



The Scottish Parliament
Pàrlamaid na h-Alba

DEVOLUTION (FURTHER POWERS) COMMITTEE

AGENDA

3rd Meeting, 2016 (Session 4)

Thursday 21 January 2016

The Committee will meet at 9.30 am in the Mary Fairfax Somerville Room (CR2).

1. **Fiscal Framework and Welfare Powers:** The Committee will take evidence from—

Professor David Bell, Professor of Economics, University of Stirling;

Dr Jim McCormick, Associate Director Scotland, Joseph Rowntree Foundation.

2. **Scotland Bill - other committees:** The Committee will consider an update on the Scotland Bill from other parliamentary committees.
3. **Scotland Bill (in private):** The Committee will consider a progress update on the Scotland Bill.
4. **Work programme (in private):** The Committee will consider its work programme.

Stephen Imrie
Clerk to the Devolution (Further Powers) Committee
Room T3.40
The Scottish Parliament
Edinburgh
Tel: 85206
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The papers for this meeting are as follows—

Agenda Item 1

Written submission from Professor David Bell

DFP/S4/16/3/1

PRIVATE PAPER

DFP/S4/16/3/2 (P)

Agenda Item 2

Note by the clerk

DFP/S4/16/3/3

Agenda Item 3

PRIVATE PAPER

DFP/S4/16/3/4 (P)

Funding Scotland's Welfare Powers

Professor David Bell
Stirling Management School
University of Stirling

January 2016

1. Introduction

The Scottish Government will assume control over a range of welfare powers if the Scotland Bill 2015 is given legislative consent by the Scottish Parliament. There has been relatively little discussion of the resources that will be used to support these new powers. Their current cost is around £2.5 billion, amounting to 14% of all welfare spending in Scotland.

How much funding will be transferred from the UK to the Scottish Government to support its welfare priorities? The first “no detriment” principle (no detriment at the point of devolution) suggests that the grant to the Scottish Government should be increased by £2.5 billion in the first instance so that neither the UK government, nor the Scottish Government, gains or loses financially from the transfer of welfare powers.

However, the Scotland Bill does not propose a clear mechanism by which Scotland’s grant should be adjusted *after* the first year to take account of these new powers and responsibilities. This is the main subject of this paper: the mechanism that is finally agreed will have an important bearing on the ability of the Scottish Government to develop new welfare policies.

How to adjust the block grant to take account of additional welfare responsibilities is part of the “fiscal framework”, currently being negotiated between the UK and Scottish governments. The fiscal framework also includes the *reduction* in Scotland’s block grant due to its additional revenue raising powers, the *rules* governing Scotland’s borrowing arrangements and the *institutional mechanisms* that will ensure that the Scottish Government follows sustainable fiscal policies.

The paper is structured as follows: in the first section we outline the welfare powers that are being transferred, their costs and the size and characteristics of the claimant base in Scotland. The next section discusses mechanisms that might be used to adjust Scotland’s block grant from Westminster to fund the welfare powers. Following this discussion, the final section focuses on issues to which the Scottish Government may have to give particular attention.

2. Welfare Powers Coming to Scotland

The welfare powers coming to Scotland under the Scotland Bill 2015 comprise¹:

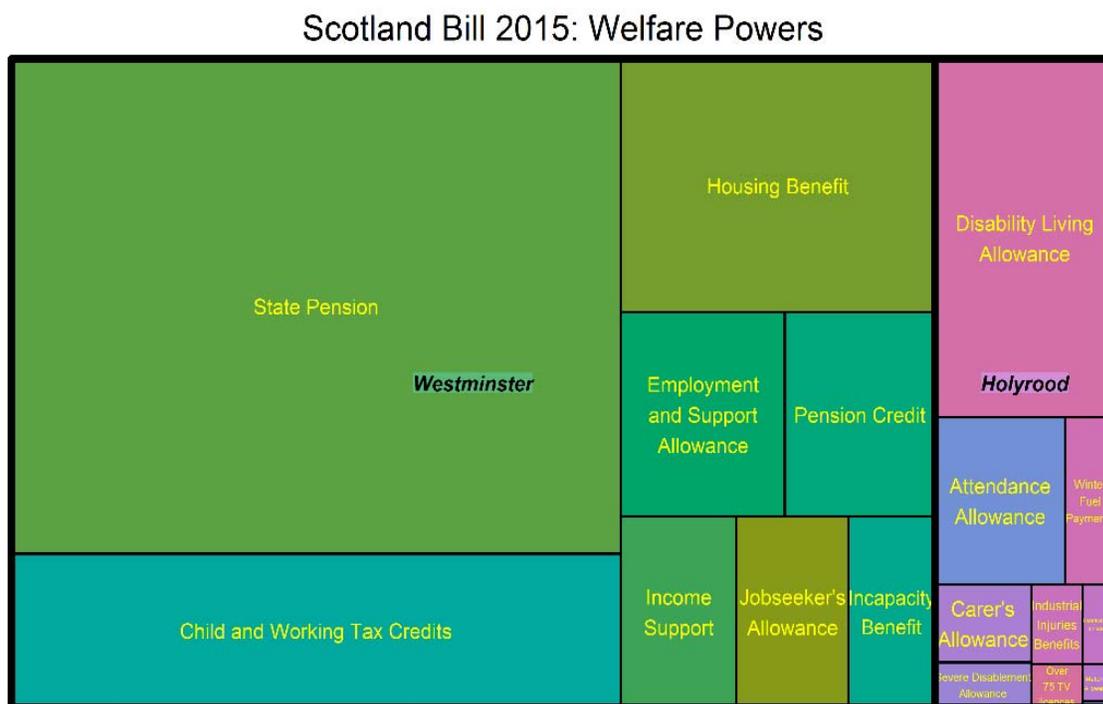
- Benefits for carers, disabled people and those who are ill: these include Attendance Allowance, Carers Allowance, Disability Living Allowance, Personal Independence Payment, Industrial Injuries Disablement Allowance and Severe Disablement Allowance
- Benefits that are part of the Regulated Social Fund: these include Cold Weather Payment, Funeral Payment, Sure Start Maternity Grant and Winter Fuel Payment
- Discretionary Housing Payments

Figure 1 is an infographic showing the benefits being transferred to Scotland, their relative size and how they compare with the benefits and pensions which will continue to be distributed by the Department for Work and Pensions (DWP). The benefits being transferred to Scotland are shown on the right of Figure 1, and are shown as rectangles whose areas are proportional to spending on these benefits in Scotland in 2013-14. The left-hand side of Figure 1 shows the benefits and pensions that will continue

¹ A description of each of these benefits and the amounts claimed in Scotland is contained in the SPICE briefing “The Smith Commission Report-Overview” (January, 2015)

to be distributed by the DWP, again with rectangles whose area is proportional to the amount spent in Scotland. Note that Personal Independence Payments (PIP) are not shown because payments of this benefit was not significant at the time that the data was collected.

