Dear Linda,

John Swinney and I were grateful for the opportunity to give evidence to the Committee on 28 June.

Amendments were made to the Scotland Bill at Commons Report on 21 June. Under rule 9B.3 of the Parliament’s standing orders, the Scottish Government should provide a view on relevant amendments to the Parliament, in the form of a legislative consent memorandum, normally within two weeks of the amendments being tabled. There is still much work to be done on the Bill in the coming months and the Scottish Government will be providing the Committee with further evidence over the course of its consideration. I therefore felt that a formal legislative consent memorandum would not be the most helpful format in which to put forward the Government’s views at this time. Instead Annex A to this letter provides Government’s response to these particular amendments; we intend to provide similar responses to future groups of amendments as the Bill proceeds. The Government also plans to consolidate these responses through the usual LCM procedures later in the process.

At our evidence session, I undertook to write to clarify the position on the ongoing EU litigation on aggregates levy. Two separate cases relating to the levy were brought by the British Aggregates Association (BAA). The main action (case T-210/02) sought to overturn the European Commission’s 2002 ruling that the aggregates levy as a whole does not include elements of state aid. The secondary action (T-359/04) sought an annulment of the Commission’s 2004 decision that the Northern Ireland Credit Scheme constitutes permissible state aid.

The European General Court (EGC) originally dismissed the main action. However, BAA successfully appealed and in 2008 the European Court of Justice referred the case back to the EGC, ruling that its judgment against BAA had been flawed. An oral hearing was held in May but a judgment is not expected until 2012.
In the secondary case, on 9 September 2010 the EGC annulled the Commission’s State aid approval for the Northern Ireland Credit Scheme. HMRC therefore announced suspension of the Credit Scheme from 1 December. The UK Government continues to support the scheme and hopes to reintroduce it, but its reinstatement is dependent on the outcome of the Commission’s investigation.

I understand that there is a strong likelihood of further appeals following the outcomes of the continuing legal action and the Commission’s investigation, which would extend both cases further. However, as I stated in my response to Stewart Maxwell on 28 June, this does not preclude the devolution of aggregates levy within the Scotland Bill. It would be possible to delay commencement of the provisions until the legal position has been resolved, and it would then be for the Scottish Parliament to ensure that Scottish legislation met EU requirements. The previous Scotland Bill Committee in the last Parliament also suggested the inclusion of aggregates levy in the Bill, to be brought into force once the relevant court cases had been resolved, and this position was supported by the Parliament in its vote on the Bill Committee’s report.

I hope that the Committee finds this helpful, and I look forward to continuing to support its work over the coming months.

Yours sincerely

Bruce Crawford

BRUCE CRAWFORD
Scottish Government response to the UK Government amendments to the Scotland Bill made at the House of Commons Report stage on 21 June

NB All clause numbers refer to the latest draft of the Bill, as brought from the Commons on 22 June 2011

Financial

Clause 31  Income tax for Scottish taxpayers

The amendment to this clause ensures that the ability to borrow to cover a shortfall on forecast receipts would apply to the existing Scottish Variable Rate (SVR) power.

Clause 32  Definition of Scottish taxpayer for Scottish variable rate

This new clause would apply the Bill's definition of a Scottish taxpayer to SVR, replacing the definitions used in the Scotland Act 1998.

Clause 37  Borrowing by the Scottish Ministers

This clause has been amended to introduce a power in the Bill which would allow the Secretary of State, with the consent of the Treasury, to amend in future the way in which Scottish Ministers can borrow without the need for further primary legislation. (The power to borrow currently included in the Bill is limited to borrowing by way of loan.) The UK Government's stated intention is to enable the power to issue bonds to be devolved to the Scottish Ministers in future. The UK Government has announced that it will conduct a review of the costs and benefits of bond issuance in comparison with other forms of borrowing, and will consider extending Scottish Ministers' powers where this does not undermine the overall UK fiscal position or have a negative impact on total UK borrowing.

This provision would remove only one legislative obstacle to the issue of bonds, rather than grant the relevant power. The statement by the Secretary of State for Scotland also clarifies that HM Treasury would review the financing cost of bond issuance relative to other potential sources of Scottish Government borrowing, in order to assess any impact on UK borrowing.

Despite offering limited progress, in the view of the Scottish Government the approach put forward by the UK Government remains deficient on two counts:

- The relative value for money of bond financing cannot be adequately tested, unilaterally, on a once-and-for-all, or even periodic, basis by HM Treasury. It is a dynamic rather than static test and the results will vary according to market conditions and Scottish Government funding requirements. The appropriate value for money tests must be conducted at specific times and for specific funding requirements, when considering the available options to finance borrowing. Thus these are judgments for Scottish Ministers rather than HM Treasury.
The Scottish Government would be fully liable to meet the cost of debt repayments (whether through loans or bonds) from its revenues. Therefore no effect can be imputed on the impact of Scottish Government financing costs on UK public borrowing.

