribunals\\_in\\_Scotland.pdf](http://www.ajtc.gov.uk/docs/Tribunals_in_Scotland.pdf).

## Part 5–I: Marine and fisheries

### Marine environment

- 5.186 The Commission has already noted that responsibility for the management of the marine environment around Scotland involves a complex series of interactions and both reserved and devolved matters. At the time the Commission's First Report was published, the UK and Scottish Governments had just announced they had reached agreement on marine planning issues in the context of their respective Marine Bills. The Commission welcomed this agreement but committed to examining what was proposed and to test the approach against its remit.
- 5.187 Scottish Ministers have responsibility for the regulation of sea fishing in relation to the "Scottish zone" and, in relation to Scottish fishing boats, wherever those boats are. The Scottish zone is that part of the sea within the British fishery limits set out under the Fishery Limits Act 1976 that is adjacent to Scotland and extends to 12 nautical miles.<sup>5.31</sup> Commercial sea fishing is a devolved function of Scottish Ministers out to 200 nautical miles from the Scottish shore. The Scottish Government is responsible for regulating all aspects of commercial fishing across this area. Scottish Ministers are the licensing authority for the majority of matters licensable under Part II of the Food and Environment Protection Act 1985 that take place in the UK offshore area adjacent to Scotland (which include the deposit of substances or articles at sea, incineration at sea and scuttling) and exercise the prerogative functions of the Crown in relation to the extraction of minerals by dredging in the Scottish zone.
- 5.188 Whilst in general generation, transmission, distribution and supply of electricity are outside Scottish devolved competence the licensing functions of the Secretary of State under section 36 of the Electricity Act 1989 in relation to the construction, extension or operation of electricity generating stations in the offshore area adjacent to Scotland have been executively devolved to the Scottish Ministers by the Energy Act 2004 and subsequent Orders in 2005 and 2006.
- 5.189 Scottish functions in the offshore area are therefore significant, but not comprehensive. The Scottish Parliament's legislative competence is much more limited than the administrative competence of the Scottish Ministers, but there remain important substantive omissions from both. In particular, the matters for which the Scottish Ministers or Parliament are not responsible in relation to the UK offshore area adjacent to Scotland include international relations, nature conservation, the exploitation of hydrocarbons (including related offshore installations and submarine pipelines), marine transport (generally including navigational rights and freedoms), defence, military remains, mapping, scientific research (so far as it is regulated) other than fishing research, broadcasting, telecommunications, and any activity that falls to be regulated in future (the presumption of devolution that applies within Scotland does not apply beyond it).
- 5.190 The current Marine and Coastal Access Bill respects the current situation and provides a new strategic framework for marine planning which has now been agreed by the UK and Scottish Governments (as well as the devolved administrations in Wales and Northern Ireland). The Bill completed its Report stage in the House of Lords on 8 June 2009.

5.31 Scotland Act 1998, Schedule 5, Part II, Section C6 and section 126(1); SI 1999/1126, article 4.

- 5.191 The Marine and Coastal Access Bill applies across the United Kingdom and, with some of the new functions contained in the Bill subject to executive devolution, is expected to provide for more coherent delivery of the UK's common objectives. The UK Government will legislate for England, the waters around England, for the "offshore waters" around the UK, and for certain functions within the territorial waters of Scotland, Wales and Northern Ireland with the agreement of ministers in the devolved administrations.
- 5.192 This means that not all the proposals in the Bill will apply to the whole of the UK. Where proposals do not apply, for example in the territorial waters of Scotland and Northern Ireland, there are proposals for legislation to be brought forward by the relevant administrations to deliver similar reforms and systems. All four administrations support the objectives of the Bill and have committed to working constructively together to ensure that there is an integrated and joined-up approach to new marine legislation and its implementation. The Commission notes that the Scottish Cabinet Secretary for Rural Affairs and the Environment has welcomed the agreement with the UK and the adoption of a coordinated approach as a clear demonstration that inter-governmental processes worked effectively.
- 5.193 Part 1 of the Marine and Coastal Access Bill sets up the Marine Management Organisation to deliver planning, licensing, fisheries management and enforcement functions in the waters around England and in the offshore area for matters that are not devolved. The Scottish Government has to set up a body, Marine Scotland, to deliver marine functions in Scottish territorial waters and to oversee devolved matters in the offshore area.
- 5.194 Part 2 of the Marine and Coastal Access Bill creates a UK-wide "exclusive economic zone" which will replace a number of different zones created for different purposes. These comprise the areas within British fishery limits, the Renewable Energy Zone, the Pollution Zone, and the Gas Importation and Storage Zone, some of which were previously the responsibility of Scottish Ministers.
- 5.195 Part 3 of the Marine and Coastal Access Bill sets up a new system of marine planning with a marine policy statement intended to cover the whole of the UK marine area. All four administrations have committed to the aim of agreeing a single marine policy statement to deliver a coherent approach to strategic planning in UK waters. The marine planning system in the Bill applies in all UK waters apart from the territorial waters of Scotland and Northern Ireland. The Scottish Government has proposed a system of marine planning in Scottish territorial waters through the Marine (Scotland) Bill with the aim of achieving a consistent approach to planning and management at the appropriate boundaries and for the interaction of Scottish functions with those of the wider UK.
- 5.196 Part 4 of the Marine and Coastal Access Bill reforms marine licensing but will not apply in Scottish territorial waters. Part 3 of the Scottish Government's Marine (Scotland) Bill makes changes to marine licensing which reflect those proposed in the UK Bill.
- 5.197 Part 5 of the Marine and Coastal Access Bill will apply new arrangements for nature conservation in all UK waters apart from the territorial waters of Scotland and Northern Ireland. The Scottish Government will bring forward similar provisions for marine protected areas in its territorial waters through the Marine (Scotland) Bill although there is no commitment to replicate or make similar provision.
- 5.198 The provisions for inshore fisheries management in Part 6 of the Marine and Coastal Access Bill apply to England for the creation of inshore fisheries and conservation authorities. Inshore fisheries management groups have been established around the coast of Scotland to consider all aspects of fisheries management to ensure the sustainability of Scottish inshore fisheries and the dependent coastal communities. The

groups will develop management plans, recommending management measures to the Scottish Government that may be supported through appropriate additional legislation. The overall aim of the project is to provide guidance for the inshore fisheries management planning process in the form of a framework or model management plan which will draw on UK and overseas best practice in inshore fisheries management planning.

- 5.199 Part 7 of the Marine and Coastal Access Bill on fisheries applies mainly to England and Wales. The Scottish Parliament put in place provisions covering the Tweed in 2007 and has reformed existing legislation which mainly relates to control of salmon.
- 5.200 Access to coastal land in Scotland has already been dealt with as part of previous land reform and responsible access legislation which came into force in 2005. The Commission has received no evidence that suggests access to coastal land is an area it needs to consider further.

## Marine and Coastal Access Bill – going forward

- 5.201 Consistent with the Sewel Convention, the UK Government will seek agreement where proposals for UK legislation impact on devolved matters. A legislative consent motion (LCM) is therefore required for the Marine and Coastal Access Bill from the Scottish Parliament for a number of clauses within the Bill. The necessary memorandum went before the Scottish Parliament in December 2008, the Subordinate Legislation Committee reported on the memorandum on 12 February 2009, and the Rural Affairs and Environment Committee reported on 3 March 2009. The Scottish Parliament debated and agreed to the LCM on 18 March 2009.<sup>5.32</sup>
- 5.202 The publicly stated view of Scottish Ministers remains that the waters around Scotland would be better served by legislation emanating from Holyrood. However, the Scottish Government recognises that “it is in the interests of our marine environment in Scotland that, as far as possible, we take a joined-up approach on the matter”. The Scottish Government undertook a consultation “Sustainable Seas for All” in 2008 and its Marine (Scotland) Bill was introduced in April 2009, covering broadly the same areas of policy as the UK Marine and Coastal Access Bill. The UK Government aims to respect the devolution settlement, recognise the existing responsibilities of Scottish Ministers and to work with the devolved administrations to ensure better protection and development of the UK’s marine resources and environment.
- 5.203 The Commission believes that there is a compelling case for consistency in the way in which the marine environment around the UK is managed. This is important in view of the UK’s international and European obligations and to provide transparency and clarity for users of the marine environment. This could be achieved through wholesale re-reservation. Given the wide-ranging powers that the Scottish Parliament and Government already have in relation to the Scottish Zone this would be politically difficult and historically incongruous. Alternatively, this could be achieved through coordination, cooperation and agreement. The Commission notes that the agreement reached on the marine environment represents a pragmatic way forward, working within, and respecting, the boundaries of the devolution settlement and ensuring a comparable framework for the marine environment around the whole of the UK.

5.32 <http://www.scottish.parliament.uk/business/legConMem/LCM-2007-2008/marinecoastalaccess.htm>.

- 5.204 Having consulted widely with experts and interest groups, the Commission has concluded that the agreement on the UK Marine Bill between the UK Government and devolved administrations announced in November 2008 represents an effective approach to the complex and overlapping issues and responsibilities governing the management of the marine environment, providing that the goodwill continues to exist to make it work. The Commission warmly welcomes the agreement and the motives for it and in considering the marine environment has sought not to upset the balance it achieves and the framework created between it and the Marine Bills currently before the UK and Scottish Parliaments.
- 5.205 The Commission does consider, however, that a strong case has been made for legislative devolution of nature conservation within the context of the agreed arrangements for marine spatial planning as outlined above.

**RECOMMENDATION 5.17:** The effectiveness of the agreement reached by the UK and Scottish Governments should be kept under review by the inter-governmental machinery, and nature conservation should be devolved to the Scottish Parliament at the earliest appropriate opportunity, taking into account the experience and evidence to be gained from the operation of the regime set out in the respective Marine Bills.

## Fisheries and EU

- 5.206 The Commission recognised the importance of the fishing industry to Scotland in its First Report and acknowledged the need for Scottish interests to be represented effectively at EU level. How Scotland is represented and recommendations for change can be found in Part 4 of this Report.

## Part 5–J: Revenue and tax raising

- 5.207 The Commission's considerations and conclusions on revenue and tax raising in Scotland can be found in Part 3 of this Report.
- 5.208 The Commission has recommended that a number of "green taxes" (Air Passenger Duty, Landfill Tax and the Aggregates Levy) be devolved. As well as helping to increase the financial accountability of the Scottish Parliament, control of these taxes will provide important policy levers in relation to environmental issues, allowing the Scottish Parliament and Government further options in determining policy.
- 5.209 The Commission has also considered the tax position of charities in so far as this is affected by the different definitions of charitable purpose used across the UK and its analysis can be found at paragraphs 5.40 – 5.62.

## Part 5–K: Science, research and higher education

- 5.210 In its First Report the Commission invited views on the most effective way of funding higher education in Scotland, including comments on the role played by the UK Research Councils.
- 5.211 Funding for higher education in Scotland (with the exception of that provided for research on a UK-wide basis by the Research Councils) is largely devolved to the Scottish Parliament. A separate funding council for Scotland has been in existence since 1993, meaning that there is an established tradition of determining how funds should be distributed that predates devolution itself. Unlike its English equivalent which is responsible for higher education funding only, the Scottish Funding Council deals with both higher and further education. The Commission has considered the system by which students are funded (which is devolved) separately from the system of research funding through Research Councils (which is reserved).
- 5.212 A system of tuition fees was introduced in England from 2006-07 in order to move some of the costs of providing higher education to individual students. It has been suggested to the Commission that the absence of alternative (and additional) funding streams of this nature in Scotland means that Scottish universities may find it more difficult to compete with English and international institutions for the quality of teaching and facilities. Equally, because this increasing proportion of income for English universities comes from fees, rather than Government grant, the “comparable” spending on universities in England is lower than it might otherwise have been and so are the consequential effects on the Scottish Budget via the Barnett formula.
- 5.213 The Commission acknowledges the quality of teaching and facilities in Scottish universities and has not questioned whether higher education itself should remain devolved. The obvious links to other elements of the education sector and to wider considerations around employment, economic development and social inclusion (and historic differences in the nature of higher education in Scotland) mean that it is appropriate that higher education and the funding mechanisms attached to students remain the responsibility of the Scottish Parliament and Government. Devolution inevitably leads to differences in policy which may result in different outcomes for those affected by them. As the Commission argued in its First Report, this in itself is not an argument against devolution itself. The structure of student funding in Scotland has been considered and determined by the Scottish Parliament and it is for the Scottish Parliament to determine whether the policy should be altered within the framework of the devolution settlement.
- 5.214 The Commission is aware of the role played by the UK social security system in providing financial support to some students and that this has been criticised as difficult to understand, unresponsive and not necessarily aligned to other forms of support for students. The Commission considers the complexities and interdependencies which characterise the UK benefit system elsewhere and, whilst sympathetic to calls for simplification and better understanding, considers this to be a UK problem, rather than something specific to Scotland and a consequence of devolution.
- 5.215 In its First Report the Commission indicated that it was not minded to recommend changes to the system of Research Councils which appeared to have served Scotland well. The Scotland Act 1998 reserves “Research Councils within the meaning of the Science and Technology Act 1965” and “The Arts and Humanities Research Council within the meaning of Part 1 of the Higher Education Act 2004”. The Research Councils comprise the Arts and Humanities Research Council, the Biotechnology and Biological

Sciences Research Council, the Engineering and Physical Sciences Research Council, the Economic and Social Research Council, the Medical Research Council, the Natural Environment Research Council and the Science and Technological Facilities Council. Since 2002, they have worked together as Research Councils UK.

- 5.216 The Research Councils are non-departmental public bodies incorporated by Royal Charter and are funded by the UK Government Department for Business, Innovation and Skills. Their combined annual budget is around £2.8 billion of which around £1.3 billion is spent on research grants and training in UK higher education institutions (forming one element of the UK's dual support system for research funding, the other element coming via the national Funding Councils as discussed above). The Research Councils allocate funds through peer review, in which the quality of proposed research is a principal factor: geographical location is not considered. In 2007, Scottish institutions received 12.5% of all Research Council funding to UK universities (compared to its 8.4% population share). It is likely that this proportion is actually higher as it does not reflect Scottish universities which are part of funding bids led by institutions outside Scotland. The Commission notes that, although the Research Councils themselves are reserved, the funding of scientific research is not, which means that the Scottish Government (or other public bodies in Scotland) could devote additional resources to research if so desired.
- 5.217 The Commission has been struck by the volume of evidence it has received claiming that Scotland “punches above its weight” in terms of attracting research funding and that institutions themselves benefit from being part of a wider academic community offering competition and challenge. This also allows Scottish universities to contribute to, and benefit from, the UK's reputation for research at an international level. The Commission notes that the UK Government and the various Research Councils take account of specific Scottish interests through, for example, the involvement of senior figures from the Scottish Funding Council at Research Councils UK Executive Group meetings and encourages them to continue to ensure that robust mechanisms are in place to consider the impact of decisions regarding Research Councils on those parts of Great Britain for which the Department for Business, Innovation and Skills has more direct responsibilities. Providing that Scottish interests are properly represented in decisions by, and affecting, the Research Councils then the Commission does not recommend a change to the existing system.
- 5.218 It has been suggested to the Commission that some Scottish research institutions may be disadvantaged compared to their English counterparts because they are considered to be Government-supported research organisations, rather than higher education institutions or independent research organisations and therefore ineligible for funding from Research Councils UK<sup>5.33</sup>. Institutions which fall into this category include the Scottish Agricultural College, the Scottish Crop Research Institute, the Macaulay Land Use Research Institute and the Moredun Research Institute. The Commission understands that eligibility for Research Council funding is a matter for the Research Councils rather than the Department for Business, Innovation and Skills but believes that Research Councils UK should re-examine its approach.

**RECOMMENDATION 5.18:** Research Councils UK should re-examine its approach to funding so that Scottish institutions delivering a comparable function to institutions elsewhere in the UK have access to the same sources of research funding, with the aim of ensuring that the effective framework for research that has been established across the UK is not jeopardised.

5.33 Oral evidence from Professor Bill McKelvey of the Scottish Agricultural College, 3 April 2009 <http://www.commissiononscottishdevolution.org.uk/uploads/transcript-3-April.pdf>.

## Part 5–L: Social Security

- 5.219 In its First Report, the Commission discussed the case for the United Kingdom as a social Union within which some key elements of the welfare state are reserved to the UK Parliament, though provision is devolved in the instances of health and education, and where the basic principles – such as healthcare free at the point of need and universal provision of education – have remained largely uniform throughout the UK. All social security benefits and pensions are reserved, and the majority are administered nationally by the UK Department for Work and Pensions. In the light of the common social citizenship enjoyed by people across the UK, the questions posed by the Commission were whether there should be scope for significant divergence in welfare services offered and whether current social security arrangements might better respond to specific Scottish issues – in particular whether components could be determined and/or delivered differently and closer to the people they are designed to assist.
- 5.220 It strikes the Commission that there are strong practical arguments for maintaining a single, Great Britain-wide model for key parts of the welfare state. The state pension, for example, is paid via the National Insurance Fund, a pot of money made up of contributions from individuals which also finances the National Health Service. Contributions to the fund are not attributable to particular individuals (unlike a personal pension scheme) and are used to pay current pensions. This makes it extremely difficult to apportion the Fund. Similarly, delivery of the social security system has developed over a number of years and is exceptionally complex. (For instance, long term benefit recipients may continue to benefit from long discontinued rules or special payments under “transitional protection” arrangements which mean their entitlements, the way they are calculated and paid and the regulations governing them might be very different to a more recent recipient of what is ostensibly the same benefit.) Whilst practical difficulties in themselves are unlikely to be a sufficient reason for determining whether it is appropriate to devolve an element of the system, it is important that they are taken into account. They may adversely impact on the ability of a devolved service provider to serve the people of Scotland better.
- 5.221 The Commission accepts that there is also a strong case for reserving other, explicitly redistributive but non-contributory benefits, such as elements of the Jobseeker’s Allowance, the Employment and Support Allowance, Income Support and Pension Credit. Allowing variations in rates or conditionality could lead to “benefit tourism” as claimants moved to areas that operated more generous or less onerous regimes. Many of these benefits also purport to provide a minimum standard of living and, whilst the cost of living may vary throughout Great Britain, in line with the principle of ensuring broadly common social citizenship, it seems right that certain minimum standards are met. Additionally, there would be obvious practical considerations in that most benefits are no longer processed locally but in processing centres scattered around the country which are not necessarily (or even usually) connected to the regions they serve.
- 5.222 There are, however, elements of the social security system which are closely aligned to areas of responsibility already devolved to Scotland and which represent levers that could potentially usefully be exercised by the Scottish Ministers to achieve its objectives in key areas of domestic policy, thereby increasing the ability of the Scottish Parliament to serve its people better. These include Housing Benefit and Council Tax Benefit which help towards the costs of renting and paying for local services and so are linked to the Scottish Government’s responsibility for housing and homelessness in Scotland, and for local taxation. Disability Living Allowance and Attendance Allowance

exist to help the disabled with the additional costs associated with their disability (for example the additional costs of getting around or in obtaining care) and have obvious links with the health and social care agenda for which is devolved. Those parts of the Social Fund which aim to help with unanticipated or one-off expenditure and welfare to work programmes – training courses for those on benefit to help them back into employment – can be regarded as complementing the link to the Scottish Government responsibilities for general well being.

## Housing Benefit and Council Tax Benefit

5.223 People on low incomes can get Housing Benefit (HB) to help with rent and Council Tax Benefit (CTB) to help with council tax bills. In order to get HB or CTB it is not necessary to be entitled to another social security benefit, although in many cases this automatically entitles someone to HB/CTB (this is often called “passporting”). HB/CTB are administered by local authorities on behalf of the UK Government Department of Work and Pensions (DWP). DWP retains responsibility for policy, stewardship and funding. Local authorities claim subsidies from DWP for benefit expenditure and administration costs incurred. Scottish local authorities therefore play an important role in the delivery of HB and CTB, and they work closely with DWP in doing so. We have looked very closely at the case for the devolution of these benefits.