Figure 1: Welfare Spending in Scotland 2013 – 14 showing benefits to be transferred under the Scotland Bill 2015



In aggregate, the state pension is by far the largest of the welfare payments to Scots. It will continue to be paid by DWP.

Going forward, the Scottish Government will have to consider its ability to meet future welfare needs. This will depend on the number of claimants, the size of the claims they are likely to make, the duration of claims and their underlying causes. This section briefly touches on these issues, without attempting a comprehensive review, which would be beyond the scope of this paper.

Number of claimants

The overall expenditure on Scotland's new welfare powers gives no sense of how these may be distributed across the Scottish population, including how many people receive them, what are the characteristics of these people, and for how long they have been receiving benefits. Table 1 starts to answer these questions by associating estimated caseloads with each of the devolved benefits, alongside the expenditure and the share of total expenditure associated with each benefit.

It is immediately obvious that a large number of Scots will be partly dependent on benefits from the Scottish Government. Aggregating the caseloads in Table 1 gives a total of 1.7 million people, equivalent to around one in three Scots. In practice, the number benefiting from Scottish Government welfare payments will be considerably less than this total, since many individuals receive more than one benefit.

Thus, for example, all AA claimants are also likely to receive Winter Fuel Payment, which is open to all aged 60+, while AA is limited to those aged 65+. It is a payment of £55.10 or £82.30 per week to help with *personal care* needs for those who are physically or mentally disabled.

Even though there is a certain amount of double counting, it is likely that although 14% of aggregate expenditure on welfare has been transferred from DWP to the Scottish Government, the impact of the new Scottish welfare benefits will be spread across a much larger proportion of the Scottish adult population. There are therefore a large number of adults with a stake in maintaining the existing benefit structure. This may become an obstacle to substantive policy change, should the government wish to follow such a course.

Table 1: Expenditure and Caseload on Benefits to Be Devolved to Scotland

Devolved benefit	£m	Share	Caseload (000s)
Disability Living Allowance	£1,473m	58.2%	330.3
Attendance Allowance	£481m	19.0%	129.0
Winter Fuel Payment	£186m	7.4%	1086.1
Carer's Allowance	£182m	7.2%	62.9
Industrial Injuries Disablement Allowance	£91m	3.6%	37.6
Severe Disablement Allowance	£91m	3.6%	23.3
Discretionary Housing Payments.	£18m	0.7%	
Sure Start Maternity Grants	£4m	0.2%	
Funeral Payments	£4m	0.2%	
Total	£2,530m		1669.1

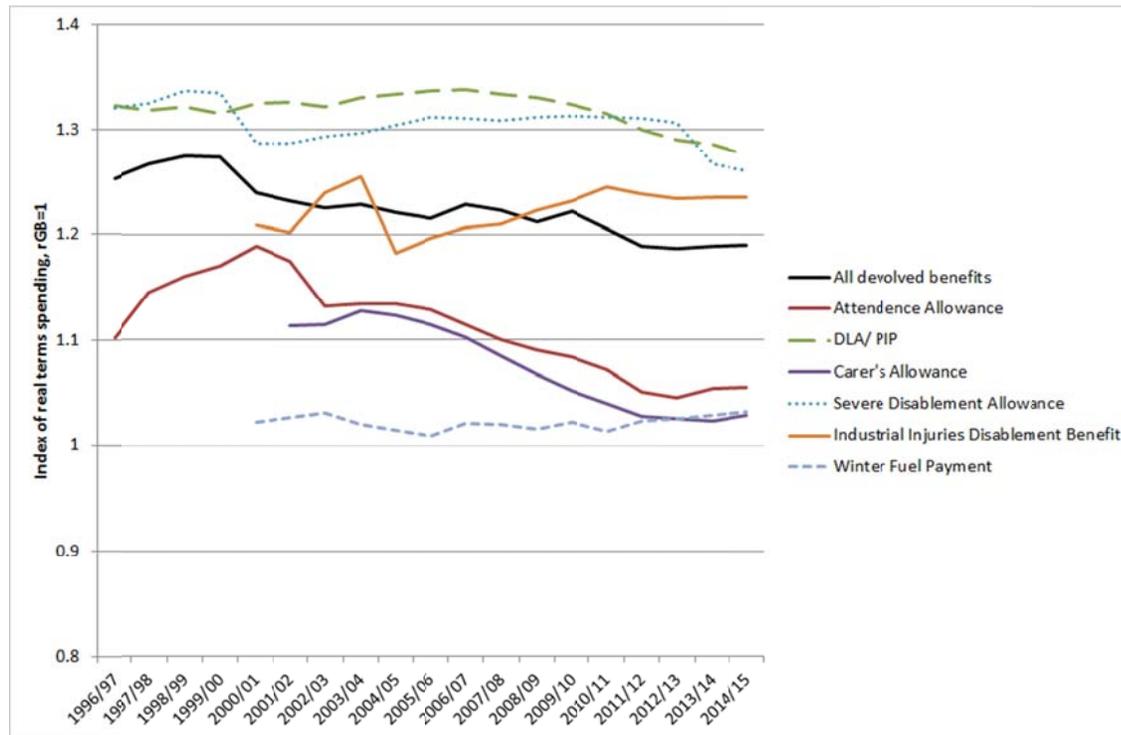
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* estimate based on most recent DWP statistics for UK as a whole

Although the sums involved in funding these benefits are substantial, Scotland's share in total GB spending on these benefits has been declining. This is shown in Figure 2. In 1996-97, overall spending in Scotland on the benefits that are to be devolved was around 25% higher per capita than in the rest of Great Britain. In 2014-15, this margin had declined to 19%. Notable relative declines took place in Attendance Allowance and in Carer's Allowance. It is not clear how far the relative decline in Attendance Allowance has been due to the refusal of DWP to provide Attendance Allowance to residents of Scottish care homes receiving free personal care since 2001.