In summary, it is entirely appropriate for Scottish Ministers to consider the full range of debt instruments and to select for each tranche of borrowing the option which best serves the interests of Scottish taxpayers. This position was endorsed unanimously by the Scottish Parliament in June 2011 and was a clear recommendation of the previous Scotland Bill Committee. There is no justification for the UK Government to create legal or bureaucratic obstacles to prevent the Scottish Government issuing its own bonds.

Neither does the amendment meet the Scottish Government’s key proposal to create a long-term framework for sustainable capital and revenue borrowing, based on clear principles. This must include a significantly higher overall limit on borrowing, an ability to borrow for over longer timeframes and the ability to use this borrowing to offset cyclical falls in tax revenue. The last Committee and the new Scottish Parliament (unanimously) have endorsed these proposals.

Non-financial

Clause 1 Administration of elections

This clause was amended to require the Secretary of State to consult Scottish Ministers before making regulations about Scottish Parliament elections (in those areas where responsibility has been retained rather than devolved).

The Scottish Government asked the UK Government for this amendment, which would provide consistency as the Bill requires Scottish Ministers to consult the Secretary of State before making regulations in those areas where responsibility has been devolved.

While the Scottish Government welcomes this amendment, it has consistently argued for the Scottish Parliament to be made wholly responsible for all matters relevant to Scottish Parliamentary elections. In the previous Parliament the Scotland Bill Committee also recommended more extensive devolution in relation to elections, specifically that the procedures for filling regional seat vacancies during the life of a Parliament and the rules relating to disqualification should be devolved. The UK Government has only partially addressed the devolution of the rules relating to disqualification (see below), and has not addressed the devolution of the procedure for filling regional seat vacancies.

Clause 2 Combination of polls at Scottish Parliamentary and other reserved elections

The amendment made to this clause relates to the section of the Bill which includes Scottish Parliament elections in the provisions of Section 15 of the Representation of the People Act 1985. Section 15 covers the procedure to be followed if different polls were to be taken on the same day and not taken separately (i.e. they were to
be combined). This power would not be devolved and it would remain for the Secretary of State to make the necessary regulations. The amendment provides that where the Secretary of State decided that elections were not to be taken together, local returning officers would not have the power to determine that local elections in Scotland and Scottish Parliament elections should be combined.

The amendment also provides that where the Secretary of State made any regulations about the combination of election he would have to consult Scottish Ministers.

The Scottish Government supports these amendments.

Clause 3 Supplementary and transitional provision about elections

A technical amendment was made to this clause, clarifying that regulations made by the Secretary of State in relation to elections would be subject to the affirmative procedure. The Scottish Government is content with the amendment.

Clause 16 Exercise of power to make Order disqualifying persons from membership of the Parliament

This new clause appears to be the UK Government’s response to the Session 3 Scotland Bill Committee’s Recommendation at paragraph 189 of its 1st Report: “We consider that ... the rules relating to disqualification should be devolved to the Scottish Parliament. “

The clause falls short of devolving all matters relating to disqualification from membership of the Parliament. That would involve extending the Parliament’s competence so that it could amend sections 15-18 (Disqualification) of the Scotland Act 1998 (as provided for in the draft amendments which the Government previously offered to the Scotland Office soon after the SBC Reported).

The clause instead would provide for amendments to various parts of the 1998 Act to enable Scottish Ministers to exercise powers to promote orders made under section 15(1) and (2) of the 1998 Act. Such orders list office-holders who are disqualified from being an MSP. Whilst it is presumed that the Government and Parliament could establish their own informal policy criteria for determining which office-holders should be disqualified, ultimate policy responsibility and legal competence for the broader disqualification framework would remain with Westminster. In that sense, the UK Government’s policy approach in this area is consistent with that which it has adopted in respect to Scottish Parliamentary electoral matters in general. It offers Scottish Ministers executive competence as opposed to conferring full legislative competence on the Scottish Parliament.

The Scottish Government welcomes this amendment, which would be an improvement on the current situation whereby the order is approved in draft by the Scottish Parliament but is ultimately an Order in Council promoted by a Minister of the Crown and compiled in accordance with policy criteria set by the UK Government. However, the clause falls short of the competence in this area sought by both the Scottish Government and the previous Scotland Bill Committee, The
Scottish Government has consistently argued for the Scottish Parliament to be made wholly responsible for all matters relevant to Scottish Parliamentary elections.

