Devolution (Further Powers) Committee

New Powers for Scotland:
Final Report on the Scotland Bill
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Devolution (Further Powers) Committee

To consider matters relating to The Scotland Act 1998 (Modification of Schedule 5) Order 2013, the Scottish Independence Referendum Act 2013, its implementation and any associated legislation. Furthermore, (i) until the end of November 2014 or when the final report of the Scotland Devolution Commission has been published, to facilitate engagement of stakeholders with the Scotland Devolution Commission and to engage in an agreed programme of work with the commission as it develops its proposals; and (ii) thereafter, to consider the work of the Scotland Devolution Commission, the proposals it makes for further devolution to the Scottish Parliament, other such proposals for further devolution and any legislation to implement such proposals that may be introduced in the UK Parliament or Scottish Parliament after the commission has published its final report.

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Introduction

Devolving powers to Scotland – the process to date

1. On the morning after the Scottish Independence Referendum of 18 September 2015, Prime Minister David Cameron MP announced the creation of a cross-party group, chaired by Lord Smith of Kelvin, to devolve further powers to the Scottish Parliament; the Smith Commission. Two members of each of the five political parties represented in the Scottish Parliament were appointed to serve alongside Lord Smith. The Smith Commission completed its Final Report on 30 November 2014. Subsequently, the UK Government published a set of draft legislative clauses designed to take forward the recommendations of the Smith Commission.

2. On 28 May, 2015, the UK Government introduced the Scotland Bill 2015-16 (“the Bill” or “Scotland Bill”) in the House of Commons to give effect to the Smith Commission’s recommendations. The Bill has completed its passage through the House of Commons and is currently nearing its final stages in the House of Lords.

3. The current Scotland Bill is the latest in a series of legislative proposals to first establish, and then subsequently devolve further powers to, the Scottish Parliament. The Scotland Act 1998 set up the Scottish Parliament and provided it with the first set of powers. A subsequent Act passed in 2012 provided additional powers, mainly, but not exclusively, of a financial nature. Between these dates, the Scottish Parliament’s powers have been modified with the addition of new competences. This Bill provides for the further transfer of a range of powers (see subsequent sections of this Report).

4. It is accepted that any bill of this nature – affecting as it does the legislative competences of the Scottish Parliament and the executive powers of the Scottish Government – requires the consent of the Scottish Parliament before it can be passed into law by the UK Parliament.

This report

5. This Final Report on the Scotland Bill sets out the Committee’s assessment of the Bill’s provisions, particularly from the perspective of whether the Bill fully delivers both on the spirit and substance of the all-party agreement in the Smith Commission.

6. The Report also provides our views on the non-legislative fiscal framework that was to be negotiated between the UK and Scottish governments to provide for a financial underpinning of the new powers being delivered in the Bill.

7. This Report builds upon our Interim Report published in June 2015, which set out our initial position on the draft clauses published by the UK Government in advance of the Bill’s introduction. This report does not
repeat at length the evidence we heard then or the conclusions we made in our Interim Report, but reflects the evidence we have taken since then and our final conclusions and recommendations on the Scotland Bill and the associated fiscal framework.

8. As we stated in our previous Interim Report, all five political parties on the Committee have entered into the process of producing this Final Report with the aim of finding as much consensus as possible on the current package of measures being proposed for further devolution and where these can be improved at 3rd Reading in the House of Lords. In short, all of the Committee want to see both the letter and the spirit of the Smith Commission’s report fully delivered.

9. The final section of our Report sets out our conclusions on the provisions in the Scotland Bill and fiscal framework. Critically, because the Scotland Bill cannot be passed by the UK Parliament without the consent of the Scottish Parliament, this Report contains our recommendation to the Scottish Parliament on the issue of legislative consent.

10. Subject to the approval of the Parliament of its forthcoming business, our Report and the conclusions and recommendations will be the focus of a debate in the Scottish Parliament in due course.

Our advisers

11. To assist us in the preparation of this report, the Committee appointed two advisers:

   • Professor Nicola McEwen, Professor of Politics and Associate Director of the ESRC Centre on Constitutional Change, based at the University of Edinburgh; and
   
   • Christine O’Neill, Partner (Chairman), Brodies LLP.

12. The Committee is grateful to our advisers for their work. We are also grateful to the Parliament’s research service – SPICe – and to the Office of the Solicitor to the Scottish Parliament.
The Scotland Bill & Fiscal Framework – an overview

Background, key facts and figures

13. The Scotland Bill 2015-16 is the latest in a series of bills that first established and then broadened the powers devolved to the Scottish Parliament, starting with the Scotland Act 1998, which followed a referendum held a year earlier. Since 2000, there have been further amendments made to the list of reserved powers set out in Schedule 5 of the Scotland Act 1998 which have devolved power to the Scottish Parliament. For example, in 2004, the power to legislate in relation to the promotion and construction of railways which start, end and remain in Scotland, was devolved.

14. In addition, further powers have been devolved to Scottish Ministers since 2000. These powers have included responsibility for the Scottish rail franchises, initially transferred in 2001. Whilst the functions are now exercised by Scottish Ministers, the subject matter remains reserved. The broad split between devolved and reserved powers is set out in Figure 1 opposite.

15. The Scotland Bill 2015-16 is the third major piece of legislation dealing with the powers of the Scottish Parliament. Its key provisions have evolved and been amended since the Bill was introduced in May 2015. The main areas of further devolution are set out in Figure 2, which contains
an overview of the main provisions of the Bill, as at Report Stage in the Commons (November 2015).

Figure 2: Broad overview of the Scotland Bill 2015-16 (Source: SPICe)

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16. This Bill would, if enacted, transfer powers which are aimed at under-pinning the permanency of the Scottish Parliament and Scottish Government within the UK’s uncodified constitution. The Bill would also devolve power to set the rates and bands of income tax on non-savings and non-dividend income. The Bill also provides for a share of VAT receipts in Scotland to be assigned to the Scottish Government’s budget. The Bill would devolve Air Passenger Duty and the Aggregates Levy; powers over certain aspects of welfare; powers over speed limits and road signs, and rail franchising; control of the functions of the British Transport Police in Scotland, Ofcom and the management of the Crown Estate relating to Scotland; abortion and welfare foods, and control of the Scottish Parliament’s electoral system, subject to a two-thirds majority within the Parliament for any proposed change.

17. However, at its core, are the provisions on tax and welfare powers. Figures 3 and 4 below contain an explanation on what is being devolved and some detail on the relative scale of the newly devolved tax and welfare powers relative to those taxes and benefits that remain reserved.
18. Finally, it is important to note that a critical element associated with the Bill is the non-legislative fiscal framework. The Framework is essentially an agreement entered into by the two governments underpins how the new financial and welfare powers will work in practice. Critically, the Framework sets out how the current block grant that provides for the bulk of the Scottish Government’s budget (around 80%) will be adjusted both initially and indexed over time as the new taxation and social security provisions in the Scotland Bill 2015-16 come into force (e.g. new powers over income tax, the assignment of a share of VAT revenues, devolution of Air Passenger Duty etc.).

19. The fiscal framework sets out the tools that a future Scottish Government will have for managing risk and volatility of revenues and also covers what fiscal rules will be put in place between the two governments and how these are credible.
20. In a letter to the Committee, the Deputy First Minister set out a list of the main areas that need to be covered in a fiscal framework. These are:

- Methods for block grant adjustments;
- Indexation;
- No detriment;
- VAT assignment;
- Administration costs;
- Crown Estate;
- Employability;
- Capital borrowing;
- Resource borrowing and other flexibilities;
- Fiscal scrutiny – institutions; and
- Governance.
Part 1 – Constitutional arrangements

Permanency of the Scottish Parliament and Scottish Government

What the Scotland Bill (as introduced) proposed

The Bill as introduced included a statement that a Scottish Parliament is “recognised as” a permanent institution within the UK. The clause is declaratory and could be reversed by a future UK Parliament. This clause was amended at Report Stage in the House of Commons.

What the Committee said in its Interim Report on the draft clauses and our subsequent scrutiny of the Bill

In the provisions on permanency in the draft clauses and in the Bill, the Committee said that the words “recognised as” should be removed. The Committee also called for changes to the Bill to require a referendum of the Scottish electorate to be held if the issue of permanency was in question, with majorities also being required in any vote in the Scottish Parliament and the UK Parliament before the Scottish Parliament could be abolished.

Evidence heard since our Interim Report

21. Pillar 1 of the Smith Agreement relates to providing a durable but responsive constitutional settlement for the governance of Scotland. In particular, paragraph 21 of the Agreement concerns the permanence of the Scottish Parliament and provides that “UK legislation will state that the Scottish Parliament and Scottish Government are permanent institutions”. 7

22. The ability or otherwise to achieve permanency has been an area of interest to the Committee since the publication of the Bill. In its most recent written submission to the Committee, the Law Society of Scotland concluded that the wording of Clause 1 “is designed to be, in fact, declaratory of political intention rather than an attempt to rewrite the existing theory of the sovereignty of Parliament.” 8

23. In his evidence to the Committee, Michael Clancy of the Law Society of Scotland proposed an alternative wording for Clause 1. He said—

“"There shall be a Scottish Parliament. I like that.”

We frequently hear that quote from Donald Dewar, from the days when he was debating the previous Scotland Bill in 1998. “A Scottish Parliament is recognised as a permanent part of the United Kingdom’s constitutional arrangements. I like that” does not have the same symbolic ring to it.
Perhaps “A Scottish Parliament is a permanent part of the United Kingdom’s constitutional arrangements” would have more of a symbolic ring to it. I think this is the question: why did Smith agree to propose that? If the answer is that it is a symbolic statement that is meant to signal a political frame of mind, we should be as direct and to the point about it as we possibly can.9

24. Professor Neil Walker of the University of Edinburgh stated in his written evidence to the Committee that “since, according to the pure theory of Parliamentary sovereignty, no Parliament can in law bind its successors, then the durability of new legislative rules, including any rule purporting to make a particular institution a permanent constitutional fixture, can never be guaranteed”.10

25. Instead, as outlined when he appeared before the Committee, Professor Walker noted that the Bill could be amended to include a series of “hurdles” that could be included before a proposal to disestablish the Scottish Parliament could be taken forward. He said—

If you cannot do the impossible, what is possible? What can you do? Clearly a range of things can be done. We can extend our super-majority provisions, which we find elsewhere in the bill, especially vis-à-vis questions of devolution of the authority to run the Scottish political system—the electoral system and so on. We can imagine the super-majority provision, perhaps independently of or in some way linked to, a provision about another referendum. That is another possibility. We can certainly imagine a requirement that you would have to have the consent of both the UK Parliament and the Scottish Parliament. All those things could be effective.11

Amendments at Report Stage in the House of Commons

26. During Report Stage in the House of Commons, the UK Government amended the Bill to remove the previous wording of the permanency provisions. The detail of what was originally intended was provided in a letter from the Secretary of State for Scotland sent to the Committee in August 2015.

27. The UK Government also provided a slightly different amendment, which was agreed to. This altered section 63A(3) of the Bill. Previously, it would have been theoretically possible for the UK Parliament to abolish the Scottish Parliament using a bill other than a government bill (i.e. a private members bill) irrespective of any vote in a referendum. The current wording addresses that issue and critically, for the Committee, agrees with its recommendation in the Interim Report that the Scottish Parliament should not be abolished without a majority vote of the people of Scotland in a referendum.

28. This had been a criticism made by some that no reference was being made to a referendum. For example, Professor Aileen McHarg, from the University of
Strathclyde, expressed reservations at the time about the UK Government’s initial proposals. She said—

The Committee recommended that, if the permanency of the devolved institutions was in question, the people of Scotland should be required to vote in a referendum on the issue, and also that the consent of the Scottish Parliament itself should be obtained. Section 63A(3) [the new clause introduced by the amendment on permanency] responds to the first part of this recommendation, but not to the second.\textsuperscript{12}

29. She concluded—

It is hard to avoid the conclusion that new section 63A is intended to give the impression that the UK Government is meeting (some of) the criticisms expressed by this Committee and others of clause 1 of the Scotland Bill, yet has been deliberately drafted in such a way that there is no possibility of it being construed as delivering a legally-binding guarantee of the permanence of the devolved institutions or a legally-binding referendum lock. In my opinion, therefore, it is still not sufficient to meet the objections to clause 1. Indeed, the introduction of section 63A(2) arguably makes it worse, because it further confuses the intended legal effect of the provision.\textsuperscript{13}

30. These were not views shared by Professor Alan Page of the University of Dundee in his evidence on the UK Government’s amendments. He said that, “Taking the three elements of the new section [63A] together, I am satisfied that they deliver the Committee’s recommendations regarding Clause 1 of the Bill”, He also noted—

The one recommendation that is not addressed is the second limb of the Committee’s recommendation in paragraph 50, whereby majorities would be required in the Scottish Parliament as well as the UK Parliament for a Bill abolishing the Scottish Parliament, but that is covered by Clause 2 of the Bill (the Sewel Convention).\textsuperscript{14}

31. It is important to note that, at Report Stage in the House of Commons, the issue of a referendum was dealt with through amendments made to the Bill by the UK Government.

32. However, it should also be noted that not all aspects of the recommendation on permanency made by the Committee in its Interim Report have been delivered. The amendment at Report Stage in the House of Commons did not introduce all three of the steps recommended by the Committee deemed necessary for any abolition of the Scottish Parliament, namely: majority votes in both the UK and Scottish Parliaments and a majority decision in a referendum of the people of Scotland. There is no provision for a vote of the Scottish Parliament.
Current state of the Bill and the views of the two governments

33. At the time of publication of the Committee’s Report, the Scotland Bill has been amended compared to the version originally introduced in May 2015. Specifically, as highlighted above, changes were made by the UK Government to the Bill at Report Stage in the House of Commons in response to the recommendations made by the Committee in its Interim Report. No significant changes have been made subsequently to this clause on the permanency of the Scottish Parliament and Scottish Government during the Bill’s passage in the House of Lords to date.

34. In its final Legislative Consent Memorandum, the Scottish Government noted that the relevant clause 1 now states that the Scottish Parliament and Government are permanent parts of the United Kingdom’s constitutional arrangements, and that those institutions are not to be abolished except on the basis of a decision of the people of Scotland in a referendum. The Scottish Government’s Legislative Consent Memorandum did not raise any further concerns with this particular provision.  

The Legislative Consent Convention

What the Scotland Bill (as introduced) proposed

The UK Government considers that the Bill places the Legislative Consent Convention – that the UK Parliament will not normally legislate on devolved matters without the consent of the Scottish Parliament – in statute. The clause is declaratory and could be reversed by a future UK Parliament.

What the Committee said in its Interim Report on the draft clauses and our subsequent scrutiny of the Bill

In the draft clause on the Legislative Consent Convention and also in the Bill itself, the Committee stated that the words “but it is recognised” and “normally” have the potential to weaken the intention of the Smith Commission’s recommendation in this area and should be removed. Furthermore, the Committee indicated that the provision, whilst placing the purpose of the Legislative Consent Convention in statute, did not incorporate in legislation the process for consultation and consent where Westminster plans to legislate in a devolved area.

Evidence heard since our Interim Report

35. The Legislative Consent Convention – formerly referred to as the Sewel Convention – was established at the time of the creation of the Scottish Parliament in 1999. Section 28 of the Scotland Act 1998 gives the Scottish Parliament the power to make Acts, but it also provides that “This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.”
36. As the Law Society of Scotland notes in its written submission, the Convention has been agreed in Memoranda of Understanding and by the House of Commons Procedure Committee and its practical usage is explained in Devolution Guidance Note Number 10 (DGN10).17

37. In its Interim Report, the Committee focussed in particular on the specific wording of draft clause 2 which the UK Government considers places the Convention in statute.

38. The Law Society has pointed out though that, in relation to DGN10, the consent provisions listed also cover the provisions of a bill before the UK Parliament which would alter the legislative competence of the Scottish Parliament and/or the executive competence of the Scottish Ministers. In the Society’s view, the current wording of Clause 2 in the Bill “would not apply to this latter category of provision.”18

39. Professor Walker wrote of the non-inclusion of these two provisions in the current wording of Clause 2 in the following terms—

This omission may be of limited impact if articulated and recorded elsewhere in the constitutional arena as a statement of the Sewel Convention. Made in the relatively solemn framework of a legal text, it may take on a more significant meaning.19

40. Speaking before the Committee, he elaborated further—

I think that “Devolution Guidance Note 10” has to continue to apply, because it specifies a convention that applies regardless of what the law says. If we are to reduce conventions to law, it would certainly help if we did so fully and not just partly.20

41. Professor Walker explained that, in his view, the reason why provision in DGN10 relating to the legislative competence of the Scottish Parliament was not initially included is that, if there was qualification with the word “normally”, that would be “political dynamite”. It would mean that, in some circumstances, the UK Parliament and the UK Government retain the right unilaterally to vary the terms of the Scotland Act 1998. He perceived this omission not to have been “inadvertent”.21

42. In her evidence to the Committee, Professor Aileen McHarg of the University of Glasgow also commented on the current wording of Clause 2 in relation to the Convention as set out in DGN10. She said, “At the moment, the only situation that clause 2 covers clearly is one in which Westminster exercises its right to legislate in an area that has been devolved to the Scottish Parliament”, describing the two other strands of the Convention as being “missing”.22

43. Mr Andrew Tickell of Glasgow Caledonian University also covered this issue, stating that, in his view, part of the problem lay with the terminology used in the Scotland Bill that Westminster will not normally legislate with regard to “devolved
matters”. Mr Tickell explained that devolved matters “is not a term that we use in the Scotland Bill in general; we talk about reserved matters, and all that is not reserved is devolved”.23

The Legislative Consent Convention, abolition of the Human Rights Act 1998 and a British Bill of Rights

44. On a separate matter, the Scottish Human Rights Commission told the Committee that the Legislative Consent Convention should be given statutory effect in order to provide a democratic check on reforms to UK human rights laws that would impact on Scotland.24 This relates to the legislation which is expected to be introduced in the UK Parliament, by the UK Government, to reform the way in which human rights are protected and given effect in the UK.

45. The suggested overlap between the UK Government’s intentions for the Human Rights Act and the powers of the Scottish Parliament is the view that the provisions in a British Bill of Rights would be UK-wide and, as such, would be contrary to the provisions in the Scotland Act 1998 which requires all legislation passed by the Scottish Parliament to be compatible with the European Convention on Human Rights. It should be noted that the UK Government does not believe that its proposals for a Bill of Rights would be incompatible with the provisions of devolution.25

46. The Church of Scotland also commented on this matter, stating—

The Church of Scotland notes with concern the proposal of the UK Government to repeal the Human Rights Act 1998. We call for the devolution of Human Rights issues and legislation to the Scottish Parliament and Government.26

47. This issue was also covered at our meeting on 10 September 2015. In his evidence to the Committee, Mr Andrew Tickell told the Committee that in his view, repeal of the Human Rights Act 1998 would require the approval of the Scottish Parliament under the Sewel Convention.27 Were the UK Government to press ahead with repeal and the introduction of a Bill of Rights without consent, Mr Tickell’s view was that—

… it would be contentious. I think that many people would regard it as outrageous, frankly, in the sense that the Sewel convention is a constitutional principle. Some people would say that it would be an unconstitutional act by the Westminster Government …28

48. The specific issue of the merits of repealing the Human Rights Act 1998 was not a matter covered by the Committee in its scrutiny of the Scotland Bill. However, the link between the provisions in the Legislative Consent Convention and the UK Parliament’s ability to legislate on devolved matters, and its plans for the Human Rights Act, provided the overlap for this issue to be considered in this report.
Current state of the Bill and the views of the two governments

49. Unlike the provision on permanency, the clause on the Legislative Consent Convention has not been amended to any significant degree during the passage of the Bill in the House of Commons or in the House of Lords to date.

50. In its final Legislative Consent Memorandum, the Scottish Government stated that the provision on the Sewel Convention (Clause 2) remains a simple restatement of the words of Lord Sewel from 1997. The Scottish Government remains of the view that the provision would “more fully implement the Smith Commission recommendation to put the Sewel Convention on a statutory basis if it was amended in line with the Scottish Government’s proposals published in its response to the Devolution (Further Powers) Committee report on 8 June 2015”. The Scottish Government stated that the UK Government has made clear that its Devolution Guidance Note 10 “remains the statement of the Sewel Convention in practice”.29

Elections, electoral administration etc.

What the Scotland Bill (as introduced) proposed

Over a series of clauses in Part 1 of the Bill, the UK Government sets out its plans to devolve electoral matters relating to Scottish Parliament elections and the franchise for local government elections. An order under section 30 of the Scotland Act 1998 has already given the Scottish Parliament the power to legislate to extend the franchise to 16- and 17-year-olds in time for the Scottish Parliament elections in 2016; a Bill to this end was agreed by the Scottish Parliament (Scottish Elections (Reduction of Voting Age) Bill).

The Scotland Bill devolves the regulation of campaign expenditure and controlled expenditure in relation to Scottish Parliament elections. The Boundary Commission for Scotland’s functions in relation to Scottish Parliament boundaries are to be transferred to the Local Government Boundary Commission for Scotland.

What the Committee said in its Interim Report on the Bill and our subsequent scrutiny

This was not an area scrutinised in any detail during the Committee’s work on the draft clauses for its Interim Report. The issue did not feature to any degree in the written evidence received subsequently by the Committee as part of our scrutiny of the Bill. However, we consider below changes made to clause 5 in the course of the Bill’s consideration.
Evidence heard since our Interim Report

51. Clauses 3 to 9 of the Bill as introduced devolve certain electoral matters relating to Scottish Parliament elections and the franchise for local government elections. As noted above, this was not an area scrutinised in any detail during the Committee’s consideration of its Interim Report as this was not raised to any degree in the evidence we took.

52. Since we published our Interim Report, the Committee has received little if any further comments from external organisations and individuals on these clauses.

Clause 5 – timing of elections

53. Clause 5 of the Scotland Bill amends section 2 of the Scotland Act 1998. The purpose of clause 5 is to give effect to the recommendation in the Smith Commission Report that, notwithstanding transfer of competence to the Scottish Parliament, ordinary general elections for membership of the Scottish Parliament should not take place on the same day as either an ordinary general election for membership of the Westminster Parliament or the European Parliament.

54. Clause 5 contains a mechanism by which a prohibited election clash can be resolved on a one-off basis without the need for primary legislation. The Scotland Bill deals with this by conferring power on the Scottish Ministers to specify the day of the poll in these circumstances by an order subject to the affirmative procedure in the Scottish Parliament. In earlier versions of the Bill, the Scottish Parliament was not to be given competence to modify this mechanism.

55. At Report Stage in the House of Commons, the UK Government made a series of broadly technical amendments that ensure that, in their view, the power in clause 5 to specify a new date for an ordinary general Scottish Parliamentary election works effectively with the Presiding Officer’s existing power to propose to move the date of such a poll. More importantly, amendments to clauses 3 and 12 confer competence on the Scottish Parliament to modify new subsection 2(2B) of the Scotland Act 1998. This will allow the Scottish Parliament to alter the mechanism for setting an alternative date for a Scottish Parliamentary general election, where otherwise there would be a prohibited clash.

Current state of the Bill and the views of the two governments

56. The Scottish Government did not make any further comment on this provision in its final Legislative Consent Memorandum.
Super majority requirements

What the Scotland Bill (as introduced) proposed

This requires certain types of electoral legislation to be passed by a two-thirds majority of the Scottish Parliament. A sub-section of the relevant clause requires the Presiding Officer to decide before the final stage at which a Bill can be voted on whether, in his/her view, any provision of the Bill relates to a protected subject-matter. The Presiding Officer must make a statement to this effect. A Bill which the Presiding Officer has decided contains provision relating to a protected subject-matter can only be passed if, at its final stage, the number of members voting for it is at least two-thirds of the total number of seats for members of the Parliament. The Law Officers are able to challenge the Presiding Officer’s statement (and therefore the procedure applied) by referring the question of whether any provision of the Bill relates to a protected subject-matter to the Supreme Court.

What the Committee said in its Interim Report on the draft clauses and our subsequent scrutiny of the Bill

This was not an area scrutinised in any detail during the Committee’s work on the draft clauses for its Interim Report. The issue did not feature to any degree in the written evidence received subsequently as part of our scrutiny of the Bill. However, the Committee did refer the matter to the Scottish Parliament’s Standards, Procedures and Public Appointment’s Committee, and its views are set out below.

Evidence heard since our Interim Report

57. In its submission to the Committee, the Law Society of Scotland indicated that it had “concerns” with Clause 10 of the Bill as introduced. Its view is that the protected legislation, where a super majority provision would apply, should be extended to cover the length of a parliamentary term even though this was not one of the areas outlined in the Smith Commission’s report as being a matter for this provision. The Society argued—

> The issue of the application of super majority should not simply rest on the content of the Scottish Commission Agreement. There are other provisions in the bill which were not in the Agreement or which differ from the Agreement. It is necessary to apply the super majority to the parliamentary term in order to insulate this issue from political interference.30

Views of the Standards, Procedures and Public Appointments Committee

58. This is also an area looked at by the Parliament’s Standards, Procedures and Public Appointments Committee. In a letter to the Committee after its deliberations, the Convener of the Standards, Procedures and Public
Appointments Committee wrote that although the recommendation of the Smith Commission in this area is straightforward, the clause is complex, sometimes unnecessarily so.

59. The Standards, Procedures and Public Appointments Committee welcomed the changes that were made to the Scotland Bill at Report Stage in the Commons, particularly the fact that it will no longer be possible to challenge an Act of the Scottish Parliament on the ground that the super-majority procedure should have been applied. A challenge by the Law Officers can only be made in the 4 week period immediately after the vote on whether the Bill be passed.

60. In his letter to the Committee, the Standards, Procedures and Public Appointments Committee Convener set out two remaining concerns about the clause.

61. The first concern arises where a bill that 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 receive Royal Assent even though a majority of that Parliament has already passed the bill.

62. The Standards, Procedures and Public Appointments Committee 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.

63. The Standards, Procedures and Public Appointments Committee did not consider this an adequate explanation. In its view, if a bill only requires a simple majority and has achieved one, that should be sufficient. The Committee stated that it is a basic principle of the Scottish legislative process as set out in the Scotland Act that the Parliament should only reconsider bills where absolutely necessary and it seemed, to the Committee, to be unnecessary in a case such as this.

64. At Report Stage in the House of Lords the Bill was amended to remove the requirement for a Bill to be reconsidered by the Parliament where the Supreme Court agrees with the Presiding Officer’s statement and that therefore the Bill has already been passed by the Parliament under the correct procedure.

65. The Committee welcomes this change as a proportionate response to implementing the Smith Commission’s recommendations.
66. The second point raised with the Secretary of State by the Standards, Procedures and Public Appointments Committee was the use of the words “incidental or consequential” in relation to the definition of what is a protected subject-matter.

67. The Committee noted that these are the same words used in Schedule 4 of the Scotland Act 1998 in relation to determining the extent to which the Scottish Parliament can legislate on reserved matters in consequence of a devolved matter. In that circumstance, the Standards, Procedures and Public Appointments Committee considered 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.

68. However, in the case of protected subject-matters 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, in the view of the Standards, Procedures and Public Appointments Committee, 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).

69. The Committee noted that it is also a ruling which would 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 seemed to the Standards, Procedures and Public Appointments 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 risk there is of a challenge being made.

70. The Standards, Procedures and Public Appointments Committee noted that 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). It did 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.

71. In its conclusion, the Standards, Procedures and Public Appointments Committee continues to take the view that the bill should be amended to remove the words “incidental or consequential”.

Current state of the Bill and the views of the two governments

72. At the time of publication of the Committee’s Report, the Scotland Bill has been altered compared to the version introduced in May 2015. Specifically, as highlighted above, a series of technical changes were made by the UK Government to the Bill at Report Stage in the House of Commons and again at Report Stage in the House of Lords.
73. The Scottish Government did not make any further comment on this provision in its final Legislative Consent Memorandum.

**Scope to modify the Scotland Act 1998**

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<th>What the Scotland Bill (as introduced) proposed</th>
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<tr>
<td>The relevant clause amends Schedule 4 of the Scotland Act 1998. In doing so, this means that the ability of an Act of the Scottish Parliament to modify, or to confer power by subordinate legislation to modify, sections of the 1998 Act is extended to sections which relate to the operation of the Scottish Parliament and Scottish Government. The Bill then specifies which aspects of the operation of these institutions can be amended without recourse to UK legislation (for example, the terms of office, resignation and disqualification for Members of the Scottish Parliament) and which remain reserved (for example, certain sections of the 1998 Act pertaining to the Scottish Law Officers).</td>
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**Evidence heard since our Interim Report**

74. From the outset of our work on this Bill, the Committee has received little comment regarding this clause. The Parliament’s Standards, Procedures and Public Appointments Committee has, however, considered the matter.

75. In November 2015, the Standards, Procedures and Public Appointments Committee received correspondence from the Scottish Government setting out in some detail its view on the provisions in the clause.

76. Minister for Parliamentary Business, Joe FitzPatrick MSP, told the Standards, Procedures and Public Appointments Committee that the clause as introduced was both “difficult to interpret and resulted in a confusing mixture of devolved and reserved competence, without a clear and justifiable rationale, difficult to operate for those who have to use the system in practice in the future.”

77. The Minister’s view was that—

> the aim should be for a provision that is as straightforward as possible, and achieves the purpose of allowing the Scottish Parliament and Scottish Government to determine their own arrangements as far as possible. The Government therefore suggested to the UK Government that it should
reconsider the clause, and the exceptions to devolution, using as a test whether it was essential that UK Government and Westminster retain policy and legislative competence over the matters excluded.\textsuperscript{32}

78. At Report Stage in the House of Commons, the UK Government did make a series of amendments to the clause. These were not, however, in the areas where the Scottish Government had concerns. The Minister concluded in his letter to the Standards, Procedures and Public Appointments Committee that “although the Government welcomes the changes made by the UK Government at Report Stage, they still do not deliver full control of the “powers to make decisions about all matters relating to the arrangements and operations of the Scottish Parliament and Scottish Government”\textsuperscript{33}

79. In its \textit{response} to this Committee, the Standards, Procedures and Public Appointments Committee noted that it had written to the Scottish Government to get its views on the clause. 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, the clause would result in “fragmented legislative competence” for the operation of the Scottish Parliament and Scottish Government.

80. In its response to the Standards, Procedures and Public Appointments Committee, 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 circumstances in which a Law Officer may decline to answer a question in Parliament or produce any document relating to the operation of the criminal justice system, 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.

81. The Standards, Procedures and Public Appointments Committee considered the additional areas which the Scottish Government considered should be devolved in order to avoid ‘fragmented legislative competence’. The Committee did not make any recommendations or express a view on this issue with regard to there being a need to pursue this matter further. The Standards, Procedures and Public Appointments Committee concluded its letter to this Committee noting that whilst the implementation of the Smith Commission recommendation on devolving powers over the Scottish Parliament and Scottish Government is not necessarily
straightforward, it did not wish to propose any amendments to the provisions in clause 12 of the Bill.

Current state of the Bill and the views of the two governments

82. At the time of publication of the Committee’s Report, the Scotland Bill has been amended compared to the version introduced in May 2015. Specifically, as highlighted above, a series of technical changes were made by the UK Government to the Bill at Report Stage in the House of Commons. No significant changes were made subsequently to this clause on the scope to modify the 1998 Act during the Bill’s passage in the House of Lords to date.

83. The Scottish Government did not make any further comment on this provision in its final Legislative Consent Memorandum.
Part 2 – Taxation

What the Scotland Bill (as introduced) proposed

The Scotland Bill proposed a series of changes to the financial powers of the Scottish Parliament, namely:

- devolution of the power to set the rates and thresholds of income tax on non-savings and non-dividend income;
- devolution of Air Passenger Duty and Aggregates Levy;
- assignment of the receipts raised in Scotland by the first 10 percentage points of the standard rate of VAT to the Scottish Government’s budget; and
- agreement to an updated fiscal framework.

What the Committee said in its Interim Report on the draft clauses and our subsequent scrutiny of the Bill

The Committee made a series of recommendations in its Interim Report on the draft clauses. These can be found on pages 133 to 135 of our Interim Report. In summary, whilst the Committee had no particular concerns regarding the drafting of the relevant clauses relating to tax, it did have a series of questions regarding the implementation of the new financial powers and, critically, a strong desire for the Scottish Parliament to be involved in the process of agreeing a new fiscal framework before the two governments reached a final agreement.

84. This section of the report deals only with a limited number of issues that have been raised in relation to income tax (such as the implementation of the new powers and links with Gift Aid), Air Passenger Duty and the Aggregates Levy. The section that follows – fiscal framework – contains a more comprehensive analysis of the fiscal provisions proposed within the Scotland Bill and the agreement reached between the two governments.

Income tax

Evidence heard since our Interim Report

Package of powers proposed for devolution

85. In their written submissions of evidence, both the Chartered Institute of Public Finance and Accountancy (CIPFA) and the Chartered Institute of Housing Scotland (CiH) commented on the overall shape of the package of financial proposed for devolution under the Scotland Bill.
86. CIPFA wrote, “The financial powers under the Scotland Act 2012 and new powers proposed by the UK Government in the Command paper and the Draft Bill will increase the financial responsibility and the accountability of the Scottish Government, and will provide some but not all of the levers that are required to fully manage the issues of tax volatility and to ensure good financial management is secured.”

87. CiH told the Committee that, “We believe there is still a danger that the Scottish Government may appear to have the power to make changes to the social security system in Scotland but lack sufficient fiscal levers to put changes into practice”.

A zero rate of income tax

88. In our Interim Report, the Committee concluded that further clarification from the UK Government was required on whether the current provisions would permit the Scottish Parliament to set a zero rate of income tax.

89. In a letter to the Committee responding to the Interim Report, the Secretary of State indicated that changes had been made to the Bill to clarify the position on income tax and enable the Scottish Parliament to set a zero per cent rate of income tax on earnings if it so decides. Speaking in the House of Commons, the Secretary of State confirmed—

The Scotland Parliament will retain the receipts from the income tax it is responsible for. This represents a significant devolution of powers, with Scotland retaining around £11 billion of income tax receipts. That accounts for over 90% of income tax receipts collected in Scotland. This gives Scotland greater fiscal autonomy, with incentives to increase employment and increase wage growth.

I emphasise to Members that there are no restrictions on this power. If the Scottish Parliament wants an income tax system with a dozen different rate bands, these powers allow it to do that. Similarly, if it wants to set a zero rate of income tax, it can.

Implementation of the new powers

90. A substantial proportion of the new evidence the Committee has received since the publication of our Interim Report has focused on the challenges of implementing the new financial provisions if the Bill receives Royal Assent. A series of issues have been raised.

91. Both the Institute of Chartered Accountants of Scotland (ICAS), and the Chartered Institute of Taxation (CIOT) and the Low Incomes Tax Reform Group in a joint submission, commented on the issue of when the new tax powers should be brought into force in light of the imminent commencement of the Scottish Rate of Income Tax (SRIT) power in April 2016 (under the Scotland Act 2012).
92. ICAS recommend that “the Scottish Rate of Income Tax should be allowed time to 
bed in, and the processes evaluated, before further changes to income tax with 
the Scotland Bill 2015-16 are implemented”. The CIOT/Low Incomes Tax 
Reform Group went further suggesting “it would be sensible for the SRIT to be in 
place for a couple of tax years before the implementation of the increased income 
tax powers contained in the Scotland Bill 2015: waiting a couple of years, until say 
April 2018, would enable HMRC to ensure they have the necessary capacity and 
allow taxpayers, employers, pension providers and agents the chance to adapt to 
the changes”.

93. Both ICAS and the CIOT/Low Incomes Tax Reform Group also provided evidence 
on a range of other challenges that they believe will be important to overcome in 
order to fully implement the proposed new income tax powers.

94. In relation to the IT and administrative systems that will need to be put in place to 
collect the tax, ICAS said—

> The requirements in the Scotland Bill 2015-16 to charge Scottish rates and 
> bands of income tax will build on existing legislation and administration. 
> However, it needs to be clarified whether the IT changes implemented by 
> HMRC to deliver the SRIT will also be able to implement the further 
> devolution, or whether further updates will be required and additional costs 
> incurred. If updates are required, it would need to be considered if the 
> capability is to be built before any changes to rates and bands.

95. The CIOT/Low Incomes Tax Reform Group raised the issue of the potential 
increase in the number of taxpayers moving to self-assessment as a result of the 
new powers. Their submission states—

> It is the responsibility of HMRC to identify and notify Scottish taxpayers for 
> those within Pay As You Earn (PAYE). Individuals who pay tax under self-
> assessment will have to determine their own Scottish taxpayer status. 
> Scottish taxpayer status will apply for a complete tax year. We have a 
> concern, however, that for some taxpayers, who move into or out of 
> Scotland during a tax year, the only way of resolving their tax position will 
> be via self-assessment – since it will only be possible to determine their 
> final Scottish taxpayer status in retrospect. It is likely therefore that many 
> more individuals will be forced into self-assessment as a result of the 
> changes to income tax under the Scotland Act 2012 and following the 
> Scotland Bill 2015.

96. The CIOT/Low Incomes Tax Reform Group also stressed the need for clear 
communications and messaging from the differing tax authorities in order to 
minimise confusion for the taxpayer. They said—

> We welcome the fact that HMRC will continue to administer income tax 
> (both at UK and Scottish rates), as at least this means that individuals and
employers will only have to deal with one tax authority in respect of their income tax affairs. Nevertheless, clear communications and messaging will be necessary to ensure that Scottish taxpayers do not become confused and attempt to deal with Revenue Scotland by mistake. It would be advisable for both HMRC and Revenue Scotland staff to have access to a well-defined route to relay calls appropriately, particularly when Revenue Scotland receive calls that should be going to HMRC.43

Gift Aid

97. Gift Aid is a UK-wide scheme enabling registered charities to reclaim tax on a donation made by a UK taxpayer, effectively increasing the amount of the donation.

98. In its written submission to the Committee, the Scottish Council for Voluntary Organisations (SCVO) raised concerns relating to the current provisions on the Bill for the devolution of income tax and the potential interaction with this scheme. For SCVO, the impact of income tax devolution on Gift Aid becomes a real concern with the prospect of differing income tax rate in Scotland to the rest of the UK.44

99. In SCVO’s view, in order to maintain the UK rate of Gift Aid against potentially lower Scottish income tax rates, the UK Government could issue a cut to the Scottish block grant, in effect, a cut to devolved services that has not been sanctioned by the Scottish taxpayer or Scottish Parliament. Alternatively, the Scottish Government could seek compensation from the UK Government, but without any ability or recourse to redirect this tax to the charities concerned.

100. SCVO also outlined its concerns regarding further uncertainties about tax status. SCVO said for taxpayers who may have moved within the UK, it would be impossible to know if they were classified as a Scottish taxpayer until the financial year end due to the Scottish Rate of Taxpayer residency rules. SCVO noted that Gift Aid is usually claimed by charities well in advance of the end of the financial tax year.

101. SCVO concluded with a call for a “clause [to be] added to the Scotland Bill which would allow for a review of the operation of Gift Aid as it relates to income tax in Scotland.”45
Current state of the Bill and the views of the two governments

102. At the time of publication of the Committee’s Report, no significant changes have been made to the Scotland Bill compared to the version introduced in May 2015 in these areas.

103. The Scottish Government did not make any comment on the details of the provisions relating to income tax (within the Bill itself) in its final Legislative Consent Memorandum.

Devolved taxes – Air Passenger Duty and the Aggregates Levy

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<tr>
<th>What the Scotland Bill (as introduced) proposed</th>
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<tr>
<td>The Scotland Bill proposed that Air Passenger Duty and Aggregates Levy be dis-applied in Scotland and the power to charge a Scottish Air Passenger Duty and Aggregates Levy will be devolved to the Scottish Parliament.</td>
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<th>What the Committee said in its Interim Report on the draft clauses and our subsequent scrutiny of the Bill</th>
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<tr>
<td>The Committee stated that it was content with the original proposals and the initial drafting of the clauses relating to the devolution of Air Passenger Duty and the Aggregates Levy. The Committee recommended that, in due course, the Scottish Government should set out its policy plans for both of these newly devolved powers.</td>
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Evidence heard since our Interim Report

104. The Committee has not received a significant amount of new evidence on these particular provisions since the publication of its Interim Report. The only comment of note came from the CIOT/Low Incomes Tax Reform Group which called for “a collaborative and consultative approach” to be adopted when the Scottish Government developed new policy and drafted legislation for these two devolved taxes.46

Current state of the Bill and the views of the two governments

105. At the time of publication of the Committee’s Report, no significant changes have been made to the Scotland Bill compared to the version introduced in May 2015 in these areas.