Figure 2: Index of real terms per capita spending on selected benefits in Scotland relative to the rest of Great Britain, 1996-97 to 2014-15, rest of GB=1



Characteristics of claimants and claims

Age

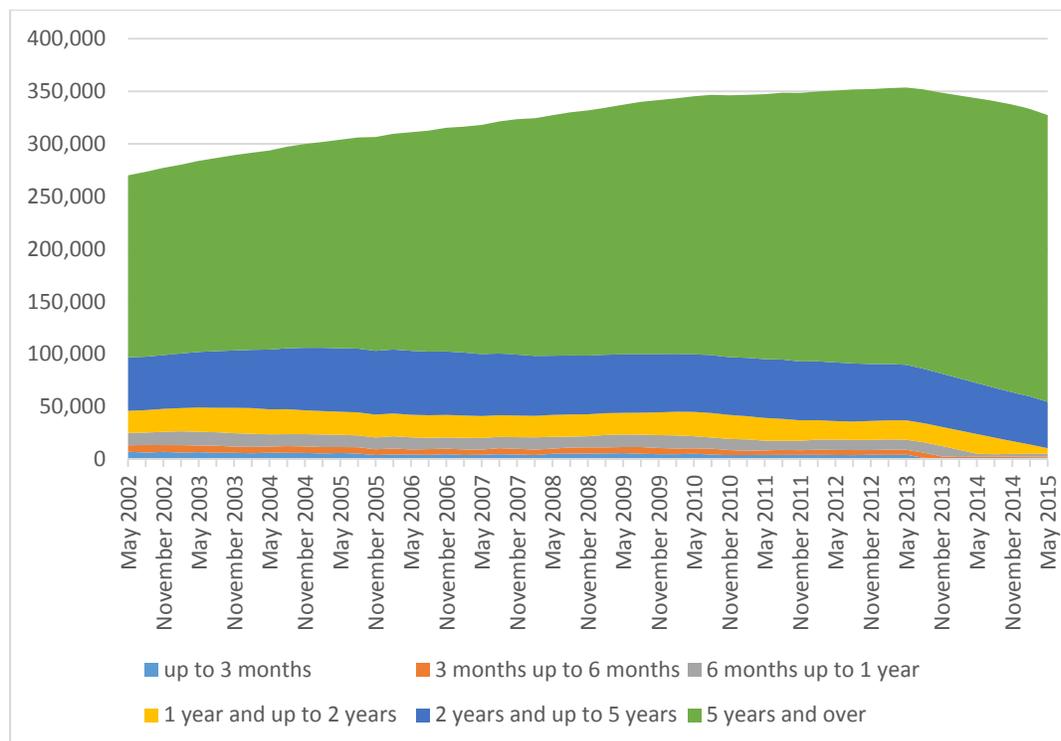
The main client group for the welfare benefits being transferred to Scotland is older people. Winter Fuel Payment is paid to the over 60s of whom there are more than 1 million in Scotland: given that Winter Fuel Payments have almost 100% take-up, the average age of Winter Fuel Payment recipients in Scotland is likely to be around 71.² The average age of those receiving Attendance Allowance and Disability Living Allowance in Scotland is around 61.³ The average age of those receiving welfare benefits whose funding is being transferred to Scotland is well above the median age of the adult population.

Duration of Claims

The duration of claims for some welfare benefits tend to be relatively short. For example, in a buoyant labour market, one might expect that claims for unemployment benefit would be relatively short lived. Others are time-limited: they are only available for a specified period. Others are neither time-limited nor of limited duration. The largest benefit (in expenditure terms) that is being transferred to Scotland has typically very long claim durations. Most DLA claims extend beyond five years. This is shown in Figure 3 which plots the duration of DLA claims in Scotland between 2002 and 2015. What is evident is the extent to which total DLA claims are dominated by those which are five years and over.

² Source: National Records of Scotland

³ Source: Family Resources Survey 2013-14

Figure 3: Duration of Disability Living Allowance Claims in Scotland 2002 – 2015

Such long-duration claims grew steadily both in absolute numbers and as a share of total claims from 2002 to 2013. Since then there has been a slight decline in total DLA claims. This is likely associated with a decline in new claims stemming from the intended transfer of DLA claimants to PIP, but this has resulted in an even greater predominance of long duration claims within this total.

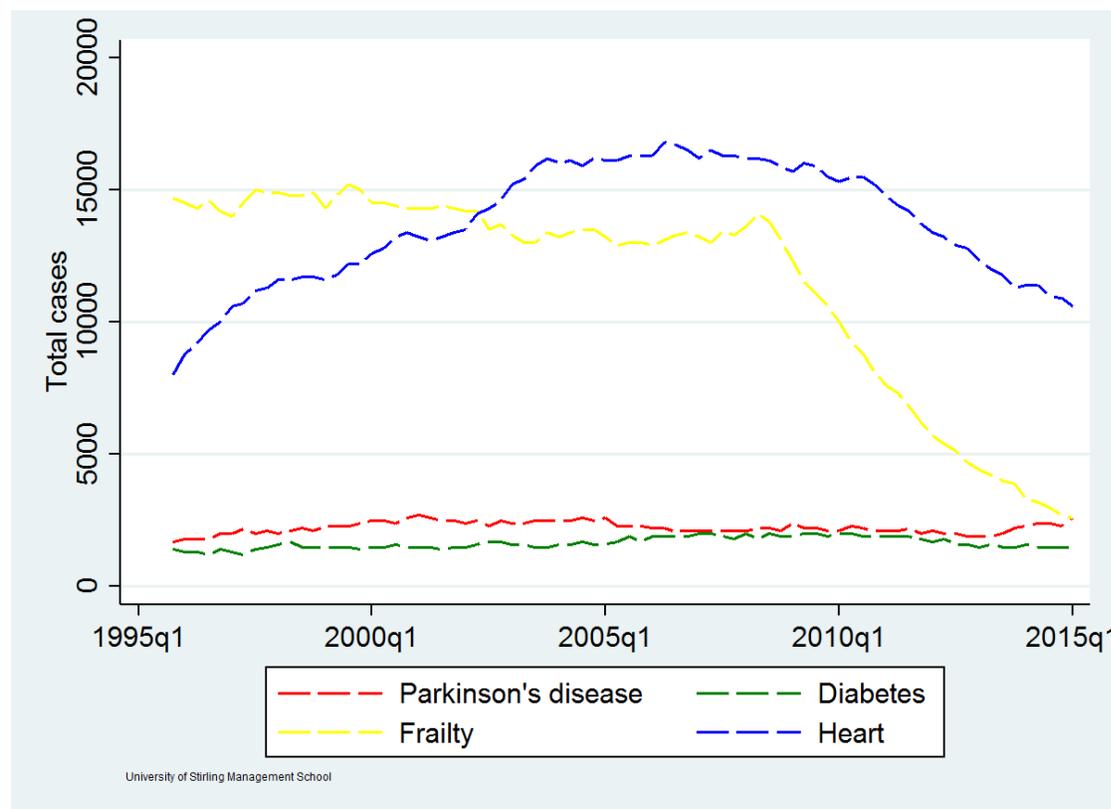
The issue of what to do with payments for disability is probably the most difficult which the Scottish Government will face when it takes over responsibility for disability-related benefits. DLA costs around 1% of Scottish GDP: these costs have increased substantially since 2000. How to contain costs, while still meeting the needs of disabled people will pose a real challenge to the Scottish Government, particularly given the move to PIP in the rest of the UK.