Clause 17  The Lord Advocate: Convention rights and Community law

This new clause would give effect to the findings of the Expert Group commissioned by the Advocate General to examine the operation of the Scotland Act 1998 in respect of acts of the Lord Advocate as head of the prosecution system of Scotland. The new clause would amend sections 57(3) and 102 of the Scotland Act 1998, removing the actions of the Lord Advocate from the devolution issue minute process, and extending the ability of courts and tribunals to limit retrospective consequences of their judgments. The Scottish Government welcomes this.

However, the clause also sets out an appeal procedure to the Supreme Court in Scottish criminal law cases on issues relating to compatibility with Convention rights and Community law. The clause would empower the Supreme Court to affirm, set aside or vary a decision of the High Court of Justiciary, remit a matter for determination by that court, or order a new trial or hearing.

The Scottish Government is opposed to the new appeal procedure created by clause 17. As noted in the First Report of the Independent Review Group appointed by the Scottish Government, the relationship between the High Court of Justiciary and Supreme Court is different from the position in the rest of the UK.

The jurisdiction in Scottish criminal cases created by the new clause would be much wider than that for England and Wales, and so be more burdensome on the Scottish criminal justice system, and on the Supreme Court itself. In England and Wales, there is only a right of appeal to the Supreme Court where the lower court certifies that a case raises a point of law of general public importance and that the point ought to be considered by the Supreme Court. Under the clause, a Scottish criminal appeal in relation to compatibility with Convention rights or Community law would need only permission of the High Court or the Supreme Court to proceed. The Review Group proposed that the Scotland Bill be amended to align the position in the two jurisdictions, and is currently consulting on the desirability and mechanics of doing so, as well as on wider issues of the composition and location of the Supreme Court. The Group will report again in the autumn, once it has considered the responses to its consultation.

In addition, the effect of the clause would be to further entrench the role of the Supreme Court as the final court of appeal in matters of Scots criminal law and to further undermine the High Court of Justiciary as the apex of the Scottish criminal justice system.

The Scottish Government reiterates its view that the most straightforward solutions to the problems created by the current devolution minute procedure, and those most in keeping with Scotland’s separate legal system, are that the High Court of Justiciary should make the final decision in Scottish criminal cases and no criminal law devolution issues should be heard by the Supreme Court. The Scottish Government offered draft amendments to these effects to the Scotland Bill.
Committee of the previous Parliament. These drafts still offer better solutions than clause 17.

Clause 19  Power to vary retrospective decisions about non-legislative acts

The Scotland Act 1998 permits Scottish Ministers to act only in accordance with various limitations. These limits are policed by the courts in Scotland and the Supreme Court. If the court finds that an act is incompatible with these limitations it is a nullity. Thus, for example, a finding that the prosecution of a case breached an individual’s Convention rights might mean that previous acts were also a fundamental nullity. The Scotland Act allows courts to restrict this retrospectivity in respect of primary and secondary legislation: the intent behind this amendment is to extend potential protection by the courts to any act of the Scottish Ministers (including the Lord Advocate).

The effect of this amendment would be to extend an existing power in the Scotland Act to potentially protect all acts of the Scottish Ministers from becoming retrospectively null, should a court decide the acts were outwith devolved competence. It would be up to the court in question, however, to decide whether, and to what extent, to apply such protection.

The Scottish Government supports this amendment as far as it goes. However, the Scottish Government takes the view that the regime of the Scotland Act 1998 as regards Convention rights is more onerous than that of the Human Rights Act 1998, under which the UK Government operates and which results merely in a finding that an act was unlawful. The Scottish Government has offered draft amendments to the Scotland Bill Committee of the previous Parliament to bring the Scotland Act position more closely into line with the position under the Human Rights Act, by removing Convention rights challenges from the ambit of the Scotland Act and providing that such challenges could be made under the Human Rights Act.

Clause 21  Exercise of functions relating to Seirbheis nam Meadhannan Gàidhlig

At present, appointments to the board of MG ALBA are made by Ofcom and approved by the Secretary of State for Scotland. Scottish Ministers are, in practice, consulted on appointments, but have no power to approve or veto appointments.

This new clause would require appointments to the board of MG ALBA to be jointly approved by the Secretary of State and by Scottish Ministers. Guidance issued in relation to appointments would still be issued by the Secretary of State, but would require the agreement of Scottish Ministers. The drafting of the guidance is the one area in which the Secretary of State and Scottish Ministers would not be “equal partners” in the appointment approval process.

In other respects the amendment puts on the face of the Scotland Bill the executive devolution arrangements already in place, including that the Scottish Ministers would pay annually to OFCOM an amount that they felt to be appropriate for the financing of programmes in Gaelic from the Gaelic Television Fund.
MG ALBA board appointments were not referred to in the Calman Commission’s report, or in the original Scotland Bill. However, this amendment follows proposals from Scottish Ministers, and a unanimous recommendation from the Scotland Bill Committee that Scottish Ministers should approve the appointment.