106. The Scottish Government did not make any comment on the details of the provisions relating to APD or the Aggregates Levy (within the Bill itself) in its final Legislative Consent Memorandum.
The Fiscal Framework

What the Scotland Bill (as introduced) proposed

The Bill is silent on the detail of what should be contained within a fiscal framework. However, this is an important part of the financial arrangement recommended by the Smith Commission. The fiscal framework is essentially a document to be agreed jointly by the two governments through the intergovernmental Joint Exchequer Committee (JEC). The Smith Commission’s recommendations for a framework and how it would operate – including the cornerstone issue of a ‘no detriment’ arrangement, are set out from paragraph 94 of the Commission’s Final Report.47

What the Committee said in its Interim Report on the draft clauses and our subsequent scrutiny of the Bill and Fiscal Framework

The Committee’s main, initial recommendation for the fiscal framework was that, whilst negotiations on a draft agreement were a matter for the two governments, a final draft had to be shared with the Scottish Parliament and its committees for their approval before this was signed off by the Scottish and UK governments. Additionally, the Committee called for detail and transparency on a range of issues within the Framework, such as how the arrangements for ‘no detriment’ would work.

The Committee also recommended that both governments enter into an agreement to establish a common database of tax information to assist with the process of dispute resolution, and that the future operation of the fiscal framework is subject to independent scrutiny by the Scottish Fiscal Commission.

What is the Fiscal Framework – an overview?

107. The key provisions that should be covered in any fiscal framework are as follows:

- Block grant adjustments;
- Indexation;
- ‘No detriment’ arrangements for policy spillover effects;
- Assignment of VAT;
- Administration and implementation costs;
- Assets of the Crown Estate;
- Employability;
• Capital borrowing, resource borrowing and other flexibilities (e.g. cash reserve facilities); and,

• Fiscal scrutiny institutions and other governance arrangements (e.g. review arrangements, dispute resolution, reporting etc.).

108. A brief overview of each of these provisions and key issues is set out below.

Block Grant Adjustments

109. A significant proportion (around 80%) of the budget of the Scottish Government is funded by a block grant from the UK Government. The Smith Commission’s Agreement and the UK Government’s subsequent response committed to the retention of the Barnett formula to calculate the block grant. To reflect the revenue and spending changes arising from the newly devolved taxes and benefits under the Scotland Bill, the block grant will have to be adjusted in a number of ways, such as decreases to reflect the revenue foregone by HM Treasury because of taxes devolved, and increases to reflect the devolution of a number of welfare benefits that will be transferred from the Department for Work and Pensions to the Scottish Government. A series of mechanisms for adjusting the block grant therefore needed to be agreed between the two governments because of these provisions.

110. Block grant adjustments are not new. The Scotland Act 2012 devolved responsibility for a number of minor taxes (Stamp Duty Land Tax and Landfill Tax). A one-year block grant adjustment was agreed for the first year of their operation in 2015-16, which was the mid-point of the forecasts made by the Scottish Government (deemed reasonable by the Scottish Fiscal Commission) and Office of Budget Responsibility. In December 2015, the Scottish Government announced that it had reached a further one-year deal for 2016-17 for these two devolved taxes.

111. The 2012 Act also devolved responsibility for the Scottish Rate of Income Tax (SRIT). In 2012, following a meeting of the Joint Exchequer Committee, the Scottish and UK governments agreed a proposal for block grant adjustments for the SRIT for a two or three year transitional period.

112. The key issues to be addressed in any fiscal framework include whether these adjustments are done on the basis of a single-year or on a multi-year average, what data is being used such as outturn or forecast expenditures / revenues, whether the data and calculations used are openly published and available for independent scrutiny and how disagreements between the two Governments will be dealt with.

Indexation

113. As indicated above, in order to reflect the revenue and spending changes arising from the newly devolved taxes and benefits under the Scotland Bill, the block grant will have to be adjusted in a number of ways. However, in addition to any
Block Grant Adjustments made at the point of transfer of the new powers, the Smith Commission also agreed that the future growth in the reduction to the block grant arising from the devolution of taxes should be indexed appropriately, as should any additions to the block grant to reflect the devolution of welfare spend. The Smith Commission stopped short of suggesting how this should occur.

114. The choice of indexation methodology is a critical component of any fiscal framework. A variety of options have been looked at by the two governments and also critiqued by external, independent academic experts and researchers such as **Professor Anton Muscatelli** (University of Glasgow), **Professor David Heald** (University of Glasgow), and **jointly** by **Professor David Bell/David Eiser** (University of Stirling) and David Phillips (Institute of Fiscal Studies).

115. All the different methods have advantages and disadvantages in terms of their effect on the Scottish budget and the risks that the Scottish and UK Governments are exposed to (see paragraph 150). In addition, it is also important which year is chosen to start indexing as this may affect the block grant adjustment.

116. A key issue is whether the data and calculations used are openly published and available for independent scrutiny, thereby enabling external commentators to assess the accuracy of the estimate used to adjust the block grant in relation to actual revenues/expenditure.

**No detriment**

117. A concept of 'no detriment' forms one of the main cornerstones of the Smith Commission’s agreement. It consists of three principles which can be broadly summarised as firstly, that neither the budget of the Scottish and UK government’s budgets should be no larger or smaller simply as a result of the transfer of tax or spending powers. Secondly, neither government being disadvantaged financially from devolution itself or the decisions made by the other after devolution. Thirdly, that changes to devolved taxes in Scotland should only affect public spending in Scotland and the same to be the case with regard to changes in taxes in the rest of the UK, which have been devolved to Scotland, only affecting the rest of the UK.

118. The key issues for the fiscal framework are how these principles are to be articulated, made operational and enforced in any framework, for example, how to measure direct effects and behavioural effects of the impact of a policy on the revenues of either government.

**Assignment of VAT**

119. The UK Government’s Scotland Bill proposes that a 50% share of VAT receipts be assigned to the Scottish Government. Key issues that need to be addressed in a fiscal framework include the methodology for estimating VAT, how the block grant will be adjusted and the arrangements that will be put in place to deal with any
transition period. The Deputy First Minister has stated\textsuperscript{49} that agreement has been reached between the two governments that the consumption method of calculating VAT will be used to determine Scotland’s share of VAT receipts.

administration costs

120. The fiscal framework should set out the administration costs for devolved taxes and spending powers. This is expected to set out the arrangements for one-off implementation costs and on-going costs including how these costs will be indexed in the future.

assets of the crown estate

121. Responsibility for the management of the Crown Estate’s economic assets in Scotland, and the revenue generated from these assets, is being transferred to the Scottish Parliament as part of the Scotland Bill. This will include the Crown Estate’s seabed, urban assets, rural estates, mineral and fishing rights, and the Scottish foreshore for which it is responsible.

122. The fiscal framework therefore covers the financial arrangements for the transfer of the Crown Estates assets in Scotland upon devolution of the management and revenue from these assets. Key issues that need to be addressed are clarity on which assets are being devolved and their value.

employability

123. The Smith Commission agreed that the Scottish Parliament will have all powers over support for unemployed people through the employment programmes currently contracted by Department of Work and Pensions (which are presently delivered mainly, but not exclusively, through the Work Programme and Work Choice) on expiry of the current commercial arrangements. The Scottish Parliament will have the power to decide how it operates these core employment support services. Funding for these services will be transferred from the UK Parliament in line with the principles set out in paragraph 95 of the Smith Commission’s report.

124. As a consequence, the fiscal framework specifically covers the financial arrangements for employability programmes.

borrowing and other flexibilities

125. The current arrangements under the Scotland Act 2012 Act give the Scottish Government the power to borrow up to 10% of the Capital DEL per year within a statutory aggregate cap of £2.2 billion. The Scottish Government is also currently able to borrow up to £200 million per year, up to a cumulative ceiling of £500 million, to deal with circumstances where revenues are lower than forecast and there are insufficient funds in the cash reserve to maintain spending.
126. The fiscal framework will also have to set out what powers around any resource borrowing and other flexibilities, beyond the current limits in the Scotland Act 2012, have been agreed in order to deal with issues such as ensuring budget stability for a future Scottish Government and helping manage shocks, volatility and forecast errors.

127. This should also include any arrangements as to how a future Scottish Government could issue bonds to provide an additional source of revenue for the above issues.

**Fiscal scrutiny institutions and other governance arrangements**

128. Finally, the last main area covered by the fiscal framework is that of the institutional arrangements, such as the future roles of the Scottish Fiscal Commission and Office of Budget Responsibility, as well as the process for reviewing and revising the agreed fiscal framework, information and dispute resolution procedures.

**Evidence heard since our Interim Report prior to the agreement of the fiscal framework**

**In general**

129. The Committee has previously highlighted the centrality of the proposed fiscal framework to the devolution proposals. Although the framework will be largely non-legislative, it underpins much of the functioning of the new tax and welfare provisions. Since our Interim Report was published, the Committee has received a number of further comments on the framework both before and after its publication in February 2016.

130. In evidence to the Committee, Professor Iain McLean of the University of Oxford commented on the need to ensure the fiscal framework struck an appropriate balance between risk (that tax receipts in Scotland may increase at a slower rate than the rest of the UK) and reward (being required to deliver certain social security benefits in a context of increasing demand for those benefits). He said, “If Scottish tax receipts do not go up in proportion to spending liabilities, it will indeed be a poisoned chalice”. He elaborated further later in his evidence to the Committee stating—

> “… the tax powers in total are still less than the spending powers in total. Therefore, there is still an imbalance.”

131. Professor McLean set out his proposal for the further devolution of a different set of taxes to the Scottish Parliament, such as excise and fuel duties, and both offshore and onshore mineral taxation. His preference was for a balance between risk and reward where “…the power to tax amounted to the same proportion of public expenditure as the power to spend.”
The concept of no detriment

132. The Smith Commission proposed that the fiscal framework should introduce a concept of no detriment to govern how the shared space of revenue powers would operate across the UK. This concept would have two core principles:

- **There would be no detriment as a result of the decision to devolve further power.** That is the Scottish and UK Governments’ budgets should be no larger or smaller simply as a result of the initial transfer of tax and/or spending powers, before considering how these are used. This means that the initial devolution and assignment of tax receipts should be accompanied by a reduction in the block grant equivalent to the revenue forgone by the UK Government, and that future growth in the reduction to the block grant should be indexed appropriately. Likewise, the initial devolution of further spending powers should be accompanied by an increase in the block grant equivalent to the existing level of Scottish expenditure by the UK Government, including any identified administrative savings arising to the UK Government from no longer delivering the devolved activity, and a share of the associated implementation and running costs in the policy area being devolved, sufficient to support the functions being transferred, at the point of transfer. Finally, the future growth in the addition to the block grant should be indexed appropriately; and

- **There would be no detriment as a result of UK Government or Scottish Government policy decisions post-devolution.** Therefore, where either the UK or Scottish Governments make policy decisions that affect the tax receipts or expenditure of the other, the decision-making government will either reimburse the other if there is an additional cost, or receive a transfer from the other if there is a saving. There should be a shared understanding of the evidence to support any adjustments. Additionally, changes to taxes in the rest of the UK, for which responsibility in Scotland has been devolved, should only affect public spending in the rest of the UK. Finally, changes to devolved taxes in Scotland should only affect public spending in Scotland.

133. A significant proportion of the evidence the Committee heard when producing its Interim Report and subsequently questioned how this concept, and in particular the second no detriment principle, would operate in practice and suggested that the fiscal framework needed to provide further detail on this and other matters.

134. In more recent evidence received by the Committee, the Institute of Chartered Accountants of Scotland listed a range of matters that the Framework needed to resolve, including—

- The calculation of adjustments to the block grant;
- The establishment of a fiscal framework;
- The interpretation of the “no detriment” principle; and
• The basis of the agreement between the Treasury and Scottish ministers for identifying the amounts of standard rate and reduced rate VAT attributable to Scotland.\(^{54}\)

135. The Institute concluded—

> The design and implementation of a Scottish fiscal framework is fundamental to the devolution of further powers to Scotland, both in terms of how these powers are exercised and the redefinition of the boundaries of accountability between the Scottish and UK Governments. The manner in which the fiscal framework is agreed, put in place and its interaction with the overall UK fiscal framework is key to how further devolution is likely to work in practice.\(^{55}\)

136. Its views were shared by the Chartered Institute of Public Finance and Accountancy who added the issues of how the indexing of the block grant arrangements will work and how the UK Government will measure the costs incurred in the collection and administration of taxes on behalf of Scotland to the list of matters set out above.\(^{56}\)

137. Speaking before the Committee, Professor McLean was critical of the principle of no detriment. He explained that, for him, “It is sort of clear what the no-detriment principles mean on day 1 of the transfer of a tax power, but it is not at all clear to me what they mean in year 2”.\(^{57}\)

138. He also commented on whether the principles of no detriment should apply to a spending review period or the session of a Parliament, but did not indicate which he preferred—

> If the system were locked into a spending review period, the downside risks and the upside rewards would be less than if it were applied annually, because if the GDP per head in one part of the country were to grow less than that in another, that might be protected for a whole spending review period, but presumably not if it were to be done annually.\(^{58}\)

139. The complexities of no detriment, particularly the workability of the second principle (that there would be no detriment as a result of UK Government or Scottish Government policy decisions post-devolution) was also commented upon by a number of other academic experts who appeared before the Committee.

140. In his evidence, Professor David Bell of the University of Stirling, said—

> The simple answer is that it is not possible to enact the second form of the no-detriment principle without going into massively complex calculations that bring with them huge potential for dispute between the different authorities.\(^{59}\)
141. He elaborated further, ultimately concluding that the second element of the no detriment principle was “unworkable”. He said—

I looked at the work that the House of Lords did on the issue. Its committee interviewed a man from the International Monetary Fund called Carlo Cottarelli, who said that no similar principle is in operation anywhere else in the world. That is the basis for my argument that it is unworkable.60

142. He was supported in his view by Jim McCormick of the Joseph Rowntree Foundation in Scotland who called for greater transparency in relation to how the no detriment principles would work in practice, particularly in relation to the new welfare powers. He said—

If we are to pursue the no-detriment principle, it is extremely important that some clear principles, such as transparency and—as far as possible—simplicity, underlie it. Transparency is about working methods; in other words, it is about one Government not trying to pull the wool over the eyes of another Government.61

143. He also called for a differentiation in focus between what he referred to as major and minor issues when it came to the concept of no detriment—

Proportionality is another aspect. The no-detriment principle cannot mean that minor changes in budgets are given the same prominence as, for example, a major incursion into tax territory. Income tax will be a shared tax base between the Governments. We have to understand that, with a shared tax base, one Government’s actions versus another’s could have substantial consequences. I do not think that we should give up on the principle; we just need to have proportionality and be able to distinguish between major detriment and more minor detriment. In fact, minor detriments might net off each other, plus or minus either side of the border.

I am in favour of shining a light on what appear to be the major risks and perhaps benefits for each Government and of building expertise to understand those major budget consequences. As I have said, those consequences potentially come from tax decisions as well as welfare spending decisions. We should build up our data and evaluation on those more major areas rather than fret about every potential consequence in our budgets.62

144. In his evidence, Professor David Heald of the University of Glasgow commented—

The second no-detriment principle is largely incoherent. I suspect that part of the historical background to it is the big argument in the early days of devolution about the Treasury refusing to let the Scottish Parliament have the savings from attendance allowance when the Scottish Executive introduced free personal care.
If we want the system to work on an asymmetrical basis with some welfare expenditure being devolved, it is going to cause difficulty if the Scottish income tax system departs from that of the rest of the UK because there is an interaction with the benefits system. The idea of payments flowing backwards and forwards across the border is implausible; I think that it will be extremely fractious.  

145. Whilst David Phillips of the Institute of Fiscal Studies said—

Professor Heald is right to suggest that it would be extremely complicated to work out what transfers we might want to make in relation to a given policy change, and such a system would be prone to disagreement because of different assumptions being made about behavioural responses, labour supply effects and consumption effects.

Indexation

146. The arrangements for indexing the future changes to the block grant (because of the devolution of taxes or because of the devolved welfare spend) was another key issue in the evidence taken by the Committee.

147. In research provided to the Committee, Professor Bell and David Eiser of the University of Stirling, and David Phillips of the Institute of Fiscal Studies, set out their modelling on how the choice of indexing method on tax might affect the future revenues of a Scottish Parliament.

148. The research looked at three possible methods for indexing tax:

- **Indexed Deduction (ID)** – where a change to the Scottish block grant is adjusted by the percentage change in income tax revenues in the rest of the UK. For example, if comparable revenues in the rest of the UK grow by 5%, the Block Grant Adjustment also grows by 5%.

- **Per Capita Indexed Deduction (PCID)** - a version of indexed deduction that protects Scotland from the effects of having slower population growth than the rest of the UK. This method indexes the Block Grant Adjustment per capita to the percentage change in comparable rest of the UK revenues per person. This option protects the Scottish budget from the risk that its population grows relatively more slowly than the rest of the UK’s.

- **Levels Deduction (LD)** - This method calculates the change in the Block Grant Adjustment as a population share of the change in comparable revenues in the rest of the UK. For example, if income tax revenues increased by £10 billion in the rest of the UK, and if Scotland’s population was 9% of the rest of the UK, Scotland’s Block Grant Adjustment would increase by £900m. This method mirrors the Barnett formula used for calculating the annual block grant.
149. In their critique of each method, Bell/Eiser/Phillips stated that the Indexed Deduction method “exposes Scotland to risk of relatively slower population growth” whilst the Per Capita Indexed Deduction method “protects the Scottish budget from the risk of slower population growth”. In terms of the Levels Deduction approach, they stated that because the revenues per capita are lower in Scotland than the rest of the UK, the population share of a revenue increase is more than the equivalent percentage increase in the Block Grant Adjustment, with the implication that Scottish revenues would “have to grow faster in percentage terms than the rest of the UK’s to maintain spending in nominal terms.”

150. Bell/Eiser/Phillips modelled what would have been the impact on the Scottish Budget if any of the methods outlined above had been in place between 1999 and 2013. Their findings are set out in Figure 5 below.

Figure 5: Variations in the Scottish Budget under different indexing methods
(Source: Bell/Eiser/Phillips.)

How would Scottish budget have fared?

![Graph showing variations in the Scottish Budget under different indexing methods]

151. Their analysis showed the potential cumulated impact on the Scottish budget had any of the three methods for indexation been in place between 1999 and 2013: a reduction of £500 million in the Scottish block grant relative to the block grant without an adjustment if the Levels Deduction method had been in place; an increase of £500 million under the Indexed Deduction method, and; an increase of nearly £1 billion using the Per Capita Index Deduction method.
152. The central conclusion of their research was that it was “difficult / impossible to design a grant system which meets all Smith principles” but that the Per Capita Indexed Deduction method was the best option to look at within a fiscal framework.  

153. Their view was also supported by Professor Anton Muscatelli who also provided a summary of his research in this area to the Committee. His research concluded that “the per-capita indexation method is better.”

154. He explained his views on why this was the case. Firstly, Professor Muscatelli noted that the Smith Commission’s Agreement had put the Barnett formula as a cornerstone. In his view, the other methods for indexing would in essence work against Barnett, potentially driving spending per head in Scotland inexorably lower. In his opinion, politically, the first no-detriment principle is likely to be very important.

155. Secondly, he stated that the third no-detriment principle around ‘tax-payer fairness’ is almost impossible to satisfy. In his view, it will be violated in any case because of the complex interactions between UK Government actions on reserved and devolved taxes and tax-payer behaviour (e.g. Capital Gains Tax and income tax), and between devolved taxes and reserved spending.

156. Thirdly, he noted that whilst a balanced budget fiscal expansion by the UK Government might breach the second no-detriment principle, under the Per Capita Indexed Deduction method, there is an asymmetry in the relationship between central and devolved government. Therefore, he argued, the UK Government has a much broader range of economic tools to deal with a deviation from the second principle. On the other hand, in his view, Scotland and the other devolved governments do not have the same range of tax powers as the central government to offset any deviations from that principle.

157. Finally, he stated that Scotland arguably does not have all the tools to counteract demographic trends, so it is, in his view, reasonable to protect devolved governments from additional demographic risk.

158. In analysis provided to the Committee, Professor Muscatelli modelled different scenarios, including the likely impact on the Scottish Block Grant if the tax revenues in Scotland grew at the same rate as the rest of the UK and relative population also grew in line with the projections of the Office of National Statistics (ONS); see Figure 6 below.
159. His analysis showed that over the period 2017/18 to 2037/38, Scotland would be no better or worse over using the Per Capita Indexed Deduction method (because this method protects the budget from demographic risk). Using Indexed Deduction, there would be an annual net loss of £2 billion by 2037/38. Using Levels Deduction, there would be an annual net loss of over £3.5 billion by 2037/38.\footnote{72}

160. The preference for the Per Capita Indexed Deduction method was also supported by others who gave evidence to the Committee. In his appearance, Professor David Heald said—

\begin{quote}
The committee has on its website evidence of modelling by David Eiser from the University of Stirling and Anton Muscatelli from the University of Glasgow. It is pretty obvious from that modelling that it is the per capita indexation method that meets the idea that the act of devolving tax powers is not going to be disadvantageous to Scotland.
\end{quote}

I therefore support the per capita indexation method.\footnote{73}

161. He was also supported in his conclusion by David Phillips of the Institute for Fiscal Studies.\footnote{74} Mr Phillips also argued that, in addition to the choice of indexing method, it was also important to consider the choice for the base-year when the process would start. He noted that the UK Government’s command paper suggests that there may be an average calculated over several years to get the base year for the indexation. He observed that the choice of date will matter when
it comes to the potential impact on the calculations that will follow on the effect on the Scottish Budget.\textsuperscript{75}

162. Finally, both he and Professor Heald stated that it was very important that the fiscal framework should cover the degree of risk sharing that will be in place between the two administrations should Scotland suffer a short- or long-term economic shock. David Phillips said—

\begin{quote}
There has not been a discussion about what degree of risk sharing there should be on shocks that hit Scotland disproportionately, whether they are short-term shocks or long-term secular declines or improvements. Most other states with substantial sub-national devolution have some kind of equalisation of such differential trends over time. Germany, Canada and Australia all have it. The UK will not have that kind of thing, and that makes things such as starting points much more important.\textsuperscript{76}
\end{quote}

163. Whilst Professor Heald warned the Committee—

\begin{quote}
As I made the argument for per capita indexation, I should say that gaming the starting point would be very foolish on either the Treasury’s side or the Scottish Government’s side. People tended to assume 18 months ago that the base year would not be that important but, given what has happened to the oil sector, it may well be important. We know from the transition to land and buildings transaction tax that substantial forestalling can take place. This is obviously a difficult area and I would want to try to get a verdict that is as neutral as possible, because there are questions about the legitimacy of the system. If the system is seen to be illegitimate on either side, frankly I do not think that it will survive.\textsuperscript{77}
\end{quote}

**Borrowing**

164. In the limited amount of new evidence received by the Committee on the issue of borrowing since our Interim Report, the lack of clarity in the current proposals was one of the key issues.

165. The Chartered Institute of Housing said—

\begin{quote}
One of our main concerns remains around a lack of clarity on how some of the powers will work in practice particularly in relation to taxation and borrowing which are vitally important in enabling the Scottish Government to fund housing development and changes to the social security system.\textsuperscript{78}
\end{quote}

166. The Institute also indicated that it was unclear whether any significant programme of house building could be supported under the current proposals for borrowing.

167. The Chartered Institute of Public Finance and Accountancy was also critical of the current borrowing powers of the Scottish Parliament, most recently extended under the Scotland Act 2012. It noted in its written submission that “under the
current settlement, the Scottish Government has only limited ability to borrow money, with the power to borrow up to £500 million to cover temporary shortfalls and up to a cumulative limit of £2.2 billion for Capital Expenditure” and compared this to the prudential regime in place for local government in Scotland which can borrow money as long as this is affordable and prudent (as set out in The Local Government Capital Expenditure Limits (Scotland) Regulations 2004).

168. The Chartered Institute of Public Finance and Accountancy was also critical of the fact that the Scottish Government has not been provided with the flexibility to carry forward any underspend into a reserve. It said—

Funding received in the block grant cannot be held in ‘reserve’ to be carried over into future financial years. Any unspent grant must be returned to the Treasury at the end of the financial year.80

169. The Institute’s written evidence noted that there is a system by which the Scottish Government can ask to carry forward any under spend, the budget exchange mechanism. However, this is subject to limits, and is designed to avoid the ‘use it or lose it’ effect, rather than to manage financial pressures across years. The Chartered Institute of Public Finance and Accountancy concluded that this does not enable the funds to be held in a ‘reserve’ but rather allows access to the agreed amount in the next financial year.

170. In his evidence to the Committee, David Phillips of the Institute of Fiscal Studies argued for increases in the level of borrowing powers currently in place. He said—

The level of borrowing powers will have to be substantially increased, especially from the current powers, which are really quite constrained. Scotland can use them only for forecast errors but, if you forecast a recession, you might still want to borrow to smooth the impact of it on public spending. Therefore, there will need to be a change in the level of borrowing powers and the type of circumstances in which those powers can be used.81

171. He also noted that—

There is also the question whether the UK Government will be willing to allow Scotland borrowing powers not only to smooth the cycle but to pursue a longer-term differential fiscal stance.82

172. The implications of borrowing in Scotland on the UK Government’s overall approach to debt was also an issue for others who gave evidence to the Committee.

173. During her appearance, Dr Monique Ebell of the National Institute of Economic and Social Research, noted that it was not quite clear at the time she gave evidence as to what extent Scotland’s borrowing will count in the fiscal framework.83 She argued—
There is a case for not considering sub-national debt as part of the UK’s fiscal framework. It would make sense from an economic perspective to treat Scottish debt as part of the overall UK fiscal framework mandate if there were either an explicit or a strong implicit guarantee by the UK Government on that debt. Whether Scottish debt should be a part of the UK’s fiscal framework and the goals that the Treasury sets for itself should depend on the extent to which that debt is an obligation—either explicit or implicit—of the UK Government.\textsuperscript{64}

174. Professor Heald stated that “it would be astonishing if the Treasury were to agree not to include Scottish borrowing” and that—

I would have thought that an attempt to park Scottish borrowing somewhere separately and pretend that it was not there would not work. For example, in a country as fiscally centralised historically as the United Kingdom, if people said that there was a no-bailout clause, frankly I do not think that anybody would believe it.\textsuperscript{85}

Assignment of VAT

175. The CIOT/Low Incomes Tax Reform Group described the challenges facing the two governments in reaching agreement on the assignment of the share of VAT revenues, as “not necessarily straightforward”.\textsuperscript{86} They both stressed the need for the intergovernmental agreement on this matter to be equitable and transparent.

176. Setting out their proposal for the most appropriate formula to be used, the CIOT/Low Incomes Tax Reform Group proposed—

VAT is intended to be a tax on consumption. In principle therefore we would suggest that the share of VAT revenues allocated to Scotland should as far as possible be allocated on the basis of deemed consumption in Scotland. Apart from anything else, if achieved, it would provide greater transparency of just what tax revenues actually arise from VAT in Scotland.\textsuperscript{87}

177. An alternative formula based on taxing according to the location where goods and services are produced or on the basis of some other proxy, such as population share, would not be appropriate in their view given the inaccuracies that would be likely to arise in the case of a production-based assessment. The CIOT/Low Incomes Tax Reform Group also suggested this measure would be “more likely to understate the VAT arising in Scotland.”\textsuperscript{88} A consumption-based formula would, however, not be without challenges given the difficulty in accurately measuring revenues by reference to where a particular business was established.

178. In its submission, the CiH expressed its disappointment that the Scotland Bill does not contain a power to vary VAT for improvements to existing homes. It said—
This measure would have helped to support much needed maintenance and improvement of homes across Scotland, a particularly pertinent issue in the private sector and one which needs to be addressed if we are to improve on current fuel poverty levels which contribute directly to poor health and inequality.  

179. It should be noted, however, that EU legislation in this area means that Member States have to charge a uniform standard rate of VAT for all goods and services across the whole Member State except for those goods and services covered by one of two lower rates applicable, which again must be applied uniformly across the Member State. As such, there is no opportunity to apply different VAT rates for different regions within a Member State.

180. During his evidence to the Committee, Professor Iain McLean was critical of the plans for VAT assignment in relation to whether assignment of tax, rather than devolution, gave the Scottish Government appropriate policy flexibility to affect the amount of revenue raised. He said—

> VAT is an example, as I say in my paper [written submission to the Committee], where we could assign—not devolve—the whole of VAT receipts in Scotland to the Scottish Government, but it would make not a blind bit of difference to the policy levers that the Parliament can pull, because it is an assignment not a devolution.

181. In his evidence to the Committee, Professor David Heald, was dismissive of the plans to assign a share of VAT to the Scottish Parliament. He argued that it did not matter what proportion of revenue the Scottish Parliament notionally raises. The key question, for him, “is whether you actually have any credible varying powers.”

182. David Phillips of the IFS noted that calculating the adjustments and working out Scotland’s share of VAT would be “incredibly complicated.” He noted—

> The calculations for the “Government Expenditure and Revenue Scotland” and HMRC estimates are not based on any real VAT data; they are based on estimates from household surveys, national accounts, gross value added and public sector accounts. They are not actual measures of the tax revenues but are pure estimates. Also, those estimates jump up and down quite a bit because of the sampling error in the surveys. I do not think that that will be appropriate for VAT.

Institutional structures, transparency and inter-governmental relations

183. Another key element of the fiscal framework is that of the institutional arrangements, such as the future roles of the Scottish Fiscal Commission and Office of Budget Responsibility, as well as the process for reviewing and revising the agreed fiscal framework, and information and dispute resolution procedures.
184. In evidence to the Committee, Professor David Heald commented in particular on the historical challenges he has had as a leading academic expert on the Barnett formula in opening up the process of the calculations made in the past by HM Treasury. He stressed that this would be an on-going issue for the new fiscal arrangements. He stated—

“The most important point regarding the discussions [on a fiscal framework] is that the system must be made transparent. You cannot have a debate about fairness unless the proper data is in the public domain. I have already made a point about the publication of comparable expenditure in England, which drives the Scottish block [grant], and the different comparable expenditures for Wales and Northern Ireland.”

185. Transparency within a new fiscal framework was also an issue for those experts who gave evidence on the welfare components of the new financial agreement. Speaking about the need to have greater clarity on the tax and welfare arrangements and how they will work in practice in terms of who does what and what the rules are, Professor David Bell said—

“It seems to me that nothing has been set in train at the minute to set up the kind of institution and rules that I have described. It really has to be part of the fiscal framework, but we will see in three weeks or so whether something like that can be agreed. It seems to me that the fiscal framework’s stability would require something transparent that was accepted by both sides.”

186. Professor Bell stressed that this was particularly important in the context of a dispute between the two governments. He said—

“There should be a set of agreed rules on how disputes will be resolved that cannot be changed without both Parliaments agreeing. There has also got to be some kind of third party that is not the Treasury—it has never been a third party—which can take a view on all the issues that we have been discussing, such as the tax and welfare issues, and which has the respect of both Governments and their electorates. Now, that is a tough call. The OBR is supposed to fit that role; it has made its way, but I think that—fairly or unfairly—it is not viewed as being fully independent.”

187. The need for dispute resolution and possibly a role for some form of independent arbitrator was also an issue raised by some in relation to the tax aspects in the fiscal framework. For example, in his research paper to the Committee, Professor Anton Muscatelli argued—

“Trying to adjudicate on Barnett formula bypass as well as no detriment might be easier if there is an arbitration mechanism. A fiscal arbitration mechanism would not be impossible to design and would not be expensive to set up.”
188. One mechanism suggested by some to minimise the risk of ‘gaming’ by either governments of the forecasts made for revenues is to ensure there are detailed procedures for ex-post reconciliation payments where necessary, based on reliable outturn figures.

189. In her evidence on this point, Dr Monique Ebell said—

> One potential mechanism for reducing conflict is to introduce some sort of ex-post compensation to the party that turns out to have been correct or misjudged. Say that the OBR and the Scottish Fiscal Commission disagreed on their forecasts and that had an impact on a spending allocation or block grant, and say that we used the OBR forecast and it turned out to be wrong, to the detriment of Scotland. In that case, we could think about some sort of ex-post compensation, and that could be written into a rule. Of course, it could go the other way. The flip-side would be that, if the OBR was wrong and that turned out to benefit Scotland, Scotland might have to accept an ex-post adjustment.

> Just the threat of such an ex-post adjustment could have a positive incentive effect, as it would reduce the incentive for either side to game its forecasts. If people know that ultimately what matters is the outcome, they will try to give their best forecast. Any disagreement will really be about the kind of thing that reasonable people can disagree about.\(^96\)

**Balancing risk and reward – funding arrangements for welfare**

**Background**

190. The Scottish Parliament will gain control over range of welfare powers if the Scotland Bill is passed. These mainly cover disability-related benefits such as Disability Living Allowance, Carer’s Allowance and Attendance Allowance but also include the Winter Fuel Payment and Discretionary Housing Grants.

191. As Professor David Bell of the University of Stirling has noted in his paper – *Paying for Powers*\(^99\) - in 2013-14, £2.5 billion was spent in Scotland on the benefits to be transferred to Scotland (with £15 billion for benefits remaining reserved). He notes that it will take some time to transfer the administrative functions for these benefits to Scotland. When this occurs, under the first principle of no detriment, the Scottish Government’s budget will increase by £2.5 billion and the DWP’s budget will drop by £2.5 billion. The Scottish Government will be given extra funds to meet the payments to those that are currently eligible for the transferred benefits. His paper poses the questions: But what will happen in subsequent years? Will the transfer remain fixed at £2.5 billion? Will it increase? Will it decrease?

192. The question for the Committee was whether the Scotland Bill and the associated fiscal framework provides the correct balance between risk (the need to pay for
the devolved benefits) and reward (the ability to raise more revenue directly through the transfer of revenue-raising powers).

Evidence heard since our Interim Report prior to the publication of the fiscal framework

Indexing arrangements for welfare

193. In his earlier evidence to the Parliament’s Welfare Reform Committee, Professor David Bell commented that—

"The arrangement for the indexation of Scotland’s welfare budget will be critical in determining how far it will be able to effect significant reform of the welfare system. The precise design of the indexation formula will affect the distribution of risks between the Scottish and UK governments in respect of welfare payments which are, in effect, a form of insurance against adverse circumstances."

194. As Professor Bell noted in his paper, “given that the welfare benefits that are being transferred largely affect older people, Scotland would appear to be at greater risk of increased demand due to its more rapidly ageing population.”

195. In his evidence to the Committee, Professor Iain McLean of the University of Oxford, commented—

"I would prefer it if risk and reward were more balanced in the way that I suggest in my [written] submission. In my view, when welfare powers are devolved, some welfare tax powers should also be devolved. That way, the risk and the reward would both sit with the Scottish Parliament. At present, some of the risk is in one place and some of it is in another."

196. Professor McLean concluded—

"I think that “poisoned chalice” is a perfectly appropriate phrase, because of the general point that I made earlier. If Scottish tax receipts do not go up in proportion to spending liabilities, it will indeed be a poisoned chalice."

197. Professor Aileen McHarg of the University of Strathclyde also spoke on this issue, stating—

"We must understand tax as not merely a revenue-raising instrument but a regulatory instrument that is designed to alter behaviour. Therefore, the fewer tax powers you have, the less flexibility you have in other areas. The failure to devolve taxes can alter the balance of risk and reward in substantive policy areas."

198. In subsequent evidence to the Devolution (Further Powers) Committee, Professor David Bell was able to build on his earlier paper to the Welfare Reform Committee
cited above and present his latest thinking on the welfare arrangements that should be in the fiscal framework.

199. He indicated that his most recent analysis\textsuperscript{105} showed that there is “no easy answer” to the question of whether the method for indexing welfare adjustments should be different from that chosen for the tax components in the fiscal framework and, if that was the case, whether different arrangements should be made for different welfare benefits.

200. Professor Bell noted that, in relative terms, it is important to get the block grant adjustment correct in relation to the tax powers as these are likely to raise around £19.4 billion whereas the expenditure on welfare benefits is “relatively modest”.\textsuperscript{106}

201. One possibility he argues is to apply the Barnett formula to the new welfare powers. However, as Professor Bell observes, the welfare budget has traditionally been part of Annually Managed Expenditure (AME) and not as part of the Departmental Expenditure Limits (DEL) arrangements and therefore Barnett has not applied.
202. Professor Bell also analysed – in a fashion similar to Figure 5 above on tax – what the effect on the spend on Scottish devolved budgets would have been if any of the three indexation methods (Levels Deduction, Indexed Deduction and Per Capita Indexed Deduction) had been in place between 1996/97 and 2013/14. His results are shown in Figure 7 below.

Figure 7: Variations in the Scottish Devolved Benefits under different indexing methods (Source: David Bell)

Note: “Indexed addition” is the welfare equivalent of "indexed deduction" on the tax side.

203. This Figure shows that of the three indexing methods, Levels Deduction (effectively mimicking Barnett) gives the least favourable outcome in 2013-14, some £320 million (in 2005 prices) less than Indexed Deduction, and £112 million less than what was actually spent by the DWP in that year. He also noted that the Per Capita Indexed Deduction method is, unlike for tax, slightly less favourable to Scotland because part of the overall increase in spending in the rest of the UK is accounted for by population growth and this effect is eliminated when the Per Capita adjustment is made.107

204. In his evidence to the Committee, David Phillips of the IFS argued for a simple and transparent approach to the indexation of welfare benefits. He said—

I am not entirely convinced that there should be a separate or more complicated way of indexing the block grant additions for welfare than there is of indexing for tax. In tax, people have focused on two or three relatively...
simple methods—for example, the per capita indexation method and the levels deduction method. There have been discussions about welfare being not just about population but about the characteristics of the population. In particular with disability benefits, it is about the population who are at risk—the older and the less-healthy population—so the argument is that we should have an indexation method that accounts for that. In principle, that seems to be plausible. In practice, though, it could be difficult. It might be simpler and more transparent to go with a more basic approach, such as per capita indexation.  

205. For Jim McCormick of the Joseph Rowntree Foundation, the issue was more one of maximising flexibility. He said—

> It makes the argument for as clear and transparent an indexing formula as possible that would, in principle, give Scotland the maximum space to decide how to use those budgets without worrying whether there would be a consequence of scrapping, renaming or redefining a particular benefit.  

Policy flexibility and resource availability (scale of revenue-raising and ability to spend)  

206. The question of the degree of policy flexibility that a future Scottish Parliament will have to alter the provision of benefits in Scotland was linked in much of the evidence we heard to the ability to raise revenues to pay for these changes, particularly through varying the rate of income tax under the new powers contained in the Scotland Bill.  

207. In research commissioned by the Committee from the Parliament’s research service – SPICe – estimates were provided on what potential impact on revenue a change in the rate of income tax in Scotland would have. Table 1 below outlines the results of the modelling from SPICe.
Table 1: Change in income tax revenue under different scenarios

*Basic Rate of income tax = 20p, Higher Rate = 40p, Additional Rate = 45p*

<table>
<thead>
<tr>
<th>Description</th>
<th>% change in income tax revenues</th>
<th>Difference (£m, rounded to nearest £5m)</th>
</tr>
</thead>
<tbody>
<tr>
<td>What if you added 1p to the Basic Rate and kept the other rates equal?</td>
<td>3.3%</td>
<td>+£375m</td>
</tr>
<tr>
<td>What if you added 1p to the Higher Rate and kept the other rates equal?</td>
<td>0.7%</td>
<td>+£85m</td>
</tr>
<tr>
<td>What if you added 1p to both the Basic Rate and Higher Rate and kept the Additional Rate equal?</td>
<td>4.0%</td>
<td>+£460m</td>
</tr>
<tr>
<td>What if you added 1p to the Additional Rate and kept the other rates equal</td>
<td>0.1%</td>
<td>+£15m</td>
</tr>
<tr>
<td>What if you added 1p to all three rates?</td>
<td>4.1%</td>
<td>+£475m</td>
</tr>
</tbody>
</table>

Source: SPICe modelling using tax benefit micro-simulation model Euromod

Note: Each scenario is compared to the same 2015/16 baseline to which SPICe has applied the 2016/17 Standard Personal Allowance of £11,000 and the Higher Rate Threshold of £43,000.

208. What the figures in Table 1 above show is that a 1p increase in the rate of income tax in Scotland applied across all tax bands could be estimated to yield an additional £475 million in revenue. An increase only in the higher rate of 1p would yield an estimate of £85 million.