Types of Claim

Reasons for claims vary. In relation to disability, the types of claim that are more prevalent vary with the general health of the population. Figure 4 partly explains why AA claims have been falling in Scotland in recent years. There has been a particularly sharp decline in claims that cite “frailty” as the main justification for the claim: there has also been a more moderate decline in claims for AA citing heart disease as the cause. The latter is likely the result of reductions in the prevalence of heart disease due to the adoption of more healthy lifestyles and also of improved medical interventions to support those with coronary disease. The declining number of claims citing “frailty” is more difficult to explain. And perhaps surprisingly, AA claims based on Parkinson’s disease or diabetes are relatively few and show no distinct trend.

Differences in the prevalence of disabling conditions clearly will play a role in the pattern of claims that are made for welfare support in Scotland. Clearly, these are not independent of the general health of the population and may be susceptible to public health interventions. This transfer of welfare powers has therefore given the Scottish Government an opportunity to reap some of the rewards from successful public health interventions.

Figure 4: Underlying Causes of AA Awards 1995-2015



Given these examples of the particular changes in the size and characteristics of the claimant population, will the adjustment of Scotland's block grant be sufficient to adequately meet welfare support needs in Scotland? We turn our attention to this issue in the next section.

3. Mechanisms for Increasing Scotland's Grant to Fund Its New Welfare Powers

The principles by which Scotland's block grant might be adjusted to accommodate the new welfare Powers were not laid out by the Smith Commission. Neither were they set out in the UK government's response to the Smith Commission. The "Enduring Settlement" document simply suggested that:

"For welfare, such as disability benefits, as this spending is outside Departmental Expenditure Limits it is therefore outside the scope of the Barnett Formula. While there will again be an increase in the block grant in year 1, reflecting the spending (both on front line programmes and the associated administration costs) that the UK Government will no longer undertake, the UK

and Scottish Governments will need to work together to determine how this funding changes in subsequent years to dynamically and mechanically reflect changes in the welfare spending that would have been undertaken by the UK Government over time. While the Smith Commission Agreement indicated that the adjustment would need to be “indexed appropriately”, as with tax devolution it stopped short of suggesting what the index should be.”⁴

Likewise, the Scotland Bill 2015 did not contain any proposals on which to base the indexation mechanism. As mentioned previously, this mechanism will form part of the “fiscal framework” which is currently being negotiated between the UK and Scottish governments. The absence of a fully specified “fiscal framework” from the Scotland Bill has been widely criticized. Many observers take the view that these arrangements are as important as the specific tax and welfare powers which are being transferred to Scotland and their absence from the Bill has been to the detriment of the debate on Scotland’s constitutional future (see, for example, House of Lords 2015)⁵. The absence of any principles-based mechanism within the Scotland Bill and its commitment to the continuation of the Barnett formula has led to a rather gnomic debate around a small number of plausible options that are both consistent with Barnett and meet some of the other conditions set out by the Smith Commission, notably those relating to “no detriment” and “taxpayer fairness”. However, Bell, Eiser and Phillips (2015)⁶ concluded that *“it is impossible to design a block grant adjustment system that satisfies the spirit of the ‘no detriment from the decision to devolve’ principle at the same time as fully achieving the ‘taxpayer fairness’ principle: at least while the Barnett Formula remains in place”*

Neither the Barnett Formula, nor the “no detriment” provisions are easy to match with arrangements in other countries. Systems of fiscal federalism, such as those in operation in Australia, Canada and Germany tend to focus on “needs assessment” and “taxable capacity” when determining federal grants to provinces or states. Hence it is difficult to find international exemplars that are very useful in the search for a block grant adjustment mechanism for Scotland.

The three main options that have been developed for determining how to adjust Scotland’s block grant are therefore solutions that have been developed to deal with the present Scottish context. It remains to be seen whether they could be extended to Wales or Northern Ireland if there was further devolution of fiscal powers within the UK. The methods presently being proposed are described as:

- indexed deduction,
- per capita indexed deduction and
- levels adjustment

These methods of block grant adjustment have mainly been analysed in relation to the *downward* adjustment of the block grant to take account of Scotland’s new tax-raising powers. In relation to welfare powers being transferred to Scotland, an *upward* adjustment to the block grant will be required. Scotland’s tax powers are likely to raise around £19.4 billion: in relation to this, the expenditure

⁴ UK Government, (2015) ‘Scotland and the United Kingdom: An Enduring Settlement’, P30

⁵ House of Lords: Select Committee on Economic Affairs (2015) “A Fracturing Union? The Implications of Financial Devolution to Scotland” accessed at: <http://www.publications.parliament.uk/pa/ld201516/ldselect/ldconaf/55/55.pdf>

⁶ Bell, D., Eiser, D. and Phillips, D. (2015) “The options for calculating Scotland’s block grant”, Institute for Fiscal Studies, November

on welfare benefits is relatively modest. Therefore one might expect that the main focus of attention will be on getting the block grant adjustment correct in relation to the tax powers. It is possible that the choice of adjustment mechanism for the tax powers will also be used in for the welfare powers to preserve symmetry.

However, one counterargument is that the transfer of welfare powers will lead to an increase in Scotland's budget. In recent history increases in Scotland's spending power have been determined by the Barnett Formula. So shouldn't the Barnett formula be applied to the new welfare powers?

There is one obvious, but not insurmountable problem with this proposal. It relates to how HM Treasury is controlled public expenditure in recent decades. The welfare budget has traditionally been part of Annually Managed Expenditure (AME), whereas Scotland's block grant is part of the Departmental Expenditure Limits (DEL) system. The rationale for this approach was that welfare expenditure had to be budgeted on an annual basis due to its instability and was therefore allocated to AME. The more predictable forms of expenditure such as health, education etc. needed to have a longer time horizon and therefore were largely set by the Spending Review process and thus formed part of DEL.

However, recent experience has shown that the boundaries between AME and DEL are not impermeable. Council tax benefit (CTB) was transferred from AME to DEL in 2013-14. This change accompanied the transfer of responsibilities for CTB from DWP to local authorities (in England). The transfer (which was accompanied by a 10 per cent cut in the value of the benefit) required a transfer of the relevant funds from AME to DEL⁷. On the one hand, this allowed councils to tailor their support for council tax payments to their local circumstances; on the other, it has meant that there are a plethora of schemes across English local authorities to support those that may have difficulty in paying their council tax.

Another important implication of the transfer from DEL to AME is that council tax benefit is now competing with other claims on councils' resources, which are also funded through the DEL channel. Thus a council might decide to redirect its council tax benefit into building more affordable housing – or to any other priority.

