Scotland Bill Committee

1st Report, 2011 (Session 4)

Report on the Scotland Bill

Volume 2 - Main Report

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Scotland Bill Committee

Remit and membership

Remit:

The remit of the Scotland Bill Committee is to consider the Scotland Bill, proposed amendments to the Bill, responses to the report of the Session 3 Scotland Bill Committee, and to report to the Parliament.

Membership:

Richard Baker
Nigel Don
Linda Fabiani (Convener)
Adam Ingram
Alison Johnstone
James Kelly (Deputy Convener)
John Mason
Stewart Maxwell
Joan McAlpine
David McLetchie
Willie Rennie

Committee Clerking Team:

Clerk to the Committee
Stephen Imrie

Senior Researcher
Scherie Nicol

Committee Assistant
Vikki Little
INTRODUCTION

A short history

1. Following the election of a new SNP minority government in May 2007, a National Conversation on Scotland’s constitutional future was launched in August 2007 by the Scottish Government. It involved a public consultation on various discussion papers and resulted in the publication of a White Paper in November 2009 setting out the options for constitutional reform. It outlined that “Scotland’s lack of financial responsibility has real economic consequences” and that the current arrangements do not provide the necessary mechanisms to boost the economy and fail to maximise efficiency, transparency or accountability.¹

2. In February 2010, the Scottish Government launched a consultation on a draft Referendum (Scotland) Bill.² This consultation lasted until 30 April 2010 and the paper included proposed ballot papers for a two question referendum.

3. The launch of the Scottish Government’s National Conversation was followed by proposals from the leaders of the three larger opposition parties at the Scottish Parliament, namely, the Scottish Labour Party, Scottish Liberal Democrats and the Scottish Conservatives.³ Their reply was taken forward in December 2007 when they instigated a debate reviewing the devolution settlement. During this debate, the motion to establish an independently chaired commission to review devolution in Scotland was carried.⁴

² Scottish Scotland’s Future: draft Referendum (Scotland) Bill consultation paper
⁴ Scottish Parliament, Official Report, 6 December 2007, Col 4268 (S3M-976, For 76, Against 46, Abstentions 3).
4. The Commission on Scottish Devolution (Calman Commission), chaired by Professor Sir Kenneth Calman, was set up in March 2008 with the following remit—

“To review the provisions of the Scotland Act 1998 in the light of experience and to recommend any changes to the present constitutional arrangements that would enable the Scottish Parliament to serve the people of Scotland better, that would improve the financial accountability of the Scottish Parliament and that would continue to secure the position of Scotland within the United Kingdom”.  

5. As the Calman Commission explicitly excluded independence as an option, the SNP declined to take part.

6. The Calman Commission published its final report in June 2009, making a total of 63 recommendations. Some of these recommendations focused on altering the powers of the Scottish Parliament or the Scottish ministers and others on improving co-operation between administrations in Edinburgh and London. At the heart of the Calman Commission report, were the proposed changes to, as the Calman Commission saw it, improve the financial accountability of the Scottish Parliament.

7. In the Scottish Parliament, a debate was held on the Calman Commission’s final report on 25 June 2009. By a majority, the Parliament passed the following resolution; namely that it—

“warmly welcomes the Calman Commission on Scottish Devolution’s report, Serving Scotland Better: Scotland and the United Kingdom in the 21st Century, which is based firmly on evidence and engagement with the people of Scotland; thanks the chair and members of the commission for their work on behalf of the Parliament and the UK Government; agrees that the commission’s report is a comprehensive response to the remit approved by the Parliament on 6 December 2007; welcomes the establishment of the steering group to take forward the report’s recommendations to strengthen devolution and enable the Parliament, through new powers and responsibilities, to serve the people of Scotland better in the United Kingdom; calls on the Scottish Government to make fully available the resources of the Scottish administration to cooperate in this respect, and calls on the Scottish Parliamentary Corporate Body to continue to allocate appropriate resources and funding to enable the Parliament to support the work of the steering group and consider the recommendations that apply to the Parliament.”

8. The Scottish Government welcomed the publication of the Calman Commission’s final report and urged the UK Government to make early progress on some of the non-financial recommendations. However, the Scottish Government expressed serious reservations about the financial powers recommended by Calman Commission.

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9. In November 2009, the Scottish Government formalised its response to the final report of the Calman Commission when it published *The Scottish Government response to the recommendations of the Commission on Scottish devolution*. It supported certain recommendations and rejected others, most notably on taxation.\(^8\)

10. The then Labour UK Government published its Command Paper, *Scotland's future in the United Kingdom: building on ten years of Scottish devolution*, in November 2009, setting out its response to the Calman Commission's recommendations.\(^9\) This included an intention to introduce legislation to take forward some the proposals, and detailed responses to the Commission’s recommendations. Most, but not all, of the Calman Commission’s recommendations were agreed to.

11. Following the UK general election in May 2010, the new Conservative-Liberal Democrat coalition agreement included a commitment to implement the proposals of the Calman Commission. The UK Government announced in the Queen's Speech that it would bring forward legislation to implement the recommendations from the final report of the Calman Commission and, on 30 November 2010, the UK Government introduced the Scotland Bill\(^10\) (“the Bill”) in the House of Commons, along with explanatory notes.\(^11\) It also published a Command Paper (*Strengthening Scotland’s Future*), setting out further detailed on its proposed policies.\(^12\) Further detail on the provisions in the Scotland Bill is set out later in this report.

12. Although the Bill was introduced in the UK Parliament by the UK Government, it contains provisions that, if enacted, would either change the law in a devolved area or change the law-making powers of the Scottish Parliament or the devolved functions of the Scottish Ministers. For these reasons, the Scotland Bill is subject to a legislative consent motion in the Scottish Parliament under what has become known as the 'Sewel Convention'.\(^13\)

13. The Sewel Convention is an important aspect of the devolution settlement, and is reflected in the Memorandum of Understanding between the UK Government and the Scottish Government (formerly Scottish Executive) and in *Devolution Guidance Note 10*.\(^14\)

14. The Guidance Note states that nothing in the Scotland Act prevents the UK Parliament from legislating on matters which are within devolved competence;

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\(^9\) Cm 7738, 25 November 2009. As cited in House of Commons’ Library, *The Commission on Scottish Devolution – the Calman Commission, Standard Note*

\(^10\) House of Commons, Scotland Bill, Bill 115, 30 November 2010. Available at: http://www.publications.parliament.uk/pa/cm201011/cmbills/115/11115.i-iii.html


\(^13\) Note: The “Sewel Convention”—that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament—is an essential feature of the devolution settlement, being reflected in the Memorandum of Understanding between the UK Government and the Devolved Administrations, as well as in the UK Government’s Devolution Guidance Note (DGN) 10.

section 28(7) of the Act makes that clear. However, during the passage of the Scotland Act, the UK Government announced that it "would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters" in Scotland without the consent of the Scottish Parliament." This has become known as the Sewel Convention, and its purpose is to reflect and respect the devolution settlement and the role of the devolved institutions.

15. The Sewel Convention ensures that Westminster will normally legislate on devolved matters only with the express agreement of the Scottish Parliament, after proper consideration and scrutiny of the proposal in question.

16. To aid its consideration of the Scotland Bill, the previous Scottish Parliament established an ad hoc committee – the Scotland Bill Committee – to consider the Scotland Bill and any relevant legislative consent memoranda. The then Scotland Bill Committee – our predecessor – was established in December 2010, and consisted of 6 members of the Scottish Parliament.  

17. The previous Scotland Bill Committee published its final report on 3 March 2011. The SNP members of the then Committee submitted a minority report, appended to the main report as Annex A, in which they rejected the tax proposals and advanced their position on full financial responsibility for Scotland.

18. The Committee’s report was debated in the Parliament following on 10 March 2011. By majority (with the exception of the then 2 Green MSPs and Helen Eadie MSP who, voted against and Margo MacDonald MSP who abstained), the Parliament passed the following resolution—

"That the Parliament agrees that, further to motion S3M-7550 passed on 9 December 2010 supporting the general principles of the Scotland Bill as introduced in the House of Commons on 30 November 2010, the Bill be considered by the UK Parliament; invites the UK Government and the UK Parliament to consider the amendments and proposals made in the report of the Scotland Bill Committee, and looks forward to considering any amendments made to the Bill with a view to debating them in a further legislative consent motion before the Bill is passed for Royal Assent."  

The then Scottish Government’s amendment was not agreed to. The text of the amendment was as follows—

"leave out from first “the Bill” to end and insert “Scotland is best served by a Scottish Parliament that has the full range of powers and responsibilities

15 In this context ‘devolved matters’ does not refer just to matters that are within the legislative competence of the Scottish Parliament and could, therefore, potentially be included within an Act of the Scottish Parliament. It additionally is taken to refer to matters which, although reserved, affect the breadth of the devolved institutions' powers - i.e. the legislative competence of the Scottish Parliament or the executive competence of the Scottish Ministers.

16 Scottish Parliament, Motion SSM-7518, agreed on 1 December, 2010.


necessary to improve Scotland’s economic performance and promote sustainable economic growth; agrees that the current provisions of the Scotland Bill do not provide those powers and responsibilities; recognises the improvements to the Bill suggested by the Scotland Bill Committee but is of the view that further improvements are needed to provide the financial responsibility that Scotland needs and to address other flaws in the Bill; nevertheless agrees that the UK Parliament should consider the Bill, apart from the provisions that reserve insolvency and the regulation of health professions (clauses 12 and 13) and allow UK ministers to implement international obligations in devolved areas (clause 23) and partial suspension of Acts subject to scrutiny by the Supreme Court (clause 7), and further agrees that, given the amendments requested by the Scottish Parliament, the incoming Scottish Parliament should consider the Bill as amended by the UK Parliament in a further legislative consent motion before the Bill is passed for Royal Assent.”

19. In May 2011, the elections to the Scottish Parliament returned a majority SNP Government. During the campaign the First Minister had made it clear that one of his priorities upon re-election would be to see the Scotland Bill strengthened. Speaking in the Chamber during one of the first items of business, the First Minister announced a series of changes which his new administration would like to see made to the Scotland Bill. These were:

- Crown Estate Commission
- Corporation Tax
- Excise Duty
- EU Representation
- Broadcasting
- Enhanced Borrowing Powers

20. As with its predecessor, this new Committee is charged with scrutinising the Scotland Bill and any proposals for amendments from the Scottish Government or other organisations or individuals. The Committee can also decide whether to report on the issue of whether, and with what conditions, the Scottish Parliament should give its legislative consent to the Bill prior to any agreement to the Bill in the UK Parliament. This time around, the Committee has 11 members, representing all of the political parties in the Parliament.

**A brief guide to the Scotland Bill and the accompanying Command Paper**

*The Bill as introduced*

21. Full details of the Scotland Bill and the accompanying Command Paper were set out comprehensively in the report by our predecessor. The Bill is also explained at length in the various accompanying documents (explanatory notes, impact

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assessments etc.) that were published when the Bill was introduced in the UK Parliament.\(^{22}\) We do not intend to repeat this at any length.

22. However, by way of an overview, the Scotland Bill, as introduced in the House of Commons, is in four parts. The first two deal with non-financial matters. Part 1 concerns the Scottish Parliament and its powers, while Part 2 concerns the Scottish Ministers and their powers. Part 3 covers the financial changes. Part 4 includes a clause on criminal penalties, plus provisions on matters such as interpretation and commencement. There are five Schedules, the majority of which cover consequential amendments.\(^{23}\)

23. At its core, and certainly the most controversial elements, are the financial provisions, which provide the right to set a new Scottish rate of income tax, collect certain other taxes, and borrow. There will be consequential changes to the Scottish block grant.

24. The main financial proposals consist of—

- A Scottish income tax to replace part of the UK income tax;
- The devolution of stamp duty land tax and landfill tax;
- The power to create or devolve other taxes to the Scottish Parliament;
- New borrowing powers;
- A Scottish cash reserve to manage fluctuations in devolved tax receipts; and
- Proposals for Scottish and UK ministers to work together on a new UK-Scottish tax committee.

25. It should be noted that, the Command Paper differs from the Calman Commission in excluding the Aggregates Levy and Air Passenger Duty (APD) from taxes to be devolved. The UK Government has said that it will consider devolution of the Aggregates Levy when on-going court proceedings have been completed.\(^{24}\) On APD, the UK Government is considering the wider future of aviation duty and it believes that it would not be practical to devolve this duty before deciding how aviation should be taxed.\(^{25}\) Others believe that these factors should not be a hindrance to devolution.

26. In addition to the financial provisions, there are a number of other key components to the Scotland Bill as introduced in the UK Parliament. These include alterations to legislative/executive competence and devolved powers, namely—

\(^{22}\) See [http://services.parliament.uk/bills/2010-11/scotland/documents.html](http://services.parliament.uk/bills/2010-11/scotland/documents.html)


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- Changes to the powers in relation to elections, most notably through the clause in the Bill which transfers certain powers relating to Scottish Parliament elections, which are currently exercisable by the Secretary of State, to the Scottish Ministers;

- Devolution of certain powers to regulate air weapons, drink driving limits and speed limits, and powers to regulate on the misuse of drugs;

- Devolution of powers relating to the appointment processes in the Crown Estate Commissioners and also the BBC Trust;

- Proposals to re-reserve to the UK Parliament certain powers relating to insolvency (namely the winding up of business associations), the regulation of all health professions and the regulation of activities in Antarctica; and

- A replacement of the title “the Scottish Executive” with “the Scottish Government” in the Scotland Act.

27. The non-financial provisions also cover a number of alterations to the powers and procedures in the Scottish Parliament, namely—

- The ability to appoint more than two Deputy Presiding Officers and the timing of these appointments;

- More flexibility on the number of members of the Scottish Parliament Corporate Body;

- Alteration to the Members’ Interest provisions; and

- Changes to require all bills, not just government bills, to have a statement of legislative competence.

28. Finally, the Scotland Bill also proposes a number of other provisions, as set out below—

- A clause to enable certain provisions within a Bill agreed by the Scottish Parliament to be referred to the UK Supreme Court for its consideration without affecting the remainder of the Bill;

- The creation of a mechanism to allow the temporary grant of legislative competence to the Scottish Parliament so as to allow, by agreement, legislation on reserved matters to be pursued in the Scottish Parliament, just as the Sewel Convention allows legislation on devolved matters to be taken in the UK Parliament;

- The creation of a statutory time limit for bringing proceedings under the Scotland Act alleging a breach of Convention rights by the Scottish Ministers. This also ensures that the same time limit applies regardless of whether proceedings are brought under the Scotland Act or the Human Rights Act 1998.
• Broadening of current powers allowing UK Ministers to act concurrently with Scottish Ministers to implement other international obligations on a UK-wide basis;

• A clause to alter the maximum penalties which may be specified in subordinate legislation; and

• Finally, there is the intention to remove acts of the Lord Advocate in his capacity as head of criminal prosecutions and investigation of deaths in Scotland that are incompatible with any rights conferred by the European Convention on Human Rights or European Community law from the ambit of section 57(2) of the Scotland Act and also the creation of a statutory right of appeal from the High Court of Justiciary sitting as a criminal appeal court to the Supreme Court in relation to matters where it is alleged that the Lord Advocate has acted incompatibly with any such Convention right or Community law to replace the existing devolution issue procedure that currently applies in such cases.

Changes to the Bill since session 3 of the Scottish Parliament

29. As stated above, the previous Parliament debated our predecessor Committee’s report in March 2011. Since then, the Scotland Bill has completed its passage through the House of Commons and currently awaits the committee stage in the House of Lords (due in the early part of 2012). Consequently, a number of amendments to the original Bill as introduced in the House of Commons have been made. Some of these are in response to the previous Committee’s report and some in response to developments since the May 2011 elections to the Scottish Parliament.

30. The key changes that have been made to the Bill since March 2011 were summarised in a series of letters to the Committee from the Secretary of State for Scotland.26 These were announced in the main in June 2011 by the Chancellor of the Exchequer and the Secretary of State for Scotland.27 They comprise of the following—

• Bringing forward to 2011 pre-payments, a form of ‘cash advance’, to allow work on the Forth Replacement Crossing to begin;

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

• Allowing Scottish Ministers to make discretionary payments into the Scottish cash reserve for the next 5 years, up to an overall total of £125 million, to help manage any variation in Scottish income tax receipts compared to forecasts in the initial phase of the new system; and

26 Available at: http://www.scottish.parliament.uk/S4_ScotlandBillCommittee/General%20Documents/Letter_from_the_Secretary_of_State_-_13_June_2011.pdf
27 Written Ministerial Statement to the House of Commons.
Introducing a power in the Scotland Bill which will enable the Government to amend, in future, the way in which Scottish Ministers can borrow to include bond issuance, without the need for further primary legislation. The UK Government also announced that it will conduct a review of the costs and benefits of bond issuance over other forms of borrowing, and will consider extending Scottish Ministers' powers where this does not undermine the overall UK fiscal position or have a negative impact on total UK borrowing.

31. In addition a number of changes were made to the non-financial sections of the package—

- Enabling Scottish Ministers to approve the appointments of MG Alba board members;
- Providing for reciprocal consultation between UK Ministers and Scottish Ministers when either makes changes to electoral administration that impact on their respective responsibilities;
- Devolving to the Scottish Ministers the responsibility for taking forward orders disqualifying persons from membership of the Scottish Parliament under section 15 of the 1998 Scotland Act;
- Implementing the findings of the Expert Group appointed by the Advocate General to consider the working of the Scotland Act in relation to devolution issues concerning the Lord Advocate as head of the system of criminal prosecution in Scotland; and
- Strengthening inter-governmental dialogue in areas of mutual interest in welfare.

32. These address, in part, some of the recommendations for amendment made by our predecessor committee and endorsed by the previous Parliament, but not all. In terms of those proposals for change which have not as yet been addressed, the Secretary of State for Scotland told the Committee that the UK Government was—

“[...] continuing to consider other recommendations made by the [previous] Committee and will keep you updated on our further consideration. As I set out in my opening remarks the UK Government will consider all further amendments to the Bill against three tests: detailed, evidence-based proposals; demonstrating benefits to Scotland without prejudice to other parts of the United Kingdom; and receiving cross-party consensus.”

33. These three tests have also been mentioned in relation to proposals for amendments to the Bill made by the Scottish Government since its election in May 2011.

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28 *Scotland Office*, letter to the Committee, 22 September 2011.
INCREASING FISCAL DECENTRALISATION AND THE ACCOUNTABILITY OF
THE SCOTTISH PARLIAMENT: THE MERITS OF THE SCOTLAND BILL AND
ALTERNATIVE APPROACHES

An overview of the current position

34. In the devolution referendum in 1997, 63% of those voting supported a Scottish Parliament with tax varying powers. This power -- the Scottish Variable Rate (SVR) (the ability to increase or decrease the basic rate of income tax by up to 3p in the pound) -- was subsequently enshrined in the Scotland Act 1998, but has never been exercised to date. As part of the Scotland Act, the Scottish Ministers were also given a facility for short-term borrowing from HM Treasury to cover temporary shortfalls of cash or to provide a working balance in the Scottish Consolidated Fund. No administration has used this power and the Act forbids the Scottish Government from borrowing for any other purposes.

35. In the context of the existing fiscal powers, the majority of the funds available to the Scottish Government currently come in the form of a block grant to the Scottish Government. As a result the Scottish Parliament is not accountable to the Scottish electorate for how revenue is raised in the same way as it is for how revenue is spent. This lack of financial accountability was seen by the Calman Commission and others as a weakness of the devolution settlement. It is also felt that it gives the Scottish Parliament little incentive to increase the tax generating potential of the Scottish economy.

29 Scottish Government website. Available at: http://www.scotland.gov.uk/About/18060/11550
36. Putting it in an international context, the UK has a low share of tax revenues attributed to sub-national administrations relative to other OECD countries, as illustrated in Figure 1 below.

37. The OECD attributes revenues to the level of Government that exercises the authority to impose the tax and has the final discretion to set and vary the rate of the tax. Thus, the Figure below provides an indication of the degree to which sub-central governments are funded by tax revenues which they control. It shows that the UK has a relatively low proportion of tax revenues determined at the sub-national level.

**Figure 1 – Share of tax revenues attributed to sub-central government**

![Bar chart showing the share of tax revenues attributed to sub-central government across various countries. Source: OECD Revenue Statistics 1965-2009 (note, UK value excludes non-domestic rates)]

38. It is generally accepted that enhanced devolution would represent a step forward for the United Kingdom in terms of international comparators.

**The scale of the proposals, powers, accountability and fiscal autonomy of the Scottish Parliament**

39. It is widely argued that accountability increases as government decisions on public spending become more closely linked with decisions in relation to how to raise the tax revenues necessary to fund them. This increased accountability encourages more rigorous decision making with regard to public spending and tax policy as they have implications on what revenues are returned.

40. The devolution of further tax powers to the Scottish Parliament has the potential to increase accountability as it becomes responsible for raising more of its revenue

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rather than simply spending it. This was a key goal behind the financial proposals put forward by the Calman Commission.

41. It is the stated aim of the Scottish Government to promote sustainable economic growth. There is debate about whether or not there is a direct link between fiscal autonomy and economic growth. Economic theory suggests that there is a greater incentive to improve the economic performance of a region if the government will benefit from it in the form of increased tax revenues. Thus, many devolved administrations argue for tools to leverage sustainable economic growth to ensure that, as the government becomes more reliant on tax revenues, it has the ability to stimulate the economy and thus generate necessary public revenues. The effectiveness of these tools in stimulating economic growth depends on what they are, how they are used and what other policies are in place.

42. Powers such as corporation tax and borrowing are viewed as key levers in promoting economic growth. In the case of corporation tax, certain experts often point to the experience of the Republic of Ireland which has historically had a low rate of corporation tax and has been successful in attracting high levels of Foreign Direct Investment, although others point to factors such as location, demography, standard of education and infrastructure as also being of importance. Borrowing and taxation are intimately linked and the former is seen as critical to meet funding pressures in an economic downturn and to help deliver important long-term infrastructure projects.

43. Under the Scotland Bill, levers for economic growth, such as corporation tax, will remain reserved to the UK Government. While capital borrowing powers are being devolved, they will be constrained by limits determined by the UK Government.

44. As a result, Scottish economic performance will continue to be significantly influenced by the fiscal policies of the UK Government which are set according to needs across the UK as a whole. This is in line with the view of the Calman Commission that macro-economic policy should continue to be the responsibility of the UK Government.31

45. An OECD study found that on average, half of sub-central government expenditure is covered by own taxes and half by grants.32 The Scottish Parliament currently lacks a level of accountability or autonomy on par with this. Table 1 details the current tax revenue position in Scotland:

- Percentage of tax revenue currently devolved 8.5% (council tax and Non-Domestic Rates)
- Additional Revenue Devolved Under Scotland Bill 11.5%
- Total Revenue Devolved Under the Scotland Bill 20.0%

Table 1 – Estimated Scottish tax revenues in 2009-10

<table>
<thead>
<tr>
<th>Tax source</th>
<th>Scotland</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>£ million</td>
</tr>
<tr>
<td>Income tax</td>
<td>10,405</td>
</tr>
<tr>
<td>National insurance contributions</td>
<td>7,997</td>
</tr>
<tr>
<td>VAT</td>
<td>7,348</td>
</tr>
<tr>
<td>North Sea revenues (geographic share)</td>
<td>5,931</td>
</tr>
<tr>
<td>Corporation tax (excl. North Sea)</td>
<td>2,597</td>
</tr>
<tr>
<td>Fuel duties</td>
<td>2,207</td>
</tr>
<tr>
<td>Council tax</td>
<td>1,960</td>
</tr>
<tr>
<td>Non-domestic rates</td>
<td>1,823</td>
</tr>
<tr>
<td>Tobacco duties</td>
<td>947</td>
</tr>
<tr>
<td>Alcohol duties</td>
<td>816</td>
</tr>
<tr>
<td>Stamp duties</td>
<td>506</td>
</tr>
<tr>
<td>Vehicle excise duty</td>
<td>446</td>
</tr>
<tr>
<td>Other taxes on income and wealth</td>
<td>210</td>
</tr>
<tr>
<td>Insurance premium tax</td>
<td>190</td>
</tr>
<tr>
<td>Capital gains tax</td>
<td>174</td>
</tr>
<tr>
<td>Air passenger duty</td>
<td>157</td>
</tr>
<tr>
<td>Inheritance tax</td>
<td>146</td>
</tr>
<tr>
<td>Betting and gaming and duties</td>
<td>109</td>
</tr>
<tr>
<td>Landfill tax</td>
<td>93</td>
</tr>
<tr>
<td>Climate change levy</td>
<td>61</td>
</tr>
<tr>
<td>Aggregates levy</td>
<td>42</td>
</tr>
<tr>
<td><strong>Total tax revenue (inc. geographic share North Sea)</strong></td>
<td>44,165</td>
</tr>
</tbody>
</table>

Source: Scottish Government, Government Expenditure and Revenue Statistics (GERS) 2009-10

46. However, the UK Government state that the Scotland Bill would, as shown in Table 2 below, mean that for this fiscal year (2011/12), 30.8% of current expenditure would be funded by taxes decided and raised in Scotland, compared to 13.8% under the status quo. This increase is almost wholly driven by the Scotland Bill proposals for a ‘Scottish rate’ of income tax. Therefore, even with the new powers proposed in the Scotland Bill, the Scottish Parliament’s fiscal accountability would fall below the OECD average.

47. It should be noted that this is a crude measure of accountability as it does not take into account the level of discretion that devolved administrations have over tax rates and the tax base.
Table 2: Estimated Scottish revenues from devolved taxes, including NDR and council tax, under different scenarios (2011/12)

<table>
<thead>
<tr>
<th>Tax</th>
<th>Scotland Bill proposals</th>
<th>Status quo</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>£m</td>
<td>%</td>
</tr>
<tr>
<td>Income tax at 10p¹</td>
<td>4,490</td>
<td>15.3%</td>
</tr>
<tr>
<td>Landfill tax³</td>
<td>110</td>
<td>0.4%</td>
</tr>
<tr>
<td>Stamp duty land tax³</td>
<td>400</td>
<td>1.4%</td>
</tr>
<tr>
<td>Non-domestic rates⁴</td>
<td>2,180</td>
<td>7.4%</td>
</tr>
<tr>
<td>Council tax³</td>
<td>1,880</td>
<td>6.4%</td>
</tr>
<tr>
<td><strong>Total devolved tax revenue</strong></td>
<td><strong>9,060</strong></td>
<td><strong>30.8%</strong></td>
</tr>
<tr>
<td>Current expenditure (Resource DEL + NDR + council tax)</td>
<td>29,370</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

¹ Assumes Scottish receipts for 10p at each rate is 2.87% of total UK receipts as per Scotland Office method. UK figure taken from OBR forecast Jan 2011.
² Assumes tax growth in line with UK receipts. UK figure taken from OBR forecast for Other HMRC Taxes Jan 2011.
³ Assumes SDLT is 60% of stamp duty revenue in GERS and assumes tax growth in line with UK receipts. UK figure taken from OBR forecast Jan 2011.
⁴ From Scottish Government Spending Plans and Draft Budget 2011-12
⁵ From Scottish Government Local Government Finance Circular No 4/2011
Source: SPICe

Table 3: Estimated share of current expenditure from devolved taxes, excluding NDR and council tax under different scenarios (2011/12)

<table>
<thead>
<tr>
<th>Tax</th>
<th>Scotland Bill proposals</th>
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<tr>
<td></td>
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<td>Income tax at 10p¹</td>
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<td>17.7%</td>
</tr>
<tr>
<td>Landfill tax³</td>
<td>110</td>
<td>0.4%</td>
</tr>
<tr>
<td>Stamp duty land tax³</td>
<td>400</td>
<td>1.6%</td>
</tr>
<tr>
<td><strong>Total devolved tax revenue</strong></td>
<td><strong>5,000</strong></td>
<td><strong>19.8%</strong></td>
</tr>
<tr>
<td>Current expenditure (Resource DEL)</td>
<td>25,310</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

¹ Assumes Scottish receipts for 10p at each rate is 2.87% of total UK receipts as per Scotland Office method. UK figure taken from OBR forecast Jan 2011.
² Assumes tax growth in line with UK receipts. UK figure taken from OBR forecast for Other HMRC Taxes Jan 2011.
³ Assumes SDLT is 60% of stamp duty revenue in GERS and assumes tax growth in line with UK receipts. UK figure taken from OBR forecast Jan 2011.
Source: SPICe

A ‘Scottish rate’ of income tax: the cornerstone of the Scotland Bill proposals

48. In order to make a step change in the accountability of an administration, it is attractive to some to devolve all or a share of one of the larger taxes. The six taxes which raised the most revenue in Scotland in 2009-10 were income tax, national insurance contributions, VAT, North Sea Revenues, corporation tax and fuel duties.³³

³³ Excludes North Sea revenues.
49. The Calman Commission considered that some of these taxes are more suitable for devolution than others. When considering whether or not a tax is a suitable candidate, factors such as the size and stability of yield, the policy objectives of the tax, the limitations of EU law and how the tax is administered and the nature, size and mobility of the tax base need to be considered.