### HB and CTB in Scotland

5.224 In the last year for which actual figures are available (2006-07) the total number of households in Scotland in receipt of Housing Benefit was just over 400,000 and expenditure amounted to £1.259 billion. The income this provides is very important to the social rented sector (i.e. local authority and housing association houses) in Scotland, as it is in England and Wales. About two-thirds of the tenants in social rented housing receive housing benefit. It is therefore an important tool of housing policy as well as an important element of the benefit system. Council Tax Benefit payments in Scotland are about £0.4 billion a year. This is about one-third of the income local authorities receive from council tax and so CTB is a very important element of the local tax system as well as of the benefit system.

### Links to wider social security system

5.225 The social security system is very complicated indeed. This is because it tries to have a set of rules that take account of very different circumstances in a way that is as fair as possible, and be as consistent and coherent as it can be. So different benefits share common rules of entitlement, and the treatment of one benefit within the rules of another is often complementary. Housing Benefit and Council Tax Benefit are closely integrated into this complex system. For example, “passporting” means that people who are entitled to Income Support, income-based Jobseeker’s Allowance or the guarantee credit of State Pension Credit are automatically entitled to the full amount of Housing Benefit and Council Tax Benefit. Where someone is in receipt of Income Support or income-based Jobseeker’s Allowance, their income, earnings and capital will be disregarded for CTB and HB. There is a similar arrangement regarding Pension Credit.

5.226 These connections are important, but perhaps more important is the overall contribution that Housing Benefit and Council Tax Benefit make to someone’s total income and how they live. There is a very complicated system of tapers, so that what

people get in benefits reduces as they earn more money. These are intended to avoid “poverty traps” so that people can benefit from the money they earn, and have the incentive to work. For these reasons, changes to HB and CTB rates cannot be considered in isolation and have to take into account the effects on other benefits and the overall effect on a person’s income and circumstances. This makes it difficult to see how it would be possible to disentangle HB and CTB from the wider benefit system so as to devolve it.

- 5.227 Spending on Housing Benefit and Council Tax Benefit has a strong cyclical element. Although there are many people who continue to get these benefits for a long time, in times of economic difficulty more people became entitled to benefits as they lose their jobs and are supported by the social security system until they find another. That is why expenditure on Housing Benefit and Council Tax Benefit is included by the UK government in Annually Managed Expenditure<sup>5.34</sup>, rather than as part of a three-year budget like that for a Government department or a devolved administration. This too would cause concern if HB or CTB were to be devolved. The expenditure is demand-led, and would go up at a time of recession, and if that had to be accommodated inside the Scottish Budget cuts would have to be made elsewhere. A Scottish Government with devolved responsibility for Housing Benefit might find itself having to make decisions in other areas of public expenditure if faced with higher demand for HB and CTB.
- 5.228 On the other hand, there are clear connections with devolved policy. Housing Benefit is probably the single most important tool of housing policy for social rented housing, and that is very firmly a devolved matter. The Scottish Parliament might well wish to pursue a different housing policy in some respect (say, for example, a desire to deliver housing more directly by providing accommodation rather than by subsidising people to rent it) but the interaction with a uniform UK-wide social security system would make that very difficult. Similarly, the form and structure of the local tax system in Scotland is the responsibility of the Scottish Parliament, and changing it or replacing it with a different local tax entirely – as has been suggested – immediately runs into problems with the Council Tax Benefit system.
- 5.229 Both HB and CTB are therefore important parts of the benefit system but are closely related to devolved responsibilities. This is a very clear example of where devolved and reserved responsibilities interact with one another. Because of the integration of these benefits within the wider social security system and the role it plays in maintaining a common social union across Great Britain, and the risks involved in bringing cyclical expenditure into the Scottish Budget, the Commission has concluded that the potential disadvantages of devolution outweigh the advantages, certainly at the present time.
- 5.230 Whether these benefits remain reserved, as we have concluded, or are devolved, it is clear that the overlapping responsibilities of the UK and Scottish Governments and Parliaments will mean that this is an area where coordination and joint working will be needed. If they remain reserved then, given the close links between these benefits and devolved responsibilities, there should be more scope for them to be adjusted to deal with changes in those areas. That will mean that there should be greater scope than there is now for Scottish variation in these policy areas, in line with the scope for variation in the devolved policy areas to which they are connected.
- 5.231 Any proposed Scottish changes will have to fit in with the general structure and interconnected nature of the benefit system, which will remain a UK responsibility. Change may be proposed by the Scottish Government or Parliament but will have to be agreed at the UK level. Of course, such changes may have financial implications and we

5.34 See Part 3, paragraph 3.2 for a fuller explanation of this.

believe that, unless otherwise agreed, in line with the established general principle<sup>5.35</sup>, the responsibility for meeting the costs of changes should lie with those who propose them, and similarly that if policy changes result in savings on the HB or CTB budget then the people of Scotland should be able to benefit from them. This would apply in relation to both housing and local taxation policy.

**RECOMMENDATION 5.19:** There should be scope for Scottish Ministers, with the agreement of the Scottish Parliament, to propose changes to the Housing Benefit and Council Tax Benefit systems (as they apply in Scotland) when these are connected to devolved policy changes, and for the UK Government – if it agrees – to make those changes by suitable regulation.

## Welfare to work in Scotland

- 5.232 The UK Government Department for Work and Pensions (DWP) runs (or, in the majority of cases, funds) a number of welfare to work programmes to support individuals in receipt of welfare benefits towards employment. As a part of these programmes DWP commissions specific external provision. All programmes are national programmes although contractual arrangements allow for regional and local variation in provision.
- 5.233 Although the primary purpose of welfare to work programmes are to equip (or re-equip) people to join the labour market they are also linked to specific Jobcentre Plus initiatives (such as the various New Deals) and hence to entitlement to benefit. Attendance on a programme may become a condition of receiving benefit as well as being a consequence of receiving that benefit.
- 5.234 Although responsibility for the provision budget is centralised in DWP, allocations are made to countries and regions for each type of provision. For 2008-09 Scotland was allocated 61,521 provision starts (9.4% of the total) and £67.5 million (11.5% of the total). The Deprived Area Fund, designed to improve employment rates for disadvantaged groups in specific geographic areas, continues to operate in Scotland and is delivered via Jobcentre Plus. The budget for 2008/2009 was £4.3 million.

## Local delivery

- 5.235 DWP published its commissioning strategy in February 2008 and has since laid out in the Welfare Reform Green Paper and White Paper<sup>5.36</sup> how it intends to work with providers and partners to ensure that provision meets the needs of localities, individuals and employers.
- 5.236 DWP specifically lays out how it will, over time, embed new contracting arrangements which will allow significant flexibility within contracts to respond to local needs. DWP also envisages three levels of “devolution” where as a part of the wider agenda of joining up skills and employment provision and cutting out duplication, the Department will work with partnerships to ensure that programmes meet local priorities whilst continuing to deliver the aims of national programmes of support.

5.35 See paragraph 10.4 in *Funding the Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly: Statement of Funding Policy* available at [http://www.hm-treasury.gov.uk/pbr\\_csr07\\_statement\\_of\\_funding\\_policy.htm](http://www.hm-treasury.gov.uk/pbr_csr07_statement_of_funding_policy.htm).

5.36 *No-one written off: reforming welfare to reward responsibility* (July 2008) and *Raising expectations and increasing support: reforming welfare for the future* (December 2008).

5.237 The three levels of devolution are:

**Level 1.** Consultation with partners on what is purchased and some influence at the margins over the specification to ensure that this fits with local need and supports partnership activity. DWP would retain the contracting role at this level.

**Level 2.** Joint commissioning: DWP to retain contracting responsibility, but partners able to add value to DWP contracts to buy improved outcomes. Partners would also have a greater say in performance monitoring and the contract award process.

**Level 3.** In the most advanced partnerships and where there is a clear business case for a more radical approach (evidence that this would deliver more outcomes), look to devolve more influence over DWP contracts including the possibility of transferring responsibility for letting contracts.

5.238 The Commission accepts that the main obstacle to devolving responsibility for welfare to work programmes is their relationship to, and dependencies on, UK-wide out-of-work benefits. As participation in a programme is usually – and, arguably, necessarily – a condition of receiving benefit then a link between the numbers of people receiving benefit and availability of provision at the right time is essential. The allocations of monies to programmes (or the level of conditionality involved in them) is difficult to separate from forecast benefit expenditure and levels of economic inactivity although this might be possible with the discrete, if tiny in expenditure terms, Deprived Areas Fund.

5.239 More promising in terms of the Commission’s remit is DWP’s professed commitment to an increasing degree of partnership in its approach to commissioning and provision. The Commission welcomes and encourages this as it appears to allow local agencies (including the Scottish Government) to take advantage of the greater purchasing power of a UK Government department as well as specifying outcomes to reflect better local needs and priorities. Moving to DWP’s proposed Level 3 allows for a large degree of practical devolution whilst maintaining necessary safeguards on expenditure and allowing for a Great Britain-wide overview of provision to ensure consistency and value for money.

**RECOMMENDATION 5.20:** A formal consultation role should be built into DWP’s commissioning process for those welfare to work programmes that are based in, or extend to, Scotland so that the views of the Scottish Government on particular skills or other needs that require to be addressed in Scotland are properly taken into account.

**RECOMMENDATION 5.21:** The Deprived Areas Fund should be devolved to the Scottish Parliament given the geographic nature of the help it is designed to provide and the fit with the Scottish Government’s wider responsibilities.

## Attendance Allowance and Disability Living Allowance

5.240 Attendance Allowance (AA) and Disability Living Allowance (DLA) are tax-free, non-means-tested, non-contributory benefits paid to UK residents who have care and/or mobility needs as a result of a mental or physical disability. DLA (which is for people aged under 65 but can continue beyond that age if already in payment) is made up of a care component for people who need help with personal care needs and a mobility component for people who need help with walking difficulties. AA (which is claimed by

those aged 65 or over) is for people who have long-term health problems that present a care or supervisory need. The benefits are administered by the Great Britain-wide Pension, Disability and Carers Service which is a predominantly telephone-based service with a very limited local presence.

## AA and DLA in Scotland

5.241 There are around 325,000 recipients of DLA in Scotland (out of a GB total of almost 3 million). Just over 140,000 people receive AA in Scotland (from a GB total of just over one and a half million). In 2008-09 it was estimated that £1.7 billion, out of total expenditure of £15.7 billion, was spent on these benefits in Scotland.

## Links to wider social security system

- 5.242 AA and DLA act as a gateway to other types of help including exemption from road tax, the Christmas Bonus, the Blue Badge and Motability schemes. They also result in premiums and elements that are payable as part of other GB-wide benefits. "Premiums" are extra monies included in the assessments of income support, income-based Jobseeker's Allowance, Housing Benefit, Council Tax Benefit and health benefits. "Elements" are those included in child tax credit (CTC) and working tax credit (WTC).
- 5.243 To an even greater degree than for HB and CTB, interdependencies with other parts of the social security and tax credit systems mean that it would be extremely difficult to devolve policy responsibility for these benefits. If the link to GB-wide benefits was maintained then any easing of the rules governing eligibility for AA and DLA would have knock-on consequences for expenditure on more "mainstream" benefits. The Commission therefore recommends retaining the reservation of Attendance Allowance and Disability Living Allowance.

## The Social Fund

- 5.244 The Social Fund exists to assist those on low incomes with costs that they might find difficult to meet out of their normal income. It is made up of two parts, the regulated and discretionary funds.
- 5.245 The regulated fund comprises those payments to which there is an entitlement if certain conditions are met. It includes winter fuel payments (made automatically to households occupied by somebody aged over 60), cold weather payments (made automatically to people on certain benefits if the local temperature drops below a certain level), funeral payments (made to people on certain benefits who have responsibility for arranging a funeral of a close relative) and sure start maternity grants (made to people on certain benefits who are expecting, or have had, a child). These payments are characterised by the relative simplicity of their rules of entitlement and means of payment. In every case (apart from the winter fuel payment) entitlement depends largely on entitlement to GB-wide benefits. None of the payments is repayable.
- 5.246 The discretionary fund comprises budgeting loans (a repayable loan to help with the cost of infrequently purchased items), community care grants (a payment to assist people in setting up or remaining in their home or to ease exceptional pressure on families) and crisis loans (a payment which may be made if no other help is available).
- 5.247 Priorities for the discretionary Social Fund are set in directions by the Secretary of State for Work and Pensions. The level of priority that can be met varies depending on the

demand on them made at the time of the decision (by a decision-maker acting on behalf of the Secretary of State). For grants, local managers must monitor budgets and advise decision-makers accordingly. For budgeting loans, decision-makers rely on a baseline amount that a single person can access set by DWP's national centre which can be raised and lowered as appropriate in order to temper demands on the budget.

- 5.248 Social Fund budgets are administered by 20 Benefit Delivery Centres, two of which are in Scotland. In 2007-08, people in Scotland received around £430 million from the discretionary Social Fund. Comparable figures are not available for the regulated Fund but it is, perhaps, notable that (with the exception of the maternity grant) the proportion of awards (particularly in community care grants and crisis loans) made in Scotland is higher than usual for other benefits and higher than might be expected based purely on population.

### Links to wider social security system

- 5.249 Eligibility for budgeting loans, maternity grants, cold weather payments and funeral payments is dependent on being in receipt of a qualifying GB-wide benefit. Community care grants are aimed at those on benefit or who are likely to receive benefit on their return to the community whilst crisis loans are available to anyone who meets the criteria. Eligibility to a winter fuel payment is based on age.
- 5.250 As with the other benefits the Commission has considered, passporting from GB-wide benefits into most of the help available through the regulated Social Fund means that there would be practical implications involved in devolution if that link were to be maintained. The automatic nature of parts of the regulated Fund – dependent on access to GB-wide records held by DWP – provides for administrative simplicity and keeps costs down (for example, this is a particularly important consideration with the non-means tested winter fuel payment).
- 5.251 The Commission is less convinced by the rationale for a UK-wide approach to the discretionary Social Fund. The purpose of payments from the Fund fits reasonably neatly with the Scottish Government's responsibilities for wellbeing, social work and tackling homelessness as well as the responsibility that local authorities have for families. The Commission can conceive that priorities in Scotland could be set by Scottish Ministers, rather than the UK Secretary of State, in order to reflect policy objectives and particular circumstances.
- 5.252 The discretionary Social Fund is currently delivered through the national Jobcentre Plus network, but a devolved system of similar support could be delivered through alternative channels such as local authorities, credit unions or even charities (provided that suitable guidelines and safeguards were in place).
- 5.253 Expenditure on the budgeting loan element is, by its nature, recoverable and this could either remain part of existing arrangements or be absorbed by the Scottish Government which might, or might not, choose to provide loans either directly or by funding third parties. The recoverability of such a loan scheme would need to be carefully considered: currently DWP can deduct repayments from benefits but it is unlikely that this option would be easily open to the Scottish Government. Where a loan recipient has moved off benefit their debts are handled by DWP's Debt Management Service and pursued like any other debt. The Debt Management Service carries out a similar function for a number of Government agencies and could, perhaps, perform a similar role for the Scottish Government (albeit at a cost).
- 5.254 Of course, a devolved discretionary Social Fund would not necessarily have to replicate the provisions of current UK arrangements or even seek to address the same sorts of

need (although the Commission has assumed that the Scottish Government would want to ensure that people who find themselves in extremis would have access to some sort of comparable support). If monies currently spent on the Fund in Scotland were to be allocated to the Scottish Government then it could determine the most effective and efficient way of spending them to best meet overall policy objectives.

- 5.255 At first glance, the discretionary Social Fund seems both manageable and suitable for further devolution. A baseline could be established based on historic expenditure and responsibility for policy and delivery passed to the Scottish Government. Delivery is already localised and the discretionary nature of the payments within a framework of priorities laid down by Ministers lends itself to a transfer of responsibility. However, the Commission remains concerned by the difficulties inherent in unpicking parts of the welfare state and of the potential implications for vulnerable Scots of changes to what is, for many, a provider of last resort. Whilst the Commission does not feel able to recommend changes to the framework within which the Social Fund is delivered at this time, it notes that the Department for Work and Pensions has promised to consult on future reforms to the Social Fund to ensure that the support it offers is active and enabling. The Commission believes that, as part of future reform, consideration should be given to whether devolution would allow a more joined-up and effective system of support for vulnerable people in Scotland

**RECOMMENDATION 5.22:** As part of its considerations as to future reform of the Social Fund, the UK Government should explore devolving the discretionary elements of the Fund to the Scottish Parliament.

## Welfare foods

- 5.256 Healthy Start is a statutory scheme providing vouchers that can be spent in participating shops on milk, fresh fruit and vegetables, and infant formula milk. The scheme mainly supports pregnant women and children under four years of age in families who receive a range of tax credits and benefits for the unemployed. It also supports pregnant women under 18 years of age regardless of circumstances. Access to free vitamin supplements via the NHS without prescription is another element of the scheme.
- 5.257 The Nursery Milk Scheme reimburses early years and childcare providers for the cost of providing daily milk to children under five years of age attending for two hours or more. The two schemes replace the former Welfare Food Scheme which provided milk or infant formula tokens to low-income families, and payments to childcare providers for provision of free milk to children. Both schemes are established under the provisions of section 13 of the Social Security Act 1988 – as amended by the Health and Social Care (Community Health and Standards) Act 2003 in the case of Healthy Start.
- 5.258 The powers to regulate for the Nursery Milk Scheme are fully reserved to the UK Parliament. The power to regulate for Healthy Start is also largely reserved to the UK Parliament following consultation with Scottish and Welsh Ministers. However, two specific powers for Healthy Start are devolved – the power to determine the range of foods, and the power to determine the nature of health advice given through the scheme. This balance reflects the fact that powers to regulate for benefits and tax credits on which the scheme is based are reserved, and that powers to regulate health matters are devolved.
- 5.259 The UK Department of Health manages Healthy Start on behalf of the whole UK, and the Nursery Milk Scheme on behalf of Scotland and Wales only. Management

involves contracting with two external companies to act as the Healthy Start Issuing Unit (beneficiary application processing, voucher print and issue, regular validation of entitlement with HMRC and Jobcentre Plus) and the Healthy Start Reimbursement Unit (retailer recruitment, registration and payment). The UK Department of Health also produces a range of generic communications materials for beneficiaries and health professionals throughout the UK which are agreed by all four countries.

- 5.260 Close working links exist between the UK Department of Health and the Scottish Government which is consulted on any potential developments in the management of the schemes or in policy governing them, whether these relate to reserved or devolved matters. Where the countries have differing views on policy on or management of any reserved aspect of Healthy Start because of differences in overall priorities of their Governments, discussions are held before recommendations are made to UK Ministers.
- 5.261 With Healthy Start, where devolved administrations have powers to vary elements of the scheme, overall reservation helps to maintain consistency and coherence across the UK, minimising confusion for those who deliver the scheme or who benefit from it. Reserved regulatory powers give retailers participating in Healthy Start which have outlets in more than one UK country confidence that participation in the scheme will not require different administrative arrangements in different stores. Over 65% of vouchers are spent with supermarkets and other very large multiples who centralise their claiming arrangements through head offices.
- 5.262 Because eligibility for support from Healthy Start relies in all but a few cases on receipt of specific tax credits and benefits, scheme delivery relies on extremely close regulatory and data sharing relationships with the tax credits and benefits systems. Current arrangements for regular data sharing and revalidation of eligibility of beneficiaries are manageable in practice because eligibility criteria expressed in regulations are identical across the UK.
- 5.263 Reservation also helps to ensure the most cost-effective use of public funds. Contract costs would be significantly higher if scheme delivery involved different legal or operational requirements in different parts of the UK. This would impact on all UK countries, but would impact most on countries outside England which benefit from the economy of scale offered by centralised delivery arrangements for a single, coherent scheme.
- 5.264 Whilst the devolution of Healthy Start would fit with the Scottish Government's general responsibilities for health and well-being, the input that Scottish Ministers already have through existing processes ensures that issues with delivery in Scotland are at the forefront of consideration. Scotland also benefits from being part of a wider, centrally administered system in terms of economies of scale and links to the national benefit system. Given the potential difficulties in breaking these links and the lack of calls for a change to the status of welfare foods the Commission recommends that this reservation continues.