The same considerations would apply if the funding for Scotland's welfare benefits are absorbed into the DEL budget. This might yield benefits. For example, AA is a non-means tested benefit intended to support those in need of personal care. Unlike England, Scotland already provides free personal care to those in need of this form of support. Integration of the AA budget with local authorities' social care budgets might lead to better outcomes. However, disability groups might well be suspicious that funding, originally intended to support the disabled might be diverted to other priorities.

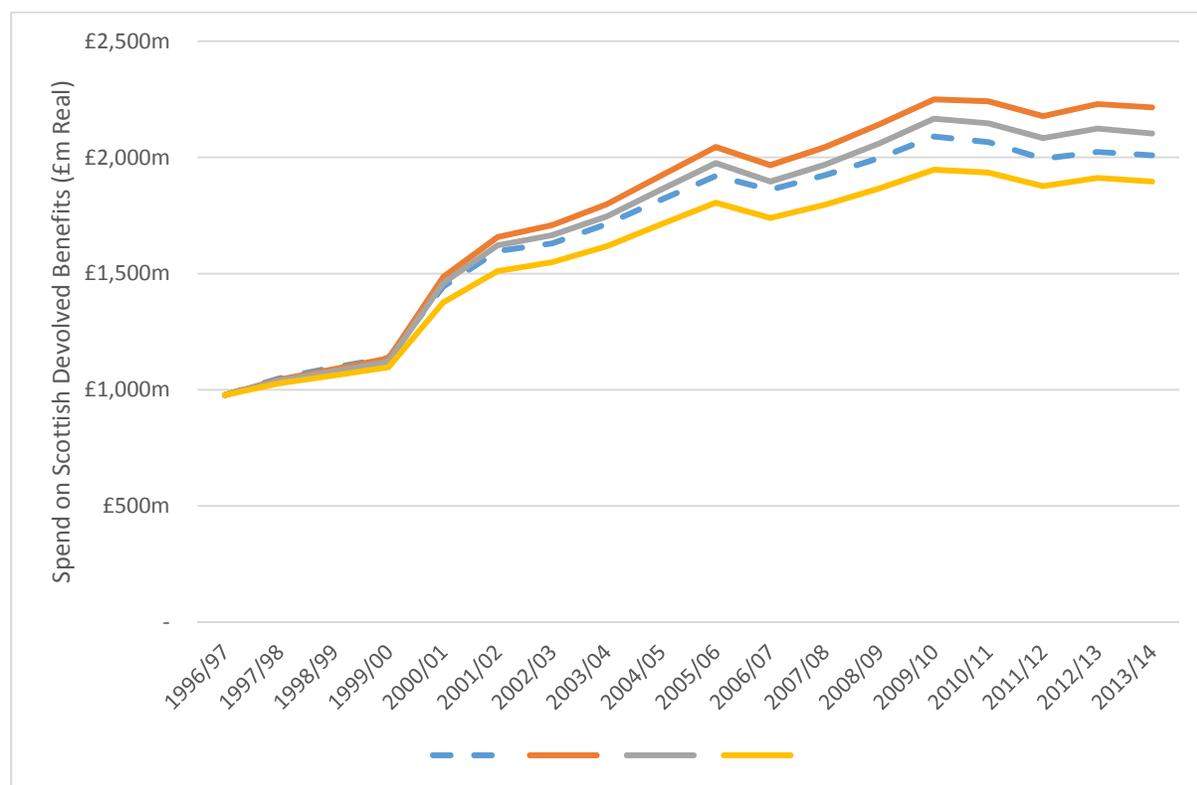
Supposing that the AME/DEL issue can be overcome, and therefore Scotland's welfare budget can be assigned to DEL, why not use the Barnett Formula to index Scotland's welfare budget? In fact, one of the three adjustment mechanisms listed above, namely levels adjustment, is identical to the Barnett

⁷ See, for example, Local Government Association (2013) "Rewiring Public Services: Council Tax Support" Accessed at: <http://www.local.gov.uk/documents/10180/11531/The+story+so+far+-+council+tax+support.pdf/a953d38d-2b39-48a9-b701-1b98591c548f>

Formula. In the context of the welfare powers, levels adjustment means that each year Scotland's grant to fund these powers would *increase* by Scotland's population share of the *increase* in spending on the equivalent welfare benefits in the rest of the UK (rUK). This contrast with the indexed deduction method (which in the case of the welfare powers is an indexed addition), where Scotland's welfare grant would be *increased* by the same *percentage* as the overall *increase* in spending on the equivalent benefits. This method takes no account of population: therefore if Scotland's population is growing more slowly than in rUK, Scotland will benefit since some of the increase in spending will simply be due to the relatively faster expansion of the population south of the border. The final method (per capita indexed deduction) is the same as the indexed deduction *except* that it corrects for changes in population in rUK. So if overall welfare expenditure in rUK increases by 5 per cent, but 1 per cent of that is due to population growth, Scotland's grant to pay for its welfare powers will grow by 4 per cent, whereas under the indexed deduction method, the full 5 per cent would have been added.

How do the indexed deduction and the per capita indexed deduction methods compare with the levels adjustment? One way to investigate this is to construct a counterfactual – to ask what would have happened to the budget available for these benefits had these methods been applied at some time in the past. And given that historical data is available, one can compare how the methods compare with historical spending levels. The results are shown in Figure 5.

Figure 5: Real Spending on Devolved Welfare Benefits under Different Forms of Adjustment



The experiment is based on the assumption that the welfare powers were transferred to Scotland in 1996-97. Assuming this to be the case, Scotland would have been exactly compensated for the current costs of the benefits under the first no detriment principle. In subsequent years, the grant that would have been paid to Scotland has been calculated using each of the three methods and converted to real

values (2005 prices). For comparison, the actual level of spending by DWP in Scotland on the transferred benefits is also shown in Figure 4.

Perhaps surprisingly, the adjustment mechanism that mimics the Barnett Formula gives Scotland the least favourable outcome in 2013-14, some £320m (at 2005 prices) less than the indexed deduction method, and £112m less than what was actually spent in Scotland by DWP in that year. Why is this?

A misunderstanding of how the Barnett formula operates may explain some of the puzzlement at this outcome. It is often wrongly assumed that the Barnett formula gives Scotland a consistent advantage in public spending per head over rUK. In fact, the Barnett Formula will ultimately cause spending per head in Scotland to converge with rUK. Even if Scotland's needs are greater, its funding per head will be no different from rUK.

One way to explain this convergence is to think of the formula as increasing Scotland's grant by the product of Scotland's population with the *increase* in spending per head in rUK. Because welfare spending per head in Scotland is higher than in rUK, the increase in spending in Scotland will be proportionately smaller than in rUK, resulting in a gradual narrowing of the difference in per capita welfare spending.