50. The Calman Commission considered the scope to devolve different taxes to the Scottish Parliament and concluded that income tax is the prime candidate. The introduction of the SVR, although never used, established a precedent for the Scottish Parliament having the power to be able to vary the rate of income tax in Scotland. Income tax, as shown in Table 1, is also the biggest tax in Scotland and raises almost a quarter of total revenues. The Calman Commission considered that its devolution would deliver a significant level of increased accountability. The Calman Commission also commented that it is the tax most evident to the electorate.\(^{34}\)

51. For these reasons, income tax is the main tax proposed for devolution as part of the Scotland Bill proposals. Income tax is in fact the predominant tax that is devolved to sub-central Governments across OECD countries, followed by property taxes, then consumption taxes.\(^{35}\)

52. However, it is certainly possible that one or more of the other large taxes could in theory be devolved instead of, or alongside, income tax to form the cornerstone of the Scotland Bill proposals.

53. Control of VAT is not suitable for devolution as this is precluded by EU rules and, although revenues could be assigned, Scotland would not be able to set a different rate from the rest of the UK. The devolution of fuel duties to a sub-member state is also constrained by the EU. The Energy Products Directive states that each member state is required to set a single rate across the whole member state (unless derogation is granted). Although some rural regions have been granted derogation, it is questionable whether or not the EU would allow derogation for Scotland as a whole.

54. The devolution or assignment of national insurance contributions was rejected by the Calman Commission as it was viewed to be notionally hypothecated to fund the social security system, which remains reserved to the UK Government. The Calman Commission also speculated that differing rates between Scotland and the rest of the UK may create economic distortions if companies take this into account when making location decisions.\(^{36}\) The devolution of national insurance contributions would therefore make sense if Scotland had a devolved benefits system within the UK.


55. North Sea taxation could be considered a good candidate for devolution given that it is an immobile tax base and given that it is possible to calculate Scottish revenues.

56. Corporation tax is often suggested as a suitable tax for devolution, particularly as it raises substantial revenues and can be a powerful economic lever. Its devolution was rejected by the Calman Commission because, in its view, the scope to vary the rate was seen as limited and there was concern that differing rates of corporation tax would have significant administrative impacts and would create economic inefficiencies.\(^{37}\)

57. However, despite these factors, there is a precedent for devolving the setting of corporation tax rates to sub-central administrations. For example, the Basque Country has such a power and has used it to introduce a lower statutory rate to the rest of Spain. Regional corporation tax powers are currently held in 9 OECD countries, or 10 if the partial decentralisation in Spain is included (in comparison regional income tax powers were held in 13 OECD countries in 2010)\(^{38}\).

**Sharing a tax base and the importance of the ‘no detriment’ principle**

58. Some jurisdictions have fuller control over the income tax system. This level of accountability brings greater risk, as their budgets are fully exposed to income tax fluctuations, but it allows them to use the tax as an instrument to deliver targeted economic and social policy.

59. Tax sharing, on the other hand, is also common between central and devolved administrations. The Scotland Bill proposals would result in the income tax base being shared between the Scottish and UK Parliaments. The Scottish Government would be able to apply relatively broad brush changes to the income tax rates with the UK Government retaining control over the structure of the tax and finer aspects such as reliefs and allowances. The Calman Commission believed that the proposed structure enables the UK Government to retain control over how income tax is used as an instrument for redistributing resources and avoids extra compliance and administrative costs that could be associated with full devolution.

60. The sharing of a tax base, as proposed for income tax, can bring with it challenges. For example, with the UK Government setting the base and the Scottish Government setting the rate, there is the potential for Scottish revenues to be adversely affected by fiscal policies and technical changes, such as a change to personal allowances, made by the UK Government.

61. The UK Government has proposed a policy of ‘no detriment’ following changes to the UK tax system in order to, in its view, mitigate this and retain the integrity of the union. This means “that any policy changes to the UK tax base that impact (either positively or negatively) upon the Scottish budget will be compensated by an appropriate adjustment to the block grant”.\(^{39}\) It is proposed that the adjustments will

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\(^{38}\) OECD, *Tax Database*, available at - http://www.oecd.org/document/60/0,3746,en_2649_34533_1942460_1_1_1_1,00.html

be based on estimates by the Office for Budget Responsibility (OBR) of the impact of any changes to the income tax system to the Scottish budget and will be transparent, published and open to scrutiny or audit by external parties.40

62. One concern with regard to these arrangements is that the timing of any announced change will impact whether or not the other government can take this into account when setting their rate of income tax. Another consideration is the extent to which both administrations have an input to these arrangements. At the time of writing, while we understand there is agreement on the high principles, the detail has yet to be agreed. It is also worth noting that the UK Government’s Command Paper suggests that block grant adjustments as a result of policy change may be only be made if they are beyond a certain threshold.41

Single rate of tax and progressivity

63. The Scotland Bill proposals stipulate that the Scottish Parliament can apply a single ‘Scottish rate’ of income tax to all income tax bands and there are a number of consequences of this.

64. Table 4 illustrates the impact of a ‘Scottish rate’ of income tax of 10p for a selected income within each of the tax bands. In the examples shown, once the personal allowance has been taken into account, the 10p rate would result in a progressive Scottish tax structure of 7p at the basic rate, 9p at the higher rate and 10p at the additional rate.

65. However, lower income taxpayers pay a greater share of their tax to Scotland than higher income taxpayers. This effect is again illustrated in the examples in Table 4 where the Scottish share accounts for 50% of tax paid by the basic rate taxpayer, 37% of tax paid by the higher rate taxpayer but just 26% of tax paid by the additional rate taxpayer.

Table 4 – The impact of a 10p ‘Scottish rate’

<table>
<thead>
<tr>
<th></th>
<th>Basic rate taxpayer</th>
<th>Higher rate taxpayer</th>
<th>Additional rate taxpayer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Income (£)</td>
<td>25,000</td>
<td>50,000</td>
<td>200,000</td>
</tr>
<tr>
<td>Personal allowance (£)</td>
<td>7,475</td>
<td>7,475</td>
<td>-</td>
</tr>
<tr>
<td>Total tax paid (£)</td>
<td>3,505</td>
<td>11,505</td>
<td>78,000</td>
</tr>
<tr>
<td>Overall tax rate</td>
<td>14</td>
<td>23</td>
<td>39</td>
</tr>
<tr>
<td>Tax attributable to Scottish rate - 10p (£)</td>
<td>1,753</td>
<td>4,253</td>
<td>20,000</td>
</tr>
<tr>
<td>Scottish tax rate</td>
<td>7</td>
<td>9</td>
<td>10</td>
</tr>
<tr>
<td>Scottish tax rate as a % of total tax rate</td>
<td>50</td>
<td>37</td>
<td>26</td>
</tr>
</tbody>
</table>

Note that these figures are based on the example incomes shown, selected to show the effect at each tax band. The figures will vary for taxpayers earning different incomes in each tax band.
Source: SPICe

Single rate of tax and its impact on taxpayer behaviour

66. Applying a single rate of income tax at each rate will likely elicit different behavioural responses from taxpayers within each band. For example, there is increased mobility of the tax base for those with higher incomes. This is because these taxpayers have a greater incentive to move to benefit from a reduced rate elsewhere. This can make policy makers more reluctant to increase tax for those on high incomes for fear of flight of revenues, particularly if that area has a large population resident close to the administrations’ border.

67. The Scottish Parliament and Government will want to consider a number of factors, including the redistributive effect and the potential behavioural responses of higher income taxpayers when setting the ‘Scottish rate’ of income tax and the impact of that response on overall revenues. The single rate of tax makes it difficult for the Scottish Government to set an income tax rates significantly different from those at the UK level. This may inhibit the Scottish Parliament and Government in the extent to which they can use the single ‘Scottish rate’ of income tax. It is for these reasons that some advocate the Scottish Parliament having the power to set different rates at each tax band.

Reliance on income tax and revenue borrowing requirements

68. There are revenue risks associated with the devolution of increased financial powers. The devolved administration is inevitably drawing revenues from a smaller tax base than the central administration and it is likely that any new tax revenues upon which they become dependent will be subject to more instability relative to any previous central administration funding allocation.

69. Some tax receipts are highly cyclical. The exposure of any budget to volatility in revenues depends on the scale of the tax revenues and the extent to which they vary year-to-year. There has been some debate on which taxes are the most and least volatile.

70. Table 5 below lists the different taxes ranked by percentage variation from the average value, known as standard deviation (SD) as a percentage of the mean.
### Table 5: Taxes ranked by percentage standard deviation, £m

<table>
<thead>
<tr>
<th>Tax</th>
<th>Mean £m</th>
<th>SD as % of mean</th>
</tr>
</thead>
<tbody>
<tr>
<td>Capital gains tax</td>
<td>298</td>
<td>52.0%</td>
</tr>
<tr>
<td>Air passenger duty</td>
<td>134</td>
<td>28.7%</td>
</tr>
<tr>
<td>North Sea oil and gas</td>
<td>8,450</td>
<td>26.4%</td>
</tr>
<tr>
<td>Stamp duties</td>
<td>682</td>
<td>24.7%</td>
</tr>
<tr>
<td>Inheritance tax</td>
<td>214</td>
<td>24.7%</td>
</tr>
<tr>
<td>Corporation tax (excl. North Sea)</td>
<td>3,147</td>
<td>14.4%</td>
</tr>
<tr>
<td>Aggregates levy</td>
<td>49</td>
<td>9.9%</td>
</tr>
<tr>
<td>Other taxes on income and wealth</td>
<td>247</td>
<td>9.8%</td>
</tr>
<tr>
<td>Tobacco duties</td>
<td>993</td>
<td>9.4%</td>
</tr>
<tr>
<td>Landfill tax</td>
<td>86</td>
<td>8.6%</td>
</tr>
<tr>
<td>Climate change levy</td>
<td>67</td>
<td>5.9%</td>
</tr>
<tr>
<td>Insurance premium tax</td>
<td>203</td>
<td>5.8%</td>
</tr>
<tr>
<td>VAT</td>
<td>7,846</td>
<td>5.1%</td>
</tr>
<tr>
<td>Income tax</td>
<td>10,977</td>
<td>5.0%</td>
</tr>
<tr>
<td>Betting and gaming and duties</td>
<td>110</td>
<td>4.1%</td>
</tr>
<tr>
<td>Non-domestic rates</td>
<td>1,837</td>
<td>3.3%</td>
</tr>
<tr>
<td>National insurance contributions</td>
<td>7,970</td>
<td>2.8%</td>
</tr>
<tr>
<td>Alcohol duties</td>
<td>789</td>
<td>2.6%</td>
</tr>
<tr>
<td>Vehicle excise duty</td>
<td>441</td>
<td>2.4%</td>
</tr>
<tr>
<td>Fuel duties</td>
<td>2,156</td>
<td>2.0%</td>
</tr>
<tr>
<td>Council tax</td>
<td>1,988</td>
<td>1.4%</td>
</tr>
</tbody>
</table>

Source: SPICe calculations

Note - The calculations use Scottish Government GERS data for the 5 years 2005-06 to 2009-10 and have been converted to real terms at 2009-10 prices.

71. However, table 6 below lists the different taxes ranked by absolute variation from the mean, measured by standard deviation.
Table 6: Taxes ranked by absolute standard deviation, £m

<table>
<thead>
<tr>
<th>Tax</th>
<th>Mean</th>
<th>SD</th>
</tr>
</thead>
<tbody>
<tr>
<td>North Sea oil and gas</td>
<td>8,450</td>
<td>2,229</td>
</tr>
<tr>
<td>Income tax</td>
<td>10,977</td>
<td>546</td>
</tr>
<tr>
<td>Corporation tax (excl. North Sea)</td>
<td>3,147</td>
<td>453</td>
</tr>
<tr>
<td>VAT</td>
<td>7,846</td>
<td>397</td>
</tr>
<tr>
<td>National insurance contributions</td>
<td>7,970</td>
<td>224</td>
</tr>
<tr>
<td>Stamp duties</td>
<td>682</td>
<td>169</td>
</tr>
<tr>
<td>Capital gains tax</td>
<td>298</td>
<td>155</td>
</tr>
<tr>
<td>Tobacco duties</td>
<td>993</td>
<td>93</td>
</tr>
<tr>
<td>Non-domestic rates</td>
<td>1,837</td>
<td>60</td>
</tr>
<tr>
<td>Inheritance tax</td>
<td>214</td>
<td>53</td>
</tr>
<tr>
<td>Fuel duties</td>
<td>2,156</td>
<td>43</td>
</tr>
<tr>
<td>Air passenger duty</td>
<td>134</td>
<td>39</td>
</tr>
<tr>
<td>Council tax</td>
<td>1,988</td>
<td>28</td>
</tr>
<tr>
<td>Other taxes on income and wealth</td>
<td>247</td>
<td>24</td>
</tr>
<tr>
<td>Alcohol duties</td>
<td>789</td>
<td>21</td>
</tr>
<tr>
<td>Insurance premium tax</td>
<td>203</td>
<td>12</td>
</tr>
<tr>
<td>Vehicle excise duty</td>
<td>441</td>
<td>11</td>
</tr>
<tr>
<td>Landfill tax</td>
<td>86</td>
<td>7</td>
</tr>
<tr>
<td>Aggregates levy</td>
<td>49</td>
<td>5</td>
</tr>
<tr>
<td>Betting and gaming and duties</td>
<td>110</td>
<td>5</td>
</tr>
<tr>
<td>Climate change levy</td>
<td>67</td>
<td>4</td>
</tr>
</tbody>
</table>

Source: SPICE calculations
Note - The calculations use Scottish Government GERS data for the 5 years 2005-06 to 2009-10 and have been converted to real terms at 2009-10 prices.

72. The impact of volatile tax revenues on a government’s budget can be reduced through broadening the tax base, particularly if the taxes are subject to different cycles and if revenues are driven by different factors. However, it can be a challenge to find large taxes whose revenues are not correlated with economic growth.

73. The Scotland Bill also proposes the devolution of stamp duty land tax (SDLT) and landfill tax. Tables 5 and 6 show that SDLT revenues are not only very variable in percentage terms, but also that they rank relatively high in terms of absolute variation. Landfill tax revenues, on the other hand, are not so cyclical in percentage terms. However, revenues from this tax are much smaller in comparison to those from income tax and thus cyclical fluctuations in income tax are unlikely to be offset through it being part of the tax mix.

74. Because of the difficulties in building a tax base that is not subject to large cyclical trends, many devolved regions cope with the volatility of tax revenues by using revenue borrowing to offset fluctuations. The Scotland Bill does not include provisions for the Scottish Government to borrow to offset cyclical fluctuations.

75. It could be argued that it is not ideal for the Scottish Government’s budget to be left open to cyclical risk associated with income tax revenues, particularly as those risks do not arise as a consequence of actions under the control of the Scottish
Government. However, the block grant will include a component of borrowing by the UK Government to counter the economic cycle.

**Fiscal drag and the debate around deflationary bias**

76. Further concerns with regard to the reliance on income tax revenues relate to the effects of fiscal drag and the debate on the existence of deflationary bias on the Scottish Government’s budget.

**Fiscal drag**

77. The concept of fiscal drag is based on the premise that as the economy grows, income also grows and more taxpayers move into the basic, higher and additional bands. There are two effects bringing about fiscal drag:

1. *New taxpayers:* As incomes grow, more people are earning an income above the personal allowance threshold and the tax base grows.

2. *Existing taxpayers:* As incomes grow, those already paying tax will find a higher proportion of their income being taxed.

78. Historically, higher rate tax payers have accounted for a larger share of the growth in tax receipts. However, as a result of the flat rate structure in the Scotland Bill proposals, the Scottish Government would receive a lower proportion of revenues from the upper bands. Thus, as overall tax revenues grow, Scottish tax revenues would not grow to the same extent.

79. A continuation of this trend over a period of time could lead to diverging trends in the capacity of Scotland and that of the rest of the UK to provide public services. However, the UK Government does uprate allowances and thresholds as GDP increases and, depending on the adjustment, this could counteract the effects of fiscal drag.

80. Increasing the allowances would also have an impact on the extent to which Scottish tax revenues benefit from the number of basic rate taxpayers rising as incomes rise. Thus, in order to adhere to the principle of ‘no detriment’ underpinning the income tax proposals in the Scotland Bill, the UK Government will need to compensate the Scottish Government for decisions in relation to allowances which alter the extent to which fiscal drag benefits Scottish tax revenues.

81. The fiscal drag effects on tax revenues could be fully mitigated if the Scotland Bill proposals were adjusted to give Scotland an equal proportion of revenues at each tax band.

**The debate on deflationary bias**

82. Deflationary bias would occur if the devolved Scottish income tax revenues were to grow at a lesser rate than public spending (and thus the block grant) over a period of time. Because the Scotland Bill proposes that part of the block grant will be replaced with income tax revenues, any deflationary bias would cause the Scottish Government’s budget to be lower than under the current framework.

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83. The extent of any deflationary bias depends on the economic circumstances at the time. During periods of high growth in public expenditure relative to tax receipts there will be a deflationary bias whereby the Scottish Government’s budget grows at a lesser rate than it would under the current framework. However, during periods of fiscal consolidation, where tax receipts grow faster than public expenditure, the Scottish Government’s budget would grow at a faster rate than under the current framework.

84. The timing and mechanism of the block grant reduction will also have a critical impact on the extent to which there may be a deflationary bias. The larger the percentage reduction in the block grant, the greater the impact that the rate of growth of Scottish income tax revenues will have going forward in determining the annual growth of the Scottish budget.

**The block grant reduction**

85. A key principle of the Scotland Bill proposals is that some of the block grant is exchanged for power transferred to the Scottish Parliament to levy its own taxes. The proposals incorporate a transitional period after the ‘Scottish rate’ of income tax is first introduced in April 2016, giving time for the forecasting and collection arrangements to bed in. After the transitional period, the block grant will be permanently reduced by a certain amount which is deemed to reflect the value of the tax powers transferred to Scotland. It will be based on both outturn tax receipt data and forecasts by the independent OBR.\(^{43}\)

86. The Command Paper accompanying the Bill states that “The policy decision on which methodology to use for this calculation is fundamental to the future success of the new financing arrangements”.\(^{44}\) It does not, however, make any specific proposals and so it is not possible to know at this stage the impact of the final mechanism chosen on Scottish public finances in the long term.

87. The Independent Commission on Funding & Finance for Wales (the Holtham Commission) looked at different methodologies which could be used to calculate a block grant reduction.\(^{45}\) The four mechanisms were—

1. The block grant is reduced by a specific percentage. This method is likely to expose the devolved budget to cyclical and UK policy risks and is most appropriate in relation to a tax which is likely to remain steady.

2. A reduction is made to the block grant, but this reduction is indexed to the growth rate of the devolved tax base. This method shields the devolved budget from policy risk and is associated with a low level of accountability.

3. A reduction is made to the block grant, but the initial reduction is indexed to an external variable such as the relevant UK tax base. This method is most appropriate in relation to cyclical tax as it protects the devolved budget from UK policy and cyclical risks.


\(^{45}\) Independent Commission on Funding & Finance for Wales, *Fairness and accountability: a new funding settlement for Wales*, July 2010, Chapter 5.
The block grant is reduced by an agreed sum which is then indexed to inflation. This method is likely to expose the devolved budget to cyclical and UK policy risks and is most appropriate in relation to small taxes that are forecast to grow slowly or even decline.

The Holtham Commission concluded that the most appropriate mechanism depends on the nature of the tax, such as the size of its yield, how cyclical it is and its long term growth trajectory.

The mechanism used to adjust the Scottish block grant would ideally reduce the exposure of the Scottish Government to the cyclical nature of income tax receipts, protect it from policy decisions made by the UK Government which change the tax base and take into account the likely future trajectory of tax receipt growth. Those mechanisms which leave the Scottish Government exposed to the cyclical nature of tax receipts would be best accompanied by revenue borrowing powers to offset budget volatility.

**Forecasting tax receipts and revenue borrowing**

The Scotland Bill proposes assigning income tax revenue to the Scottish Government based on forecasts of Scottish tax receipts by the OBR. These forecasts would then be reconciled with outturn receipts 12 months after the end of the financial year.

Although revenue borrowing is not to be made available for counter-cyclical purposes, the UK Government agrees that a current borrowing facility is necessary for the Scottish Government to deal with the deviation between forecast and actual outturn receipts that may be associated with the devolved taxes. Effective management of the deviations between forecast and actual receipts by the devolved administration depends on the borrowing limits and repayment period being set at adequate levels.

Although the OBR has a limited track record in forecasting since it was only recently established, HM Treasury forecasts in the past have tended to be over-optimistic. The largest errors occurred during the recent recession. When considering borrowing limits, the Scottish Government may wish to be aware of whether or not the proposed limit would be sufficient in order to offset deviations from forecasts in times of recession, and whether the repayment period is sufficiently long in times of economic downturn when revenue budgets will already be being squeezed. Other factors that are considered when setting limits include the devolved Government’s ability to service borrowing and the capacity of the central Government to lend.

**Capital borrowing**

As well as counter-cyclical borrowing, and borrowing to manage cash-flows, governments borrow to pay for large-scale capital projects such as bridges, hospitals, schools and trunk roads. Loans are typically repaid over the life-span of these assets. For large-scale projects, this is seen as a more acceptable option than raising current tax levels to pay for assets future generations will benefit from.
Capital investment during an economic downturn is also acknowledged as a good way to boost the economy and create jobs. The case for capital borrowing powers is made stronger when an administration has its own tax-raising powers as this provides it with a source of revenue from which it can make repayments. When considering borrowing limits, similar to revenue borrowing, any central government may wish to consider the devolved administrations ability to service capital borrowing, and the overall UK macro-economic context.

94. There are different types of borrowing that can be undertaken including; commercial borrowing, the issuing of bonds, borrowing from the central administration and private finance initiatives such as the Private Finance Initiative (PFI) and Not-for-Profit Distributing (NPD) models. Factors which a central administration may consider when deciding which facilities to make available to the devolved administration will likely include the impact of borrowing on the UK Government’s fiscal position, the macro-economic framework and its impact on the pricing of UK borrowing in general.

95. The Scotland Bill stipulates that capital borrowing should be sourced from the National Loans Fund (NLF) which is already used to lend money to local authorities and is likely to offer the most preferential rate. However, the UK Government has since agreed (in June 2011) that it will review whether or not Scottish Ministers should be able to borrow using bonds, an instrument which is currently available to local authorities in the UK and sub-central regions in Australia, Spain, Canada and the US.
THE FINANCIAL PROVISIONS: EVIDENCE RECEIVED

A ‘Scottish rate’ of income tax - Scotland Bill proposals

96. It is proposed that the SVR is repealed and replaced with a Scottish income tax. From April 2016, the UK rates of income tax will be reduced for Scottish taxpayers by 10p at the basic, higher and additional rates and the Scottish Parliament will have the flexibility to set different rates of income tax each year for Scottish taxpayers by adding a new amount uniformly to all rates. A one pence increase in the income tax rate is estimated to yield approximately £450 million. Specific proposals for its implementation include:

- Taxes will still be collected by Her Majesty’s Revenue and Customs (HMRC);
- The OBR will provide forecasts of Scottish income tax from April 2012;
- Once the Scottish Government has set the ‘Scottish rate’, forecast revenues will be provided alongside the block grant. Over the course of the following year, once total actual receipts are known, the amount will be reconciled with that which was forecast; and
- A Scottish cash reserve and revenue borrowing facility will be in place so that the Scottish Government can save any surplus or meet any shortfall.

97. The proposals include a transitional period anticipated to last two or three fiscal years over which time the forecasting and collection systems can be tested to prevent any adverse shocks or windfall gains to the Scottish budget. When the transitional period ends, the permanent reduction in block grant to be replaced by annual income tax receipts.

Evidence taken by the Committee on the proposed ‘Scottish rate’ of income tax

The 10p rate

98. The Committee was keen to understand the origins of, and rationale for, the 10p rate as part of its scrutiny of the proposals for the ‘Scottish rate’ of income tax. Sir Kenneth Calman, chair of the Calman Commission, explained that—

“It [10p] was a relatively straightforward figure to choose, as opposed to a figure of, say, 7.5p, and it gave a significant drop in the block grant, which the Scottish Parliament would have to meet. That is why we chose it. There was no magic formula that said that it had to be 10p.”

99. He also said that—

“Most people know what 10p is; it is easier to measure and easier to calculate with than other figures. There is nothing magic about it.”\(^48\)

100. He later clarified that—

“Given that we had concluded that there should be, for simplicity, a single Scottish tax rate, we also concluded that 10p in the pound was an appropriate starting point: it meant that the basic rate of tax (which is the rate that is relevant for all Scottish taxpayers and the only rate paid by the majority) is, as it were, split equally between the UK and Scottish taxation at the outset of the scheme”.\(^49\)

101. Some witnesses have suggested that it might be more appropriate for the Scotland Bill to devolve the whole of income tax rather than only the ability to set a uniform rate across all tax bands. Ben Thomson of Reform Scotland stated—

“If one is going to pass across a tax, one would want to give across the whole power so that things are clear and simple. The Scotland Bill would create ongoing tension between the Treasury and the Scottish Government around income tax. There is always tension between the Treasury and the Scottish Government, as the Treasury sets the budget, but there would be tension around not only the setting of the budget, but around creating the formula. The formula would have to be continually adjusted, and both sides would see that continual adjustment as something of a black art”.\(^50\)

102. However, in relation to devolving the whole of income tax, the UK Government wrote that—

“Were the whole of income tax to be assigned to the Scottish Government, income tax receipts would represent 36% of their total budget, as opposed to 15% under the current proposals – a significant increased risk, given that currently the Scottish Government has very limited responsibility for revenue raising. The Government’s judgement is that the Scotland Bill proposals represent a sensible balance of risk while providing the Scottish Government with increased accountability and responsibility”.\(^51\)

Access to the higher bands

103. The Scottish Government will only be able to set a single rate of tax, which will be applicable to all rates. If it were to set the tax rate at 10p, then Scotland would get 50% of revenues at the basic rate of income tax, 25% of revenues at the higher rate and 20% of revenues at the additional rate. The Committee received evidence about the potential challenges brought about by this proposal and they are outlined in the following paragraphs.

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\(^{49}\) Sir Kenneth Calman, written submission to the Committee.  
\(^{50}\) Scotland Bill Committee, *Official Report*, 27 September 2011, Col 223.  
\(^{51}\) UK Government. Letter from the Exchequer Secretary to the Treasury to the Convener of the Scotland Bill Committee, 25 October 2011.
Lack of discretion for the Scottish Government

104. One concern expressed to the Committee is that this does not allow the Scottish Government the flexibility to apply or disapply progressive taxation. However, the UK Government explained to the Committee that they do not feel it is appropriate for the Scottish Government to set different rates at each band, stating “the ability to use the tax system as a redistributive mechanism is something that we believe should remain at UK level”. The UK Government and Sir Kenneth Calman also gave evidence explaining that the proposed system is intended to reduce the complexity of the proposals with the UK Government stating—

“The complexities that one can introduce through personal allowances, tax reliefs and different bandings are of great advantage to the UK within the simplicity of having a unified system across the UK”.

105. However, Sir Kenneth Calman also said that “Making the system more complex at this stage in the process would create difficulty. That is not to say that things could not be done differently in the future”.

High-income taxpayer mobility

106. Another issue brought to the attention of the Committee is that those on higher incomes are often more responsive to changes in tax rates and, as mentioned earlier in the report, the Scottish Government may be wary of making any changes to their tax rate for fear that they may move between tax jurisdictions to benefit from a lower rate of taxation. The Scottish Chambers of Commerce expressed concern to the Committee that any changes to income tax for higher and top rate payers could have a negative impact on “attracting and retaining headquartered businesses within Scotland”.

107. The lack of flexibility in being able to apply a different rate to different bands may mean that the Scottish Government is deterred from varying income tax

Fiscal drag

108. Fiscal drag is another concern that arose during evidence taking. It occurs as the economy grows and taxpayers move into higher bands, resulting in more revenues being collected from these bands. Jim and Margaret Cuthbert wrote to the Committee explaining—

“The danger is that, since the Scottish government’s income tax revenues constitute a lower percentage of the higher rate bands, then the Scottish government would receive a decreasing percentage of the income tax revenues collected in Scotland, if fiscal drag led to an increasing percentage of the overall income tax take being collected from the higher bands”.

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52 Scotland Bill Committee, Official Report, 8 September 2011, Col 70.
53 Scotland Bill Committee, Official Report, 8 September 2011, Col 70.
54 Scotland Bill Committee, Official Report, 8 September 2011, Col 70.
55 Scotland Bill Committee, Official Report, 13 September 2011, Col 106.
56 Scottish Chambers of Commerce, written submission to the Committee.
57 Jim and Margaret Cuthbert, written submission to the Committee.
109. In a letter to the Committee dated 25 October 2011, the Exchequer Secretary to the Treasury stated that—

“The claim that fiscal drag will lead to an overall declining share of total income tax receipts over time is based on the assumption that the personal allowance and tax bands will not be uprated in line with growth in income. There is a statutory requirement that personal allowances and rate bands are automatically raised by at least the rate of inflation.”