## Part 5–M: Trade and commerce

- 5.265 In Part 2 of this Report we make the case for the UK as a single, economic Union. Scotland benefits from being part of a wider economic entity, contributing to and sharing in the benefits in times of prosperity and pooling resources and risk in times of financial uncertainty. Underpinning the effective operation of the UK as a successful, modern economy are a complex set of laws relating to business associations, financial services and consumer protection.
- 5.266 The Commission does not recommend changes to the reservation of company law, competition policy, financial services regulation and consumer protection which it considers are vital safeguards for the single market and wider economic Union.

### Corporate insolvency

- 5.267 Company law is in general reserved, and the Scotland Act achieves this by reserving “business associations” (which include partnerships as well as companies). But company law interacts with other aspects of Scots law, including the procedures which are followed by courts when winding up companies which are insolvent. The boundary which is drawn in the Scotland Act between these two areas of law is quite complex, because the law itself is inevitably complicated also. The Scotland Act (Schedule 5, Part II, Section C2) reserves (in relation to business associations) “(a) the modes of, and grounds for and the general legal effect of winding up, and the persons who may initiate winding up, (b) liability to contribute to assets on winding up, (c) powers of courts in relation to proceedings for winding up, other than the power to sist proceedings, (d) arrangements with creditors and (e) procedures giving protection from creditors”. But it devolves “(a) the process of winding up, including the person having responsibility for the conduct of a winding up or any part of it, and his conduct of it or of that part, (b) the effect of winding up on diligence, and (c) avoidance and adjustment of prior transactions on winding up” and “floating charges and receivers, except in relation to preferential debts, regulation of insolvency practitioners and co-operation of insolvency courts”.
- 5.268 Essentially this means that the ways in which winding up can happen, and the grounds for doing so, are reserved. This prevents there being different circumstances under which winding up can happen in different parts of the UK. The reservation of the general legal effect of winding up allows for a consistent legislative response to court rulings affecting insolvency. The “process of winding up” – which is devolved – refers to procedural issues arising in practice (for example, who would need to be served with information or documents about the case, and by what timescales, by various parties to proceedings).
- 5.269 The elements involved in this process have changed since the Scotland Act came into force. Previously the winding-up process in Scotland could be seen as analogous to the procedure used for (personal) bankruptcy. But changes to the administration procedure in Great Britain (made by the Enterprise Act 2002) to allow winding up through administration has meant that there could be undesirable differences in the processes governing winding up depending on the jurisdiction under which that winding up happens.
- 5.270 Bankruptcy law in Scotland has a different history to the law in England and Wales and has always been subject to a separate legal framework (as the Scotland Act recognises in the exceptions made in Schedule 5).

- 5.271 It was suggested to the Commission that legislation relating to corporate insolvency in Scotland has lagged behind that in England and Wales. The Scottish Government has said that it proposes to make amendments to the Scottish Insolvency Rules in 2009 to remove cross-references to personal insolvency and replace them with stand-alone provisions with the intention of making the Rules clearer, and that additional resources have been made available by the Accountant in Bankruptcy. The Rules are also being reviewed to identify areas where administrative burdens can be eased by simplifying processes and ensuring consistency between insolvency procedures. A similar modernisation project is being carried out for England by the Insolvency Service.
- 5.272 Notwithstanding moves by the Accountant in Bankruptcy to bring the law relating to insolvency procedure in line with that of England and Wales, the Commission has heard from insolvency practitioners who question the necessity of duplicating work in Scotland and the potential this allows for divergence in policy and practice. The Institute of Chartered Accountants of Scotland (ICAS), for example, argues that this is unhelpful in a field in which businesses operate across the UK, supported by lenders who also operate common policies across different jurisdictions
- 5.273 Given that the Scotland Act 1998 reserved company law as a whole to the UK Parliament, there is an argument that the current division of responsibility for liquidation between the UK and Scottish Parliament should be ended.
- 5.274 On the other hand, some of the exceptions to the general reservation in the Scotland Act relate to matters where the law of Scotland is materially different from the law of England, not least because of the distinction between law and equity. This underlies much of English law on securities, bankruptcy, receivership and winding up and does not exist in Scots law. Scots law must therefore find different solutions appropriate to the nature of the problem. In addition, the Scottish courts exercise a wide supervisory jurisdiction in relation to liquidators, receivers, administrators and other aspects of winding up. The procedures of the Scottish courts are, of course, a matter of Scots law.
- 5.275 The Commission is, however, persuaded that devolution has produced an unsatisfactory state of affairs relating to corporate insolvency in that:
- there is an absence of clarity as to where responsibility lies for drawing up the rules to be followed by insolvency practitioners dealing with corporate insolvencies;
  - there are unnecessary and confusing divergences between the insolvency rules applying in England and Scotland; and
  - there have been unnecessary and damaging delays in introducing new rules in Scotland.
- 5.276 Many corporate insolvencies involve companies operating on both sides of the border. Clarity, consistency and speed are essential, particularly in the present economic and financial climate. Whether or not, as some submissions have suggested, the necessary expertise is lacking in Scotland (which the Commission is not in a position to judge), that does not alter the importance of clarity, consistency and speed.
- 5.277 In the opinion of the Commission, the serious issues raised in connection with corporate insolvency might be resolved without altering the reserved/devolved boundary in Schedule 5 in relation to primary legislative competence. The essential point appears to be that the UK Insolvency Service, with appropriate input from the relevant department(s) of the Scottish Government, should be made responsible for laying down the rules to be applied by insolvency practitioners on both sides of the Border. This could be achieved by UK legislation to which the Scottish Parliament would consent by legislative consent motion under the Sewel Convention.

- 5.278 If such a solution is not possible for technical reasons (or if, which the Commission hopes would not be the case, the Scottish Government and Parliament were to withhold their consent or cause unnecessary delays in agreeing a solution), then it would be necessary for the UK Parliament to amend Section C2 of Schedule 5. Given the complexity of this area of the law generally, and the terms of Section C2 in particular, the Commission is not in a position to suggest the terms of an appropriate amendment, nor would it be appropriate to do so. The Commission does, however, consider that this is a problem which should now be resolved with the minimum of delay.

**RECOMMENDATION 5.23:** The UK Insolvency Service, with appropriate input from the relevant department(s) of the Scottish Government, should be made responsible for laying down the rules to be applied by insolvency practitioners on both sides of the border. This should be achieved by UK legislation.

## Part 5–N: Other areas

5.279 A number of issues have been raised with the Commission that do not neatly fall within the themes explored above but which, nevertheless, the Commission considers it important to address.

### Definition of “social security purposes”

5.280 The Law Society of Scotland drew the attention of the Commission to the possibility that a literal reading of the interpretation provision in relation to “social security purposes” in Section F1 of Schedule 5 to the Scotland Act could prevent the Scottish Parliament from legislating in areas like legal aid or prescription charges where reference is made to low income or other social factors.

5.281 Whilst there has been no suggestion that the wording of Schedule 5 has prevented the Scottish Parliament from legislating on these matters, the Commission believes it would be helpful to clarify the legal basis for its being able to do so and recommends that the definition be amended to make it clear that the reservation refers to social security purposes related to the type of provision provided by the UK Department for Work and Pensions.

**RECOMMENDATION 5.24:** The interpretation provision in relation to “social security purposes” in the Scotland Act should be amended to make it clear that the reservation refers to social security purposes related to the type of provision provided by the UK Department for Work and Pensions.

### International development

5.282 The Scotland Act reserves foreign affairs, stating clearly that “international development assistance and co-operation are reserved matters”.

5.283 Nevertheless, the Scottish Government has an international development policy which sets out the framework for engagement with some of the poorest countries in sub-Saharan Africa which have historical, and in some cases, contemporary relationships with Scotland. These countries are supported through block grants delivered by the Scottish Government's partners in development. By 2010-11 devolved spending in this area is expected to be around £9 million.

5.284 The legal basis for the Scottish Government's involvement in this reserved area can be found in paragraph 7(2)(b) of Part I of Schedule 5 which does not reserve “assisting Ministers of the Crown in relation to” matters reserved under the heading of foreign affairs, including international development.

5.285 The Commission has received mixed evidence as to the viability of the current pragmatic arrangements governing Scottish Ministers' role in international development, with some calls for full devolution to ensure that “key international development matters ... have a specific Scottish perspective and [can] be directly handled by the Scottish Parliament and the Scottish Government”.

- 5.286 The Commission recognises that the ability of Scottish Ministers to operate in the field of international development is, constitutionally, dependent on the permission of the UK Secretary of State for International Development and upon satisfying the criteria of “assisting Ministers of the Crown”. The Commission agrees that any significant changes to the scale or scope of Scottish Government projects in this area would have to be agreed by the UK Secretary of State.
- 5.287 The Commission regards the field of international development as offering a useful example of Governments working together, with the UK Government respecting the Scottish Government’s desire to make a contribution in a reserved area in which Scotland has historical interest and the Scottish Government recognising that it operates in this area because the UK Government has agreed to allow it to do so. The Commission welcomes the fact that international development is an area in which the UK and Scottish Governments can collaborate effectively, each complementing the activities of the other within the boundaries set out in the Scotland Act.
- 5.288 The Commission recognises, however, that given the legal basis for any international development programme, it is important that the UK Government is satisfied that any act by Scottish Ministers in furtherance of international development does, in fact, assist UK Ministers in the discharge of their functions. Given the concern that we have heard expressed about the effectiveness of some programmes, we consider that it is important for the UK Government to be able to evaluate the effectiveness of any programme promoted and operated by Scottish Ministers. We observe that any expenditure on international development programmes which did not achieve the purpose of assisting UK Ministers in the discharge of their international development function would be *ultra vires*.

## Judges before committees

- 5.289 It has been suggested to the Commission that it is anomalous that Scottish judges are not answerable to the Scottish Parliament for the discharge of their non-judicial functions (e.g. their responsibility for administration of Scottish courts under the Judiciary and Courts (Scotland) Act 2008). The Commission considers, however, that it would be inconsistent with the constitutional separation of powers that the Parliament should have power to compel judges to appear before the Parliament or its committees. On the other hand, it is reasonable that the Parliament should be entitled, as at present, to invite their attendance, provided that it is recognised (as seems to be the case) that judges should not be subject to questioning about what they have done, or may do, in their judicial capacity when ostensibly being questioned about their executive duties. Bodies on which judges serve in their non-judicial capacity, such as the Scottish Courts Service can, where appropriate, be represented by their Chief Executives.

## Rivers Esk and Tweed

- 5.290 Section 111 of the Scotland Act allows Her Majesty by Order in Council to make provision for or in connection with the conservation, management and exploitation of salmon, trout, eels and freshwater fish in the Border rivers (the Esk and Tweed) – including to confer functions on a Minister of the Crown, the Scottish Ministers or a public body.

- 5.291 These functions were subsequently conferred on the Tweed Commissioners (for the Tweed) and the Environment Agency (for the Esk) which reflected the historic position that the Tweed was governed by Scots law (albeit made at Westminster prior to devolution) and the Esk by English law.
- 5.292 The Commission has been made aware of the perception that, whilst arrangements for the Tweed appear to have worked well, those for the Esk have proved less satisfactory.<sup>5.37</sup> Decisions taken by the Environment Agency have been criticised and the Commission acknowledges the frustration caused to those affected by them. However, the Commission does not believe that because pursuit of a particular policy is unpopular that the framework within which that policy is being delivered should necessarily be reviewed. The Commission has not received evidence to indicate that the devolution settlement itself as regards the Border rivers is flawed and is of the opinion that the issue it has been asked to examine is around the way in which regulations are being applied on the Esk, as opposed to the legitimacy of the powers to impose those regulations. The Commission urges the Environment Agency to work with Scottish interests but does not feel that this is an area about which it can legitimately make a recommendation.

5.37 Written submission by David Mundell: <http://www.commissiononscottishdevolution.org.uk/uploads/2009-01-08-david-mundell-mp.pdf>.

# Part 6: Strengthening the Scottish Parliament

## Summary

This Part considers a number of key elements of the Parliament itself – how it is constituted and how it carries out its business. We consider, in particular, the electoral system, the effectiveness of the committee system, the Parliament’s procedures for making laws and ensuring that they do not exceed its legislative competence, and the limitations on the Parliament’s procedures that are set out in the Scotland Act. Criticisms and concerns raised in evidence are discussed, and recommendations are made with the aim of encouraging the Parliament to operate more effectively.

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## Part 6–A: Introduction and background

- 6.1 Previous Parts have covered the funding of the Scottish Parliament and ways to enhance its financial accountability; the formal and informal relations that the devolved institutions have with counterparts elsewhere in the UK and beyond; and the powers and functions of the Parliament and of Scottish Ministers. These have been the three principal themes of the Commission’s work, but it has become increasingly clear as that work has developed that there are significant issues concerning the workings of the Parliament itself which do not fit comfortably under any of these three themes.
- 6.2 The need for separate consideration of these issues was already apparent by the time of the Commission’s First Report, which devoted a separate chapter (Chapter 8) to an initial consideration of them.
- 6.3 The Commission has received a substantial amount of evidence on some of the issues raised in that Chapter – particularly on the electoral system, the effectiveness of the Parliament’s committee system, and the procedures for scrutinising legislation.
- 6.4 In this Part, we review what we see as the key issues in this area. Some of our recommendations are about adjusting the parameters imposed by the Scotland Act on the internal workings of the Scottish Parliament, where it has become apparent that these statutory limits are inhibiting the Parliament from operating as effectively as it might. Other recommendations, however, concern matters that the Parliament is itself already fully responsible for, because we believe it is helpful to offer an external perspective informed by the evidence of those who have made representations to us.
- 6.5 The remaining chapters of this Part cover the following topics:
- the Parliament’s electoral system, and wider aspects of how it is constituted and renewed (the unicameral structure, the number of MSPs and the regular cycle of fixed four-year sessions)
  - key elements of how Parliamentary business is arranged and conducted – the sitting pattern, the management of debates and the structure and operation of committees
  - the effectiveness of the Parliament’s procedures for scrutiny of primary legislation (Bills)
  - the statutory mechanisms for ensuring that the Parliament does not legislate beyond its powers (that is, *ultra vires*)
  - the various statutory requirements about how the Parliament regulates its own operations, including provision required to be made by standing orders.
- 6.6 In developing its thinking on these issues, the Commission has benefited from the experience of three of its members in particular – Jim Wallace, who served as a constituency MSP and was also Deputy First Minister; James Selkirk, who served as a regional MSP, a business manager and a deputy convener; and Colin Boyd, who served as Solicitor General and then Lord Advocate.<sup>6.1</sup> All three also have experience of the UK Parliament – Jim Wallace and James Selkirk as former MPs, and all three as current life peers.

6.1 The Solicitor General and the Lord Advocate, when not also elected MSPs, have the same rights to participate in the Parliament’s proceedings (although they may not vote). This includes, for example, speaking in debates, making statements, and introducing Executive Bills.

## Part 6–B: The Parliament’s electoral system

### Introduction

- 6.7 As outlined in Part 1 of this Report, the Scottish Parliament has a mixed electoral system, by which constituency MSPs are elected on a first-past-the-post basis, while regional (or list) MSPs are elected using the additional member system (AMS) of proportional representation.
- 6.8 This electoral system is closely bound up with other aspects of the way the Parliament is constituted under the Scotland Act, namely
- the size of the Parliament (129 members, comprising 73 constituency MSPs and 56 regional MSPs);
  - the unicameral structure of the Parliament – that is, the lack of a second or revising chamber equivalent to the House of Lords in the UK Parliament; and
  - the fixed four-year cycle of “ordinary general elections”.
- 6.9 In Part 5, we consider whether there is a case for devolving to the Scottish Parliament legislative competence for deciding what its electoral system should be, and conclude that there was not (although we separately recommend devolving to Scottish Ministers responsibility for the administration of Scottish Parliament elections). Here we consider the related question of whether there is a case for changing that electoral system, or any of the related elements identified above.

### The size of the Parliament, unicameralism and the electoral cycle

- 6.10 Although we have received some representations about the size of the Parliament, suggesting that there are too many MSPs<sup>6.2</sup>, we have not seen anything to convince us of a case for change. We recognise, in particular, that this is one of the few respects in which the Scotland Act has been substantially altered since 1998.
- 6.11 As noted in Part 1, the Scotland Act included changes to the rules under which the Boundary Commission must operate, which had the effect of reducing the number of Scottish MPs from 72 at the time of devolution to 59 by the time of the 2005 UK general election. However, as enacted, the Scotland Act also directly linked the number of Scottish MPs with the number of MSPs in such a way that the size of the Parliament would have been reduced in consequence from 129 to around 106.<sup>6.3</sup> Although this would have preserved co-terminosity (that is, ensured that constituency MSPs and Scottish MPs shared constituency boundaries), it was subsequently acknowledged that

6.2 See for example submissions by Councillor Scoullar and Professor Bonney. This was also a point made in a significant number of comments in responses to the Commission’s questionnaire: <http://www.commissiononscottishdevolution.org.uk/uploads/questionnaire-annexe-a.pdf>.

6.3 The number of constituency MSPs would have reduced from 73 to 60, since the Act separately provides that, in the Scottish Parliament but not in the House of Commons, Orkney and Shetland are to be separately represented. Since the Act also requires the Boundary Commission to maintain (so far as reasonably practicable) a ratio of regional to constituency MSPs of 56:73, the number of regional MSPs would have been reduced to around 46.

such a substantial reduction in the number of MSPs would have had an unacceptable impact on the operation of the new Parliament. Accordingly, the UK Government introduced a Bill to remove the linkage in the Act between the number of Scottish MPs and the number of MSPs.<sup>6.4</sup>

- 6.12 Given this relatively recent decision by the UK Parliament and the arguments advanced at the time as to why a figure of around 129 was necessary to enable the Parliament to operate effectively, we do not consider it appropriate to revisit the issue at this stage. At the same time, we do not regard 129 as a “magic number” and recognise that it may vary over time – either because of the routine application of Boundary Commission rules or as a by-product of changes to the electoral system.
- 6.13 We have received a few suggestions that the Parliament’s approach to scrutiny would benefit from the addition of an unelected element or second chamber.<sup>6.5</sup> However, these submissions did not provide the weight of evidence that would be required as a basis for serious contemplation of such a fundamental change. In addition, as already indicated in our First Report (paragraph 8.14), such a proposal would have to confront formidable objections on grounds of legitimacy and practicality. For these reasons, we make no recommendation for change on this aspect of the Parliament’s constitution.
- 6.14 Similarly, we have received no evidence suggesting that the fixed four-year electoral cycle needs to be revisited, and accordingly we make no recommendation for change. In doing so, however, we consider it worth remarking on how specific the terms of the Scotland Act are about the timing of “ordinary” general elections – which must be held on “the first Thursday in May” (section 2(2)). It may be questioned whether stipulating the day of the week is really necessary, and whether a limited degree of flexibility in this respect might not be preferable.

## The electoral system

- 6.15 By contrast, the Commission has received quite a substantial body of evidence on the Parliament’s electoral system itself, much of it critical. Most of the relevant submissions have advocated a move to the single transferable vote (STV) system.<sup>6.6</sup>
- 6.16 One of the main objections to the current system is that it creates two categories of MSPs, with the regional MSPs seen as having less legitimacy and as able unfairly to cherry-pick popular issues while not having the burden of constituency casework. We are certainly aware that there are tensions between regional MSPs, constituency MSPs and MPs in some locations. One of the contributory factors appears to be that the Act allows a political party to field the same person both as a constituency candidate and as part of a regional list in the region that includes the constituency. As a result many of those returned as regional MSPs have stood unsuccessfully in a constituency within their region, thereby inviting the perception that the system rewards failure and that regional MSPs are “second class” members or “runners up”.
- 6.17 Concerns have also been expressed that AMS is not fully proportional, and that the “closed list” element gives too much power to the political parties as opposed to the electorate.