Historically, the indexed deduction method would have worked in Scotland's favour as shown in Figure 5 because, although spending per head is higher in Scotland, there has been a more rapid increase in overall expenditure on the relevant benefits in rUK than in Scotland since 1996-97 and it is this increase in overall expenditure that drives the increased budget that would have come to Scotland under the indexed deduction method. The per capita indexed deduction method is slightly less favourable to Scotland because part of the overall increase in spending in rUK is accounted for by population growth and this effect is eliminated when the per capita adjustment is made.

How to choose between these adjustment methods? There is no easy answer to this question: outcomes for the indexed deduction and per capita indexed deduction are reversed when considering the block grant adjustment in relation to the tax powers because tax revenues per head are lower than those in rUK. Therefore if the negotiations are principally driven by the relatively more important adjustment for tax revenues, the outcome for the welfare adjustment may seem distinctly suboptimal for Scotland.

4. Further Considerations

Comparability of the structure of welfare benefits after transfer of powers

Note that for each of the indexation methods discussed in the previous section, calculation of the adjustment requires estimates of spending on comparable benefits at the UK level. This calculation will become more difficult if the structure of welfare benefits in rUK changes. So, for example, suppose that AA was devolved to local authorities in the way that council tax benefit has been. How would one calculate the appropriate counterfactual? i.e. what would have been the increase in spending on AA had it still been administered by DWP? Again, experience in relation to the localisation of council tax benefit is relevant.

Funds to support council tax benefit were transferred to local authorities in England in 2013-14. These were accompanied by a 10% cut in their value. Unfortunately, local authorities can no longer identify how much has been transferred to them to meet council tax benefit costs since this allocation has been subsumed within their overall grants. If the same process happened in respect of AA, there would be no relevant data on which to base the calculation of the welfare component of Scotland's block grant. Such information is necessary for each of the indexation methods. It would not be possible to carry out the necessary calculations for any of the methods previously discussed and therefore some other, possibly cruder, indexation method would have to be agreed and implemented.

Administration costs

The costs of administering the benefit system (including tax credits) were estimated by the Scottish Government expert working group on welfare in 2013. It concluded that

*"Taking DWP and HMRC administration costs together, the total DEL costs for administering benefits in Scotland are forecast to remain broadly constant at £0.7 billion each year to 2017-18. The implicit assumption behind this way of producing a forecast is that the cost of administering benefits in Scotland is no higher, per pound of benefits paid to claimants, than it is across Great Britain at present."*⁸

Given that the Scottish Government will be responsible for 14% of the total welfare spend, one might as a first approximation estimate the administration costs associated with the new welfare powers at 14% of the expert working groups estimate, which equals £100 million. This would probably be a lower limit since it does not take account of the initial fixed costs required to establish a benefits administration in Scotland, nor of the likelihood that Scotland has less scope to realise economies of scale in the administration of welfare benefits.

It is not entirely clear from the Smith Commission report where the liability how setup costs for the welfare system should be assigned between the Scottish and UK governments. However it is clear that once operational, the Scottish Government will have to pay the ongoing running costs, as described above.

Indexing to "at risk" populations

Our paper Bell, Eiser and Phillips (2015) suggested that one might account for differential demographic or socioeconomic change between Scotland and rUK by using a "risk-adjusted" population in the formula for the methods for adjusting Scotland's block grant. Thus one might, for example, index the adjustment to the population aged 60+ if this population constituted the main source of potential liability for Scotland's new welfare payments. However, such calculations may be complex and therefore potentially contentious. Their aggregate effect may also be difficult to predict.

No detriment implications of welfare spending

Suppose that Scotland decided to change its welfare policy. This would have a number of effects including direct effect through changes to benefits (eligibility criteria, rates, thresholds, exemptions, etc.) and also indirect effect through behavioural change. There may be consequential effects to other benefits, both Scottish and DWP. The second no detriment principle implies that each government is responsible for the effects of its own welfare policy changes. Determining liability for consequent

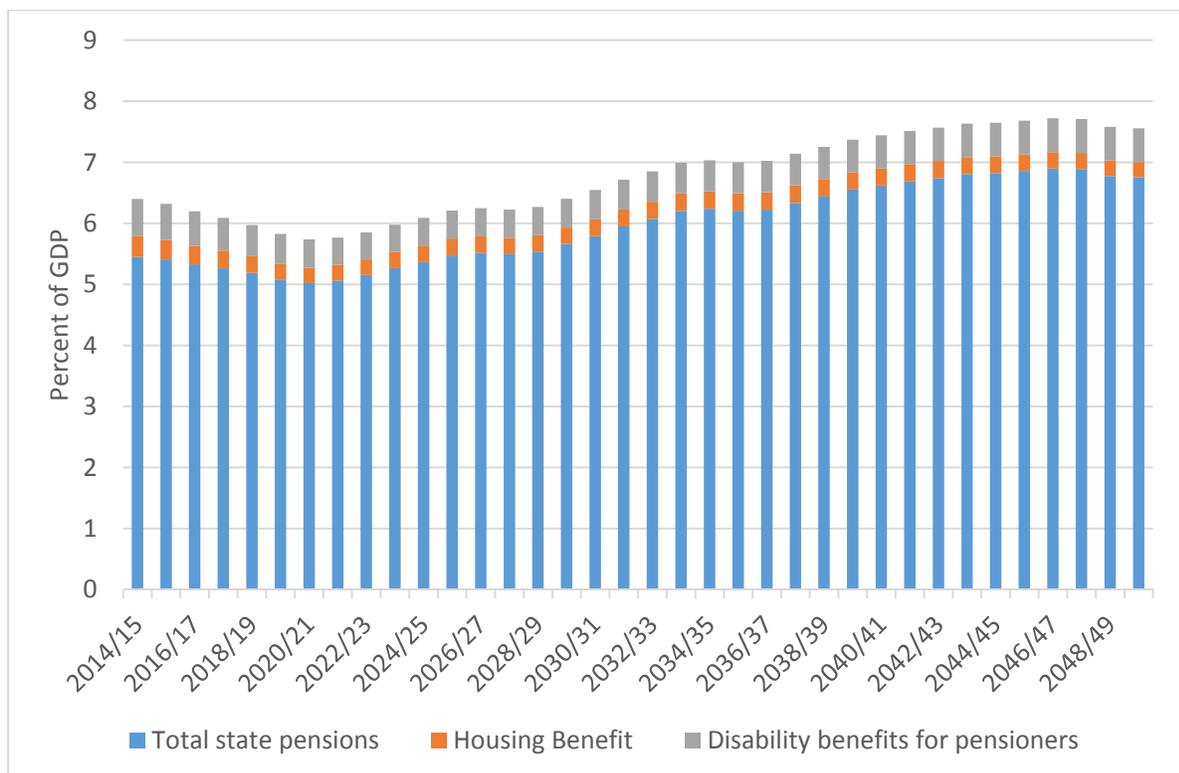
⁸ Scottish Government (2013) accessed at: <http://www.gov.scot/Publications/2013/06/8875/5>

adverse (or beneficial) effects on the other government’s policies and funding would be extremely complex and time consuming if second and subsequent round effects were included in the calculations. It will be as difficult to identify “detriment” in relation to the welfare powers as we have already argued in relation to the tax powers.