110. However, the UK Government has the discretion to choose the rate at which thresholds and allowances are adjusted in these circumstances, and thus the effects of fiscal drag may or may not be eliminated. Jim Cuthbert highlighted this danger to the Committee. He said—

“The fiscal drag argument suggests that because Governments tend not to index their tax thresholds fully, more and more tax will through time be collected from the higher tax bands—or the bands from which the Scottish Government is getting a lower share. As a result, the share that it gets of the overall Scottish tax take will tend to drop through time.”

111. Both Jim and Margaret Cuthbert explained that figures presented to the Committee’s predecessor by the Secretary of State which estimated the yield of a Scottish 10p tax rate highlighted that “from 2001-02, the yield of a Scottish 10p rate as a percentage of Scottish income tax receipts fell from 41.7 per cent to 37.8 per cent. That shows that even where it is Government policy not to have fiscal drag, it still happens”.

The debate on deflationary bias

112. Under the Scotland Bill proposals, if UK income tax receipts do not grow at the same pace as overall UK Government expenditure then there will be a deflationary effect on the Scottish Government’s budget. The deflationary effect results in Scottish budget, under the Scotland Bill proposals, being lower than it would be under the status quo, using the Barnett formula.

113. There is much debate over what the long term trend in income tax revenues, relative to other UK Government revenues, might be. Professor Heady of the University of Kent told the Committee that over the past 30 or 40 years “it has gone up and down a little bit, but there is not a strong trend”. Jim Cuthbert had a similar view, stating—

“At times, income tax receipts drop relative to public expenditure, as has been the case recently, in which case you are worse off if you get part of your revenue via income tax rather than in line with Barnett. At other times, the opposite could happen: public expenditure and what you get through Barnett

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57 UK Government. Letter from the Exchequer Secretary to the Treasury to the Convener of the Scotland Bill Committee, 25 October 2011.
58 Scotland Bill Committee, Official Report, 13 September 2011, Col 127.
60 Scotland Bill Committee, Official Report, 13 September 2011, Col 129.
could drop relative to a rebound in income tax receipts, in which case you would be better off if part of your revenue was tied to income tax”.61

114. In the modelling that has been done to date of the potential for a deflationary bias, there has been significant variation in the estimated net effect. Jim Cuthbert explained that he felt “I do not know whether, in the long run, there will be a consistent effect, but much of the debate and many of the figures that have been bandied about seem to relate to accidents of timing”.62

115. Indeed, the timing of the reduction in the block grant is one of the factors which appears to impact the on the scale of any subsequent deflationary bias. The UK Government also stressed this to Committee, with the Secretary of State stating—

“What is very clear is that the answer to the question whether Scotland wins or loses depends on which years you take. I can quote you a set of years where, for example, over the spending review period, Scotland would do very well under the proposed system. You can cite other years when that would not be the case”.63

116. Given this, Jim Cuthbert warned about the potential for the timing of the block grant reduction to adversely affect the Scottish budget saying—

“Looking back at the evidence that Professor Holtham gave to the Scotland Bill Committee in the previous session of Parliament, it is interesting that he thought that the Treasury was pushing the transitional arrangements in order to prevent the Scottish Government from benefiting from a rebound in income tax receipts at a time when public expenditure was being pushed back”.64

Implementation issues

117. The Committee received evidence on several issues to do with the implementation of the ‘Scottish rate’ of income tax and this is outlined in the following paragraphs.

Cost of delivering the Scottish rate of income tax

118. The Statement of Funding Policy 2010 states that—

“where decisions taken by any of the devolved administrations or bodies under their jurisdiction have financial implications for departments or agencies of the United Kingdom Government or, alternatively, decisions of United Kingdom departments or agencies lead to additional costs for any of the devolved administrations, where other arrangements do not exist automatically to adjust for such extra costs, the body whose decision leads to the additional cost will meet that cost”

61 Scotland Bill Committee, Official Report, 13 September 2011, Col 128.
62 Scotland Bill Committee, Official Report, 13 September 2011, Col 129.
64 Scotland Bill Committee, Official Report, 13 September 2011, Col 129.
119. The Command Paper accompanying the Bill states that “it is an established principle that the costs of devolution will be borne by the Scottish budget”. While the Regulatory Impact Assessment accompanying the Bill estimates that the cost will be £45 million, the Committee were informed that this figure could be substantially more. When the Committee asked Derek Allen of the Institute of Chartered Accountants of Scotland (ICAS) if the cost could be £150 million, he stated--

“It could be more. In fact, unless we address the problem and properly define the right to tax and therefore the right to the money, it could be an awful lot more.”

Impact of Scottish rate of income tax on taxpayers and businesses

120. Concerns have been expressed to the Committee in relation to the potential challenges to businesses of implementing the ‘Scottish rate’ of income tax. The Scottish Chambers of Commerce wrote—

“If Government is going to take a decision to impose taxation changes on businesses, then Government should ensure that the cost to businesses of implementing these changes is minimised. Businesses must also be adequately supported before and during the change to make sure that they have the time to plan and the ability to learn for what new practices will need to be introduced as a result of the legislation.”

Identification of a Scottish Taxpayer

121. The ‘Scottish rate’ of income tax will apply to UK resident taxpayers who are defined as Scottish taxpayers. The definition of a Scottish taxpayer was set out for the purposes of the SVR in the Scotland Act 1998, but the Scotland Bill proposes to refine the definition.

122. The Committee has heard from the Chartered Institute of Taxation, ICAS, the Scottish section of the Institute of Chartered Accountants of England and Wales (ICAEW) and the Scottish Council for Development and Industry (SCDI), who have all expressed concerns about the practical difficulties that may arise in identifying a Scottish taxpayer. Derek Allen outlined the scale of the challenge—

“In the UK, we have a tax-paying population of approximately 30 million, of whom 8.5 million complete tax returns annually. The vast majority do not complete tax returns, which means that HMRC does not have a database that shows whether they reside in Scotland or elsewhere in the UK.”

123. He also expressed concern to the Committee about the current definition “built as it is on an unsound definition and practice historically of residence in the UK”.

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67 Scottish Chambers of Commerce, written evidence submitted to the Committee.
He suggested that if it is not done correctly the UK Government may end up with costly disputes.

124. Raymond Kelly, Secretary of the Scottish Branch of the Chartered Institute of Taxation, told the Committee that he believed that “The difficulties lie in some of the more technical and definitional aspects, such as who is a Scottish taxpayer, how does one determine the income of a Scottish taxpayer and what happens if someone leaves Scotland during the year”. ICAS highlighted additional difficulties to the Committee and “potential for abuse because savings income will not become liable to Scottish taxation”.

Accountability of HMRC

125. The Secretary of State for Scotland reminded the Committee that the Command Paper outlined the new lines of accountability between the Scottish Parliament and HMRC—

“[…] principally an Additional Accounting Officer being made specifically accountable for the collection of the Scottish rate of income tax. The Scottish Parliament will receive a report on the administration of the Scottish income tax receipts as part of the National Audit Office's annual report on HMRC's overall performance. Scottish Parliamentary Committees will be able to request HMRC Accounting Officers to give evidence”.

126. When giving evidence to the Committee, the Secretary of State reiterated that—

“The governance of HMRC is appropriately set out. I do not think that there is any shortage of willingness on its part to come before committees of the Scottish Parliament, as it demonstrated during the Scottish variable rate inquiry in the previous session of Parliament”.

127. However, other evidence received by the Committee suggests support for the idea that HMRC should be directly accountable to the Scottish Parliament for their role in operating the Scottish rate of income tax. In written evidence to the Committee, PwC stated—

“If the Scottish Income Tax (SIT) is to have force of law in Scotland as elsewhere in the UK there needs to be a mechanism whereby HMRC can be called to account by the lawmaking body in the relevant jurisdiction”.

128. They also suggest “the formation of a distinctive Scottish Tax Department within HMRC which will be familiar with the additional aspects of the Scottish
devolved taxes" as the most appropriate way for the Scottish taxation system to function efficiently and effectively.\textsuperscript{75}

129. The Committee has also heard concerns expressed at a number of informal engagement events with the business community in Scotland that HMRC may not be adequately resourced to deal with the introduction of the new financial system in Scotland.

**Transitional period issues**

130. During the transitional period, forecast receipts from the rate of Scottish income tax will be paid to the Scottish budget with no subsequent reconciliation to the actual tax revenues. The Command Paper states that “Once there is clear evidence that the new forecasting and collection systems are operating correctly, these transitional arrangements will cease”.\textsuperscript{76}

131. However, Jim Cuthbert highlighted what he described as “widely recognised” concerns to the Committee with regard to the perverse effects created by these arrangements because, under these, increasing the tax rate always benefits the Scottish Government.\textsuperscript{77} He explained to the Committee—

“I will give an analogy from the old days, involving local authorities, business rates and the resources element. The way in which the resources element worked was rather like the transitional arrangements in the Scotland Bill tax proposals. It meant that authorities that were below the resources threshold had an incentive to raise the business rate, even though doing so would push the local economy into decline. It was indeed found that authorities tended to raise the rate—because it benefited them financially to do so—and that places below the resources threshold were pushed further and further into economic decline. The situation that we are considering now is slightly different, but it contains the same sort of mechanism and perverse incentive”.\textsuperscript{78}

**Block grant adjustment mechanism**

132. Within the Bill proposals, some of the block grant is exchanged for tax revenues from the ‘Scottish rate’ of income tax, SDLT and landfill tax. The UK Government infers from the Calman Commission’s final report that it envisaged that “the reduction would be a percentage based on the average worth of the devolved tax receipts over a number of years, not a single year”.\textsuperscript{79} The Command Paper also explains that it is likely that actual outturn receipts from the Scottish income tax during the transition period will be instrumental in informing the reduction in block grant associated with the new income tax power. Key concerns that witnesses have raised in relation to the proposals are outlined in the following paragraphs.

\textsuperscript{75} PwC, written submissions to the Committee.


\textsuperscript{77} Scotland Bill Committee, *Official Report*, 13 September 2011, Col 133.


Block grant adjustment - lack of detail

133. The Committee’s predecessor outlined that “the determination of what reduction is necessary is the most significant question that the Scottish Parliament has to consider as part of its consideration of the Scotland Bill”.  

134. However, witnesses have expressed concerns to the Committee with regard to the lack of detail which has been provided to date by the UK Government on the grant reduction mechanism. Alan Trench of University College London, stated—

“I find it deplorable—I think that I have to use that word—that the UK Government has still not spelt out what the effect on the block grant will be.”

135. The Secretary of State for Scotland explained to the Committee that “the precise mechanisms by which the proposals will be implemented and when that will happen are matters for the future and will depend on the Joint Exchequer Committee’s deliberations”. At a later meeting, he outlined that (during their first and only meeting to date) the Joint Exchequer Committee had agreed on the high-level principles for the adjustment to the block grant—

“It starts off with the overarching objective of fairness to both the UK and Scottish Governments, limiting the risks of unintended transfers of resources one way or the other, ensuring that the mechanism is not designed to gain advantage in one set of fiscal circumstances or another, and considering the effects of a shared tax base, including issues related to policy spillover and tax avoidance. That sets the scene from the design process all the way through implementation, operation and review.”

136. As noted earlier in this report, there are a variety of options for grant adjustment mechanisms which have been looked at by the Independent Commission on Funding and Finance for Wales, e.g. a basic percentage reduction, or indexing the reduction to inflation or a specific tax base. The Cabinet Secretary for Finance, Employment and Sustainable Growth explained to the Committee that—

“The key point—I am sorry to labour it, but it is the nub of the issue—is whether a mechanism exists that enables the Scottish Government to be confident that, when the block grant adjustment mechanism is worked out, it will fulfil the objective of Scotland being no better off and no worse off”.

137. The Scottish Government has also raised concerns that the Scottish Parliament is being asked to scrutinise the Bill without adequate detail. The Scottish Government wrote to the Committee stating that—

“There is no commitment about when the mechanism will be finalised, but it is clear that it will be well after the Scottish Parliament is asked to approve the

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81 Scotland Bill Committee, Official Report, 1 November 2011, Col 468.
82 Scotland Bill Committee, Official Report, 8 September 2011, Col 60.
84 Scotland Bill Committee, Official Report, 17 November 2011, Col 577.
Scotland Bill. Without knowing what mechanism will be used, this amounts to the Scottish Parliament being asked to sign a blank cheque. That is why we have proposed that commencement of the taxation provisions should require the consent of the Scottish Parliament. That will allow the Scottish Parliament to take an informed view before it gives final consent to the taxation provisions being implemented”.

138. However, the UK Government indicated to the Committee that it is not persuaded in respect of the joint commencement, with the Secretary of State for Scotland explaining that it is not practical given that the taxation powers need to come into effect before the block-grant adjustment is calculated. He stated—

“The commencement must be right at the outset to let us get on with the work on income tax receipts, otherwise there is no discussion to be had about the adjustment mechanism”.

139. The Scottish Government has responded in a letter to Committee explaining that it would not be delaying the approval of commencement until reliable data is gathered, but that it would instead be until the adjustment mechanism is agreed—

“It is true that it will not be possible to calculate the block-grant adjustment applicable in any year until the relevant factors relating to that year are known […] However, the key question is not the outcome of the calculation itself, but deciding on the mechanism governing the calculation […] the Scottish Parliament should be asked to approve commencement of the relevant parts of the Bill only once the block-grant adjustment mechanism has been agreed between the two Governments […] That could take place in the second half of 2012 or in 2013”.

140. It is now clear that the formula for the grant reduction mechanism and the procedures for inter-governmental agreement which will underpin it – deemed by witnesses such as Alan Trench as “a fundamental issue” – are unlikely to be agreed before the Legislative Consent Motion on the Scotland Bill is considered by the Scottish Parliament.

141. The policy intention of the UK Government is that the block grant adjustment mechanism will be neutral in its effect. This policy intention is also shared by the Scottish Government.

The principle of ‘no detriment’

142. The UK Government states within its Command Paper that it will adopt a principle of ‘no detriment’.

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85 Scottish Government. Letter from the Cabinet Secretary for Parliamentary Business and Government Strategy to the Convenor of the Scotland Bill Committee, 21 November 2011.
86 Scotland Bill Committee, Official Report, 17 November 2011, Col 620.
87 Scottish Government. Letter from the Cabinet Secretary for Parliamentary Business and Government strategy to the Convenor of the Scotland Bill Committee, 21 November 2011.
88 Scotland Bill Committee, Official Report, 1 November 2011, Col 471.
90 Scotland Bill Committee, Official Report, 17 September 2011, Col 577.
143. The need for this principle arises because the UK Government will maintain overall responsibility for deciding on the tax base and thresholds. Policy decisions by the UK Government with regard to these may adversely affect devolved tax revenues. The ‘no detriment’ principle means that “any policy changes to the UK tax base that impact (either positively or negatively) upon the Scottish budget will be compensated by an appropriate adjustment to the block grant”. 91

144. Professor Andrew Hughes Hallett identified to the Committee the type of occasion when an adjustment would need to be made to ensure there was ‘no detriment’ as a result of a UK policy decision. He said—

“In the last UK budget, the lower income tax threshold was raised. Had the Scottish income tax been in operation, such a move would have lowered the revenues coming into Scotland. In England—I am sorry; I should say the rest of the UK, although I pretty much mean England—compensation comes through the raising of national insurance contributions and capital gains tax. In Scotland, those two taxes cannot be raised to compensate in that way.” 92

145. Ben Thomson of Reform Scotland warned the Committee that even with this principle in place, complications could still arise when such adjustments are undertaken. He said—

“The other thing about the income tax proposals is that every time a threshold was changed, the Barnett formula would have to be readjusted, which would be a real black art. At least the Barnett formula is simple, but every time anything changes there has to be a renegotiation. We would get into a position in which the Scottish Government would be set against the Treasury every time proposals were made, which we think is not healthy”. 93

146. Alan Trench speculated that in order to deliver the principle of ‘no detriment’, “the Scottish Government will need to be involved much earlier in discussions [on the UK budget]”. 94

Over-reliance on income tax and the need for a larger basket of taxes

147. A central debate arising during consideration of the Scotland Bill financial provisions is whether or not the tax proposals make the Scottish Government’s budget over-reliant on income tax and the risks associated with this. Some witnesses have presented the case to the Committee that a larger basket of taxes would reduce the impact of income tax revenue volatility and provide the Scottish Government with more adequate tax levers to stimulate economic growth. The evidence in relation to these is looked at in the following paragraphs.

Reducing revenue volatility

148. Income tax revenues are likely to account for around 50% of total devolved tax revenue (if non-domestic rates and council tax are included), which in turn accounts

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93 Scotland Bill Committee, Official Report, 27 September 2011, Col 223.
94 Scotland Bill Committee, Official Report, 1 November 2011, Col 475.
for approximately 30% of the overall current expenditure (see Table 1). Thus, income tax revenues will account for something in the region of 15% of overall current expenditure. To have such a large proportion of the Scottish budget influenced by income tax could, some argue, leaves it exposed to volatilities in this tax.

149. Tax receipts are in general positively correlated with economic activity and the Exchequer Secretary to the Treasury defended the proposals saying that “If more taxes are devolved and a greater share of the Scottish Government’s revenue comes from taxation as opposed to the block grant, the volatility risks will increase […]. I stress the point that income tax is not particularly volatile and is less volatile than other taxes”).

150. However, in his evidence to Committee, the Cabinet Secretary for Finance, Employment and Sustainable Growth stated “we have consistently outlined our significant concerns about the proposals, particularly around the reliance on the performance of one individual tax as the driver of future Scottish budgets.” Professor Andrew Hughes Hallet agreed, arguing that a broadening of the tax base would provide more budget stability—

“[…] taxes do not have the same cycles, there are stability factors, which it would be useful to get your hands on, so that you can benefit from them. It would be useful to have those in the basket”.

151. He also specified which taxes would provide more stability when building up a basket of taxes—

“If you want a secure income stream, for example to ensure that you have the adequate resources to pay on any borrowing, excise taxes—and particularly sin taxes—are the ones to go for. Correspondingly, my guess is that taxes on pollution would also be fairly stable”.

152. In his final appearance before the Committee, the Secretary of State for Scotland stated—

“We have not turned our back on further taxes being devolved but, at this point in time and in terms of achieving our objectives around giving this Parliament greater financial accountability and ensuring that more economic powers are available to the Scottish Government, I think that we are getting the balance right”.

Increasing tax levers to stimulate economic growth

153. Ben Thomson also argued that a basket of taxes would be more effective at stimulating the economy, stating that “income tax is a very blunt instrument”. The

95 Scotland Bill Committee, Official Report, 27 September 2011, Col 286.
100 Scotland Bill Committee, Official Report, 27 September 2011, Col 207.
Scottish section of the Institute of Chartered Accountants in England and Wales (ICAEW) agreed with this viewpoint, and Jim McColl of Clyde Blowers said—

“I agree that it is more desirable to have a basket of taxes. With regard to the 10p variability, you need something to balance that”.

154. However, Garry Clark of the Scottish Chambers of Commerce believes that the Scottish Government has adequate tools—

“I do not believe that it is a matter of devolving a whole set of new tax powers to Scotland. We do not need them all because we already have many tools in our basket to influence businesses to come to Scotland or make domestic businesses more competitive: the planning system; education, in our schools and through to further and higher education; transportation systems; and business rates”.

155. However, while Scotland does have discretion on how to spend in these areas, the Scottish Government feels that “real economic teeth” in the form of financial powers are needed to boost Scotland’s economic growth. In a letter to the Convener of the Committee, the Scottish Government wrote—

“Most significantly, enhanced borrowing powers, the devolution of corporation tax and the management and revenues of the Crown Estate would provide a much more balanced fiscal package and facilitate the tailoring of economic policy to Scotland’s distinct needs”.

156. The evidence in relation to the potential for enhanced borrowing powers, the devolution of corporation tax and the management and revenues of the Crown Estate to boost economic growth is presented in subsequent chapters.

Revenue borrowing powers and the cash reserve

157. As mentioned previously, as part of the Scotland Act 1998, the Scottish Government was given revenue borrowing powers amounting to £500 million from the National Loans Fund to cover “temporary shortfalls of cash or for providing a working balance in the Scottish Consolidated Fund”.

The Scotland Bill proposals and subsequent UK Government amendments

158. The Command Paper accompanying the Bill proposed extended revenue borrowing powers and states that “the extended current borrowing facility will provide Scottish Ministers with the fiscal levers necessary to deal with the deviation between

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101 ICAEW Scotland, written submission to the Committee.
102 Scotland Bill Committee, Official Report, 27 September 2011, Col 261.
103 Scotland Bill Committee, Official Report, 27 September 2011, Col 216.
105 Scotland Act 1998, Explanatory Notes, Section 66: Borrowing by the Scottish Ministers, etc. Purpose and Effect.
forecast and actual outturn receipts that may be associated with the devolved taxes.\textsuperscript{106} Specific details of the proposals are as follows—

- From April 2015 (when it is proposed that SDLT and landfill tax are devolved), the Scottish Government will be able to borrow up to £200 million in any one year with a cumulative limit of £500 million to deal with the situation when outturn tax receipts are less than forecast.

- The first 0.5% (circa. £125 million) of tax shortfall must be absorbed by the Scottish budget.

- Borrowing will be from the NLF and Scottish Ministers will be required to repay their loans within a maximum of four years.

- HM Treasury will have the power to revise the borrowing limits upward or downward through secondary legislation.

159. In addition, it is proposed that a new Scottish cash reserve is created for when actual receipts are higher than that forecast. Monies in the cash reserve would be used to pay for potential future deficits, thus being a tool to manage differences between forecast and actual tax receipts over the long term.

\textit{Previous Scotland Bill Committee recommendations}

160. The previous Scotland Bill Committee generally welcomed the approach, but had concerns about a number of areas where it felt change was needed. As such, it recommended that the Scottish Government should not be required to meet the first £125 million of tax forecasting variation from its budget and that the short-term annual borrowing limit should be increased from £500 million to around £1 billion. The Committee also recommended that the cash reserve should include all Scottish End Year Flexibility (EYF) saved in Scotland without the need for Treasury agreement, so in future Scottish ministers will have total discretion over the Scottish budget.\textsuperscript{107}

\textit{UK Government amendments to date}

161. As mentioned earlier in the report, in response, the UK Government tabled amendments to the Scotland Bill package in relation to revenue borrowing and the cash reserve. This included removing the requirement for Scottish Ministers to absorb the first £125 million of tax forecasting variation within their budget, giving Scottish Ministers more flexibility to decide how best to respond to any variations in tax receipts compared to forecasts and allowing Scottish Ministers to make discretionary payments into the Scottish Cash Reserve for the next five years, up to an overall total of £125 million, to help manage any variation in Scottish income tax receipts compared to forecasts in the initial phase of the new system.\textsuperscript{108}


\textsuperscript{107} Scotland Bill Committee. 1\textsuperscript{st} Report 2011 (Session 3) Report on the Scotland Bill and relevant legislative consent memoranda Para 118.

\textsuperscript{108} UK Government. Correspondence from the Secretary of State for Scotland to the Committee, 13 June 2011, p9.
162. It should be noted that although the above-mentioned changes to the Bill and associated policy have been made by the UK Government, the borrowing limits remain as first proposed when the Bill was introduced.

The Scottish Government proposals for revenue borrowing powers in the Scotland Bill
163. The Scottish Government is concerned that the proposals “would effectively expose the Scottish Budget to cyclical fluctuations in revenue and embed a high degree of volatility in Scotland’s public finances”. It finds three principle shortcomings with the revenue borrowing proposals within the Bill and proposes amendments—

1. The annual and cumulative limits are inadequate. It proposes that borrowing should be subject to a total limit of 5% of the resource base.

2. The proposals do not allow for counter-cyclical borrowing needs. It proposes that borrowing should be permitted to cover cyclical variations in tax receipts, not just differences between the forecast and outturn level of tax receipts.

3. The repayment period is too short for periods of economic downturn. It proposes repayments should be made over 5 years.

164. The Scottish Government has, however, stated that it “does not seek borrowing powers to fund any structural deficit in the Scottish Budget”.

Evidence received on revenue borrowing
165. The UK Government amendments tabled in relation to revenue borrowing and the cash reserve were widely welcomed in evidence submitted to the Committee by the Scottish Government and organisations such as SCDI and the Scottish Property Federation. The Scottish Government stated—

“This Scottish Government welcomed the direction of these proposals, which respond to recommendations in the Scotland Bill Committee report”.

166. However, some key concerns remain among witnesses, and these are outlined in the following paragraphs.

Accuracy of tax forecasts and adequacy of new limits
167. As with the capital borrowing limits, the revenue borrowing limits being proposed in the Bill are still the same as those set for the Scottish Government within the 1998 Scotland Act, in the context of more limited taxation powers. Despite this, the UK Government believes that they remain sufficient. In a letter to the Convener of the Committee, the Secretary of State for Scotland wrote—

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112 Scottish Government. Letter from the Cabinet Secretary for Parliamentary Business and Government Strategy to the Convener of the Scotland Bill Committee, 12 August 2011.
“HMT analysis shows that total savings of £125m, together with the revenue borrowing powers will be sufficient for the Scottish Government to manage forecasting errors in normal times”.\(^{113}\)

168. However, Professor Chris Heady, of the University of Kent, told the Committee that “We are in a time when it is extremely difficult to predict what will happen”.\(^{114}\) Other witnesses also warned about the historic inaccuracy of Treasury forecasts, for example, Garry Clark of the Scottish Chambers of Commerce told the Committee that “Treasury forecasts have been notoriously unreliable for many years – especially recent forecasts, as we have seen”.\(^{115}\) The Scottish Government provided an illustration of how the revenue borrowing limits would have been adequate in recent years—

“An annual cap of £200 million borrowing would have been insufficient to offset falls of £400 million in 2008-09, minus £900 million in 2009-10, and an estimated minus £1 billion in 2010-11 relative to forecast. Moreover, the overall capital of £500 million would have been fully utilised if the downturn has lasted beyond a year”.\(^{116}\)

169. Another key concern highlighted with regard to the forecasting proposals is that the Scotland Bill proposes using forecasts made by OBR at the start of the spending review period. However, forecasts can be subject to greater errors for later years. Professor Hughes Hallett suggested to the Committee that, instead—

“It would pay to have frequent reconciliations rather than waiting three or four years, as is proposed in the case of income tax. Each time new numbers came in on actual revenue, you could reconcile it with the forecast and make adjustments accordingly, at much more frequent intervals”.\(^{117}\)

Counter-cyclical borrowing

170. In their paper on borrowing, the Scottish Government point out that “borrowing to offset forecast errors is not the same as borrowing to offset cyclical fluctuations”.\(^{118}\) The Scotland Bill proposes revenue borrowing for the sole purpose of offsetting forecast errors and does not provide a facility for the Scottish Government to borrow to mitigate the impact of cyclical tax fluctuations on public spending. The Scottish Government explains that—

“The Scotland Bill proposals on taxation and reforming the funding framework would effectively expose the Scottish Budget to cyclical fluctuations in revenue and embed a high degree of volatility in Scotland’s public finances. The proposals for revenue borrowing outlined in the Bill offer only a limited means of cushioning against these shocks”.\(^{119}\)

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\(^{113}\) UK Government. Letter from the Secretary of State for Scotland to the Convener of the Scotland Bill Committee, 22 September 2011.


171. The Cabinet Secretary for Finance, Employment and Sustainable Growth stated—

“We want to put in place a framework for revenue borrowing that provides us with the ability to borrow against volatility in tax revenues, up to a total limit of 5 per cent of the Scottish resource base”.

Repayment

172. The Scottish Government also raised significant concerns with regard to the short repayment period (3 years) that is proposed in the Scotland Bill for revenue loans taken out by the Scottish Ministers. If borrowing is taken out during a prolonged economic downturn, then repayment may be due at a time when public revenues may be already squeezed. The Scottish Government provided an example in their paper on borrowing—

“For example, the £1.3 billion fall in 2008-09 and 2009-10 due to forecasting error would have to be repaid between 2011-12 and 2014-15, when the budget is being cut by around £3 billion. This highlights the risk that repaying high but necessary levels of revenue borrowing over a short time period could damage future economic growth”.

173. To mitigate this, the Scottish Government is proposing that the Bill should be amended so that repayment would be undertaken over five years.

Capital borrowing and bonds

Scotland Bill proposals and subsequent UK Government amendments

174. The Scotland Bill proposes new capital borrowing powers from April 2015. The Scottish Government will be able to borrow up to 10% of the capital budget any year with a cumulative limit of £2.2 billion. Borrowing can be from the NLF, via the Secretary of State for Scotland, or from commercial banks. Loans from the NLF will be for a maximum of 10 years, although longer timeframes may be negotiated.

175. The previous Scotland Bill Committee welcomed the borrowing powers but recommended that the limit should be substantially more and saw no reason why these powers could not be available earlier. It also recommended that the Bill be amended to allow the Scottish Government access to the bond markets.

176. In response, the UK Government later tabled an amendment to the Bill for the Scottish Government to access capital borrowing prepayments to help with some of the early costs in relation to the Forth Replacement Crossing.

177. It also tabled an amendment introducing a power which would enable the UK Government to approve, in the future, the methods by which the Scottish

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120 Scotland Bill Committee, Official Report, 28 June 2011, Col 33.
Government can borrow to include bond issuance, without the need for further primary legislation. It also outlined that it would “conduct a review of the costs and benefits of bond issuance over other forms of borrowing, and will consider extending Scottish Ministers’ powers where this does not undermine the overall UK fiscal position or have a negative impact on total UK borrowing”.