6.4 The Scottish Parliament (Constituencies) Act 2004.

6.5 See for example, submissions by the Scottish Rural Property and Business Association and Scottish Borders Council. The questionnaire comments also revealed a degree of support for a second chamber.

6.6 For example, submissions by the Electoral Reform Society Scotland, Lord Steel of Aikwood, and the Association of Electoral Administrators.

- 6.18 On the other hand, a number of submissions have provided direct support for retaining the current electoral system unchanged. There has been widespread support for at least the broad principles behind the current electoral system, in particular that it is far more proportional than the simple majority or “first-past-the-post” (FPTP) system used for the House of Commons. We certainly recognise that proportionality is now so integral to public understanding of the Parliament that any move to elect all MSPs by first-past-the-post is inconceivable.
- 6.19 As we noted in our First Report, this is a complex subject that the Commission was not set up to consider in detail. No electoral system is perfect, and while there may be flaws in the current AMS system, it does broadly succeed in combining some of the strengths of first-past-the-post, notably the close connection it establishes within a local area between member and constituents, with an overall composition that more fairly represents the balance of voting preferences across the country. That balance of advantages would not easily be obtained from any alternative system. It is also fair to acknowledge that the current system was the product of detailed negotiation and political compromise within the Constitutional Convention, and was a key element in the Government white paper that formed the basis of the 1997 referendum. For these reasons, we make no recommendations for changes to the Scottish Parliament’s electoral system at the present time.
- 6.20 We are also conscious that the Arbuthnott Commission, with a much narrower remit focused on this issue, reported only relatively recently (in 2006).<sup>6.7</sup> We note that, while it recommended retention of the current system for the time being, it also argued for a further review after two more elections (i.e. after 2011) to consider whether to move then to STV. We also note that it made other recommendations for changes to the current system which have not so far been put into effect. These included replacing the current “closed” lists with “open” lists (thus allowing electors to select individual party candidates in the regional vote, rather than just choosing a list of candidates in the order chosen by the party); revising the constituency and regional boundaries to align them with local authority areas; and continuing to allow parties the option of fielding the same individual as a constituency candidate and on the party list for the region containing that constituency (unlike in Wales, where this practice is now disallowed).<sup>6.8</sup>
- 6.21 On the assumption that there will indeed be a further review after the 2011 election, as Arbuthnott recommended, we do not consider it would be helpful or appropriate for us, in this report, to make recommendations about whether the Scottish Parliament’s electoral system should at that time be retained, varied or replaced.

6.7 Commission on Boundary Differences and Voting Systems (the Arbuthnott Commission), *Putting Citizens First: Boundaries, Voting and Representation in Scotland*, available at: <http://www.scotlandoffice.gov.uk/scotlandoffice/files/Final%20version%20of%20report.pdf>.

6.8 Government of Wales Act 2006, s.7(5). The UK Government, in its written evidence to the Commission (November 2008, chapter 3, paragraph 24), says that this “ended the anomaly” that previously existed in Wales, without saying whether it intends in due course to propose a similar change in Scotland.

## Part 6–C: The Parliament’s committee system

### Introduction

- 6.22 The Commission received very considerable evidence during the first phase of its work suggesting that the Scottish Parliament’s committees generally work well and, in particular, that they are more open and accessible than their UK Parliament counterparts.
- 6.23 One of those who was particularly positive about the role of committees was the Auditor General for Scotland, who told us that “the situation has been completely transformed ... the level of scrutiny is much more extensive and robust than that which existed before devolution.” He went on to make the interesting suggestion that there should be “an arrangement whereby each of the major portfolios of spend is subjected to planned scrutiny [perhaps] once a parliamentary session” by the Parliament’s subject committees (with some backing from Audit Scotland). We consider this to be a worthwhile suggestion that the Parliament might wish to take on board.<sup>6.9</sup>
- 6.24 Nevertheless, we also heard some concerns about how effective the Parliament’s committee system has proved to be as a check against executive dominance, with suggestions in particular that voting on legislation tends to break down along party lines. Some doubts have also been expressed about the Parliament’s system of “dual-purpose” committees that combine a general scrutiny function with responsibility for the detailed consideration of Bills.

### Substituting for a second chamber

- 6.25 Some of the doubts raised with the Commission about the ability of committees to act as a counterweight to executive dominance were raised in the context of the unicameral nature of the Parliament. Certainly, one of the arguments made at the time of devolution was that a powerful committee system in a proportionally-elected parliament would offer similar checks and balances to a second chamber.
- 6.26 As already noted, we see no case for introducing any second chamber or unelected element into the structure of the Scottish Parliament. Therefore, in addressing the concerns that have been raised with us in evidence, our priority is on seeing what scope there may be within a unicameral Parliament to improve the effectiveness of the committee system.
- 6.27 One of the issues for a unicameral system is partisanship. The Commission recognises that elected politicians will, quite legitimately, always give some priority to party loyalty, and that this puts some limit on their ability, when sitting as members of a committee, to provide fully detached scrutiny of issues on their merits. That is not a criticism of elected politicians – it is simply a reflection of what they are and what they do. As David McLetchie MSP put it,

“There is nothing wrong with being partisan. It is why we were elected. On occasions, I have argued that we are not partisan enough.”<sup>6.10</sup>

6.9 Bob Black, oral evidence, 20 March 2009, cols 523, 529.

6.10 Oral evidence from MSPs, 31 March 2009, p.13.

- 6.28 We acknowledge the dominance of the party system as a fact of political life in the UK, as in most other democracies. Indeed, we believe it has many advantages, for example in giving coherence and discipline to political debate, offering clear choices to the electorate and providing a structure liable to promote advancement on merit for aspiring politicians. However, we are also aware that it tends to promote an adversarial style of political discourse that many people find unattractive.
- 6.29 Excessive partisanship certainly has the potential to compromise the effectiveness of cross-party committees, making it difficult for them to reach consensus on many issues, and requiring conclusions either to be watered down to a lowest common denominator or pushed through by a narrow majority vote. However, we have taken limited evidence on whether this is a particular problem in Scottish Parliament committees. No doubt a partisan element is generally present to some extent, but much business is conducted consensually; reports are often agreed unanimously and substantial changes are made and concessions secured in consideration of Executive Bills, even in previous sessions when all committees had a majority of members from the coalition (that is, Executive) parties.
- 6.30 Another perceived benefit of a second chamber is that it can bring into the scrutiny of legislation and the conduct of inquiries people with relevant expertise and experience who are detached from the pressures of party politics.<sup>6.11</sup> Within a unicameral and directly-elected Parliament, these virtues can only be secured indirectly, by giving outside experts and commentators a direct part to play in committee business. This is most effectively done by conducting as much as possible of committee business in public, and by providing adequate opportunities for written and oral evidence at all stages of the legislative and inquiry process.
- 6.31 This already happens to a considerable extent at the Scottish Parliament. Committees conduct the large majority of their business in public, with private sessions normally restricted to consideration of draft reports and to housekeeping matters such as considering lines of questioning or deciding on candidates for the post of committee adviser. Inquiries are launched with public calls for evidence, and much of the time involved taken up with hearing oral evidence from the principal relevant interests. As a result, committee reports are substantially evidence-based (which does not – and should not – mean slavishly following the majority view of witnesses, but at least demonstrating that witnesses have been listened to and the weight of their arguments taken into account).

## Dual-purpose committees

- 6.32 Some questions have also been raised in evidence about the appropriateness of having “dual-purpose” committees that combine the functions of departmental “select” committees and those of public bill (formerly “standing”) committees conducting line-by-line scrutiny of Bills. This was a central recommendation of the Consultative Steering Group, and was intended to feed into the legislative process the merits of the select committee system – its ability to take a relatively non-partisan approach to an issue, bringing in outside expert opinion and building experience among the members over time.
- 6.33 This approach also fits well with the legislative process that the Parliament operates, in which the plenary debate on the general principles of the Bill (Stage 1) is informed by a committee report, itself based on an inquiry to which relevant stakeholder interests

6.11 See comments by Magnus Linklater: “Several bills have gone through the committee process that were never subjected to the rigorous analysis that takes place in – dare I say it? – the House of Lords, where bills are considered in enormous detail and with detachment. That is lacking in the Scottish Parliament system.” (oral evidence, 3 April, col 607)

have had an opportunity to contribute. In that context, it makes sense for the same committee that undertook the Stage 1 inquiry to go on to consider amendments at Stage 2. (There are some exceptions – the standing orders require separate ad hoc committees to be established to scrutinise Committee Bills at Stage 2, to provide some detachment from the committee which originated the Bill.)

- 6.34 We have little doubt from the evidence we have received that these dual-purpose committees generally work well. Nevertheless we recognise that there are some practical difficulties.
- 6.35 One of these concerns continuity of membership. We believe that, if committees are to be effective in fulfilling their dual-purpose role (conducting inquiries and scrutinising legislation), they need to build up expertise in the subject-matter over time, and this requires a relatively low rate of turnover of members. It also helps committees to act as an effective counterweight to the Executive if their conveners are seen as figures of influence and status. In practice, however, the ideal of continuity has been undermined by regular rotations of members of all parties, usually prompted by internal party re-shuffles.<sup>6.12</sup> The upshot is that only a small minority of committee members appointed at the beginning of a session are still members by the end of the session; and conveners (and deputy conveners) change with around the same frequency as other members.
- 6.36 We recognise that political parties will generally tend to see committee appointments – in particular, those of convener and deputy convener – as internal matters for themselves (effectively, as items of patronage for business managers); while appointment as a Minister or party spokesperson will generally be regarded by most MSPs as promotion from being a convener. Nevertheless, we would encourage all political parties to give greater recognition to the value of continuity in committee memberships (and convenerships in particular) by doing what they can to minimise changes in membership during a session (although we recognise that some level of “churn” is probably inevitable and even desirable).
- 6.37 Another practical difficulty that has arisen is one of legislative overload on particular committees and hence on their ability to strike a balance between legislative scrutiny and proactive inquiry work. This was particularly a problem in Session 1, when a raft of law reform and justice-related legislation dominated the work programme of the Justice and Home Affairs Committee to such an extent that it was eventually replaced by two separate Justice Committees (with identical remits), while a number of other subject committees also found their ability to undertake substantial inquiries of their own choosing heavily constrained by the volume of legislation. The problem is less acute in the current session by virtue of the smaller volume of Executive Bills (itself partly a product of there being a minority administration).
- 6.38 We recognise, however, that this is not an easy issue for the Parliament to address. Dual-purpose committees are a pragmatic, and probably necessary, response to the practical problem of operating a committee-based Parliament with only around 100 available members (once Presiding Officers and Ministers have been excluded). In order to accommodate separate scrutiny and legislation committees, it would presumably be necessary either to increase the number of committees – which in turn would either require committees to be smaller than they are already or require more MSPs to serve on two or more committees at once – or maintain the same number of committees overall, but with a reduced number of scrutiny committees with remits wider than those of the existing subject committees. It seems unlikely that such alterations would enhance the overall effectiveness of the committee system.

6.12 There is a convention that Ministers do not serve as committee members, while the opposition parties either have a policy of appointing their spokespersons to serve on the committees whose remits overlap most with their portfolio responsibilities (for example the Conservatives), or a policy of avoiding all such overlaps (for example Labour).

- 6.39 Where problems of legislative overload do arise, committees might make more use of the facility to establish sub-committees (which could be made simpler to use by removing the requirement to obtain the approval of the Parliamentary Bureau and the Parliament itself). In this way, work on a particular Bill could be undertaken in parallel with ongoing inquiry work.
- 6.40 Jack McConnell MSP told us that, in his view:
- “the system in Holyrood of combining the functions of select and Bill committees in Westminster into one committee in Holyrood, I think has probably made the consideration of Bills less partisan from time to time. But I think it’s almost certainly made the scrutiny role, the investigative role, of the committees more partisan than it should be, or would be at Westminster.”<sup>6.13</sup>
- 6.41 This is an interesting observation, and there may well be some substance in it. But we do not believe it necessarily challenges the basic principle of dual-purpose committees, since the implication is that separating out their functions would increase partisanship in committee consideration of Bills but decrease it in the context of committee inquiries. There may also be a range of other factors that have contributed to any greater observed partisanship in committee inquiries at the Scottish Parliament compared with the House of Commons.
- 6.42 Overall, despite some concerns, we believe the Parliament’s system of dual-purpose committees remains a great strength and is in any case almost certainly a necessary response to the particular circumstances in which the Parliament must operate.

## Conclusion

- 6.43 In any unicameral parliament, and in a political culture which is dominated by the larger parties, there will be limits on the extent to which any committee system, comprised of the same members as the Chamber, can act as a detached scrutineer and an effective counterweight to the executive. Nevertheless, most of the evidence the Commission has received does regard the committee system – including its structure of dual-purpose committees – as generally effective. No doubt the system could be improved, but the drivers for change are likely to be less about the formal structures of the Parliament or its rules, and more about its culture and working practices, which are not easily influenced by external strictures. The committee system could work better than it does, but the motivation to achieve that can really only come from within.

**RECOMMENDATION 6.1:** In relation to the Parliament’s committee system:

- a. The structure of dual-purpose committees established both to carry out investigative inquiries and to undertake the detailed scrutiny of legislation, should be maintained.
- b. The level of turnover of committee memberships during a session should be minimised, in order to enable committee members to build expertise.
- c. Committees should have the facility to establish sub-committees to address temporary problems of legislative overload, without this requiring the prior approval of the Parliament as a whole.

6.13 Oral evidence, 1 October 2008, page 4: <http://www.commissiononscottishdevolution.org.uk/uploads/transcript-1-October.pdf>.

## Part 6–D: Procedures for scrutinising legislation

### Background

6.44 The evidence the Commission has received has included a number of concerns about the robustness of the Scottish Parliament’s procedures for scrutinising legislation. In particular, we have heard concerns that, despite the focus early on in the process on consultation and an evidence-based approach, the later amending stages are often rushed, giving outside interests insufficient opportunity to make representations. A related concern is that new provisions are sometimes introduced late in the process, shortly before the legislation is passed, thereby bypassing detailed scrutiny in committee.

### The existing rules

6.45 As noted in Part 1 (paragraphs 1.90-1), the Parliament’s rules provide for a three-stage scrutiny process for public Bills (with Members’ Bills and Committee Bills subject to some additional pre-introduction requirements).<sup>6.14</sup>

6.46 These rules already provide mechanisms to allow the basic three-stage process to be extended in appropriate circumstances:

- at Stage 3, the member in charge (or the Minister, if different) may, immediately after the last amendment has been dealt with, move that the debate on passing the Bill be deferred to a later day. If this is agreed to (or if that debate has been scheduled for a later day from the outset), the member in charge (and the Minister, if different) has a limited opportunity to lodge further amendments to be considered at the resumed proceedings;
- also at Stage 3, the member in charge of the Bill may propose that up to half the sections and schedules of a Bill may be referred back to committee for further Stage 2 consideration;
- a Reconsideration Stage may be required after the Bill has been passed – but only if the Law Officers make a reference on a question of legislative competence under section 33 of the Act or the Secretary of State makes an order under section 35, and then only to permit the Bill to be amended to address the issue that has given rise to the reference or order.<sup>6.15</sup>

6.47 The facility to defer the Stage 3 debate at the last minute has been used only once, and the facility to refer a Bill back for further Stage 2 consideration has never been used. There has also never been a Reconsideration Stage on any Bill.

6.14 The relevant rules are set out in Chapter 9 of the Parliament’s standing orders, available at: <http://www.scottish.parliament.uk/business/so/sto-c.htm>.

6.15 Rules 9.8.5C and D; Rules 9.8.6-8; Rule 9.9.

## Notice-periods for amendments to Bills

- 6.48 A regular complaint from organisations that take an active interest in new legislation is the lack of time available between publication of amendments to Bills and the proceedings at which they are debated and decided – and hence the amount of time available to such organisations to consider the implications of amendments and to make representations to MSPs about them.
- 6.49 The Parliament has in fact recognised and responded to this concern, and has changed its standing orders on two previous occasions to extend the notice-periods involved at one or both amending stages.<sup>6.16</sup>
- 6.50 Current procedures are as follows:
- At Stage 2 the rules specify a “final lodging-day” for amendments to be taken during each week of the stage. This is the third sitting day before the Stage 2 committee meeting that week (or before the first such meeting).<sup>6.17</sup> There must also be at least 11 sitting days between the day Stage 1 is completed and the day Stage 2 starts.<sup>6.18</sup>
  - At Stage 3 the final lodging-day is the fourth sitting day before the proceedings.<sup>6.19</sup> There must be at least nine sitting days between the day Stage 2 is completed and the day Stage 3 starts.<sup>6.20</sup>
  - At both amending stages, there is a facility for lodging “manuscript amendments” (defined as any amendment lodged after the normal deadline), subject to the committee convener (at Stage 2) or Presiding Officer (at Stage 3) agreeing to allow the amendment to be taken, taking account of the reasons for its late lodging and the disadvantages of the reduced notice.
- 6.51 We recognise that this is a complex area, and that it is difficult to make changes without upsetting the careful balance struck by the current rules.
- 6.52 At Stage 2, extending the notice-period for amendments would either make the time available for lodging new amendments between weekly meetings unacceptably short, or would make it necessary to move to fortnightly Stage 2 meetings (which would substantially delay larger Bills). It might also require an extension of the minimum interval between Stage 1 and Stage 2, to protect the amount of time available for lodging amendments before the first Stage 2 meeting. This is important not just for MSPs but also for external stakeholders, who may use that time to discuss with MSPs the amendments they would like to see lodged.
- 6.53 There may be less of a problem with extending the notice-period for Stage 3 amendments, as Stage 3 is normally taken on a single day. However, any extension would make it more difficult to split the Stage 3 amending proceedings over more than one week when required, at least without losing the right to lodge further amendments after the first day. It would also almost certainly require an extension to the current minimum interval between Stage 2 and Stage 3.

6.16 A further extension to the notice-period for Stage 3 amendments was proposed by the Parliament’s Procedures Committee at the end of Session 2, but this was not implemented.

6.17 Rule 9.10.2. For example, if the committee meets on Wednesday mornings, the final lodging-day is normally the previous Friday.

6.18 Rule 9.5.3A.

6.19 Rule 9.10.2A. For example, if Stage 3 is scheduled for a Thursday, the final lodging-day is normally the previous Friday.

6.20 Rule 9.5.3B.

- 6.54 At either Stage, an earlier lodging-deadline is likely to increase the number of manuscript amendments lodged after the deadline. We recognise that such amendments can be important in enabling last-minute compromises to be reached and problems to be resolved, but there is always a risk associated with legislating in haste. It should therefore be a measure of the general effectiveness of the legislative process that manuscript amendments are only rarely employed.
- 6.55 Extending the intervals between stages increases the overall time required for the passage of legislation, making timetabling of business more complex and reducing the overall responsiveness of the legislative process. There is a difficult balance to be struck here that enables MSPs and Ministers to get legislation through reasonably quickly, while giving stakeholders reasonable opportunities to contribute throughout the process. Nobody wants the whole process to become unduly cumbersome and bureaucratic.
- 6.56 Taking into account all of these considerations, we do not see a clear case for recommending further extension of the notice-period for Stage 2 amendments, and only a limited case for such an extension at Stage 3, recognising that this would have some cost in terms of slowing down the overall process of scrutiny.<sup>6.21</sup>
- 6.57 The Commission therefore makes no specific recommendation on the issue of the notice-periods for amendments, but we would encourage the Parliament's Standards, Procedures and Public Appointments Committee to keep it under active review.