209. It is important to note that the above figures do not include an estimate based on possible behavioural effects. In further analysis provided to the Committee by SPICe, it was estimated that behavioural responses may mean that a 1p increases in all bands of income tax would cause revenues to be 2.3% lower that if there were no behavioural responses. This is particularly an issue for people in the additional rate of income tax band as they tend to have a greater ability to manage or transfer their income in a manner that reduces overall tax take to a greater extent than those paying the lower rate. The estimate for the total additional revenue, including a possible behavioural response, was £463 million for a 1p increase in all bands of income tax in Scotland. SPICe consider that, although these figures are subject to uncertainty and must be interpreted with caution, the above estimates are reasonable and are consistent with HMRC data.

210. Professor Bell cautioned the Committee not to over-estimate possible revenues from changes to income tax because of possible behavioural effects. He said—
I agree that all the estimates are subject to considerable uncertainty. You can turn the handle and figure out what the implications and the effect on tax revenues would be if people did not change their behaviour at all. What we are not good at doing and what there is relatively little information on is around the behavioural changes that people might make.

We have to be a bit concerned about how high earners will respond, because they contribute such a big proportion of total income tax revenues. Alan Manning from the London School of Economics did work on the effect of the increase from the 45p to 50p tax rate. I have forgotten when that change happened, but it was not clear that an increase in rate added anything to total revenues. Therefore, you must be cautious, because you do not know what the behavioural response might be. As Jim McCormick said, that is less of an issue down the income scale where people perhaps have fewer opportunities to find ways of avoiding tax.\textsuperscript{110}

211. On the spending side, the Committee also took evidence from other experts on what it may cost to alter the way that certain benefits were provided in Scotland after they were devolved under the Scotland Bill.

212. In evidence to the Committee, Dr Jim McCormick of the Joseph Rowntree Foundation provided an example relating to a decision to fully re-instate the work allowance for single claimants within Universal Credit by 2020. He estimated that the cost of mitigation would be—

\textit{… hundreds of millions of pounds. The revenues lost would be about £200 million to £300 million, so that would be the cost of mitigation.}\textsuperscript{111}

or the equivalent of adding approximately 3p to the higher rate of income tax in Scotland to raise the necessary benefit.\textsuperscript{112}

213. In separate analysis provided to the Committee, IPPR Scotland modelled the impact of a range of income tax and welfare policy changes upon the Scottish Government’s budget. With regard to income tax, IPPR Scotland modelled the impact of a 1p rise in income tax at the basic and higher rates and found that in Scotland—

\textit{In revenue terms, a 1p rise in the basic rate of income tax would raise £400m, a 1p increase in the higher rate would raise £100m, and a 1p increase across all current tax rates would raise £500m}\textsuperscript{113}.

214. These estimates for the amount of revenue that could be raised from the new powers over income tax are broadly in line with the analysis produced by SPICe for the Committee; set out in Table 1 above.

215. IPPR Scotland also considered the impact on Scottish income tax revenue if a range of UK Government policy proposals were to be implemented. It should be noted that the Scotland Bill does not propose the devolution of the personal
allowance. At present, the UK Government plans to increase the personal allowance from £11,000 to £12,500. IPPR Scotland estimated that this change would, if implemented by 2020-21, “see tax revenue raised in Scotland fall by £300m per year”\(^{114}\). The UK Government also plans to increase the higher rate income tax threshold (HRT) from £43,000 to £50,000 by the end of the current UK Parliamentary session (May 2020). IPPR Scotland estimated that “to match the UK Government’s plans to increase the HRT to £50,000 would see Scottish tax revenues fall by £300m per year by 2020/21”\(^{115}\).

216. IPPR Scotland also modelled the cost of reversing two recent UK Government welfare policy announcements. These were firstly, the cost of increasing the work allowances within Universal Credit to the levels expected before the summer budget (for couples, lone parents and those with disabilities) and restoring work allowances to single and adult couples with children. Secondly, IPPR Scotland looked at the cost of returning to the Consumer Price Index (CPI) as a means of indexing working-age benefits. IPPR Scotland estimated the following costs to the Scottish Government’s budget if it was to make these policy decisions—

\[
\begin{align*}
\text{In fiscal terms, a full reversal of the Universal Credit work allowances would cost £200m per year by 2020/21, as would reversing the freeze on working-age benefits}^{116}. \\
\text{In fiscal terms, up-rating disability benefits in line with earnings would cost £100m per year by 2021/21. ... The fiscal cost of increasing the Winter Fuel Allowance is likely to be less than £10m per year by 2020/21}^{117}.
\end{align*}
\]

Need for transparency and improved data collection

218. The need for transparency and improved collection of data in the area of welfare was highlighted by some who gave evidence to the Committee. Of particular note to Dr Jim McCormick was the lack of reliable data on the take-up rates of certain benefits in Scotland as this can affect forecasts of what revenue is needed to pay for such benefits compared to what is actually needed if there are errors in estimating take-up rates. He said—

\[
\begin{align*}
\text{I am in favour of a fiscal framework that over time gets better at measuring what underlying eligibility should be and tries to close the gap in the take-up of benefits.}^{118}
\end{align*}
\]

219. In his evidence, Professor David Bell said—
If we are seriously thinking about some indexation with regard to welfare powers, take-up will be an important part of the overall picture that determines the budget. Patterns change over time, as do the costs to individuals of applying for different benefits. Some are difficult and some are much less difficult. For example, there is almost 100 per cent take-up of winter fuel allowance and the state pension, while with more complex benefits that people do not understand or for which they are unwilling to go through the relevant tests, the take-up rate drops substantially.

Some of my colleagues down south have done work on the factors that influence take-up rates, and perhaps that is something that we should be aware of. Because it is such an important part of the determination of the overall budget, it is an issue that one will have to revisit fairly regularly. I do not see how one can forecast how it will change. Because we do not measure eligibility all that well, we do not have the necessary information about take-up rates, so how will we know where we will be in five years’ time?\textsuperscript{119}

220. One final suggestion made by Dr McCormick to improve the way in which the fiscal framework deals with the issue of block grant adjustment, indexing and the choice of the baseline is to move to a calculation based on a rolling average, not a single year. He said—

We should be measuring populations that might be eligible and the budgets that are attached to them over running averages of three to five years and not by taking a single baseline year as the best indicator that we have. This is about indexation in the future. It is important that we have the broad rolling averages as our measurements, because they can help to incorporate changes in data from year to year that are perhaps not typical.\textsuperscript{120}

221. Professor Bell agreed with this suggestion, but noted that this would require better data to be collected.\textsuperscript{121}

Administration costs

222. The final area of evidence on the issue of welfare and the fiscal framework was that of the potential administration costs associated with the provision of new, devolved benefits in Scotland.

223. It is not entirely clear from the Smith Commission’s report where the liability lies for 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 on-going running costs.

224. In evidence to the Committee, Professor David Bell stated—
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.

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.

225. The First Minister, in a letter to the Prime Minister, detailed the variation in the estimates of the administration costs between the two governments in terms of welfare in the following terms—

based on information provided by DWP and our own analysis of published data from DWP’s Personal Independence Payment and Universal Credit business cases, we estimate ongoing administration costs to be approximately £200m annually, and set up costs to be between £400m-£660m. Smith was clear that the devolution of welfare should be accompanied by an increase in Scotland’s block grant equivalent to existing UK expenditure in Scotland, including administrative savings and a share of the implementation and running costs “sufficient to support the functions being transferred”. The Deputy First Minister has indicated a willingness to compromise on these estimates – however, I hope you will appreciate why the Chief Secretary’s current offer of £50m to cover all transition costs associated with the fiscal framework (tax, welfare and other areas of spending) is not acceptable to us, and would not be recognised by people in Scotland as fair and reasonable.

What the governments have agreed

226. On 23 February, the First Minister announced to the Scottish Parliament that an agreement had been reached, subject to the approval of the Parliament, to a fiscal framework. The fiscal framework was published and provided to the Committee on 26 February 2016. A synopsis of what was agreed is set out below.
The fiscal framework – a synopsis

- Changes to the Scottish Government’s block grant will continue to be determined via the operation of the Barnett Formula.

- The block grant will be adjusted to reflect the introduction of devolved and assigned reviews and for the transfer of responsibilities on welfare. These adjustments will be made initially upon transfer and an indexation mechanism.

- The initial deduction from the block grant on tax will be from the year immediately prior to devolution of the new powers. It will not be based on an average across a number of years. The baseline adjustment for Stamp Duty Land Tax will come with a reduction on the baseline of £20 million to take into account forestalling that is estimated to have occurred.

- The initial baseline addition to the block grant for devolved welfare payments will be the UK government’s spending on these areas in Scotland in the year immediately prior to the devolution of powers, with the exception of the Cold Weather Payment. Reflecting the substantial volatility of the Cold Weather Payment, the initial baseline addition will be an average of the UK Government’s spending in Scotland on this benefit from 2008-09 to the year prior to devolution.

- Future adjustments to the block grant will deliver the outcome that would have resulted from using the Per Capita Indexed Deduction Method for both tax and welfare whilst using the indexing method known as the Comparable Method (perceived to be an adjusted form of the Levels Deduction method termed ‘Tax Capacity Adjusted Levels Deduction’). This ensures that the Scottish Government’s overall level of funding will be unaffected if Scotland’s population grows at a different rate from the rest of the UK.

- The above indexing mechanism will operate for a transitional period up to and including 2021/22. There will then be a Review informed by an independent report (produced by the end of 2021). No assumptions have been made on the indexing method that follows 2021/22, except that it will deliver results consistent with the Smith Commission’s recommendations, including the principles of no detriment, taxpayer fairness and economic responsibility. No change can be made to future arrangements without the joint agreement of both governments.

- Full devolution of income tax rates and thresholds commences on April 2017, with Air Passenger Duty devolved in April 2018. The Joint Exchequer Committee (JEC) will agree a suitable date for the Aggregates Levy. Revenues from courts / tribunals will be retained from April 2017. Implementation dates for welfare will be agreed by the Joint Ministerial Working Group on Welfare.

- The UK Government will provide the Scottish Government with a one-off, non-
baselined payment of £200 million to support implementation of the new tax and welfare powers, and a £66 million on-going baseline transfer for administration costs.

- The assignment of VAT will be based on a methodology that will estimate expenditure in Scotland on goods and services that are liable for VAT. The details will be worked out between the Scottish Government and HMRC, and signed off by the JEC. The aim is to have this implemented by 2019/20.

- The UK and Scottish Governments have agreed to account for all direct effects in terms of the financial consequences of their policy decisions. Behavioural effects that involve a material and demonstrable welfare cost or saving will be taken into account in exceptional circumstances. In relation to tax, the exceptional circumstances must be demonstrated to be material and jointly agreed to by both governments. Any decision or transfer relating to a spillover effect has to be agreed jointly.

- Borrowing for capital expenditure will be increased to £3 billion, with an annual limit of 15% of the overall borrowing cap; this will be equivalent to £450 million per year. The repayment arrangements are to be finalised in a revised Memorandum of Understanding. The Scottish Government will see its resource borrowing powers increased to £600 million per year up to a total limit of £1.75 billion. The borrowing powers are to come into force in 2017-18. The Scottish Government will also have the power to issue bonds. Arrangements have also been struck within the resource borrowing provisions relating to forecast errors and dealing with a Scotland-specific economic shock. Finally, a new Scotland Reserve (cash reserve) will apply from 2017-18, capped in aggregate at £700 million, with annual drawdown limits of £250 million for resource expenditure and £100 million for capital.

- The remit of the Scottish Fiscal Commission (SFC) is to be expanded (via regulation-making powers). There will be a reciprocal duty of cooperation between the Office of Budget Responsibility and the SFC. This will be set out in a new Memorandum of Understanding. The SFC will be responsible for preparing forecasts of tax revenue and demand-led welfare spend. Arrangements for the production of forecasts are to be agreed by the JEC.

- The Coastal Communities Fund will be devolved to the Scottish Government. Additionally, the two governments have agreed that a baseline deduction to the Scottish Government’s block grant will be equal to the net revenues generated by the Crown Estate assets in Scotland in the year immediately prior to the transfer. A baseline addition will be made for the funding of the Coastal Communities Fund equal to the UK Government spending in the year immediately prior to devolution. Neither baseline adjustment will be subject to indexation.

- Both Governments have reaffirmed that any new benefits or discretionary payments introduced by the Scottish Government must provide additional
income for a recipient and not result in an automatic offsetting reduction by the UK Government in their entitlement elsewhere in the UK benefits system. Any new benefits or discretionary payments introduced by the Scottish Government will not be deemed to be income for tax purposes, unless topping up a benefit which is deemed taxable such as Carer’s Allowance.

- The Joint Exchequer Committee will be the prime vehicle for joint governance. The dispute resolution procedure will ultimately follow the overall Memorandum of Understanding that is currently in place between the UK Government and other devolved administrations. There will be annual reports to both parliaments, alongside any additional updates that are requested.

Views of experts on the agreed fiscal framework and evidence from the two governments

Initial block grant adjustments and future indexing

227. These issues were at the core of the negotiations on the fiscal framework. In terms of the agreement on how initially to adjust the block grant, the two governments have agreed that the initial baseline deduction for devolved tax (other than for the already devolved Landfill Tax and Stamp Duty Land Tax) will be equal to UK Government’s receipts in the year immediately prior to the devolution of powers. Professor David Bell, David Eiser and David Phillips suggested that this was a “pragmatic and simple approach” but suggested that two questions still remain.123 Firstly, given that revenues in the year prior to devolution are likely to differ from those in which devolution occurs, how might any eventual discrepancy between revenues in the year prior to devolution be reconciled with actual outturn revenue figures once these are available? Second, what would happen should the year in which powers are devolved turn out to be an exceptional one in respect of Scottish revenues relative to those of the rest of the UK; presumably any subsequent changes would need to be negotiated by the two governments?

228. In terms of future indexing arrangements, Professor David Bell, David Eiser and David Phillips noted the “slightly unusual form of words” in the fiscal framework in terms of what has been agreed. In their view, implicitly, two calculations will be made using the Comparable Model (which they describe as the Tax Capacity Adjusted Levels Deduction (TCA-LD) method) and also the Per Capita Indexed Deduction (PCID) method, but it will be the outcome of the latter that is actually used in practice. The calculation from the former method will be used to enable a comparison to be made of how different the Scottish budget would have been had that method been used.124

229. This view is shared by Professor Anton Muscatelli in his additional written evidence to the Committee. He notes—
In essence, the TCA-LD method will be a shadow formula which is not operational during the initial duration of this Fiscal Framework Agreement (i.e. until 2021-22), during which *de facto* PCID will determine the BGA [Block Grant Adjustment].

230. More generally, Professor Muscatelli welcomed the fiscal framework and, in particular, stated that “the outcome is a good one for both Scotland and the UK, especially in relation to the area which involved the most intense negotiations, namely the block grant adjustment (BGA) mechanism.”

**Views of the two governments**

231. In their evidence to the Committee, both the Deputy First Minister and the Chief Secretary to HM Treasury commented on what had been agreed by both governments in relation to the initial block grant adjustments and how calculations would be reconciled with actual outturn figures when these were available.

232. Mr John Swinney MSP commented on what figures would be used to calculate the baseline adjustment for 2017-18. He said “the baseline position will be a year-zero calculation, and that will be based on 2016-17. That will be the reference point for 2017-18” and confirmed that this would be based on the OBR’s prediction for that financial year but that this would be followed by a reconciliation of actual tax revenues based on outturn figures.

233. Mr Greg Hands MP said—

> We will ultimately use outturn figures for the year prior to devolution to determine the baseline adjustment; we will then apply the indexation mechanism to determine the adjustment for the first year of devolution.

234. The Chief Secretary to the Treasury expanded on the approach to be used with reference to how the adjustment would be made in relation to income tax, by commenting that—

> In the case of income tax, for example, we will provisionally use a forecast of relevant Scottish income tax revenues in 2016-17 to set the baseline block grant adjustment, which will subsequently be reconciled to outturn once this is available. To determine the Scottish Government’s block grant for 2017-18, we will also apply the agreed indexation mechanism to changes in UK government income tax revenues (excluding Scotland) between 2016-17 and 2017-18.

235. Both also commented on the agreement that had been reached on the operation of the method chosen for future indexing during the transitional period to March 2022.
236. Mr John Swinney MSP said that “Essentially, the Treasury model is being run, but it has to deliver the outcome that is delivered by per capita index deductions.”

He elaborated—

...there will be an output from the comparability model that will show the information that the model shows, and there will be analysis from the per capita indexed deduction model. The per capita indexed deduction model will drive our budget and the information will be available for scrutiny on an annual basis. That will, of course, inform the process. We will have a period of data to get us to 2022, which will enable that information to be part of the review.

237. Mr Greg Hands MP said—

...the model that has been agreed for the next five years is the comparability model. Before the transitional period, should Scotland’s population grow differently to the growth in the rest of the United Kingdom, it will be reconciled to what PCID would have delivered. That is what the status quo is.

Level of detail and information provided from the fiscal framework negotiations

238. In his evidence to the Committee, Professor David Heald was critical about the lack of detail in the fiscal framework. He said “This does nothing for intelligibility and transparency and, while there might be some presentational benefits for the two Governments, this exposes the Agreement to ridicule.”

239. Professor Heald concluded by noting—

Full transparency of the block grant calculations is imperative in the context of the Scottish Government setting income tax bands and rates. The Agreement does not make clear what will be regularly published.

240. The need for more detailed information was also shared by Professor David Bell, David Eiser and David Phillips. They said—

It would have been useful for the Agreement to specify more robustly the actual calculation that is implied by both the ‘Comparable Model (Scotland’s share)’ and the Indexed Per Capita (IPC) method. The PCID approach in particular has been subject of some differences in interpretation, and it is important that the meaning of any particular approach is clearly understood. Paragraph 114 of the Agreement states that the more detailed aspects of the Fiscal Framework will be published ‘as soon as possible’. This Annex must be available to both Parliaments for scrutiny.

241. In addition, the Auditor General for Scotland, Caroline Gardner, wrote to the Committee to provide an audit perspective with regard to the fiscal framework.
The Auditor General commented on the need for transparency in relation to the fiscal framework in the following terms—

> Underpinning all of this is a need for transparency to enable Parliament, Government and the wider public to see the basis on which decisions are being made and to be able to understand the assumptions underlying changes in revenues and expenditures from one year to another. The agreement on the fiscal framework sets out how areas such as the block grant adjustment will work, and further technical detail is anticipated in due course. The continuing role of the Barnett formula is also highlighted.

> In my view it is critical that the detail of how these mechanisms operate in practice in each year is clearly and objectively reported by the Scottish Government, covering all material elements of the Scottish budget”\(^{136}\).

Views of the two governments

242. In a letter to the Committee prior to the end of the negotiations on the fiscal framework, the Deputy First Minister told the Committee that—

> I recognise that Parliamentary scrutiny of any agreement between the two Governments is essential and as I confirmed earlier this week it is also my intention to publish the key documents on the fiscal framework to support that scrutiny process\(^ {137}\).

243. Both governments were questioned on the nature of the key documents and whether they would be published prior to dissolution of the Scottish Parliament in order to aid scrutiny of the fiscal framework.

244. Mr John Swinney MSP said—

> A range of documents have been part of that process and I would like to be in a position to publish as many of those as I can, although, in the case of some documents, I will need to liaise with the Treasury about whether it is content for those to be published. I am actively exploring and discussing with the Treasury what documents we can publish to further enhance the scrutiny that the committee is able to undertake in this process.\(^ {138}\)

245. By contrast, Mr Greg Hands MP said—

> Given that the negotiation on the fiscal framework was not the first and certainly will not be the last negotiation between the two Governments, I think that it is important that the papers remain confidential. There has been a lot of commentary, and I am very happy to talk about things such as the different models that have been proposed, but I think that, in the long run, it would be unhelpful to release the papers.\(^ {139}\)
246. It was also clear that there were a substantial number of areas where the fiscal framework refers to work that is still outstanding and where further decisions – outwith the formal review – are still necessary. In a letter of 9 March 2016 to the Committee, the Deputy First Minister listed the issues still under discussion:

- The technical and operational annex to the fiscal framework;
- Memoranda of Understanding on a range of issues including for example to govern information sharing between the Scottish Government and the Department of Work and Pensions and the relationship between the Scottish Fiscal Commission and the Office of Budget Responsibility;
- Agreements on the production of VAT revenues and details of the VAT assignment methodology.

247. Additionally, the following issues are still to be resolved:

- the operation of the independent review process;
- the audit reports of costs incurred by the UK Government where the Scottish Government is expected to meet the costs;
- a revised Memorandum of Understanding in relation to capital borrowing.

248. These will be key matters for the relevant committee(s) in the next parliamentary session to consider.

**No detriment and accounting for policy spillover effects**

249. Professor David Bell, David Eiser and David Phillips were generally supportive of the fiscal framework and how it has dealt with the issues of no detriment and policy spillover effects. The agreement states that all ‘direct effects’ (the first principle in the Smith Commission) will be accounted for, i.e. will be subject to a resource transfer. For behavioural effects of tax policy changes (the second principle in the Smith Commission), these will not generally be taken into account (unless they are “material”). Professor David Bell, David Eiser and David Phillips believed that the agreement “implicitly plays down the importance of this element of the Smith principles” and described this approach as “sensible given that many behavioural impacts would likely be small, and nearly all will be difficult to estimate, subject to significant uncertainty, and therefore open to contention.”

250. Professor David Bell, David Eiser and David Phillips did however raise the question about what level of financial spillover effect might be considered “material” and who decides. They cautioned that this will be entirely a matter for each government to decide on a case-by-case basis and that this could open the door to further dispute between the Scottish and UK governments. They also noted that there is no third party to adjudicate disputes over estimates of causality of spillover effects.
251. Professor Heald was supportive of the incorporation of the first principle of no detriment within the fiscal framework but he also warned about potential issues in relation to the second principle; dealing with behavioural and spillover effects. He said—

> While I understand the motivation for the second No Detriment principle, my view is that implementation is not feasible. The circumstances in which the Agreement indicates that it will apply will lead to controversy about calculations and whether compensation should be paid. A further level of complexity will be added to the Barnett formula system, one of the original attractions of which was its simplicity.¹⁴²

252. Professor Muscatelli also commented on this issue. He said—

> On the issue of no detriment from any spillover effects, it is interesting that both governments do feel that this is an important issue (par. 44-53). In earlier evidence I and other commentators had said that this ‘compensation principle’ in the ‘no detriment’ clauses in Smith would be difficult to apply in practice. It is interesting that both governments agree that direct effects should be accounted for, but not behavioural effects unless they are material. The issues will be handled through JEC and if required dispute resolution. The main issue will be whether the two governments will always agree what a direct effect is and what a behavioural effect is, or what ‘material’ represents in the context of behavioural effects.

Views of the two governments

253. In their evidence to the Committee, both the Deputy First Minister and the Chief Secretary to HM Treasury commented on how policy spillover and behaviour effects would be accounted for and what process would be followed if such an issue arose.

254. Mr John Swinney MSP said—

> We aim to address the question of policy spillovers on the basis of evidence. Within the agreement, we tabulate the categories of policy spillovers between direct effects and behavioural effects. We specifically ruled out second-round or indirect effects from the process, which is helpful.

> Direct effects will be much more tangible to determine and there will be sufficient data to inform an assessment of behavioural effects. As part of the process, we can draw on information from the OBR and the Scottish Fiscal Commission to try to help us to resolve any outstanding questions in that respect.¹⁴³
255. Asked what was meant in the Agreement by the phrases “material” and “exceptional circumstances” in terms of when a behavioural effect might be considered he added—

“That would be decided by agreement between the two Governments. Paragraph 50 can be read only as setting a high bar. It includes the terms “material”, “demonstrable” and “exceptional”. It does not refer to an everyday occurrence; rather, it would be a very rare occasion on which those effects might happen. There would have to be acceptance of the exceptional nature of circumstances that would give rise to such a claim, and that would have to be agreed between both Governments.”

256. Mr Greg Hands MP said—

“The questions really revolve around the behavioural impact. I am clear—and I think that John Swinney is clear, too—that we are talking about something that will generally be pretty exceptional and likely to have been unforeseen. At the end of the day, we want to have an element of flexibility and we want the Scottish Government to be able to set its own tax rates. That is the purpose of income tax devolution. We want to ensure that the behavioural impact does not effectively negate the purpose of doing tax devolution in the first place. If the Scottish Government was to make a decision on tax that would have an impact on the rest of the UK, we would in no way want to prevent that from happening merely because it might have a behavioural impact.

I think that the provision would be used in exceptional cases. It would need to be shown that something had had a material impact, too, and then we would deal with it using an appropriate mechanism, which would have to be agreed by the two Governments. It is a kind of a backstop position that allows the two Governments to look at something that perhaps had not been foreseen and assess its impact. As I said, I see that being used in fairly exceptional cases.”

Independent review process

257. A central component of the agreed fiscal framework is that the arrangements it outlines will be subject to a review. Therefore, the agreement reached on indexing applies only until the review scheduled for completion by the end of the 2021/22 financial year. The review itself is to be informed by an independent report produced by the end of 2021.

258. Professor Bell, David Eiser and David Phillips were critical about the lack of detail in the agreement about the review. They noted that “The Agreement provides no information as to who will deliver this report, nor what might happen should the two governments fail to agree an indexation method at that point.”
259. More broadly, for Professor Muscatelli, the key issue in relation to the review was the lack of an assumption of the preferred outcome. He noted that—

The agreement makes it clear that there will be an independent review which will inform the two governments’ views. The governments will decide, through a new negotiation, post-2021 what the future indexation mechanism should be. In effect this is a sunset clause for the BGA indexation mechanism post 2021-22. The important point is that there is no presumption that a particular method will be used. The agreement does not specify what might happen if a methodology is not reached in time for 2021-22.147

260. In Professor Muscatelli’s view, the use of a transition period and review will also bring other benefits. He said that the period until 2021-22 provides a period in which we will learn more about the actual economic and demographic risks that emerge from the framework without having to rely on modelling assumptions and forecasts.

261. In their joint evidence to the Committee on the fiscal framework, Professors Iain McLean and Jim Gallagher also comment on the review. They said—

It is clear that the negotiations to agree a fiscal framework have proved very difficult, and as a result the agreement is subject to review in five or six years’ time. We are pleased that both governments have now agreed that ‘The agreed fiscal framework set out in this document is consistent with the principles in the Smith Agreement’ (Agreement paragraph 6). While it is arguably unfortunate that a permanent agreement could not be reached, this does provide an opportunity for analysis of what happens in practice, rather than argument about what might happen, to inform the next set of negotiations, which are, we understand, to be preceded by an independent review.148

262. They further noted that the critical element that would be required for the review to be properly undertaken is the provision of data, which needs to be published regularly and addressing the relevant questions.

Views of the two governments

263. The process to be followed during the independent review period outlined in the fiscal framework was also the subject of questioning for both governments. Of particular interest to the Committee was the process of appointing people to the independent body conducting the review, the status of any report produced and what agreement had been reached, if any, on the post-transition period block grant adjustment method and indexing.

264. On the issue of the appointment process, both governments agreed that decisions on any person or persons appointed to provide independent advice and produce the report would be taken jointly.149
265. Commenting on whether the Scottish Parliament would receive a copy of the independent report at the same time as it was provided to the two governments, Mr John Swinney MSP said—

> I cannot give a commitment on behalf of the United Kingdom Government, but I can give a commitment on behalf of the Scottish Government that our wish is that that would be the case.\[^{150}\]

266. Whilst Mr Greg Hands MP said—

> It is slightly difficult for me to predict. Obviously, the two Governments in the future would have to agree on the basis of the independent review and report, and I do not want to prejudice in any way the procedure that future Governments might use for that report.\[^{151}\]

267. The Chief Secretary to HM Treasury offered then to write to the Committee to clarify. In a subsequent letter to the Committee, Mr Hands stated that—

> We will need to agree the precise arrangements for the independent report with the Scottish Government and make sure those independent experts authoring the report are content with those arrangements. I hope personally that we will be able to involve both Parliaments in the review process, but it is too early to set that out definitively\[^{152}\].

268. Finally, the Committee also sought to clarify what arrangements had been agreed to by the two governments in the circumstances where the review process did not lead to an agreed outcome by the end of the review period (the end of the 2021/22) financial year.

269. The fiscal framework states—

> The fiscal framework does not include or assume the method for adjusting the block grant beyond the transitional period. The two governments will jointly agree that method as part of the review. The method adopted will deliver results consistent with the Smith Commission’s recommendations, including the principles of no detriment, taxpayer fairness and economic responsibility.\[^{153}\]

270. In previous evidence to the Committee, the Secretary of State for Scotland said—

> I confirm that no mechanism would be imposed at the end of that period without agreement. If we were unable to reach agreement on what was to happen in the longer term, post 2022, we would have to agree on what was to happen in the short term. However, no arrangement would be imposed on the Scottish Government.\[^{154}\]

271. In his evidence, the Deputy First Minister stated—
As for the review, after the 2021 Scottish parliamentary elections, an independent report will be commissioned jointly by both Governments; in other words, both Governments will have to consent to who will undertake that independent report and how that work will be undertaken. The review will report to both Governments at the same time; both Governments will consider it; and by the end of financial year 2021-22, both Governments will have to agree the steps to take as a consequence of receiving the report of the review that has been undertaken. That requires the agreement of both Governments at that time. The obligation in the agreement that has been reached is that both Governments have got to come to an agreement at that stage, and that is what we will endeavour to do.\textsuperscript{155}

272. Asked to confirm whether the transitional arrangements would continue after the end of the 2021/22 financial year if no agreement between the two governments on what followed, the Deputy First Minister said—

That would be a reasonable conclusion\textsuperscript{156} and that there could be no imposition of a different model without agreement.

273. Whilst the Chief Secretary to HM Treasury said—

I have a lot of confidence in the process of finding the right people or bodies to do that independent report. Early in 2022, the two Governments will work on a review of the whole fiscal framework, which will inform the whole process.

Going beyond that, there is no default option. There is no prejudice in favour of one model or another, or whether other new models may come along. It is no secret that a variety of models has been looked at during the process over the past nine to 10 months, but there is genuinely no prejudice for or against any particular model this far in advance.\textsuperscript{157}

274. When pressed on the issue of which model would be in place should no agreement on indexation be reached by the two governments, Mr Hands stated—

There is an unprejudiced position; there will be no default indexation model. Both Governments are clear on that. Part of the agreement is that we will put the issue to the independent review after we get the independent report; there will be a review process at the time when we get there\textsuperscript{158}.

275. He stressed the importance of the findings of the independent report, stating—

When the independent review is established in 2021, it will be hard for either Government to go against the centrality and the substance of it. Without in any way trying to speculate on how the independent review might happen, the two Governments might sit around and discuss one or two things. However, on the centrality of the recommendations, given that
the independent review will have the confidence of the two Governments and it will be based on real-life experience over five years, it will be extremely difficult for either Government to say that it is going to completely ignore it and instead impose something or carry on in one way or the other.\textsuperscript{159}

**Borrowing arrangements**

276. The agreement in relation to borrowing was also touched upon by some of the expert commentators who provided evidence to the Committee on the fiscal framework.

277. Professor Anton Muscatelli was one such expert, commenting on capital borrowing that—

> the capital borrowing limits (par. 54-60) set limits for capital borrowing which are very [his emphasis] prudent relative to the overall UK fiscal framework. It may be worth the two governments reviewing this in future to determine if the limits proposed are appropriate given the additional Scottish tax base.\textsuperscript{160}

278. He also said that on resource borrowing and the Scotland Reserve, the agreement would seem to provide adequate smoothing of expenditures and taxation given the volatility of the income tax base.

279. The Auditor General for Scotland commented on the borrowing provisions outlined in the fiscal framework that—

> I note that there is no specific provision for the review / uprating of borrowing and reserve limits in the agreement on the fiscal framework in the transition period to 2021/22. The equivalent powers in the Scotland Act 2012 were subject to provisions for such a review. I anticipate that both Governments would wish to keep this under review\textsuperscript{161}.

**Views of the two governments**

280. The Smith Commission recommended that the Scottish Government should have “sufficient, additional borrowing powers to ensure budgetary stability and provide safeguards to smooth Scottish public spending in the event of economic shocks” as well as “sufficient borrowing powers to support capital investment”\textsuperscript{162}.

281. The Deputy First Minister informed the Committee why a prudential borrowing regime had not be agreed to and why a figure of £3 billion in capital borrowing was considered sufficient—

> The figure is a product of a negotiation. The Smith commission required of us that whatever agreements and arrangements were put in place would have to operate within the United Kingdom’s fiscal framework. That is a
product of the fact that Scotland remains part of the United Kingdom in constitutional terms. It is therefore understandable that there should be a requirement that we operate within the UK’s fiscal framework.

I had to be mindful of the fact that the UK Government has set out its own UK fiscal framework, which requires that there will be no borrowing by 2019-20—obviously, we take a different philosophical view on that subject. Therefore, any borrowing facility that we as a Government would want has to be compatible with the wider fiscal framework of the United Kingdom.

I also had to be mindful of the fact that the UK Government would have to reach an agreement that would, in effect, contradict its wider fiscal framework. For that reason, I accepted that we could not have a prudential borrowing regime. I accepted that the Treasury requires to limit our borrowing so that it understands the extent to which we plan to borrow, so we negotiated a cap of £3 billion for the aggregate total of capital borrowing that would be available to Scotland.  

282. Giving evidence to the Committee, the Chief Secretary to HM Treasury stated that his understanding of the Smith Commission recommendation in relation to borrowing was—

Paragraph 95 of the [Smith Commission’s] report was clear that there should be sufficient capital borrowing powers and “sufficient, additional” resource borrowing powers. The use of the word “additional” in relation to resource rather than capital was distinctive and is a clear part of the agreement.

If one were to interpret the report strictly, one would say that it does not say anything about additional capital borrowing powers. However, in our willingness to get an agreement and find something with which both Governments could work, the two Governments agreed to increase the capital borrowing limit from £2.2 billion under the previous arrangements—that is, the Scotland Act 2012—to £3 billion and to increase the amount that could be borrowed in each year from the previous 10 per cent of capital departmental expenditure limit to 15 per cent of the limit. That is a £450 million annual borrowing power as long as the Scottish Government does not exceed the £3 billion limit. It will make a significant difference.

283. He went on to say that—

… the Scottish Government already has a generous CDEL [capital DEL borrowing limit] settlement over the spending review period. It is up significantly from the previous spending review period. I think that it is 14 per cent higher, so there is a lot of generosity there. I look forward to seeing the Scottish Government deploying that generosity well in capital
projects and infrastructure projects that will make a real difference to the Scottish economy.\textsuperscript{165}

284. With regard to the question of shifting to a prudential borrowing regime. He said—

\begin{quote}
Smith was clear that a prudential borrowing regime should be considered, although he did not necessarily recommend that a prudential borrowing regime should be adopted. Therefore, we considered and discussed that, but both Governments were content to adopt the arrangements that we have made—that is, an increase in borrowing based on the existing arrangements.\textsuperscript{166}
\end{quote}

Welfare

285. The main aspects of the fiscal framework relating to welfare were the arrangements for block grant adjustments and indexing, and administration and implementation costs. Views on the latter are set out below.

286. In relation to the block grant, Professor Bell, David Eiser and David Phillips made similar comments on the decisions taken for the initial block grant adjustment for welfare benefits, describing these as pragmatic and simple, with the same caveats made above regarding tax (i.e. about reconciling spending in the year prior to devolution with outturn expenditure).\textsuperscript{167}

287. They also commented that the fiscal framework does provide for an exception to the arrangements in relation to Cold Weather Payment. They explained that given the volatility of expenditure on the Cold Weather Payment, the initial baseline addition will be an average of the UK Government’s spending in Scotland from 2008/9 to the year prior to devolution. They commented that “further clarity is required on how the effects of inflation might be taken into account in such a calculation.”\textsuperscript{168}

288. Professor David Bell, David Eiser and David Phillips also commented on the arrangements for indexing of welfare benefits and employability programmes. They noted that, for welfare, the change in Scotland’s block grant each year will initially be determined by the Barnett Formula in a manner akin to “Levels Deduction” (which one might term “Levels Addition”). Thus the Scottish budget will receive a population share of changes in aggregate spending on the comparable benefits in the rest of the UK. However, for an interim period until 2022, this calculation will be reconciled with the Indexed Per Capita method.

289. Professor Bell and his colleagues noted that spending on the benefits to be devolved is 20\% higher per capita in Scotland than in the rest of the UK. In their view, this means that use of the Barnett formula to determine the funding for the devolved welfare benefits would tend to bring per capita spending in Scotland on these benefits closer to the UK level than at present unless resources are found elsewhere in the Scottish budget. They observed that the ‘Levels’ approach does
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not account for Scotland’s higher initial spend per capita, and it does not fully account for relative population change.

290. Furthermore, they note that, in the same way that the block grant adjustment for tax will be reconciled with the Per Capita Indexed Deduction method over the period until 2022, the block grant adjustment for welfare will also be reconciled with the Per Capita Indexed Deduction method until 2022. They note that this method does not have a convergence property built into it.

291. Professor Bell and his colleagues conclude their analysis by stating that—

…on the welfare spending side, one cannot say with any particular certainty whether the Scottish budget would be better off under the UK Government’s initial ‘Levels’ method, or the subsequent ‘reconciliation’ to Indexed Per Capita. Indexed Per Capita certainly does not have a convergence property built into it (i.e. it takes account of Scotland’s higher initial spend per capita), but it fully adjusts for Scotland’s declining relative population. The Levels method does not account for Scotland’s higher initial spend per capita, but it only partially adjusts for Scotland’s relatively declining population.\(^{169}\)

292. In relation to the devolved Employment Programmes, they note that the Barnett Formula will also apply. Professor Bell and his teams state that, “In some ways this is preferable to determining spend according to some Payment by Results approach: it means fewer constraints in the way in which the Scottish Government can use these funds, and a greater degree of certainty on the level of funds.” They argue that the level of funding now associated with these programmes is “so small that the question of the adjustment mechanism is not of huge importance.”\(^{170}\)

293. In his analysis, Professor David Heald cautions against expectations of increasing benefits after devolution. He said that there appears to be a widespread assumption in Scotland that devolution of some welfare powers will mean more spending without increases in taxation: the talk is of top-up, not of cut-down. In his view, “such illusions carry severe risks of disillusionment when the realities bite”. He believes that “future UK spending cuts will affect Scottish public services through the Barnett formula and there seem likely to be further cuts to existing benefit levels.”\(^{171}\)

294. Professor Paul Spicker also commented on the plans for block grant adjustments and drew on his views of experiences in other parts of the UK. He wrote—

The Northern Ireland Assembly had full powers and authority over its benefit system, but was paid proportionately to the costs of benefits in the rest of the UK. During the recent dispute over welfare reform, the Treasury calculated that the amounts distributed relating primarily to Employment and Support Allowance and Personal Independence Payment (PIP) should be reduced and the Assembly had substantial payments deducted from its
allocation because of its failure to introduce equivalent legislation. The calculation was particularly questionable in relation to PIP, which has been introduced very slowly in the rest of the UK and retains the responsibility to pay for the needs that have led to increasing costs to date. The example seems to imply that, regardless of the devolution of powers, the UK government may demand future conformity with its own policies and priorities.172

**Administration and implementation costs**

295. The fiscal framework states that the UK government will provide £200 million to the Scottish Government to support the implementation of all new powers (this includes tax, welfare, the Crown Estate etc., i.e. not just welfare benefits). This will represent a one-off (non-baselined) transfer, supplementing the block grant, to support the functions being transferred. The profile of this transfer is to be agreed by the Joint Exchequer Committee. The governments have also agreed a baseline transfer of £66 million per year to cover the ongoing administration costs associated with the new powers.

296. In its evidence to the Committee, Child Poverty Action Scotland states that it believed that resources need to be available to cover the cost of enabling a national delivery body to ensure consistency and uniformity of delivery across Scotland, clear accountability and a clear line of command, fairness and equality of access for claimants. In its view, national delivery standards could be developed, allow delivery practices to be relatively reactive to the Scottish Government’s policy intention and allow for ongoing change and continuous improvement. CPAG’s submission makes it clear that it is not entirely clear how the figures for administration and implementation costs in the fiscal framework were reached.173

**Role of the Scottish Fiscal Commission**

297. The fiscal framework specifies that forecasts for tax revenue and welfare expenditure will be used to determine the block grant. The Scottish Fiscal Commission (SFC) is to develop these forecasts. The Scottish Government had previously argued that it should make the forecasts. Professor Bell, David Eiser and David Phillips make comment on this change of policy, describing this as “a welcome development, which should remove any doubt about political interference with the forecasting process.”174

298. In addition, the Scottish and UK governments have agreed that “appropriate and reciprocal information-sharing agreements” will be put in place to enable the governments, the Office of Budget Responsibility (OBR) and the Scottish Fiscal Commission to carry out their duties.175

299. Professor Bell and his colleagues state that “it is not clear what the agreements between the governments, the OBR and the Scottish fiscal commission might
comprise” and noted that the agreement does not specify how the Fiscal Commission and the OBR might work together.