178. It should be noted that although the above changes have been made by the UK Government, the borrowing limits remain as first proposed in the Bill and Command Paper.

Scottish Government proposals for capital borrowing powers in the Scotland Bill
179. The Scottish Government believes that the capital borrowing proposals within the Bill require enhancement and that the subsequent UK Government amendments “do very little to offset the huge loss in Scotland’s capital spending power, a reduction of £4.1bn in real terms over the 2010 Spending Review period”.

180. The Scottish Government published proposals for greater amendments to the Scotland Bill in relation to capital borrowing. Its proposed framework is based on an assessment of overall debt sustainability and the ability of the Government to service any debt, and suggests permitting—

- Annual borrowing equivalent to 2% of Scottish Government resources;
- A cumulative borrowing limit equivalent to 20% of Scottish Government resources; and
- These powers to be in place from the enactment of the Bill.

Evidence received on capital borrowing
181. The Committee received evidence in relation to the Bill, with UK Government amendments, and the Scottish Government proposals. The key issues are outlined in the following paragraphs.

Borrowing as an economic stimulus
182. Similar to evidence heard by the predecessor Committee, many witnesses have again raised concerns that the borrowing powers are inadequate and will be unable to provide a much needed economic stimulus because (i) the limits are too low, (ii) the powers do not come in early enough and (iii) as limits currently proposed are a proportion of Scotland’s capital budget, this means that Scotland’s capacity to borrow is lowest when it is most needed. The Scottish Building Federation, the Scottish section of the Institute for Chartered Accountants in England and Wales, SCDI and the Scottish Property Federation all expressed concerns in relation to the proposals being inadequate to stimulate economic growth. For example, SCDI stated—

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124 UK Government. Letter from the Secretary of State for Scotland and the Chancellor of the Exchequer to the Oldest Member of the Scotland Bill Committee, 13 June 2011.
“SCDI believes that investment in strategic infrastructure that will provide a short-term boost to economic activity and increase long-term economic output, such as transport and digital connectivity, should be prioritised at this time, and we recommend further consideration of the proposed borrowing limit to support Scotland’s capital programme”.127

183. The Scottish Government has also been critical of the UK Government amendment with regard to borrowing pre-payments, stating to Committee that—

“It would not amount to early implementation of borrowing powers of any substance and gives no clarity on how much the Scottish Government will be able to borrow in this Parliament to bring forward investment to support the economy”.128

184. It is calling for immediate implementation of full capital borrowing powers; however, the UK Government explained that they are “constrained by the fiscal situation that we are in and the paramount need to retain our fiscal credibility”.129 The UK Government did indicate to the Committee that there may be scope for greater flexibility in the future.

185. The Scottish Government has told the Committee that it does not accept this position as it believes that “the UK Government has a range of options available to bring forward substantial capital borrowing powers for Scotland, within the current CSR settlement”130, such as the use of unallocated funds or through the reallocation of savings.

Establishing a prudential borrowing framework

186. The Scottish Government’s paper on borrowing powers outlines its concerns that the current borrowing framework “has been developed without any explicit discussion of sustainability and affordability, and without offering any objective means to test these essential criteria”.131

187. Capital borrowing limits are currently proposed in the Bill as a proportion of the capital budget. As highlighted earlier, this means that borrowing limits are at their lowest when, typically, borrowing is needed most. The Scottish Government and several witnesses have suggested that it would be more sensible if limits were set according to the Scottish Government’s ability to service any debt using its block grant and revenue resource base. The Chartered Institute of Public Finance and Accountancy (CIPFA) submitted evidence to the Committee highlighting that this is how the borrowing framework works for local authorities. It said—

“In the spirit of affordability, the parameters for local authority borrowing levels are based upon relationship to revenue income rather than capital budget”.132

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127 SCDI, written submission to the Committee.
128 Scottish Government. Letter for the Cabinet Secretary for Parliamentary Business and Government Strategy to the Convener of the Scotland Bill Committee, 12 November 2011.
129 Scotland Bill Committee, Official Report, 8 September 2011, Col 303.
132 CIPFA, written submission to the Committee.
188. They explained that local government borrowing is controlled by the ‘prudential framework’ whereby capital expenditure plans must be affordable, external borrowing must be within prudent and sustainable levels and treasury management decisions are taken in accordance with good professional practice. CIPFA recommend that a governance and control framework for capital borrowing, which could be based on the ‘prudential framework’, is developed prior to enactment of the Bill.

189. The Calman Commission also recommended that there should be an overall limit to capital borrowing similar to the ‘prudential framework’ for local authorities.\textsuperscript{133} In this situation, the Secretary of State for Scotland warned the Committee that—

“As I understand it—I do not claim to be an expert—the prudential regime is quite tight and controlled, more so than I would envisage the capital facility will be when it comes fully on stream in 2015, so the facility that we are offering might be better”.\textsuperscript{134}

190. However, the Cabinet Secretary for Finance, Employment and Sustainable Growth, explained to Committee that the Government had attempted to create a prudential borrowing framework and that they have calculated that it enables—

“[…] the Scottish Government to undertake capital borrowing that is equivalent to 2 per cent of its annual resources—on current numbers, that would be £558 million. The stock of debt would have to be capped at the equivalent of 20 per cent of Scottish Government resources”.\textsuperscript{135}

191. It is therefore questionable to some whether there is a sense of logic is missing from the Bill when it comes to the borrowing limits proposed. There appears to be support for a governance and control framework for borrowing, such as the prudential framework, and for this to be proposed within the Scotland Bill and used to set Scottish Government borrowing limits based on affordability.

\textit{Access to bond markets}

192. It is acknowledged that bonds can be a more costly form of financing, relative to the NLF, but the Committee notes that there is continuing interest in them as an alternative source of finance.

193. The Scottish Government believes that the additional provision added to the Bill with regard to bonds offers “limited progress”\textsuperscript{136} and only removes the legislative obstacle to issuing bonds, as opposed to granting the power. It is also concerned with regard to the review that the UK Government is suggesting on the costs and benefits of bond issuance by Scottish Ministers’ relative to other forms of borrowing. It believes that it is more appropriate for the Scottish Ministers to consider the full range of debt instruments and select the best option and said—

\textsuperscript{134} Scotland Bill Committee, \textit{Official Report}, 8 September 2011, Col 57.
\textsuperscript{136} Scottish Government. Letter from the Cabinet Secretary for Parliamentary Business and Government Strategy to the Convener of the Scotland Bill Committee, 12 August 2011.
“There is no justification for the UK Government to create legal or bureaucratic obstacles to prevent the Scottish Government issuing its own bonds”.  

194. However, Alan Trench was sceptical about the Scottish Government being able to issue its own bonds, saying that the problem is that “the markets will assume that there is a UK guarantee, even if the legislation says that there is no guarantee whatsoever for Scotland-issued bonds. That could have all sorts of peculiar effects for the UK”.  

Stamp duty land tax, landfill tax and new taxes – “devolved taxes”

Background

195. Stamp Duty Land Tax is a tax on land transactions and landfill tax is a tax on the disposal of waste to landfill. SDLT is estimated to have raised around £300 million and landfill tax £90 million in 2009-10, together accounting for 0.9% of total revenues in Scotland (including North Sea revenues). While SDLT is a very cyclical tax, landfill tax revenues have grown in recent years as rates have risen. It should be noted that a large percentage of landfill tax is levied on local authorities for disposing waste to landfill and it could thus be viewed as a circuitous tax.

The Scotland Bill proposals

196. The UK Government proposes to devolve SDLT and landfill tax from April 2015. These would become “devolved taxes” with the design and collection the responsibility of the Scottish Government. These taxes would cease to apply in Scotland and this would provide the Scottish Government with the capacity to reform taxation on land transactions and the disposal of waste to landfill.

197. The Bill also proposes giving the Scottish Parliament the power to be able to create ‘new taxes’ applicable only to Scotland, with the agreement of the UK Government and Parliament.

Views expressed to the Committee

198. The devolution of these taxes was welcomed by many witnesses who gave evidence to the previous Scotland Bill Committee. This Committee has not received significant new evidence on the devolution of these taxes, although there has been evidence received on the Landfill Communities Fund, which encourages landfill site operators to fund local community environmental projects through providing them with a tax credit for contributions they make to environmental bodies, and this is outlined below.

Landfill Communities Fund

199. One issue that was raised with our predecessor and continues to be raised with this Committee is the continuation of the Landfill Communities Fund. This was supported by Bill Garner, the Royal Society for the Protection of Birds (RSPB), the

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137 Scottish Government. Letter from the Cabinet Secretary for Parliamentary Business and Government Strategy to the Convener of the Scotland Bill Committee, 12 August 2011.
138 Scotland Bill Committee, Official Report, 1 November 2011, Col 484.
139 SPICe estimate.
Scottish Landfill Communities Fund Forum, the Scottish Wildlife Trust, Waterways Scotland Trust and Froglife Scotland who said—

“If Landfill Tax is devolved the Scottish Government should, at a minimum, strive to continue the good practice of the Landfill Communities Fund by allowing landfill operators to pay a percentage of their Landfill Tax into an LCF or similar, in order to maximise the environmental benefits of this form of hypothecated taxation.”

Air passenger duty and aggregates levy

200. Although the devolution of the APD and the aggregates levy was recommended by the Calman Commission in its final report, the UK Government did not propose their immediate devolution in the Scotland Bill, although the Command Paper states that they will be considered for devolution in the future.

201. APD has not yet been included in the Scotland Bill proposals because it is currently subject to a review at the UK level. The UK Government response to the consultation is due “this autumn”, but the UK Government have already announced that from 1 November 2011, APD will be cut for passengers travelling on direct long-haul routes departing from airports in Northern Ireland. HM Treasury have explained that, as the UK Government is setting a different rate of APD in a specific region of the UK, then in order to comply with EU law that region is incurring the cost of the reduced revenue (to meet with EU law in relation to devolved taxes). The cost of reducing APD in Northern Ireland will thus ultimately fall to the Northern Ireland Executive.

202. On 6 December 2011, HM Treasury made a further announcement regarding APD stating that “to provide a lasting solution in Northern Ireland, the Government has launched a parallel process to devolve aspects of APD to the Northern Ireland Assembly” and that “legislation to achieve this will be introduced as soon as possible”. However, in relation to other Devolved Administrations, the UK Government said that it will “continue to explore the feasibility and likely effects of devolution of APD to Scotland and Wales.”

203. The UK Government also does not propose to devolve the aggregates levy at this stage as the British Aggregates Association is currently challenging the legality of the aggregates levy in the High Court in England and the EU General Court. The British Aggregates Association state that their case “is based on illegal State Aid being given to competing industries many of which have a much greater environmental footprint than aggregates quarries [...] As we have already won our appeal in the higher court, the ECJ, we expect a positive outcome within a matter of months”. The outcome of this is due within the next year, but overall proceedings may continue much longer than that.

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141 Froglife Scotland, written submission to the Committee.
143 HM Treasury, Chancellor announces overhaul of Northern Ireland flight tax, 27 September 2011.
145 BAA, written submission to the Committee.
Evidence received on APD

204. The evidence which the Committee received raised concerns with regard to the effectiveness of the existing air passenger duty regime in the UK. The key issues raised are outlined in the following paragraphs.

APD as an economic tool

205. According to a report prepared by York Aviation on behalf of Aberdeen, Edinburgh and Glasgow airports, the UK has the highest level of airport taxation in Europe.\(^{146}\) Given the global nature of business, Scotland’s economy is dependent on good air connections, as well as wider connections through other modes of travel. However, evidence was presented to the Committee that Scottish airports have difficulty competing to secure new routes without intervention because of the extra fuel costs that an airline incurs flying to regional airports and the aviation duty regime in the UK.

206. The British Airports Association, PwC, SCDI and the Scottish Chambers of Commerce are all in favour of the devolution of APD so that the Scottish Government can help Scottish businesses do business globally. The Scottish Chambers of Commerce wrote—

“If Scotland is to maintain a competitive position and attract tourism and investment to our nation, the Scottish Government will require a greater variety of policy and fiscal tools at its disposal. This makes it even more important that APD is devolved to Scotland.”\(^{147}\)

APD as an environmental tool

207. Although APD is considered by some as an environmental tax, the Committee received evidence suggesting that there may be other more appropriate methods for taxing or cutting \( \text{CO}_2 \) emissions such as the European Emissions Trading Scheme, suggested by the British Airports Authority, or changing the tax from a ‘per-passenger’ duty to a ‘per-plane’ duty which may incentivise airlines to fill up their planes, suggested by the RSPB.

208. Amanda McMillan, Managing Director of Glasgow Airport, explained to the Committee that there is recognition that aviation should be taxed, but that she had concerns about the current taxation regime in the UK. She stated that “devolution is about a clear understanding of the importance of aviation to Scotland. That is what I am looking for”.\(^{148}\)

Powers to alter APD in the scope of EU law

209. Another issue that has come to the attention of the Committee is that it is not clear at this stage whether or not the devolution of APD would comply with EU law. In addition, if it is compliant with EU law to devolve APD, then there may still be EU


\(^{147}\) Scottish Chambers of Commerce, written submission to the Committee.

restrictions on how the tax is structured or levied which would restrict the extent to which the Scottish Government could reform the tax or differentiate the rate from the rest of the UK. Amanda McMillan admitted to the Committee that “EU law is definitely a concern\textsuperscript{149}, when it comes to the devolution of APD. Lastly, the Committee is aware that it may be that the tax is abolished if Scotland is required to join the EU Emissions Trading Scheme in 2012, which Amanda McMillan described as “a more appropriate mechanism whereby the industry can pay its way”.\textsuperscript{150}

210. Additionally, if APD (or the Aggregates Levy) is declared illegal, there are two separate possibilities that may happen. Firstly, the taxpayer concerned may be entitled to recover any tax paid subject to the time limits and the possibility that there would be an unjust enrichment defence. Secondly, there is a possibility that were such a decision that a reduction in rates constituted illegal state aid, then that would have to be repaid by the business that benefited.

\textit{Evidence received on the aggregates levy}

211. The evidence received on the aggregates levy focussed on frustrations that the industry has with the existing levy. The issues on which evidence was received are outlined in the following paragraphs.

\textbf{Fairness}

212. A key concern that the Committee has heard about with regard to the existing tax is that it is currently levied unfairly across the industry. The British Aggregates Association believes that this is brought about because “the aggregates levy is one of the most complex taxes on the statute book and is an absolute minefield of exemptions and rebates”.\textsuperscript{151} Evidence received suggests that the industry is asking that, if the tax is to continue to be levied, it should be levied in a fairer manner across all aggregates.

\textbf{Aggregates levy as an environmental tool}

213. There have been reports that the aggregates levy has not delivered increased recycling and that it has had no positive impact on the environment. One of the key issues with the existing design of the tax is that it is not linked directly to environmental impact of extracting certain aggregates or the environmental performances of businesses. There is frustration within the industry that the aggregates levy may be being branded an environmental tax. Giving evidence to Committee, Richard Bird of the British Aggregates Association stated “We argue that it is certainly not an environmental tax, there is nothing environmental about any of it [...] If it will be a finance-raising measure, that is fine, but do not cover that up by suggesting that it is some sort of green tax”.\textsuperscript{152}

214. If this tax were devolved, it may be that this would create an opportunity for it to have more of a positive impact on the environment, particularly if it was applied more

\begin{footnotesize}
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    \item \textsuperscript{149} Scotland Bill Committee, \textit{Official Report}, 27 September 2011, Col 240.
    \item \textsuperscript{150} Scotland Bill Committee, \textit{Official Report}, 27 September 2011, Col 239.
    \item \textsuperscript{151} BAA, written submission to the Committee.
    \item \textsuperscript{152} Scotland Bill Committee, \textit{Official Report}, 27 September 2011, Col 233 and 241
\end{itemize}
\end{footnotesize}
fairly and if revenues were used, as suggested by the RSPB, to “push forward environmental objectives”.\textsuperscript{153}

Devolving the tax and the impact on businesses

215. The Committee is aware that the devolution of aggregates levy would bring with it additional administrative and compliance costs for the Scottish Government and businesses, which may or may not be outweighed by any benefits brought from a new tax being in place in Scotland. Consideration would need to be given on how to minimise these costs.

216. In addition, witnesses have pointed out that consideration should be given to the potential legal and illegal cross-border trading which might occur between Scotland and the rest of the UK, which would impact on revenues for all regions. PwC warned the Committee that—

“When AGL [aggregates levy] was introduced, there were specific problems in Northern Ireland due to its land border with the Republic of Ireland. This resulted in smuggling aggregates across the land border, an increase in imports of aggregates from RoI, and illegal sites being used to extract aggregates […] A similar situation could result in Scotland”.\textsuperscript{154}

EU risks

217. A final consideration should be given to the risk associated with devolving aggregates levy now in the face of EU proceedings. The Scottish Government suggests that this should not preclude the devolution of these taxes and states—

“It would be possible to delay commencement of the [aggregates levy] provisions until the legal position has been resolved, and it would then be for the Scottish Parliament to ensure that Scottish legislation met EU requirements”.\textsuperscript{155}

218. However, it is not yet apparent to the Committee what the consequences may be of taking on a duty and then finding in the future that the Court of Justice finds it incompatible with EU Law. In such a case, EU law potentially gives the aggrieved taxpayer a right of redress. The Committee notes that when Denmark was subject to a legal ruling where a particular levy was found incompatible with EU law, Denmark was ordered by the Court of Justice to repay the amount yielded by the levy to the taxpayers. Denmark asked the Court of Justice to limit the repayment of the levy because of what it described as the extremely serious consequences which such a decision would have for Denmark’s public finances. However, the request to limit the effects was rejected.\textsuperscript{156} The potential devolution of aggregates levy raises an important question about who would bear the cost of unravelling any consequences

\textsuperscript{153} RSPB, written submission to the Committee.
\textsuperscript{154} PwC, written submission to the Committee.
\textsuperscript{155} Scottish Government, Letter from the Cabinet Secretary for Parliamentary Business and Government Strategy to the Convener of the Scotland Bill Committee, 12 August 2011.
\textsuperscript{156} EUR-Lex, 61990CJ0200, Judgement of the Court of 31 March 1992.
of a duty being found to be incompatible with EU law. This point is also made above in relation to APD.

**Corporation tax**

*Background*

219. Decisions on Corporation tax are currently reserved to the UK Government. The main rate of corporation tax in the UK is currently 26%, but companies with taxable profits under £300,000 are subject to a reduced “small profits rate” of 20% with a tapered increase up to the main rate as profits rise from £300,000 to £1,500,000.\(^\text{157}\) The Chancellor of the Exchequer has announced that the main rate will decline in 1% steps in each of the next 3 years to reach 23% from April 2014.\(^\text{158}\)

220. The effective rate of corporation tax can be significantly lower than the main rate depending on the degree to which allowances reduce the level of taxable profits. Thus in 2010, Germany had a main rate of 30.2% but an effective average rate of 24.2%, the UK main rate was 28% but the effective average rate was 18.8% and Ireland’s main rate was 12.5% but the effective average rate was 10.9%.\(^\text{159}\)

221. Corporation tax, excluding offshore oil and gas, raised £30 billion\(^\text{160}\) for the UK exchequer in 2009-10, of which an estimated £2.6 billion\(^\text{161}\) could be attributable to Scotland. The OBR forecasts that the UK onshore yield from corporation tax will increase to £45 billion by 2015-16.\(^\text{162}\)

*Commission on Scottish Devolution and corporation tax*

222. The Calman Commission identified corporation tax as a possible candidate for devolution but sought views from an Independent Expert Group on the potential for harmful tax competition this might create. The Group recognised that devolving corporation tax would represent an increase in the financial accountability of the Scottish Parliament but thought the scope for reductions in the possible rate of corporation tax in Scotland were limited unless the Scottish Government was able to increase revenues from other sources.\(^\text{163}\)

223. The Group stated that they were—

“[…] not convinced that allowing the Scottish Parliament to determine a Scottish rate of corporation tax would produce harmful tax competition because the scope to vary the rate is, in effect, constrained. Even so, the potential for differing rates of corporation tax across the UK would create economic inefficiencies as firms react to tax considerations rather than commercial factors. We also think the potential administrative impacts of such a move are significant.”\(^\text{164}\)

\(^{157}\) HM Revenue and Customs, *Corporation Tax rates*.


\(^{159}\) Hassett K. A. and Mathur A., *Report Card on Effective Corporate Tax Rates* Table 2.

\(^{160}\) OBR, *Economic and Fiscal Outlook*, Table C3.

\(^{161}\) Scottish Government, *Government Expenditure and Revenue Scotland 2009-10*, Table 4.1.

\(^{162}\) OBR, *Economic and Fiscal Outlook*, Table C3.


224. For these reasons and supporting evidence from bodies such as the Scottish Retail Consortium, CBI Scotland and the Chartered Institute of Taxation, the Calman Commission rejected devolution of corporation tax and there are no proposals for the devolution of corporation tax in the Scotland Bill.

Previous Scotland Bill Committee
225. The previous Scotland Bill Committee still considered the case for devolving corporation tax but stated that they—

“did not believe that Scotland should seek to maximise its tax income by becoming a tax haven for companies operating elsewhere in the UK.”  

226. The Committee noted, however—

- that the use of corporation tax as a development tool especially by small countries and concluded that it should not be ruled out entirely for the future;

- the idea in the Report of the Holtham Commission for Wales\(^\text{166}\) of a method that might be used to devolve corporation tax while avoiding some of the risks by relating the corporation tax liability of a company in Wales or Scotland to activity or proportion of payroll there; and

- the commitment by the UK Government to consider whether there is scope for reducing corporation tax in Northern Ireland, again for economic development reasons, bearing in mind the land border with the Republic of Ireland with its low tax rates.\(^\text{167}\)

227. The previous Committee decided not to support legislation for corporation tax devolution to Scotland but concluded, however, that if corporation tax variation were to become part of a regional development strategy or were to be available in other devolved administrations then it should also be available as an option for a Scottish Government.\(^\text{168}\)

228. Two members of the previous Scotland Bill Committee did not agree with these views and submitted a minority report recommending that—

“[…] the Bill be amended to include the devolution of corporation tax so that a competitive rate of corporation tax can be set in Scotland to increase our competitiveness, attract business and create jobs.”\(^\text{169}\)

Scottish Government’s discussion papers
229. The Scottish Government published Corporation Tax Discussion Paper: Options for Reform in August 2011 inviting discussion of a competitive corporation

\(^{165}\) Scotland Bill Committee 1st Report, 2011 (Session 3) para 54.
\(^{166}\) Independent Commission on Funding and Finance for Wales, Fairness and accountability: a new funding settlement for Wales, Final Report, July 2010.
\(^{167}\) Scotland Bill Committee 1st Report, 2011 (Session 3) para 57.
\(^{168}\) Scotland Bill Committee 1st Report, 2011 (Session 3) para 59.
\(^{169}\) Scotland Bill Committee 1st Report, 2011 (Session 3) Annex A.

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tax regime in Scotland.\textsuperscript{170} This was followed in September 2011 with a paper proposing that the Scotland Bill be amended to devolve corporation tax to the Scottish Parliament, with a like-for-like adjustment to the Scottish Budget.\textsuperscript{171} The Scottish Government expects that the net cost to the UK Exchequer would be zero.

230. In evidence to the Committee, the Cabinet Secretary for Finance, Employment and Sustainable Growth confirmed that it was the Scottish Government’s view that corporation tax in its entirety should be devolved and not just responsibility for the rate.\textsuperscript{172} He said that it would be his position that all the features that make a corporate tax system, such as the exemptions, reliefs, allowances and rates should be wholly devolved and that the UK Parliament, under the Scotland Bill should have no role in these matters.\textsuperscript{173}

\textit{Evidence received on corporation tax}

231. Many responses to the Committee’s call for evidence made specific references to corporation tax. A diverse range of views have been presented to the Committee. The Committee noted a lack of a clear view from some respondents reflecting uncertainty over the way in which the power might be used. The key themes arising are outlined in the following paragraphs.

\textbf{The case for devolving corporation tax}

232. One of the objectives of the Scotland Bill as set out in the Command Paper is to “enhance the financial accountability of the Parliament and Government in Scotland”\textsuperscript{174} and that “measures to improve the financial accountability of the Scottish Parliament are at the centre of the Scotland Bill.”\textsuperscript{175} Devolving corporation tax would undoubtedly increase the share of revenue under the control of the Scottish Parliament. Devolving control of the tax regime including exemptions, reliefs, allowances and rates would provide an additional tool for managing the economy. Much of the evidence focussed on the latter aspect but Reform Scotland and the Scottish Youth Parliament emphasised the former.

\textbf{Increasing accountability}

233. Reform Scotland view is that each layer of government should be responsible for the money it spends and therefore the Scottish Parliament should raise almost all the money it has responsibility for spending. They believe that better government comes from politicians being financially accountable for their decisions and that the centralised allocation of budgets provides the wrong incentives for promoting efficient public sector spending.\textsuperscript{176} On the other hand, SCDI found mixed evidence that devolving greater powers to sub-central governments to raise and spend their own funds is in itself enough to promote economic growth.\textsuperscript{177}

\textsuperscript{170} Scottish Government Corporation Tax: Discussion Paper: Options for Reform
\textsuperscript{171} Scottish Government Devolving Corporation Tax in the Scotland Bill.
\textsuperscript{172} Scotland Bill Committee, Official Report, 17 November 2011, Col 571.
\textsuperscript{173} Scotland Bill Committee, Official Report, 17 November 2011, Col 571.
\textsuperscript{174} UK Government Strengthening Scotland’s Future p9.
\textsuperscript{175} Michael Moore Hansard 27 Jan 2011 Col 468.
\textsuperscript{176} Reform Scotland, evidence submitted to the Committee, Appendix.
\textsuperscript{177} Scottish Council Development and Industry, evidence submitted to the Committee, p5.
234. Scottish Government figures show that in 2009-10, corporation tax, excluding North Sea, raised £2.6 billion in Scotland, 8.7% of total UK onshore receipts.\(^{178}\) If Scotland’s share of receipts remained at the same level then by 2015-16, corporation tax would generate revenue of £4 billion annually. This is likely to be over 10% of Scottish Government spending by that date, and would far exceed the amounts raised by stamp duty land tax and landfill tax, two other taxes which are proposed for devolution and would represent a significant increase in the financial accountability of the Scottish Parliament. The Independent Expert Group to the Calman Commission noted that “other taxes have a closer connection to the electorate”\(^ {179}\) but it could be argued that stamp duty or landfill taxes have a similar disconnect for most of the electorate.

**Corporation tax as an economic tool**

235. The other argument made for devolving corporation tax is that tax has an impact on decisions by businesses on where and how much they invest. The ability to change, more specifically perhaps reduce, the rate of corporation tax would give the Scottish Government an additional tool in managing the economy and promoting economic development.

236. The need for such a tool was emphasised by Jim McColl, Chairman and Chief Executive of Clyde Blowers who said—

“We have to do something to increase the number and size of businesses in Scotland. It is necessary to give businesses some reason to locate in Scotland. We need the power to attract more businesses.”\(^ {180}\)

237. The UK Government clearly believes that there is a link between corporation tax rates and economic growth. It wishes to create the most competitive tax system in the G20 and has announced a reduction in the main rate of corporation tax to 23% by 2014.\(^ {181}\)

238. The Scottish Government argues that a lower corporation tax will encourage more investment in plant and equipment, training and research and development with beneficial effects on employment, productivity and earnings.\(^ {182}\) It reports the results of initial modelling work to explore how changes to the corporation tax rate could impact on the Scottish economy. This assumes pre-announcing a reduction in corporation tax in Scotland equivalent to a fall from 23% to 20% (i.e. 3% points below the rate planned to be introduced by the UK Government in 2014-15).\(^ {183}\)

239. The long-term results from the modelling indicate:

- An increase in the level of Scottish GDP by 1.4% after 20 years;

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\(^ {178}\) Scottish Government, *Government Expenditure and Revenue Scotland 2009-10* Table 4.1.


\(^ {181}\) HM Treasury *Budget 2011* p2.


- An increase in overall employment in Scotland by 1.1% (equivalent to around 27,000 jobs) after 20 years;
- An increase in overall investment in the Scottish economy by 1.9% after 20 years; and
- A boost to Scottish exports to the rest of the UK by 1.4% and to the rest of the world by 1.3% after 20 years.\(^{184}\)

240. The Scottish Government subsequently published a paper\(^ {185}\) which gave more details of the assumptions used and the impacts which resulted. The model takes the underlying rate of growth of the economy as given, which is standard for this type of modelling. The simulation considers the changes in output and other economic variables as a result of a change in corporation tax, in isolation from other shocks and policy changes that the economy might experience over the period considered. The simulation was run for up to 50 years to allow the economy to reach a new stable state, although most of the impact on key variables was found to be realised within the first 20 years.