## Splitting Stage 3

- 6.58 As noted above, the Parliament's normal practice has been to timetable all of Stage 3 to take place on a single day, so that the debate on passing the Bill usually begins immediately after the disposal of the last amendment. With some more controversial Bills, this has sometimes resulted in a final decision being taken to pass a Bill only very shortly after some quite significant changes to its details have been agreed, with no real opportunity for MSPs or external stakeholders to consider the final shape of the Bill or to satisfy themselves that it achieves its intended purpose and is free from anomalies or technical defects.
- 6.59 To address these concerns, the Law Society of Scotland, in particular, has argued that Stage 3 should routinely be split into two separate proceedings, on different days, to open up a gap between the second main amending stage and the decision on whether to pass the Bill.
- 6.60 As already noted, the standing orders allow for some flexibility in this respect by providing an opportunity for the member in charge of the Bill (and the relevant Minister, in the case of a non-Executive Bill) to move a motion immediately after the last amendment to defer the final debate to a later day (Rule 9.8.5C). If this is agreed to, the standing orders then provide (Rule 9.8.5D) for a further limited opportunity for the member in charge of the Bill (and the relevant Minister, in the case of a non-Executive Bill) to lodge and move amendments at the beginning of the resumed Stage 3 proceedings. Such amendments may only be "for the purpose of clarifying uncertainties or giving effect to commitments given at the earlier proceedings at Stage 3" – and so cannot be used to reverse policy defeats, or to introduce novel provisions.

6.21 Such a move was in fact proposed by the Parliament's Procedures Committee at the end of Session 2 – 11th Report, 2006, Review of Parliamentary Time, paragraphs 110-118, <http://www.scottish.parliament.uk/business/committees/procedures/reports-06/pr06-11-Vol01-00.htm> - but the report was not debated, and the proposal has therefore fallen into abeyance.

- 6.61 This additional amending opportunity is essential, since there is clearly no point in providing a “period of reflection” between the second main amending stage and the decision to pass the Bill, unless the option exists to correct any problems that are identified during that period.
- 6.62 However, this ability to split Stage 3 at the last minute has been used only once (on a controversial Committee Bill), presumably because of the detrimental impact it has on the business programme, and the inevitable delay in the timescale for bringing the new legislation into force. In other words, it seems to be regarded as a procedural back-stop, to be used only in exceptional circumstances (for example where an amendment with uncertain legal implications has been unexpectedly agreed to).
- 6.63 In addition, the rules allow Stage 3 to be scheduled in advance over two different days, with the amending proceedings on one day and the final debate on a later day – and, in that event, give the member-in-charge (or Minister) the same additional opportunity to lodge technical amendments for consideration immediately before the debate on whether to pass the Bill. However, this option has never been used, presumably because Ministers generally want to see their legislation completed at the earliest opportunity, and have usually been sufficiently confident (when the Stage 3 proceedings are being slotted into the Parliamentary business programme) that the decisions on Stage 3 amendments will be the ones they were hoping for (that is, that all and only the amendments they consider legally or politically essential will be agreed to).
- 6.64 We are convinced that there is a strong case for the Parliament to amend its rules so that the splitting of Stage 3 moves from being a rarely used procedural possibility, to becoming the normal, if not invariable, practice.

**RECOMMENDATION 6.2:** The current three-stage Bill process should be changed to a four-stage process, with Stage 3 becoming limited to a second main amending stage, taken in the Chamber, while the final debate on whether to pass the Bill would become Stage 4.

This should be done in such a way that Stage 4 would provide a similar, limited, opportunity for further amendments as is already provided in Rule 9.8.5D.

- 6.65 We believe this would provide an important additional safeguard for the quality of the Parliament’s legislation, giving both MSPs and the wider public an opportunity to consider the full implications of Stage 3 amendments before taking the final decision to pass the Bill into law (and a final opportunity to tidy up any loose ends or inconsistencies that may be identified). The small amount of additional time required overall is, we believe, a small price to pay – and it should be far easier to find that extra time when it needs to be planned for from the outset than it would be under the current arrangements to add it on at the last minute.
- 6.66 We recognise that it must be for the Parliament itself to work out (through its Standards, Procedures and Public Appointments Committee) the detail of how to move to a four-stage legislative process.<sup>6.22</sup> In doing so, it may wish to allow for exceptions being made in appropriate circumstances – for example to allow Stage 4 to be re-scheduled for the same day as Stage 3 if no Stage 3 amendments are in fact lodged by the deadline – although we would expect the rules at least to create a clear presumption that the two stages will be on different days, with a reasonable time period between them. We also do not envisage a move to a four-stage process limiting the Parliament’s ability to expedite proceedings on Bills in exceptional cases through its “Emergency Bills” procedure.

6.22 The Parliament’s Procedures Committee in fact considered such a move in 2006 but did not at that time recommend it – 11th Report, 2006, Review of Parliamentary Time, para 119: <http://www.scottish.parliament.uk/business/committees/procedures/reports-06/pr06-11-Vol01-00.htm>.

- 6.67 Implementing this recommendation would not require any change to the Scotland Act, as the relevant provision (section 36) specifies three stages as a minimum and does not preclude additional stages.
- 6.68 As the Law Society of Scotland itself noted in evidence, a four-stage Bill process as outlined above would be roughly equivalent to the process that applies in the House of Lords – with Stage 3 becoming equivalent to Report Stage and Stage 4 to Third Reading.<sup>6.23</sup> This seems to us a useful benchmark for a unicameral Parliament based on the Westminster model – that it provides at least as many amending opportunities as one House, if only half as many as that Parliament taken as a whole.
- 6.69 A final benefit of splitting Stage 3 is that it should reduce the time pressure on the amendment proceedings – which at the moment are normally timetabled so as to protect at least the last half-hour for the debate on passing the Bill. It is clearly important that there is adequate time available for debating Stage 3 amendments, particularly where issues of substance or political controversy remain to be resolved. We note in this connection that the Parliament reformed its procedures in 2005 to ensure at least that all members who had lodged amendments have a minimum right to speak on them, and to facilitate extensions to any agreed timetabling motions where it becomes clear that extra time is needed.<sup>6.24</sup> We also note that it is largely up to the Parliamentary Bureau (the party business managers) to ensure that sufficient time is allocated in the first place for the Stage 3 amendments, even if this means pushing back Decision Time beyond its normal time of 5 pm, or even scheduling the amendment proceedings over more than one day. We would certainly encourage the Parliament to be prepared to sit later when debating the details of legislation whenever that proves necessary.

## Novel amendments at later stages

- 6.70 Another issue that the Commission has considered is whether to prevent amendments being made to a Bill at later stages of the legislative process if they would raise substantial new issues not considered at earlier stages.
- 6.71 The concern here is that there is a loophole in the current process, which generally puts considerable emphasis on consultation and engagement with external stakeholders throughout the legislative process (an expectation of pre-introduction consultation, the requirement for an evidence-based committee inquiry at Stage 1, and concern to allow long enough notice-periods for amendments at Stages 2 and 3). In this context, it is arguably anomalous that the procedures do not prevent novel provisions being introduced by amendment, including at Stage 3, even where their policy implications were not subject to scrutiny at earlier stages.
- 6.72 In considering this question, we have attempted to strike a careful balance. On the one hand, we understand the objection to novel amendments which appear to bypass proper scrutiny – particularly at later stages, where there is the least opportunity for scrutiny and hence, arguably, the greatest risk of passing ill-considered legislation that causes problems further down the line. But, on the other hand, too rigid a restriction on introducing new ideas by amendment is liable to prove inflexible and unresponsive – and, given that Executive Bills are always likely to constitute the Parliament’s main legislative output, would effectively give Ministers an even greater monopoly of legislative initiative than they have already.

6.23 The Parliament’s Stage 1 is already broadly comparable to Second Reading (although with the important addition of a committee inquiry preceding the plenary debate) while Stage 2 is equivalent to Committee Stage. The limited opportunity for amendments at Stage 4 that we envisage makes it closer to Third Reading in the Lords than to the equivalent stage in the Commons, which is routinely taken on the same day as Report Stage.

6.24 Rules 9.8.4A, 5A and 5B; Procedures Committee 7th Report, 2004.

- 6.73 We are also conscious that the Parliament’s standing orders already require amendments at all stages, as one of a number of criteria of admissibility, to be “relevant” to the Bill and to the provision to be amended. The judgment as to what is relevant in each case is exercised in the first instance by the clerks, but with an appeal to the Presiding Officer (or committee convener, at Stage 2) in a case of dispute (Rule 9.10.4). Despite the inherent difficulties of applying this criterion, we recognise that it is an important safeguard against Bills being hijacked by those who see a Bill already in progress as a convenient vehicle to secure changes to the law more quickly and easily than would otherwise be possible, and hence it is an important guarantee of the integrity of the parliamentary legislative process. However, this existing rule does not necessarily preclude amendments that raise previously un-scrutinised issues so long as those issues are deemed to fall within the overall “scope” of the legislation.<sup>6.25</sup>
- 6.74 At Stage 2, we do not see a good case for imposing any additional restriction on MSPs’ ability to raise new issues by amendment (within the limits already imposed by the admissibility criteria). This is partly because committees have the power (subject to timetable constraints) to take evidence on amendments before formally debating them – thus providing some substitute for the scrutiny process provided at Stage 1 for the other provisions of the Bill. In addition, the existence of a further amending stage after Stage 2 guarantees that stakeholders will have at least some opportunity to make representations to MSPs about the implications of any new provision introduced by amendment, and for corrections to be made (or the provision removed again), before the Bill becomes law.
- 6.75 Neither of these considerations applies at Stage 3, so we can see a much stronger case for some limitation on novel amendments in the context of the current three-stage process (where Stage 3 is the final amending stage). We also note in this context that the Presiding Officer does not appear to treat the fact that a Stage 3 amendment would introduce novel provision into the Bill as a reason for not selecting it.<sup>6.26</sup>
- 6.76 The situation changes again in the context of the four-stage process that we recommend, for other reasons, above. The existence of an additional (albeit limited) opportunity for reflection and then correction at Stage 4 would undoubtedly reduce the objection to introducing novel material at Stage 3. (And the existing Rule 9.8.5D limits on Stage 4 amendments would already be sufficient to prevent novel material being introduced at that stage.) Nevertheless, the objection to introducing novel material at Stage 3 remains greater than it is at Stage 2, even if there is also a Stage 4 – partly because of the limited time available to consider the implications of the new provisions and partly because of the tighter limits on the amendments that could then be moved at Stage 4 (which would allow defects to be corrected, but would not allow a novel provision inserted at Stage 3 to be removed again entirely).
- 6.77 This suggests that there is still some case for at least discouraging novel amendments at Stage 3, even if there is also to be a separate and later Stage 4. However, we also recognise the potential disadvantages of ruling out such amendments altogether, principally the lack of flexibility to respond quickly to legislative problems that have only come to light during the passage of a relevant Bill, and the additional burden that applying it would impose on the Presiding Officer.

6.25 Rule 9.10.5(b). On how the rule is applied, see the Parliament’s Guidance on Public Bills, paras 4.11-4.18: <http://www.scottish.parliament.uk/business/bills/billguidance/gpb-2.htm#42>.

6.26 The criteria that the Presiding Officer applies in selecting Stage 3 amendments are set out in paragraph 4.61 of the Guidance on Public Bills.

- 6.78 We therefore recommend making it easier for the Parliament, at Stage 3, to refer a Bill back to committee if substantial new provisions are added by amendment. One way of doing this is to extend the existing power (in Rule 9.8.6) to propose such a referral – which only the Bill’s promoter may currently exercise – to any MSP.

**RECOMMENDATION 6.3:** The Parliament should amend its rules so that any MSP has the right to propose, at the conclusions of the Stage 3 amendment proceedings, that parts of a Bill be referred back to committee for further Stage 2 consideration.

- 6.79 In addition, we propose that the Presiding Officer be given the power (at the time that he selects amendments for debate at Stage 3) to identify those amendments that, in his view, raise such significant new issues that there is a case for consideration by a committee before they can be passed into law. This is not about changing the Presiding Officer’s selection criteria: amendments categorised as we propose would still be available for the Parliament to debate and decide upon. Instead, the standing orders should specify that agreeing to any such amendment would automatically trigger a referral of relevant provisions of the Bill back to committee for further Stage 2 scrutiny – unless the Bill’s promoter persuades the Parliament otherwise (by moving a motion to that effect).
- 6.80 Under the present rules, there is no referral back to committee unless (at the end of the Stage 3 amendment proceedings) the Parliament decides that there should be. On this recommendation, a decision by the Parliament to agree to one or more novel amendments would reverse that presumption – there would then be an automatic referral back to committee unless the Parliament decides there should not be. This maintains the flexibility we consider important, as the Parliament still makes the final decision; but it puts the onus on the Bill’s promoter to persuade MSPs that the merits of subjecting novel provisions to committee scrutiny are outweighed on this occasion (for example, because there is an overriding interest in getting the Bill passed into law without further delay). That may be the right decision in some cases – but this will at least ensure that it is deliberately taken in a transparent and accountable way.

**RECOMMENDATION 6.4:** The Presiding Officer should be able to identify in advance of Stage 3 amendments that (in his view) raise substantial issues not considered at earlier stages. If, at the end of the amendment proceedings, any such amendment has been agreed to, relevant provisions of the Bill should be referred back to committee for further Stage 2 consideration unless the Parliament decides otherwise (on a motion that may be moved only by the member in charge of the Bill).

- 6.81 We believe this new mechanism will provide a useful additional safeguard in the legislative process. It requires the Presiding Officer to exercise an important role in protecting the integrity of the scrutiny process, but one that we believe is consistent with his existing responsibilities, and that does not unduly compromise the impartiality of his role. Unlike his existing power of selection, the exercise of this new power would not in itself limit the Parliament’s discretion – decisions about whether to change the law, and decisions about whether additional committee scrutiny is required, remain decisions for the Parliament as a whole.

## Part 6–E: Statutory mechanisms for *vires* compliance

### Context and background

- 6.82 As noted in Part 1 (paragraphs 1.130-1), the Scotland Act provides a set of mechanisms to help ensure that the Parliament only legislates within the confines of its legislative competence:
- a requirement on a Scottish Minister introducing a Bill to make a statement at the time of introduction that the Bill is within the Parliament’s legislative competence (section 31(1));
  - a requirement on the Presiding Officer to make a statement at the time of introduction of any Bill on whether, in his view, the Bill is within the Parliament’s legislative competence (section 31(2));
  - a right exercisable by three UK and Scottish Law Officers (the Attorney General, the Advocate General for Scotland and the Lord Advocate) to refer a question about the *vires* of a Bill passed by the Parliament to the Judicial Committee of the Privy Council (soon to be to the Supreme Court) within four weeks of the Bill being passed, thus preventing it being sent for Royal Assent until the matter is resolved (section 33).
- 6.83 The Parliament’s standing orders require the Ministerial statement to be published as an accompanying document to any Executive Bill. In practice, has always been single, formulaic sentence (“In my view, the provisions of the XYZ Bill would be within the legislative competence of the Scottish Parliament”); reasons have never been given, and the legal advice on which it is based never made public. Although the statement is made by the Minister, it is understood that the Lord Advocate is always closely involved in reaching a view.
- 6.84 The standing orders require the Presiding Officer’s statement to be published as an accompanying document, and also require the Presiding Officer to state reasons for any “negative” decision. The Presiding Officer statement in all “positive” cases is a single formulaic sentence using the same form of words as the Ministerial statement. Reasons have never been given for a “positive” statement, and the legal advice on which it is based is not published.<sup>6.27</sup>
- 6.85 We believe it is important in this context to recognise that both statements are expressions of opinion rather than definitive rulings (which could only be given by the courts). It is significant that neither the Act nor the Parliament’s Standing Orders prevent the introduction of a Bill that the Presiding Officer considers to be *ultra vires*.<sup>6.28</sup>

6.27 The Presiding Officer has so far made a negative statement only in relation to two Members’ Bills at the end of Session 2 – Tommy Sheridan’s Provision of Rail Passenger Services (Scotland) Bill and Adam Ingram’s Civil Appeals (Scotland) Bill. These Bills were introduced, despite the negative statements, but both were defeated at Stage 1 on motions by the lead committees under Rule 9.14.18 (on the grounds that, taking account of the Presiding Officer’s statement on competence, the Bills appeared to be clearly outwith the Parliament’s legislative competence and unlikely to be capable of amendment to bring them within competence).

6.28 This was a change to the Scotland Bill made at a relatively late stage; in the Bill as originally introduced, a “negative” statement by the Presiding Officer would normally have been a bar to introduction (although subject to over-ride by the Parliament).

- 6.86 The Law Officers' right to refer a Bill under section 33 has not so far been exercised but, if it is, the Act allows the Parliament to request a withdrawal of the reference to allow it to hold a "Reconsideration Stage" on the Bill with a view to amending the provision that gave rise to the reference (although the Law Officers then get a fresh opportunity to consider the amended Bill and make a further reference if still not satisfied).
- 6.87 We consider below some concerns made in evidence to us about the adequacy of this statutory system for ensuring that the Parliament legislates only within its competence.

## Statements on legislative competence

- 6.88 Iain Jamieson, a former senior Scottish Office lawyer made a number of detailed criticisms in his submission of the requirement for a statement by the Presiding Officer, concluding that the requirement should be removed as it served no useful purpose.<sup>6.29</sup> The Law Society of Scotland argued in oral and written evidence that the Presiding Officer should be required to give reasons for any statement that a Bill is within competence.<sup>6.30</sup>
- 6.89 We see no convincing reason to support the call for repeal of section 31(2). We believe that the requirement for a Presiding Officer statement – like the similar requirement for a Ministerial statement under section 31(1) – helps ensure that vires issues are thoroughly considered during the drafting process. Although no Executive Bill has so far been given a "negative" statement by the Presiding Officer, we understand that there have been a number of robust exchanges behind the scenes between Parliament and Scottish Government lawyers, which have led to changes to draft Bills prior to introduction. (We understand that UK Government lawyers are also sometimes involved in these exchanges, by virtue of the role of the Advocate General for Scotland under section 33.) We recognise that this is not a particularly transparent process, but it appears to be effective in identifying and resolving potential problems.
- 6.90 We have given particular consideration to the argument advanced by the Law Society of Scotland that the Presiding Officer should be required to give reasons for a "positive" statement as well as for a "negative" one. One of our initial concerns about this suggestion was that, given the scheme of the Act, Bills can be presumed to be within competence unless they can be shown to intrude on a reserved matter, contravene ECHR or community law, or otherwise breach one of the statutory criteria of competence. This makes it relatively easy to give reasons for thinking a Bill is outside competence (as the Standing Orders require the Presiding Officer to do), but more difficult to give reasons for a Bill being within competence (other than that there is no reason to think it outside competence). Our other main doubt was that exposing to public view any grey areas in relation to competence could provide ammunition to those who are politically opposed to the Bill, either during its passage, or later (by providing a basis for legal challenge). Although the Law Society of Scotland was able to respond to these concerns quite effectively during oral evidence, arguing that a concise set of reasons could be both meaningful and useful, we remain unconvinced that the solution proposed was appropriate.<sup>6.31</sup>

6.29 <http://www.commissiononscottishdevolution.org.uk/uploads/2008-09-02-jamieson.pdf>.

6.30 Written submission of March 2009, page 4; see also oral evidence of 22 October, pages 4-6: <http://www.commissiononscottishdevolution.org.uk/uploads/transcript-22-October.pdf>.

6.31 See transcript of 20 February, cols 447-449: <http://www.commissiononscottishdevolution.org.uk/uploads/transcript-20-February.pdf>.