The Scottish Government has in the past (following on from a recommendation of the Scottish Broadcasting Commission) argued that Scottish Ministers should be solely responsible for approving MG ALBA Board appointments. This amendment does not go that far, but would represent a significant step forward from previous arrangements. The Scottish Government therefore welcomes the amendment.

**Transitional provision for Scottish statutory instruments**

This clause was removed at Report. It is no longer necessary, as the provisions have now come into force under the Interpretation and Legislative Reform (Scotland) Act 2010.
**Proposed non-legislative changes**

In his written ministerial statement of 13 June, the Secretary of State for Scotland also announced several non-legislative proposals.

**Capital borrowing**

The Secretary of State for Scotland announced that the UK Government would be, “Bringing forward to 2011 pre-payments, a form of ‘cash advance’, to allow work on the Forth Replacement Crossing to begin”.

The proposal is for a total of £100m pre-payments (outside the Scottish Government’s Capital Departmental Expenditure Limit (CDEL)) over the Comprehensive Spending Review (CSR) period, starting in 2011-12. It would not amount to early implementation of borrowing powers of any substance and gives no clarity on how much the Scottish Government will be able to borrow in this Parliament to bring forward investment to support the economy. The Scottish Government has proposed immediate implementation of full capital borrowing powers, including substantial extra budget capacity from 2011-12 onwards (£1 billion extra capital cover in this CSR period).

**Revenue borrowing**

The Secretary of State announced that the UK Government would be:

- “Removing the requirement for Scottish Ministers to absorb the first £125m of tax forecasting variation within their budget, giving Scottish Ministers more flexibility to decide how best to respond to any variations in tax receipts compared to forecasts.”

- “Allowing Scottish Ministers to make discretionary payments into the Scottish Cash Reserve for the next 5 years, up to an overall total of £125m, to help manage any variation in Scottish income tax receipts compared to forecasts in the initial phase of the new system.”

The Scottish Government welcomes the direction of these proposals, which respond to recommendations in the Scotland Bill Committee report (Paras 116 and 118). The amendments in relation to the Scottish Cash Reserve and to remove the requirement for Scottish Ministers to absorb up to £125M of any tax forecasting variation are positive, and would go some way to mitigating the difficulties created by the volatility of tax receipts.

However the proposals do not address the inadequate £200M annual and £500M total caps on revenue borrowing nor the overly restrictive requirement that any resource borrowing must be repaid in four years (also criticised by the Scotland Bill Committee – Para 117).

Moreover, the UK Government has still not addressed a fundamental flaw in the proposals, that the Scottish Government would only be able to borrow to correct variations between tax receipt forecasts by the OBR and actual income from taxes,
and not to address cyclical falls in tax revenue. Overall, the financial proposals would transfer a significant degree of risk to the Scottish Budget – including the potential for a long-term deflationary bias - without the necessary levers to mitigate the worst effects.

Welfare

The Secretary of State for Scotland announced the UK Government’s intention to strengthen inter-governmental dialogue in areas of mutual interest in welfare. No details have yet been provided about the content of this proposal, which is understood to be non-legislative, or about how it might align with Scottish interests in the UK Government’s ongoing programme of wider welfare reforms which will include further devolution in respect of Council Tax Benefit and elements of the discretionary Social Fund.

Other recommendations made by the previous Scotland Bill Committee

In the last session of Parliament the Scotland Bill Committee recommended a series of changes to the Bill. The amendments made by the UK Government at Report stage and the measures announced in the Secretary of State’s written ministerial statement of 13 June address some of these recommendations. However, a number of recommendations made by the previous Committee have not yet been addressed, or have been addressed only partially:

- Devolution of the procedure for filling regional seat vacancies
- Devolution of the rules relating to disqualification (only partially addressed by amendment at Report – see above)
- Agreement of the Scottish Parliament to any order bringing into effect non-referred parts of a bill (where a bill has been partially suspended following reference of individual provisions to the Supreme Court)
- The removal of the reservation of registered social landlord insolvency
- Changes to the administration of the Crown Estate in Scotland to increase its accountability to Scottish Ministers and the Scottish Parliament and to recognise the important interaction of the Crown Estate Commissioners’ work with devolved policy, particularly renewables policy
- A review of all options for future governance of the Crown Estate in Scotland, including full devolution.
- More extensive devolution of powers over drink-driving
- More extensive devolution of powers over speed limits
- Removal or restriction of the clause on the implementation of international obligations
- Significantly increased prudential capital borrowing limits
- Significantly increased revenue borrowing limits
- The ability to issue bonds (only partially addressed by amendment at Report – see above)
- The devolution of aggregates levy
- A UK Government review of further devolution of the marine environment