241. The assumptions are—

- A change in corporation tax equivalent to a reduction in the headline rate from 23% to 20%
- No change in corporation tax rates (or any other policy) in the rest of the UK and in other countries
- Free flow of labour in and out of the country with the flow governed by the differentials between unemployment rate and real wages in Scotland compared to the rest of the UK
- No change in the real wage or in unemployment in the long term compared with what they would have been without the policy change


242. The impacts over 20 years and in the long run are summarised in the table below.

**Table 7 Percentage changes in key variables as a result of a reduction in the corporation tax rate**

<table>
<thead>
<tr>
<th>Variable</th>
<th>Long term impacts</th>
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<td>20 years</td>
<td>Long-run</td>
</tr>
<tr>
<td>GDP</td>
<td>1.4%</td>
<td>1.5%</td>
</tr>
<tr>
<td>Employment</td>
<td>1.1%</td>
<td>1.3%</td>
</tr>
<tr>
<td>CPI</td>
<td>-0.2 to 0.3%</td>
<td>-0.3%</td>
</tr>
<tr>
<td>Unemployment rate</td>
<td>-0.3%</td>
<td>0.0%</td>
</tr>
<tr>
<td>Nominal Wage</td>
<td>-0.2%</td>
<td>-0.3%</td>
</tr>
<tr>
<td>Real Wage</td>
<td>0.0%</td>
<td>0.0%</td>
</tr>
<tr>
<td>Household Consumption</td>
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<tr>
<td>Government Consumption</td>
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<td>Investment</td>
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</tr>
<tr>
<td>Capital Stock</td>
<td>1.8%</td>
<td>2.0%</td>
</tr>
<tr>
<td>Export RUK</td>
<td>1.4%</td>
<td>1.6%</td>
</tr>
<tr>
<td>Export ROW</td>
<td>1.3%</td>
<td>1.4%</td>
</tr>
<tr>
<td>Indirect Tax revenues</td>
<td>0.8%</td>
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</tr>
<tr>
<td>Income Tax revenues</td>
<td>0.9%</td>
<td>1.0%</td>
</tr>
</tbody>
</table>

Source: Scottish Government

243. However, the assumptions underpinning the model have been called into question by some witnesses. Derek Allen from the Institute of Chartered Accountants Scotland stated that—

“[…] it is absurd to assume a static background. In Europe, measures are being brought forward to introduce a common consolidated tax base for corporation tax. A number of jurisdictions in Europe are already lowering their tax rates and pushing corporation tax down.” 186

244. The Committee notes that even assuming no change elsewhere, the impact on factor productivity shown in the modelling could be considered modest. GDP growth of an extra 1.4% over 20 years and extra employment growth of 1.1% in the same period implies extra labour productivity growth of 0.3% over 20 years or 0.015% per annum. Capital productivity may decline and it is not clear what the impact would be on Net National Product, a better measure of the income enjoyed by Scottish residents as opposed to overseas owners of businesses.

245. The Scottish TUC questioned whether a reduction in the rate of corporation tax would achieve the benefits claimed arguing that there is no evidence that Scottish businesses are over taxed, that a reduction in corporation tax would further increase income inequality and that it would be “hugely irresponsible to develop policy on the basis that a corporation tax cut will pay for itself”. 187

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246. ICAS believes that the benefits of a lower rate are limited by the cuts in rates already announced by the UK Government.\textsuperscript{188} Dr Graham Gudgin, formerly of the Northern Ireland Economic Reform Group, stated that low corporation tax only works well for very weak economies. The economy of the Republic of Ireland was extremely weak in the 1950s when it first started competing on corporation tax. He said, "Northern Ireland is very weak now, but Scotland is not – it is an averagely strong economy."\textsuperscript{189}

247. Norman Springford of the APEX Group stated that—

"[...] attracting companies to set up a head office structure in Scotland does not necessarily create growth in employment; it amounts to merely shifting money around. If you are asking what the level of taxation should be, my answer is that it should be set with regard to the unitary system of tax in the UK. Whatever tax rate the rest of the country is using should be the rate that Scotland uses too."\textsuperscript{190}

248. However, when asked in relation to SMEs, Mr Springford said—

"...if I were a politician, I would say that we should keep the main level of corporation tax for the larger companies—they generate the bulk of the revenue in any event—but give incentives to SMEs. That is not a particularly expensive option, because they are not paying all that much in corporation tax anyway, in relation to the big guys. However, doing that will create a level of growth."\textsuperscript{191}

249. The Scottish Government seeks devolution of all aspects of corporation tax not only the rate of corporation tax but also over exemptions, reliefs and allowances.\textsuperscript{192} This would allow the Scottish Government to target activities it deems particularly desirable such as research and development.

250. Other witnesses who appear at the Committee were supportive of this view. Martin Togneri, formerly chief executive officer at Scottish Development International, was of the opinion that—

"[...] lowering corporation tax is generally beneficial to economic growth and employment generation. On its specific impact on things like research and development or entrepreneurship—this comes back to the point that others and I have made already—it is probably best not used in isolation. I believe that lowering tax would have a beneficial effect on R and D and entrepreneurship, but so would other things... The impact of corporation tax specifically is much more likely to be on broader measures such as economic growth and employment. You can encourage research and development with specific R and D tax credits or grants of various sorts. You can encourage entrepreneurship by making changes to the capital gains tax regime or through entrepreneurial education. I do not think that the potential for lowering

\textsuperscript{188} Institute of Chartered Accountants Scotland, written submission to the Committee, p18.
corporation tax to impact on R and D and entrepreneurship is as important as its potential to impact on economic growth and employment generally.\footnote{Scotland Bill Committee, \textit{Official Report}, 27 September 2011 Col 225.}

\textit{Risks associated with devolving Corporation Tax}

251. The risks, identified by witnesses, of devolving corporation tax can be grouped under the following headings—

- A loss of revenue to the Scottish Government if the rate of corporation tax is reduced or allowances increased;
- A loss of revenue by other jurisdictions as a result of profit shifting, tax-motivated incorporation and loss of investment;
- Volatility of corporation tax revenue leading to volatility in the funding of Scottish public services; and
- Increased cost of collection and compliance.

\textbf{Loss of revenue to the Scottish Government - EU issues}

252. Concern about tax competition has led to the European Commission preventing Member States from using corporation tax as a form of regional assistance. However a ruling by the European Court of Justice (ECJ), known as the Azores case, allows a devolved administration to vary corporation tax provided it has sufficient autonomous power. The ECJ ruled that the exercise of sufficient autonomous powers requires that—

- The decision must have been taken by a regional or local authority which has from a constitutional point of view, a political and administrative status separate from that of the central government;
- The decision must have been adopted without the central government being able to directly intervene as regards its content; and
- The financial consequences of a reduction of the national tax rate for undertakings in the region must not be offset by aid or subsidies from other regions or central government.\footnote{Court of Justice of the European Communities Press Release No 66/06.}

253. This means that any loss of tax yield as a result of changes to corporation tax must be borne by the Scottish Government. Professor Rosa Greaves of the University of Glasgow confirmed that “no offset must be available for any potential loss. If a region takes autonomy, it takes it with the positive and the negative”.\footnote{Scotland Bill Committee, \textit{Official Report}, 8 November 2011 Col 534.}
Loss of revenue to the Scottish Government – evidence received

254. Referring to an explanatory note prepared by HMRC, the Secretary of State for Scotland stated that if the Scottish Government reduced the rate to the Irish level of 12.5% then the cost to the Scottish budget could be as much as £2.6 billion. The Committee notes the GERS report stating that the value of Corporation Tax raised in Scotland in 2009/10 was £2.6bn.

255. In arriving at its figure, HMRC included direct losses from businesses in Scotland that would have paid a higher rate and losses to the UK exchequer due to—

- businesses transferring activities and profits from other parts of the UK to Scotland, and
- tax-motivated incorporation in which, with a lower level of corporation tax, individuals, sole traders and others decide to incorporate rather than remain as part of the income tax arrangements.

256. The Secretary of State was challenged on the figure of £2.6 billion and the method used to arrive at the estimate. He was prepared to accept that—

“There will be offsets to this, but we need to see the detailed case and the arguments. The question is whether the benefits offset what we have set out here in a way that is not inherently costly”.

257. However, Ben Thomson of Reform Scotland referred to the HMRC paper which makes this assertion. Mr Thomson said—

“I tried to work out the numbers. They are inconsistent. If the whole tax take is £2.6bn, it should not go from £2.6bn to nothing if the tax is reduced from 26% to 12.5%; something should be collected.”

258. The Scottish section of the Institute of Chartered Accountants of England and Wales sees a corporation tax rate reduction to generate an increased yield in the medium to long term as “a gamble.” The Scottish TUC is “highly sceptical of whether the incentive effects of the tax will be sufficient to increase revenue at all, never mind to the level of £2.6bn.”

259. Dr Gudgin suggested that a reduction in the main rate of corporation tax from 23% to 20% would be—

196 HM Revenue and Customs Explanatory Note on estimating the cost of a reduction in the Corporation Tax rate in Scotland
197 Scotland Bill Committee, Official Report, 8 September 2011 Col 71.
198 Scotland Bill Committee, Official Report, 8 September 2011 Col 71.
199 Scotland Bill Committee, Official Report, 8 September 2011 Col 76.
201 Institute of Chartered Accountants of England and Wales, written submission to the Committee p7.
“[...] a loss of revenue of between £300 million and £400 million. If that came off public expenditure, it would lead to the loss of about 6,000 public sector jobs, to be replaced by something like 1,500 jobs a year, mainly in foreign direct investment. The cost per job would be enormous: about £200,000 per job.”

260. Referring to the study by the Northern Ireland Economic Reform Group, Dr Gudgin stated that if the rate of corporation tax in Northern Ireland was reduced to 12.5% it would take 20 years to break-even but if income tax, national insurance and additional local income taxes were included it would take something like seven years.

Loss of revenue by other jurisdictions

261. Professor Hughes-Hallett, referring to work by the OECD, stated that there is no evidence of tax competition in the long term but several witnesses and respondents to the call for evidence expressed concern about tax competition and profit shifting. The advisor to the UK’s Crown Dependencies, Alastair Sutton, told the Committee of an intensification of discussion on tax competition within the euro zone and the OECD.

262. The potential scale of transfer of activities and profits to exploit lower tax rates was illustrated by Martin Togneri who gave figures on the approximate amount of corporation tax paid by Microsoft in 2004. He said—

“they paid in total in Europe something in the order of [US] $320 million in corporation taxes. Of that $320 million, $300 million was paid to the Irish Government and $20 million was paid to all other European Union Governments combined.”

263. CBI Scotland stated that companies would take advantage of a lower tax rate without creating new economic activity.

264. David Gauke MP, the Exchequer Secretary to the Treasury, told the Committee that the loss of revenue to other UK jurisdictions due to tax-motivated incorporation and profit shifting would be taken into account in adjusting the block grant.

265. The Scottish Government’s modelling of the benefits of reducing corporation tax does not consider impacts on other jurisdictions. That this takes place is acknowledged in the discussion paper—

“[L]ower rates of corporation tax [...] makes a country more attractive as a location for enterprise. This is especially important in an increasingly globalised...
marketplace where multinational firms face a choice of a range of countries in which to locate their operations."^{210}

266. It could also be said that the modelling did not consider the positive impacts on other tax revenues (in particular the taxes retained at Westminster) that might be associated with the increased economic growth identified.

Volatility of revenue

267. While the devolution of corporation tax would certainly increase the basket of taxes, some concerns have been expressed by certain witnesses about the potential instability that adding it to the basket might create. If corporation tax is devolved, Alan Trench pointed out that, like many other taxes, it is volatile pro-cyclically.\(^211\) In his view, revenue would decline just when the demands on government are increasing.

268. The volatility of an income stream can be measured in either percentage or absolute terms. In percentage terms, corporation tax does not have the stability or predictability of VAT, Income tax and National Insurance but, yielding a smaller amount on average than these other taxes, it is likely to be less volatile in absolute terms. It is the absolute change which the Scottish Government will have to deal with although, pursued to its logical conclusion, that would be an argument for devolving only those taxes with a low yield.

269. GERS\(^212\) figures show that over the three years from 2007-08 to 2009-10, the yield from corporation tax in Scotland fell from £3.5 billion to £2.6 billion. In response to a question about volatility, the Cabinet Secretary for Finance, Employment and Sustainable Growth stated that corporation tax is expected to rise steadily in the next five years and that volatility would be reduced if more taxes were devolved.\(^213\)

Increased cost of collection and compliance

270. The Committee heard from Derek Allen that in the complex commercial world with so many valuable intangible assets, there is a problem of transfer pricing and providing an evidential trail resulting in a high cost of compliance.\(^214\)

271. Some witnesses expressed concerns about the potential costs of compliance. CBI Scotland stated that any potential benefits need to be weighed against the certain costs. Devolving the tax would conflict with the UK Government’s tax simplification agenda and increase tax compliance costs for all affected businesses.\(^215\)

272. However, a report from the Northern Ireland Economic Reform Group provided to the Committee states that “there would be compliance costs, which need not be significant, for companies, particularly those operating in Great Britain and Northern

\(^{211}\) Alan Trench written submission to the Committee p1-2.
\(^{212}\) Scottish Government, *Government Expenditure and Revenue Scotland 2009-10 Table 4.2*.
\(^{215}\) CBI Scotland evidence submitted to the Committee, p2-3.
Dr Gudgin confirmed that the accountants on the group believe that there is no great problem.\textsuperscript{217}

Response of the UK Government

273. While the UK Government maintained that consideration would be given to the Scottish Government’s proposals on Corporation Tax, this was contradicted by Dr Gudgin who, when asked whether UK Government Ministers had told him privately that “this Committee is wasting its time talking about Corporation Tax”, answered “yes. That is the short answer.”\textsuperscript{218}

274. The Secretary of State for Scotland was asked to comment on this and said—

“I am afraid that I do not know on whose authority Dr Gudgin was speaking and certainly do not recognise what he said as being close to the truth. We have had a consultation, we are considering what will happen in Northern Ireland and we are still looking carefully at the corporation tax proposals that have been made by the Scottish Government and which you have been scrutinising. We will continue to do that. Nothing has been ruled out. I repeat, though, that we are currently not persuaded of the proposal, for reasons that were well rehearsed previously. Nevertheless, we are having an on-going dialogue on the matter.”\textsuperscript{219}

Excise Duty

Background

275. Excise duties are currently reserved to the UK Government. Although it sets the rates for different types of alcohol, it must adhere to EU directives with regard to certain aspects such as minimum duty rates, exemptions, who is liable, etc.

276. Alcohol duty is the tenth most lucrative tax in Scotland, estimated to generate over £800 million in tax revenues in 2009-10 (see Table 1). It is also estimated that revenues generated per capita are higher in Scotland than they are across the UK.\textsuperscript{220} While the Calman Commission recognised the attractiveness of devolving alcohol excise duty as a policy tool for the Scottish Government, it concluded that it should remain reserved as it received strong evidence with regard to the compliance costs for businesses and the scope for tax avoidance.\textsuperscript{221}

277. In recent years, the Scottish Government has been considering a variety of measures to tackle alcohol misuse, including Minimum Unit Pricing. This has been driven by the recognition that Scotland has a more significant alcohol problem relative to many other countries.

\textsuperscript{216} Economic Reform Group \textit{The Case for a Reduced Rate of Corporation Tax – A Supporting Update}, para 17.
\textsuperscript{220} Scottish Government, \textit{Government Expenditure & Revenue Scotland 2009-10}, June 2011, Table 4.1.
278. After the election victory in May 2011, the First Minister said in the Chamber that “We need control of excise duties, so that we can tackle the problems of alcohol abuse and can benefit the public purse”. In October 2011, the Scottish Government published a paper to highlight its proposed enhancements to the Scotland Bill in relation to excise duty for alcohol.

The Scottish Government’s proposal
279. The Scottish Government’s submission to the UK Government states “The Scotland Bill should be amended to devolve alcohol duties to the Scottish Parliament” and “The Scottish Budget should be reduced by a per-capita share of UK-wide alcohol duties, with the amount of duty actually collected in Scotland assigned to the Scottish Budget.” The objectives of the Scottish Government in relation to its proposal are that—

- The Scotland Bill should be amended to devolve alcohol duties to the Scottish Parliament;
- The Scottish Budget should be reduced by a per-capita share of UK-wide alcohol duties, with the amount of duty actually collected in Scotland assigned to the Scottish Budget;
- This new revenue source will provide a stable tax base to help partly mitigate the flawed income tax proposals contained within the current Scotland Bill. It will also more closely align the ‘revenue benefit’ with the ‘public spending cost’ from the higher level of alcohol consumption in Scotland; and
- Under independence, the Scottish Government will work with the industry and public health organisations to establish a revised, more transparent duty regime for Scotland. This system will work in tandem with Minimum Pricing to encourage more responsible drinking.

280. However, the Committee notes that in the context of the Scotland Bill, this is an assignment of revenues.

Addressing the misalignment between devolved policy and financial competencies in the current devolution settlement
281. Responsibility for health, social welfare and public order are devolved to the Scottish Government and it argues for greater alignment between the spending in relation to alcohol misuse and the revenues generated from it. The Scottish Government believe that this would give them the opportunity to “allocate additional funding to tackle these negative consequences, such as through educational initiatives or other forms of preventative spending.” However, the UK Government warns against hypothecating revenues to mitigate the public health cost of higher...
alcohol consumption, arguing that “were alcohol duty receipts to fall, it would leave a short-fall in the areas of public spending which relied on these receipts”.  

**Using excise duties to provide a more stable tax base**  
282. Although alcohol duties account for just 1.8% of total Scottish tax revenues, including North Sea revenues, it is a relatively stable source of tax revenue, even when there is an economic downturn. In a letter to the Exchequer to the Treasury, the Scottish Government wrote that the proposals would “provide a more stable revenue stream to help partly offset the volatility from the other tax proposals in the Scotland Bill”.  

**The devolution of excise duty revenues – key issues**  
283. There has been some debate between the Scottish and UK Governments with regard to aspects of the Scottish Government's proposal. The issues which have been discussed are outlined in the following paragraphs.

**Higher alcohol duty receipts per capita in Scotland relative to the UK**  
284. It is assumed that the higher level of consumption of alcohol in Scotland relative to the UK means that there is extra tax revenue generated per capita (although expenditure data is not necessarily the same as the consumption of alcohol, given that prices vary by type of alcohol). The Scottish Government believes the current system whereby the UK Treasury benefits from the extra revenue that arises from the higher levels of consumption of alcohol in Scotland should be altered and it estimates that “Scotland’s excessive alcohol consumption has generated an additional £250 million in duty receipts for the UK Treasury over the past five years, compared to a population share of duty revenues”. However, the UK Government argues that the Scottish Government is not short-changed through the existing arrangements because taxes are not allocated to the devolved administrations on a per capita basis, but instead the devolved administrations are funded from all UK taxes and borrowing.  

**The basis for adjusting the block grant**  
285. The UK Government is concerned with the Scottish Government’s proposal to reduce the block grant on a per capita basis, but allocate alcohol duties on a consumption basis and say that it “appears to benefit the Scottish budget by £250 million compared to a population based share of revenues”. However, the Scottish Government have explained that its proposal “is based on the belief that there is no fundamental reason why the level of alcohol consumption in a particular nation or region of England should differ from another part of the UK” and that “this clear and simple principle would provide a fair basis for adjusting the block grant”. It also  

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argues that using consumption as a means for apportioning consumer revenues is the most appropriate approach and is already adopted in other countries.\textsuperscript{231}

\textbf{Conflicting incentives}

286. In a letter to the Scottish Government, the UK Government raised concerns that this proposal could bring about perverse incentives as “the Scottish Government would stand to benefit financially from increased alcohol consumption in Scotland”.\textsuperscript{232} However, in response the Scottish Government refuted this argument and expressed its commitment to tackling alcohol misuse in Scotland.\textsuperscript{233} It should be noted that if the Scottish Government is successful in its policy objective of reducing alcohol consumption in Scotland then this will reduce the revenues which it derives from the assignment of excise duties on alcohol. There may well be corresponding savings in other budgets such as health, social welfare and public disorder.

\textit{The full devolution of excise duties}

287. The Scottish Government’s paper states that the current proposals for an amendment to the Scotland Bill relate to the devolution of revenues from excise duty, as opposed to the duty regime as a whole (which would include the power to set the rates) which it would have under independence.

288. It should be noted that the Scottish Government’s paper was published after the Committee’s evidence session on excise duties and that, therefore, the witnesses we heard from at the time were only able to give evidence on the general principle of devolving excise duties and not the specific details of the Scottish Government’s subsequent proposal. This is regrettable.

\textsuperscript{231}Scottish Government. \textit{Letter from the Cabinet Secretary for Finance, Employment and Sustainable Growth} to David Gauke MP, Exchequer to the Treasury - 16 November 2011, p3.

\textsuperscript{232}UK Government, \textit{Letter from Exchequer to the Treasury to the Cabinet Secretary for Finance, Employment and Sustainable Growth} – October 2011, p4.

\textsuperscript{233}Scottish Government. \textit{Letter from the Cabinet Secretary for Finance, Employment and Sustainable Growth} to David Gauke MP, Exchequer to the Treasury - 16 November 2011, p3.
VIEWS ON THE KEY NON-FINANCIAL PROVISIONS IN THE BILL

Background

289. In addition to the financial provisions in the Scotland Bill described earlier, there are also a number of non-financial provisions. This section of the report covers the proposals to re-reserve to the UK Parliament certain elements of corporate insolvency law, the regulation of the health professions and some matters concerning Antarctica.

Insolvency

290. Corporate insolvency law is currently partly reserved and partly devolved. Under the Scotland Act, the general legal effect of liquidation is a reserved matter, but the process and effects of liquidation are devolved. Administration is also reserved, while receivership is devolved.

291. The final report of the Calman Commission recommended that the UK Insolvency Service, with appropriate input from the relevant department of the Scottish Government, should be made responsible for laying down the rules to be applied by insolvency practitioners on both sides of the border. The Commission concluded that this might be achieved without altering devolved legislative competence through UK legislation with consent from Scottish Parliament under the Sewel Convention.234

292. In its Command Paper, however, the UK Government stated that whilst it agreed that a common approach across the UK is necessary, it would include a clause in the Scotland Bill to make amendments to Schedule 5 to the Scotland Act 1998. Therefore, responsibility for the rules on winding-up in Scotland would be reserved.235

293. The UK Government argued that this will enable the rules on winding-up to remain properly aligned throughout Great Britain. It stated that windings-up in Scotland will remain subject to supervision where necessary by Scottish Courts. Matters which are the subject of common law, such as set off and disclaiming onerous property, will not be affected, with Scottish law still applying.

The views of our predecessor committee

294. During the former Committee’s consideration of the relevant provisions in the Bill that seek to re-reserve particular policy areas (e.g. regulation of the health professions, insolvency), the former Committee debated whether, in principle, any power currently devolved should be reserved. On a division, the then members voted against the presumption that powers should never be re-reserved and consider that the merits for doing so should be considered on a case-by-case basis.236

295. In their Minority view the two SNP members of the former Committee (Brian Adam and Tricia Marwick) stated—

“We are against the Bill’s proposals to ‘re-reserve’ powers in certain areas, most notably in regulation of health professionals, corporate insolvency and implementation of international obligations. In practical terms, the Committee heard evidence from health professional bodies that cast doubt on whether there was any need to re-reserve powers and also that there was little desire amongst the sector itself for this move. With regard to corporate insolvency, there are very serious concerns that this move will have a detrimental impact on Registered Social Landlords and the overwhelming evidence from the social housing sector was against this move.

[...]

More generally, the proposals to ‘re-reserve’ powers are fundamentally against the spirit of devolution and should be rejected.

We recommend that the Bill be amended to remove the ‘re-reserving’ of certain powers, particularly those related to [...] regulation of health professionals.

296. One of the key issues debated by our predecessor is that of the impact of the insolvency provisions on Registered Social Landlords in Scotland. On the detail of these provisions, the Scottish Government notes that the provisions would reserve responsibility for insolvency procedures relating to Registered Social Landlords (RSLs), for which the Scottish Parliament had particular responsibility, recently exercised in the Housing (Scotland) Bill 2010.

297. This is an area where the limited amount of evidence that the Committee and our predecessor received was overwhelming negative. For example, the Scottish Federation of Housing Associations (SFHA) wrote to our predecessor that it was “opposed in the strongest possible terms to the provision contained within clause 12 of the Scotland Bill which serves to re-reserve to Westminster responsibility for legislation relating to the insolvency of social landlords in Scotland.”

298. SHFA argued that since housing is a devolved matter, the UK Government should not be using the Scotland Bill to affect the Scottish Parliament’s ability to legislate on all aspects of housing policy, such as land, tenancies, leases and regulation, including regulation of social housing (an integral part of which is the regulatory regime for addressing the risk of insolvency among RSLs).

299. SFHA’s view was that it is of “paramount importance that the power to legislate over any changes to the existing powers of the SHR [Scottish Housing Regulator],

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237 Scotland Bill Committee. 1st Report 2011 (Session 3) Report on the Scotland Bill and relevant legislative consent memorandum Annexe A.
238 Scotland Bill Committee. 1st Report 2011 (Session 3) Report on the Scotland Bill and relevant legislative consent memorandum Annexe A.
239 Scottish Government, legislative consent memorandum, LCM(S3) 30.1.
240 Scottish Federation of Housing Associations, written evidence submitted to the previous Committee.
241 Scottish Federation of Housing Associations, written evidence submitted to the previous Committee.
including that relating to the winding up of RSLs, should remain with the Scottish Parliament.” The SFHA wanted the existing exemption for the winding up of RSLs to be confirmed in the forthcoming Scotland Act, or for proposals to reserve the powers to do so to be removed from the Scotland Bill.\textsuperscript{242}

300. The SHFA’s view was supported in the evidence provided by others, including the Chartered Institute of Housing Scotland and the Glasgow and West of Scotland Forum of Housing Associations.

301. In a response to the former Committee, the Scotland Office ministers told the then Committee members that\textsuperscript{243} —

“We followed the recommendation of the commission that there was confusion about responsibilities in relation to insolvency matters.

[...]

We considered the housing associations issue, but we would get into a complicated legal area if some legal entities were to be excluded from the provisions or treated differently from others. That is why there is no specific proposal to exclude housing associations from the provisions.”

302. As noted, on a division, our predecessor favoured the principle of re-reservation of insolvency as set out in the Bill. However, the former Committee did have concerns in relation to the impact on Registered Social Landlords raised by the Scottish Federation of Housing Associations and others.\textsuperscript{244}. To that extent, the whole of the former Committee was content to recommend to the Scottish Parliament that it should give its legislative consent to the provisions in the Scotland Bill relating to the re-reservation of insolvency, subject to provisions being drafted which will secure capacity for devolved legislation to affect the winding-up of Registered Social Landlords (Clause 12).\textsuperscript{245}

The Scotland Bill as introduced in the House of Lords and the evidence received by this Committee on insolvency

303. Clause 12 of the Bill as introduced, dealing with re-reservation of insolvency, was not amended during the Bill’s passage through the House of Commons.

304. Since we have begun our work, the Committee has received only one piece of written evidence relating to the question of re-reservation of insolvency from the Scottish Federation of Housing Associations. This says that despite the meetings it has had with the UK Government over the previous months, it remains uncertain

\begin{footnotes}
\item[242] Scottish Federation of Housing Associations, written evidence submitted to the previous Committee.
\item[243] Scotland Bill Committee, Official Report, 3 February 2011, Cols 60-61.
\item[244] Scotland Bill Committee. 1st Report 2011 (Session 3) Report on the Scotland Bill and relevant legislative consent memoranda Para 147.
\end{footnotes}
about the potential impact of re-reserving to Westminster responsibility for legislation relating to the winding up of registered social landlords in Scotland.\footnote{Scottish Federation of Housing Associations, written evidence submitted to the Committee.}

305. They explained that housing associations—

“have been subject to regulation since the 1970’s, currently by the Scottish Housing Regulator (SHR). The sector is strong and there have been no cases of RSL insolvency in the past 40 years. However, we must not be complacent given the economic and financial environment in which RSLs now operate. Consequently, there needs to be a provision so that a regulatory authority can deal appropriately and timeously should any cases of potential insolvency arise in the future. Also, in line with the position since 2001, the Scottish Parliament needs to be able to legislate in respect of that authority in light of changing circumstances in Scotland.”\footnote{Scottish Federation of Housing Associations, written evidence submitted to the Committee.}

306. The SFHA state that they—

“recognise that Clause 12 as currently drafted would not change the effect of the provisions in the Housing (Scotland) Act 2010. Our concern is that if amendments to the existing provisions relating to the winding up of RSLs are required at some point in the future, the process may be lengthier than would otherwise be the case had the legislative powers remained devolved. SFHA has been assured by the Under Secretary of State for Scotland that there is no precedent to suggest that this would be the case. We acknowledge that the route for achieving changes to the provisions for the winding up of Scottish RSLs would be a Section 104 Order. However, we remain concerned that Clause 12 as currently drafted has the potential to build in delays to essential early action should an insolvency situation arise.”\footnote{Scottish Federation of Housing Associations, written evidence submitted to the Committee.}

307. The Federation, therefore—

“urge the Committee to support the Session 3 Committee’s recommendation that legislative consent to the provisions in the Scotland Bill relating to insolvency should be subject to provisions being drafted which will secure the capacity for devolved legislation to affect the winding up of RSLs.”