300. Professor Muscatelli also welcomed the outcome in this area. He said—

> The independent fiscal scrutiny envisaged in par. 79-83 is in the spirit of the Smith Commission agreement and will require appropriate resourcing of the Scottish Fiscal Commission (par. 84-88). It is positive to see the collaboration which will be required between the SFC and the OBR. This does not go as far as the suggestion of an independent fiscal arbitrator which I raised in my previous evidence, although as noted above there will be an independent review of the Block Grant Adjustment mechanism. The proposals for the governance, review and dispute resolution (par. 97-113) are consistent with the continued reliance on seeking consensus around the framework.  

Views of the two governments

301. In his evidence to the Committee, the Deputy First Minister was asked to comment on the future role of the Scottish Fiscal Commission, how its remit was being amended and whether the Commission would require additional resources to fulfil its new functions agreed as part of the fiscal framework. He said—

> Those issues are yet to be resolved and finalised, but I accept the principle of Mr [Tavish] Scott’s question. There will have to be independent capacity within the Scottish Fiscal Commission to undertake what is going to be a very significant role.

Future provision of information and data

302. The final area where some of the expert commentators expressed their views related to the future requirements that a Scottish Parliament and its committees could anticipate as part of their role in scrutinising the operation of the fiscal framework and the review itself.

303. Professors Iain McLean and Jim Gallagher in particular commented on this area. They said it would be helpful if either or both governments published data about how the fiscal framework operates in practice, on an annual basis. In their view, the data should include the following:

- Comparative expenditure per capita on devolved services for Scotland and the rest of the UK: at a minimum this should include the total comparable expenditure used in the calculation of the Barnett formula, and how it compares to expenditure in Scotland.

- Data on how this expenditure is financed: including in particular,
- the grant which is allocated under the Barnett formula, as it would be have been calculated excluding the effect of devolved taxes (what has been described as the "levels" method);

- the amounts which are calculated under the Treasury's proposed formula which will be put into practice under the agreement;

- the difference between the two;

- the amount which flows to Scotland as a result of applying the Scottish government's favoured formula of per capita indexation; and

- the amount which is yielded by the devolved taxes.  

304. In their opinion, these data should be prepared in a way which enables them to be properly validated as National Statistics. They conclude that publication of these data will provide transparency to the public in Scotland and elsewhere in the UK and will offer a firm factual basis for review on the dates agreed between the governments.

305. On the issue of publication of information and data in the future, the Deputy First Minister stated—

> All the documents to which you refer are material to the transparency and scrutiny process, so they have to be in the public domain. I have tried to be open on the fiscal framework process, but as I have conceded to the committee the process has not been perfect and I have not been able to be as open with the committee as I would have liked. It will be easier to make those documents available to committees as part of the on-going scrutiny process of the fiscal arrangements that will have to underpin the implementation of the Scotland Bill.  

**Views of the Finance Committee**

306. The Fiscal Framework is also an area that has been investigated at some length by the Scottish Parliament’s Finance Committee. The main points from the Finance Committee’s analysis of the Fiscal Framework are summarised below.

307. The Finance Committee emphasised that the robustness and sustainability of the fiscal framework would be largely dependent on the extent to which the framework provides the Scottish Government with sufficient flexibility to pursue separate fiscal policies within Scotland. In relation to capital borrowing, the Committee was disappointed that a prudential borrowing regime had not been included as part of the fiscal framework but also recognised that the £3bn borrowing limit had “to be viewed within the context of the wider fiscal framework and the UK’s own fiscal framework”180. The Finance Committee supported the provision of a £1.75bn cash limit for resource borrowing.
308. The Finance Committee considered in detail the arrangements for forecasting income tax receipts and raised a range of issues with regard to the availability and timing of data in relation to forecasting these receipts. The Finance Committee also welcomed the new Scotland Reserve.

309. In relation to the indexation mechanism agreed by the two governments, the Finance Committee welcomed “the agreement within the fiscal framework that relative changes in population size will not impact on the size of the Scottish budget throughout the next Parliament”\(^{181}\). The Committee did however seek clarity around how this process would work in practice. Lastly, with regard to what would happen in relation to indexation if there is no agreement between the two governments following the transition period, the Finance Committee concluded that—

> The Committee notes that the two governments appear to have different interpretations of what will happen if no agreement can be reached following the review of the transitional arrangements and clarification is required\(^{182}\).
Part 3 - Welfare

What the Scotland Bill (as introduced) proposed

The UK Government considers that the Bill devolves powers to the Scottish Parliament in the following areas of welfare—

- Allowing the Scottish Parliament to have the power to vary the housing element of Universal Credit in Scotland, and powers to vary Universal Credit payment arrangements, whilst keeping all other aspects of Universal Credit reserved;

- Devolving responsibility for certain benefits outside Universal Credit, specifically 1: Disability Living Allowance, Attendance Allowance, Personal Independence Payment, Carer’s Allowance, “Industrial Injuries Disablement Allowance” and Severe Disablement Allowance, 2. Benefits which currently comprise the Regulated Social Fund (Winter Fuel Payments, Cold Weather Payments, Funeral Payments and the Sure Start Maternity Grant) and 3. Discretionary Housing Payments.

- Introducing the power to create new benefits in the areas of devolved responsibility and providing the Scottish Parliament with the power to make top-up payments to reserved benefits.

- Introducing the power to provide discretionary payments and assistance and discretionary housing payments.

- Giving the Scottish Parliament legislative competence for employment schemes in relation to disabled people and those at risk of long-term unemployment, defined as individuals who have been unemployed for at least 12 months, who are claiming reserved benefits. The main employment schemes proposed for devolution are the Work Programme and Work Choice. The conditionality and sanctions regime which governs referrals to the Work Programme will remain reserved. Schemes in relation to unemployment must last at least a year.

What the Committee said in its Interim Report on the draft clauses and our subsequent scrutiny of the Bill

The Committee made a series of recommendations in its Interim Report on the draft clauses. These can be found on paragraphs 518 to 539 of our Interim Report. In summary, the Committee concluded that, at that stage, the welfare provisions did not yet meet the spirit and substance of the Smith Commission’s recommendations and potentially posed challenges in any attempt to implement them. The Committee’s concerns with the subsequent provisions in the Bill as introduced are set out below.
Power to create new benefits and top-up reserved benefits

What the Scotland Bill (as introduced) proposed

The Smith Commission recommended that the Scottish Parliament would be given powers to create new benefits in areas of *devolved responsibility* (e.g. including health, transport, education etc.). The UK Government has proposed in the Scotland Bill, following an amendment at Report Stage in the House of Commons, that the Scottish Parliament would have the power to create new benefits in devolved areas of *welfare responsibility* – arguably a narrower interpretation of the Smith Commission’s report.

On top-up powers for reserved benefits, the Scotland Bill includes a clause enabling top-up payments to reserved benefits, which can provide on-going entitlements, as well as payments on a case-by-case basis to meet short-term needs.

What the Committee said in its Interim Report on the draft clauses and our subsequent scrutiny of the Bill

In relation to both new benefits and top-up powers, the Committee recommended that the UK Government re-consider the draft clauses to ensure that the relevant sections of the Bill met the spirit and substance of the Smith Commission thereby ensuring that the Scottish Government would have genuine policy discretion in this area. This included the issues of whether new benefits could be created in areas beyond welfare responsibilities, such as in health or transport, and that, for new or top-up benefits, any additional income for a recipient would not result in an automatic offsetting reduction (or ‘clawback’) in their entitlement to other benefits or post-tax earnings if in employment (as recommended by the Smith Commission).

Evidence heard since our Interim Report

Top-up benefits

310. In relation to top-up powers, the Committee has received a number of additional submissions of evidence since the publication of its Interim Report. In its written submission to the Committee, Inclusion Scotland expressed concern that the relevant clause as drafted (clause 21 in the Bill as introduced) placed restrictions on the ability of the Scottish Parliament to top-up reserved benefits that had not been agreed to in the Smith Commission’s report—

> Whilst the powers proposed in the Bill go further than those included in the Draft Clauses, there remains a restriction preventing the Scottish Parliament from providing financial assistance where “the requirement for it arises from reduction, non-payability or suspension of a reserved benefit as a result of an individual’s conduct” (i.e. a sanction).\(^{184}\)
311. Inclusion Scotland called for these restrictions to be removed from the Scotland Bill. Its views were shared by the Child Poverty Action Group in Scotland (CPAG). CPAG welcomed certain aspects of the clause as introduced, but called for clarification—

> CPAG believe there is need for clarification in relation to several aspects of this clause. Firstly, paragraph 159 of the Bill’s explanatory notes state that this discretionary power can be used to provide ‘top-ups’ on an individual, case by case basis or by way of an on-going entitlement to all – or a defined group of - benefit claimants. We are pleased that this clarification has been provided but believe Clause 21 could be amended to ensure that the government’s intention is clearly expressed in the legislation itself. Otherwise there is a risk that clause 21 could be interpreted as allowing ‘top-up’ payments to be made only on a case by case basis, and requiring an assessment of a claimant’s need for financial assistance. Neither of these requirements were mentioned anywhere in the Smith Commission’s recommendations.\(^{185}\)

New benefits

312. CPAG also commented on the UK Government’s proposals to enable a future Scottish Parliament to introduce new benefits. CPAG highlighted the anomaly between the recommendation that was agreed to in the Smith Commission and that set out in the Bill (clause 21 as introduced). In its view, the impact would be that whilst new disability benefits might be created, new benefits relating to health or education could not.\(^{186}\)

313. CPAG’s views were shared by the Scottish Council for Voluntary Organisations (SCVO). It concluded—

> There does not appear to be a clause in the Bill that would enable the Scottish Parliament to create new benefits beyond discretionary responses (as per clause 23). Again, the Bill fails to reflect the terms of the Smith Commission. SCVO would like to see a clause, phrased clearly so that there is no ambiguity, inserted in to the Bill in order to devolve such a power.

> Without the genuine transfer of powers allowing for the different political parties in Scotland to advocate for new policy directions concerning social security, the Bill is, in effect, handing over administration of certain benefits rather than giving the Scottish Parliament the opportunity to create its own. This does not reflect the intention behind the Smith Commission proposals.\(^{187}\)

314. In a letter to the Committee sent after Committee Stage in the House of Commons, the Secretary of State for Scotland commented at some length on the issue of the ability of the Scottish Parliament to introduce new benefits. He said that the reason why there is no specific power in the Scotland Bill to create new
benefits in areas of devolved responsibility is “because the UK Government believes the Scottish Parliament already has this power”.\(^{188}\)

315. The Secretary of State outlined why he had rejected the amendment suggested by the Scottish Government to the Committee in a letter dated 7 June 2015. He said that the UK Government rejected this amendment because it would not provide a new power to create benefits in areas of devolved responsibility; rather, it would devolve further areas of responsibility to the Scottish Parliament beyond that agreed by all of Scotland’s main political parties in the Smith Commission.\(^{189}\)

316. The Secretary of State concluded that the proposed amendment from the Scottish Government—

\[\text{…would in effect give the Scottish Parliament competence to legislate to create any benefit in any area other than one that is for the same purpose as a reserved benefit in existence on the 28 May 2015. As such it would fundamentally undermine the social security reservation in a way that would limit the freedom of the UK Parliament to introduce new welfare benefits or making changes to existing reserved benefits in the future. This is clearly not what the Smith Commission intended or agreed.}\(^{190}\)

**Amendments at Introduction or at Report Stage in the House of Commons**

317. Since the Committee published its Interim Report in May 2015, significant progress was made towards improving the wording in the Bill in the areas of new benefits and top-up benefits, through amendments to the Bill made immediately following introduction and also, particularly, during Report Stage in the House of Commons.

318. In relation to the powers to create *new benefits in areas of devolved responsibility*, the UK Government introduced a new clause (clause 26) which the committee understands significantly broadens the Scottish Parliament’s legislative competence in social security.

319. Clause 26 creates a further exception to the social security reservation to provide the Scottish Parliament with the power to create benefits, allowances, grants, loans and any other form of financial assistance for social security purposes, provided these benefits:

- can be supported from the Scottish Consolidated Fund (i.e. the Scottish Government’s budget);
- are not already devolved by other clauses within this legislation;
- are not connected to other reserved matters (other than social security);
- are not targeted at those who would qualify by virtue of old age; and
• are not offered where the requirement for assistance has arisen solely as a result of benefit sanctions.

320. This clause means that the Scottish Government could, provided it had the financial means and the political will, create new welfare benefits to, or in respect of, individuals:

• who qualify by reason of survivorship, disability, sickness, incapacity, injury, unemployment, maternity or the care of children or others needing care;

• who qualify by reason of low income; or

• in relation to their housing costs or liabilities for local taxes.

321. Further, the exception will not allow the Scottish Government to provide assistance by way of pensions or in respect of individuals who qualify by reason of old age. It will not allow assistance to be provided where the need for it arises from a reduction, non-payability or suspension of a reserved benefit as a result of an individual’s conduct, unless (a) the requirement for it also arises from some exceptional event or exceptional circumstances, and (b) the requirement for it is immediate. This latter provision reflects restrictions in some of the existing welfare clauses.

322. In relation to the ability to make top-ups to benefits in reserved areas, this was also an area where there has been some progress on the provisions in the Bill at introduction compared to the previous draft clauses. There was also significant debate during Report Stage in the House of Commons on whether the Scottish Parliament would have, in particular, the legal competence to make payments to compensate for changes to the household income of certain Scots who were to see reductions in the amount of tax credits they received through changes being brought in by the UK Government.

323. Clause 21 of the Bill as introduced – ‘Discretionary Payments – top up of reserved benefits’ - provides the Scottish Parliament with legislative competence to introduce top-up payments to people in Scotland who are entitled to a reserved benefit. These top-up payments could be paid on an individual case-by-case basis to meet short-term needs, or to provide on-going entitlement to specific or to all benefit claimants. The Bill as drafted does not allow payment to be made to an individual to offset a reduction in a reserved benefit because of a sanction.

324. Our analysis is that the impact of this improved clause in the Bill means that, for example, the Scottish Parliament would have the competence to top-up tax credits or child benefit. The clause also appears to go part way towards giving some ‘exceptional circumstance’ flexibility in the case of, for example, someone who receives a Jobseekers Allowance or Employment and Support Allowance sanction.
Current state of the Bill and the views of the two governments

325. No significant amendments have been made during the Bill’s passage in the House of Lords. Therefore, the Bill remains broadly unchanged since it was agreed to in the House of Commons (see above).

326. In its supplementary Legislative Consent Memorandum, the Scottish Government noted that a new clause (Clause 26) had been introduced to the Bill during its passage that provides a power for the Scottish Parliament to create new benefits, so long as the new benefit does not provide assistance in relation to old age. In the Scottish Government’s view, “this implements the Smith recommendation for a power to create new benefits.”

Carer’s Allowance

What the Scotland Bill (as introduced) proposed

Clause 19 of the Scotland Bill as introduced devolves responsibility for Carer’s Allowance to the Scottish Parliament. It seeks to do this by amending the current exception to the reservation on social security in the Scotland Act 1998. The definition for carer’s benefit used included being aged 16 or over, not in full-time education, not gainfully employed, and looking after a disabled person in receipt of a disability benefit. This appears to be similar to the existing criteria used by the UK Government for Carer’s Allowance.

What the Committee said in its Interim Report on the draft clauses and our subsequent scrutiny of the Bill

The Committee expressed its concerns that the initial definition of carer in the draft clauses appeared overly restrictive and could limit the policy discretion of future Scottish administrations in this area. The Committee recommended that the clause should be re-drafted to ensure that future Scottish administrations are able to define what constitutes a carer.

Evidence heard since our Interim Report

327. The Committee has previously heard from a range of organisations during evidence-taking prior to the publication of the Committee’s Interim Report. These organisations expressed concerns at the time about the restrictions that had been proposed on the definition of a carer. In the most recent evidence received by the Committee on this clause in the Scotland Bill as introduced, these concerns were, in the main, repeated.

328. Citizens Advice Scotland (CAS) stated “Clause 19 should be amended to remove restrictions on paying carers benefits to all carers, including those who are under 16, in full-time education or in employment.” CAS concluded—
The clause as currently drafted would therefore limit any future development, for example, to support young carers or those who wish to study while undertaking a caring role. The clause should be amended to ensure that the Scottish Parliament is able to develop its own definition of a carer and therefore exercise full autonomy over the benefit being devolved as envisaged by Smith.193

329. CAS’s views were shared by a number of other groups, such as the Child Poverty Action Group in Scotland, Inclusion Scotland and ENABLE.

330. In its written submission to the Committee, Engender Scotland noted that its research showed that around 60% of unpaid carers are women, that women are twice as likely to claim carer’s allowance as men, and are twice as likely to give up paid work in order to care. As such, Engender Scotland believed that these restrictions would “undermine the opportunity for the Scottish Parliament to tackle women’s economic inequality through a distinct approach to carers’ benefits that recognised women’s caring roles and supported women to balance paid and unpaid work”.194

331. In his aforementioned letter to the Committee, the Secretary of State for Scotland set out his reasoning for the specific drafting of the clause relating to Carer’s Allowance. He said that whilst the clause allows the Scottish Parliament to decide the detail of to whom carer’s benefits are paid, how much they are paid and what the eligibility criteria should be, the parameters around the definition of a relevant carer reflect longstanding principles about the purpose of Carer’s benefits and how people are supported in different circumstances.195

332. The Secretary of State set out three principles that guided the UK Government’s preferences in relation to the current Carer’s Allowance and that these had been included in the consideration of what and how to devolve this benefit—

First, those under 16 are not normally supported by the benefit system. Rather they are supported by parents, guardians or local authorities/councils. This is a long-standing principle of the social security system.

Secondly, the current Carer’s Allowance is designed as a form of compensation for those who can do no work or only limited work because of the time they dedicate to their caring duties. Therefore, there needs to be a threshold to judge whether the claimant is in employment or not. The gainful employment provision is a means of doing so.

Thirdly, those in full time education are not normally supported by the benefit system. Rather they are supported by the educational maintenance system through its system of loans and grants.196
Amendments at Report Stage in the House of Commons

333. Following the Committee’s Interim Report and the representations we made to the UK Government, significant progress was made to this provision through amendments to the Bill at Report Stage in the House of Commons. The amendments to clause 19 of the Bill as introduced replaced the phrase ‘relevant carer’ with ‘person’ and removed the requirement to be 16 or over, not in full-time education, and not ‘gainfully employed’. The intention of the UK Government was to enable the Scottish Parliament to legislate for a carer’s benefit to provide any person who provides regular and substantial care for a disabled person. The person being cared for would still need to be in receipt of a disability benefit as defined in clause 19(4) of the Bill as introduced. Clause 19 is considered below.

Current state of the Bill and the views of the two governments

334. No significant amendments have been made during the Bill’s passage in the House of Lords. Therefore, the Bill remains broadly unchanged since it was agreed to in the House of Commons (see above).

335. In its supplementary Legislative Consent Memorandum, the Scottish Government noted that “significant amendments” had been made to remove the restrictions on competence for carers allowance. In its view, the previous clause had restricted this competence to those over 16 and not in employment or education.\(^{197}\)

Disability benefits

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<tr>
<th>What the Scotland Bill (as introduced) proposed</th>
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<tr>
<td>Clause 19 of the Scotland Bill also devolves responsibility for a number of disability benefits outwith Universal Credit, including Disability Living Allowance, Personal Independence Payments, “Industrial Injuries Disablement Allowance” and Severe Disablement Allowance.</td>
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<tr>
<th>What the Committee said in its Interim Report on the draft clauses and our subsequent scrutiny of the Bill</th>
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<tr>
<td>The Committee was concerned that the original definition of disability contained in draft clauses was overly restrictive and would not provide a future Scottish Government with the power to develop its own approach to disability benefits in the future. Accordingly, the Committee recommended that the definition of disability used in the Equality Act 2010 should also be used in the Scotland Bill.</td>
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</table>
Evidence heard since our Interim Report

336. As with Carer’s Allowance, the Committee had previously heard concerns from a range of organisations during its consideration of its Interim Report and many of these have been repeated again in the more recent evidence received.

337. Both CPAG and CAS reiterated previously expressed views that the drafting of the clause in the Bill as introduced was too restrictive. CPAG stated that the definition of ‘disability benefit’ used in the Bill was “overly restrictive” and that it may place unnecessary limitations on the kind of replacement benefit the Scottish Government could introduce. It explained that the high threshold established for the severity of the effects of an impairment (‘significant’) and the use of very specific examples in (a) and (b) of the definition in clause 19 could potentially deprive the Scottish Parliament of the ability to introduce a benefit providing assistance to people with very low level disabilities (for preventative reasons) or, for instance, those for whom the effect of their disability is largely financial. CPAG provided an example outlining why it had concerns—

For example, a person who had incontinence at night as a result of a damaged bladder might face additional weekly costs as a result of the need to wash sheets every day and frequently replace his/her mattress. It is feasible that the Scottish Government may wish to introduce a benefit that could provide support to people in circumstances such as these, where the main effects of an impairment are financial. As currently drafted, Clause 19 would make this problematic, given its focus on ‘day to day tasks’ and ‘significant needs (for example a need for supervision to avoid risk)’ used in the definition.\(^{198}\)

338. CPAG also commented that terminally ill claimants with less than six months to live, for instance, currently have automatic eligibility to DLA or PIP but could not be given similar access to a devolved benefit (unless they could establish the impact of their condition on day-to-day activities or the need for supervision to avoid risk). In its view, use of the phrase “short term” in clause 19 might also create an obstacle for terminally ill people who are not expected to live for more than a couple of months.\(^{199}\)

339. CPAG noted that during the Bill’s Committee Stage, the UK Government Minister of State for Employment noted that the UK Government’s approach “must reflect the benefits as they stand, including, importantly, the fact that they contain exceptions both to allow entitlement and to restrict payment where necessary”. In CPAG’s view, “this implies the UK Government has deliberately taken a restrictive approach, whilst allowing the Scottish Parliament to legislate for exceptional circumstances.”\(^{200}\)

340. In its submission, Inclusion Scotland concluded that “the Scotland Bill as presently drafted restricts the autonomy of the Scottish Parliament to create a new disability benefits system, based on empowering disabled people to lead active lives and promoting their right to independent living, by defining the new powers in terms of
existing disability benefits and a restrictive definition of who is entitled to claim these benefits”.201

341. The Scottish Federation of Housing Associations (SFHA) expressed concerns in its submission at the differences in definitions for disability used in the clause relating to devolution of disability benefits and that relating to Discretionary Housing Payments. SFHA stated that it was—

… concerned about the inconsistent definition of disability employed in Clause 19 and 22. We urge an amendment to change the definition in Clause 19 to refer to the definition used in the Equality Act 2010.202

342. In March 2015, the Secretary of State for Work and Pensions wrote to the Committee outlining why this particular clause had used the specific definitions for disability that can be found in the Scotland Bill. He explained that the chosen definition was intended to broadly define the characteristics of those benefits without being overly prescriptive in terms of the Scottish Parliament’s plans for future disability benefits. This included a view that benefits should not cover a short-term or transient condition and should be in place to help a claimant carry out normal, daily activities.203 The phrase “short-term” was not defined.

Current state of the Bill and the views of the two governments

343. No significant amendments were made to clause 19 of the Bill as introduced at Report Stage in the House of Commons relating to the provisions on disability benefits. The Secretary of State for Scotland did, however, write to the Committee in November 2015 providing further information on the definitions of disability used in the Bill in response to the Committee’s request for further clarification.204

344. He explained that the reason that there is a variation in definitions used for disability between clause 19 and the clause relating to employment provisions is to accommodate different devolution issues. The UK Government’s view is that the Equality Act 2010 definition would not be appropriate for clause 19 and, indeed, could put limits on the Scottish Parliament’s ability to decide who is, and who is not, covered by their provisions relating to disability benefits. The definition used in clause 19 is designed, in the UK Government’s view, to cover the adverse effects or needs arising from an individual’s health condition or disability, with the proviso that these effects or needs must not be short-term.

345. The Secretary of State concluded by noting that the inclusion of the phrase “normally payable” gives the Scottish Parliament the necessary flexibility to create exclusions or to create special categories, for example to enable provision for people who are terminally ill. The phrase “normally payable” was explained in more detail by the UK Government. It said, “The phrase “normally payable” is designed to provide sufficient flexibility to enable provision for exceptional cases - for example it would enable provision to be made to prevent the payment of benefit in situations where a person is temporarily accommodated at public or local expense in a care home or is receiving free in-patient treatment from the
NHS or to enable the payment of benefit in situations where a person is terminally ill.\textsuperscript{205}

346. It should be noted that this area is not one where the Scottish Government has sought any amendment to the definition of disability. In a letter to the Committee, the Scottish Government stated “Our view is that the clause defining ‘disability benefit’ met the requirements as set out in Smith and provided a reasonable scope to implement a replacement benefit” and that “the current definition enables the Scottish Government to vary the level and criteria placed on the benefits and it would be for the Scottish Parliament to legislate on the definitions in relation to any future benefit.”

347. No significant amendments have been made during the Bill’s passage in the House of Lords. Therefore, the Bill remains broadly unchanged since it was agreed to in the House of Commons (see above).

348. The Scottish Government did not make any further comment on this provision in its final Legislative Consent Memorandum.

**Universal credit and administrative powers – perceived ‘vetoes’**

| What the Scotland Bill (as introduced) proposed |
| Universal credit (UC) remains an area reserved to the UK Parliament. However, the Scotland Bill does provide that some administrative aspects will be devolved. For example, Scottish Ministers will be given regulation-making powers to vary the calculation of the housing costs element of UC, subject to consultation with the Secretary of State about practicability of implementation. The explanatory text refers to the Secretary of State’s agreement on a start date being required and that such agreement would not be unreasonably withheld. Similarly, the Scottish Ministers are to be given regulation-making powers to vary arrangements relating to the person to whom, and the time when, UC is paid. These are subject to consultation with the Secretary of State about practicability, with the same type of conditions set out above. |

| What the Committee said in its Interim Report on the draft clauses and our subsequent scrutiny of the Bill |
| The Committee has previously concluded that the relevant draft clauses and those in the Bill as introduced (clauses 24 and 25) could be considered or perceived as a ‘veto’. The Committee considered that this was an issue which required resolution between the two Governments through the Joint Ministerial Working Group on Welfare. The Committee said it expected this issue to have been resolved to the satisfaction of both the Scottish and UK Governments before any future legislation was introduced. During this process, the Committee said it expected the Scottish Government to report to Parliament and its committees on the progress of discussion and specifically before any final agreement is reached. |
Evidence heard since our Interim Report

349. The evidence received since the publication of the Committee’s Interim Report is broadly similar to that heard prior to the introduction of the Bill. Bodies such as CAS and other welfare groups have continued to call for as much policy flexibility as possible for the Scottish Parliament to exercise these new administrative powers. CAS said—

> The Bill as introduced contains a so-called ‘veto’ over the Scottish Government’s devolved power to make regulations on certain areas of Universal Credit. Whilst CAS recognises the practical need for joint working where the Scottish Government has power to make regulations in this area but the UK Government is responsible for ensuring that those regulations are carried out in practice, as drafted the process does not appear to be equitable, does not appear to be consistent with the Sewel Convention and may have the effect of causing the same stand-off and claimant confusion as if no process were outlined in the clauses.206

350. It concluded—

> Whilst the intention appears that the timing of any changes needs to be subject to negotiation on what it is practically possible to do, there is scope for wide interpretation of the circumstances in which it might be considered ‘reasonable’ for the Secretary of State to withhold their agreement to the Scottish Government utilising its devolved power to make regulations in this area. Differing priorities between the Governments could cause this to be a major area of contention in the future.207

351. For equality group Engender, the power to vary the administration of Universal Credit offered potential to better support women with little or no financial independence. Its view was that access to financial support and safe housing are crucial for these women and their safety is undermined by the single, monthly household payment under the Universal Credit regime. Engender concluded that it had concerns that access to resources and physical safety for women in danger could be delayed due to complex constitutional processes.208

352. In his letter to the Committee of August 2015, the Secretary of State for Scotland set out his reasoning for the ‘consent provisions’ in the Scotland Bill as introduced. He indicated that he was not persuaded that the consent provisions in the Bill constituted a ‘veto’ that prevented Scottish Ministers making the changes to policy that they will be empowered to make under the legislation. His view was that are practical issues that may arise as the powers are exercised that mean it is sensible to include consent provisions in the Bill.209

Amendments at Report Stage in the House of Commons

353. Since we published out Interim Report, some progress has been made in this important area through amendments to the Bill at Report Stage in the House of Commons.
Commons. Prior to Report Stage, clause 24 of the Bill as introduced setting out Scottish ministerial autonomy regarding the housing-related component of Universal Credit (UC) stipulated that—

“The Scottish Ministers may not exercise the function of making regulations to which this section applies unless—

(a) they have consulted the Secretary of State about the practicability of implementing the regulations, and

(b) the Secretary of State has given his or her agreement as to when any change made by the regulations is to start to have effect, such agreement not to be unreasonably withheld.”

354. A similar wording appeared in Clause 25 relating to the scope for Scottish Ministers to exercise flexibilities in the delivery of Universal Credit.

355. Amendments at Report Stage in the House of Commons replaced elements of the clause with the following wording:

If—

(a) the Scottish Ministers make regulations to which this section applies, and

(b) the Secretary of State considers that it is not practicable to implement a change made by the regulations by the time that change is to start to have effect,

the Secretary of State may by regulations made by statutory instrument amend the regulations so that the change is to start to have effect from a time later than the time originally set.

( ) The altered time must be no later than the Secretary of State considers necessary, having regard to the practicability of implementing the change.

356. The same wording also appeared in a UK Government amendment to clause 25.

357. The new wording of clause 24 and 25 suggests that the Secretary of State would not be permitted to formally veto Scottish ministerial decisions relating to Universal Credit, but he/she would maintain the power to override the date set out in Scottish regulations so as to postpone the date at which they would come into effect. The expectation would be that agreement would be reached through the intergovernmental process prior to the date being set within Scottish regulations, removing the necessity for Westminster regulations. The grounds on which such intervention could be made relate only to the practicability of date of implementation. Practicability is not defined, but may be expected to refer to the capacity of DWP IT systems/staff to affect the planned changes and the compatibility with, and priority given, to the UK Government’s own plans for Universal Credit.
Current state of the Bill and the views of the two governments

358. No significant amendments have been made during the Bill’s passage in the House of Lords. Therefore, the Bill remains broadly unchanged since it was agreed to in the House of Commons (see above).

359. In its supplementary legislative consent memorandum, the Scottish Government stated that there had been “significant amendments” to adjust the terms of the veto over flexibilities on Universal Credit changes. Instead of requiring consent, the provision now allows the Secretary of State, by a UK Parliament Statutory Instrument, to change a commencement date in a Scottish Statutory Instrument. The Scottish Government’s view is that there is no requirement for Scottish Government Ministers or the Scottish Parliament to agree to this direct intervention by the Secretary of State in the use of a devolved power to make Scottish legislation (Clauses 27 and 28).

Under Occupancy Charge/‗Bedroom Tax‘

What the Scotland Bill (as introduced) proposed

The Smith Commission recommended that the Scottish Parliament should have the power to vary the housing cost elements of Universal Credit, including varying the Under-Occupancy Charge (‗Bedroom Tax‘) and local housing allowance rates, eligible rent, and deductions for non-dependants. The UK Government has said that the Scotland Bill as introduced gives the Scottish Ministers regulation-making powers under section 11(4) of the Welfare Reform Act 2012 (determination and calculation of housing costs element) where the claimant rents accommodation and thereby includes the power to vary or remove the under-occupancy charge.

The UK Government has indicated it seeks to give effect to the recommendation of the Smith Commission to devolve responsibility for discretionary housing payments (DHPs) via the Scotland Bill. The relevant clause (clause 22 of the Bill as introduced) devolves powers over DHPs to the Scottish Parliament, allowing it to set eligibility criteria and limits on the amount spent on DHPs. As is currently the case, the power to make DHPs will only extend to those who are already in receipt of reserved benefits to help towards their rent, and who appear to require further financial assistance to meet housing costs.

What the Committee said in its Interim Report on the draft clauses and our subsequent scrutiny of the Bill

The Committee did not comment specifically on DHPs, or the powers to vary the housing element of Universal Credit, per se in its Interim Report on the draft clauses; its focus at that stage was on the interplay between DHPs and the Under Occupancy Charge/‗Bedroom Tax‘.

The Committee has previously sought clarity on the issues which had been raised with
regard to the inter-play between the power to remove the Under Occupancy Charge/‗Bedroom Tax‘ and discretionary housing payments. The Committee considered that it was essential that the application of these clauses should not have the effect of causing detriment to individuals in receipt of discretionary housing payments.

Evidence heard since our Interim Report

360. CPAG commented on this issue in more recent evidence to the Committee since the publication of our Interim Report. Its written submission refers to the clauses in the Bill relating to DHPs. CPAG explained that the Bill proposes devolution of powers over DHPs to the Scottish Parliament, allowing it to set eligibility criteria and limits on the amount spent on DHPs. CPAG notes that, as is currently the case, the power to make DHPs will only extend to those who are already in receipt of reserved benefits to help towards their rent, and who appear to require further financial assistance to meet housing costs. CPAG concluded—

> We believe the requirement that applicants be in receipt of housing benefit or universal credit should be removed. This would enable the Scottish Government to use DHPs to completely mitigate the impact of the bedroom tax. Currently, those who lose entitlement to housing benefit as a result of the bedroom tax […] are also precluded from accessing DHPs. This means that the bedroom tax will continue to affect tenants in Scotland and the Scottish Government will be unable to fully mitigate its effect.²¹¹

361. In its written submission, CPAG provide an illustrated example to explained why it had reached the above conclusion:

**Example**: Anna works 25 hours and earns £194 net per week. She lives in a two bedroom flat in the social rented sector. Her rent is £87 a week. In the past, once her earnings had been taken into account she would have been entitled to £11.67 per week housing benefit. However, the bedroom tax means that her rent (for the purpose of a housing benefit calculation) is reduced by 14% to £74.82. Once her earnings are taken into account, she is now entitled to £0.00 housing benefit. As she is not eligible for housing benefit she is not entitled to access discretionary housing payments.

362. This is a view shared by Inclusion Scotland who noted in its submission that the Scotland Bill restricts autonomy over DHPs by limiting eligibility to those in receipt of Housing benefit or Universal Credit. As such, “One, presumably unintended, side-effect of the Under-Occupation Penalty (Bedroom Tax) is that there are some people with an underlying entitlement to Housing Benefit who then lose it because of the penalty imposed.”²¹² In Inclusion Scotland’s view, given that 80% of the Scottish Households affected by the Under Occupation Penalty contain a disabled person, this restriction on eligibility to DHPs is bound to have a disproportionate impact on disabled tenants and carers.
363. Similarly, the Chartered Institute of Housing Scotland (CiH) welcomed the changes that had been made to the Bill from the draft clauses that had previously been published. However, CiH stated that “there still remain limitations regarding eligibility for DHPs and payments to people who have had their income reduced as a result of sanctions or conditionality”.

364. In the Institute’s view, any sanctions that are applied to a household’s total income are likely to increase the risk of rent arrears, possible court action and even homelessness. It called for “greater flexibility in how DHPs can be awarded”.

Amendments at Report Stage in the House of Commons

365. This is another area where some progress was made through amendments to the Bill at Report Stage in the House of Commons.

366. The Committee had stated previously that it had concerns regarding the inter-play between the power to remove the Under Occupancy Charge/‘Bedroom Tax’ and DHPs. The Committee considered that it was essential that the application of these clauses should not have the effect of causing detriment to individuals in receipt of DHPs.

367. Amendments made to the Bill at Report Stage in the House of Commons would potentially give more flexibility to the Scottish Parliament as to how it uses DHPs. However, the clause as amended still restricts eligibility for DHPs to those who are entitled to housing benefit or another reserved benefit to meet rent payments, and, in some situations, restricts payments to those who have been sanctioned. Payments can now be made to those that have been sanctioned but only where the requirement arises from an exceptional event and the need is immediate.

Current state of the Bill and the views of the two governments

368. In November 2015, the Secretary of State for Scotland provided the Committee with further information regarding the Committee’s concerns about the ability of a future Scottish Parliament to remove the Under Occupancy Charge/‘Bedroom Tax’ if it so wished.

369. The Secretary of State stated that he was not in favour of removal the link between payment of DHPs and receipt of a reserved benefit relating to rental costs (e.g. Housing Benefit). Therefore, the relevant clause provides that, in order to be eligible for a DHP, a person must be entitled to Housing Benefit or another reserved benefit in respect of rental costs.

370. The Secretary of State noted though that, in his view, the Scottish Government would be able to provide discretionary payments to individuals to meet short-term needs under the clause relating to Discretionary Payments and Assistance regardless of whether or not they are entitled to a reserved benefit. The UK Government also suggested the Scottish Government could consider provision under the new power to create benefits in devolved areas.
371. The Secretary of State also outlined his position on sanctions. The view of the UK Government is that it is appropriate that discretionary payments introduced by the Scottish Government cannot be used to systematically undermine this reserved policy.

372. No significant amendments have been made during the Bill’s passage in the House of Lords. Therefore, the Bill remains broadly unchanged since it was agreed to in the House of Commons (see above).

373. The Scottish Government did not make any further comment on this provision in its final Legislative Consent Memorandum.

**Discretionary payments and the Scottish Welfare Fund**

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<tr>
<td>The Smith Commission recommended that the Scottish Parliament be given powers to make discretionary payments in any area of welfare without the need to obtain prior permission from DWP. The relevant clause in the UK Government’s Scotland Bill broadens the provisions in the Scotland Act that allow for the Scottish Welfare Fund.</td>
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<th>What the Committee said in its Interim Report on the draft clauses and our subsequent scrutiny of the Bill</th>
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<tr>
<td>During its evidence-taking to inform the Interim Report, the Committee received some evidence that the effect of the draft clause (now clause 23 of the Bill as introduced), which dealt with discretionary payments, could restrict eligibility to the Scottish Welfare Fund which the Scottish Government currently provides. The Committee therefore sought clarification on this matter.</td>
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**Evidence heard since our Interim Report**

374. In its written submission of evidence, Citizens Advice Scotland (CAS) noted that the Scotland Bill proposes to devolve a power to make payments to people to meet a short-term need in order to avoid a risk to their well-being. As such, it also allows grants to be made to those who have been or might otherwise be in prison, hospital, a residential care establishment or other institution, homeless or otherwise living an unsettled way of life, who appear to require assistance to establish or maintain a settled home.

375. CAS noted that similar powers have already been devolved to the Scottish Parliament through the Scotland Act 1998 (Modification of Schedule 5) (No.2) Order 2013. These powers enabled the Scottish Government to establish the Scottish Welfare Fund (SWF) and the Scottish Parliament to pass the Welfare Funds (Scotland) Act 2015, which gives the SWF a permanent statutory basis.
376. In relation to the drafting of the current Scotland Bill, CAS expressed concerns that “clause 23 adds a restriction to the existing devolved powers to exclude individuals who are subject to a benefit sanction, unless the requirement for it arises from ‘some exceptional event or exceptional circumstances and the requirement is immediate.”\(^{216}\)

377. CAS concluded that this would—

…significantly limit the ability of the Scottish Government to continue to provide assistance through the SWF to people who have had their benefit payments suspended or sanctioned. Current guidance explicitly clarifies that they should be able to apply for help “in the same way as any other applicant”.\(^{217}\)

378. CAS’s concerns on the suggested restrictions relating to the sanctions regime were shared by CPAG and ENABLE in their written evidence to us.