Which government bears the risk of population ageing?

One final issue is to note that though the Scottish government is taking over responsibility for many benefits which principally affect older people, it is not correct to say that the Scottish Government is bearing the majority of the welfare risk associated with population ageing. Figure 6 below shows the expected costs (expressed as a percentage of UK GDP) of UK pensioner benefits from 2014-15 to 2048-49 as estimated by the office for budget responsibility. These are based on assumptions about rates of benefit, size of eligible population and levels of need. While these may be subject to some variation, Figure 6 suggests that the main source of variation in pensioner benefit projections over the next 30 years is associated with changes in the costs of the state pension. This is partly due to the “triple lock” and the assumption that other benefits will not increase at the same rate as the state pension during this period. The implication of these projections is that the UK Government will continue to be a significant proportion of the risks associated with population ageing in Scotland.

Figure 6: Pensioner Benefit Expenditure Projections, OBR Up-rating Assumptions



Devolution (Further Powers) Committee

3rd Meeting, 2016 (Session 4), 21 January 2016

Scotland Bill – recent developments from other parliamentary committees

Purpose

1. This note provides Members with an update (see Annexe) on recent developments on the Scotland Bill in other parliamentary committees, specifically :
 - a report issued by the Local Government and Regeneration Committee on **Fixed Odds Betting Terminals**; and
 - a copy of a letter from the Convener of the Standards, Procedures and Public Appointments Committee on the issues of **supermajorities** and also **powers to amend the 1998 Scotland Act**.
2. Additionally, Members may wish to note that the Infrastructure and Capital Investment Committee is planning an evidence session with **OFCOM** in February. One of the issues likely to be raised is the progress towards the agreement of a Memorandum of Understanding between the two governments on OFCOM's relations with the Scottish Parliament.
3. Finally, members may wish to note that the Parliament's Rural Affairs, Climate Change and the Environment Committee is continuing its work on the **draft transfer scheme for the Crown Estate** and the clerks will report back shortly on its progress.

Action/recommendation

4. Members are invited to note the content of this paper.
5. Specifically, Members are also invited to:
 - agree to consider the issues raised by the above-mentioned documents when agreeing a Final Report on the Scotland Bill.

**Clerking Team
January 2016**

Report of the Local Government and Regeneration Committee on Fixed Odds Betting Terminals

This report was published on the 21 December 2015. A copy can be found at:

http://www.scottish.parliament.uk/S4_LocalGovernmentandRegenerationCommittee/Reports/LGRS042015R06.pdf

Key recommendations made by the Committee include:

69. We support the principle that the Scotland Bill provisions should apply to existing betting premises licences. As noted earlier, we believe there are already too many FOBT machines in Scotland. This provision would have given the Scottish Parliament real and effective legislative powers to address this.

70. Accordingly, we conclude that the Scotland Bill should be amended to ensure the provisions also apply to existing licences.

75. We note the Scottish Government's position that all gaming and betting powers should be devolved to the Scottish Parliament.

76. Our inquiry was focused on the Scotland Bill provisions and it did not consult on this particular issue, so we are not able to provide detailed comments on this approach.

77. We agree, however, that devolution of this policy area would enable the Scottish Parliament to develop a strategic approach to betting and gambling. A holistic approach is essential; having piecemeal powers will inevitably result in displacement and render any policy incoherent.

82. We agree a reduction to the stakes and increase of the time between games would help alleviate the damaging effects of FOBTs for some players. We recognise this is beyond the scope of the Scotland Bill but draw governments' attention to this issue for consideration when making future betting and gambling policy.

Plus a series of recommendations on the ways in which local authorities in Scotland can tackle some of the issues which have arisen in relation to FOBTs using existing powers.

Letter from the Convener of the SPPA Committee on the issues of supermajorities and also powers to amend the 1998 Scotland Act (17 December 2015)

Dear Bruce

As you will be aware, the Standards, Procedures and Public Appointments Committee has been examining certain parts of the Scotland Bill.

I am writing to you with the outcome of the Committee's consideration of these provisions.

Super-majorities

The Committee considered clause 11 (originally clause 10) on super-majorities. This included an exchange of correspondence with the Secretary of State for Scotland which is attached.

Clause 11 puts in to effect the following recommendation of the Smith Commission:

“To provide an adequate check on Scottish Parliament legislation changing the franchise, the electoral system or the number of constituency and regional members for the Scottish Parliament, UK legislation will require such legislation to be passed by a two-thirds majority of the Scottish Parliament.”

Although the recommendation is straightforward, the clause is complex, sometimes unnecessarily so. Some of our initial concerns were addressed by the amendments made in the House of Commons. In particular, we welcome the fact that it will no longer be possible to challenge a bill which is passed by a super-majority in practice, even if the Presiding Officer ruled that it did not *require* a super-majority.

We note that, to be able to benefit from that amendment, the Parliament will have to be able to demonstrate whether or not a bill has been passed by a super-majority. We plan to draw up Standing Order rule changes before the end of the session which can be put to the next Parliament once the Scotland Bill has passed. These will provide for a vote on every bill at the end of Stage 3, whether or not there is any dissent, so that the Parliament has a record of which bills have super-majority support.

We note that the bill requires the Presiding Officer to state in relation to every bill whether or not it concerns protected subject-matter. We consider this is a transparent approach which should not be unduly onerous. The detailed arrangements, including ensuring members are notified as early as possible where a bill is likely to need a super-majority, can be worked out between the Presiding Officer and the Bureau in due course.

However, we have two remaining concerns about the clause.

The first concern arises where a bill has been passed with a simple majority in accordance with the Presiding Officer's statement is challenged, and the Supreme Court agrees that a simple majority is sufficient. At the moment, such a bill would have to be reconsidered by the Scottish Parliament before it could pass, even though a majority of that Parliament has already agreed to the bill.

We wrote to the Secretary of State for Scotland for further clarification and he replied:

“The UK Government recognises that this reconsideration will entail a final stage at which the reconsidered Bill must be approved by a simple majority. This is an important provision - in a scenario where some time may have passed and circumstances may have changed since the Bill was first passed, it is key that the Scottish Parliament has the opportunity to reconsider the Bill.”