- 6.91 Our attention was then drawn to recent practice in the UK Parliament, where the Explanatory Notes to Government Bills now provide an outline (sometimes quite detailed) of the thinking behind the formulaic ECHR-compatibility statement that is required for all such Bills under the Human Rights Act. We see this as a useful precedent, and suggest that it offers a more appropriate way of addressing the Law Society of Scotland’s underlying concern to provide a general public indication of where competence issues with a Scottish Parliament Bill arise.
- 6.92 To ensure that this approach is applicable to all Bills that are introduced, we recommend that the existing statutory requirement (section 31(1)) to make a statement that a Bill is within the Parliament’s legislative competence be extended to anyone introducing a Bill – that is, to backbench MSPs introducing Members’ Bills, committee conveners introducing Committee Bills and private individuals and organisations introducing Private Bills, as well as to Ministers. In addition, the Parliament’s standing orders should require the Explanatory Notes that must be published alongside all Bills on introduction to provide a general indication of the main considerations that informed that statement.<sup>6.32</sup> We would expect the Parliament’s Standards, Procedures and Public Appointments Committee to consider carefully how this new obligation should be expressed, recognising that the level of detail that is appropriate may vary greatly according to the circumstances.

**RECOMMENDATION 6.5:** Section 31(1) of the Act should be amended to require any person introducing a Bill in the Parliament to make a statement that it is (in that person’s opinion) within the Parliament’s legislative competence.

**RECOMMENDATION 6.6:** The Explanatory Notes published with a Bill should give a general account of the main considerations that informed the statement on legislative competence under section 31(1).

- 6.93 Accordingly, we recommend no change to the obligations on the Presiding Officer – who should continue to be subject to a statutory requirement to make a statement in every instance, and a standing order requirement to give reasons to support a “negative” statement only. It would remain open to the Presiding Officer, as it is already, to add reasons to any “positive” statement if he chose, but we consider it unlikely (in the absence of any requirement or clear expectation) that he would do so.

6.32 The standing orders already require Executive Bills to be accompanied by a Policy Memorandum which, among other things, is required to include an assessment of the Bill’s impact on human rights – a requirement that would presumably no longer be necessary if our recommendation was implemented.

## Law Officers' power to refer issues of competence

- 6.94 Iain Jamieson also argued for the repeal of section 33 of the Act, but on the basis of less detailed arguments than those he advanced for the repeal of section 31(2).<sup>6.33</sup> Here, too, we were unconvinced. The fact that no reference to the Judicial Committee has so far been made does not in itself seem like a good reason to remove what was always intended to be an ultimate “back stop” safeguard. Without this power, the only way to prevent *ultra vires* legislation coming into effect would be through court action – which is liable to be slow, uncertain and expensive. Nor do we see a strong objection in the fact that any such reference would consist of a hypothetical question of law, to be considered outside the context of the facts of a particular case. Questions decided by the highest courts (including the Judicial Committee) usually do involve points of law which have, in effect, been abstracted from the details of a case by the intervening appeal process. We therefore see no reason why the Judicial Committee (or Supreme Court) should have an objection to addressing matters referred to it in the manner envisaged by section 33.
- 6.95 Indeed, we would go further. It seems to us entirely appropriate that there should be a formal mechanism for *vires* compliance at the end of the legislative process as well as at the beginning. This is partly because – as Iain Jamieson acknowledged – there is no statutory or procedural mechanism within the Parliament to prevent a Bill that is within competence on introduction being amended during its passage in ways that render it *ultra vires*. We recognise that it would be both undesirable and impractical to try to police individual amendments on *vires* grounds, and therefore strongly support the retention of section 33, while also welcoming the fact that it has not so far been used – something that seems to us an effective demonstration that the Parliament’s legislative process is working well.

6.33 See page 8 of his submission under the heading “Section 33”.

## Part 6–F: Statutory constraints on Parliamentary procedure and operations

### Context and background

6.96 The Scotland Act generally applies a fairly light touch in terms of dictating how the Parliament operates. This is consistent with the Government’s stated aim in the white paper:

“The Government intend the minimum of legislation to establish the Scottish Parliament; and wherever possible to leave the Scottish Parliament to decide for itself what its procedures should be. [...]

“The Scottish Parliament will be responsible for drawing up and adopting standing orders. The Government intend that these Standing Orders be designed to ensure openness, responsiveness and accountability. There will be minimum requirements covering stages of Bills, Crown interests, preservation of order, Members’ pecuniary interests, reporting of proceedings, public access and committees.” (paras 9.1, 9.8)

6.97 Nevertheless, given our remit to review the provisions of the Act we have given some consideration to the various fixed points it contains which, in one way or another, constrain the Parliament’s ability to determine its own way of working. While most of these are uncontroversial and have not been raised with us in evidence, there are a few that we highlighted in Chapter 8 of our First Report, and which we have since examined further.

6.98 Our First Report also discussed the more general idea that, while it was understandable for the UK Parliament to legislate in 1998 so as to require the new Parliament’s standing orders to include certain specified provisions, there could be merit in now loosening or even removing some of these constraints. On the one hand, we recognised the merits of handing over to a maturing Parliament greater responsibility for how it conducts its own business; but we also acknowledged the case for retaining some framework of minimum external guarantees for the integrity of the Parliamentary process.

### Setting the framework

6.99 It is part of the definition of a devolved Parliament that it gains its status and its powers from a “higher” (nation-state) level, and can only operate within certain externally-imposed confines. At the same time, it is consistent with the rationale for devolution – which is about bringing decision-making closer to the local level, and allowing governance to be conducted in accordance with local needs and preferences – to give the Parliament substantial control over how it operates. It was clearly part of the UK Government’s intention for the Scottish Parliament that it should embrace progressive and innovative ways of working, and it needs a considerable degree of autonomy and flexibility if that is to be achieved.

6.100 The question is therefore about where to strike the balance between a set of parameters that are necessary to enable the Parliament to function at all, or to give it an appropriate remit, and an appropriate latitude within those parameters to let it develop its own distinctive ways of fulfilling that remit.

- 6.101 The Scotland Act struck a particular balance at a time when the priority was to provide enough of a framework to get a new institution off to a sound start. We recognise that the Parliament now has a solid track-record of stable and effective operation, and that this might suggest that it would now be appropriate to loosen or remove some of the external constraints – without this in any way implying that it was wrong or inappropriate to impose them in the circumstances of 1998.
- 6.102 But we see this also from another perspective. The Scottish Parliament's status as a devolved institution within a larger structure of governance means that it does not have to be self-regulating in the way that UK Parliament has traditionally been. There is now a widespread recognition that politicians, like other groups of people in public life, should not be expected to regulate aspects of their own affairs in which they have a direct interest, and that systems of independent oversight, or external checks and balances, are vital to preserving public confidence.
- 6.103 Applying this approach to the Parliament, we do not think there should be a presumption that the more it matures the more it should be left to its own devices. Checks and balances are needed to ensure that the Parliament's basic functions of legislation, scrutiny and debate are fulfilled properly, and we see the maintenance of some externally-imposed structure as an important element in achieving that outcome, both now and in the longer term. This is not because we believe MSPs are incapable now or in the future of doing these things for themselves, but because it offers a better safeguard of public confidence in the system.
- 6.104 Our starting-point, therefore, is a presumption that these provisions of the Act should be retained unless there is already evidence that they are causing practical difficulties, or unless some adjustment of the wording might better enable them to achieve their purpose.

## Presiding Officers

- 6.105 The point about which we have received perhaps the clearest evidence has been the requirement in section 19(1) for there to be exactly two Deputy Presiding Officers (DPOs). Former Presiding Officer, Sir David Steel, referred to the practical difficulties this caused during Session 1 when he was temporarily ill, and suggested that the Parliament should have the ability to appoint an additional DPO as required. The current incumbent, Alex Fergusson MSP, backed this idea, suggesting that circumstances in which one or more of the three current office-holders were ill or otherwise unavailable at the same time could have a detrimental impact on parliamentary business.<sup>6.34</sup>
- 6.106 We can see no good reason for having such a rigid limit on numbers imposed at the level of the Scotland Act. We therefore recommend introducing additional flexibility into the Act by allowing for the appointment of temporary additional DPOs when required.
- 6.107 We are also aware that another aspect of section 19(1) – namely the requirement to elect a Presiding Officer and deputies at the Parliament's first meeting following a general election – presented practical difficulties at the beginning of the present session, when the close electoral result initially made the main parties reluctant to relinquish one of their members for the non-voting role of Presiding Officer. The statutory obstacle was, in the event, circumvented by deeming the first meeting to be adjourned and then continued on a later day – but this can hardly be regarded as a satisfactory long-term solution. We therefore recommend a further amendment to this

6.34 Note of evidence session with Lord Steel of Aikwood, paragraph 15; submission by the Scottish Parliament, page 2.

section of the Act to introduce an appropriate degree of flexibility. It could, for example, require that the first substantive item of business for the newly-elected MSPs (once they have taken the oath) is to elect a Presiding Officer, and that this must be completed within (say) 14 days of the election.

**RECOMMENDATION 6.7:** Section 19(1) of the Scotland Act should be amended so as to loosen the requirement on the Parliament to appoint a Presiding Officer and deputies at the first meeting of a new session, and to enable additional deputies to be appointed if and when that becomes appropriate.

## Members' interests

- 6.108 Section 39 of the Act is quite prescriptive about the type of members' interests regime that the Parliament must impose (by means of legislation). We are aware that this caused some difficulties when, in Session 2, the Parliament replaced the earlier Scotland Act transitional order with its own Act.<sup>6.35</sup>
- 6.109 A particular problem was that the Scotland Act directly proscribes certain conduct (failure to register or declare certain interests, paid advocacy) and makes it a criminal offence subject to a specified level of penalty. This prevented the Parliament, in passing its own legislation, from providing defences to certain offences in appropriate circumstances – for example, when a member has a reasonable excuse for failing to register an interest within the specified time-limit. The clear implication from the debates at the time was that MSPs accepted the general need for a regime along the lines set out in section 39, but would have liked more flexibility on the details.
- 6.110 Recent events have shown that the probity and standards of conduct expected of politicians remain an issue of great sensitivity and public importance. All the same, thinking about how best to set and enforce appropriate standards is continually evolving (not least through the work of the Committee on Standards in Public Life) and we believe it is important that the Parliament's own standards regime is able to evolve and adapt to changing circumstances.
- 6.111 On this basis, we see a case for some amendment of section 39 of the Act to allow for additional discretion to be exercised in how the key principles of probity that it aims to protect are translated into law. We do not consider it is for us to specify in detail the changes that are required, but suggest that the Parliament itself be invited to discuss this with the UK Government (on the basis of its experience of drafting the Bill that became the 2006 Act).

6.35 The Interests of Members of the Scottish Parliament Act 2006.

## Provision required to be made by Standing Orders

- 6.112 There are a number of provisions in the Scotland Act that impose requirements about what must be included in the Parliament's Standing Orders. These include:
- section 36(1) – requiring minimum stages in the scrutiny of Bills;
  - paragraph 1 of Schedule 3 – requiring rules about the preservation of order in the proceedings of the Parliament, including provision for (a) preventing conduct which would constitute a criminal offence or contempt of court, and (b) a *sub judice* rule;
  - paragraph 3(1) of that Schedule – which requires there to be a presumption that the proceedings of the Parliament be held in public;
  - paragraph 4 – which requires provision for reporting the proceedings of the Parliament and for publishing the reports;
  - paragraph 5 – which requires provision for “ensuring that the Presiding Officer and deputies do not all represent the same political party”;
  - paragraph 6(2) – which requires that, in appointing members to committees and sub-committees, “regard is had to the balance of political parties in the Parliament”; and
  - paragraph 7 of Schedule 3, which requires the signification of Crown consent in relation to Bills.
- 6.113 We have received no particular evidence about these provisions or their operation and, while we regard them as a reasonable set of general standards for the operation of a devolved Parliament, they may also be capable of improvement. Some of them could be described as unnecessary but harmless, since the Parliament would almost inevitably do in any case what they require. Others, however, may be more questionable.
- 6.114 For example, while most people will agree on the importance of ensuring that the Presiding Officers are seen to be politically impartial when serving in that capacity, it is less clear that the requirement in paragraph 5 of Schedule 3 is the best means to achieve this. Arguably, the more effective safeguard is the existing standing order requirement that they be elected by secret ballot, together with the convention that the Presiding Officer does not represent any political party while in office.
- 6.115 Another example is the paragraph 6(2) requirement about political balance on committees. It is not obvious how strict an adherence to proportionality of committee membership this requires, and this arguably makes it difficult for the Parliament to decide how far and in what circumstances it might be legitimate to make exceptions – for example, if there was a desire to appoint a committee to consider some practical or technical issue where the MSPs best qualified to contribute happened to be mostly from a single party.
- 6.116 A final example is the requirement in paragraph 7 of Schedule 3, which sets as the test for whether a Bill requires Crown consent to be signified in the Scottish Parliament according to whether such a Bill would require such signification in the UK Parliament – a test that, taken literally, is almost impossible for the Scottish Parliament to apply. We see no reason why an equivalent outcome could not be achieved more simply and directly – for example by requiring the Parliament to ensure that Crown consent is appropriately signified in any case where the Presiding Officer, having consulted the Palace, considers that appropriate.

- 6.117 We give these examples not to suggest that there is any pressing need to amend or repeal any of the provisions referred to but because this may be a good opportunity to re-examine them carefully and address any anomalies that might exist. We would therefore encourage a dialogue between the Scottish Parliament authorities and the UK Government with a view to identifying any useful alterations to the wording of these provisions that might be made in the context of any more general amending legislation.
- 6.118 The opportunity might also be taken to review other aspects of how (including by omission) the Scotland Act creates fixed points for the Parliament in relation to its internal arrangements and procedures – for example:
- section 21(2), which fixes the composition of the Scottish Parliamentary Corporate Body (SPCB);
  - section 24, which prescribes how notice must be given of a requirement to attend the Parliament’s proceedings or provide documents;
  - the lack of a provision to enable the Parliament to vary the titles of its principal offices (Presiding Officer, Clerk of the Parliament, SPCB).

**RECOMMENDATION 6.8:** There should be a review of all other provisions in the Act that constrain the Parliament in terms of its procedures or working arrangements to ensure they are proportionate, appropriate and effective.

# Glossary

<b>AME</b>	Annually Managed Expenditure: the budgets of UK Government Departments and devolved administrations to finance demand-led expenditure (for example, social security payments)
<b>AMS</b>	Additional Member System: a method of voting in which some representatives are elected from geographic constituencies and others are elected under proportional representation from a wider area, usually by party lists. This is the electoral system used for elections to the Scottish Parliament
<b>British-Irish Council</b>	a body established under the Belfast Agreement of 1998 which aims to “promote the harmonious and mutually beneficial development of the totality of relationships among the peoples of these islands”. It’s members include representatives of the UK and Irish Governments, of the devolved Scottish, Welsh and Northern Irish executives and of the administrations of Jersey, Guernsey and the Isle of Man
<b>CCC</b>	Abbreviation for the UK Ministerial Committee for Civil Contingencies—a committee of the UK Cabinet whose terms of reference are “to consider, in an emergency, plans for assuring the supplies and services essential to the life of the community and to supervise their prompt and effective implementation where required
<b>Concordat</b>	the name given to a bilateral agreement between a UK Government (or Department thereof) and the Scottish Government, establishing a framework for working arrangements
<b>COREPER</b>	Comité des Représentants Permanents (Committee of Permanent Representatives): a body made up of the ambassadors to the EU (and deputy permanent representatives) from EU member states, whose role is to prepare the work of the Council of the European Union meetings.
<b>DEL</b>	Departmental Expenditure Limit: the allocated budgets of UK Government Departments and devolved administrations to fund public expenditure
<b>EMILE</b>	European Members Information Liaison and Exchange
<b>EU</b>	European Union
<b>executive devolution</b>	process whereby responsibility, exercising administrative functions where the legislative competence remains with the UK Parliament is transferred from the UK Government to Scottish Ministers
<b>FM</b>	First Minister (of Scotland)
<b>GB</b>	Great Britain: geographically the islands comprising England, Scotland and Wales; politically used to denote the UK except for Northern Ireland
<b>GERS</b>	Government Expenditure and Revenue in Scotland: a Scottish Government publication estimating Scotland’s fiscal balance

<b>Hansard</b>	the official record of proceedings in the UK Parliament. The equivalent of the Scottish Parliament is the Official Record
<b>HMRC</b>	Her Majesty's Revenue and Customs
<b>home rule</b>	a term traditionally used in the UK to refer to a degree of self-government, devolution or independence, for constituent nations
<b>IEG</b>	Independent Expert Group: the group of independent experts convened to assist the Commission in its work considering financial accountability
<b>JMC</b>	Joint Ministerial Committee: a body consisting of representatives of the UK Government and devolved administrations, established by the Memorandum of Understanding to undertake central coordination of the overall relationship between them
<b>JMC(D)</b>	Joint Ministerial Committee (Domestic): a forum of the JMC for the devolved administrations to discuss domestic issues with each other and with the UK Government
<b>JMC(E)</b>	Joint Ministerial Committee (Europe): chaired by the UK Foreign Secretary, a forum of the JMC for the devolved administrations to discuss EU-related issues with each other and with the UK Government
<b>LCM</b>	Legislative Consent Motion: a parliamentary motion lodged in the Scottish Parliament which, if passed, gives the Parliament's consent for the the UK Parliament to pass legislation extending to Scotland on a devolved issue, over which the Scottish Parliament has legislative competence (previously, and colloquially, known as a 'Sewel Motion' after its originator, Lord Sewel)
<b>MoU</b>	Memorandum of Understanding: an agreement setting out the principles underlying relations between the UK Government and the devolved administrations.
<b>MEP</b>	Member of the European Parliament
<b>MP</b>	Member of (the UK) Parliament
<b>MSP</b>	Member of the Scottish Parliament
<b>NHS</b>	National Health Service
<b>NICs</b>	National Insurance Contributions: a UK Government-levied tax on employers and employees hypothecated to fund social security payments and the National Health Service
<b>Official Record</b>	the full and authoritative written report of proceedings in the Scottish Parliament and its committees. Hansard is the equivalent of the UK Parliament
<b>PAYE</b>	Pay As You Earn – a means of payment of income tax in the UK
<b>PM</b>	Prime Minister of the United Kingdom

<b>PO</b>	Presiding Officer: effectively, the speaker and head of the Corporate Body of the Scottish Parliament
<b>PWLB</b>	Public Works Loan Board: a UK Government agency lending to local authorities on a prudential basis
<b>Rt Hon</b>	The Right Honourable: an honorific prefix usually indicating membership of the Privy Council although also used by barons, earls and viscounts
<b>Scottish Consolidated Fund</b>	account through which revenues and expenditures for the devolved Scottish budget flow
<b>Scottish Government</b>	the executive arm of devolved government in Scotland. Under section 44 of the Scotland Act 1998 its legal name is the Scottish Executive
<b>Scottish MEP</b>	a Member of the European Parliament elected for a Scottish constituency
<b>Scottish MP</b>	a Member of the UK Parliament elected for a Scottish constituency
<b>Sewel Convention</b>	the parliamentary convention whereby the UK Parliament will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament (see LCM)
<b>SPICe</b>	Scottish Parliament Information Centre
<b>STV</b>	Single Transferable Vote: a method of preferential voting using multi-seat constituencies which involves transferring all votes that would otherwise be “wasted” to other eligible candidates
<b>Sub-national Government</b>	term used in academic literature to describe the tier of government between national and local or municipal.
<b>SVR</b>	Scottish Variable Rate: the existing tax varying power of the Scottish Government
<b>UK</b>	The United Kingdom of Great Britain and Northern Ireland
<b>UKRep</b>	United Kingdom Permanent Representation to the European Union: the UK Government’s diplomatic representation to the EU in Brussels
<b>VAT</b>	Value Added Tax: tax on goods and services levied in the UK by HMRC

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# Annexe 1: List of witnesses and other sources of evidence

The Commission expresses their thanks to all those listed below who provided evidence or otherwise engaged in the Commission's work. We are very grateful for their contributions.