379. CPAG also commented that its main concern in relation to clause 23 is that Exception 8 is “narrowly drafted” and does not include ‘families under exceptional pressure’ amongst the categories of person potentially eligible for ‘occasional financial or other assistance’. CPAG noted that this group is currently eligible for community care grants under the interim SWF and were also eligible for grants from the predecessor Social Fund administered by the DWP. In its view, failure to refer to this group in the Scotland Bill, and put beyond doubt the protection of families under exceptional pressure as a priority group in their own right, could put the health and wellbeing of some of Scotland’s most vulnerable families at serious risk.\(^{218}\)

380. In his letter to the Committee of August 2015, the Secretary of State for Scotland commented on the issues raised in the evidence from CPAG, ENABLE and CAS outlined above. In relation to sanctions, the Secretary of State explained that short-term discretionary payments cannot be paid solely to off-set a reduction in a reserved benefit, for example, as a result of work-related sanction, because the sanctions system is a mechanism to ensure the sanctions and conditionality policy, which remains reserved to the UK Government under the Smith Commission Agreement, is not undermined.\(^{219}\)

381. The Secretary of State for Scotland also commented on Exception 8, stating it was necessary so that—

…any discretionary payments or other assistance under clause 23 could be “regular” or “long-term”. [Removing this Exception] This would be at odds with the overall purpose of this clause in helping to avoid a risk to a person’s well-being because of a short-term need or to assist vulnerable people establish or maintain a settled home.”\(^{220}\)

382. No amendments were made to clause 23 of the Bill as introduced at Report Stage in the House of Commons relating to the provisions on the Scottish Welfare Fund.
The Secretary of State did, however, provide further information in relation to the Scottish Welfare Fund in a letter to the Committee of November 2015.

383. He stated that under the Bill as introduced, the Scottish Parliament will have the power to legislate for discretionary payments to meet a person's short term need and to avoid risk to the well-being of an individual. In his view, this is similar to, but expands upon, the power the Scottish Parliament currently has to make exceptional payments under certain circumstances under which the Scottish Welfare Fund is delivered.221

384. He stated that, similar to the other discretionary payment clauses (22 and 23), the power to create new benefits (clause 26), payments cannot be made solely to offset a reduction in a reserved benefit. This is because, in his view, under the Smith Commission Agreement, the sanctions and conditionality policy remains reserved. The view of the UK Government is that it is therefore appropriate that discretionary payments, or new benefits, introduced by the Scottish Government cannot be used to systematically undermine this reserved policy.

385. The Secretary of State noted, however, that this does not mean that sanctioned claimants cannot be given discretionary payments. A discretionary payment may still be made if the need arises due to some other exceptional circumstance or event not related purely to the reduction in the benefit. As is the case now, under Exception 8, the Scottish Parliament will be able to continue to make provision for occasional payments to help vulnerable people needing to establish or maintain a settled home.

Current state of the Bill and the views of the two governments

386. No significant amendments have been made during the Bill’s passage in the House of Lords. Therefore, the Bill remains broadly unchanged since it was agreed to in the House of Commons (see above).

387. In its supplementary legislative consent memorandum, the Scottish Government stated that there had been “significant amendments” in this area to removing the limit on the amount of discretionary financial assistance an individual who is in receipt of a reserved benefit to assist with housing costs can receive.222

Employment provisions

What the Scotland Bill (as introduced) proposed

The Smith Commission recommended that the Scottish Parliament should have all powers over support for unemployed people through the employment programmes currently contracted by DWP on expiry of the current commercial arrangements. It also recommended that the Scottish Parliament should have the power to decide how it operates these core employment support services.
In the Scotland Bill, the UK Government has created an exception to paragraph H3 of Schedule 5 to the Scotland Act 1998 which seeks to give the Scottish Parliament legislative competence for employment schemes in relation to disabled people and those at risk of long-term unemployment who are claiming reserved benefits. The main scheme is the Work Programme. The conditionality and sanctions regime which governs referrals to the Work Programme will remain reserved. Schemes in relation to unemployment must last at least a year.

The Bill also seeks to extend the existing shared ministerial competence for employment and training under the Employment and Training Act 1973 to include provision made under s.17B of the Jobseekers Act 1995. This means that power would be shared between UK and Scottish Ministers.

What the Committee said in its Interim Report on the draft clauses and our subsequent scrutiny of the Bill

The Committee previously considered that the draft clauses (and clause 26 of the Bill as introduced) did not fully implement the Smith Commission recommendations. The Committee considered that the Smith Commission intended that all employment programmes currently contracted by DWP should be devolved. Therefore, the Committee recommended that there should be no restriction on the type of person receiving support or in regard to the length of unemployment any person has experienced. The Committee considered that this should include the devolution of the Access to Work Programme.

Evidence heard since our Interim Report

388. The non-inclusion of the Access to Work programme – which offers grant to pay for practical support if a person has a disability, health or mental health condition with help to start work, stay in work or move into self-employment or start a business – was an issue for most of those who have provided the Committee evidence since the publication of our Interim Report.

389. The Scottish Association for Mental Health’s (SAMH) written submission was typical in that respect. SAMH believed that this was “a missed opportunity not to transfer this programme.” The Association stated—

> The Scotland Bill devolves disability benefits; the specialist disability employment programme; and additional powers to the Scottish Parliament on equalities. Yet the programme which supports disabled people to retain employment is not included, which is counter to the direction of travel within the Scotland Bill, and arguably, Smith’s intentions. This may be an oversight, and we hope that this will be amended at report stage. Linking Access to Work with people who join Work Choice would make the transition to employment more successful, both from the employee and the employer perspective. The administration of Access to Work has been criticised by the UK Parliament House of Commons Work and Pensions
Select Committee as overly centralised, and it is clear that this would present an on-going barrier to people with disabilities in Scotland if it remains reserved.  

390. Inclusion Scotland, CAS and ENABLE also called for the inclusion of the Access to Work Programme in the employment programmes to be devolved to the Scottish Parliament through the Scotland Bill.

391. SAMH also made reference in their written submission to Jobcentre Plus, stating—

> The Smith Report stated that JobCentre Plus and Universal Credit would remain reserved, and as such, the Scotland Bill does not deviate from the report; these decisions were disappointing, and SAMH remains concerned at the piecemeal nature of devolution, and the potential conflict between UK and Scottish Government’s views on social security and employability.  

392. SAMH’s views that Jobcentre Plus be included in the package of devolution was shared by the Scottish Council for Voluntary Organisations (SCVO). Its written submission states—

> … the sector would like to see amendments which would transfer powers over Jobcentre Plus. This would align with the current responsibilities Holyrood has over skills and learning and would be appropriate with the transfer of powers over employability schemes. The full devolution of competence for job search and support to the Scottish Parliament, in order to integrate service provision in the area of employability, was recommended by the Christie Commission back in 2011.

393. SCVO also said it “would like to see the current clause amended to remove reference to ‘at least a year’ in order to give the Scottish Parliament the opportunity to design and deliver support for individuals who may not need such intensive or lengthy intervention.”

394. In his letter to the Committee of August 2015, the Secretary of State for Scotland commented on the issues raised above. He indicated that he believed “that clause 26 delivers a substantial transfer of powers to the Scottish Parliament and delivers on the Smith Commission Agreement.” He confirmed that the legislative intent behind the Bill as drafted was to create “clear lines of accountability” between those claimants that Scottish Ministers are able to create employment programmes for and those claimants that will continue to be supported through Jobcentre Plus.

395. For the Secretary of State, the Bill—

> …makes it clear that the Scottish Parliament can only provide employment support for claimants who are at risk of long-term unemployment where the
assistance lasts at least a year, or for those with disabilities that are likely to need greater support. Help for long-term unemployed and disabled people currently makes up 95% of DWP’s budget for centrally contracted employment support delivered through providers. It therefore draws a line between such schemes and the core functions of Jobcentre Plus. This enables the smooth delivery of an integrated benefit system, and will result in a better service for claimants.229

396. No amendments were made to clause 26 of the Bill as introduced at Report Stage in the House of Commons relating to employment programmes. The Secretary of State for Scotland did, however, write to the Committee on this matter in November 2015.

397. He indicated that he considered that the relevant clause on employment support “delivers the Smith Agreement in full, as does the whole of the Bill”.230 In his view, the clause devolves the power to create employment programmes akin to the Work Programme and Work Choice, but does not devolve the specific programmes as they currently exist. This is so that Scottish Ministers have the flexibility to provide schemes of their own design within devolved competence.

398. He indicated that the clause creates a clear distinction between the Jobcentre Plus and the Scottish Government-led elements of the claimant journey, giving both a clear space in which to develop its own support. In his view, Jobcentre Plus will remain able to offer short intensive interventions, while the Scottish Government programmes will last a year or more in duration. The UK Government’s position is that “this is only right, as the Smith Agreement was clear that Jobcentre Plus would remain reserved.”231

Current state of the Bill and the views of the two governments

399. No significant amendments have been made during the Bill’s passage in the House of Lords. Therefore, the Bill remains broadly unchanged since it was agreed to in the House of Commons (see above).

400. In its supplementary legislative consent memorandum, the Scottish Government stated that this was one of the areas of the Bill where there remained room for improvement. It said that the provision on employment support (now Clause 29) is still limited to two categories: those who are disabled or, in receipt of reserved benefits and who are at risk of long-term unemployment and for whom programmes must last for at least one year. Its view is that “this does not deliver the Smith Commission recommendation and the Scottish Government remains disappointed at lack of amendment by UK Government, but is now moving towards implementation, including delivery of employment support service contracts”232.
Proposed budgets for the devolved employment programmes

401. A final issue considered by the Committee was the implications of the decisions taken by the UK Government after the 2015 Autumn Statement regarding the levels of funding for the employment programmes being devolved.

402. The estimated annual combined value in Scotland of the current contracts for the employment programmes is in the region of £53 million. This is split between around £42 million per year for the Work Programme and around £9.8 million per year for Work Choice.233

403. These contracts will stop taking referrals in April 2017. However, as people attend the programmes for up to two years, there will still be people in Scotland attending Work Programme and Work Choice provision after this date.

404. The Chancellor’s Autumn Statement included the announcement that a new Work and Health Programme will replace the Work Programme and Work Choice in England and Wales from 2017. This decision was made in the context of putting more emphasis on help earlier in the claim and focusing on disability and health barriers to employment.

405. The Autumn Statement did not itself set out a specific budget for this new combined provision. However, UK Minister for Employment Minister, Rt. Hon Priti Patel MP, has said that while overall funding for employment support would remain stable, the contracted-out element - the new Work and Health Programme - would receive around £130 million per year for GB as a whole. This is around 20% of the level of funding for the Work Programme and Work Choice, which it will replace.234

406. In figures provided by the Scottish Government to SPICe235, it is estimated that the budgets to be transferred to Scotland for these devolved employment programmes will see a cut from the current estimated annual value of £53 million to an estimated allocation of £7 million in year 1; or a cut of 87%. The cut in comparison to year 4 funding of £13m is 76%.

407. In February 2015, the Committee wrote to the UK Minister for Employment seeking clarification on the proposed scale of the budget reductions that the next Scottish Parliament can anticipate in relation to the devolved employment programmes. The Committee also set out a number of other queries.

408. In her response, Rt. Hon Priti Patel MP, UK Minister for Employment, confirmed the figures outlined above as an indicative profile of the budget that will be transferred upon devolution of these powers. In terms of the rationale for reduction, the Minister argued that the programme spend “fully reflects the current, positive, economic position” in Scotland, noting that national long-term unemployment is down 25% in the last year and therefore the funding for the new Work and Health Programme “reflects the significant decline in unemployment” but also extends to support those with health conditions and disabilities.
Implementation of the new powers

Evidence heard since our Interim Report

409. In addition to the evidence taken on the Scotland Bill itself and how it should be improved, the Committee also heard a number of views making suggestions as to how the welfare powers should be implemented. This evidence is set out below and should be seen as complementary to, and a contribution towards, the inquiry by the Parliament’s Welfare Reform Committee into The Future of Social Security in Scotland.

410. The issue of joint working between the two governments both to agree how the new benefit powers would operate from the outset as well as on a day-to-day basis thereafter was a key point for those who provided evidence. The Chartered Institute of Taxation in Scotland and Low Incomes Tax Reform Group commented—

...we think joint-working is essential, not only between the Scottish and UK Governments, but also between the Scottish Government and Scottish councils, if the Scottish Government decides to devolve powers to a more local level. This is to ensure transparency for the individual and household, but also to ensure that the government and others can assess accurately the interactions between welfare benefits and between taxes and welfare benefits.236

411. These bodies concluded—

We note that the Scottish Parliament may decide whether devolved and new Scottish benefits are to be delivered by the Department for Work and Pensions (DWP) or by establishing separate Scottish arrangements. We observe that separate Scottish arrangements could create additional complexity for claimants. Many claimants will also be claiming reserved benefits and/or also be taxpayers. They will therefore be dealing with the DWP and HMRC already. They will also deal with their local council concerning Council Tax. All these benefits and taxes interact. A query concerning one benefit may lead to a query concerning another. From this point of view, the fewer organisations the individual has to deal with the better.237

412. The views expressed above were also shared by Money Advice Scotland. It commented that if responsibility for all welfare benefits was brought together in one place, the system would be “much more efficient and joined up than at present”. Money Advice Scotland stated that, in its view, the present arrangements are complex and confusing. It said that housing benefit, local housing allowance and council tax reduction are all administered through local authorities at present, as is the Scottish Welfare Fund, whilst other welfare benefits are administered centrally by the Department for Work and Pensions. In
its view, “if the same people were responsible for administering housing benefit, local housing allowance and council tax benefit, as well as other welfare benefits, this would make the system a lot simpler and would be easier for people to navigate”.238

413. For CPAG Scotland, the interaction between devolved and reserved benefits in the context of passporting was key. It noted that eligibility for one benefit (such as DLA or PIP) is often used as a passport for access to another (such as employment and support allowance or universal credit for full-time students). In CPAG’s view, difficulties may arise where a passported benefit (such as DLA/PIP) is devolved, while the other (such as the disabled child element of universal credit) is not. CPAG highlighted that this could result in a situation whereby the Scottish Government changed eligibility criteria for one benefit, thereby increasing entitlement to a second, administered by the UK Government. CPAG concluded that “there is a need for the UK and Scottish Government to identify all relevant passported benefits and ensure that working agreements and information sharing arrangements are in place”.239

414. An additional issue raised by CPAG and Inclusion Scotland in their evidence to the Welfare Reform Committee was that of the decision on which type of organisation should administer the benefits. CPAG said—

> CPAG strongly believe that responsibility for disability and carers benefits should be held at Scottish national level and that it should not be devolved to local authorities. The risks associated with localisation of benefits are well documented for example in relation to England’s local welfare assistance scheme. Previously administered at UK level, devolution of this discretionary scheme to local level has resulted in confusion, erosion of entitlement and a lack of transparency and oversight. Concerns have also been raised by the Social Security Advisory Committee in their 2015 review of localisation and social security.

415. Whilst Inclusion Scotland said—

> Virtually all of the disabled people we have consulted are absolutely firm on desiring nationally administered disability benefits scheme to reduce local variation in entitlement i.e. they would be totally opposed to disability benefits being assessed and administered by local authorities. Such a postcode lottery, or worse a means tested disability benefits system, is completely unacceptable as it would be viewed by disabled people as a return to the days of the parish poor law.

**Offsetting benefits/‗clawback‘**

416. One of the very first issues raised by the Committee when it commenced its work in November 2014 was that of the potential for offsetting, whereby any additional benefits or payments made by the Scottish Government under the provisions in
the Bill could be ‘clawed back’ or offset by the UK Government making adjustments elsewhere to other reserved benefits or payments received by a claimant. A general rule for means-tested benefits is that income from certain benefits will be deducted in full, less any tax due. For example, income from three of the benefits to be devolved - Carer’s Allowance, Industrial Injuries Benefit and Severe Disablement Allowance - would lead to a reduction in the award for Universal Credit, income-based Jobseeker’s Allowance and income-related Employment and Support Allowance. The Committee had sought assurances on these matters—

Any new benefits or discretionary payments introduced by the Scottish Parliament must provide additional income for a recipient and not result in an automatic offsetting reduction in their entitlement to other benefits or post-tax earnings if in employment.  

417. A letter received from the Secretary of State for Scotland in November 2015 made his position clear on this matter. He said—

The UK Government agrees with the principle of not automatically offsetting new benefits with reductions elsewhere, as set out in paragraph 55 of the Smith Commission Agreement. This position was set out in the Command Paper (Cm 8990) published in January 2015 and has not changed.

418. The Smith Commission agreement states at paragraph 55—

Any new benefits or discretionary payments introduced by the Scottish Parliament must provide additional income for a recipient and not result in an automatic offsetting reduction in their entitlement to other benefits or post-tax earnings if in employment.

419. The Command Paper states—

The UK Government agrees with the principle of not automatically offsetting new benefits with reductions elsewhere. The UK Government will therefore consider the introduction of new benefits or discretionary payments on an individual basis, to ensure the implications of any changes are assessed appropriately, and to enable the development of tailored legislation, where appropriate.

420. This issue was clarified in the fiscal framework agreed between the two governments in February 2016. This states—

The Governments have agreed that any new benefits or discretionary payments introduced by the Scottish Government must provide additional income for a recipient and not result in an automatic offsetting reduction by the UK government in their entitlement elsewhere in the UK benefits.
system. Any new benefits or discretionary payments introduced by the Scottish Government will not be deemed to be income for tax purposes, unless topping up a benefit which is deemed taxable such as Carer’s Allowance.\textsuperscript{244}

421. The two governments also agreed that the UK Government’s Benefit Cap will be adjusted to accommodate any additional benefit payments introduced by the Scottish Government.
Part 4 – Other provisions

The Crown Estate

Background

422. The Crown Estate in Scotland consists of the rights, interests and property in Scotland that are managed, but not owned, by the Crown Estate Commissioners (CEC) as part of the UK wide Crown Estate. The CEC itself belongs to the reigning monarch ‘in right of The Crown’, that is owned by the monarch for the duration of their reign, but it is not their private property in that Crown Estate assets cannot be sold by monarch nor do revenues from it belong to the monarch. The CEC is a statutory corporation operating under the Crown Estate Act 1961 and managed by a Board of publicly appointed Commissioners. There can sometimes be confusion between the Crown Estate and the organisation managing it, as the CEC brands itself as The Crown Estate.

What the Scotland Bill (as introduced) proposed

The Smith Commission agreed that responsibility for the management of the Crown Estate’s economic assets in Scotland, and the revenue generated from these assets, should be transferred to the Scottish Parliament. This would include the Crown Estate’s seabed, urban assets, rural estates, mineral and fishing rights, and the Scottish foreshore for which it is responsible. The Commission also agreed that, following this transfer, responsibility for the management of those assets will be further devolved to local authority areas such as Orkney, Shetland, Na h-Eilean Siar or other areas who seek such responsibilities. It recommended that the definition of economic assets in coastal waters recognises the foreshore and economic activity such as aquaculture.

The UK Government has said that clause 31 of the Bill as introduced provides for the devolution to Scotland of the functions of managing the Crown Estate’s then current wholly-owned assets in Scotland (“the Scottish assets”), the revenue arising from those assets and competence to legislate about those functions going forward.

Devolution of competence over the management of the Scottish Assets is achieved by modifying Part 1 of Schedule 5 to the Scotland Act and consequential amendments to the Crown Estate Act 1961. Transfer of the existing management functions is to be delivered through a transfer Scheme made by the Treasury with the consent of the Scottish Ministers. The Scheme will take the form of a UK statutory instrument subject to the affirmative procedure in the House of Commons and House of Lords but it is not subject to scrutiny by the Scottish Parliament. The Scheme will contain important and legally enforceable restrictions on the management of the Scottish Assets, including rights which can be claimed with regard to the Scottish Assets by the Secretary of
State for Defence in the interests of national security.

Initially on transfer under the Scheme, the current commercial focus of the Crown Estate Commissioners will transfer to the new Scheme manager. However, the Scottish Parliament will be able to modify the management objectives in the future, subject to the requirement that the Scottish Assets must continue to take the form of an estate in land. A separate Memorandum of Understanding which is not legally enforceable will set out how the Scottish and UK Governments will work together where they both have an interest in the use of the Scottish Assets. The terms of the transfer Scheme and the Memorandum of Understanding have not yet been fully agreed."

What the Committee said in its Interim Report on the draft clauses and our subsequent scrutiny of the Bill

The Committee recommended that the UK Government considered revising its drafting approach regarding the provisions relating to The Crown Estate. In particular, the Committee recommended that the UK Government replaces the word “may” with “shall in clause 31 of the Bill as introduced.

The Committee also expressed serious concerns regarding the situation in Scotland post-devolution and the competition and confusion that may arise from the creation of ‘two Crown Estates’. The Committee called for “absolute clarity on this matter from the UK Government and HM Treasury” and recommended that, at the very least, there should be an obligation placed on the non-devolved Crown Estate to consider, if it is considering investing in Scotland in the future, the option of shared investments with the devolved Crown Estate in Scotland with a fair allocation of revenues.

The Committee also called on The Crown Estate and HM Treasury to find a means of ensuring that a full share of the Crown Estate’s revenues from Fort Kinnaird accrue to Scotland. Furthermore, in relation to future investments using this particular type of joint venture investment vehicle, the Committee believed that Scotland should receive its fair share from any such investment vehicles operating within Scotland in the future. The Committee sought clarity on the longer-term operation of the policy and financial position of the Crown Estate on this issue.

Finally, once the powers over the Crown Estate had been transferred, the Committee recommended the early implementation of the Smith Commission recommendation that responsibility of the management of the Crown Estate assets in Scotland should be devolved further to local authorities such as Orkney, Shetland, Na h-Eilean Siar or other areas who seek such responsibilities.
Evidence heard since our Interim Report

Draft transfer scheme

423. Community Land Scotland’s (CLS) evidence to the Committee states that there are a number of matters that “require further clarification”. These include issues around:

- the protection of an estate in land in perpetuity;
- the effect of not devolving interests held in registered limited partnerships;
- the implications of the requirement to maintain the Crown Estate an “estate in land with such proportion of cash or investments as they consider necessary”; and
- whether the Crown Estate (once devolved) becomes a Scottish public body subject to the Transfer of Assets provisions in the Community Empowerment Bill (by that time Act) 2015.  

424. CLS indicated in its submission that it was seeking clarification on these matters from the UK Government and that it hoped its views could be taken into account.

425. The National Farmers Union Scotland (NFUS) also called for consultation. Its written submission made suggestions for an “open dialogue between the Crown Estate, MSPs and tenants of the rural estate will be key to the formulation of management plans post-devolution.”

426. In relation to the design of the transfer scheme, the Law Society of Scotland stated that it was “inappropriate for the Treasury to have exclusive discretion on making of the scheme and Scottish Ministers ought to be involved”.

427. In November 2015, the Committee was provided, by HM Treasury, with a copy of a draft Memorandum of Understanding (MoU) between the two governments which it was proposed would set out the basis for resolving areas of conflicting interest as regards the Scottish Assets and an incomplete draft UK Statutory Instrument setting out the proposed transfer scheme. These two documents are crucial to understanding the limits within which the Scottish Parliament and the Scottish Ministers may exercise their functions in relation to the Scottish Assets. These were considered initially at the Committee’s meeting of 19 November and referred to the Parliament’s Rural Affairs, Climate Change and Environment Committee for further consideration and analysis.

428. In January 2016, the Rural Affairs, Climate Change and Environment Committee responded to this Committee outlining a series of more general concerns it had with the draft MoU and draft transfer scheme.

429. Firstly, the Convener of the Rural Affairs, Climate Change and Environment Committee indicated that his committee considered that the draft transfer scheme
includes “carve outs for reserved issues and scope for UK Ministers to restrict devolution of the Crown Estate assets which will result in a constraining framework in a devolved area, limiting the way in which the Scottish Parliament will be able to exercise legislative competence with regard to altering the manner in which the Crown Estate assets are managed or by whom they are managed.” 248

430. Secondly, the Rural Affairs, Climate Change and Environment Committee “is also concerned about the balance between the statutory Transfer Scheme and the MoU and our strong preference is to see more of the substance in the MoU.” 249

431. Finally, a number of specific issues were of concern to the Rural Affairs, Climate Change and Environment Committee.

432. In its letter to this Committee, the Rural Affairs, Climate Change and Environment Committee highlighted issues with the restrictions on what the Scottish Parliament may do in providing for further devolution of the management of the Scottish assets. Specifically, the Rural Affairs, Climate Change and Environment Committee noted that the draft transfer scheme includes significant protections for defence and national security, including the ability of the Secretary of State for Defence to require the grant or re-grant of rights in relation to assets within the Estate and to restrict the grant of rights to third parties where these are considered to affect defence operations or capabilities.

433. The draft transfer scheme states that payments which can be required in respect of leases etc. to petroleum pipeline operators or persons transmitting/distributing electricity are subject to the control of HM Treasury where they consider these to be “excessive”.

434. Furthermore, paragraph 3(3)(a) of Schedule 5, of the Scotland Act 1998, reserves the revenues from the Scottish Crown Estate assets as hereditary revenues of the Crown. It would appear to be the case, therefore, that when further devolving management of these assets, the Scottish Parliament cannot alter their status as Crown revenues or alter the requirement that these are to be paid into the Scottish Consolidated Fund (SCF).

435. The next issue relates to the interaction of proposed rights with EU law. The draft transfer scheme creates a new separate mechanism under which the Secretary of State can acquire rights from the Scottish Ministers (or other managers of the Scottish Crown Estate assets). Where the Secretary of State is seeking to restrict or prevent the grant of a right to a third party the Scheme requires the Scottish Ministers or a manager of the assets to comply with a direction from the Secretary of State. The Rural Affairs, Climate Change and Environment (RACCE) Committee indicated that these will be enforceable by the Secretary of State against the Scottish Ministers or other manager. The RACCE Committee has raised concerns as to whether this might affect the Scottish Ministers’ ability to fulfil their EU law obligations.
436. The Rural Affairs, Climate Change and Environment Committee were also concerned about the application of rights where there may be disagreement between the Scottish and UK governments. It noted that, at present, the respective interests of the Scottish Ministers and the Secretary of State for Defence in discharging his or her role in relation to national security operate against the background of a concordat. This concordat provides a framework for joint working and the resolution of disputes.

437. However, the draft transfer scheme goes further in creating legal mechanisms for giving effect to rights in the event that these cannot be resolved through the MoU and by mutual agreement. The scheme confers rights on the Secretary of State which are enforceable against the Scottish Ministers/manager and third parties but does not appear to confer any rights on the Scottish Ministers/manager through which they can ensure that their interests are given full consideration. As currently drafted there is no opportunity for reference to a referee or arbiter in the event of a dispute, save with regard to the determination of fair market value – which the Secretary of State must pay for the grant of any rights. No compensation appears to be payable where the Secretary of State prevents the grant of rights to a third party.

438. Finally, the Rural Affairs, Climate Change and Environment Committee raised a series of points regarding the treatment of, and reference to, assets and liabilities and the treatment of the tax status of the new manager of the devolved assets of the Crown Estate.

439. Firstly, the Rural Affairs, Climate Change and Environment Committee was concerned that the land held under the Limited Partnership (Fort Kinnaird) is excluded from the transfer by the Bill, as are the related revenues. Its view is that even if the asset is not wholly owned by the Crown Estate, the Crown Estate interest, the equivalent value of the economic asset or its annual revenues could be transferred to Scottish Ministers.

440. Secondly, the Rural Affairs, Climate Change and Environment Committee questioned the value of seeking to list all Scottish Crown Estate assets (as set out in Schedule 1 of the Transfer Scheme) which appeared to the Committee to risk being incomplete. In its view, a more effective approach would be to avoid seeking to list all assets and include a broad definition that would cover all Scottish assets (all property, rights and interests in land in Scotland) which are held by the Commissioners on behalf of the Crown. It also appeared to the Rural Affairs, Climate Change and Environment Committee that consideration should be given to the treatment of liabilities and, if a listing of assets is to remain, that should include further information on those assets, be a complete listing of all assets held and should also incorporate similar detail and level of information, including a full listing of liabilities.

441. Finally, the Rural Affairs, Climate Change and Environment Committee questioned the requirement to be explicit that there would be no detriment to the tax status of
the new manager, as presently the Crown Estate does not pay corporation or capital gains tax.

442. At its meeting of 4 February 2016, the Committee considered the issues raised above by the Rural Affairs, Climate Change and Environment Committee and agreed to write to HM Treasury, the Scottish Government and The Crown Estate seeking clarification on the points raised with us. Responses to all three letters were received by the Committee in February 2016.

443. In the letter from HM Treasury, Exchequer Secretary, Damian Hinds MP, stated that, in relation to the insertion of new rights in the MoU and draft transfer scheme relating to defence and energy, the MoU was not “legally binding” and did not provide “certainty” to protect these important interests. Mr Hinds MP also said that the Ministry of Defence would also use these rights in a “defence imperative” and only when all other avenues had been exhausted.

444. In relation to a full list of assets and liabilities, Mr Hinds MP stated that the list hadn’t intended to be exhaustive and that a statutory instrument was not the appropriate vehicle for a comprehensive list of this nature.

445. Finally, Mr Hinds MP confirmed that the “Crown exemption” would be extended to the new body in Scotland and it would therefore be exempt from income, capital and corporation tax, but not VAT or other transaction taxes such as Land and Buildings Transaction Tax.

446. In his letter to the Committee, the Scottish Government’s Cabinet Secretary for Rural Affairs, Food and the Environment, Richard Lochhead MSP stated that the geographic scope of the procedures for protection of defence is “extensive and would seem to apply to a wide range of activities of the Crown Estate”. He also said that the restrictions for pipelines and electricity infrastructure are also “a concern”. He concluded that, in total, this amounts to significant constraints on the devolved management of the Scottish assets with no equivalent controls for the manager of Crown Estate assets in other parts of the UK.”

447. Mr Lochhead MSP also informed the Committee that there is no legislative process that would provide the Scottish Parliament with a formal role in scrutinising a Statutory Instrument at Westminster but that he would ensure that the appropriate Scottish Parliament committees [in session 5] will have sight of the details of the proposals for the transfer scheme in advance of the UK Government legislating.

Transitional issues and draft transfer scheme

448. During the period of transfer, the NFUS queried the situation regarding the various types of agricultural tenancies being held on the Crown Estate’s rural estate. Its submission states that there may be “implications for short-term tenancies that are due for renewal during the transitional period as these assets are devolved”. In its
view, “it is important that any manager of Crown Estate farm land continues the
good track record of the current landlord in making land available to rent.”

Future management of the rural estate

449. NFUS also expressed some concerns regarding the possible future management of the rural estate assets currently held by the Crown Estate. It said—

"NFUS would however emphasise that particular concerns that have been raised following initial discussions that led to the suggestion that local authorities or Forestry Commission Scotland could be handed some management responsibilities with regard to the rural estate. It is considered that such a system could lead to conflict due to a plethora of interests being represented within the management – for example, between food production and tree-planting targets. NFUS Crown rural estate tenants would prefer to speak to one central body as opposed to a plethora of agencies. Clearly, we also consider that any new manager of Crown rural land must recognise and actively work to maintain the agricultural potential of the land and be forward-looking in this respect."

Views of the UK Government on the Committee’s Interim Report

450. In June 2015, the Secretary of State for Scotland wrote to the Committee in advance of Committee Stage in the House of Commons, providing his views on the Committee’s Interim Report. In his letter, he made reference to the provisions in the Bill relating to the Crown Estate.

451. The Secretary of State for Scotland confirmed that the UK Government believed the Crown Estate clause in the Bill devolves the management and revenues of the Crown Estate in an effective way. His view was that this is because the transfer scheme will allow for rights and liabilities to be identified properly; for strategic UK assets to be protected; and for the employment rights of transferring staff to be protected.

452. In relation to Fort Kinnaird, the Secretary of State for Scotland stated that only the management of all the Crown Estate’s “wholly and directly-owned Scottish assets” will be transferred under the transfer scheme. In his view, the Fort Kinnaird shopping centre is not wholly and directly-owned by the Crown, being held by an English limited partnership in which the Crown Estate Commissioners manage an interest alongside other commercial investors.

Current state of the Bill and the views of the two governments

453. The Bill has not changed significantly since the publication of the Committee’s Interim Report in May 2015. Additionally, the main recommendations made by the Committee in the Report have not been taken up by the UK Government.

454. During the Bill’s passage in the House of Lords, Lord Dunlop, Parliamentary Under Secretary of State in the Scotland Office commented specifically on
amendments that were in line with the Committee’s recommendations set out in its Interim Report.

455. On the issue of placing a requirement on HM Treasury to make a transfer scheme (the replacement of “may” with “shall” in the clause), Lord Dunlop said—

The clause as drafted, with the use of “The Treasury may” together with the requirement for the consent of Scottish Ministers, provides the right incentives for both parties to reach agreement and for a level playing field in the negotiations. The UK Government represent the interests of all people in the United Kingdom and, if this amendment were made, the ability to represent these interests would be constrained as the Treasury would be under a statutory duty to make a scheme, the discharge of which could be fulfilled only with the co-operation of a body beyond its control. As the scheme contains important protections for defence and national security, it is imperative that both sides are able to come to an agreement on the detail.254

456. In relation to Fort Kinnaird, Lord Dunlop stated—

I very much agree with what my noble friends Lord Lang and Lord Sanderson have said about this and the importance of not upsetting joint arrangements built on trust. The management of all the Crown Estates, wholly and directly owned Scottish assets, will be transferred under the transfer scheme. Fort Kinnaird, as has already been said, is not wholly and directly owned by the Crown; it is held by an English limited partnership in which the Crown Estate commissioners manage interests alongside other commercial investors. The partnership owns property in other parts of the United Kingdom, and Fort Kinnaird has never been wholly and directly owned by the Crown. It was brought into the partnership by the commissioners’ joint venture partner, the Hercules Unit Trust, and is managed by British Land. Revenue from the Crown Estate’s interests in Fort Kinnaird will therefore continue to be passed to the UK consolidated fund for the benefit of the UK as a whole.255

457. Finally, Lord Dunlop also commented on proposals to legislate for the ‘double devolution’ of the management and revenues of certain Crown Estate assets to island authorities in Scotland. Rejecting the need to legislate for this, Lord Dunlop said “we believe that the Scottish Parliament should decide how further devolution within Scotland will occur.”256

458. On the Crown Estate, the Scottish Government concluded in its supplementary legislative consent memorandum that the provisions in the Bill now make it clear that the Scottish Ministers can legislate for the management of Crown Estate property, and can set up a public body to administer the Crown Estate in Scotland. However, in its view, “the overall provision remains complex and excludes Fort
Kinnaird from the Crown Estate’s economic assets in Scotland for the purposes of the Bill.\textsuperscript{257}

459. The Scottish Government also noted that a draft transfer scheme under the terms of the provision has been published by the UK Government. This includes statutory protection for UK-wide critical national infrastructure in contrast to the Smith Commission which recommended that the Scottish and UK Governments agree a Memorandum of Understanding - rather than statutory provision. Discussions between the UK and Scottish governments on the details of the scheme are continuing according to the Scottish Government.\textsuperscript{258}

**Equal opportunities**

### What the Scotland Bill (as introduced) proposed

The Smith Commission agreed that whilst the Equality Act 2010 will remain reserved, the powers of the Scottish Parliament would include, but not be limited to, the introduction of gender quotas in respect of public bodies in Scotland. The Commission also agreed that the Scottish Parliament should be able to legislate in relation to socio-economic rights in devolved areas.

According to the UK Government, the Scotland Bill now contains a clause (clause 32 of the Bill as introduced) which amends the reservation of equal opportunities in Section L2 in Part 2 of Schedule 5 of the Scotland Act 1998 to give the Scottish Parliament more competence to legislate for equalities. The two provisions of most interest to the Committee were the reference to the ability to impose socio-economic duties (as provided for in Part 1 of the Equality Act 2010) on public authorities in Scotland exercising devolved or mainly devolved functions, and on the ability to introduce gender quotas.

### What the Committee said in its Interim Report on the draft clauses and our subsequent scrutiny of the Bill

In both of the provisions in draft clauses and in the Bill relating to socio-economic duties and the proposal on gender quotas, the Committee sought clarification from the UK Government on the particular wording of the provisions as it was not clear what was being devolved and whether there were any limitations on the ability of Scottish Ministers to legislate with regard to equalities issues.

### Evidence heard since our Interim Report

#### Gender quotas

460. For Engender Scotland, women are underrepresented at all levels of political and public life in Scotland. It cites the proportion of MSPs that are women and a 2014
study by the Scottish Government which indicated that 10% of public boards have less than 20% of women sitting on them, and four public boards had none.259

461. In Engender’s view, “the current clause 32 [in the Bill as introduced] does not adequately reflect the Smith Commission Agreement that devolved competence over gender quotas should not be limited to public boards.” Furthermore, Engender believed that the current clause was “extremely unclear”. It called for the clause to be “redrafted in order to clearly devolve the power to introduce gender quotas for public boards, as well as temporary special measures relating to all protected characteristics.”260

462. Engender’s view on the limitations of the current clause was also shared by the Equality Network. It told the Committee that the current clause “still does not fully implement the policy in the Command Paper.”261 The Equality Network’s submission states—

… it is unclear to us that, as it stands, the clause [clause 32 of the Bill as introduced] devolves the power to legislate for gender quotas for the boards of public bodies. Such legislation would be likely to constitute “positive discrimination” which is currently unlawful under the Equality Act 2010. In order to make such legislation, it would therefore be necessary to dis-apply the discrimination provisions of the Equality Act, in strictly limited circumstances. It appears that clause 32(3) does not allow this.262

Limitations in extending equal opportunities

463. The Equality Network also expressed concerns at possible limitations on the ability of a future Scottish Parliament to extend equalities provisions because of the current drafting of the relevant clause in the Bill. It said that the “proposed devolved power does not include the power to modify the Equality Acts, but does include the power to make supplementary or additional provision, which may impose new requirements that are not prohibited by those Acts.”263 As an example, their submission reads—

Would it be possible, for example, for the Scottish Parliament, if it chose, to legislate to extend the protection from discrimination by Scottish public bodies, to cover discrimination against those transgender and intersex people who are not currently covered by the relatively restricted ‘gender reassignment’ protected characteristic in the Equality Act? Such an example certainly seems to us to fall within the scope of the proposed new devolved competence on equality described in the UK Government’s Command Paper.264

Full devolution of equalities law

464. Both Engender Scotland and the Equalities Network called for the full devolution of equalities law to the Scottish Parliament as part of the Bill. The Equality Network explained that “devolution of equal opportunities would enable equality
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law and policy to be set appropriately by the Scottish Parliament for Scotland’s specific needs”.265

Accountability of the Equality and Human Rights Commission


466. In his contribution in the House of Commons on 3 July 2015, the Secretary of State was asked whether responsibility for the EHRC should be devolved to the Scottish Parliament. He said in response—

"The commission [EHRC] is open to discussion as to how accountability to the Scottish Parliament for its activities in Scotland might be strengthened. I would expect that to be a matter of discussion with the Scottish Government, should they wish to make it so."266

467. In its written submission, the EHRC informed the Committee that “there may be scope for new provisions to strengthen the lines of accountability between the Commission in Scotland and the Scottish Parliament.”267

Amendments at Report Stage in the House of Commons – gender quotas

468. At Report Stage in the House of Commons, the UK Government made a series of amendments to this provision. Previously, the Committee had stated that it considered that the words “except to the extent that provision is made by the Equality Act 2006 or the Equality Act 2010” created doubt about the power of the Scottish Parliament to legislate for gender quotas in relation to Scottish public authorities and cross-border public authorities.

469. In amendments to the Bill, the UK Government altered the clause to allow the Scottish Parliament (subject to any other restrictions on competence, for example under EU law) to pass legislation in the field of “Equal opportunities so far as relating to the inclusion of persons with protected characteristics in non-executive posts on boards of Scottish public authorities with mixed functions or no reserved functions”.

470. Separately, the UK Government amended the Bill to makes it clear that “protected characteristics” is to have the same meaning as in the Equality Act 2010, i.e. age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, gender and sexual orientation.

471. Finally, a third amendment was agreed to make it clear that the new power in relation to quotas includes the power to amend the Equality Act 2006, Equality Act 2010 and subordinate legislation under those Acts. This is achieved by carving out the quota power from the more general prohibition on amending that
Amendments at Report Stage in the House of Commons – socio-economic duties

472. At Report Stage in the House of Commons, the UK Government also made a series of amendments to this provision relating to socio-economic duties. The Committee had said previously that it was unclear about the scope of the proposed extension of legislative competence to socio-economic rights and, in particular, whether any extension would be limited to the socio-economic equality duty contained in Part 1 of the Equality Act 2010.

473. Of particular note to the Committee was the amendment made to this clause to delete from the Scotland Bill a proposed further exception to the general reservation of equal opportunities, namely “the subject-matter of Part 1 of the Equality Act 2010 (socio-economic inequalities)”. The rationale given for this joint UK Government/SNP amendment is that “this area is already devolved”.