\textbf{Regulation of the health professions}

308. The Scotland Act reserves the regulation of health professions that are regulated under enactments listed within the Act. This includes doctors, dentists, dental auxiliaries, opticians, pharmacists, nurses, midwives, health visitors, chiropodists and veterinary surgeons. Legislation has been passed subsequent to the Scotland Act which provides for the regulation of additional health professions that are not listed in the Scotland Act, meaning that the regulation of such professions is devolved to the Scottish Parliament. Examples of these professions include dental nurses, dental technicians and pharmacy technicians.

\footnote{Scottish Federation of Housing Associations, written evidence submitted to the Committee.\footnote{Scottish Federation of Housing Associations, written evidence submitted to the Committee.\footnote{Scottish Federation of Housing Associations, written evidence submitted to the Committee.}}
309. Where the UK Government Department of Health seeks to place requirements on these new professions, this requires an order under section 60 of the Health Act 1999 and which must, to have effect, be ratified by the Scottish Parliament, as well as the UK Parliament.

310. The Calman Commission’s report stated that the section 60 process can be “cumbersome and time consuming”. It concluded that—

“…it is important that there should be a common approach to regulation of the health professions to ensure that there is clarity for patients as well as an assurance of common standards irrespective of the location in which they find themselves in need of care or advice. Similarly, for practitioners, a consistent approach to regulation helps to ensure that mobility within Great Britain is straightforward and that relevant continuing professional development is recognised…The Commission therefore recommends that regulation of the health professions is reserved without exception.”

311. Clause 13 of the Scotland Bill as introduced seeks to give effect to this recommendation. It also makes a number of consequential amendments to the legislation relating to the health professions that are regulated by the Health Professions Council, the General Dental Council, and the General Pharmaceutical Council (the regulators that regulate the few devolved professions).

312. The legislative consent memorandum from the previous Scottish Government made clear that it did not support the proposed change arguing that intergovernmental working already achieves the objectives set out by the Calman Commission. The memorandum then provided a number of examples to demonstrate that such relationships and lines of communication are already in place. It also argued that since health is almost entirely devolved—

“any proposal to remove responsibility for a health matter from Scotland, and transfer it to the United Kingdom Government, is anomalous.”

313. It also cited part of the UK Department of Health’s (DH) evidence to the Calman Commission, which, in full, stated—

“[…] DH is not seeking any change to the reservations of the health professions in the Scotland Act 1998. In practice, both the Government and the devolved administration have always sought to apply a UK-wide framework to the regulation of health professions, despite the fact the devolved competence exists for some professions. By working together, we have been able to manage the complications and additional work inherent in the settlement. To seek total reservation in this area would be unnecessary, when pragmatic, shared solutions are available.

Total devolution would reduce the burden of work for officials and lawyers but the position for individual professionals wishing to work in Scotland or England

250 Scotland Bill Explanatory Notes.
251 Scottish Government, Legislative Consent Memorandum: Scotland Bill, LCM(S3)30.1.
would then be similar to that if they wished to work in France or any other EU country. There would be a significant number of technical details to be worked through and significant cost in replicating regulatory bodies and machinery for Scotland.\textsuperscript{252}

The views of our predecessor committee

314. As with insolvency, a minority of the previous Committee was against the principle of any re-reservation of powers. However, for the then majority of the Committee, they concluded that, overall, they were content to recommend to the Scottish Parliament that it should give its legislative consent to the provisions in the Scotland Bill relating to the re-reservation of the regulation of health professions.

The Scotland Bill as introduced in the House of Lords and the evidence received by this Committee on the health professions

315. As with insolvency, Clause 13 dealing with the health professions was not amended during the Bill’s passage through the House of Commons.

316. Similarly, this new Committee has received very little additional evidence on this subject on top of that received by its predecessor. However, the Cabinet Secretary for Parliamentary Business and Government, Bruce Crawford MSP, did tell the Committee that this was one of the further examples of areas that need to be re-examined in the Bill. He said that the Scottish Government believed—

“That the devolved regulation has clear benefits for Scotland and enables regulations to be tailored to meet the needs and circumstances of the Scottish health service. It also ensures that Scotland has a voice in wider decisions that are taken at a UK level that have implications for devolved matters. The recent regulations that were introduced for practitioner psychologists are an example of the benefit of the devolved regulation. The UK Department of Health originally wanted them to be educated to doctorate level for regulation purposes, as that is the standard in England. That would have posed a major problem for the national health service in Scotland, and for its educational psychologists, the majority of whom are trained to masters level to undertake specific tasks, as that is considered to be a better use of resources. If those regulations were re-reserved, that might cause some difficulties.”\textsuperscript{253}

Antarctica

317. Clause 14 of the Scotland Bill as introduced seeks to regulate activities in Antarctica, which were not reserved under the Scotland Act 1998. The Scottish Government’s view was that the “creation of an entire new reservation in Schedule 5 to address this issue is unnecessary and disproportionate”.\textsuperscript{254} Its view at the time of the Bill’s introduction was that the outcome sought by both governments was merely to ensure that relevant functions can be exercised consistently by the Foreign and Commonwealth Office (FCO) on behalf of the UK as a whole, and that this could be achieved entirely satisfactorily by allowing executive functions belonging to the

\textsuperscript{252} HM Government and Scotland Office Government evidence to the Commission on Scottish Devolution 11 November 2008 p.70-80.
\textsuperscript{254} Scottish Government, written evidence submitted to the Committee.
Scottish Ministers to be exercised by UK Ministers, in a manner consistent with section 108 of the Scotland Act.

318. The Scottish Government’s position was that the proposal also set an undesirable precedent for the Scottish Parliament. As for other parts of the Bill, its view was that “removing responsibilities from the Scottish Parliament should only be a last resort”. Once reserved, its opinion was that the Scottish Parliament would lose all influence over the policy to be pursued, and there would be no foreseeable prospect of the Parliament regaining its responsibilities from Westminster.

319. The alternative proposed by the Scottish Government was to use the vehicle of a Legislative Consent Motion in connection with the proposed Antarctic Bill. This would suggest that the relevant executive functions under the existing 1994 Act should be exercisable by the FCO, with retrospective effect. New functions arising would be treated on an analogous basis and would also be exercisable by the FCO. The net result would be to enable the FCO to undertake the regulation of existing and new activities for both reserved and devolved matters, but without altering the legislative competence of the Scottish Parliament in relation to environmental protection or other devolved matters.

The views of our predecessor committee
320. The former Committee’s view was that it is entirely sensible for the UK Government to propose the change that it has done in the Scotland Bill. Whilst the then Committee noted the Scottish Government’s objection to re-reservation of any power, the previous Committee was content to recommend to the Scottish Parliament that it should give its legislative consent to the provisions in the Scotland Bill relating to Antarctica (clause 14).

The Scotland Bill as introduced in the House of Lords and the evidence received by this Committee
321. There have been no amendments to clause 14 and this Committee has received no oral or written evidence on the provisions in this clause.

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255 Scottish Government, written evidence submitted to the Committee.
256 Scottish Government, written evidence submitted to the Committee.
BACKGROUND

322. In addition to the other financial and non-financial provisions in the Scotland Bill described earlier, there are also a number of provisions which change the legislative competence or the powers of the Scottish Ministers. This section of the report covers the provisions in the following areas—

- air weapons;
- speed limits;
- drink driving;
- misuse of drugs;
- administration of elections; and
- changing the descriptor of the Scottish Government from the Scottish Executive.

AIRE WEAPONS

323. Clause 11 of the Bill as introduced would amend the Scotland Act to provide that the regulation of air weapons, within the terms of section 1(3)(b) of the Firearms Act 1968, would fall within the legislative competence of the Scottish Parliament. However, the power to make rules and orders in relation to “specially dangerous weapons” would remain a reserved power. The UK Government has indicated that the reason for proposing this partial devolution of air weapons regulation is that—

“These [specially dangerous weapons] are weapons that have been the subject of particular licensing regimes or, in the case of air pistols, banned from use. They are a category of weapon that the Home Secretary has determined is particularly dangerous and which is already the subject of significant regulation or, indeed, a ban across the UK.

The Calman proposal was to devolve competence to the Scottish Parliament in relation to air weapons other than those particularly dangerous ones so that, in theory, the Scottish Parliament could make provision for airguns because of specific concerns that had been raised here in Scotland. The proposal was to give an additional power to the Scottish Parliament on airguns to meet a legitimate concern that you and others have raised about issues in Scotland that might not be addressed on a United Kingdom basis.”

The views of our predecessor committee

324. On a division, the majority of the previous Committee did not agree that the powers to regulate all firearms should be devolved to the Scottish Parliament. Consequently, the former Committee welcomed the intention of the UK Government to amend the Scotland Act to create a specific exception to the reservation of firearms for the regulation of air weapons, in order to give the Scottish Parliament legislative competence in this area. The former Committee noted that this excluded those air rifles, air guns or air pistols which are of a type declared by rules made by the Secretary of State under section 53 of the 1968 Act to be “specially dangerous”. These particular weapons are already banned and the former Committee saw no reason why this would change.

The Scotland Bill as introduced in the House of Lords and the evidence received by this Committee on air weapons

325. To date, Clause 11 was not amended during the Bill’s passage through the House of Commons.

326. This Committee only received one piece of written evidence on Clause 11 from the Scottish Countryside Alliance (SCA). The SCA recognised that while there was a desire to have powers over legislation relating to airguns devolved to the Scottish Parliament, if powers were devolved to the Scottish Parliament the SCA would argue against the introduction of new legislation which could unnecessarily penalise legitimate airgun users. It wanted to let the Committee know—

“that we believe that there is no requirement for further legislation regarding the use and possession of airguns in Scotland. The SCA would instead call for better enforcement of existing laws in order to further reduce the small annual number of injuries incurred through misuse of airguns.”

Speed limits

327. Clause 21 of the Bill as introduced in the House of Commons would allow Scottish Ministers the power to set speed limits on all Scottish roads without the need to consult with the Secretary of State, and Scottish Ministers would also be enabled to specify signs for a Scottish national speed limit. The powers would include setting the national speed limit on special roads, and setting the national speed limit on all other roads (except the 30mph limit on restricted roads), including the current 70mph on all dual carriageways and the current 60mph on all single carriageways.

328. In its evidence to the former Committee, the Scottish Government set out its position—

“Legislation relating to speed limits is currently reserved, although certain functions are delegated to Scottish Ministers. The national speed limits (30mph generally in built-up areas; 60mph on single carriageway rural roads; and

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258 The proposal was disagreed to by division: For 2 (Brian Adam, Tricia Marwick), Against 4 (Wendy Alexander, Robert Brown, David McLetchie, Peter Peacock), Abstentions 0.
260 Scottish Countryside Alliance, written evidence submitted to the previous Committee.
70mph on dual carriageways and motorways) are set by the UK Government. Local authorities have the power to set lower speed limits on local roads in their areas on a road by road basis and Scottish Ministers have the power to set lower speed limits on trunk roads, also on a road by road basis.

329. Some of those providing evidence to our predecessor suggested that one of the reasons for supporting the case for devolving all powers associated with setting speed limits to Scottish Ministers was that there was a difference in Scottish roads and a local knowledge which was best recognised by those in Scotland. For example, the Road Haulage Association Ltd stated that—

“We think that speed limits in Scotland should be set in Scotland, because of the differences in the roads. The vast majority of roads in Scotland are rural roads. Local knowledge of how safe those roads are, and of the volumes of traffic concerned, means that there would be a benefit from speed limits in Scotland being dealt with in Scotland, rather than at Westminster, where the majority of people have probably never been in Scotland or seen the roads here. There are differences, and we believe that the Scottish Parliament is best placed to make the decisions for the roads here.”

330. At present, the Bill’s current provisions are restricted to cars only. When they appeared before the former Committee, UK ministers were questioned on why this was the case. In response, Rt. Hon David Mundell MP, Under Secretary of State for Scotland, told the former Committee—

“There is a range of speed limits for specific vehicles. It is not the intention to devolve specific speed limits, partly on the basis that it is incumbent on those who drive those vehicles to know the speed limit for that vehicle and that it is more straightforward to have those limits consistent throughout the UK. However, the speed limit for cars – which make up the vast majority of vehicles in Scotland and the UK – is a national speed limit. That is the speed limit that was to be devolved.”

331. In the evidence heard by the former Committee, there was a reasonable degree of support for the inclusion of vehicles such as HGVs, buses and cars towing caravans to be included in the power to set a national speed limit.

332. The former Committee also heard arguments in favour of increasing the national speed limit in certain circumstances and locations for freight vehicles (a power which is not currently in the Bill). The Road Haulage Association Ltd referred to the economic case, with Scotland having “many strategic single carriageway roads which are the lifeblood of the Scottish economy in being able to move goods efficiently across the country”. Its representative, Phil Flanders, cited a parliamentary

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261 Scottish Government, letter from the Minister for Culture and External Affairs to the Convener of the previous Scotland Bill Committee, dated 31 January 2011.
committee’s inquiry into freight transport, which recommended a trial on increased speed limits.\footnote{Scottish Parliament, Local Government and Transport Committee. 10th Report 2006, \textit{Report on Inquiry into Freight Transport in Scotland}.} He also stated that—

“With regard to many roads, and the A9 in particular, the Scottish Parliaments inquiry into freight in 2005 or 2006 recommended that we trial an increased speed limit to see how it would work. There are arguments for and against that, but in the long term, as far as the safety element is concerned, people would see that such a change would not increase the rate of accidents. We have evidence from studies that were carried out by Transport Scotland that shows that if trucks were allowed to do 50mph, and if that limit were rigorously enforced, and if cars stuck to a limit of 60mph, and that was also rigorously enforced, the number of accidents on the A9 would reduce by 18 per cent. 

[…]

We can argue all we want, but if we do not have a trial to see what happens we will never know. We have a chance to do that up here, and to lead the UK yet again.”\footnote{Scotland Bill Committee. \textit{Official Report}, 1 February 2011, Col 342.}

\textbf{The views of our predecessor committee}

333. Our predecessor agreed\footnote{Scotland Bill Committee. 1st Report 2011 (Session 3) \textit{Report on the Scotland Bill and relevant legislative consent memoranda} Para 178.} that there is a case to be made to extend the current powers in the Scotland Bill and devolve responsibility for the speed of all classes of vehicle, not just the maximum speed of vehicles on roads, which might therefore enable the Scottish Ministers, on a pilot basis, to alter the speed limits on specific roads for other types of vehicles such as HGVs. The also agreed that the UK Government should give consideration to the case for a more extensive set of powers to be devolved, including the setting of speed limits for other classes of vehicle\footnote{Scotland Bill Committee. 1st Report 2011 (Session 3) \textit{Report on the Scotland Bill and relevant legislative consent memoranda} Para 179.}

\textbf{The Scotland Bill as introduced in the House of Lords and the evidence received by this Committee on speed limits}

334. When the Scotland Bill was introduced in the House of Lords, Clauses 21 and 22 became Clauses 25 and 26. The new Clause 25 includes minor amendments: relating the regulations made by Scottish Ministers under section 17(2) of the Road Traffic Regulation Act 1984 being subject to the negative procedure (see the new subsection 3ZD); and a new subsection 5 which states that Scottish Ministers shall consult not only the National Park authority for any National Park which would be affected by the regulations, but also any such representative organisation they think fit.

335. This Committee has received two pieces written evidence relating to speed limits, from the Road Haulage Association and the Scottish Chambers of Commerce, but heard no oral evidence relating to these clauses.
336. The Road Haulage Association stated that although the former Committee had supported its earlier proposals – that the Scottish Parliament should have the power to amend speed limits for particular classes of vehicle such as Heavy Goods Vehicles (HGVs) – it had been

“extremely disappointed that the latest version of the Bill does still not include this important power. We believe that Scotland should not miss out on this opportunity to take the power which would enable the current HGV speed limit of 40 mph on single carriageway roads to be raised by a modest amount.

[...]

We therefore urge the Scotland Bill Committee to press the UK Government to include an enabling provision in the current Bill along the lines previously proposed by the Session 3 Committee.”

337. In its submission the Scottish Chambers of Commerce tells the Committee that—

“A number of our members have suggested that the Scottish Parliament should be given the power to increase the speed limits for HGVs on single carriageway roads from 40mph to 50mph in order to reduce congestion and increase fuel efficiency.”

Drink driving

338. Clause 20 of the Scotland Bill as introduced in the House of Commons amends the Road Traffic Act 1988 to give Scottish Ministers powers to make regulations in relation to the prescribed alcohol limit which applies when driving in Scotland. The Road Traffic Act includes two offences when the limit has been exceeded: causing death by careless driving when under the influence of alcohol and driving a vehicle with an alcohol level about the prescribed limit.

339. One of the key issues to emerge during the former Committee’s consideration of this issue related less to the principle of devolution of these powers and more to whether it went far enough. The then Minister for Culture and External Affairs told the Committee that additional devolution of a more complete package of powers over drink-driving would be helpful. She said—

“In terms of policy implementation, that would be in the interests of the police as it would give them the powers on random breath testing and penalties that they would need to make an impact. There is no reason why it cannot be devolved and members on all sides of the chamber have called for that for a number of years. There is no strong reason for it to be retained; the case for that has still to be argued.”

340. During their evidence to the former Committee, UK ministers said that—

268 Road Haulage Association, written evidence submitted to the Committee.
269 Scottish Chambers of Commerce, written evidence submitted to the Committee.
270 Scotland Bill Committee, Official Report, 8 February 2011, Col 433.
“The first important point, particularly given how some of the evidence to the committee is reported, is that devolving powers over certain matters under the Scotland Bill will not automatically lead to change on those matters. Whether the Scottish Parliament makes changes to, for example, drink-driving limits, speed limits or the regulation of air guns will be entirely a matter for it to determine.

341. On the specific point about the range of drink-driving powers, that issue was considered in detail by the Calman commission, which concluded — and the UK Government shared this view — that responsibility for the other powers should rest with the UK Government. That was to ensure certainty of provision throughout the UK while allowing the Scottish Parliament and Government to influence issues in relation to alcohol consumption and crime in Scotland.”

The views of our predecessor committee
342. The former Committee agreed that there was merit in the UK Government considering the extent of devolution currently proposed to include a more complete package of powers relating to drink-driving.272 All of the then Committee therefore recommended to the Scottish Parliament that whilst it should give its legislative consent to the provisions in the Scotland Bill relating to drink driving limits (then clause 20), the UK Government should give consideration to the case for a more extensive set of powers to be devolved (including limits, penalties and the responsibility for random testing).273

The Scotland Bill as introduced in the House of Lords and the evidence received by this Committee on drink driving
343. When the Bill was introduced in the House of Lords Clause 20 had become Clause 24, with no amendments. This Committee has received no written evidence and heard no oral evidence relating to this clause.

Misuse of drugs
344. Clause 19 of the Scotland Bill as introduced in the House of Commons would amend the Misuse of Drugs Act 1971 (the MDA) in relation to the circumstances in which a doctor may prescribe controlled drugs to a person addicted to certain drugs. Section 10((2)(i) of the MDA provides for the Secretary of State to make regulations to prohibit a doctor from providing certain controlled drugs to such a person except in accordance with an “addicts licence”.

345. The Bill proposes amending the MDA—

- to give Scottish Ministers powers to issue addicts licences to doctors acting in Scotland and to set terms and conditions and modify or revoke existing licences;

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271 Scotland Bill Committee, Official Report, 3 February 2011, Col 397.
to give Scottish Ministers (instead of the Secretary of State) a power of direction to any doctor who has contravened certain provisions of the MDA, where the contravention relates to activities which took place in Scotland; and

- to give Scottish Ministers (instead of the Secretary of State) the power to refer cases about directions to a tribunal or advisory board.

The views of our predecessor committee

346. The former Committee recommended to the Scottish Parliament that it should give its legislative consent to the provisions in the Scotland Bill relating to the misuse of drugs and asked that the UK Government to give consideration to the points raised in the evidence heard. 274

The Scotland Bill as introduced in the House of Lords and the evidence received by this Committee on the misuse of drugs

347. In the Bill as introduced in the House of Lords, Clause 19 had become Clause 23 with no amendments. This Committee received no written evidence and heard no oral evidence relating to this clause.

Administration of elections

348. In its final report, the Calman Commission recommended that the powers of the Secretary of State for Scotland relating to the administration of elections to the Scottish Parliament should be devolved 275. In its response to the recommendation, the previous UK Government agreed to consider carefully how certain aspects of executive responsibility for putting in place the framework for the administration of the Scottish Parliament elections might be devolved, whilst ensuring the efficient and effective conduct of elections 276.

349. In the current UK Government’s Command Paper, 277 which it published to accompany the Scotland Bill as introduced in the House of Commons, it referred to the work of the Arbuthnott Commission, which in its 2006 report 278 stated that there should be a review of the electoral system after the 2011 elections to the Scottish Parliament. The UK Government have agreed to consider this recommendation, taking into account the views of the new Scottish Parliament, following the May 2011 elections.

350. The Command Paper also discussed the 2007 Gould Report 279 which had considered the devolution of responsibility for elections in Scotland, following problems encountered during the combined local government and Scottish

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276 HM Government, Scotland’s Future in the United Kingdom: Building on ten years of Scottish devolution, November 2009, page 27.
Parliamentary elections of 2007. The independent review led by Mr Gould had recommended that exploratory discussions should take place with a view to assigning responsibility for both elections to one jurisdictional entity. In its view, the Scottish Government would be the logical institution\textsuperscript{280}.

351. In its report, the Calman Commission stated that devolving those elements of responsibility for the administration of elections, currently vested in the Secretary of State for Scotland, would be consistent with the principle that matters should be decided at the level closest to those affected, unless there are good reasons for determining them at a UK level\textsuperscript{281}. In its Command Paper, the UK Government stated that it agreed with this approach\textsuperscript{282}.

352. The UK Government went onto to state that it believed that there were good reasons why some elements of electoral administration should remain with the Secretary of State as they relate to reserved matters (in particular the franchise and the combining of Scottish Parliament polls with polls at other reserved elections), thus ensuring that issues of UK constitutional importance continue to be dealt with at UK level. The UK Government believed that the provisions in the Bill would enable Scottish Ministers to make general provision for the conduct and administration of elections to Holyrood, subject to necessary constraints\textsuperscript{283}. The Command Paper did not indicate what these constraints are.

353. While, in its submission to the former Scotland Bill Committee, the Scottish Government welcomed the devolution of the administration of Scottish Parliament elections as set out in the Calman Commission recommendation, it also pointed out that it has consistently argued that full legislative, as well as administrative, responsibility for the elections should be devolved\textsuperscript{284}. The Scottish Government believed that the Gould report could be seen to support this view\textsuperscript{285}, although others did not, e.g. the House of Commons Scottish Affairs Committee.\textsuperscript{286}

354. The Scottish Government accepted that the provisions in the Scotland Bill would result in an improvement to the current position, devolving certain (but not all) administrative arrangements. The Scottish Government believed that the Bill’s provisions offered Scottish Ministers the opportunity to make rules of conduct for elections, but that they would need to approach the UK Government if primary legislation was required, for example, in relation to the date of elections or the voting system used. The Scottish Government also believed that the Scottish Parliament’s role would be limited to approving or disapproving the rules made by Scottish Ministers; with the Parliament having no opportunity to shape the parameters for

\textsuperscript{283} HM Government. \textit{Strengthening Scotland’s Future}, page 51.
\textsuperscript{284} Scottish Government, letter from the Minister for Culture and External Affairs to the Convener of the previous Scotland Bill Committee, dated 31 January 2011.
those rules through its own primary legislation. The Bill also required that Scottish Ministers must consult the Secretary of State before making the rules.

355. The Gould Report had indicated that fragmentation of responsibility was a key issue in the problems highlighted in the 2007 elections. In its submission to the former Committee, the Scottish Government pointed out that under the proposals in the Bill, there would be further fragmentation, with the Secretary of State retaining a number of responsibilities including voter registration, rules about the composition of Parliament, the procedure for filling any regional seat vacancy during the life of a Parliament and rules relating to disqualification. These areas would be covered by separate Scottish Parliament Rules to be made by the Secretary of State. However, there would be no requirement for the Secretary of State to consult Scottish Ministers about these rules (in contrast to the equivalent requirement placed on Scottish Ministers).

356. The Scottish Government believed that full devolution of the administration of elections would reflect the spirit of the Gould Report and would allow the Scottish Parliament and Scottish Ministers to work with electoral professionals in Scotland to ensure that the problems highlighted by the Gould Report did not happen again.

357. In its legislative consent memorandum in the previous parliamentary session, the Scottish Government welcomed the suggestion that the UK Government will consider a review of the electoral system after the 2011 elections to the Scottish Parliament, taking into account the views of the new Scottish Parliament, as suggested by the report of the Arbuthnott Commission.

358. The Scottish Government did not consider that the UK Government’s current policy for a simple transfer of Ministerial powers addresses the position satisfactorily. The Scottish Government, therefore, invited the previous Parliament to consider the case for devolution of legislative competence over the administration of elections, and to examine the detail of the proposed division of responsibilities between Scottish and UK Ministers.

359. In its submission to the former Committee, the Scottish Government provided its own draft amendment to the Bill, which it believes would devolve to the Scottish Parliament full responsibility for elections.

The views of our predecessor committee

360. The previous Committee believed that there was a case to be made for the issues of voter registration and the rules about the composition of the Scottish Parliament to be made by the UK Government. However, it also agreed that there may be a case that the procedure for filling any regional seat vacancy during the life of a Parliament and the rules relating to disqualification were not issues that the UK Government should have control over, and that these sat more properly with the Scottish Parliament. Furthermore, on clauses 1 and 3 in particular, the Committee recommended that the UK Government should commit to consultation with the

287 Scottish Government, letter from the Minister for Culture and External Affairs to the Convener of the previous Scotland Bill Committee, dated 31 January 2011.
288 Scottish Government, Legislative Consent Memorandum: Scotland Bill, LCM(S3)30.1.
Scottish Parliament and the Scottish Ministers prior to any future use of the powers.\footnote{Scotland Bill Committee. 1st Report 2011 (Session 3) Report on the Scotland Bill and relevant legislative consent memoranda Para 189.}

361. The previous Committee therefore recommended to the Scottish Parliament that whilst it should give its legislative consent to the provisions in the Scotland Bill relating to elections (clauses 1 to 3), the UK Government should give consideration to the case for curtailing the extent of the Rules to be reserved. The former Committee considered that the issues of the procedure for filling any regional seat vacancy during the life of a Parliament and the rules relating to disqualification should be devolved to the Scottish Parliament. Furthermore, on clauses 1 and 3 in particular, the UK Government should commit to consultation with the Scottish Parliament and the Scottish Ministers prior to any future use of the powers.\footnote{Scotland Bill Committee. 1st Report 2011 (Session 3) Report on the Scotland Bill and relevant legislative consent memoranda Para 189.}

The Scotland Bill as introduced in the House of Lords and the evidence received by this Committee on the administration of elections

362. In the Scotland Bill as it was introduced in the House of Lords, Clause 1 has a new subsection within Clause 1(9). This proposed new subsection (12A(5)) to the Scotland Act 1998, relates to the Power of the Secretary of State to make provision about elections. It states that before making regulations under this section the Secretary of State must consult Scottish Ministers. This appears to address one of the issues raised by the previous Committee in its recommendation on Clause 1.

363. The Bill also includes two new subsections, 4 and 5, in Clause 2. The new subsection (4) inserts new subsection (3A) into section 15 of the Representation of the People Act 1985; this provides that the discretion of the returning officers under subsection (2) does not extend to determining that a Scottish Parliamentary election and a local government election in Scotland are to be taken together.

364. The new subsection (5) inserts new subsection (5B) to section 15 of the Representation of the People Act 1985, requiring the Secretary of State to consult Scottish Ministers before making combination rules under subsection (5) where one of the elections is a Scottish Parliamentary election or a local government election in Scotland. This appears to address one of the issues raised by the Session 3 Committee in its recommendation on Clause 2.

365. Clause 3 of the bill also includes new subsection 1, which amends subsection 113(1) of the Scotland Act 1998 so that it also applies to Scottish Ministers’ new powers to make subordinate legislation about the administration of Scottish Parliament elections under section 12 of the 1998 Act (provided for by clause 1 of the Bill).

366. At the Report Stage in the House of Commons, the UK Government introduced a new clause which will amend section 112 of the Scotland Act 1998. This clause will in effect devolve to Scottish Government Ministers the responsibility to take forward Orders in Council made under section 15(1) or (2) of the 1998 Act to specify descriptions of office-holders who are disqualified from being an MSP.
367. This new clause 16 addresses a recommendation from the predecessor Committee that the rules relating to disqualification should be devolved to the Scottish Parliament.291

368. This new Committee has received no written evidence and heard no oral evidence relating to these clauses.

**Scottish Government/Scottish Executive**

369. The Scotland Bill also contains a proposal to replace the phrase “Scottish Executive” with “Scottish Government” in the Scotland Act. This proposal was warmly welcomed by all who gave evidence on this matter to our predecessor, which endorsed this proposed change. To date, there have been no changes to this proposal (clause 15) in the Bill’s passage in the UK Parliament. This Committee has received no written evidence and heard no oral evidence relating to this clause.