## Those who attended our local engagement events in:

Glasgow – 10 September 2008	Newcastle-upon-Tyne – 19 November 2008
Dumfries – 25 September 2008	Stirling – 6 March 2009
Inverness – 28 October 2008	Aberdeen – 12 March 2009
Dundee – 29 October 2008	Lerwick – 30 March 2009
Stornoway – 31 October 2008	Kirkwall – 30 March 2009
Ayr – 12 November 2008	

## Those who gave evidence in public evidence sessions:

Administrative Justice and Tribunals Council Scottish Committee	Convention of Scottish Local Authorities
Association of Business Recovery Professionals (R3)	Council of Ethnic Minority Voluntary Organisations, Scotland
Association of Chief Police Officers in Scotland	David Dinsmore
Elspeth Attwooll MEP	Equalities and Human Rights Commission
Audit Scotland	Federation of Small Businesses
Eddie Barnes	Food Standards Agency
BBC	General Teaching Council
British Veterinary Association	Health Protection Agency
Chartered Institute of Public Finance and Accountancy	Health and Safety Executive
Church of Scotland	Institute of Chartered Accountants in Scotland
Alan Cochrane	Institute of Directors Scotland
College of Medicine and Veterinary Medicine, University of Edinburgh	Law Society of Scotland
Confederation of British Industry, Scotland	Magnus Linklater
Consumer Focus Scotland	Iain Macwhirter
	Jack McConnell MSP
	Rt Hon Henry McLeish

John McLellan	Scottish Council for Voluntary Organisations
National Farmers Union Scotland	Scottish Environment Link
Office of Communications (Ofcom)	Scottish Federation of Housing Associations
Oil and Gas UK	Scottish Fishermen's Federation
Graeme Pearson	Scottish Funding Council
Reform Scotland	Scottish Natural Heritage
Royal Environmental Health Institute of Scotland	Scottish Screen
Royal Society of Edinburgh	Scottish Tourism Forum
Scotland's Colleges	Scottish Trades Union Congress
Scottish Agricultural College	Society of Local Authority Chief Executives
Scottish Arts Council	Sustainable Development Commission Scotland
Scottish Council for Development and Industry	UNISON
Scottish Council Foundation	Veterans Scotland

**Those who gave evidence in private evidence sessions:**

Wendy Alexander MSP	Lord (Julian) Grenfell
Dr Sir Iain Anderson	Professor Russel Griggs
Michael Aron	Robin Harper MSP
Richard Baker MSP	Professor Andrew Hughes Hallett
Rt Hon Sir Alan Beith MP	Sir George Mathewson
Professor Vernon Bogdanor	Jim McColl OBE
Russell Brown MP	David McLetchie MSP
Rt Hon Des Browne MP	Alan Morris
David Cairns MP	David Mundell MP
Rt Hon Tom Clarke MP	Lord (Philip) Norton of Louth
Michael Connarty MP	Office of Fair Trading
David Crawley	Baroness (Joyce) Quin
Ian Davidson MP	Rt Hon George Reid
Helen Eadie MSP	Lindsay Roy MP
Ross Finnie MSP	Sir Muir Russell
Lord (George) Foulkes of Cumnock MSP	Lord (John) Sewel
Annabel Goldie MSP	Jim Sheridan MP

Sir Jon Shortridge	Alan Trench
Professor Richard Simeon	Professor Francois Vaillancourt
Lord (David) Steel of Aikwood	Wine and Spirit Trade Association
Struan Stevenson MEP	

## Lists of those who made written submissions

Note: This list excludes a small number of submissions made in confidence or judged to be outside the Commission's remit. Some of those listed made more than one submission during the relevant phase.

### Those who made written submissions:

University of Abertay	British Ports Association
Action of Churches Together in Scotland	British Shooting Sports Council
James Aitken (Reform Scotland)	British Veterinary Association
Alex [surname withheld]	Cairngorms National Park Authority
Councillor David Alexander (Falkirk Council)	David Cairns MP
Ruthie Allan	James Caldwell
Alloway & Doonfoot Community Council	Caledonia Centre for Social Development
Anonymous (three anonymous contributors)	Campaign for an English Parliament
Architecture and Design Scotland	Alistair Campbell (on behalf of some Renfrewshire residents)
Association of Chief Police Officers in Scotland	Dennis Canavan
Association of Electoral Administrators (Scotland and Northern Ireland Branch)	Bruce Cartwright
Association of North East Councils	Catholic Parliamentary Office
Association of Scotland's Colleges	Charity Commission
Association of Scottish Community Councils	Chartered Institute of Public Finance and Accountancy
Alastair Balls	Chartered Institute of Taxation
BBC	Chartered Society of Physiotherapy Scotland
BBC Trust	Children in Scotland
Big Lottery Fund Scotland	Church of Scotland
Professor Norman Bonney	Rt Hon Tom Clarke MP
Boundary Commission for Scotland	Euan Colam
Andrew Bradford	Comhairle nan Eilean Siar
British Association for Shooting and Conservation	Community Pharmacy Scotland

Confederation of British Industry, Scotland	Professor Adrian Grant
Consumer Focus Scotland	Stanley Grant
Convention of Scottish Local Authorities	Professor George Gretton
Council of Ethnic Minority Voluntary Organisations Scotland	Gun Trade Association
Council for Healthcare Regulatory Excellence	Professor John Haldane
Jim Craigen	Professor David Hannay
Crown Estate	Professor Christopher Harvie MSP
Professor Anna Dominiczak	Professor David Heald
Brian Donohoe MP	Health Protection Agency
University of Dundee	Heritage Lottery Fund in Scotland
Helen Eadie MSP	Highland Council
East Lothian Council	Historic Houses Association for Scotland
Ecas	House of Commons
City of Edinburgh Council	House of Lords
Edinburgh Peace and Justice Centre	David Hutchison
University of Edinburgh	Institute of Chartered Accountants in Scotland
Educational Institute of Scotland	Institute of Directors in Scotland
Electoral Commission	Institute of Fundraising
Electoral Reform Society Scotland	Institute of Local Television
Environment Agency	Iain Jamieson
Equality and Human Rights Commission	Judiciary in the Court of Session
Faculty of Advocates	Christopher Kavanagh
Fairshare	Professor Michael Keating
Dr M A Fazal	Ian Keillar
Federation of Small Businesses in Scotland	Anne Kerr
Tim Flinn	Councillor Philip Latham
Dr Patrick Ford	Law Society of Scotland
George Foulkes MSP	Richard Lindsay
Councillor Michael Foxley	Literature Forum, University of Glasgow
Dr James Gilmour	George Lyon
Glasgow Caledonian University	John MacAdam
Glasgow City Council	Kenneth MacArthur

Simon Mackintosh	Orkney Islands Council
David Martin MEP and Catherine Stihler MEP	Oxfam Scotland
Councillor Dr Christopher Mason	Mr A J Parrott
James Matthews	Planning Aid for Scotland
Simon Maxwell (Overseas Development Institute)	Port Services Invergordon Ltd
Stephen Maxwell	Quality Meat Scotland
D R Mayer	Professor Colin Reid
Graeme McCormick	Reform Scotland
John McLaren	Regulatory Review Group
David Mcphail	Renfrewshire Council
MG Alba	Road Haulage Association Scotland
Professor Arthur Midwinter	Robert Gordon University
Paul Moar	John Robertson MP
Gordon Morrison	Andrea Ross
Andrew Morton	Royal College of Physicians and Surgeons of Glasgow
Keith Muir	Royal College of Physicians of Edinburgh
David Mundell MP	Royal College of Psychiatrists, Scottish Division
Councillor Gordon Murray	Royal Pharmaceutical Society of Great Britain
Musicians Union	Royal Scottish Academy of Music and Drama
National Clinical Assessment Service	Royal Society for the Prevention of Accidents, Scotland
National Farmers Union Scotland	Royal Society of Edinburgh
National Trust for Scotland	Royal Town Planning Institute in Scotland
NHS National Clinical Assessment Service	Edith Ryan
NHS Tayside	Scotland's Colleges
Dr M J North	James G Scott
North East Chamber of Commerce	Tavish Scott MSP
North Lanarkshire Council	Scottish Artists Union
The Northern Way	Scottish Association for Public Transport
Ofcom Advisory Committee for Scotland	Scottish Ballet
Office of Communications (Ofcom)	Scottish Borders Council
Office of the Scottish Charity Regulator	
Open University in Scotland	

Scottish Campaign for Nuclear Disarmament	Alan Shute & Anne MacLean
Scottish Competition Law Forum	Professor Richard Simeon
Scottish Council for Development and Industry	Ronald Singleton
Scottish Council for Voluntary Organisations	Society of Local Authority Chief Executives
Scottish Engineering	South Ayrshire Council
Scottish Environment Protection Agency	South-East Scotland Transport Partnership
Scottish Episcopal Church	SportScotland
Scottish Federation of Housing Associations	Lord (David) Steel of Aikwood
Scottish Funding Council	Struan Stevenson MEP
Scottish Green Party	Stonewall Scotland
Scottish Government	Student Loan Company Ltd
Scottish Information Commissioner	Taxpayers Alliance
Scottish Labour Party	David Taylor
Scottish Law Commission	Thompsons Scotland
Scottish Library and Information Council & Chartered Institute of Library and Information Professionals in Scotland	Trading Standards Institute (Scottish Branch)
Scottish Natural Heritage	Alan Trench
Scottish Parliament	Professor Ivan Turok
Scottish Parliament Economy, Energy and Tourism Committee	UK Government
Scottish Police Federation	UNISON Scotland
Scottish Public Services Ombudsman	United Free Church of Scotland
Scottish Refugee Council	Universities Scotland
Scottish Retail Consortium	University and College Union, Scotland
Scottish Rural Property and Business Association	Christopher Vine
Scottish Screen	Councillors Walsh and Scoullar (Argyll and Bute Council)
Scottish Television	Gordon West
Scottish Trades Union Congress	West Dunbartonshire Council
Scottish Women's Budget Group	West Lothian Council
Scottish Youth Parliament	Canon Kenyon Wright
Shetland Islands Council	Gareth Young
	Youthlink Scotland
	Angie Zelter

## Annexe 2: Reserved matters (from Schedules 4 and 5 to the Scotland Act)

### Protected enactments

The powers of the Scottish Parliament are constrained by Schedule 4 to the Scotland Act which provides that, subject to certain exceptions set out in Part II of the Schedule, the Scottish Parliament cannot modify (or confer power on Scottish Ministers to modify) certain enactments. These include:

- four constitutional enactments
  - the provisions of the Acts of Union relating to freedom of trade
  - the Private Legislation Procedure (Scotland) Act 1936
  - key provisions of the European Communities Act
  - the Human Rights Act
- statutory provisions relating to
  - designation of enterprise zones
  - rent rebate and rent allowance subsidy and council tax benefit
- the law on reserved matters – both statute law and common law – subject to certain qualifications.
- the Scotland Act itself and enactments modified by it (with certain exceptions)

Schedule 5 to the Act sets out some “general reservations” (Part I) and then a long list of “specific reservations” (Part II).

### General reservations

- The constitution, including the Crown, the Union, the UK Parliament, and the continued existence of Scotland’s higher courts.
- Registration and funding of registration and funding
- Foreign affairs and international relations
- Public service (the civil service, other than sheriff clerks, procurators fiscal, and officers of the higher courts).
- Defence (other than some aspects of civil defence and sea fishing enforcement)
- Treason

## Specific reservations

The specific reservations are set out under 12 main heads, each with a series of sub-heads. In some cases, there are exceptions, illustrations and interpretations.

- Financial and economic matters
  - Fiscal, economic and monetary policy, except local taxes to fund local authority expenditure (for example council tax and non-domestic rates)
  - The currency
  - Financial services, except bank holidays
  - Financial markets
  - Money laundering
- Home affairs
  - Misuse of drugs
  - Data protection
  - Elections (elections to the House of Commons, European Parliament and Scottish Parliament, and the franchise at local government elections)
  - Firearms
  - Entertainment (essentially videos and films)
  - Immigration and nationality
  - Scientific procedures on live animals
  - National security, interception of communications, official secrets and terrorism
  - Betting, gaming and lotteries
  - Emergency powers
  - Extradition
  - Lieutenancies
  - Public access to information held by most public bodies
- Trade and industry
  - Business associations, except “particular public bodies” and charities
  - Insolvency, except some aspects of winding up and receivership
  - Competition, except regulation of aspects of the legal profession
  - Intellectual property, except relating to plant varieties
  - Import and export control, except food, animals, plants, etc
  - Regulation of sea fishing outside the Scottish zone, except in relation to Scottish fishing boats

- Consumer protection, except food safety
- Product standards, safety and liability, except in relation to food, agricultural, pesticide products etc.
- Weights and measures
- Telecommunications and wireless telegraphy, except certain police powers
- Post Office and Postal Services
- Research Councils, including funding of scientific research
- Designation of assisted areas (under the Industrial Development Act 1982)
- Industrial Development Advisory Board
- Protection of trading and economic interests (under emergency powers, etc.)
- Energy
  - Electricity, except aspects of environmental protection
  - Oil and gas, except some aspects of offshore activity and production and movement of gas
  - Coal, except environmental protection
  - Nuclear energy, except environmental protection and the Radioactive Substances Act 1993
  - Energy conservation, except the encouragement of energy efficiency
- Transport
  - Road transport, except aspects of road safety
  - Rail transport, except aspects of grants for rail services, some strategic functions, the transfer of functions of passenger transport executives, and the promotion and construction of railways wholly within Scotland
  - Marine transport, except ports etc., hazards to navigation and financial assistance for bulk freight services to the Highlands and Islands
  - Air transport, except some matters to do with airports and aerodromes
  - Transport of radioactive material
  - Technical specifications for public passenger transport for disabled persons
  - Carriage of dangerous goods

- Social security
  - Social security schemes, except aspects of
    - Social welfare services
    - Welfare services for the chronically sick and disabled
    - Payments towards maintenance of children
    - Industrial injuries benefit
    - promotion of the welfare of children in need
    - advice and assistance for young persons formerly looked after by local authorities
  - Child support, except aliment
  - Occupational and personal pensions
  - War pensions
- Regulation of the professions
  - Architects
  - Specified health professions. The reserved professions are identified by reference to the Acts governing them. Consequently, regulation of new professions, such as pharmacy technicians, is not reserved.
  - Auditors
- Employment
  - Employment and industrial relations, except agricultural wages
  - Health and safety, including the Health and Safety Executive and the Employment Medical Advisory Service, but excluding some aspects of fire safety
  - Job search and support, except careers services and aspects of Scottish Enterprise and Highlands and Islands Enterprise
- Health and medicines
  - Abortion
  - Xenotransplantation
  - Embryology, surrogacy and genetics
  - Medicines, medical supplies and poisons
  - Welfare foods

- Media and culture
  - Broadcasting
  - Public lending right
  - Government Indemnity Scheme
  - Property accepted in satisfaction of tax
- Miscellaneous
  - Judicial remuneration
  - Equal opportunities legislation, except for the encouragement of equal opportunities and the imposition of duties on public office-holders
  - Control of weapons of mass destruction
  - Ordnance survey
  - Timescales, time zones, and summer time, except the computation of periods of time, bank holidays, Term Days and Quarter Days
  - Regulation of activities in outer space

### Part III of Schedule 5

Part III of Schedule 5 makes clear that:

- Scottish public authorities are not reserved, even if they have “mixed functions” (functions relating to both reserved and devolved matters), unless they are “cross-border public authorities”
- “reserved bodies” include all bodies mentioned in Part II of the Schedule, such as the Research Councils, plus the bodies that are now amalgamated in the Equality and Human Rights Commission
- with certain exceptions, “giving financial assistance to commercial activities for the purpose of promoting or sustaining economic development or employment” is not reserved.

## Annexe 3: The Independent Expert Group

The Independent Expert Group was established to advise the Commission on financial accountability. Its role is to provide the Commission with the best available information about funding options in a devolved context, informed by international comparisons.

This Annexe provides details of its membership and summaries of its conclusions.<sup>1</sup>

### Membership

#### Chair

Professor Anton Muscatelli, Principal and Vice-Chancellor Heriot Watt University

#### Other members based in the United Kingdom

John Aldridge, former Finance Director at the Scottish Executive

Professor David Bell, Professor of Economics, Stirling University

Professor Julia Darby, Professor of Economics, University of Strathclyde

Dr Sandra Eden, senior lecturer in tax law, Edinburgh University

Professor Clemens Fuest, Professor of Business Taxation and Research Director of the University of Oxford Centre for Business Taxation, Oxford Said Business School

Professor Charlie Jeffery, Professor of Politics, Edinburgh University

Professor Alex Kemp, Schlumberger Professor of Petroleum Economics, University of Aberdeen

Professor Iain McLean, Official Fellow in Politics, Nuffield College, Oxford, and Professor of Politics, University of Oxford

Jeremy Peat, Director of the David Hume Institute, former Group Chief Economist at the Royal Bank of Scotland and a former economic adviser at HM Treasury and the Scottish Office

Professor David Ulph, Professor and Head of School of Economics and Finance, St Andrews University

#### Members based overseas

Professor Robin Boadway, Professor of Economics, Queen's University, Kingston, Ontario, Canada  
Ministry of Finance

Professor Andrew Hughes-Hallett, Professor of Economics and Public Policy, George Mason University, Virginia, USA, and Professor at St Andrews University.

<sup>1</sup> The full papers can be found at: [www.commissiononscottishdevolution.org.uk/papers.php](http://www.commissiononscottishdevolution.org.uk/papers.php).

## The First Evidence of the Independent Expert Group: Conclusions

1. In reviewing the evidence relevant to how the Scottish Parliament might be funded, we start with some observations on the present system. Barnett is internationally unique: no other country operates anything remotely like it for funding a sub national government. It provides stability and predictability of funding and near total autonomy of spending decisions for the devolved administrations in the United Kingdom. At the same time, the current funding arrangements facilitate the centralised management of economic aggregates. It is a pragmatic solution to the funding question and is near costless to implement. It represents continuity with pre-devolution arrangements, but as a result, some of the relativities of the previous system have been perpetuated.
2. But whilst Barnett offers real strengths, its disadvantages are clear. With no substantive tax raising power, the Scottish Parliament is funded by a block grant, needed to address a near total vertical fiscal imbalance. Voters are not exposed to tax and spending decisions at the margin, meaning that a degree of political accountability for the taxation which supports spending decisions is missing. The disconnection between revenues and economic performance also means that the incentives to develop growth are secondary rather than immediate.
3. The current arrangements also mean that the Scottish Parliament lacks a degree of autonomy - its scope to influence the size of its budget is limited whilst it is not able to use fiscal measures to influence behaviours.
4. The lack of autonomy and accountability issues both resonate in Scotland, even though the linkage between these properties and efficient government or economic growth are not proven.
5. At the same time, the funding allocated to the Scottish Parliament is causing increasing levels of discontent in other parts of the UK where the equity of the existing arrangements is now challenged. Equity has been a significant dimension to UK public expenditure decisions for many years: indeed reference to meeting needs equitably has been the main justifying criteria within the centralised public spending system. It was certainly routinely used to justify spending allocations for Scotland before devolution and indeed before Barnett was introduced. But the Scotland of 2008 is a very different place to the Scotland of the mid 1970's when a needs assessment concluded that public expenditure per head in Scotland needed to be 16% over the UK average to maintain parity of service provision. This report does not attempt to provide any assessment of the relative needs of the constituent parts of the United Kingdom. Indeed, a needs assessment now, given the policy divergences brought on by devolution, would be a difficult and controversial exercise. The equity issue is important however, as the continuance of the substantively higher level of public expenditure in Scotland compared to England will become increasingly difficult to defend unless empirically justified. The relative decline in Scotland's population compared to England means that convergence which might be expected under the Barnett formula for Scotland will be deferred.
6. The combination of pressures for change, both from within Scotland and from the rest of the UK, has resulted in serious doubts being cast over the long term continuation of the Barnett formula in its current form. This view is confirmed to a degree by the Welsh Assembly Government decision to review the Barnett funding arrangements for Wales, although this is motivated by a different sentiment.
7. But as the analysis of experiences from around Europe and the rest of the world demonstrate, none of the alternatives necessarily meet the conflicting desiderata of autonomy, accountability and equity. All the implemented systems we describe are in fact some mix of the possible mechanisms available. Some, such as Germany and

Canada use a system of tax sharing or assignment “topped up” by grants to ensure equal access to public services. Furthermore, neither system is without controversy. The Australian model of an independent body – the Commonwealth Grants Commission – is seen by many as a paradigm of best practice, although it does result in the Australian States lacking some accountability. It is noteworthy that the Commission itself is necessarily a significant administrative body, although any departure from Barnett will almost certainly require greater administrative effort as new systems are put in place. This is especially the case for any arrangement that would incur the decentralisation of the UK’s currently highly centralised tax system.