Current state of the Bill and the views of the two governments

474. The Bill has not changed significantly during the Bill’s passage in the House of Lords. During these stages, Lord Dunlop, Parliamentary Under-Secretary of State in the Scotland Office commented specifically on some of the issues that have been raised in the evidence taken by the Committee since its Interim Report.

475. On gender quotas and the wider issue of whether there should be a full devolution of equalities law to the Scottish Parliament, Lord Dunlop commented—

In delivering Smith, the equal opportunities clause strikes the right balance between conferring greater competence on the Scottish Parliament for safeguarding and promoting equalities in public bodies and the importance of preserving a GB-wide legal framework. The Government’s delivery of paragraph 60 of the commission agreement ensures that we continue to reserve the 2010 Act while providing the Scottish Parliament with the ability to legislate for specific provisions such as gender quotas. Through the general exception that we are providing, the Scottish Parliament will be able only to add to and supplement the 2010 Act. It will not be able to reduce protections but, instead, will be limited to increasing and promoting protections in relation to public bodies.

On the specific issue of board appointments, the Scottish Parliament will be able to modify the 2010 Act if necessary—for example, to introduce gender quotas. The Government are confident that this is the right approach and that it delivers the benefits of devolution while, as I said, retaining the GB-wide equality framework.268

476. In its supplementary legislative consent memorandum, the Scottish Government noted that a new clause (clause 36) had been inserted into the Bill, containing a
revision of the provisions giving the Scottish Ministers the power to commence Part 1 of the Equality Act 2010 (socio-economic inequalities). It also noted that further amendments to the Bill have delivered on two sets of changes that Scottish Government had requested:

- An express exception for addressing equal opportunities relating to non-executive posts on boards of Scottish public authorities.

477. The Scottish Government stated that this latter amendment “delivers the Smith Commission recommendation on gender balance on public boards”.

**Tribunals**

**What the Scotland Bill (as introduced) proposed**

The Smith Commission proposed that all powers over the management and operation of all reserved tribunals (which includes administrative, judicial and legislative powers) should be devolved to the Scottish Parliament, other than the Special Immigration Appeals Commission and the Proscribed Organisations Appeals Commission.

The UK Government proposed a clause in the Bill (clause 33 in the Bill as introduced) which sets out the tribunal functions which may be transferred. Restrictions on the transfer of certain functions relating to reserved matters are to be set out in the new paragraph 2A to Part 3 of Schedule 5 that would be inserted into the Scotland Act 1998.

**What the Committee said in its Interim Report on the draft clauses and our subsequent scrutiny of the Bill**

The Committee welcomed the transfer of powers for tribunals to the Scottish Parliament but noted the views of the Law Society of Scotland at the time about the drafting of the relevant clause and potential limitations. The Committee sought assurances from the UK Government on these matters before a new bill was introduced.

**Evidence heard since our Interim Report**

478. In its most recent written submission to the Committee, the Law Society of Scotland continues to express “reservations” about the drafting of the relevant clause in the Scotland Bill. It said—

> We welcome the inclusion of this clause which is directed at tribunals dealing with reserved matters in Scotland. We however have reservations
about the drafting of Clause 33, believing it does not give effect to Paragraphs 63 and 64 of the Smith Commission Report. We believe that Clause 33 sets limitations on the transfer of responsibility for management of transferred tribunals.\textsuperscript{270}

479. The Society concluded that a “complete transfer of responsibility is needed to avoid questions as to the status of tribunals which deal with Scottish matters but which were not within the devolved responsibility of the Scottish Parliament”.\textsuperscript{271}

480. The Law Society’s reservations on the restrictions of the current clause were shared by Engender Scotland, Citizens Advice Scotland and Money Advice Scotland in their written submissions to the Committee.

481. In its written submission, Inclusion Scotland reported that there had been a 54% reduction in applications under disability discrimination (from 1801 to 818) after the introduction of fees in 2013.\textsuperscript{272} Inclusion Scotland concluded—

\begin{quote}
\ldots we are concerned that Clause 33 [of the Bill as introduced] proposes to transfer these powers tribunal by tribunal using Orders in Council, as this may allow the UK Government to delay transferring powers over Employment Appeals Tribunals, or restricting the freedom of the Scottish Parliament to set its own fee structure. This would be against the spirit of the Smith Commission.\textsuperscript{273}
\end{quote}

482. The Chartered Institute of Taxation and Low Incomes Tax Reform Group also commented on the provision relating to tribunals. Their written submission called for the implementation of these proposals to be managed effectively behind the scenes, such that for the taxpayer the impact will be minimal.\textsuperscript{274}

Amendments at Report Stage in the House of Commons

483. At Report Stage in the House of Commons, the UK Government also made a series of amendments to this provision. The amended clause now offers a clearer division of tribunal functions in relation to Scottish cases about reserved matters and devolution of their regulation. There is a general provision which devolves competence to the Scottish Parliament to transfer functions of reserved tribunals to Scottish tribunals in respect of Scottish Cases. “Scottish cases” are to be defined in an Order in Council made by Her Majesty. It is subject to approval in both Houses of the UK Parliament and the affirmative procedure in the Scottish Parliament.

484. There are, however two further categories of cases which are exceptions from the direct transfer of competence. Certain tribunals are excluded from this transfer of competence completely. The Scottish Parliament will not acquire competence to legislate to transfer their functions.

485. The further categories are “national security tribunals”, functions of regulators (within the meaning of the Legislative and Regulatory Reform Act 2006) and
functions of the Comptroller-General of Patents, Designs and Trade Marks. The other category is functions which are subject to "qualified transfer". The Scottish Parliament will gain the competence to transfer these functions to Scottish tribunals but only in accordance with provision made about that transfer in an Order in Council made by Her Majesty. Again the Order in Council is subject to approval by both Houses of the UK Parliament and the affirmative procedure in the Scottish Parliament.

486. The amendments made to this clause do not specifically address all the issues that the Committee had with this provision when it first considered the issue in its Interim Report. Consequently, the Committee wrote to the Secretary of State for Scotland in November 2015 seeking further clarification from the UK Government as to why additional reservations were being included rather than making them subject to qualified transfer.

487. In response, the Secretary of State told the Committee that, in his view, the Smith Commission specifically agreed that the Special Immigration Appeals Commission and Proscribed Organisations Appeals Commission, which deal with national security issues, should continue to be reserved on national security grounds. As set out in the Command Paper published on 22 January, the UK Government also considered that similar considerations applied to the Pathogens Access Appeals Commission and the Investigatory Powers Tribunal and took the view that to the extent that national security matters may be handled by any other tribunal, whether generally, or in individual cases these should also continue to be reserved.\textsuperscript{275}

488. The Secretary of State noted that the Command Paper also confirmed that the clause would not be used to transfer responsibility where the tribunal in question was an integral part of a national regulatory body operating in a reserved area where it also provided an appellate function intrinsically linked to that regulatory function.

Current state of the Bill and the views of the two governments

489. The Bill has not changed significantly during the Bill’s passage in the House of Lords.

490. The Scottish Government’s supplementary legislative consent memorandum states that “minor amendments” to the clause have reordered and clarified the provisions. Orders in Council will specify the functions that will transfer to a specified Scottish Tribunal. Such Orders may impose conditions or restrictions on the transfer and modify the functions which are transferring. The Scottish Government’s view is that it is appropriate that this level of detail is contained in Orders, rather than being specified in the Bill. The Scottish Government is consulting on a draft Order in Council to transfer the functions of the Employment Tribunal and is working closely with the UK Government and stakeholders.\textsuperscript{276}
Road signs, speed limits etc.

What the Scotland Bill (as introduced) proposed

The Smith Commission agreed that the remaining powers to change speed limits should be devolved to the Scottish Parliament and that powers over all road traffic signs in Scotland should also be devolved. Clauses 34 to 37 of the Bill as introduced takes forward these proposals.

What the Committee said in its Interim Report on the draft clauses and our subsequent scrutiny of the Bill

This was not an area scrutinised in any detail during the Committee’s work on the draft clauses for its Interim Report. The issue did not feature to any degree in the Committee’s subsequent written evidence received as part of our scrutiny of the Bill.

Evidence heard since our Interim Report

491. The Committee did not receive any substantive evidence in relation to these particular provisions in the Bill.

492. However, outwith the work of the Committee, efforts have been made through a Members Bill to legislate for obstructive parking. A bill of this nature was ruled as failing to meet the test of legislative competence. As a consequence, efforts were made in the House of Lords to amend the Scotland Bill to devolve competence in this area. These amendments were not agreed to. However, Lord Dunlop, Parliamentary Under Secretary of State at the Scotland Office, stated at the time that there had been discussions with the Scottish Government with a view to resolving this issue and that “If it proves possible to conclude the discussion on the detail shortly, the Government will consider an amendment to the Bill.”

Current state of the Bill and the views of the two governments

493. The Bill has not changed significantly during the Bill’s passage in the House of Lords.

494. The Scottish Government did not make any further comment on this provision in its final Legislative Consent Memorandum.
Devolution of the functions of the British Transport Police Scotland

What the Scotland Bill (as introduced) proposed
The Bill devolves legislative and executive competence over railway policing. This would be achieved through amending paragraph E2 of Schedule 5 Part II to the Scotland Act 1998, which reserves the provision and regulation of rail services and rail transport security, by including an exception for the policing of the railways and railway property.

What the Committee said in its Interim Report on the draft clauses and our subsequent scrutiny of the Bill
This was not an area scrutinised in any detail during the Committee’s work on the draft clauses for its Interim Report. However, the issue did feature to a limited degree in the Committee’s subsequent written evidence received as part of our scrutiny of the Bill.

Evidence heard since our Interim Report
495. In its written submission, the British Transport Police Federation expressed concern about this provision, stating that “it seems to us that the costs, complications and consequences of such a move have not been properly explored”.278 The Federation’s concerns focus around their view of the implications of “subsuming” the British Transport Police (BTP) into Police Scotland. The Federation stated—

“If the motivation for subsuming BTP in Scotland into Police Scotland is to shore up their numbers to avoid financial penalties, the result would merely be a sticking plaster, and the short term political expediency would quickly leave the travelling public vulnerable, and the rail network and security seriously compromised.”279

496. The Federation would prefer to see a different option for the role of the British Transport Police in Scotland post-devolution, consisting of either the retention of a separate force alongside Police Scotland or seeking to achieve devolution through administrative means, rather than legislative means. The latter would, in the Federation’s view, maintain the responsibility on the BTPA to pass on the cost of the Force to the rail industry, as well as over employment matters and pensions.280

497. In its submission, the RMT Union said that it did not believe that amalgamating the BTP into Police Scotland met the spirit of the Smith Agreement. It said there is “a case for the Scotland Bill to be amended to protect the role of the BTP to protect the integrity of the Smith Commission agreement on this matter.”281
Current state of the Bill and the views of the two governments

498. During the Bill’s passage in the House of Lords, Lord Dunlop, Parliamentary Under Secretary of State in the Scotland Office commented specifically on the proposals relating to the British Transport Police. Responding to concerns expressed by some, Lord Dunlop stated—

> The starting point is for the Scottish Government to determine the operating model and to legislate for future policing of the railways. The aim of both Governments, working together, is to ensure an orderly transfer of property, assets and liabilities. Clearly the UK Government will work to ensure continued co-operation during the transfer and afterwards to achieve the best possible outcome.262

499. He also wanted to—

> … make it clear that, as is consistent with the nature of devolution, it will be for the Scottish Parliament to legislate in relation to the policing of the railways in Scotland and for the Scottish Government to decide how they want the new structure to operate in practice.263

500. The Bill has, however, not changed significantly during the Bill’s passage in the House of Lords.

501. The Scottish Government did not make any further comment on this provision in its final Legislative Consent Memorandum.

Onshore petroleum provisions

What the Scotland Bill (as introduced) proposed

The Smith Commission agreed that the licensing of onshore oil and gas extraction underlying Scotland would be devolved to the Scottish Parliament, whilst the licensing of offshore oil and gas extraction will remain reserved. Furthermore, the Commission agreed that responsibility for mineral access rights for underground onshore extraction of oil and gas in Scotland will be devolved to the Scottish Parliament.

Clause 40 of the Bill as introduced devolves licencing of onshore oil and gas resources, whilst clauses 41-42 provide a range of consequential amendments and deal with existing licences.

What the Committee said in its Interim Report on the draft clauses and our subsequent scrutiny of the Bill

This was not an area scrutinised in any detail during the Committee’s work on the draft clauses for its Interim Report. The issue did feature to a limited degree in the Committee’s subsequent written evidence received as part of our scrutiny of the Bill.
Evidence heard since our Interim Report

502. In its written submission, the National Farmers Union of Scotland (NFUS) commented in the proposals for devolution, welcoming the intent. It also said that whilst it was yet to formalise a policy position for or against unconventional gas extraction (‘fracking’), significant research and impact assessment must be undertaken to decipher the feasibility for extraction before any licences are granted.²⁸⁴

503. NFUS concluded by noting—

... the divergent policies currently being pursued by the Scottish and UK Governments with regard to unconventional gas extraction, and supports the Scottish Government’s cautious approach in imposing a moratorium on licence granting whilst studies into public health and environmental regulations are undertaken. However, NFUS does query where liability will sit in the case of licences eventually being granted in Scotland in the future.²⁸⁵

Amendments at Report Stage in the House of Commons

504. At Report Stage in the House of Commons, the UK Government made a series of amendments to this provision. The most significant of the amendments to these clauses were—

- To clarify that not only the granting of licences is devolved, but also their regulation.
- To clarify that the access powers being transferred are those to land for the purposes of searching or boring for or getting petroleum.
- To clarify that for a given licence, the definition of onshore Scotland shall be the one which applies at the time the licence is granted. The reason for this is to “prevent a change in onshore-offshore delineations due to geological processes from impacting an existing licence”.
- To enable the Secretary of State to split cross-border licences between Scotland and England so as to transfer the administration of acreage in Scotland to Scottish Ministers while maintaining the administration of acreage in England with the Secretary of State.

Current state of the Bill and the views of the two governments

505. The Bill has not changed significantly during the Bill’s passage in the House of Lords.

506. The Scottish Government did not make any further comment on this provision in its final Legislative Consent Memorandum.
Consumer advocacy and payday lenders

What the Scotland Bill (as introduced) proposed

The Smith Commission agreed that consumer advocacy and advice should be devolved to the Scottish Parliament. Furthermore, the Commission agreed that the Scottish Parliament should have the power to prevent the proliferation of Payday Loan shops. Clause 43 of the Bill as introduced amends several provisions in Part 2 of Schedule 5 to the Scotland Act 1998 so that responsibility for consumer advocacy and advice is devolved to the Scottish Parliament.

What the Committee said in its Interim Report on the draft clauses and our subsequent scrutiny of the Bill

The Committee did not take any substantive evidence on the consumer advocacy provisions for its Interim Report, agreeing to return to this matter in this Final Report. However, on payday lenders, the Committee’s initial view was that the original provisions in the Bill could go further and consideration could be given to including powers over licensing and regulation not just planning. The issue also featured to a limited degree in the Committee’s subsequent written evidence received as part of our scrutiny of the Bill.

Evidence heard since our Interim Report

507. In its submission to the Committee, Money Advice Scotland makes a general point that, in its view, a significant proportion of any funds made available for consumer advice in Scotland in the future should be targeted towards services offering money advice because the issues that it tends to deal with are at the forefront of the types of problems on which the general public seeks advice. 286

508. Money Advice Scotland’s view of the proposals for devolution of consumer advocacy is that, in principle, it supports the devolution of all aspects of consumer advocacy, including the remaining ‘two pillars’ of consumer enforcement and redress that are not currently part of the UK Government’s proposals. The body also raises the issue of where financial services complaints will fall given that these aspects of consumer advocacy remain reserved. 287

509. The Law Society of Scotland’s written submission also touched upon consumer matters, calling for an extension to the provisions currently being devolved. It said—

The majority of the reservations under this section are important for completion of the UK single market. It would be difficult to devolve much of this area without significant disruption to that market; however, some aspects could be devolved without upsetting the public policy objective of
maintaining equal consumer redress across the UK. In particular, the regulation of estate agency could be devolved.\textsuperscript{288}

Current state of the Bill and the views of the two governments

510. The Bill has not changed significantly during the Bill’s passage in the House of Commons or the House of Lords.

511. The Scottish Government did not make any further comment on this provision in its final Legislative Consent Memorandum.

Fixed odds betting terminals and the provisions on gaming

What the Scotland Bill (as introduced) proposed

The Smith Commission agreed that the Scottish Parliament should have the power to prevent the proliferation of Fixed-Odds Betting Terminals (FOBTs). According to the UK Government, clause 45 of the Scotland Bill as introduced inserts a specific exception into Section B9 of Part 2 of Schedule 5 to the Scotland Act 1998, so that the Scottish Parliament will have legislative competence, and the Scottish Ministers executive competence, to vary the number of certain gaming machines authorised by a betting premises licence.

There are three limitations on this devolved competence. First, it is confined to gaming machines for which it is possible to stake more than £10 in respect of a single game; at present, this is possible only with sub-category B2 gaming machines. Secondly, it applies only to a betting premises licence issued after the date on which this clause comes into force. Nothing in this clause empowers the Scottish Parliament or the Scottish Ministers to vary the number of gaming machines authorised by betting premises licences issued before that date. Thirdly, the exception does not include betting premises licences issued in respect of a track (e.g. horse racing).

What the Committee said in its Interim Report on the draft clauses and our subsequent scrutiny of the Bill

At the time of the Committee’s Interim Report, the Committee had not considered any detailed evidence on this matter. However, at that stage, the Committee stated that it had “some sympathy” with the view that the clauses should be amended to include the ability to limit the number of gaming machines in both existing and new betting premises. The issue was covered, however, to some degree in further written evidence and was also considered in-depth by the Parliament’s Local Government and Regeneration Committee.
Evidence heard since our Interim Report

512. Both individual betting and gaming companies and their industry association provided written evidence to the Committee. In its submission, the Association of British Bookmakers (ABB) stated that it believed the clause as currently drafted fulfils the Smith Commission objective and has been designed for longevity purposes. In its view—

"The commitment specifying that the Scottish Parliament would have the power to prevent the proliferation of Fixed-Odds Betting Terminals clearly suggests that there is no current proliferation and therefore to amend the clause to apply to both new and existing licences would appear to be in disconnect with the original intention of the Smith Commission commitment."

513. ABB’s view was shared by William Hill plc. In its submission to the Committee, William Hill stated that—

"Whilst, the policy proposal does nothing to effectively reduce gambling related harm more widely, William Hill believes that the clause, as drafted, reflects the wording in the Smith Commission’s Heads of Agreement document. To attempt to widen the policy proposal (for example the introduction of retrospective review) would be beyond the original agreement."

514. William Hill described calls for the removal of Fixed-Odds Better Terminals (defined in the Bill as B2 category gaming machines allowing a maximum stake of £100 (with permission) and maximum prize money of £500) from its premises as “unreasonable and disproportionate”. The company also stated that the legislation should not be made retrospective in terms of extending the provisions on regulating the numbers of terminals in existing premises.

515. In their submission to the Committee, the British Amusement Catering Trade Association (BACTA) also commented on the provisions relating to Fixed-Odds Betting Terminals. BACTA’s view is that the “existence of these machines has skewed the commercial playing field, which has resulted in major commercial damage to other legitimate and important part of the leisure sector.” BACTA further commented that “there needs to be a substantial reduction in the stake allowed on FOBTs, to bring them in line with other High Street gaming machines” and that—

"Local Authorities and the devolved governments should be given the authority through the planning process and localism objective to control the number and location of Betting Shops. They should also be able to determine the number of Fixed-Odds Betting Terminal machines in each location."
516. In its additional written submission sent to us after our Interim Report, the Law Society of Scotland commented further on its original views on the draft clause relating to gaming. The Law Society said that “there are differing views in the profession as to how the Scottish Parliament should exercise any of the powers devolved by this provision but there is a consensus that it is an undesirable outcome for some aspects of the Gambling Act 2005 (which is a UK statute) and aspects of any future Scottish Parliament legislation to apply to the same betting premises and that it is more desirable for law made in one legislature rather than two to apply to the variation of the number of gaming machines authorised by a betting premises licence.”

517. Furthermore, the Law Society stated that:

- “Consideration should be given to devolve competence to permit the variation of the number of gaming machines authorised by existing gaming licences; and,
- The Scottish Parliament should be able to limit the number of machines irrespective of the value of the stake.”

Report of the Local Government and Regeneration Committee

518. As part of its own work programme, the Local Government and Regeneration Committee considered the provisions in the Scotland Bill relating to Fixed-Odds Betting Terminals, producing a Report in December 2015.

519. The key recommendations made by the Local Government and Regeneration Committee included the following—

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

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

- 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.

Current state of the Bill and the views of the two governments

520. The issue of an extension to the currently proposed powers in the Scotland Bill on Fixed-Odds Betting Terminals was raised during Committee Stage in the House of Lords. Speaking at the time, Lord Dunlop in the Scotland Office rejected proposals to extend the current provisions. On the issue of extending powers to cover other forms of gaming machines he said—

…” the [UK] Government consider that the intentions of the Smith commission agreement have been delivered and that it is unnecessary to bring other gaming machines, which have far lower stakes and prizes, within the scope of this clause.297

521. Referring to an amendment proposed at the time in the House of Lords to remove the restrictions limiting the powers of the Scottish Parliament to legislate only for new licenses for FOBTs, Lord Dunlop said—

…” the Smith commission sought powers to prevent the proliferation of FOBTs, and the Government have interpreted this to mean the ability to restrain any future increase in the number, thus preventing proliferation—and hence the focus on new licences. Amendment 58 would extend this power to include existing licences as well as new ones. In conjunction with the extensive planning powers which have already been devolved, the clause as drafted will give the Scottish Parliament sufficient levers to tackle high street gambling and the extent of FOBT terminals, as Smith envisaged and which is the focus of public debate.298

522. No significant amendments to the Bill’s provisions on gaming and Fixed-Odds Betting Terminals were made by the UK Government during the Bill’s passage in the House of Commons or the House of Lords.

523. In its supplementary legislative consent memorandum, the Scottish Government identified FOBTs as one area of the Bill where there could have been further improvement. It said that the provision in the Bill (Clause 49) remains “strictly limited to betting premises licences only and to future applications for a betting premises licence”. It is therefore, in its view, “doubtful whether this provision will be effective in achieving the Smith Commission recommendation to provide the Scottish Parliament the power to prevent the proliferation of Fixed Odds Betting Terminals". 299
Devolution of abortion

524. Devolution of abortion was not part of the Bill as introduced in the House of Commons in June 2015. It was, however, an issue where the Smith Commission concluded that abortion was regarded “as an anomalous health reservation” and agreed that “further serious consideration should be given to its devolution and a process should be established immediately to consider the matter further”.

525. At Report Stage in the House of Commons, the UK Government amended the Bill to devolve powers over abortion to the Scottish Parliament. According to the UK Government, the amendment removes the specific reservation of abortion in Part 2 of Schedule 5 of the Scotland Act 1998 thereby devolving legislative competence on the subject-matter of abortion to the Scottish Parliament.

Evidence heard since our Interim Report

526. Given that this provision was introduced only at Report Stage in the Commons (November 2015), this is not an area where the Committee received a substantial amount of evidence following its Interim Report of May 2015.

527. However, in its then written submission to the Committee, Engender stated that it saw “the potential for the devolution of power and responsibility around abortion to Scotland to afford a more progressive law.” Engender also stated that itself—

… and other women’s and human rights organisations are keen to see as much time as possible for civil society to build capacity to engage in the discussion about how women’s reproductive health and rights should be realised in Scotland if abortion is devolved. The original Smith Agreement suggested that all parties were committed to the devolution of abortion, but that this would not happen as part of the Scotland Bill.

Current state of the Bill and the views of the two governments

528. No further amendments to the Bill’s provisions on abortion were made by the UK Government during the Bill’s passage in the House of Lords.

529. In its final Legislative Consent Memorandum, the Scottish Government noted that “Clause 50 devolves legislative competence over abortion by removing it from the reservation on health and medicines functions in Schedule 5 of the Scotland Act 1998.” Speaking in the Chamber, the First Minister said that—

“… the Scottish Government’s position on abortion law remains unchanged. We have no plans to change the law on abortion.”
Devolution of welfare foods

530. As with abortion, devolution of powers over welfare foods was not part of the Bill as introduced in the House of Commons in June 2015. It was, however, also an issue where the Smith Commission concluded that welfare foods (i.e. matters reserved under Sections J2 to J5 of Head J – Health and Medicines, Schedule 5 to the Scotland Act 1998) should be the subject of further discussions between the UK and Scottish Governments.  

531. The amendment made to the Bill at Report Stage in the House of Commons relating to this area devolves to the Scottish Parliament legislative competence regarding welfare foods, enabling the Scottish Parliament, in relation to Scotland, to abolish or amend schemes for the provision of welfare foods, as currently made under section 13 of the Social Security Act 1988, or to make new schemes for the provision of welfare foods. Additional amendments made further changes such as:

- ensuring that functions of Ministers of the Crown in relation to welfare foods transfer to Scottish Ministers along with legislative competence;
- making clear that, in Clause 27, the relevant date is the date on which the relevant provision in the new clause on welfare foods comes into force;
- ensuring that the Secretary of State and Scottish Ministers may share information during the course of devolving welfare foods functions and subsequently; and
- ensuring that the meaning of “relevant Scottish social security function” includes the Scottish Ministers’ functions relating to welfare foods.

532. The UK Government has outlined that any schemes must be targeted at pregnant women, mothers, and children “with a view to helping and encouraging them to have access to, and to incorporate in their diets, food of a prescribed description.” Current legislation already requires Scottish Ministers’ consent to changes and enables Scottish Ministers to specify the particular foods included.

533. Given that this provision was introduced only at Report Stage in the Commons (November 2015), this is not an area where the Committee received a substantial amount of evidence following its Interim Report of May 2015.

Current state of the Bill and the views of the two governments

534. No further amendments to the Bill’s provisions on welfare foods were made by the UK Government during the Bill’s passage in the House of Lords.

535. The Scottish Government did not make any substantive comment on this provision beyond noting that the powers would be devolved as a consequence of an amendment introduced during the passage of the Bill.
Devolution of powers over irresponsible parking

536. During the latter part of Committee Stage in the House of Lords, the UK Government informed the Committee that the result of its discussions with the Scottish Government had led to an agreement to table amendments to clarify the Scottish Parliament’s powers over measures to tackle irresponsible parking.

537. The Scottish Government did not make any substantive comment on this provision beyond noting that the powers would be devolved as a consequence of an amendment introduced during the passage of the Bill.
Part 5 – Other executive competences

Gaelic Media Service, Commissioners of Northern Lighthouses and the Maritime and Coastguard Agency

What the Scotland Bill (as introduced) proposed

Clauses 46-48 of the Bill as introduced contains a range of provisions for the Gaelic Media Service, Commissioners of Northern Lighthouses and the Maritime and Coastguard Agency, namely:

- Appointments to the Gaelic Media Service (MG Alba) would only be subject to the approval of the Scottish Ministers (and no longer the Secretary of State) and that the appointment guidance may be issued by the Scottish Ministers.

- Additional Ministerial appointments to the Commissioners of Northern Lighthouses can be made and the Bill imposes duties on its Board to send the accounts to the Scottish Ministers who have a duty to lay the reports and accounts passed to them by the Board before the Scottish Parliament. The total number of Commissioners will remain the same because the relevant clause reduces the number of elected Commissioners from five to three.

- Secretary of State must consult the Scottish Ministers about his or her strategic priorities when exercising functions under the 1925 Act in relation to activities of the Coastguard in Scotland (which includes activities of the Coastguard in Scotland’s territorial waters). These functions, which are conferred on the Board of Trade by section 1 of the 1925 Act, are now exercisable by the Secretary of State for Transport.

- The Secretary of State must now consult the Scottish Ministers about his or her strategic priorities when exercising certain functions in relation to activities of the Coastguard in Scotland. The Secretary of State must also consult the Scottish Ministers about his or her strategic priorities when exercising certain functions in relation to the protection of people on ships in Scotland, and the safety standards which apply to both ships and people on ships in Scotland (including in relation to Scotland’s territorial waters).

What the Committee said in its Interim Report on the draft clauses and our subsequent scrutiny of the Bill

This was not an area scrutinised in any detail during the Committee’s work on the draft clauses for its Interim Report. The issue did not feature to any degree in the Committee’s subsequent written evidence received as part of our scrutiny of the Bill.
Current state of the Bill and the views of the two governments

538. The Committee received no substantive evidence on any of these provisions since the publication of its Interim Report. Additionally, no significant amendments have been made to the relevant clauses during the passage of the Bill to date.

539. The Scottish Government did not make any further comment on this provision in its final Legislative Consent Memorandum.

Rail franchising

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<th>What the Scotland Bill (as introduced) proposed</th>
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<td>Clause 49 of the Bill as introduced devolves a number of powers relating to railway franchising. Of particular note is the power to allow a public sector operator to be a franchisee in relation to a franchise agreement for the provision of services that begin and end in Scotland (Scotland-only services) and such other cross-border services that are designated by Scottish Ministers to be provided under that same franchise agreement. Rail franchises currently funded and specified by Scottish Ministers are the ScotRail Franchise and Caledonian Sleeper Franchise.</td>
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Evidence heard since our Interim Report

540. In evidence received since the publication of our Interim Report, the RMT Union set out its view on this clause. It indicated that, as currently drafted, the clause “is unacceptable” and “against the spirit of the Smith Commission as it will require the Scottish Government to put rail services out to tender whether they wish to or not”.305 RMT’s view is that the final legislation should ensure that the Scottish Government should be able to make an assessment of whether or not it wishes to run rail services it is responsible for in the public or private sector. In its opinion, the key issue is that the Scottish Government should no longer be required to put out to tender rail services it has responsibility for.

Current state of the Bill and the views of the two governments

541. No significant amendments were made to the relevant clauses during the passage of the Bill to date. Efforts were made during Committee Stage in the House of Lords to alter Section 25 of the Railways Act 1993 by removing the prohibition on public sector operators bidding for a future franchise in relation to a Scottish
franchise agreement. Rejecting these amendments as unnecessary, Lord Dunlop of the Scotland Office argued—

> Once Clause 54 is commenced, not-for-profit entities, irrespective of whether they are public or private organisations, will be able to bid for rail franchises, just as other public sector operators will also be able to.\(^{306}\)

542. In relation to the ability to bid for current franchises in the Scotland, Lord Dunlop also reject a proposed amendment arguing that this was also unnecessary and could cause uncertainty. His view was that “the ScotRail franchise has a break clause after five years, but in practice that means that a new competition for either Scottish rail franchise will not occur until 2020 at the earliest.”\(^{307}\)

543. The Scottish Government did not make any further comment on this provision in its final Legislative Consent Memorandum.

**Fuel poverty and other energy provisions**

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<td>The Smith Commission recommended the devolution of powers to determine how supplier obligations in relation to energy efficiency and fuel poverty, such as the Energy Company Obligation and Warm Home Discount, should be designed and implemented in Scotland. In doing so, it said that any provision has to be implemented in a way that is not to the detriment of the rest of the UK or to the UK’s international obligations and commitments on energy efficiency and climate change. In the Scotland Bill, the UK Government has introduced a series of clauses to take forward this recommendation.</td>
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Clause 50 amends the Energy Act 2010 to enable the Scottish Ministers to make support schemes in relation to reducing fuel poverty in Scotland through obligations on gas and electricity suppliers.

Clause 51 amends the Gas Act 1986 and the Electricity Act 1989 to enable the Scottish Ministers to exercise many of the powers held by the Secretary of State in relation to the promotion by gas and electricity suppliers of reductions in carbon emissions and home-heating costs in Scotland.

Clause 52 amends the Utilities Act 2000. Where the Secretary of State has set an overall carbon emissions reduction target for the purpose of an energy company obligation, subsection (3) enables the Secretary of State to apportion that target between England and Wales and Scotland. Subsection (6) makes similar provision in relation to the apportionment of any overall home-heating cost reduction target.

Clause 53 amends the Scotland Act 1998 to place a duty on the Secretary of State to consult Scottish Ministers when establishing any renewables incentive scheme that would apply in Scotland, or significantly amending any such scheme; including those
already established i.e. contracts for difference, feed-in tariffs and the renewables obligation. It does not apply to fossil fuel or nuclear generation. This clause does not require the Secretary of State to consult the Scottish Ministers about any levy in connection with a renewable electricity incentive scheme. It is understood that this relates to Contract for Difference - Supplier Operational Levies and Capacity Market - Settlement Cost Levies. These are levy payments made by Suppliers to cover the operational costs of administrating Contract for Difference and Capacity Market.

Clause 54 amends the Energy Act 2004 to enable the Scottish Ministers to exercise functions in relation to declaring safety zones around, and the decommissioning of, offshore renewable energy developments wholly in Scottish waters or in a Scottish part of a Renewable Energy Zone (REZ).

What the Committee said in its Interim Report on the draft clauses and our subsequent scrutiny of the Bill

This was not an area scrutinised in any detail during the Committee’s work on the draft clauses for its Interim Report. The issue did feature to a limited degree in the Committee’s subsequent written evidence received as part of our scrutiny of the Bill.

Evidence heard since our Interim Report

544. In its written evidence to the Committee, the Scottish Federation of Housing Associations (SFHA) made a series of comments relating to the above-mentioned energy clauses in the Bill.

545. Firstly, SFHA expressed concerns at the restrictions in clause 50 as introduced on the Scottish Government. It noted that the Scotland Bill makes provision for fuel poverty support schemes to be transferred to Scottish Ministers in clause 50 following the recommendation in Paragraph 68 in Smith. In SFHA’s view, for this to happen, any proposals must be agreed with the UK Government, which reflects the recommendation in the Smith Agreement and the need for inter-governmental relations. However, unlike clause 24 and 25, clause 50 does not contain a caveat that “such agreement is not to be unreasonably withheld”. SFHA therefore called for “this to be amended to ensure inter-governmental co-operation”.

546. SFHA also told the Committee that the proposal to devolve Energy Company Obligations (ECO) to Scotland contained in the Scotland Bill is, broadly, to be welcomed. However, one concern it had is that Scotland has previously won more than its share of ECO, in large part due to the Scottish Government schemes helping to lever in ECO funding. In its view, if Scotland were to receive its pro-rata share of ECO, but had very limited powers to vary how ECO was spent, then the opportunity to provide funding to address off-gas properties and stone tenements could be lost. It concluded that “further detail is required to explain how this will work in practice.”
Amendments at Report Stage in the House of Commons

547. At Report Stage in the House of Commons, the UK Government made a series of amendments to these provisions. Of most significance is the amendment addressing one of the issues raised by SFHA above. At Report Stage, the UK Government removed the requirement for Scottish Ministers to seek HM Treasury consent before exercising powers in relation to fuel poverty support schemes provided by energy suppliers.

548. At its meeting on 19 November, the Committee considered this and other changes that had been made to the Bill. Consequently, the Committee wrote to the Secretary of State for Scotland seeking further clarification from the UK Government on how clause 50 would work in practice and how the Scottish Government’s consultative role in the strategic priorities of the UK Government’s Energy Strategy and Policy Statement would be realised.

549. In his response, the Secretary of State for Scotland indicated that, in relation to clause 50 on fuel poverty, the further powers being devolved allows the Scottish Ministers to determine the amount of any benefit provided by an energy supplier to a Scottish consumer under the fuel poverty support scheme. This means the Scottish Ministers can set the monetary value of a rebate within a defined envelope but also the value of any other benefit that the Scottish Ministers may wish to form part of the rebate.

550. In relation to the Scottish Government’s consultative role, the Secretary of State said that the Energy Act 2013 already gives the Scottish Ministers a clear consultative role in the development of the Strategy and Policy Statement. During the process of designing these Statements, there will be two rounds of consultation with the Scottish Ministers where they can provide views on draft documents. Therefore, the UK Government believes that the agreement reached in the Smith Commission has been fulfilled and no changes are needed to the Bill.

Current state of the Bill and the views of the two governments

551. No further significant amendments have been made to the relevant clauses during the passage of the Bill in the House of Lords.

552. In its supplementary legislative consent memorandum, the Scottish Government stated that the amendments to Clauses 55 and 56, on devolved powers on fuel poverty and energy efficiency schemes, have “clarified and focused provisions” for UK Ministers’ right of oversight of Scottish Ministers’ use of the powers in the Bill.310
References to the Competition and Markets Authority

What the Scotland Bill (as introduced) proposed

The Smith Commission recommended that Scottish Ministers should have equivalent powers to UK Ministers to require Competition & Markets Authority (CMA) to carry out an investigation into a market for particular goods or services, in relation to particular competition issues arising in Scotland.

The Scotland Bill as introduced allows the Scottish Ministers, in exceptional circumstances, to refer specific markets to the CMA, in section 132 of Enterprise Act 2002, to extend power to Scottish Ministers, if acting jointly with the Secretary of State.

What the Committee said in its Interim Report on the draft clauses and our subsequent scrutiny of the Bill

This was not an area scrutinised in any detail during the Committee’s work on the draft clauses for its Interim Report. The issue did not feature to any degree in the Committee’s subsequent written evidence received as part of our scrutiny of the Bill.

553. The Committee did not receive any substantive evidence in relation to these particular provisions in the Bill. Additionally, no significant amendments were made to the relevant clauses during the passage of the Bill to date.

Current state of the Bill and the views of the two governments

554. The Scottish Government did not make any further comment on this provision in its final Legislative Consent Memorandum.

Gas and Electricity Markets Authority (Ofgem) and Ofcom

What the Scotland Bill (as introduced) proposed

The Smith Commission recommended that Ofgem lay its annual report and accounts before the Scottish Parliament and submit reports to, and appear before, committees of the Scottish Parliament. Additionally, the Commission recommended that the Scottish Ministers should be able to appoint a Scottish member to Ofcom board and that Ofcom should lay annual reports before Scottish Parliament and appear before its committees. There would also be a formal consultative role for Scottish Government and Scottish Parliament in setting Ofcom’s priorities (to be implemented by Memorandum of Understanding).

Clause 56 to 58 of the Bill as introduced take forward these recommendations.
What the Committee said in its Interim Report on the draft clauses and our subsequent scrutiny of the Bill

This was not an area scrutinised in any detail during the Committee’s work on the draft clauses for its Interim Report. The issue did not feature to any degree in the Committee’s subsequent written evidence received as part of our scrutiny of the Bill. However, this is an area where the Parliament’s Infrastructure and Capital Investment Committee has taken an interest in Ofcom as part of its work programme.

555. The Committee did not receive any substantive evidence in relation to these particular provisions in the Bill. Additionally, no significant amendments were made to the relevant clauses during the passage of the Bill to date.

556. As indicated above, the Parliament’s Infrastructure and Capital Investment Committee has taken an interest in the provisions in the Bill relating to Ofcom as part of its work. At its meeting of 3 February 2016, the Committee took evidence from Sharon White, Chief Executive of Ofcom.

557. The Committee agreed to keep a close eye on developments, foremost among which is the strategic review on digital communications. The Committee also agreed to look at what difference the new Ofcom board member for Scotland will make, the voluntary codes of practice for business and residential broadband speeds and the review of Openreach’s provision of superfast broadband.

Current state of the Bill and the views of the two governments

558. No significant amendments were made to the relevant clauses during the passage of the Bill to date.

559. The Scottish Government did not make any further comment on this provision in its final Legislative Consent Memorandum.
Intergovernmental relations

What the Scotland Bill (as introduced) proposed

The structure of inter-governmental relations (IGR) is essentially a non-legislative issue and therefore it is not dealt with in the Scotland Bill itself. However, the Smith Commission report underlined that the “current inter-governmental machinery between the Scottish and UK Governments, including the Joint Ministerial Committee (JMC) structures, must be reformed as a matter of urgency and scaled up significantly to reflect the scope of the agreement arrived at by the parties”. The Smith Commission recommended that this would involve the “development of a new and overarching Memorandum of Understanding (MoU) between the UK Government and devolved administrations”. In addition, the new structures should be underpinned by “stronger and more transparent parliamentary scrutiny” and also provide for “more effective and workable mechanisms to resolve inter-administration disputes in a timely and constructive fashion” with provision for arbitration processes as a last resort.