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VIEWS ON THE BILL’S LEGAL PROVISIONS, INCLUDING THE ROLE OF THE UK SUPREME COURT

Background

370. As set out above in the introductory section of our report, the Scotland Bill contains a number of provisions of a more legal or technical nature, most notably a clause to alter the role of the Lord Advocate in respect of Convention rights and Community law and to create a statutory right of appeal to the UK Supreme Court from the High Court of Justiciary sitting as a court of criminal appeal where it is alleged that there has been a breach of Convention rights or Community law on the part of the prosecutor. In addition to this proposed change, the Bill also makes a series of other proposals as outlined below.

The Lord Advocate: Convention rights and Community Law

371. The Scottish Ministers are created by the Scotland Act 1998 and their functions and powers are, in general, derived from that Act. The Lord Advocate and the Solicitor General are members of the Scottish Executive and are included within the collective term “Scottish Ministers”. However, the Lord Advocate continues to exercise functions which the Lord Advocate had before the enactment of the Scotland Act 1998 as the head of the systems of criminal prosecution and of investigation of deaths in Scotland. These functions, which do not derive from the Scotland Act 1998 but predate it, are called “retained functions”.

Section 57 of the Scotland Act 1998

372. Section 57(2) of the Scotland Act provides that a member of the Scottish Executive has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights or with EU law. As the Lord Advocate is one of the Scottish Ministers, s/he likewise has no power to do any act which is incompatible with the Convention rights or with EU law. The concept of “acts of the Lord Advocate” has been given a wide interpretation. Because the Lord Advocate is head of the system of criminal prosecution, it can cover the act of any public prosecutor. It can also cover any act of the public prosecutor occurring in the context of criminal proceedings which is incompatible with Convention rights or EU law. There is a saving where the prosecutor could not, by reason of an Act of the UK Parliament, have acted differently. However, it would not be within the prosecutor’s power to do any other act which is incompatible with Convention rights or EU law.

373. The Scotland Act provides a mechanism for resolution of, among other things, section 57(2) challenges. Schedule 6 enumerates a number of legal questions which are known as “devolution issues”. These include (para. 1(d)) a question as to whether a purported exercise of a function by a member of the Scottish Executive is incompatible with any of the Convention or with Community law. Importantly, the Scotland Act 1998 provides that the determination of a devolution issue may be appealed, with leave, to the UK Supreme Court. Separately, the Scotland Act

293 e.g. Cadder v. H.M. Advocate 2011 SC (UKSC) 13.
contains mechanisms under which devolution issues may be referred to the UK
Supreme Court either by the Scottish courts or by a Law Officer.

**Devolution issues in criminal proceedings**

374. Devolution issues may arise in criminal proceedings. For example, a question
as to whether an Act of the Scottish Parliament relevant to the proceedings was
within the powers of the Scottish Parliament might require to be determined. Equally,
a question as to whether an act of the prosecutor, in conducting the proceedings, is
incompatible with Convention rights (and hence, by reason of section 57(2) not
within his powers) could arise, and such a question would be a devolution issue.
Such an issue may be determined at first instance or, on appeal, in the Criminal
Appeal Court.\(^{294}\) The Criminal Appeal Court has power to quash a conviction if the
incompatibility with Convention rights has resulted in a miscarriage of justice.

375. By statute, the decisions of the High Court of Justiciary are final and not open
to review in any court (Criminal Procedure (Scotland) Act 1995, s.124(2)).
Accordingly (and by contrast with the position in civil proceedings), before the
Scotland Act 1998 was enacted, there was no appeal from a decision in Scottish
criminal proceedings from the Criminal Appeal Court to London. The Scotland Act
1998 for the first time created an appeal from the Criminal Appeal Court, initially to
the Judicial Committee of the Privy Council, and now to the UK Supreme Court. But
an appeal lies to the UK Supreme Court under the Scotland Act 1998 only from the
determination of a devolution issue in the High Court.

376. Such an appeal may be taken only if permission to appeal has been granted,
either by the Criminal Appeal Court itself or, if the Criminal Appeal Court has refused
permission, by the UK Supreme Court. The Supreme Court’s Practice Directions
indicate that permission to appeal will be granted only for applications which, in the
opinion of the appeal panel, raise an arguable point of law of general public
importance which ought to be considered by the Supreme Court at that time.\(^{295}\)
According to the Advocate General, since the Supreme Court’s establishment,
permission to appeal has been granted on four and refused on 17 occasions. These
may – as the **Cadder** case illustrates – however be cases of great significance to the
criminal justice system in Scotland.

377. On appeal, the UK Supreme Court has all the powers of the court below.\(^{296}\) It
follows that it is open to the UK Supreme Court, in an appeal against a determination
of a devolution issue in the High Court of Justiciary following conviction, to quash the
conviction.

**The Human Rights Act 1998**

378. In addition to the Scotland Act control, the Lord Advocate is also a public
authority for the purposes of section 6 of the Human Rights Act 1998. It would
accordingly be unlawful for the Lord Advocate to act in a way which is incompatible
with a Convention right even if s/he was not subject to the section 57(2) control.
Other actors in the criminal justice system (e.g. the courts and the police) are also

\(^{294}\) This term is used, for convenience, to refer to the High Court of Justiciary, sitting as a court of
criminal appeal.

\(^{295}\) Practice Direction 3, para. 3.3.3.

\(^{296}\) Supreme Court Rules, 2009, rule 29.
public authorities, which by reason of the Human Rights Act 1998 may not lawfully act incompatibly with Convention rights.

379. The key difference between the Scotland Act control and the Human Rights Act control in the present context is that no appeal lies to the UK Supreme Court from the Criminal Appeal Court by reason only of any unlawfulness under the Human Rights Act 1998. It is only where the incompatibility with Convention rights gives rise to a devolution issue – e.g. where it arises by reason of an act of the Lord Advocate – that there is an appeal to the UK Supreme Court.

The Advocate General for Scotland’s Expert Group and Lord McCluskey’s Review Group

380. At the time of the previous Committee’s report and the resolution of the Scottish Parliament in the preceding session, the issue of how to take forward the issue of the role of the Lord Advocate in respect of Convention rights and Community law had yet to be fully resolved.

381. The Advocate General for Scotland in the UK Government had launched a consultation and established an Expert Group, chaired by Professor Sir David Edward, a former judge at the European Court of Justice. This Expert Group published its findings in November 2010. 297

382. The Expert Group concluded that the Supreme Court should retain its jurisdiction but that acts of the Lord Advocate as head of the system of criminal prosecution and investigation of deaths in Scotland should be removed from the scope of section 57(2) of the Scotland Act and replaced by a freestanding provision defining the jurisdiction in relation to criminal proceedings in Scotland. The Advocate General for Scotland subsequently introduced amendments to the current Scotland Bill at the House of Commons Report stage on 21 June 2011.

383. In late May 2011, the UK Supreme Court unanimously decided in the case of Fraser v. Her Majesty’s Advocate that there had been a miscarriage of justice at the appellant’s trial and that his appeal should be allowed. The Supreme Court remitted the case to the High Court of Justiciary to decide whether or not there should be a retrial and, having made that decision, to quash the conviction.

384. The Scottish Government responded to these developments by appointing Lord McCluskey, a former a judge of the Court of Session and High Court of Justiciary, to chair a Review Group.

385. In a news release at the time (5 June 2011), Rt. Hon Alex Salmond MSP, the First Minister said that "[...] my own view is that we simply cannot ignore a situation where a court in another UK jurisdiction is intervening so aggressively in our judicial system." 298 He also said that—

"The fact that courts outside Scotland should have no jurisdiction over Scottish criminal matters is a long-standing and fundamental principle which is enshrined in the Act of Union.

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Yet we find ourselves in a situation where the unanimous decision of a bench of seven judges in the High Court in Scotland can be overturned by a UK Supreme Court where Scots judges are in a minority.

We must protect the independent and unique nature of Scots law and pursue change in the role of the UK Supreme Court to prevent further erosion and interference in Scotland’s distinct legal system.

The Scottish Government's view is that Scotland should be like every other jurisdiction across Europe and use the Strasbourg Court as the final option for judgement when needed.

Unlike the UK Supreme Court in London, the Strasbourg Court can't strike down convictions, it doesn't open cell doors and potentially enable people to walk free, and it certainly doesn't do so without a proper examination of the degree of protections, checks and balances within the Scottish judicial system."

386. The Review Group established by the First Minister published an interim report on 27 June 2011 and subsequently a final report on 14 September 2011.\(^{299}\) The Review Group broadly supported the conclusions of the Advocate General's Expert Group, subject to qualifications concerning the granting of leave to appeal and the powers of the Supreme Court.

387. Specifically, the two groups agree that—

- the inclusion of the Lord Advocate’s retained functions within the devolution scheme was a constitutional error which has created practical problems and should be reversed; but

- that there should continue to be an appeal to the UK Supreme Court in Scottish criminal cases on questions of compatibility with Convention rights and Community law.

388. Lord McCluskey’s Review Group recommends that an appeal should be available on compatibility grounds to the UK Supreme Court in respect of criminal proceedings whether or not the alleged incompatibility with Convention rights or Community law is due to an act or omission of the prosecutor. Clause 17 in the Scotland Bill as proposed would restrict the appeal to a case where the alleged incompatibility with Convention rights or Community law is due to an act or omission of the prosecutor.

389. Lord McCluskey’s Review Group proposes that the mechanics of the appeal should be different from that proposed in clause 17 of the current Scotland Bill. His Group proposes that—

\(^{299}\) Independent Review Group examining the relationship of the High Court of Justiciary and the United Kingdom Supreme Court. Copies of both reports are available at: http://www.scotland.gov.uk/About/supreme-court-review
• An appeal should be available only if the Criminal Appeal Court has certified that the case raises an issue of law of general public importance (and leave has been granted);

• The UK Supreme Court should not have all the powers of the Criminal Appeal Court (and, in particular, should not have power to quash convictions), but should confine itself to dealing with the issue of law identified by the Appeal Court (if necessary, as reformulated by the UK Supreme Court), before remitting the case back to the Appeal Court for disposal; and

• It would be for the Criminal Appeal Court to decide whether or not, in light of the UK Supreme Court’s decision, a miscarriage of justice has occurred. If the McCluskey proposals were to be implemented it would not be necessary for the UK Supreme Court to address the miscarriage of justice test.

390. Although the elements of this proposal are linked, they do not necessarily stand or fall together. In England and Wales, an appeal from the Court of Appeal (Criminal Division) is, as a general rule, available only if the Court of Appeal has certified that the case raises an issue of law of general public importance. However, the UK Supreme Court, on appeal, has all the powers of the Court of Appeal (Criminal Division) and may itself quash the conviction.

391. Responding to the interim report of the McCluskey Review Group, the Cabinet Secretary for Justice welcomed the conclusions and said—

“Clearly in an independent Scotland the solutions would be simpler with cases referred from the Scottish courts direct to the European Court of Human Rights. But we must deal with the existing, albeit unsatisfactory, constitutional position and act to restore and protect the traditional role of our High Court and put it on an equal footing with higher courts in the rest of the UK. We will now consider the solutions set out within this seminal report and how the Scotland Bill can help to put right this wrong.”

Evidence received
392. The publication of Lord McCluskey’s Review Group report and the comments that followed appear to suggest that there is now broad consensus that an appeal should continue to lie to the UK Supreme Court from the Criminal Appeal Court in relation to alleged incompatibilities with Convention rights and Community law. The following issues arose in the evidence:

(a) whether the Lord Advocate’s retained functions should be removed from the devolution settlement;

(b) whether the scope of the appeal should be restricted to incompatibilities which are due to acts of the prosecutor;

300 Scottish Government, News Release, UK Supreme Court, 14 September 2011.
(c) whether an appeal to the UK Supreme Court should lie only if the Criminal Appeal Court has issued a certificate that the case raises a point of general public importance;

(d) what the powers of the Supreme Court on a compatibility appeal should be, and in particular (i) whether the Supreme Court should have all the powers of the Criminal Appeal Court or should be required to remit the case back to the Appeal Court for disposal, and (ii) whether the Supreme Court should be required to apply the statutory miscarriage of justice test which must be satisfied before the Criminal Appeal Court can quash a conviction; and

(e) whether or not the Law Officers should have power to refer a case directly to the UK Supreme Court.

393. Of these, the key issues would appear to be: (i) certification; (ii) scope of appeal, (iii) the powers of the Supreme Court; and (iv) whether the Law Officers should have a power to refer cases directly to the UK Supreme Court.

Should the Lord Advocate’s retained functions be removed from the devolution settlement?

394. The Advocate General’s Expert Group recommended that the Lord Advocate’s retained functions should be removed from the devolution settlement. Clause 17 of the current Scotland Bill implements this. This reform is supported by Lord McCluskey’s Review Group and by the Lord Advocate. The key arguments for the proposal are these—

(a) that the inclusion of the Lord Advocate’s retained functions within the devolution scheme when they did not derive from the Scotland Act was a constitutional error; and

(b) that the need to comply with procedural rules about the raising of devolution issues (and in particular to intimate these to the Advocate General) has caused disruption to criminal proceedings.

395. However, Christine O’Neill of the Law Society told the Committee that her organisation—

“[…] takes the view that the current system ensures robust protection for individual human rights, and particularly for those who might be innocent and the victims of an unfair process. The proposals shift the balance in favour of the prosecution and away from the robust protection of human rights.”301

396. She further explained—

“Under the current regime, the Lord Advocate simply cannot act in a way that breaches someone’s Convention rights whereas, under the English system and under the proposed system, it would be possible for the Lord Advocate to

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301 Scotland Bill Committee, Official Report, 21 October, Col 378.
prosecute someone in a way that breached their Convention rights and for the conviction that resulted to stand."³⁰²

Certification

397. Lord McCluskey, when he appeared before the Committee along with Sheriff Stoddart, set out the case for certification. He explained the rationale behind his proposal for certification, stressing that it should be adopted in Scotland.³⁰³ Lord McCluskey further stated that his Review Group did “not believe that the Supreme Court needs—and it therefore should not have—the same powers as the High Court of Justiciary”.³⁰⁴ For him—

“The basic point of principle is simple. The constitutional position is that since 1707, there has never been any right of appeal in criminal matters from Scotland's High Court to the House of Lords or to any other such body. When the Human Rights Act 1998 was passed, it made it appropriate that judges with a UK jurisdiction should have an oversight to ensure consistency of interpretation of the act and the convention that it incorporates. However, it is also important that the High Court should have the right to apply the law—as it has been doing for hundreds of years—to the particular circumstances identified by the jury or by the judge who finds the facts.”³⁰⁵

398. He described as “deeply offensive” an argument that Scottish judges could not be trusted to decide upon issues in the “apex” court in Scotland as a result of the devolution Act.³⁰⁶

399. In a written submission to the Committee, the Lord President of the Court of Session set out the views from this body on the principle of certification. He said that there was “much to commend” in the report from Lord McCluskey and that, in particular, the judges in the Court of Session “commend the proposal that the High Court should be brought into line with the Court of Appeal (Criminal Division) and the Court of Appeal of Northern Ireland by the requirement of certification by these intermediate appeal courts as a precondition of any criminal case being taken to the UK Supreme Court.”³⁰⁷

400. The Lord Advocate, Frank Mulholland Q.C., also concurred with much of the evidence provided by Lord McCluskey’s Review Group. He said that he welcomed the reports prepared by Lord McCluskey’s independent review group. He described the Group’s advice as “objective and measured” and that it provided “a sound and sensible basis for progressing”. He concluded that it “puts forward measured and achievable suggestions” for how we can bring about change.³⁰⁸

³⁰² Scotland Bill Committee, Official Report, 21 October, Col 390.
³⁰³ Scotland Bill Committee, Official Report, 1 November, Col 414.
³⁰⁴ Scotland Bill Committee, Official Report, 1 November, Col 414.
³⁰⁵ Scotland Bill Committee, Official Report, 1 November, Col 414.
³⁰⁶ Scotland Bill Committee, Official Report, 1 November, Col 414.
³⁰⁷ The Lord President of the Court of Session, written submission of evidence to the Committee.
³⁰⁸ Scotland Bill Committee, Official Report, 1 November, Col 434.
401. The Lord Advocate also said that “We must trust the High Court of Justiciary to consider the merits of cases and rule accordingly, just as the courts of appeal in the other constituent parts of the United Kingdom are trusted.”

402. Specifically on certification, he said—

“The key point is that if the High Court does not grant a certificate, the Supreme Court has no powers to consider the matter. Thus, the High Court has the final say on the test of general public importance, as the court of appeal does in England and Wales. We have confidence that the High Court can be trusted to apply that threshold test. That practical measure will help to maintain the High Court’s traditional position at the apex of the Scottish criminal justice system.”

403. Paul McBride Q.C. agreed. He said, “We must trust the High Court of Justiciary in Scotland to decide whether a case is of general public importance and therefore requires the granting of a certificate for leave to appeal to the Supreme Court.”

404. Speaking against the idea, Richard Keen Q.C., Dean of the Faculty of Advocates, said his organisation was “materially concerned” by the proposal for certification. He explained that—

“It would put Scotland in a different position from that of the other devolved Administrations and it would mean that the High Court, in effect, would certify whether the United Kingdom Supreme Court could determine Scotland’s compliance with the United Kingdom’s international treaty obligations in the context of convention rights.”

405. In its written submission of evidence, the Law Society of Scotland set out its case against certification as proposed in section 98A(4) of the Bill—

“[…] the Society would not be in favour of any further limitation or threshold for such an appeal, such as certification that the issue was one of ‘general public importance’ as highlighted by Lord McCluskey’s review group or requiring certification such as that prescribed under English law …”

406. The Scottish Human Rights Commission states —

“The Supreme Court is best placed to provide consistent, authoritative interpretation of the European Convention on Human Rights, as it relates to “Convention rights” under domestic law. Such a right of appeal is vital in order to safeguard the development of that consistent jurisprudence and to ensure equal levels of human rights protection across the jurisdictions. The key point at issue is the recognition of the need to have a consistent level of protection
throughout the United Kingdom of fundamental human rights enshrined in international legal obligations.”

407. In its evidence, JUSTICE – a UK-based human rights and law reform organisation – stated that it considers “that the [Lord McCluskey] Review Group’s initial conclusions are incoherent in that they recommend unifying leave to appeal across all UK jurisdictions, yet also recommend the creation of specific procedures in relation to such appeals to the UKSC [UK Supreme Court] solely for Scotland.”

408. Lord Wallace, the UK Government’s Advocate General for Scotland, also gave evidence to the Committee on this matter more generally, and also specifically on the certification proposals. In his evidence to the Committee on 1 November 2011, Lord Wallace said that he had been “considering carefully Lord McCluskey’s report” and that there would be a “proper consideration of the bill when the committee stage at the House of Lords takes place.” He indicated, however, in reference to an earlier stage of consideration in the House of Lords that “the case for certification was not made” when he tabled his amendments at the time. However, later in his evidence during our meeting he said that he had not “ruled certification out.”

409. He also indicated that “compelling arguments” had been made in terms of ensuring that the UK Supreme Court does not, as is currently the case in relation to the Bill, have the powers of the lower court that referred a case to it. He said that—

“Lord Hope [Deputy President of the UK Supreme Court] has commented that the Supreme Court should determine the convention right and that the High Court of Justiciary should then apply that law to particular circumstances, and his argument carries a great deal of force.”

410. The Lord Advocate agreed. He said—

“I agree with Lord McCluskey that the jurisdiction of the Supreme Court should be in relation to the interpretation of convention rights. The disposal of cases should not be within its jurisdiction. In my view, cases should be referred back to the appeal court, which is the apex, in order for it to apply its judgment on the law to the facts of a particular case. It is not appropriate for the Supreme Court to have the powers of disposal that the appeal court has.”

411. For some of the witnesses, a key argument for certification is that of parity between the nations and regions in the UK in relation to appeals to the UK Supreme Court. For example, Paul McBride Q.C. said in relation to the proposals from Lord McCluskey that—
“The arrangement would put the Scottish appeal court in the same position as the Court of Appeal in England is in. It cannot be right to treat one part of the country differently from another part.”

412. For him, the issue should be about the citizens of Scotland and the citizens of England having the same kinds of rights as envisaged by the Human Rights Act 1998. He said that this “really is the issue for the Scotland Bill to address.”

413. The Lord Advocate agreed. He said that there needed to be consistency and parity for Scotland. He further stated—

“I do not agree with the Law Society or the Faculty of Advocates. In England, certification is required in order to go to the Supreme Court on human rights issues. The definition of a devolution issue in Wales and Northern Ireland is much narrower than the definition in Scotland. For example, the definition in Wales and Northern Ireland does not include acts of the Lord Advocate, so we are not comparing like with like.”

414. In a letter to the Committee dated 27 October 2011, the Cabinet Secretary for Justice set out his position on the matter. He said—

“The Scottish Government wishes to see a situation whereby the UK Supreme Court has a more focused jurisdiction and the High Court of Justiciary retains its place at the apex of the Scottish criminal justice system. We remain deeply concerned that the proposals of the Advocate General seek inappropriately to establish the UK Supreme Court as a court of appeal within the Scottish criminal justice system, rather than as a specialist court whose role is to define and interpret Convention Rights and then to remit cases back to the High Court for determination of the appropriate remedy.”

415. Lord Wallace, however, said that—

“It is not strict about parity, because in England, Wales and Northern Ireland, we are talking about the whole of the criminal law—substantive criminal law, criminal evidence and criminal procedure. That is not what we are talking about here. We are talking about cases involving human rights law or those that involve issues arising out of compliance with European Union law, which are far more limited than is the case in the context of England, Wales and Northern Ireland, where we are dealing with the whole of the criminal law.”

416. For Lord Wallace, there was an issue as to whether certification would be helpful in minimising the number of appeals from Scotland to the UK Supreme Court. He indicated, however, that even in the current system (where there is no certification and no requirement for the granting of leave to appeal), the UK Supreme Court was not being flooded with cases. He said—

321 Scotland Bill Committee, Official Report, 1 November, Col 404.
322 Scotland Bill Committee, Official Report, 1 November, Col 406.
323 Scotland Bill Committee, Official Report, 1 November, Col 441.
324 Scotland Bill Committee, Official Report, 1 November, Col 443.
325 Scottish Government, correspondence with the Committee, 27 October 2011.
326 Scotland Bill Committee, Official Report, 1 November, Col 452.
“The figures—as best we can tally them up—are that, since the Supreme Court’s establishment some two years ago, permission to appeal has been granted on four and refused on 17 occasions. In the four cases in which it was granted, two appeals were upheld and two were dismissed. To me, that does not seem to amount to a torrent…”

417. However, when speaking about the current system or the proposals currently contained in the Scotland Bill, Lord McCluskey said—

“The danger—of which there has been some sign in the much higher number of cases that go from Scotland in comparison with the number that go from England—is that the Supreme Court will see itself, and be seen by others, as a court of criminal appeal.”

Scope of appeal: compatibility issues

418. Clause 17 as presently drafted allows an appeal to the UK Supreme Court only if an act of the prosecution is incompatible with Convention rights or Community law. The Review Group report recommends that an appeal should lie in respect of any alleged incompatibility with Convention rights or Community law, irrespective of whether the responsibility for the incompatibility lies with the prosecutor rather than some other actor in the criminal justice system. This was reflected in the evidence from Lord McCluskey and Sheriff Stoddart.

419. According to Sheriff Stoddart, as it currently stands, “clause 17 of the Scotland Bill keeps that focus as it still refers to the Lord Advocate’s acts or failures to act as being the key to the Supreme Court”. He recommended the Bill “should be broadened to cover the acts of any public authority by focusing on the nature of the right and the protection given by the right rather than naming a particular public authority that might be responsible for that.”

420. In response to the evidence taken by the Committee, Lord Wallace stated that he had “not finally decided on the matter” but could “hear the strength of the arguments”. He indicated that a “persuasive case” had been made. For some on the Committee, this, however, raises the issue of whether a broadening of scope is linked to the need for certification.

Powers of the Supreme Court

421. Clause 17 as drafted provides that the Supreme Court will have all the powers of the Appeal Court. This reflects the current position. The clause adds to this by providing that the Supreme Court shall apply the statutory miscarriage of justice which applies when the Criminal Appeal Court considers a conviction.

422. In its written submission, the Law Society of Scotland expressed concerns in relation to the proposals for a ‘miscarriage of justice’ test. It states that the current Bill appears to have the effect of providing that any appeal to the Supreme Court can only be on grounds of miscarriage of justice and that any alleged miscarriage of
justice may only be brought under review for the purpose of determining a question relating to compatibility. However, it is not clear whether, if the act of the Lord Advocate is unlawful in terms of Section 6 of the Human Rights Act, this automatically means that a miscarriage of justice has occurred or whether it does not affect a conviction unless it also amounts to a miscarriage of justice.

423. Christine O’Neill of the Law Society explained—

“[…] we are concerned that the miscarriage of justice test may allow for convictions to stand even though there has been a breach of fundamental rights. It is essentially a political judgment for the Parliament whether it takes the view that convictions that are reached in breach of human rights should stand.’’

424. Lord McCluskey’s Review Group takes issue with both provisions. That Group proposes that the Supreme Court should be restricted to answering the compatibility question addressed to it, before remitting the case back to the Criminal Appeal Court for disposal.

425. In his evidence, Lord McCluskey stated that the term, miscarriage of justice, is not one recognised in England, Wales or Northern Ireland, and described its inclusion as “superfluous”, suggesting that these references should be taken out. In his written submission to the Committee, the Lord Advocate concurs with this view.

426. Responding at the Committee, Lord Wallace stated that—

“[…] the miscarriage of justice test was not in our original consideration, but was urged upon us so that the Supreme Court should be subject to the same test as is set out for the High Court of Justiciary. Those who were urging it are perhaps not so keen on it now. Again, I am more than willing to reconsider that provision, bearing in mind what Lord McCluskey’s report said about the test.”

427. In relation to the powers of the Court, he said—

“I am minded to consider changing the provision, because in practice most—if not all—cases have been remitted. Lord Hope has commented that the Supreme Court should determine the convention right and that the High Court of Justiciary should then apply that law to particular circumstances, and his argument carries a great deal of force.

I am not wedded to the provision, and some compelling arguments have been made for changing it. I would not die in a ditch over it—far from it; I am quite persuaded by some of the points that have been made.”

332 Scotland Bill Committee, Official Report, 21 October, Col 394
333 Scotland Bill Committee, Official Report, 1 November, Col 433.
334 Lord Advocate, written submission to the Committee.
335 Scotland Bill Committee, Official Report, 1 November, Col 460.
336 Scotland Bill Committee, Official Report, 1 November, Col 460.
Proposals for the Lord Advocate and the Advocate General for Scotland to refer cases to the UK Supreme Court

428. Lord McCluskey’s report states that in normal cases, an appeal to the Supreme Court should be competent only after the conclusion of all proceedings in the courts below. In their submission to the UK Government, the Lord Advocate and the Scottish Government have set out some draft amendments to that effect.

429. Although he had some issues with the wording of the proposed amendments to the Bill from the Lord Advocate, Lord McCluskey agrees with this point. In his final report, Lord McCluskey states that “The current powers of the Lord Advocate and the Advocate General to refer or require the High Court to refer devolution issues to the Supreme Court should continue and be extended to compatibility issues.”

430. The Lord Advocate was questioned by the Committee on whether the proposal that the law officers should be able to refer directly cases to the UK Supreme Court was in effect bypassing the role of the “apex” court in Scotland and creating instances of “leap-frogging”. On this, the Lord Advocate argued that referrals would only take place by the law officers when it was a case of such importance that it raised “real issues of law and application across the system itself.” He further described his proposals not as circumvention but as complementary.

431. In his evidence to the Committee, the Advocate General for Scotland set out his concerns for the potential unequal treatment for an accused in the case being unable to ask for permission to appeal a case to the UK Supreme Court whereas the Lord Advocate, or the Advocate General for Scotland, could. He explained that he had taken the view that the Supreme Court would benefit from having a decision from the Appeal Court before it came itself to consider the case.

Partial suspension of Acts subject to scrutiny by UK Supreme Court

432. Section 33 of the Scotland Act 1998 allows the Advocate General, The Lord Advocate or the Attorney General to refer a Bill directly to the UK Supreme Court on the basis that the Bill, or any provision of it, is not within the competence of the Scottish Parliament. The power must be exercised within 4 weeks of the Bill being passed by the Scottish Parliament. This power has not been exercised to date.

433. Clause 7 of the Scotland Bill as introduced adds a new section 33A into the Scotland Act. In essence it allows for part, or parts of a Bill, to be referred to the Supreme Court whilst allowing the rest of the Bill to be brought into force. This is referred to as a “limited reference” whereas a reference of the whole Bill is referred to as a “general reference”. The limited reference provision is new.

434. Section 33A(8) allows the UK Supreme Court to make certain orders to ensure the provisions which have been referred cannot be brought into force before the Court has considered the case and has thereafter issued an order following its consideration.

337 Lord McCluskey review group, final report, executive summary, paragraph 10.
338 Scotland Bill Committee, Official Report, 1 November, Col 444.
339 Scotland Bill Committee, Official Report, 1 November, Col 453.
435. In any event it is for Scottish Ministers to commence the provisions after such time as the Court says that it is appropriate to do so using the negative resolution procedure. If, however, the Court considers the provisions are beyond competence, then the Court may prohibit Ministers from bringing them into force.