We do not consider this an adequate explanation. If a bill only requires a simple majority, and has achieved one that should be sufficient. It is a basic principle in the Scottish legislative process as set out in the Scotland Act that the Parliament should only reconsider bills where absolutely necessary and it seems to us unnecessary in a case such as this.

We accept that, if the challenge process creates extensive delay, then circumstances could have changed. In that case, however, it would be sufficient for the bill to provide that such a bill *could* be reconsidered if the Parliament so resolves, not that it must be.

The second point we raised with the Secretary of State was the use of the words “incidental or consequential” in relation to protected subject-matter. The new subsection 31(4) (inserted in the Scotland Act by 11(5)) says:

“For the purposes of this Part a provision of a Bill relates to a protected subject-matter if it would modify, or confer power to modify, any of the matters listed in subsection (5) (but not if the provision is incidental to or consequential on another provision of the Bill).”

We note that these are the same words used in Schedule 4 of the Scotland Act 1998 in relation to determining whether or not the Scottish Parliament can legislate on reserved matters. In that circumstance, we consider that the words are essential to ensure that, at the complex boundary between reserved and devolved matters, the Scottish Parliament can use its devolved powers fully.

However, in the case of protected subject-matter under clause 11, the effect of the Presiding Officer's ruling would not be to prevent the Parliament from legislating but only to prevent it from doing so without two-thirds support. In other words this is fundamentally a procedural matter, rather than one of legal validity (and this is reflected in the clause in that failure to meet the super-majority requirement is not grounds for challenging the validity of an Act once it has Royal Assent).

It is also a ruling which will have to be made quickly, between stage 3 amendments and the final vote on the bill, and which has the potential to draw the Presiding Officer into political controversy. It seems to the Committee that it is desirable for the line which the Presiding Officer is asked to draw to be as clear-cut as possible. The more nuanced a decision the Presiding Officer has to make, the more scope there is for challenge.

Bills covering protected subject-matter will arise rarely; those which cover such subject-matter only consequentially will be even rarer (if they even arise at all). We do not therefore think that it would be a significant restriction on the Parliament to require a two-thirds majority for any bill which touches on restricted subject-matter.

We therefore continue to take the view that the bill should be amended to remove the words “incidental or consequential”.

Scope to modify the Scotland Act 1998

The Committee has also examined clause 12 of the Scotland Bill (originally clause 11) on the scope to modify the Scotland Act 1998.

Clause 12 seeks to implement the recommendation in the Smith Commission that the Scottish Parliament should receive “powers to make decisions about all matters relating to the arrangements and operations of the Scottish Parliament and Scottish Government”.

Paragraph 4 of schedule 4 of the Scotland Act 1998 lists those sections of the Act which can currently be modified by the Scottish Parliament. Clause 12 of the Scotland Bill adds additional sections to this schedule in order to give the Scottish Parliament new powers over the operation of the Scottish Parliament and the Scottish Government.

We wrote to the Scottish Government to get its views on clause 12. The Scottish Government’s view is that it “remains difficult to discern the criteria the UK Government applied when selecting sections for devolution”. In the view of the Scottish Government, even as amended, clause 12 would result in “fragmented legislative competence” for the operation of the Scottish Parliament and Scottish Government.

The Scottish Government welcomed the amendments to the bill made by the UK Government at Report Stage in the House of Commons but noted that there were some additional areas which it considered should be devolved. For example—

- Competence over the Lord Advocate’s position as head of the systems of criminal prosecution and investigation of deaths in Scotland. For example, section 27(3) covers the participation of the Law Officers in parliamentary proceedings, and is not being devolved. Section 48(1) which covers the appointment of the Lord Advocate and the Solicitor General also remains reserved.

- The power to legislate on arrangements for the final stage of a bill. This is covered in section 36 of the Scotland Act. The requirement for a 'final stage at which a bill can be passed or rejected' will remain reserved but the requirement for there to be a stage 1 and 2 is devolved.
- The use of the names "Bills" and "Acts". This is covered in section 28 of the Scotland Act 1998 and provides that bills are called 'Bills' and Acts are called 'Acts'.

Section 23 of the Scotland Act 1998, which provides the Parliament with powers to require witnesses to appear before it to give evidence or to produce documents, will also remain reserved.

While we also do not know the criteria applied by the UK Government in their approach to implementing this recommendation we have considered carefully the possible reasons why these particular powers may not have been devolved to the Scottish Parliament.

We note that one possible argument is that each of these provisions deal with matters which extend, to some extent, beyond the scope of the operations of the Scottish Parliament and Scottish Government. As a result, it could be argued that devolving these powers would go further than was intended by the Smith Commission agreement.

For example, the Lord Advocate has a role as head of the system of investigation of deaths in Scotland. This role is independent of the Scottish Government and the Lord Advocate does not undertake this function as a member of the Scottish Government. It could therefore be argued that some aspects of the Lord Advocate's responsibilities do not relate to the "operations of the Scottish Parliament and Scottish Government". This may explain why the Scotland Bill does not propose devolving powers relating to the appointment process of the Lord Advocate. We observe that the independence of this role has always been protected through a limitation on the Scottish Parliament's legislative competence.

We also note that the decision on whether to pass a bill at the final stage of the legislative process is linked to the power of the Law Officers to refer the bill to the Supreme Court for a decision on its legislative competence. There is an argument that access to the Supreme Court at this point in the legislative process as the arbiter on devolution issues is part of the 'constitutional framework' of the UK, which may explain why the Scotland Bill proposes that the final stage of the legislative process remains reserved, while all other parts of the legislative process are being devolved.

Similarly we note that for the framework of checks and balances to operate there must be a common terminology across the reserved and devolved aspects of the legislative process. There is an argument that this shared terminology must be retained as part of the shared constitutional framework of the UK.

Finally, section 23 of the Scotland Act deals with the Scottish Parliament's powers to call witnesses and documents, but some of its provisions cover restrictions on calling UK Ministers or witnesses on matters outwith the responsibility of the Parliament.

The view could be taken that this section, at least in part, deals with interface between devolved and reserved matters and therefore should not be devolved itself.

In summary, we note that the implementation the Smith Commission recommendation on devolving powers over the Scottish Parliament and Scottish Government is not necessarily straightforward. In part this is due to the challenge of identifying with certainty which provisions in the Scotland Act 1998 relate to the “arrangements and operations” of the Scottish Parliament, and which provisions have a wider impact on reserved matters or the constitutional relationship with the rest of the UK. We have discussed above some of the different views on which provisions should be devolved and which should remain reserved, and the likely reasons behind the approach taken in the Bill.

We draw the attention of the Devolution (Further Powers) Committee to our comments on these matters. We do not, however, wish to propose any amendments to the provisions in clause 12 of the bill.