What the Committee said in its Interim Report on the draft clauses and our subsequent scrutiny of the Bill

The Committee considered that the Smith Commission recommendations in relation to inter-governmental relations, and parliamentary scrutiny of those relations, represented one of the most significant challenges to be addressed in implementing the Smith Commission report. Specifically, the Committee recommended that the principles underpinning the operation and parliamentary scrutiny of revised IGR structures should be placed in statute. In particular, the Committee highlighted the need for parliamentary scrutiny of the fiscal framework before any legislation could be passed. The Committee also signalled its intention to undertake further work on the issue of inter-governmental relations and the role of parliament in scrutinising those relations. To this end, we commissioned research, heard evidence and, in October 2015, we issued a separate report of our recommendations on intergovernmental relations.

Evidence heard since our Interim Report

560. Throughout all of our evidence, it was apparent that the new devolution settlement embodied in the Scotland Bill will bring more complexity, with more shared space between the Scottish and UK parliaments, more interdependence between reserved matters and devolved competences, and increased potential for the decisions made by governments and parliaments at one level to have “spillover effects” for the other. We shared the view of the Smith Commission that there is an urgent need to reform and enhance the current system of intergovernmental relations if these complexities and interdependencies are to be managed. The
Committee also shared the Smith Commission’s concerns at the current lack of transparency in intergovernmental relations. We were strongly of the view that procedures to enhance parliamentary scrutiny should form part of the process of reforming and enhancing intergovernmental relations.

561. From the onset of the Committee’s work the issue of the importance of effective inter-governmental relations if the provisions of Scotland Bill are to be successfully implemented has been a recurring theme throughout the Committee’s scrutiny of the proposals for further devolution. The Committee’s Interim Report included a commitment to undertake further work in this area, and as a result, the Committee undertook a range of formal and informal evidence gathering. Reflecting the commitment in the Interim Report to undertake further work in this area, the Committee undertook a range of formal and informal evidence gathering. This included the publication of an external research report on parliamentary scrutiny of IGR in other countries which informed the Committee’s consideration of IGR. The Committee published its own report in October 2015 entitled ‘Changing Relationships: Parliamentary Scrutiny of Intergovernmental Relations’. The Committee reached a range of recommendations which are summarised below.

562. In terms of the guiding principles that should underpin improved scrutiny of inter-governmental relations, the Committee recommended that the principles of transparency and accountability should be built into the revised Memorandum of Understanding. In order to ensure that the Scottish Parliament’s interests are protected from the outset, the Committee recommended that these principles should be placed in statute in the Scotland Bill. In addition, the Committee recommended that a specific section on parliamentary oversight of inter-governmental relations be included in the revised Memorandum of Understanding.

563. The Committee was of the view that processes to facilitate parliamentary scrutiny of IGR should be the subject of a new written agreement between the Scottish Parliament and Scottish Government. This agreement would set out the information the Scottish Government would provide the Scottish Parliament regarding formal IGR and how the views of the Scottish Parliament would be taken into account with respect to any inter-governmental agreements entered into by the Scottish Government.

564. The Committee agreed that the next Scottish Parliament should give careful consideration as to whether to establish a specific parliamentary committee, or revise the remit of an existing committee, to scrutinise IGR and constitutional matters in the next session of Parliament. The Committee stated that this recommendation should be considered by a new Parliamentary Bureau after the 2016 Scottish Parliament election. The Committee also considered that greater inter-parliamentary co-operation in scrutinising IGR could be beneficial.

565. The Committee restated its position that any fiscal framework that is agreed between the two governments must be subject to parliamentary scrutiny before any Legislative Consent Memorandum could be considered. In addition, the
Committee stated that it expected to be consulted on the fiscal framework before it is formally agreed. Similarly, the Committee stated that a revised MoU, as well as any other bi-lateral agreements agreed with regard to the operation of shared powers, must also be available for parliamentary scrutiny.

**Governmental Responses**

566. The UK Government Cabinet Office did not respond directly to the Committee’s recommendations but rather commented generally on the process of revising the MoU. The Cabinet Office commented—

> Your report is well timed as we continue the work to develop a revised Memorandum of Understanding which was commissioned by the Prime Minister and the heads of the Devolved Administrations at the Plenary meeting of the Joint Ministerial Committee in November 2014.

> As part of this process, the four administrations are considering the reports of the Silk and Smith Commissions, as well as other recent reports on intergovernmental relations including, of course, your own.

567. The Scottish Government response emphasised its commitment to openness and transparency. However, the response also highlighted that ensuring an appropriate flow of information to the Parliament would present challenges. The Deputy First Minister stated—

> There are of course some key challenges for us in finding ways to provide an appropriate flow of information to the Parliament to meet the desire for openness and transparency whilst both preserving the necessary private space for discussion and negotiation between governments and respecting the views of other parties to those discussions, who will have different imperatives, and who may not always agree to the release of information. In particular, I am not yet convinced that it would be practicable to make such provisions statutory on the face of the Scotland Bill, and think it would be preferable for us to continue exploring non-statutory routes.

568. The Deputy First Minister re-iterated his position that the Scottish Parliament must have the opportunity to consider and analyse the fiscal framework before consideration could be given to a Legislative Consent Memorandum. With regard to a revised MoU, the Deputy First Minister noted that the Scottish Government normally provides these to the Scottish Parliament and also noted that the detail and timing of what could be shared would require the consent of all the parties who would be subject to such an agreement. In subsequent correspondence, the Deputy First Minister confirmed that the Scottish Government was supportive of the Committee’s recommendation for a written agreement between the Scottish Government and Scottish Parliament on parliamentary oversight of IGR. He commented—
I can confirm that the Government is supportive in principle of this approach, subject to the need to both respect the views of other Governments involved and maintain confidentiality around discussions as and when appropriate.

I have asked that officials get in touch with the Clerk to the Committee to commence discussions in order that a draft can be agreed prior to dissolution.

Current position

Reforming Intergovernmental Relations

569. The Committee is aware that discussions regarding a revision of the Memorandum of Understanding are on-going between the four administrations within the UK and it is not expected that these discussions will have reached a conclusion prior to the dissolution of the Scottish Parliament. A revised MoU is expected to address the Joint Ministerial Committee and other supplementary agreements and concordats affecting the four administrations of the UK. The Smith Commission also noted the need to enhance the operation and scrutiny of bilateral relations between the Scottish and UK Governments. Accordingly, the Committee re-iterates its previous recommendation that there must be adequate time available for parliamentary scrutiny of a revised MoU in the next session of Parliament.

570. The Committee also notes its disappointment that agreement has not been reached on a revised MoU prior to the Scottish Parliament considering a Legislative Consent Memorandum. The Committee and others, including the Smith Commission, consider a reformed system of intergovernmental relations to be central to the successful implementation of the Scotland Bill. It is unsatisfactory that a key recommendation of the Smith Commission is not guaranteed and disappointing that this recommendation has not been subject to parliamentary scrutiny prior to the Scottish Parliament having to express a view on a Legislative Consent Memorandum on the Scotland Bill.

571. The Committee reiterates the central importance of inter-governmental relations to the implementation of the Scotland Bill. These relationships will include not just forums that are governed by the Memorandum of Understanding but also by forums which exist outwith the Memorandum such as the Joint Exchequer Committee.

Parliamentary Structures

572. The Committee also reiterates the recommendations it made in its previous report with regard to the parliamentary structures which should be considered by the next Scottish Parliament to facilitate parliamentary scrutiny of inter-governmental relations and constitutional matters.
Written Agreement on Parliamentary Oversight of IGR with the Scottish Government

573. The Committee’s proposal for a Written Agreement on Parliamentary Oversight of Intergovernmental Relations was agreed with the Scottish Government on 10 March 2016. A copy of the Written Agreement can be found in Annexe D of this Final Report.

Fiscal Framework

574. The intergovernmental agreement known as the fiscal framework has been covered at length in preceding sections of this Final Report.
Views of other Parliamentary committees

Background

575. The work of scrutinising the Scotland Bill, the fiscal framework and other associated material (such as memoranda of understanding) has involved more than just the Devolution (Further Powers) Committee. Many provisions in the Bill as well as these other strands have benefitted from scrutiny by a range of other parliamentary committees. The Committee is grateful to all of our colleagues in other committees for their work and for the views they have provided to us.

576. These views have been set out at some length in the body of this Final Report. The section below signposts where this information can be found.

Finance Committee

577. The Finance Committee played a particularly prominent role in the scrutiny of the fiscal framework, starting with a Report published in June 2015. Its final views on the fiscal framework were set out in a letter to this Committee in March 2016.

578. The Finance Committee’s views on the framework are discussed from paragraph 306 in this Final Report.

Welfare Reform Committee

579. The Welfare Reform Committee’s particular area of interest has been in the implementation of the new welfare powers. This work resulted in a Report published in December 2015 on the Future Delivery of Social Security in Scotland.

580. This Committee has benefitted from the work of the Welfare Reform Committee and the evidence it took, and this has been cited in various sections of this Final Report, notably on the welfare provisions of the Bill and in the welfare aspects of the fiscal framework.

Rural Affairs, Climate Change and Environment Committee

581. The Rural Affairs, Climate Change and Environment Committee’s input to our work has focussed on the provisions to devolve the management of, and revenues from, The Crown Estate’s assets in Scotland, as well as the detail of the draft MoU and transfer scheme.

582. This Committee set out its final views to us in a letter dated January 2016. The views expressed in that letter have been influential in our own work scrutinising
the discussions that have been taking place between the two governments and with The Crown Estate on the draft MoU and transfer scheme.

583. The Rural Affairs, Climate Change and Environment Committee’s views on the MoU and transfer scheme are discussed from paragraph 428 in this Final Report.

**Standards, Procedures and Public Appointments Committee**

584. The Standards, Procedures and Public Appointments Committee’s input to our work has focussed on the provisions in Part 1 of the Bill on supermajority clauses and those relating to the scope to modify the Scotland Act 1998.

585. This Committee set out its final views to us on these matters in a letter dated December 2015. The views of the Standards, Procedures and Public Appointments Committee were a very helpful input which has aided our understanding of these complex, procedural matters.

586. The Standards, Procedures and Public Appointments Committee’s views on these procedural provisions in Part 1 of the Bill are discussed from paragraph 58 in this Final Report.

**Public Audit Committee & Education and Culture Committee**

587. The Public Audit Committee and the Education & Culture Committee’s input to our work has focussed on the agreement to a Memorandum of Understanding between the two governments, the Scottish Parliament and the BBC. This MoU is designed to assist, in the short-term, with the consultation process around agreement of a new Charter for the BBC.

588. This culminated in a [letter](#) from the Public Audit Committee to us in June 2015 and a [report](#) from the Education and Culture Committee of February on the renewal of the BBC’s Royal Charter.

589. The Public Audit Committee also focussed on the audit and accountability arrangements for a wide number of organisations identified within the Scotland Bill. This resulted in a [paper](#) from that Committee on the Scotland Bill published in June 2015.

**Local Government & Regeneration Committee**

590. As indicated elsewhere in this report, the Local Government and Regeneration Committee’s input to our scrutiny has focussed on the provisions in the Scotland Bill relating to Fixed-Odds Betting Terminals. Their work has cemented the views that this Committee took on these provisions as part of our initial Interim Report.

591. The [report](#) of the Local Government and Regeneration Committee was published in December 2015 and was covered from paragraph 518 in this Final Report.
Infrastructure and Capital Investment Committee

592. The Parliament’s Infrastructure and Capital Investment Committee has held a one-off evidence session to cover the proposal from the Smith Commission to draw up a Memorandum of Understanding setting out how Ofcom will interact with the Scottish Parliament.

Delegated Powers and Law Reform Committee

593. Finally, the Delegated Powers and Law Reform Committee also considered the Scotland Bill and the Scottish Government’s Legislative Consent Memorandum. It noted in its Report that the exercise of two powers should be laid before Parliament and not subject to any procedure. These are the powers in clause 7(14) and 38(10) of the Bill.

594. This Committee notes the views of the Delegated Powers and Law Reform Committee.
Legislative consent memorandum

Background

595. When a bill of this nature requires the legislative consent of the Scottish Parliament, the process for consideration of the question of consent commences with the Scottish Government or other member of the Parliament lodging a Legislative Consent Memorandum (LCM).

596. An LCM:

- summarises what the bill does and its policy objectives;
- specifies the extent to which the bill makes provision to alter the legislative competence of the Scottish Parliament and/or alter that legislative competence or the executive competence of the Scottish Ministers.

597. LCMs also set out a draft of the suggested motion for legislative consent that is set to be lodged and used as the basis of a subsequent debate in the Chamber. If the person lodging the LCM does not wish the Scottish Parliament to give its legislative consent, the LCM must explain why not.

598. Upon the lodging of an LCM, the Parliamentary Bureau refers the memorandum to the relevant committee, which must report on the contents of the LCM.

599. On 18 June 2015, the Scottish Government lodged an initial LCM on the Scotland Bill. Subsequently, on 1 March 2016, the Scottish Government lodged a supplementary LCM. Copies of both LCMs are set out in Annex C of this Report.

Our view

600. The Devolution (Further Powers) Committee notes the comments of both the legislative consent memoranda cited above. The Committee has no points it wishes to raise in relation to the contents of either LCM. Our views on the question of legislative consent itself to the Scotland Bill are set out in the final section of this report.
Conclusions and recommendations

Introduction

601. This Final Report is made to the Scottish Parliament by the Devolution (Further Powers) Committee, which was established to consider the work of the Smith Commission and subsequently the UK Government’s Scotland Bill.

602. This Committee has met on 47 occasions since it was established by the Scottish Parliament in November 2014. It has received nearly 90 written submissions of evidence and heard from numerous witnesses from all across Scotland, from the rest of the UK and internationally. The Committee has also organised a number of more informal sessions with the people of Scotland in Hamilton, Aberdeen and Lerwick to hear their views on the proposed new powers for Scotland. The Committee is grateful to all of those who took the time to engage with us and provide their thoughts.

603. We have been supported by two eminent advisers – Professor Nicola McEwen and Christine O’Neill - and we are indebted to them for their time and expertise, which has helped shape our Final Report.

604. Although the Devolution (Further Powers) Committee has been the lead committee for the consideration of the Scotland Bill, we have benefited from the contributions of many other parliamentary committees – Finance; Standards, Procedures and Public Appointments; Local Government and Regeneration; Rural Affairs, Climate Change and the Environment; Education and Culture; Infrastructure and Capital Investment, and Welfare Reform – and we are grateful for their input to our work.

About the Scotland Bill

605. This Scotland Bill is the third piece of primary legislation to first established and then broadened the powers devolved to the Scottish Parliament (following the 1998 and 2012 Acts). If enacted, the Bill would bring into law provisions addressing the permanency of the Scottish Parliament and Scottish Government
within the UK’s uncodified constitution. The Bill would also devolve power to set the rates and bands of income tax on non-savings and non-dividend income. The Bill also provides for a share of VAT receipts in Scotland to be assigned to the Scottish Government’s budget. The Bill would devolve Air Passenger Duty and Aggregates Levy; powers over certain aspects of welfare and housing-related benefits; powers over speed limits and road signs, and rail franchising; control of the functions of the British Transport Police, Ofcom and the management of the Crown Estate relating to Scotland; abortion and welfare foods (for example, milk and infant formula for pregnant women and children under 5 years of age in low-income families), and control of the Scottish Parliament’s electoral system, subject to a two-thirds majority within the Parliament for any proposed change.

606. However, at its core, are the provisions on tax and welfare powers. In estimates produced by the Scottish Parliament’s Research Service – SPICe – the proportion of devolved revenue compared to devolved expenditure in Scotland will be 36% under this Bill and there will be around £2.6 billion of devolved benefits (mainly DLA/PIP, Attendance Allowance, Carers Allowance and others) compared to £15 billion per year of reserved benefits.

607. More information on the Scotland Bill can be found in our Citizen’s Guide to Devolution published in late 2015. This contains an overview of the Scotland Bill as it stood at the end of 2015, and some facts and figures on the nature of the powers being devolved and a timeline of devolution in Scotland. The Guide is being updated and will be re-published shortly.

General commentary

608. From the outset of the Committee’s work, all five parties represented on the Committee have sought to find as much consensus as possible on the measures being proposed for further devolution and to make unanimous suggestions where possible on how the Bill can be improved throughout its passage in the UK Parliament.

609. In the Interim Report published by the Committee in June 2015 – shortly after the Bill had started its proceedings in the House of Commons – we all shared the same goal. All of the Committee agreed that we wanted to see both the letter and the spirit of the Smith Commission’s report fully delivered. We still share that aim.
610. The Scotland Bill has been improved along the way and we are certain that the Committee’s work has played a major part in that process. A significant number of the suggestions we have made as to how to improve the Bill to deliver the Smith Agreement have been accepted by the UK Government, and this is to be welcomed.

611. Nevertheless, there are still a few areas where the Committee believes that the Bill still falls short and where improvements could have been made.\(^1\)

612. On three occasions during the passage of the Bill we have set out a summary of our views on whether the Bill has been delivering on the recommendations made in the Smith Commission’s Report: in our Interim Report and in two subsequent Analysis Papers issued after key stages were reached in the UK Parliament’s consideration (see Annexe A).

613. After each stage in our analysis, we have sought to convince the Secretary of State for Scotland to accept our views on how the Bill could have been improved and where amendments were needed. In some areas we were successful. On some issues we were not.

614. In the section below, we set out our final analysis and views on some of the main provisions in the Scotland Bill. We deal with all other areas of the Bill separately in the body of our report. The proposed commencement dates for the provisions in the Scotland Bill are set out in Annexe E to this report\(^3\)

**Views on the main provisions in the Scotland Bill**

**The permanency of the Scottish Parliament and the Scottish Government**

615. Promises to make the Scottish Parliament and Scottish Government permanent features of the constitutional landscape were a key component of the Smith Commission’s Final Report. Paragraph 21 of the Smith Commission’s Report recommended that “UK legislation will state that the Scottish Parliament and Scottish Gover\[nment\] are permanent institutions”.\(^3\) As such, the Scotland Bill contains a clause to give effect to this statement.

616. From the Committee’s perspective, the original proposals in the Bill as introduced were welcome, but inadequate. The Committee took the view that as the Scottish Parliament was created by the will of the people of Scotland in a referendum, any moves to abolish the Parliament – however unlikely that is perceived to be – must involve a similar vote. The Scottish Parliament should not be able to be abolished by the decisions of politicians alone. It is a long established principle that sovereignty lies with the people of Scotland.

617. Secondly, the Committee had recommended that in addition to a popular vote in a referendum, there should be parity of treatment between the institutions and that

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\(^1\) Alex Johnstone MSP dissented from this paragraph.
any vote to abolish the Scottish Parliament in the UK Parliament should also be mirrored by a majority vote of MSPs.

618. **The Committee welcomes the amendments made to the Bill by the UK Government during Report Stage in the House of Commons that the Scottish Parliament should not be abolished without a majority vote of the people of Scotland in a referendum. We are pleased that the Secretary of State for Scotland agrees with us on this point.**

619. However, the one component that has not been addressed is the second limb of the Committee’s original recommendation, whereby majorities would be required in the Scottish Parliament as well as in the UK Parliament for a bill to abolish the Scottish Parliament. This was not agreed to by the UK Government. Consequently, there is no provision in the Scotland Bill requiring a vote of the Scottish Parliament prior to any abolition.

620. **The Committee therefore welcomes the agreement by the Secretary of State for Scotland that a referendum is required on any question of abolition of the Scottish Parliament but we are disappointed that not all aspects of our recommendations, in particular with regard to a vote in the Scottish Parliament, in this area have been agreed to.**

### Legislative consent convention and procedures

621. The UK Government considers that the Scotland Bill places the Legislative Consent Convention – that the UK Parliament will not *normally* legislate on devolved matters without the consent of the Scottish Parliament – in statute. In should be noted that the relevant clause is declaratory and could be reversed by a future UK Parliament.

622. In the Committee’s initial analysis, the move to place the Legislative Consent Convention in statute was welcomed but some changes were required to the wording of the clause, particular to remove the words “but it is recognised” and “normally” as these had the potential to weaken the intention of the Smith Commission’s recommendation in this area.

623. Furthermore, the Committee wanted to see all strands of the Legislative Consent Convention written into statute and we considered that the current provision in the Scotland Bill does not incorporate the process for consultation and consent where Westminster plans to legislate in a devolved area. The Committee also highlights the use of the term ‘devolved matters’ and notes the evidence it has taken that the legal meaning of this term, which is new to legislation concerning devolution, requires clarification by the UK Government. **The Committee is disappointed that it has not received a response from the UK Government on this issue despite having first raised the matter in September 2015.**

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*Alex Johnstone MSP dissented from this paragraph.*
624. To date, at the time of the publication of this Final Report, no such changes have been made to the Scotland Bill to bring it into line with our original recommendation. The Committee regrets that no amendments have been made to bring the legislative consent provision in line with our views and the evidence we took.iii

625. Whilst some may see the Legislative Consent Convention as an abstract issue, recent political debates over the issue of whether the UK Government’s Trade Union Bill and Immigration Bill should have been subject to legislative consent highlight the importance of not only ensuring that the Convention is fully translated into the Bill but also of ensuring that the principles and wording in the Bill are correct.

626. We are pleased to see that Scottish Government shares our views in its supplementary legislative consent memorandum that the Scotland Bill still falls short and that this failure to fully incorporate all strands of the Legislative Consent Convention as set out in Devolution Guidance Note 10 into the statute will only cause difficulties in the future. Furthermore, the Committee also seeks clarification from the UK Government on the legal meaning of the term ‘devolved matters’.iv

627. The Committee recommends that a definition of ‘devolved matters’ must be included in the Bill if the term is to remain in the Bill.v

Super-majorities

628. The Committee notes the consideration of the Standards, Public Appointments and Procedures Committee of the use of the words ‘incidental or consequential’ in relation to the definition of what is a protected subject-matter and the conclusion of that Committee in relation to these terms. This Committee is also not clear as to the merits of expanding on the clear definition of protected subject-matters in the Smith Commission report by the exclusion of incidental or consequential provisions.

629. Mindful that this issue concerns the determination of a procedural matter, the Committee considers that this expression introduces a level of subjectivity which is unhelpful. The Committee considers that the more straightforward the test to be applied by the Presiding Officer, the smaller the risk of a reference to the Supreme Court being required. It would therefore prefer the reference to incidental and consequential provisions be removed.

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iii Alex Johnstone MSP dissented from this paragraph.
iv Alex Johnstone MSP dissented from this paragraph.
v Alex Johnstone MSP dissented from this paragraph.
Income tax and other devolved taxes

630. The Scotland Bill proposes a series of changes to the financial powers of the Scottish Parliament, namely:

- devolution of the power to set the rates and thresholds of income tax on non-savings and non-dividend income;
- devolution of Air Passenger Duty and Aggregates Levy;
- assignment of the receipts raised in Scotland by the first 10 percentage points of the standard rate of VAT; and
- agreement on an updated fiscal framework.

631. The Committee’s analysis and conclusions on the wider fiscal framework are set out in a separate section below.

632. We have, however, no major concerns with the drafting of the specific provisions in the Scotland Bill itself relating to income tax and other devolved taxes.

633. The Committee welcomes the work that has been done in these areas and the assurances that have been provided that the Bill affords the Scottish Parliament with the ability to set a zero rate of income tax if it so wishes.

634. We also welcome the recognition that the issue of Gift Aid is one that still needs to be addressed as we continue to have some concerns in this area. This should be a matter where the two governments, working co-operatively with the charity sector, should aim to reach a resolution early in the next Parliamentary session.
635. Finally, as with the financial powers under the Scotland Act 2012 relating to the Scottish Rate of Income Tax and other devolved taxes, the effective implementation of the new, more extensive, tax powers is absolutely critical. The potential for cost and confusion on business and the Scottish public is a very real risk. We recommend that a future Scottish Government and UK Government takes a careful and considered approach to the implementation of any new powers and any associated legislation, and consults at length to ensure all views are heard and as wide as possible understanding of any tax changes ahead is realised.

636. The Committee notes that new taxes may well have a different distributional impact, and an analysis of this impact should help inform the wider consultation. We note that the Equal Opportunities Committee, in its review of the budget process this parliamentary session\(^{319}\), has recently called for a new and sharper level distributional analysis in relation to the new tax and welfare powers.

New benefits in devolved areas and top-up benefits in reserved areas

637. The Smith Commission recommended that the Scottish Parliament would be given powers to create new benefits in areas of devolved responsibility (e.g. including health, education, transport etc.). The UK Government originally proposed that this power was devolved and then amended the Scotland Bill with the stated intention of providing the Scottish Parliament with the power to create new benefits in devolved areas of welfare responsibility – arguably a narrower interpretation of the Smith Commission’s report.

638. On top-up powers for reserved benefits, the Scotland Bill includes a clause enabling top-up payments to reserved benefits, which can provide on-going entitlements, as well as payments on a case-by-case basis to meet short-term needs.

639. From the Committee’s perspective, the key to these new powers was to ensure that there was clarity in terms of how they would operate and that there was genuine policy discretion in this area for a future Scottish Parliament.

640. The Committee welcomes the changes that were made by the Secretary of State for Scotland to these areas during the passage of the Bill. We believe they go some way in meeting our concerns for clarity of purpose.
641. The Committee welcomes the agreement between the two governments in the fiscal framework that any new benefits or discretionary payments introduced by the Scottish Government must provide additional income for a recipient and not result in an automatic offsetting reduction or ‘clawback’ by the UK Government in their entitlement elsewhere in the UK benefits system. We also welcome the statement that any new benefits or discretionary payments introduced by the Scottish Government will not be deemed to be income for tax purposes, unless topping up a benefit which is deemed taxable such as Carer’s Allowance. We recommend that further analysis on this issue by the Joint Ministerial Working Group on Welfare or as part of any review of the fiscal framework is shared with the relevant committee in the Scottish Parliament.

Carers Allowance

642. The Scotland Bill proposes that this benefit be devolved to Scotland. Carers Allowance is an important welfare provision in Scotland, currently estimated to be worth around £182 million per year.

643. In the Committee’s view, the original drafting of the relevant clause in the Bill was overly restrictive and could have limited the policy discretion of future Scottish administrations in this area. The Committee recommended that the clause should be re-drafted to ensure that future Scottish administrations are able to define a carer.

644. The Committee is pleased that the UK Government listened to the evidence we took and our concerns and we very much welcome the amendments made to the Bill at Report Stage in the House of Commons. We believe this brings the relevant clause in line with our expectations.

Disability Benefits

645. The Scotland Bill also devolves responsibility for a number of disability benefits outwith Universal Credit, including Disability Living Allowance, Personal Independence Payment, “Industrial Injuries Disablement Allowance” and Severe Disablement Allowance. In total, these benefits amount to around £1.5 billion per year.

646. The Committee was concerned at the outset of our scrutiny that the definition of disability contained in the Bill was overly restrictive and would not provide a future Scottish Parliament with the power to develop its own approach to disability benefits in the future. Accordingly, the Committee recommended that the definition of disability used in the Equality Act 2010 is also used in the Scotland Bill.

647. No such amendments have been made to the Bill during its passage to date. However, the Secretary of State for Scotland did provide some clarification on these matters in a letter to the Committee in November 2015.
648. The Committee welcomes the reassurances made by the Secretary of State for Scotland in correspondence to us. We do, however, have some remaining concerns and want to see a future Scottish Parliament being able to have the flexibility to pursue its own policy agenda if it wishes in relation to supporting those with disabilities. Accordingly, the test of the UK Government’s assurances will be when the time comes for a Scottish Parliament to legislate for the new devolved benefits. We recommend both governments work together in the Joint Ministerial Working Group on Welfare and with the third sector to maximise the policy choices we have, and that the Scottish Parliament is consulted on any agreements reached.

Under-Occupancy Charge/‘Bedroom Tax’

649. The Under-Occupancy Charge, (or ‘Bedroom Tax’), has been a contentious issue in Scotland since its introduction. The Smith Commission recommended that the Scottish Parliament should have the power to vary the housing cost elements of Universal Credit, including varying the Under-Occupancy Charge (or ‘Bedroom Tax’) and local housing allowance rates, eligible rent, and deductions for non-dependants. The UK Government has said that the Scotland Bill as introduced gives the Scottish Ministers regulation-making powers under section 11(4) of the Welfare Reform Act 2012 (determination and calculation of housing costs element) where the claimant rents accommodation and thereby includes the power to vary or remove the under-occupancy charge.

650. When the Bill was introduced and also during our scrutiny, the Committee strived for clarity on the issues which had been raised in evidence to us with regard to the inter-play between the power to remove the charge/‘tax’ and discretionary housing payments. The Committee considered that it was essential that the application of these clauses should not have the effect of causing detriment to individuals in receipt of discretionary housing payments.

651. The Bill has been improved by the Secretary of State for Scotland in some respects and we welcome his agreement to our recommendations in these areas. Whilst we are not sure we yet have the absolute clarity we wanted that the Scottish Parliament can effectively abolish the Under-Occupancy Charge (or ‘Bedroom Tax’) in Scotland, we nonetheless are pleased with the changes that have been made to the Bill to date. The test of this provision will soon become apparent when a future Scottish Parliament, if it so wishes, seeks to abolish the ‘Bedroom Tax’ in a simple and cost-effective manner. This is an issue that will require close scrutiny in the next session.
Perceived vetoes in welfare

652. Universal credit remains an area reserved to the UK Parliament. However, the Scotland Bill does provide that some administrative aspects will be devolved. For example, Scottish Ministers will be given regulation-making powers to vary the calculation of the housing costs element of Universal Credit, subject to consultation with the Secretary of State about practicability of implementation. The explanatory text refers to the Secretary of State’s agreement on a start date being required and that such agreement would not be “unreasonably withheld”. Similarly, the Scottish Ministers are to be given regulation-making powers to vary arrangements relating to the person to whom, and the time when, Universal Credit is paid. These are subject to consultation with the Secretary of State about “practicability”, with the same type of conditions set out above.

653. Our initial assessment of the relevant clauses is that they could be considered or perceived as a ‘veto’. We called on the two governments to work out a mutually-acceptable arrangement that recognised the increasingly shared space for competences in relation to welfare, but that allowed either government to make its own decisions.

654. We are pleased that the Secretary of State for Scotland has, in part, listened to our call and has improved the Bill. The Committee does, however, continue to have some reservations about the power of the UK Government to intervene through its ability to alter the dates on which as Scottish Government may bring about any new proposals on the grounds of “practicability”, which it itself defines. Ultimately, the extent to which such provisions are a ‘veto’ or are simply a sensible measure will come down to good dialogue between the two governments as equal partners and to trust.

Employment programmes

655. The Smith Commission’s agreement stated that the Scottish Parliament will have all powers over support for unemployed people through the employment programmes currently contracted by DWP (which are presently delivered mainly, but not exclusively, through the Work Programme and Work Choice) on expiry of the current commercial arrangements.

656. In the Scotland Bill itself, the UK Government provided for the devolution of schemes for:

- assisting disabled people to select, obtain and retain employment, and;
- assisting people claiming reserved benefits who are at risk of long term unemployment to select, obtain and retain employment, where the assistance is for at least a year.

657. The Committee stated at the time that its view was that the provisions in the Bill were too limited and did not meet the letter and spirit of the Smith Commission’s Agreement in this key area. The Committee recommended at the time when the
Bill was introduced, and subsequently during our evidence-based scrutiny, that the Scotland Bill should not place any restriction on the type of person receiving support or in regard to the length of unemployment any person has experienced. The Committee also considered that the Bill should also include devolution of the Access to Work Programme.

658. The UK Government does not agree with our view and has refused to countenance any changes to the Bill during its passage to date.

659. The estimated annual combined value in Scotland of the current employment-related programme contracts is in the region of £53 million per year (roughly split between £42 million per year for the Work Programme and £9.8 million per year for Work Choice).

660. These contracts will stop taking referrals in April 2017. However, as people attend the programmes for up to two years, there will still be people in Scotland attending Work Programme and Work Choice provision after this date.

661. In his Autumn Statement, the Chancellor of the Exchequer, Rt. Hon George Osborne MP, announced that a new Work and Health Programme will replace the Work Programme and Work Choice in England and Wales from 2017. The Autumn Statement did not itself set out a specific budget for this new combined provision. Subsequently, DWP Employment Minister, Priti Patel MP, has said that while overall funding for employment support would remain stable, the contracted-out element - the new Work and Health Programme - would receive around £130 million per year for GB as a whole. This is around 20% of the level of funding for the Work Programme and Work Choice, which it will replace.

662. The actual funding set to be transferred to the Scottish Government as part of the Scotland Bill will be part of the fiscal framework and its implementation. However, the current assumption is that what is devolved is a straightforward proportion of the £130m programme funding. According to information provided by the Scottish Government to SPICe, the DWP has now informed the Scottish Government that it will be given indicative programme funding of £41 million over four years, starting from 2017, with some £7 million in Year 1. This represents a severe cut from the originally estimated annual value of £53 million to the estimated allocation now of £7 million in 2017; a reduction of 87%.

663. The Committee is disappointed with the decisions that have been taken in the area of employment programmes both in terms of the degree of devolution itself – which we still believe does not deliver on the Smith Commission’s recommendation – and now on the stark reductions in the actual budgets that will devolved. We welcome that fact that the Scottish Government shares our views as set out in its supplementary legislative consent memorandum. These decisions will seriously undermine a future
Scottish Parliament’s ability to make a meaningful change to some people’s lives through tackling unemployment.\textsuperscript{vi}

664. Devolution of the Access to Work programme would have provided greater policy coherence for disabled jobseekers and employees and helped achieve genuine flexibility over how long support should last for. Permitting programmes to be introduced to help those unemployed for less than a year would make this support more personalised and could achieve savings to allow more intensive support for others.\textsuperscript{vii}

665. Even at this late stage, we recommend that the UK Government thinks again on what powers, programmes and level of budget is to be devolved in relation to employment programmes. The current restrictions on what is being devolved and the substantial reductions in the budgets being transferred are not acceptable. We call on the Secretary of State to encourage the DWP to change its view on these matters.\textsuperscript{viii}

Equal opportunities and gender quotas

666. The Smith Commission agreed that whist the Equality Act 2010 will remain reserved, the powers of the Scottish Parliament will include, but not be limited to, the introduction of gender quotas in respect of public bodies in Scotland. The Commission also agreed that the Scottish Parliament can legislate in relation to socio-economic rights in devolved areas.

667. In both of the provisions in the Bill relating to socio-economic duties and the proposal on gender quotas, the Committee’s work has been aimed at securing clarification from the UK Government on the particular wording of the provisions as it was not clear what was being devolved and whether there were any limitations on the ability of Scottish Ministers to legislate with regard to equalities issues.

668. Whilst no specific amendments have been made to the Bill to date, the Committee notes the comments made by Scotland Office Minister, Lord Dunlop, that a future Scottish Parliament will be able to modify the Equality Act 2010 in order to legislate on gender quotas for appointments to public bodies. We welcome these assurances.

The Crown Estate

669. Devolution of the management and revenues of the Crown Estate’s assets in Scotland seems to be a perennial issue in debates on devolution, featuring also as a major issue for previous Scotland Bill committees during their consideration in

\textsuperscript{vi} Alex Johnstone MSP dissented from this paragraph.
\textsuperscript{vii} Alex Johnstone MSP dissented from this paragraph.
\textsuperscript{viii} Alex Johnstone MSP dissented from this paragraph.
sessions 3 and 4 of the Scotland Act 2012. Until this issue is properly addressed, debate and discourse will continue with no satisfactory outcome.

670. The Committee very much welcomes the agreement reached by the parties in the Smith Commission that responsibility for the management of the Crown Estate’s economic assets in Scotland, and the revenue generated from these assets, will be transferred to the Scottish Parliament. This will include the Crown Estate’s seabed, urban assets, rural estates, mineral and fishing rights, and the Scottish foreshore for which it is responsible.

671. We also welcome the recommendation that, following this transfer, responsibility for the management of those assets will be further devolved to local authority areas such as Orkney, Shetland, Na h-Eilean Siar or other areas who seek such responsibilities, and that the definition of economic assets in coastal waters recognises the foreshore and economic activity such as aquaculture.

672. This Committee further welcomes the work that has been done by the Rural Affairs, Climate Change and Environment Committee in this area. This has been very helpful in shaping our own deliberations.

673. This Committee agrees that a different, and perhaps more straight-forward approach, ought to have been taken in terms of the approach to drafting of the clauses that are designed to achieve the Smith Commission’s goals. This approach was not agreed to by the UK Government. This being the case, the Committee’s primary objective has been to see the Smith Commission’s recommendation on devolution of the management and revenues realised in full.

674. The Committee notes the position that has been taken by the UK Government in relation to Fort Kinnaird and its view that this asset should not form part of the package being devolved. We made our views clear on this matter in our Interim Report. Specifically, we called upon the Crown Estate and HM Treasury to find a means of ensuring that a full share of the Crown Estate’s revenues from Fort Kinnaird accrue to Scotland. We recommend that the type of investment vehicle used for Fort Kinnaird (an English limited partnership in which the Crown Estate commissioners manage their interests alongside other commercial investors) should be reviewed before 2021 taking into account the published profits to the Crown Estate, with a view to seeking a means of avoiding such investment vehicles based on English law being used again for property investments in Scotland by the Crown Estate.

675. The planned devolution is now being taken forward via the means of a Memorandum of Understanding between the Scottish Government and HM Treasury and by the means of a statutory transfer scheme.
676. **We are disappointed that there would appear to have been little engagement by HM Treasury with the Scottish Government on these documents until late in the process (early 2016).** We have written to the UK Government setting out a number of questions we still have and outlining areas of concern where we feel the current draft transfer scheme is too restrictive and lacks clarity.

677. The Memorandum of Understanding and statutory transfer scheme will not be agreed to before the Scotland Bill is passed. These will, therefore, be matters for the next session of the Scottish Parliament. It is imperative that the Scottish Parliament is fully consulted and has a role to play in commenting on these arrangements and we recommend that the UK Government give assurances to this effect. We also recommend that the next Scottish Government makes its intentions clear to the relevant parliamentary committee early in the next session as to how it intends to meet the second aspect recommended by Smith, namely that the management of the Crown Estate’s Scottish assets will be further devolved to local authority areas such as Orkney, Shetland, Na h-Eilean Siar or other areas who seek such responsibilities.

### Pay Day Loans & Fixed-Odds Betting Terminals

678. Finally, in relation to Pay Day Loans Shops, the Smith Commission agreed that the Scottish Parliament should have the power to prevent their proliferation. The Committee’s initial view was that the provisions in the Bill at introduction could go further and consideration could be given to including powers over licensing and regulation, not just planning.

679. To date, the UK Government has not been prepared to make any amendments to the Bill in relation to Pay Day Loans. **This is disappointing as the Committee believes that an enhancement in this area of the Bill would have given the Scottish Parliament more effective powers to tackle these lenders.**

680. Similarly, in relation to Fixed-Odds Betting Terminals (FOBTs), our initial recommendations were that the provisions suggested in the Bill should be enhanced so that the Scottish Parliament would be given powers to tackle the number of FOBTs in existing, not just new, premises, and also cover the licensing of FOBTs in other establishments such as on horse-racing tracks.

681. **The Committee welcomes the detailed work of the Local Government and Regeneration Committee on FOBTs and endorses its recommendations. We are pleased that the Scottish Government shares our views in its supplementary legislative consent memorandum and believe that this is an**

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[ix] Alex Johnstone MSP dissented from this paragraph.
area where the current provisions in the Bill fall short in terms of tackling the problems caused for some by their use of FOBTs in Scotland.\textsuperscript{x}

Non-legislative measures set out in the Smith Commission’s report

682. The Committee notes the comments from the Scottish Government in its supplementary legislative consent memorandum that the Smith Commission made a number of recommendations for the Scottish and UK Governments to work together to achieve non-legislative approaches to matters of common concern (see Paragraph 96 of the Smith Commission’s report).\textsuperscript{320} We welcome the Scottish Government’s view that there have been discussions across all of these areas and generally progress has been made on the issues the Smith Commission identified, particularly in areas such as UK Government support at EU level for ‘Made in Scotland’ food labelling and co-operative joint-working in relation to addressing human trafficking.

683. We share, however, the concern around the lack of agreement to re-introduce a Post-Study Work Visa type scheme. We have published separately on this matter and encourage both governments to review the situation again in the next parliamentary session and report to the relevant parliamentary committee. The Committee notes the response of the Minister for Europe and International Development, Humza Yousaf MSP, where he states that “the Scottish Government agrees with all the 8 recommendations”\textsuperscript{321} in the Committee’s report on this issue.

The fiscal framework

684. On 23 February 2016, both governments agreed the fiscal framework which outlines the financial arrangements governing the new powers on tax and welfare set to be devolved if the Scotland Bill is agreed to by both parliaments.