8. In considering alternatives, Scotland’s fiscal position, as expressed in the Scottish Government’s “Government Expenditure and Revenue in Scotland” (GERS) publication, is obviously relevant. So is the existing operational framework which is simply not conceived to support a system of collecting taxes at a devolved level. The GERS data suggests that a self financing Scotland within the Union would see a substantive reduction in the budget available to both the Scottish Parliament and to UK Government expenditure in or on behalf of Scotland, or a prevailing need for fiscal transfers to Scotland from the UK Government. Even if a proportion of natural resource taxation revenues were to be allocated to Scotland – and it is not clear on what basis this would be justified - the volatility of oil prices means this would not deliver a stable revenue stream.
9. However, we strongly recommend that the economics and politics of natural resource taxation are given further detailed consideration. This is not a straightforward proposition for many reasons. For example, any devolution of oil and gas exploitation tax revenues would need to address the issue of decommissioning costs, most of which are allowable for tax purposes. This would require some settlement at UK level as decommissioning costs will be for fields which have yielded tax revenues from North Sea oil and gas exploitation in the past that have accrued to the UK Treasury. In view of this recommendation, the Independent Expert Group will provide further evidence on natural resource taxation in due course.
10. It is also the case that whilst one might wish to develop alternative means of financing the Scottish Parliament, Barnett applies elsewhere in the United Kingdom. This could potentially restrict the policy options that might be brought forward for financing the Scottish Parliament.
11. Commensurate with our brief, this report does not recommend a particular ideal solution. Indeed, this first evidence demonstrates that one probably does not exist. Our intention has been, however, to demonstrate that each option is associated with certain trade-offs. Barnett alone has substantial deficiencies. A sophisticated system of needs based equalisation grants has attractions, perhaps when complementing a degree of autonomy or tax sharing or assignment, but it necessarily becomes controversial and resource intensive.
12. Systems based on tax assignment do have attractions, both in terms of delivering (in principle) an incentive to deliver policies promoting economic growth and a relative operational simplicity. In Scotland’s case, financing by tax assignment would clearly need to be supplemented by some further payment from the UK Government.
13. Tax decentralisation certainly addresses the accountability concerns, although the scope of its application in Scotland might be constrained by EU Law. It could also lead to businesses and individuals facing additional compliance burdens and as well as a number of undesirable second order effects such as tax shifting and exportation. We have concerns that full fiscal autonomy may not be readily compatible with the

maintenance of the United Kingdom and as noted above, it is difficult to find examples of full fiscal autonomy which do not involve regulation by the national government, as in the case of the Basque countries and Spain.

14. Any system of devolved finance not solely based on a certain block grant, such as Barnett, creates the need for some degree of borrowing (whether from markets or the national government) by the devolved authorities to smooth fluctuations in tax revenues. As in countries where borrowing is currently allowed at sub-national government level (particularly in Eurozone countries where sub-national versions of the 'stability pact' have been introduced), an intergovernmental system of co-ordination would need to be introduced between HM Treasury and the devolved administrations to ensure the coordination of overall UK fiscal policy and the management of economic aggregates
15. Overall, we believe that the selection of an alternative means of financing the Scottish Parliament that will deliver increased financial accountability has to be a judgement based on the trade offs we have sought to identify. This judgement is dependant on the choices made by the Commission regarding the appropriate constitutional structure. In other words, it is necessary to first have a clear view on the very nature of the union with the rest of the United Kingdom prior to working through the trade-offs of different approaches to territorial finance.

## Should Scottish Ministers be Able to Borrow? - Evidence from the Independent Expert Group: Conclusions

1. Borrowing enables governments – both national and sub-national – to manage their short term cash flows as public expenditure commitments and revenues from taxes may be asynchronous and tax receipts will vary from forecasts even during periods of economic stability. Over the medium term, borrowing enables public expenditure to counter the peaks and troughs of the business cycle, and, over the longer term, to deliver intergenerational equity around the financing of major capital projects.
2. It is important to recognise that borrowing does not represent "new" money to an administration, rather it changes the time at which money becomes available. At some time debts have to be paid, whilst borrowing itself incurs charges.
3. In practice, most governments successfully use borrowing to manage the revenue risk associated with tax receipts and also as a response to macro economic events whilst maintaining debts at sustainable levels. But there are instances from across the world of borrowing reaching unsustainable levels with grave consequences for the stability and economic prosperity of the affected countries. Managing borrowing and debt levels is therefore a fundamental tenet of successful macro economic management.
4. The relationship between a borrowing sub national government and the national government must support macro economic policy management. There are many examples from across the world of this being successfully achieved but also some where this has not happened. International experiences suggest that it is important for a borrowing sub national government to face a hard budget constraint, that is, absolute clarity that there is no prospect of a bail out by the national government. A key feature of successful examples of borrowing by sub national governments is the existence of a mechanism providing that hard budget constraint, although the evidence suggests there is no single model for facilitating this.

5. If borrowing powers were to be conferred on Scottish Ministers, we would therefore recommend that measures are identified and implemented to deliver that hard budget constraint. This recommendation should not be interpreted as inferring any judgement on either previous or current Scottish and UK Administrations' financial and economic capabilities, rather it reflects observation of best practice from overseas.
6. Under the present financial arrangements, Scotland already has an implied share of the overall UK debt. This arises because the budget available to the Scottish Parliament is funded – with the exception of the unused Scottish tax varying power and Non Domestic Rates - by a block grant from the UK Government. In order to provide that block grant, the UK Government will borrow over the short term to align tax receipts with those payment commitments, over the medium term to maintain a level of public expenditure - including the Scottish share - that counters the business cycle and over the long term to contribute to the capital budget available to the Scottish Parliament. UK Government borrowing will also support public expenditure in Scotland that is the direct responsibility of the UK Government, such as social security payments.
7. The link between the Scottish budget and an implied share of UK borrowing is important. Scottish Ministers' implied access to existing borrowing, either to counter the business cycle or to finance capital expenditure, whilst not necessarily consistent with their preferences or Scotland's economic needs, is an inherent part of financing by block grant. Although not separately identifiable, this borrowing is significant (the estimated Scottish share of debt repayments for 2006-07 being £2.4 billion ) but not widely appreciated and we recommend effort is given to making these arrangements more transparent.
8. Even if the Scottish budget continues to be almost wholly made up from a block grant and the associated implied borrowing, we recognise that there is merit in conferring Scottish Ministers with additional borrowing powers limited to capital expenditure. This would increase the financial autonomy of the Scottish Administration, not by increasing the size of its budget in the long term as debts have to be repaid ultimately, but by allowing it some choice over the time at which those investments are made. It is the case that UK Departments influence and negotiate their budgets with HM Treasury, so they have a degree of autonomy in determining the size of their capital budget which is currently not available to the Scottish Parliament.
9. At present, the Scottish Government does not have a tax base against which to borrow (Scottish Variable Rate aside), and hence the ultimate guarantor for such borrowing would clearly be the UK Government as repayment would be from the block grant. We therefore recommend that borrowing under these circumstances is not delivered through the capital markets but rather is facilitated directly from the UK Treasury. This would provide oversight and control for the UK Government to ensure Scottish borrowing did not conflict with their reserved macro economic management policy responsibility and would be further facilitated as the Scottish Budget is part of the UK public expenditure system. The hard budget constraint would be provided by loan repayments being netted off UK Government payments into the Scottish Consolidated Fund.
10. From the Scottish Government's perspective, the successful operation of such an arrangement would require the borrowing capacity with HM Treasury to be formalised. For this arrangement to ensure electoral accountability it would need to be associated with a high level of transparency that extended to the existing implied UK Government borrowing that relates to the capital element of the Scottish Budget.
11. If a proportion of the Scottish budget was to be comprised of "own source" revenue, in other words some elements of the existing block grant were to be displaced by Scottish assigned or devolved tax revenues, then Scottish Ministers would have a tax base against which to borrow.

12. Since 2004, Local Authorities across the UK have been able to borrow using the Prudential Code to fund capital expenditure with interest and debt repayment effectively having the first claim against Council Tax receipts. We consider the Prudential Code has much to commend it, and similar provisions could sensibly be conferred on Scottish Ministers if some of the Scottish budget was to derive from “own source” revenues. The adoption of the Prudential Code for borrowing by Scottish Ministers would therefore be centred around compliance with processes relating to asset management and forward budgeting and a mechanism to protect against the moral hazard issue of borrowing by one administration in the knowledge that other administrations bear the costs. The Prudential Regime includes a (to date unused) ultimate right of approval over such borrowing from Central Government, along with an overall borrowing limit.
13. Experience of Local Authorities use of borrowing under the Prudential Code suggests that few loans are sourced from the capital markets, so constraining borrowing by Scottish Ministers to the National Loans Fund or the Public Works Loans Board is unlikely to be disadvantageous. This would also provide the UK Government with additional oversight over Scottish borrowing that would support the reserved macro economic management policy responsibility. However, we recognise that existing UK Government mechanisms might not always provide loans at lowest cost or with the most flexible terms, in which case direct access to capital markets might be considered. Full transparency in relation to loans, repayments and the residual implied borrowing by the UK Government associated with block grant payments would be necessary to deliver proper accountability.
14. Additionally, we recognise that if a proportion of the existing block grant were to be displaced by Scottish assigned or devolved tax revenues, a proportion of the Scottish budget becomes exposed to revenue risk, giving rise to temporary cash flow problems. However, we feel the existing short term borrowing powers in Sections 66 and 67 of the Scotland Act should provide an adequate tool to manage these, although the existing £500 million cap would need to be reconsidered, depending on the proportion of the Scottish budget deriving from assigned or devolved tax revenues.
15. If the major component of the Scottish budget continued to be a block grant paid by the UK Government, we do not think it appropriate for Scottish Ministers to be able to borrow to fund resource or current expenditure. Although some exposure to revenue risk would be associated with assigned or devolved Scottish taxes, the contribution of the block grant to the Scottish budget includes a component of borrowing by the UK Government to counter the economic cycle. This arrangement is commensurate with the reservation of overall macro economic policy to the UK Government, although we do acknowledge that UK macro economic policy choices would not necessarily meet any specific needs of the Scottish economy or coincide with Scottish Ministers’ preferences.
16. If the financing mechanism for the Scottish Parliament were to undergo a more radical revision and the greater part of its revenues accrued from assigned or devolved taxes, then there is a case for borrowing powers to extend beyond finance for cash flow management and capital expenditure. This is because the contribution of the block grant within the Scottish budget would be diminished, hence reducing the relative importance of the component of borrowing by the UK Government to counter the economic cycle implied by that block grant. The practical effect of this change would be for existing borrowing on behalf of Scotland undertaken by the UK Government being displaced by borrowing by Scottish Ministers.
17. A necessary condition of such a change would be the integration of any new borrowing powers conferred to Scottish Ministers with the reserved macro economic policy management responsibilities of the UK Government, including how a hard

budget constraint would be applied. This might include, for example, a cascading of whatever fiscal rules adopted by the UK Government to the Scottish budget. It is worth highlighting that adherence to fiscal rules could require net reductions in borrowing during the upswings of a business cycle. If the Scottish budget is determined in substantial part from 'own source' revenues, it is possible that UK taxation decisions might impact considerably on Scottish tax revenues and hence granting Scottish Ministers some formal right of consultation with UK Ministers on fiscal matters, including macroeconomic policies, would be desirable. Benefits to both UK and Scottish Governments might accrue in these circumstances. However, we are not placed to make specific recommendations until any associated changes to the constitutional order and financial settlement are known.

18. In making these recommendations, we feel it necessary to draw attention to the possible availability of credit in the current economic climate. The economic down turn, along with the bail out of major financial institutions has meant that the UK is facing levels of debt greater than seen for a number of years. When combined with the possible impact of transferring a number of debts associated with PFI sourced assets to the balance sheet, the scope for additional public borrowing by any UK body is likely to be constrained for the foreseeable future.

## Natural Resource Taxation and Scottish Devolution - Evidence from the Independent Expert Group: Conclusions

1. It is possible to construct and implement a basis for identifying accurately the "Scottish" share of UK oil taxation. This is to say that oil and gas taxation revenues accruing to activities within Scotland's territorial waters could be assigned if it was necessary or desirable to so do. There are several possible arrangements to achieve this of varying complexity and ease of implementation.
2. Devolving, rather than assigning, oil and gas taxation policies to the Scottish Parliament would add complexity as separate taxation regimes applying in Scottish and the rest of the UK's waters would produce transitional and other problems. While these would be justified for an independent Scotland the costs may be unduly high for a devolved Government situation. Only if there is a substantial difference in taxation policies between the two Governments would this be appropriate.
3. Established economic theory suggests that, in order to achieve intergenerational equity, sufficient revenues from oil/gas taxation should be invested to at least maintain the nation's total capital stock. This reflects that the exploitation of reserves now means that they will not be available to future generations. Such depletion can be counterbalanced by investing sufficient revenues either in an investment vehicle such as an oil fund or in long term capital investments. This does not necessarily mean that all assigned revenues to the Scottish Government would have to be invested.
4. The assignment of a Scottish share of these revenues would have major implications for the funding of the Scottish budget. It would expose the Scottish Parliament to significant revenue variations, given the inherent volatility of oil and gas taxation revenues. Oil and gas taxation revenues from the UKCS [UK continental shelf] will also diminish over time given the finite nature of the resource. Substantive borrowing and investment powers could enable these revenue variations to be mitigated. For example, investments in an oil fund above the level to maintain the nation's capital stock could be made when prices were high.

5. Ultimately, the treatment of the Scottish share of UKCS revenues and whether they should accrue to the Scottish or UK Government relates directly to the current debate about the appropriate constitutional relationship between Scotland and the rest of the UK. Their assignment could be justified by the derivation principle if a proportion of the Scottish budget was to be comprised of Scottish tax revenues.
6. The assignment of a Scottish share of UK oil taxation revenues might be expected to have major implications for the grant from the UK Government which currently forms the basis for the Scottish Government's budget. The grant could clearly be reduced, and a formula would need to be designed which did so in an equitable manner. This subject is beyond the scope of the present paper.

## Consultation Response - Evidence from the Independent Expert Group: Summary and Conclusions

### Principles and Policy Instruments

1. How the principles of equity, accountability and efficiency might be weighted relative to each other can only be determined once the desired relationship between Scotland and the rest of the United Kingdom is agreed.
2. The descriptions of tax devolution, assignment and funding by block grant provided in our first report were intentionally polarised in order to demonstrate the meaning of each term. Financing systems used across the world usually incorporate elements of some or all of these mechanisms and there is every reason to consider alternatives within the UK that also include elements of some or all of these mechanisms and possible variants of these.

### Devolution of Specific Taxes

3. The primary benefit of devolving excise duties to the Scottish Government would be to enable a closer alignment of existing devolved policy responsibilities (such as public health, social welfare and public order) with the fiscal system. However, excise duties on tobacco and alcohol themselves are not the most suitable candidates for tax devolution as this would potentially create a number of economic and administrative costs.
4. Devolving Corporation Tax would represent a shift in increasing the financial accountability of the Scottish Parliament, although other taxes have a closer connection to the electorate. We are not convinced that allowing the Scottish Parliament to determine a Scottish rate of Corporation Tax would produce harmful tax competition because the scope to vary the rate is, in effect, constrained. Divergent rates of Corporation Tax across the UK would create economic inefficiencies as firms react to tax considerations rather than commercial factors. If tax competition did occur, it would have the potential to be harmful rather than efficient. The creation of compliance costs to businesses operating on either side of the border, as well as the increased collection costs to government, would be especially undesirable in the present economic climate.

5. The existing tax instruments most suitable for devolving are those based on relatively immobile factors – that is to say the tax base is fixed. Potential candidates would be stamp duty on property sales (but not equity transactions), landfill tax, air passenger duty and aggregates levy. The scope would be limited for these taxes to be used to substantially alter the budget of the Scottish Parliament but allowing a Scottish rate of such taxes would offer a better match of policy instruments to the existing powers whilst not necessarily creating economic inefficiencies. The devolution of such taxes, because they are based on location, may be more readily achieved from an administrative perspective.
6. As long as the greater part of National Insurance Contributions (NIC's) are a notionally hypothecated tax relating to the reserved Social Security System, they should remain reserved to the UK Parliament (although NIC's also have notional link to - devolved - NHS funding as well)
7. We recognise the benefits of allowing the Scottish Parliament to create new taxes. The desirability of a new tax is distinct from the principle of whether to extend the powers of the Parliament.
8. User charges should also be considered in addressing this question. The consideration of providing the Parliament with the power to raise user charges is distinct from whether they should be applied, but user charges generally have the benefit of applying to immobile goods and services.

## The Tax Varying Power and Making a Tax Decision

9. We would see the attractions of extending the SVR to unearned income and income from investments, but suggest the administrative costs of this would need to be assessed against the potential yields before progressing such a course.
10. There are reasonably firm arguments for extending the SVR to the higher rate of income tax. It would make the Scottish tax power more progressive but would be associated with additional implementation costs. The benefits, in terms of both the yield and the fulfilment of policy objectives, should be assessed against the implementation costs before progressing such a course.
11. One means of requiring the Scottish Parliament to make a tax decision would be for a default position for national income tax in a devolved territory to be substantially less than the national rate (with block grant from the national government reduced accordingly). The devolved government would then have to make some sort of positive choice on the rate of income tax applying in that region in order to address its revenue shortfall and increase the block grant. The critical factor being that the drop in revenues is sufficiently large to "bite" so the "do nothing" option is unlikely to be sustainable. Such a mechanism would deliver accountability to the devolved administration - it connects a tax base that is very evident to the electorate with the capacity of the devolved administration to provide public services – whilst not necessarily altering the parity of public service provision across regions. In the Scottish context, it may be that the administrative costs of such an arrangement would not differ substantially from those associated with implementing the SVR.

## Annexe 4: Worked example of the Barnett formula

The following is based on a worked example of how the Barnett formula operates provided in the HM Treasury evidence to the Commission.<sup>2</sup>

If for example:

- the Government decides to increase the DEL budget of the Department of Innovation, Universities and Skills by £ 100 million; and
- the comparability percentage for that particular department for each devolved administration is 79 per cent (because that Government department carries out some expenditure at an all United Kingdom level); and
- the population proportions are 10.08 per cent for Scotland, 5.84 per cent for Wales and 3.43 per cent for Northern Ireland of England's population;

then the following changes are added to each devolved administration's overall budget:

- for Scotland, £100 million (change in Government department's budget) x 79 per cent (comparability percentage) x 10.08 per cent (population proportion as a percentage of England's) giving a net change of £7.96 million;
- for Wales, £100 million (change in Government department's budget) x 79 per cent (comparability percentage) x 5.84 per cent (population proportion as a percentage of England's) giving a net change of £4.61 million; and
- for Northern Ireland, £100 million (change in Government department's budget) x 79 per cent (comparability percentage) x 3.43 per cent (population proportion as a percentage of England's) giving a change of £2.71 million. This amount is then abated by 2.5 per cent to reflect the fact the Northern Ireland Executive do not require funding to meet Value Added Tax costs incurred as these are refunded by HM Customs and Excise. The net change for Northern Ireland is therefore £2.64 million.

<sup>2</sup> HM Government evidence to the Commission on Scottish Devolution, Chapter 5 – HM Treasury.

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