685. This Final Report has previously set out at length the evidence we received on what should have been covered in a fiscal framework, what was finally agreed to and the views of independent experts on the agreement that we were able to collect in the limited time available for parliamentary scrutiny.

686. The Committee recognises the centrality of the fiscal framework to the question of whether the Scotland Bill should be agreed to by the Scottish Parliament. We also recognise the substantial challenge faced by both governments in what provided to be a difficult and time-consuming set of negotiations.

687. The delays in agreeing a fiscal framework, beyond even the extended timetable preferred by this Committee, has had a detrimental impact on the level of scrutiny that we would have been able to undertake with regard to the fiscal framework. Nevertheless, on the basis of the information provided

\textsuperscript{x} Alex Johnstone MSP dissented from this paragraph.
to date by the two governments, the Committee welcomes the agreed fiscal framework and we are prepared to endorse its key provisions.

688. Of critical importance to us was the issue of resolving no detriment to the satisfaction of both governments and to realising a deal that, over the longer-term, would not result in a reduction to the Scottish budget than would otherwise have been the case had future budget transfers followed the Barnett Formula. Calculations at the outset of the negotiations had suggested a possible loss of up to £7 billion over the next decade. The final agreement sees no loss to the Scottish budget.

689. The fiscal framework also sets out increased limits on borrowing which some experts have described as “very prudent”. This Committee previously recommended in its Interim Report that there should be a move to a prudential borrowing regime. The Finance Committee was “disappointed that a prudential regime has not been included in the fiscal framework” and went on to question whether “the increase from £2.2bn to £3bn is sufficient to provide credible opportunities for the Scottish Government to invest for the long-term through a distinctive approach on capital borrowing”\textsuperscript{322}.

690. We also welcome the agreement to a transitional period to 2021/22 and the process for a joint review at that point. Of crucial importance though is the question of what arrangement will be put in place in the event of a failure to agree a framework beyond the transitional period in March 2022. The Committee notes that the Finance Committee considered that “the two governments appear to have different interpretations of what will happen if no agreement can be reached”\textsuperscript{323}.

691. Both governments commented on the principle of parity of esteem and respect in future discussions between them, with both agreeing to the concept.\textsuperscript{324} In terms of the review process, both governments also agreed that there would be no imposition of any method.\textsuperscript{325} The Secretary of State said “I confirm that no mechanism would be imposed at the end of that period without agreement”. The Deputy First Minister said “That requires the agreement of both Governments at that time. The obligation in the agreement that has been reached is that both Governments have got to come to an agreement at that stage, and that is what we will endeavour to do”.

692. It is important to note that the agreement to a transitional period, whilst very welcome, means that both governments will have to return to the central issue of block grant adjustments and indexing methods in 2021/22. There is also a substantial amount of detail – such as the method for calculating and assigning a share of VAT; agreements to new memoranda of understanding within the Joint Exchequer Committee; the future role of the Scottish Fiscal Commission and its relations with the Office of Budget Responsibility; the finalisation of details of the transfer of welfare powers in the Joint Ministerial Working Group on Welfare – that is absent from the Fiscal Framework and will need to be agreed by the two governments. The Committee notes the recommendation of the Finance
Committee that “the commitment of both governments to overhaul the intergovernmental machinery needs to be delivered and this must allow for effective parliamentary scrutiny”\textsuperscript{326}.

693. Scrutiny of these matters will not now take place in the remainder of this parliamentary session and will be a matter for the relevant committee(s) in the next, and future, Scottish Parliaments.

694. It is a matter of regret to this Committee that the undertaking that was given by the Scottish Government during the final stages of the negotiations on the fiscal framework to publish all key documents to aid scrutiny has not been met. The explanation provided to us is that this is not acceptable to one party to the negotiations – namely HM Treasury – who would prefer that all associated documents from the negotiations remain confidential. This is not acceptable. The resulting position has meant that this Committee has been unable to scrutinise the fiscal framework to the degree we would have wished.\textsuperscript{xi} Given the letter from the Deputy First Minister of 9 March and the new Written Agreement on Parliamentary Scrutiny of Intergovernmental Relations, we encourage both governments to continue to discuss how further, more detailed information could be published to facilitate additional scrutiny by future parliamentary committees.

695. Of equal concern to the Committee is the lack of detail in the public domain on what happens after the review if there is no agreement on how to adjust the block grant after March 2022. The Deputy First Minister was clear in his response to the Committee that the status quo continues (see paragraph 271). However, the Chief Secretary to HM Treasury was less clear (see paragraph 273-274 ). The lack of clarity means that we are no clearer as a Committee to knowing for certain what faces a future Scottish Parliament five years hence. The danger now is, as we have witnessed from the decision by HM Treasury to veto the release of key documents from these negotiations, that we are storing up problems in the future that will only emerge again in 2021/22.\textsuperscript{xii}

696. The Committee notes that the reality of the situation is that there will be further negotiations that will take place in 5 years’ time in the aftermath of elections to both the Scottish and UK parliaments.

\textsuperscript{xii} Alex Johnstone MSP dissented from this paragraph.

\textsuperscript{xiii} Alex Johnstone MSP dissented from this paragraph.
697. Accordingly, we recommend that all aspects of the future intergovernmental discussions and agreements on the tax and welfare powers as set out in the fiscal framework are covered under the auspices of the Written Agreement set to be concluded between the Committee and the Scottish Government relating to parliamentary oversight. This means that the Committee expects a future Scottish Parliament to be fully informed of the outcome of all of the issues that we outlined above where there is currently insufficient detail in the fiscal framework, or where discussions are still on-going (in the Joint Exchequer Committee and Joint Ministerial Working Group on Welfare), or where discussions, such as the future review of block grant adjustment in 2021/22, have yet to start. No-one party to the negotiations should be able to veto what the Scottish Government decides to share with the Scottish Parliament to whom it is accountable.\textsuperscript{xiii}

### Improving intergovernmental relations

698. As Lord Smith of Kelvin noted in his Commission’s report, the current arrangements for intergovernmental relations (IGR) are not fit for purpose and need to be improved as we move towards an increasingly shared space of distinct as well as overlapping competences between the two administrations.

699. In a separate inquiry, we set out at length our views on this matter and published these in a Report entitled Changing Relationships: Parliamentary Scrutiny of Intergovernmental Relations.

700. The culmination of our work has seen the approval by the Committee and the Scottish Government of a Written Agreement on Parliamentary Oversight of IGR. A copy of this Agreement in set out in the Annexes to this Report.

701. We welcome the constructive approach of the Scottish Government in agreeing to produce a Written Agreement. We believe that this Agreement will be of value to the committees in the next parliamentary session in terms of being better informed and consulted on the work that takes place across government as part of their engagement with administrations across the UK and more widely. Ultimately, however, the Written Agreement will only work if there is a changed relationship that recognises that parliamentary scrutiny of IGR is necessary and that the Parliament has a right to be informed, whilst recognising that a Scottish Government needs a private space to conduct negotiations prior to any agreements being reached.

\textsuperscript{xiii} Alex Johnstone MSP dissented from this last sentence.
Should the Scottish Parliament give its legislative consent to the Scotland Bill?

703. The process of agreeing the Scotland Bill and the fiscal framework that underpins the financial arrangements has primarily been one of negotiation between the two governments. However, scrutiny carried out by this Committee, and other committees in the Scottish Parliament, has both informed the content of the Bill and the inter-governmental negotiations and, accordingly, has resulted in substantial improvements being made to the Bill.

704. As the only parliamentary committee that has been involved in the detailed scrutiny of the Smith Commission’s work, the UK Government's draft legislative clauses, the Scotland Bill itself and now the fiscal framework, we believe our Final Report is authoritative. It is also a Report that has been better informed, to as great an extent as we were able to achieve, through engagement with people across Scotland and a wide range of experts and organisations. Governments negotiated behind closed doors, but as a parliamentary committee, we have tried to open up that process and place transparency, accountability and the importance of parliamentary scrutiny as the core principles that have shaped our work as a Committee. We are disappointed, however, that we have not yet been provided with as much information from the fiscal framework negotiations as had been promised.\(^{xiv}\)

705. We welcome the statement from the Secretary of State for Scotland that he valued the “constructive relationship” he had with the Committee and our contribution to the process of improving the Bill. It remains our belief that parity of esteem between the two governments will be vital as decisions on how the new powers need to be implemented start to be taken. So will the principle of accountability to respective parliaments.

706. Our efforts to convince the UK Government to make amendments to the Scotland Bill led to the agreement that the Scottish Parliament cannot be abolished without the will of the people of Scotland expressed in a democratic referendum. Thus the sovereignty of the people of Scotland has been protected. We also improved the Bill in the area of new and top-up benefits where we now have a much clearer articulation of these new powers, and also in relation to Carers Allowance and the ability to introduce gender quotas. Our work also led to a better agreement on how the two governments had to work together on welfare matters, reducing, to some

\(^{xiv}\) Alex Johnstone MSP dissented from this last sentence.
degree, the perceived vetoes that were in place at the outset. Finally, our firm adherence to the principle of parliamentary scrutiny concentrated the minds of both governments in the last days of their negotiations on the fiscal framework.

707. From the outset of our scrutiny, the Committee has been clear that there are two tests that must be passed before the Scottish Parliament can give its legislative consent to the Scotland Bill.

708. First, that the provisions in the Bill should meet both the spirit and substance of the unanimously agreed, cross-party report of the Smith Commission.

709. Secondly, that the financial settlement reached between the two governments in the fiscal framework should be seen to be fair and sustainable so that the future budget of the Scottish Parliament should be no worse off than would otherwise be the case, and that this and future Scottish Parliaments are afforded the necessary time to be consulted and to scrutinise the details.

710. There are still some areas where we feel that the Scotland Bill continues to fall short of the spirit and substance of Smith, notably in relation to the devolution of employment programmes and also the future operation of the legislative consent provision. Nevertheless, the Bill has been improved during its passage through our detailed scrutiny and we welcome the fact that the Secretary of State for Scotland has been prepared to listen to the evidence we have presented and improve the Bill in other areas. This shows the value of effective, cross-party parliamentary scrutiny by committees and on maintaining a productive working relationship with both governments.

711. As we have stated above, in our view, on the basis of the information provided to date by both governments, we are prepared to endorse the fiscal framework underpinning the powers to be devolved to Scotland as part of this Bill.

712. Therefore, on balance, we recommend that the Scottish Parliament gives its legislative consent to the Scotland Bill.

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## Annexe A – Final analysis of the Scotland Bill

### Key

<table>
<thead>
<tr>
<th>Color</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Red</td>
<td>No or insufficient substantive changes to the clause(s) in the Scotland Bill appear to have been made to bring it/them into line with the Committee’s assessment of the Bill in its Interim Report</td>
</tr>
<tr>
<td>Yellow</td>
<td>It is still unclear at this stage whether the clause(s) have been changed sufficiently to be in line with the Committee’s assessment of the Bill in its Interim Report and a more detailed assessment is needed of the impact or partial changes have been made.</td>
</tr>
<tr>
<td>Green</td>
<td>Changes have been made to the clause(s) in the Scotland Bill which now appear to bring it/them into line with the Committee’s assessment of the Bill in its Interim Report or the Committee was previously content regarding the drafting of the clause</td>
</tr>
<tr>
<td></td>
<td>The Committee’s assessment of the Bill in its Interim Report suggested changes to non-legislative matters so, at this stage, no view can be taken as the detail of non-legislative aspects is still being finalised.</td>
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<tr>
<td>--------------------------------------------------------------------------</td>
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<tr>
<td>Permanency of the Scottish Parliament &amp; Scottish Government</td>
<td>495-497</td>
</tr>
<tr>
<td>Legislative Consent Convention</td>
<td>498</td>
</tr>
<tr>
<td>Equal opportunities: socio-economic inequalities</td>
<td>501</td>
</tr>
<tr>
<td>Equal opportunities: gender quotas</td>
<td>502</td>
</tr>
<tr>
<td>Income tax – ability to set zero rate</td>
<td>504</td>
</tr>
<tr>
<td>New benefits in devolved areas</td>
<td>522</td>
</tr>
<tr>
<td>Top-up benefits in reserved areas</td>
<td>522</td>
</tr>
<tr>
<td>Definition of carers</td>
<td>523-524</td>
</tr>
<tr>
<td>Definitions of disability</td>
<td>525</td>
</tr>
<tr>
<td>Universal Credit – perceived ‘veto power’</td>
<td>531</td>
</tr>
<tr>
<td>Under occupancy charge/Bedroom Tax &amp; Discretionary Housing Payments</td>
<td>532</td>
</tr>
<tr>
<td>Maternity, Funeral and Heating Expenses (e.g. Winter Fuel Payments)</td>
<td>533</td>
</tr>
<tr>
<td>Scottish Welfare Fund</td>
<td>534</td>
</tr>
<tr>
<td>Employment Programmes</td>
<td>535-537</td>
</tr>
<tr>
<td>Crown Estate</td>
<td>540, 541, 543, 544 and 545</td>
</tr>
</tbody>
</table>
## Explanatory notes

1. The amendments at Report Stage in the House of Commons still do not introduce all three of the steps recommended by the Committee deemed necessary for any abolition of the Scottish Parliament, namely: majority votes in both the UK and Scottish Parliaments and a majority decision in a referendum of the people of Scotland. There is not yet any provision for a vote of the Scottish Parliament.

2. The clause as it stands does not include all three strands of the Sewel Convention as defined in Devolution Guidance Note No.10, namely the UK Parliament legislating: 1. With regard to devolved matters in Scotland, 2. With regard to altering the legislative competence of the Scottish Parliament or, 3. Altering the executive competence of the Scottish Ministers. The Committee had said previously that it wanted to see all three strands of the Sewel Convention placed in statute. Moreover, the Committee considered previously that the use of the words “but it is recognised” and “normally” in the clause has the potential to weaken the intention of the Smith Commission’s recommendation in this area and recommended that these words be removed from the clause. The previous wording remains unaltered.

3. Amendments have been made to this Bill at Report Stage in the House of Commons. The Committee’s Interim Report concluded that it was unclear about what was being done with socio-economic duties. If it is now the case that this area is already devolved, then the amendment made at Report Stage (removing reference to this area from the exceptions to the reservation) is acceptable.

4. Amendments have been made to the Bill at Report Stage in the House of Commons. The Committee is now broadly content.

5. The Committee has no further comment to make about this provision.

6. Amendments at Report Stage in the House of Commons were agreed to in this area which improve the Bill. The Committee is now broadly content.
(7) The Committee’s view is that this clause has been improved since the Bill was introduced. The Committee has no further comment to make about this provision.

(8) Amendments at Report Stage in the House of Commons remove the restrictions on the definition of carers so that this now includes a person who is under 16 years of age, is in full-time education or is gainfully employed. The Committee has no further comment to make about this provision.

(9) The Committee had previously concluded that it was concerned that the definition of disability contained in draft clause 16 is overly restrictive and would not provide a future Scottish Government with the power to develop its own approach to disability benefits in the future. Accordingly, the Committee recommended that the definition of disability used in the Equality Act 2010 is also used in the Bill. This was not agreed to, but we do welcome some of the clarification that the UK Government provided in subsequent correspondence with the Committee.

(10) Significant amendments have been made to this area of the Bill at Report Stage in the House of Commons. The effect is to make progress towards a mutually acceptable agreement on this key provision. The amendments have removed the requirement to secure the Secretary of State’s general agreement. The only matter on which the Secretary of State for Work and Pensions can now formally intervene is regarding the date of implementation. The amendments make the process whereby a Secretary of State can make such a change more transparent than may be the case were the process of securing agreement purely intergovernmental. Conversely, it maintains the scope for the UK government to override Scottish ministerial decisions. The Committee is seeking further clarity in this important matter.

(11) Changes to the Bill in this area have been made which improve the Bill. The Committee has no further comment to make about this provision.

(12) The Committee has no further comment to make about this provision.

(13) Changes to the Bill in this area have been made which improve the Bill. The Committee has no further comment to make about this provision.

(14) The Committee has called for the inclusion of the Access to Work Programme into the employment programmes being devolved and for the removal of the restriction that devolved programmes should apply only to the long-term (i.e. more than one year) unemployed. Neither of these amendments has as yet been made. The Committee is also concerned at the substantial reduction in the budget set to be devolved.

(15) Whilst a number of amendments have been made to this clause in the Bill, these have not related to the Committee’s conclusions and recommendations made it its Interim Report. Reference remains to “may” rather than “shall” (make a transfer scheme) in the clause. There is no reference to an obligation being placed on the non-devolved Crown Estate to consider the option of shared investments with the devolved Crown Estate in Scotland with a fair allocation of revenues. Furthermore, there is no resolution of the Committee’s call on The Crown Estate and HM Treasury to find a means of ensuring that a full share of the Crown Estate’s revenues from Fort Kinnaird accrue to Scotland.

(16) The Committee’s initial view was that the current provisions for payday loan shops could go further and consideration could be given to including powers over licensing and regulation not just planning. No such amendments have as yet been made.

(17) The Committee indicated that it had clauses should be amended to include the ability to limit the number of gaming machines in both existing and new betting premises. No such amendments have as yet been made.
Devolution (Further Powers) Committee

(18) The amendments made at Report Stage in the House of Commons have improved the position from the Committee Stage version of the Bill. It could be argued, however, that it makes the position more transparent and clearer about how responsibility for regulating tribunals hearing Scottish cases in relation to devolved matters is to be allocated.

(19) The Committee called for the principles of transparency and accountability in relation to parliamentary oversight of inter-governmental relations to be placed into the Scotland Bill. These amendments have not as yet been made. The Committee also called for reference to be made to the role of Parliaments in oversight of intergovernmental relations to be made in a revised Memorandum of Understanding currently being developed by the UK Cabinet Office. It is not yet clear if this has been agreed to by the UK Government.

(20) The proposals for the devolution of welfare foods, abortion and measures to tackle irresponsible parking to the Scottish Parliament were introduced by the Secretary of State for Scotland at Report Stages in both the Lords and Commons.
Annexe B – Extracts of the minutes, links to Official Reports and written evidence

Note: The Devolution (Further Powers) Committee published its Interim Report on the Scotland Bill on 14 May 2015. Details of all the committee meetings held and evidence received prior to that date are contained within Annexe B of the Interim Report. They are not reproduced here. Annexe B of the Interim Report can be found here:

http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/89474.asp#b17

Annexe B of this Final Report contains extracts of the minutes, links to the Official Reports and written evidence received since 14 May 2015.
16th Meeting, 2015 (Session 4), Thursday 4 June 2015

Present:

Bruce Crawford (Convener)
Linda Fabiani
Rob Gibson
Alex Johnstone
Alison Johnstone
Lewis Macdonald
Stewart Maxwell
Mark McDonald
Duncan McNeil (Deputy Convener)
Tavish Scott

Apologies were received from Stuart McMillan.

The meeting opened at 10.00 am.

1. Scotland Bill 2015-16 (in private): The Committee considered its approach to the scrutiny of the UK Government's Scotland Bill and agreed:

- to issue a call for written evidence
- that all future witness expenses relating to scrutiny of the Scotland Bill be signed off by the Convener;
- that all future discussions of the Committee's work programme be taken in private;
- that following evidence sessions on the Scotland Bill that Members should have a short discussion to consider evidence heard and that this discussion should be held in private;
- that draft reports on the Scotland Bill should be taken in private; and to write to the Secretary of State for Scotland providing the Committee’s initial analysis of the Scotland Bill.

The meeting closed at 11.18 am.
18th Meeting, 2015 (Session 4), Thursday 18 June 2015

Present:

Bruce Crawford (Convener)
Linda Fabiani
Rob Gibson
Alex Johnstone
Alison Johnstone
Lewis Macdonald
Stewart Maxwell
Mark McDonald
Stuart McMillan
Duncan McNeil (Deputy Convener)
Tavish Scott

The meeting opened at 10.00 am.

2. Scotland Bill (in private): The Committee agreed its approach to its consideration of the Scotland Bill.

3. Scotland Bill (in private): The Committee considered a briefing note on the progress of the Scotland Bill in the UK Parliament at Committee Stage.

4. Scotland Bill (in private): The Committee agreed candidates for the posts of adviser in connection with its consideration of the Scotland Bill.

5. Scotland Bill (in private): The Committee agreed a specification for the commissioning of external research on parliamentary oversight of intergovernmental relations.

The meeting closed at 10.53 am.
19th Meeting, 2015 (Session 4), Thursday 25 June 2015

Present:

Bruce Crawford (Convener)
Linda Fabiani
Rob Gibson
Alex Johnstone
Alison Johnstone
Lewis Macdonald
Stewart Maxwell
Mark McDonald
Stuart McMillan
Duncan McNeil (Deputy Convener)
Tavish Scott

The meeting opened at 9.00 am.

1. Scotland Bill 2015-16: The Committee took evidence from—

John Swinney, Deputy First Minister & Cabinet Secretary for Finance, Constitution and Economy, Sean Neill, Fiscal Responsibility Division, and Stephen Sadler, Team Leader, Elections and Constitution Division, Scottish Government;

Rt. Hon David Mundell, Secretary of State for Scotland, Colin Faulkner, Deputy Director, Constitutional Policy and Scotland Bill, and James Dowler, Manager, Scotland Bill, Scotland Office.

The meeting closed at 11.32 am.

Official Report:

Written evidence:
Scottish and UK Governments
20th Meeting, 2015 (Session 4), Thursday 3 September 2015

Present:

Malcolm Chisholm
Bruce Crawford (Convener)
Linda Fabiani
Rob Gibson
Alex Johnstone
Alison Johnstone
Stewart Maxwell
Mark McDonald
Stuart McMillan
Duncan McNeil (Deputy Convener)

Apologies were received from Tavish Scott.

In attendance: Christine O’Neill (Committee Adviser)

The meeting opened at 9.00 am.

2. Scotland Bill - constitutional and equalities provisions: The Committee took evidence from—
Michael Clancy, Director of Law Reform, Law Society of Scotland;
Emma Ritch, Executive Director, Engender;
Professor Neil Walker, Regius Professor of Public Law and the Law of Nature and Nations, University of Edinburgh;
Talat Yaqoob, Chair and Co-Founder, Women 50:50.

3. Scotland Bill - welfare provisions: The Committee took evidence from—
John Dickie, Director, Child Poverty Action Group in Scotland;
Nile Istephan, Vice Chair, Scottish Federation of Housing Associations;
Bill Scott, Director of Policy, Inclusion Scotland;
Rachel Stewart, Public Affairs Officer, Scottish Association for Mental Health.

5. Scotland Bill - letter to the Secretary of State for Scotland (in private):
The Committee provisionally agreed a draft of a letter to the Secretary of State for Scotland setting out views on amending the Scotland Bill at Report Stage.

The meeting closed at 11.18 am.

Official Report:
Written evidence:

Written submissions for this meeting
21st Meeting, 2015 (Session 4), Thursday 10 September 2015

Present:

Malcolm Chisholm
Bruce Crawford (Convener)
Linda Fabiani
Rob Gibson
Alex Johnstone
Alison Johnstone
Mark McDonald
Stuart McMillan
Tavish Scott

Apologies were received from Stewart Maxwell, Duncan McNeil (Deputy Convener).

In attendance: Christine O'Neil and Nicola McEwen

The meeting opened at 9.01 am.

2. Scotland Bill: The Committee took evidence from—
Professor Iain McLean, Professor of Politics, University of Oxford;
Professor Aileen McHarg, Professor of Public Law, University of Strathclyde;
Andrew Tickell, Lecturer, Glasgow Caledonian University.

3. Scotland Bill: The Committee reviewed the evidence heard to date and discussed and agreed the text of a letter to the Secretary of State for Scotland.


The meeting closed at 11.18 am.

Official Report:

Written evidence:

Written submissions for this meeting
25th Meeting, 2015 (Session 4), Thursday 8 October 2015

Present:

Malcolm Chisholm
Bruce Crawford (Convener)
Linda Fabiani
Rob Gibson
Alex Johnstone
Stewart Maxwell
Mark McDonald
Stuart McMillan
Duncan McNeil
(Deputy Convener)
Tavish Scott

Apologies were received from Alison Johnstone.

The meeting opened at 9.30 am.

1. Scotland Bill (welfare provisions): The Committee took evidence from—
Mike O'Donnell, Head of Partnerships, Skills Development Scotland;
Fiona Collie, Policy and Public Affairs Manager, Carers Scotland;
Pamela Smith, Deputy Chair, Scottish Local Authorities Economic Development network.

The meeting closed at 10.43 am.

Official Report:

Written evidence:
Written submissions for this meeting
2nd Meeting, 2016 (Session 4), Thursday 14 January 2016

Present:

Malcolm Chisholm
Bruce Crawford (Convener)
Linda Fabiani
Rob Gibson
Alex Johnstone
Alison Johnstone
Stewart Maxwell
Mark McDonald
Stuart McMillan
Tavish Scott

Apologies were received from Duncan McNeil (Deputy Convener).

The meeting opened at 9.30 am.

1. Scotland’s Fiscal Framework: The Committee took evidence from—
Dr Monique Ebell, Research Fellow, National Institute of Economic and Social Research;
Professor David Heald, Professor of Public Sector Accounting, University of Glasgow;
David Phillips, Senior Research Economist, Institute for Fiscal Studies.

4. Scotland’s Fiscal Framework (in private): The Committee considered the evidence heard earlier in the meeting.

The meeting closed at 11.14 am.

Official Report:

Written evidence:
Written submissions for this meeting
Present:

Malcolm Chisholm
Bruce Crawford (Convener)
Linda Fabiani
Rob Gibson
Alex Johnstone
Alison Johnstone
Stewart Maxwell
Mark McDonald
Stuart McMillan
Duncan McNeil (Deputy Convener)

Apologies were received from Tavish Scott.

The meeting opened at 9.30 am.

1. Fiscal Framework and Welfare Powers: The Committee took 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 considered an update on the Scotland Bill from other parliamentary committees. The Committee agreed to consider the issues raised in the update during the drafting of its final report on the Scotland Bill.

3. Scotland Bill (in private): The Committee considered a progress update on the Scotland Bill and agreed to write to both the Scottish and UK Governments on a number of ongoing matters. The Committee also agreed to write to the Scottish and UK Governments on the issue of post-study work visas.

The meeting closed at 11.26 am.

Official Report:

Written evidence:

Written submissions for this meeting
PowerPoint presentation from Professor Anton Muscatelli, University of Glasgow
PowerPoint presentation from Mr David Eiser, University of Stirling
Supplementary evidence from Professor David Heald following his oral evidence on 14 January 2016

Supplementary evidence from David Phillips (Part 1) following his oral evidence on 14 January 2016

Supplementary evidence from David Phillips (Part 2) following his oral evidence on 14 January 2016

Additional evidence from Professor Anton Muscatelli on the Fiscal Framework and Block Grant Adjustments

Additional evidence from Professor David Bell, David Phillips and David Eiser on the Fiscal Framework
5th Meeting, 2016 (Session 4), Thursday 4 February 2016

Present:

Malcolm Chisholm
Bruce Crawford (Convener)
Linda Fabiani
Rob Gibson
Alex Johnstone
Stewart Maxwell
Mark McDonald
Stuart McMillan
Duncan McNeil (Deputy Convener)
Tavish Scott

Apologies were received from Alison Johnstone.

The meeting opened at 10.01 am.

1. Scotland Bill and the Crown Estate: The Committee considered correspondence from the Rural Affairs, Climate Change and Environment Committee on the proposed devolution of the Crown Estate in Scotland and the draft transfer scheme.

2. Scotland Bill (in private): The Committee considered and agreed sections of its draft Final Report.

The meeting closed at 10.52 am.

Official Report:
7th Meeting, 2016 (Session 4), Tuesday 23 February 2016

Present:

Malcolm Chisholm  
Bruce Crawford (Convener)  
Linda Fabiani  
Rob Gibson  
Alex Johnstone  
Alison Johnstone  
Stewart Maxwell  
Mark McDonald  
Stuart McMillan  
Duncan McNeil (Deputy Convener)  
Tavish Scott

In attendance: Nicola McEwen (Committee Adviser)

The meeting opened at 8.30 am.

1. Scotland Bill: The Committee took evidence from—
John Swinney, Deputy First Minister & Cabinet Secretary for Finance, Constitution and Economy, Scottish Government.

The meeting closed at 9.29 am.

Official Report;  
8th Meeting, 2016 (Session 4), Tuesday 23 February 2016

Present:

Malcolm Chisholm
Bruce Crawford (Convener)
Linda Fabiani
Rob Gibson
Alex Johnstone
Alison Johnstone
Stewart Maxwell
Mark McDonald
Stuart McMillan
Duncan McNeil (Deputy Convener)
Tavish Scott

The meeting opened at 6.59 pm.


2. Scotland Bill (in private): The Convener closed the meeting at the conclusion of agenda item 1. The Committee did not continue in private to consider the evidence heard earlier in the meeting.

The meeting closed at 7.45 pm.

10th Meeting, 2016 (Session 4), Thursday 3 March 2016

Present:

Malcolm Chisholm
Bruce Crawford (Convener)
Linda Fabiani
Rob Gibson
Alex Johnstone
Alison Johnstone
Stewart Maxwell
Mark McDonald
Stuart McMillan
Duncan McNeil (Deputy Convener)
Tavish Scott

The meeting opened at 9.00 am.

1. Scotland Bill and Fiscal Framework: The Committee took evidence from—
John Swinney, Deputy First Minister & Cabinet Secretary for Finance, Constitution and Economy, Sean Neill, Acting Deputy Director of Finance, and Gerald Byrne, Constitution and UK Relations Division, Scottish Government;

Rt. Hon David Mundell, Secretary of State for Scotland, Scotland Office,
Rt. Hon Greg Hands, Chief Secretary to the Treasury, HM Treasury, and Francesca Osowska, Director of Scotland Office, UK Government.

2. Scotland Bill and Fiscal Framework (in private): The Convener closed the meeting at the conclusion of agenda item 1. The Committee did not continue in private to consider the evidence heard earlier in the meeting.

The meeting closed at 11.28 am.

Official Report:
11th Meeting, 2016 (Session 4), Thursday 10 March 2016

Present:

Malcolm Chisholm
Bruce Crawford (Convener)
Linda Fabiani
Rob Gibson
Alex Johnstone
Alison Johnstone
Stewart Maxwell
Mark McDonald
Stuart McMillan
Duncan McNeil (Deputy Convener)
Tavish Scott
In attendance: Christine O'Neill (Committee Adviser)

The meeting opened at 9.00 am.

3. Scotland Bill (in private): The Committee considered a draft Final Report on the Scotland Bill. Various changes were agreed to, and the report was agreed for publication.

The meeting closed at 10.04 am.
Annexe C – Legislative Consent Memoranda

The Scottish Government lodged two Legislative Consent Memoranda (LCM) during the process of our scrutiny of the Scotland Bill and Fiscal Framework.

These can be found here—

Initial LCM, lodged 18 June 2015

http://www.scottish.parliament.uk/LegislativeConsentMemoranda/ScotlandBillLCM1.pdf

Supplementary LCM, lodged 1 March 2016

http://www.scottish.parliament.uk/20160301_Scotland_Bill_supp_LCM.pdf
Background to this Agreement

1. The Smith Commission agreement considered the issue of inter-governmental relations in some detail. Amongst the recommendations of the Commission was that inter-governmental arrangements to support the devolution of further powers be “underpinned by much stronger and more transparent parliamentary scrutiny”.

2. The Commission stated that this improved transparency would include the laying of reports regarding implementation and operation of any revised Memorandum of Understanding between governments and the pro-active reporting to parliaments regarding inter-administration bilateral meetings established to implement the proposals for further devolution. Examples of multilateral and bilateral meetings cited by the Commission were the Joint Ministerial Committee and the Joint Exchequer Committee.

3. The Devolution (Further Powers) Committee considered the issue of inter-governmental relations in its report, ‘Changing Relationships: Parliamentary Scrutiny of Intergovernmental Relations’. In particular the Committee made the following recommendation:

“The Committee considers that a new Written Agreement on Parliamentary Oversight of IGR between the Scottish Government and the Scottish Parliament with regard to the provision of information and how the views of the Scottish Parliament will be incorporated with regard to IGR agreements is an appropriate approach to adopt in order to aid transparency in this area.

The Committee considers that information provided by governments must enable parliamentary scrutiny of formal, inter-ministerial meetings before and after such meetings. Such information, must include, as a minimum, a ‘forward look’ calendar of IGR meetings and the agendas for these meetings. Subsequently, detailed minutes of meetings held and the text of any agreements reached must also be made available to legislatures in a timely manner”.

4. In response to the Committee’s report, the Deputy First Minister wrote to the Committee Convener, Bruce Crawford MSP, confirming that the Scottish Government was supportive in principle with the Committee’s recommendation with regard to a written agreement between the Scottish Parliament and Scottish Government. The Deputy First Minister noted that the approach taken would be “subject to the need to both respect the views of other Governments involved and maintain confidentiality around discussions as and when appropriate”.

Annexe D – Copy of the Written Agreement on Parliamentary Oversight of Intergovernmental Relations
Purpose of the Agreement

5. This Written Agreement represents the agreed position of the Scottish Parliament and Scottish Government on the information that the Scottish Government will, where appropriate (see paragraph 6 below), provide the Scottish Parliament with regard to its own participation in formal, ministerial-level inter-governmental meetings, concordats, agreements and memorandums of understanding.

6. In reaching this Agreement, the Scottish Government recognises the Scottish Parliament’s primary purpose of scrutinising the activity of the Scottish Government within formal inter-governmental structures. The Scottish Parliament also recognises and respects the need for a shared, private space for inter-governmental discussion between the administrations within the United Kingdom, such as, in situations where negotiations are on-going.

7. This Agreement is in recognition of the increased complexity and ‘shared’ space between the Scottish and UK Governments that the powers proposed for devolution entail. It further recognises that the increased interdependence between devolved and reserved competences will be managed mainly in inter-governmental relations. This Agreement seeks to ensure that the principles of the Scottish Government’s accountability to the Scottish Parliament and transparency with regard to these relationships are built into the revised inter-governmental mechanisms from the outset of this structure of devolution.

8. This Agreement establishes three principles which will govern the relationship between the Scottish Parliament and Scottish Government with regard to inter-governmental relations. These are:

- Transparency
- Accountability
- Respect for the confidentiality of discussions between governments

Scope of this Agreement

9. This Agreement applies to the participation of Scottish Ministers in formal, inter-governmental structures. This means, in practice, discussions and agreements of, or linked to, the Joint Ministerial Committee (in all its functioning formats); the Finance Ministers’ Quadrilaterals; the Joint Exchequer Committee; the Joint Ministerial Group on Welfare; and other standing or ad hoc multilateral and bilateral inter-ministerial forums of similar standing as may be established. This Agreement does not cover other engagement between the governments, although the Annual Report (referred to in paragraph 16) will comment upon the range and scale of such activity.

10. This Agreement is intended to support the Scottish Parliament’s capacity to scrutinise Scottish Government activity and to hold Scottish Ministers to account in the intergovernmental arena only. The Agreement in no way places obligations on other administrations and legislatures involved with inter-governmental relations and the groups and agreements described here. In line
with the principle of respect for the confidentiality of discussions between administrations, the Agreement recognises that the release of details of discussions directly involving intergovernmental partners is subject to their consent.

11. Subject to the above, the Scottish Government agrees to provide, to the relevant committee of the Scottish Parliament, as far as practicable, advance written notice at least one month prior to scheduled relevant meetings, or in the case of meetings with less than one month’s notice, as soon as possible after meetings are scheduled. This will enable the relevant Committee to express a view on the topic and, if appropriate, to invite the Minister responsible to attend a Committee meeting in advance of the inter-governmental meeting. Advance written notice will include agenda items and a broad outline of key issues to be discussed, with recognition that agenda items, from time to time, may be marked as “private” in recognition of the need for confidentiality.

12. After each inter-governmental ministerial meeting within the scope of this Agreement, the Scottish Government will provide the relevant committee of the Scottish Parliament with a written summary of the issues discussed at the meeting as soon as practicable and, if possible, within two weeks. Such a summary will include any joint statement released after the meeting, information pertaining to who attended the meeting, when the meeting took place, and where appropriate, subject to the need to respect confidentiality, an indication of key issues and of the content of discussions and an outline of the positions advanced by the Scottish Government.

13. The Scottish Government also agrees to provide to the relevant committee of the Scottish Parliament the text of any multilateral or bilateral inter-governmental agreements, memorandums of understanding or other resolutions within the scope of this Agreement.

14. In line with the provisions of paragraph 9 above, in circumstances where the Scottish Government intends to establish new arrangements with the aim of reaching an intergovernmental agreement the Scottish Government will provide advance notice to the Scottish Parliament of its intention to do so.

15. The Scottish Government also agrees to maintain a record of all relevant formal intergovernmental agreements, concordats, resolutions and memorandums that the Scottish Government has entered into and to make these accessible on the Scottish Government’s website.

Annual Report

16. The Scottish Government will prepare an Annual Report on inter-governmental relations and submit this to the relevant Committee of the Scottish Parliament. This report will summarise the key outputs from activity that is subject to the provisions of this agreement, including any reports issued by relevant intergovernmental forums. It will also comment upon the range of broader intergovernmental relations work undertaken during the year, including dispute
resolution. That report will also, provide as much information as is practicable and appropriate of issues expected to emerge in the year that follows.

Appearances before committees

17. In line with the Parliament’s overarching Protocol between Committees and the Scottish Government, Scottish Ministers will attend, as appropriate, meetings of the relevant committee of the Scottish Parliament when invited.

18. When issuing an invitation for a Minister to provide oral evidence the relevant clerk(s) should liaise with the Minister’s private office in the first instance to determine a suitable date and time and should take into account the timing of Cabinet and other major Ministerial commitments already scheduled in the diary. When reasonable notice has been given, the Minister should give priority to attending the committee meeting.

19. Furthermore, the relevant committee(s) may invite Scottish Government officials alone (i.e. not accompanying a Minister) to attend a meeting for the purpose of giving oral evidence on any relevant matter which is within the official’s area of expertise and for which the Scottish Government has general responsibility.
## Annexe E – Commencement Provisions in the Scotland Bill

<table>
<thead>
<tr>
<th>Clause No.</th>
<th>Clause Title</th>
<th>Commencement provision in the Scotland Bill</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Part 1: Constitutional Arrangements</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>Permanence</td>
<td>On the day the Act is passed</td>
</tr>
<tr>
<td>2</td>
<td>Sewel</td>
<td>2 months after Royal Assent</td>
</tr>
<tr>
<td>3 - 12</td>
<td>Elections, Supermajority, Scope to Modify the Scotland Act</td>
<td>By statutory instrument</td>
</tr>
<tr>
<td><strong>Part 2: Tax</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>13 - 19</td>
<td>Income Tax, VAT, Air Passenger Duty, Aggregates levy</td>
<td>2 months after Royal Assent</td>
</tr>
<tr>
<td>20, 21</td>
<td>Borrowing and Provision of information to the Office for Budget Responsibility</td>
<td>By statutory instrument</td>
</tr>
<tr>
<td><strong>Part 3: Welfare</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>22 - 35</td>
<td>Disability and carer's benefits, Regulated Social Fund payments, discretionary benefits, top-ups, powers to create benefits, Universal Credit flexibilities, Employment Support and Information Sharing</td>
<td>By statutory instrument</td>
</tr>
<tr>
<td><strong>Part 4: Other Legislative Competence</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>36</td>
<td>Crown Estate</td>
<td>34 (1), (5), (6) and (9) to (12) on the day the Act passed; the remainder on transfer date for Crown Estate Scheme</td>
</tr>
<tr>
<td>37</td>
<td>Equal opportunities</td>
<td>2 months after Royal Assent</td>
</tr>
<tr>
<td>38</td>
<td>Public sector duty regarding socio-economic inequalities</td>
<td>2 months after Royal Assent</td>
</tr>
<tr>
<td>39</td>
<td>Tribunals</td>
<td>2 months after Royal Assent</td>
</tr>
<tr>
<td>40</td>
<td>Roads</td>
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<td>Traffic signs</td>
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<td>42</td>
<td>Speed limits</td>
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<td>Roads: consequential provisions</td>
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<td>Policing of railways and railway</td>
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<td>British Transport Police</td>
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<td>46</td>
<td>Onshore oil and gas</td>
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<td>Onshore petroleum: consequential provisions</td>
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<td>Onshore old and gas: existing licences</td>
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<td>Consumer Advocacy and Advice</td>
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<td>Functions exercisable within devolved competence</td>
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<td>51</td>
<td>Gaming machines on licenced betting premises</td>
<td>2 months after Royal Assent</td>
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<tr>
<td>52</td>
<td>Abortion</td>
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