436. In its written evidence to the Committee, the Law Society stated that this power “is potentially valuable”, allowing questions about the constitutionality of the legislation to be considered in advance of that legislation being relied upon by the public. The Society described the limited reference as “attractive” and said that this will address the concern that the existing Section 33 reference power is not being used because the effect of a reference would be to “freeze” the whole of a bill, even where only one or a limited number of provisions might be thought to give rise to a question about competence. However, the Society concluded that “Further detail is required as to how this provision would work in practice.”

437. In the previous parliamentary session, the Scottish Government was of the view there were “strong arguments against it [clause 7]”. In a more recent letter to the Committee, the Scottish Government called for the removal of this clause, calling it “unnecessary and undesirable”.

438. In a briefing provided to us by one of our advisers, it was noted that no bill has yet been referred to the UK Supreme Court and that sections 31 to 33 in the Scotland Act already provide a means of policing the vires limits of the Scottish Parliament. It was also suggest that the new power was potentially open-ended.

**Continued effect of provisions where legislative competence conferred for limited period**

439. Clause 10 of the Bill as introduced has been referred to by some as a ‘reverse Sewel’ provision. Its effect is that when an Order in Council has been made under section 30 of the Scotland Act, then that change can be time limited. The amendment would cease to have effect at the end of the set period and the provision would return to its previous effect. Anything done using the amended provision will, however, continue to have effect.

440. Despite being referred to as a ‘reverse Sewel’ it is more like a “sunset clause”. It would mean that only one order would be required to achieve the same effect rather than one to make the change and another to remove it. Any order under section 30 still, however, requires the approval of both Houses at Westminster and of the Scottish Parliament.

441. The Law Society of Scotland also commented on this proposed clause in the Bill in its written evidence. It stated—

“In any event the Society is of the view that section 113(4)(b) of the Scotland Act 1998 would authorise any Order in Council under section 30 – even one with temporary effect – to contain a savings provision which would save not only the previous operation of an ASP [Act of the Scottish Parliament] but also

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340 Law Society of Scotland, written submission to the Committee.
341 Scottish Government, legislative consent memorandum, LCM(S3) 30.1.
342 Scottish Government, correspondence with the Committee, 7 September 2011.
its continued validity. Nevertheless, the Law Society accepts that there could be doubts about the matter and it would be preferable to clarify that such an Order in Council could contain such a provision.  ^343

442. The Scottish Government’s view at the time of the Bill’s introduction was that whilst the proposal would address some of the difficulties that arose recently through the Somerville case, it would generally be preferable for orders made under section 30 of the Scotland Act 1998 to transfer legislative competence to the Parliament on a permanent basis.

**Time limits for human rights actions against Scottish Ministers**

443. Clause 16 of the Scotland Bill as introduced substitutes the provisions of the Convention Rights Proceedings (Amendment) (Scotland) Act 2009 to insert a time limit of one year for actions against the Scottish Ministers under the Scotland Act 1998 where it is claimed that they have acted incompatibly with Convention rights. It was understood that the 2009 Act should be a temporary measure, to deal with the outcome of the Somerville case. The opportunity is taken now to amend the relevant provisions in the Scotland Act and repeal the 2009 Act.

444. In its evidence to the Committee, the Law Society of Scotland stated that this clause now “goes some way to fulfilling a joint statement by the First Minister and the then Secretary of State dated 9 March 2009” when both Ministers agreed that they would work together to deliver first a one year time bar by the Summer of 2009 – which became the Convention Rights Proceedings (Amendment) (Scotland) Act 2009 - and later, the UK Government will seek the support of the UK Parliament to bring forward a comprehensive solution extending the same protections to Wales and Northern Ireland on a consistent footing. That proposed change was included in the Constitutional Reform and Governance Bill which was considered before the 2010 election. However in the ‘wash up’ phase before the 2010 General Election, the provisions for Scotland, Wales and Northern Ireland were removed from the Bill.  ^344

445. Although the Scottish Government highlighted a number of concerns with this provision in the last parliamentary session, overall it did not oppose the proposal, which implements the terms of an understanding reached between them and the previous UK Government.  ^345

**Implementation of international obligations**

446. Clause 23 as introduced inserts a new section 57A into the Scotland Act to allow UK Ministers, concurrently with Scottish Ministers, to implement international obligations in relation to matters within devolved competence. The need for this clause was not part of the Calman Commission report.

447. The UK Government suggested in its Command Paper that the rationale for this clause is to allow UK Ministers to implement international obligations on a UK basis where it would be more convenient to take action on a UK basis, rather than Scotland separately having to implement the obligations.

^343 Law Society of Scotland, written submission to the Committee.
^344 Law Society of Scotland, written submission to the Committee.
^345 Scottish Government, legislative consent memorandum, LCM(S3) 30.1.
448. The Scottish Government has said previously that it is not in favour of this clause. Its legislative consent memorandum in the last session stated that it had "significant doubts about the wider practical use or relevance of the new powers". It suggested that the UK Government already has powers, under sections 35 and 58 of the Scotland Act, to enforce compliance with international obligations and that the approach in the Bill would effectively provide UK Ministers with a substantial area of executive authority over devolved matters which would be exercisable without reference to, or approval, of the Scottish Parliament. In a more recent letter to the Committee, the Scottish Government said that this clause should be removed on the basis that joint working between the Scottish and UK Governments can ensure effective implementation.\textsuperscript{346}

449. In its submission, the Scottish Human Rights Commission said that "there may be more pragmatic ways to deal with the effective implementation of international obligations in Scotland than those proposed by the UK Government under clause 23 of the Bill." The Commission stated that there are safeguards that could be put in place to ensure better 'observance and implementation of international obligations' by Scottish Ministers (and the Scottish Parliament).\textsuperscript{347}

450. Alan Trench was also critical of this proposed clause when he gave evidence to the Committee. He was concerned that the scope of the clause as drafted meant that there was the potential for the UK Government to interfere in devolved matters because of the existence of wider international obligations.\textsuperscript{348} He said—

"I dislike the metaphor of the Trojan horse, but I am struggling to think of a better one. It is a way by which it is possible that the UK Government could intervene in a wide range of matters that are already devolved at an executive level without necessarily going through Westminster, which it would be entitled to do because it occurred to it to do so. It appears that there is no intention to do that at present, but it is a possibility."\textsuperscript{349}

451. His suggestion was to limit the scope of the clause those organisations that are officially identified, specifically to section 1 of the International Organisations Act 1968, which gives a scheduled list of international organisations to which it applies.\textsuperscript{350}

452. In a briefing provided to us by one of our advisers, it was noted that the current system appears to have been working with no apparent problems and, as indicated above, this clause was not part of the Calman Commission’s recommendations. It was also described as a potentially open-ended power.

\textsuperscript{346} Scottish Government, correspondence with the Committee, 7 September 2011.
\textsuperscript{347} Scottish Human Rights Commission, written submission to the Committee.
\textsuperscript{348} Scotland Bill Committee, Official Report, 1 November 2011, Col 477-478.
\textsuperscript{349} Scotland Bill Committee, Official Report, 1 November 2011, Col 478.
\textsuperscript{350} Scotland Bill Committee, Official Report, 1 November 2011, Col 478.
EVIDENCE RELATING TO OTHER PROVISIONS IN THE BILL

Background

453. In addition to other changes to the legislative powers of the Scottish Parliament and the executive competences of the Scottish Ministers, the UK Government proposes to make a series of additional changes to the Scotland Act 1998. In this section, the Committee reviews the issues in relation to—

- Appointment of the Presiding Officer and deputies (Clause 4 of the Bill as introduced);
- Appointment of the Scottish Parliamentary Corporate Body (SPCB) (Clause 5 of the Bill as introduced);
- Statements of legislative competence (Clause 6 of the Bill as introduced); and
- Members' interests (Clause 8 of the Bill as introduced).

454. These provisions were introduced in the Bill by the UK Government largely as a result of the recommendations made by the former Standards, Procedures and Public Appointments (“SPPA”) Committee in the previous parliamentary session.\(^\text{351}\) These procedures have already been scrutinised by the Scottish Parliament\(^\text{352}\) and recommended for consent by our predecessor committee. The details of what is being proposed are outlined below for completeness.

Presiding Officer and Deputy Presiding Officers

455. The former SPPA Committee supported the Calman Commission’s recommended changes to section 19 of the Scotland Act in relation to the election of the Presiding Officer and two deputy Presiding Officers. The proposed changes related to—

- loosening the current requirement that the elections for the Presiding Officer and deputies must take place at the first meeting following a general election. Clause 14 replaces this with a requirement that the elections must take place within 14 days of the election and before any other proceedings (other than the oath taking); and
- giving the Scottish Parliament power to appoint additional temporary deputies to mitigate against any additional pressures being placed on the existing office holders in circumstances, such as a period of illness, where the Presiding Officer or one of the existing deputies is unable to carry out the functions of the office.


Composition of the Scottish Parliamentary Corporate Body

456. The Calman Commission also suggested (without making firm recommendations) a number of procedural aspects of the Scotland Act that might merit review. The former SPPA Committee made one recommendation in this context, namely that section 21 of the Scotland Act could be amended to provide greater flexibility over the composition of the SPCB.

457. The SPPA Committee noted that the current membership of the Presiding Officer and four other members reflected the current situation of four major political parties forming most of the Scottish Parliament's membership, but this might not always be the case. The Bill proposes, therefore, that that this section of the Act be amended so that membership of the SPCB is no longer fixed at four, but must have at least four members and any increase in the number would be implemented by the Scottish Parliament through a change to Standing Orders.

Statements on legislative competence (clause 6)

458. The former SPPA Committee also agreed with the Calman Commission's recommendation that section 31 of the Scotland Act should be amended to require that any person introducing a Bill should make a statement that the Bill is within the legislative competence of the Parliament. At present this requirement applies only to a Minister who is introducing a Bill.

459. The Law Society for Scotland in its written evidence stated that it agreed with this provision. However, the Society also said that it considered that the explanatory notes should detail the main considerations that inform the statement on legislative competence under Section 31(1) of the 1998 Act and the reasons which were taken into account for the views taken in that statement. Its argument for this was one of public disclosure, thereby allowing those who wish to challenge the legislation with information.\(^{353}\)

Members’ interests

460. In its report, the Calman Commission was of the view that “it is important that the Parliament’s own standards regime is able to evolve and adapt to changing circumstances” and therefore suggested that the Scottish Parliament be invited to make proposals to allow for greater discretion in this area.

461. The Scotland Act (section 39) currently requires the Scottish Parliament to make provision which proscribes certain conduct (failure to register or declare certain interests, and undertaking paid advocacy) and makes contravention of those provisions a criminal offence (incurring a penalty, on summary conviction, of a fine not exceeding level 5 on the standard scale). The Scottish Parliament is also enabled to apply its own sanctions for contravention of these provisions.

462. The former SPPA Committee agreed with the Calman Commission that the current provisions of the Scotland Act are too prescriptive and therefore recommended that section 39 should be amended to give the Scottish Parliament

\(^{353}\) Law Society of Scotland, written submission to the Committee.
greater discretion in the implementation its members’ interests regime. Clause 8 of the Bill as introduced would allow the Scottish Parliament to make its own provision in relation to criminal offences in this area (rather than prescribing the offences in the Scotland Act) and would give greater flexibility about the circumstances in which sanctions were to be imposed on members. Any changes to the current arrangements would be implemented by an Act of the Scottish Parliament replacing the current Interests of Members of the Scottish Parliament Act 2006 and in the meantime, the Scotland Bill contains transitional provisions to continue the 2006 Act.
PROPOSALS FOR GREATER CONTROL OF THE CROWN ESTATE

Introduction

463. The Crown Estate in Scotland consists of the rights, interests and property in Scotland that are managed by the Crown Estate Commissioners (CEC) as part of the UK wide Crown Estate. The CEC is a statutory corporation operating under the Crown Estate Act 1961 and managed by a Board of up to eight publicly appointed Commissioners.

464. The Scotland Bill as introduced by the UK Government into the House of Commons on 30th November 2010 contained one measure related to the responsibilities of the CEC in Scotland. Clause 18 consisted of provisions to amend the Crown Estate Act 1961, so that one of the CEC’s Board of Commissioners would be appointed as a ‘Scottish Commissioner’ following consultation by the Chancellor of the Exchequer with Scottish Ministers. This measure has been carried forward in identical terms as Clause 22 in the current Scotland Bill.

465. The measure was a proposal considered by the previous Scotland Bill Committee and in their report on the Bill (March 2011), the Committee welcomed the limited provisions in Clause 18 regarding a Scottish Commissioner. However, the Committee also noted that “there are clearly significant issues to be dealt with in relation to the Crown Estate and its Commissioners”354 and urged “an early and full dialogue between the UK Government and devolved administrations on this issue with all options on the table for the future governance of the Crown Estate Commissioners functions in Scotland”.355

466. The Committee was re-assured at the beginning of its consideration of the Crown Estate in Scotland by the Secretary of State for Scotland’s comments in the Committee’s opening evidence session, that the CEC’s operations in Scotland is still a live issue in the context of the Scotland Bill and “up for debate and consideration”.356

467. The Committee also noted the Secretary of State’s three key tests for any further changes to the Scotland Bill, namely that “they must be based on detailed proposals and be capable of establishing a broad consensus, and they should, while clearly benefiting Scotland, not be detrimental to the rest of the UK.”357

Setting the context

Extent of the evidence

468. In considering the proposed Clause 22 and more widely ‘the future governance of the CEC’s functions in Scotland”, the Committee has had the benefit of a significant volume of information on both the Crown property, rights and interests in Scotland that are administered with their revenues by the CEC as part of the Crown Estate, and the CEC’s operations in Scotland.

354 Scotland Bill Committee, Session 3, Official Report, Col.166.
355 Scotland Bill Committee, Session 3, Official Report, Col.164.
356 Scotland Bill Committee, Official Report, 8 September 2011, Col.84.
357 Scotland Bill Committee, Official Report, 8 September 2011, Col.54.
469. As was highlighted in a number of submissions to the Committee, the Crown Estate in Scotland has been an issue considered in a number of inquiries and reports over the last five years. Since the Crown Estate Review Working Group’s (CERWG) report on ‘The Crown Estate in Scotland’, a sequence of committees at Westminster and Holyrood have considered the issue in addition to the Commission on Scottish Devolution. The Committee has taken account of these previous inquiries and our predecessor committee’s work on the topic.

470. The previous Committee was the most recent of the inquiries to publish its findings on this topic. However, the committee noted in its report as an important development, that the House of Commons Scottish Affairs Select Committee had announced in February 2011, that they would be conducting an inquiry into the Crown Estate in Scotland. The terms of reference for that inquiry were published in May and the inquiry has been on-going during the work of our Committee.

471. The evidence to the Scottish Affairs Committee, both in written submissions and witness sessions, has assisted our considerations and we acknowledge the work of the Scottish Affairs Committee on this topic. This has included the very helpful additional information that they obtained from the CEC on the finances and composition of the Crown Estate in Scotland.

472. This Committee received a number of submissions specifically on the issue of the Crown Estate in Scotland, in addition to the Scottish Government’s paper on the topic published in June 2011. The issue was also covered in some of the other submissions to the Committee that also commented on other provisions in the Scotland Bill.

473. In addition, the Committee received the record of the evidence session that the Rural Affairs, Environment and Climate Change Committee held on the Crown Estate in Scotland on 7th September, 2011. We are grateful to the Rural Affairs, Environment and Climate Change Committee for its work, which has made a valuable contribution to our analysis.

Clarifying the subject

474. There can sometimes be confusion between the Crown Estate and the organisation managing it, as the CEC brands itself as The Crown Estate. As evidence to the Committee showed, it is also still necessary to note that the CEC does not own the Crown property, rights and interests that make up the Crown Estate. The CEC manages them on behalf of the Crown and in doing so, exercises the Crown’s rights of ownership.

475. The CEC has a general duty to maintain the Crown Estate as ‘an estate in land’ and ‘to maintain and enhance its value and the return obtained from it, but with due regard to the requirements of good management’. CEC’s ‘net surplus revenue’ (or profit) from the Crown Estate each year is transferred to HM Treasury’s Consolidated

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358 Various reports, including Environment and Rural Affairs Committee (2007-08), Commission on Scottish Devolution (2009), Treasury Select Committee (2010), Scottish Affairs Committee (2011, Scotland Bill inquiry) and Scotland Bill Committee, session 3 (2011)
360 Scottish Affairs Committee, The Crown Estate, written submission 38.
361 Crown Estate Act 1961 Act, s1(3.)
Fund for use by the UK Government as part of public expenditure. The CEC is managed by a Board of up to eight Commissioners selected under normal public appointment procedures, and reports to the Treasury as specified in the 1961 Act.

476. The Committee, in improving its own understanding of the Crown Estate and CEC, noted the Treasury Select Committee’s view\textsuperscript{362} that there is a lack of clarity that has tended to obscure the fact that the CEC are a public body charged with managing public resources for public benefits.

477. The Scottish Government has published a summary list of the Scottish Crown, property, rights and interests managed by the CEC and the Committee welcomes this as a helpful clarification of the CEC’s responsibilities in Scotland. The Committee notes the different legal identity of these Crown property, rights and interests in Scots property law, compared to those in the rest of the UK in English law.

478. The Committee also notes as background that the origins of the CEC’s involvement in Scotland was the transfer of the administration and revenues of some of Scotland’s Crown property rights to Whitehall in 1832, with the CEC as the latest in a series of Commissions that have managed these rights since. The CEC’s administration of these rights and revenues as part of the Crown Estate is reserved to Westminster by the Scotland Act 1998.\textsuperscript{363}

479. Under the Scotland Act 1998, the Scottish Parliament has legislative competence to regulate Crown property (apart from the provisions of the Crown Property Estates Act and subject to Crown consent procedures and Royal Assent to any Bill). In relation to the Crown Estate in Scotland, this is subject to the reservation of the management of the Estate by CEC in terms of the 1961 Act. The Scottish Parliament can also regulate the use of land and property rights in Scotland, including those forming part of the Crown Estate in relation to devolved matters, such as planning or the marine environment to the extent necessary to achieve the devolved purpose.

480. The reserved status of the CEC means that the CEC is not accountable to the Scottish Parliament or Scottish Ministers, but to Westminster with the Secretary of State for Scotland being the UK Government Minister responsible for the CEC’s operations in Scotland.

481. The Committee noted that the CEC stopped managing the Crown Estate in Scotland as one of its distinct operating divisions in 2002. This change included ending reporting separately on the CEC operations in Scotland and integrating them into the CEC’s operations in the rest of the UK.

\textit{Scale in Scotland}

482. One factor that became apparent during our consideration of this subject is the small scale of the CEC’s operations in Scotland compared to those in the rest of the UK. For example, the CEC manages a £7 billion property portfolio with over 96% of the capital value of the Crown Estate in England and also over 95% of the revenue...
The Crown Estate in Scotland had a value of £207.1 million in 2010/11 or 3.1% of the total value, and contributed £9.9 million or 3.7% of the CEC’s gross revenue.

The Committee noted that Scotland appears from the records available to have always accounted for around 5% or less of the value and revenue of the UK wide Crown Estate under the CEC and its predecessors back to the origins of the current arrangements in the 19th Century. The Committee did, however, question whether this position would necessarily continue to be the case given the apparent potential for renewable marine energy generation in the waters around Scotland.

The CEC have provided two scenarios for its future potential income from leases for marine renewable generation in Scotland by 2020, with the income projected to be between £12 million and £49 million depending on the actual extent of generation installed and operating. In evidence to the Committee, however, the CEC said that the harsher environment and technical developments required meant that there is a greater risk of some developments not going ahead around Scotland, while the fact that the development of offshore wind is further ahead around England and Wales means income to the CEC will increase there significantly during this period as generation comes on stream.

The Committee recognises that there is also an important difference in the balance of the CEC’s operations in Scotland compared with the rest of the UK. The CEC manages the Crown Estate through four operation divisions or Estates (Urban, Rural, Marine and Windsor) and each year, the Marine Estate accounts for around 15% of the CEC’s surplus revenue. However, in Scotland, 50% or more of the CEC’s surplus revenue each year tends to come from their Marine Estate in Scotland.

Indeed, the percentage of the CEC’s total revenue in Scotland from its marine involvements looks set to increase, given that the CEC’s planned capital investment in Scotland over the current five year period is all due to be in the marine environment.

The Committee considers that the small size of capital value and revenues of the Crown Estate in Scotland compared to the rest of the UK, together with the greater importance in Scotland of the marine environment, are both important factors to consider when reviewing the future governance of the CEC’s responsibilities in Scotland.

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367 Supplementary Evidence to Scotland Bill Committee, Session 3, 7 February 2011, p.3.
368 Scotland Bill Committee, Official Report, 20 September 2011, Col.162.
370 The Crown Estate, Scotland Reports.
The specific proposal in the Scotland Bill

488. The one clause in the Scotland Bill concerning the Crown Estate, Clause 22, makes provision to amend Schedule 1 of the Crown Estate Act 1961, so that one of the Commissioners of the CEC is appointed as the ‘Scottish Commissioner’ following consultation by the Chancellor of the Exchequer with Scottish Ministers.\(^\text{372}\)

489. This clause implements one of the two recommendations of the Commission on Scottish Devolution for the Crown Estate in Scotland. However, the Committee notes the view of the CEC that the change will essentially make no actual practical difference.\(^\text{373}\) The CEC has always had a Board member as the Scottish Commissioner since the CEC was established in 1956 and Clause 22 will simply formalise that traditional arrangement.

490. It could also be argued that the provision in Clause 22 to consult Scottish Ministers on the appointment also seems likely to be of little significance, as the consultation will come after the candidate has been through a public appointments selection procedure.

491. The Committee also notes that the role of the Scottish Commissioner is not to represent Scottish interests on the Board\(^\text{374}\), but to have knowledge of Scotland as part of being one of the eight Board members of the CEC and contributing as a Non-Executive Director to the overall management of the Crown Estate. The role of the part-time Commissioner is, as the Scottish Commissioner, limited in its scope.\(^\text{375}\) During our consideration of evidence and despite the invitation to attend, the current Scottish Commissioner did not represent the CEC when the CEC appeared before this Committee in September 2011.

492. The Committee recognises that placing the appointment of the CEC’s Scottish Commissioner on a statutory basis as proposed, could be as a legacy of the CEC ending Scotland’s position as one of the CEC’s distinct operating divisions. Following that change, there were concerns that the traditional position of Scottish Commissioner might also be discontinued as the last separate treatment of the CEC’s operations in Scotland.\(^\text{376}\)

493. The proposal now to convert the traditional position of Scottish Commissioner into a statutory appointment, only ensures the role will continue and will not necessarily bring other changes.

The key issues and evidence taken

494. The range of evidence received on the CEC has, in most cases, gone well beyond the proposal contained in the Bill to discuss the governance arrangements of the CEC, and its activities more widely. Indeed, direct evidence on the proposal in the Bill was relatively limited. This seems to suggest that stakeholders feel that the Bill represents a rare opportunity for public debate about the role of the CEC in

\(^{372}\) Scotland Bill.

\(^{373}\) Scotland Bill Committee, *Official Report*, 20 September 2011, Col158.

\(^{374}\) As implied, for example, by the report of the Scotland Bill Committee, Session 3, paragraph 164.


Scotland. This section of the report considers some of key issues which can be drawn from the evidence received. These issues are either directly or indirectly linked to the proposal in the Bill.

As well as considering the contribution made by the Rural Affairs, Climate Change and Environment Committee in holding an evidence session focusing on harbour and aquaculture issues, the Scotland Bill Committee held specific evidence sessions with the CEC, and with stakeholders. In addition the issue was raised with UK and Scottish Ministers.

Crown Property, Rights and Interests that make up the Crown Estate in Scotland

The evidence that the committee has heard has improved its understanding of the CEC, its role, relationships with government and, critically, relationship with stakeholders. This includes what actually constitutes the Crown Estate in Scotland, a combination of what are known as ancient possessions and modern acquisitions. The detail of these rights has been examined in more detail by others, however the Committee is clear that the following accurately reflects the relevant Crown property, rights and interests.

Ancient possessions

- Ownership of the seabed (excluding hydrocarbons) within Scotland’s territorial seas out to the 12 nautical mile limit, where this has not been granted out.
- Rights over the continental shelf to minerals (excluding hydrocarbons) and sedentary species from Scotland’s territorial seas to 200 nautical mile limit including recent claims of rights on renewables and carbon sequestration.
- Ownership of Scotland’s foreshore where this has not been granted out and excluding areas under udal tenure.
- The right to all naturally occurring mussels in Scotland’s territorial seas where this has not been granted out.
- The right to all naturally occurring oysters in Scotland’s territorial seas where this has not been granted out.
- The right to all coastal salmon fishing within Scotland’s territorial seas where this has not been granted out.
- The right to all salmon fishing in rivers and lochs in Scotland where this has not been granted out and excluding areas under udal tenure.
- The right to mine naturally occurring gold and silver in Scotland
- Ownership of 5 ha of West Princes Street Gardens, Edinburgh, including the Castlebanks.
- Ownership of Kings Park, Stirling

Modern Acquisitions

- Ownership of five rural properties:
  - Glenlivet (Moray)
  - Fochabers (Moray)
  - Applegirth (Dumfries and Galloway)
  - Whitehill (Midlothian)

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Old Mills Farm (Stirling)
- Ownership of one urban property in Edinburgh (39/41 George Street)
- Involvement in joint property partnerships (50% ownership of Fort Kinnaird Retail Park in Edinburgh through Gibraltar Ltd Partnership)
- Ownership of coastal properties (excluding harbour and related property) (Rhu Marina, Firth of Clyde)

Other Rights & Dues
- Title reservations: minerals rights and other rights reserved by the Crown over former Crown lands, including Edinburgh Castle and other prominent sites.
- Other income: The right of the Crown to income if the one site in Scotland transferred to government ownership under the Forestry (Transfer of Woods) Act 1923, is sold.

497. The Committee believes it is important to understand exactly what makes up the Crown Estate in Scotland as only then can legitimate recommendations be made as to any reform of their governance.

Relationship with the UK and Scottish Governments
498. The Committee has received a lot of evidence examining the relationships the CEC has with the UK Government and Scottish Government. Relationships with the latter are not based in statute, and so have tended to be more ad hoc in nature. The relationship between the CEC and the Scottish Government is explored in more detail in the section below, Accountability in Scotland. This section of the report examines the evidence received in relation to the CECs engagement with UK Ministers and departments.

499. As explained earlier, management of the CEC is a reserved issue. The Chancellor of the Exchequer and the Secretary of State for Scotland have powers of direction, jointly or separately, over the operations of the CEC, with the Secretary of State holding such powers for operations in Scotland, and is the UK Government Minister responsible for overseeing the CEC’s operations in Scotland. These powers have never been used. The CEC key line of accountability is to the UK Government, and specifically to HM Treasury.

500. The Committee did however explore broader issues with the Secretary of State for Scotland, Michael Moore, and with the Exchequer Secretary to the Treasury, David Gauke, in particular exploring their views on the potential for devolution of the activities of the CEC.

501. The Secretary of State for Scotland made clear that a policy of devolving administration of the Crown Estate to Scotland is not UK Government policy and that—

“it would only ever be our policy if we were persuaded of the case. A considerable amount of discussion would have to take place before we got even close to that position. The debate is a live one, not only here in the context of the Scottish Government’s proposals, which we have received and
are considering, but in the context of work that is going on at Westminster on
the operations of the Crown Estate Commissioners – they are subject to
scrutiny by the Scottish Affairs Committee.” 378

“We have said that we will discuss all serious, detailed proposals. We have had
a proposal from the Scottish Government on the issue, which Richard
Lochhead wrote to us about in June. In time, we will engage in discussions with
the Scottish Government and will have further questions for it. At present we
are not persuaded that what it proposes is the right way forward”. 379

502. The Exchequer Secretary to the Treasury was asked about the potential
implications for the block grant if the CEC’s responsibilities were devolved. He
responded that—

“It is impossible to say what effect devolution would have on the block grant,
without specifying how devolution, were it agreed, would take place. The
mechanism would have to be developed and agreed jointly with the Scottish
Government in line with the principles for adjusting the block grant”. 380

503. It has become clear to this Committee that the revenue generated from the
activities of the CEC in Scotland is relatively small. This issue was explored with the
Secretary of State for Scotland who stated that—

“It should be recognised that the Crown Estate’s investment in Scotland has
been disproportionate to the income and the assets that it already has in the
country”. 381

504. The Committee is aware that more detail on the financial arrangements of the
activities of the CEC has become available over the past 18 months. This culminated
in evidence submitted to the UK Parliament Scottish Affairs Committee which
outlined the most recent position382. This is reproduced below to give further context
to this section of the report. Table 8 below shows the capital value, and capital
investment and receipts of the Crown Estate. Table 9 shows Gross Revenue.

378 Scotland Bill Committee, Official Report, 8 September 2011, Col 83.
379 Scotland Bill Committee, Official Report, 8 September 2011, Col 83.
380 Letter from the Exchequer Secretary to the Treasury to the Convenor of the Scotland Bill
381 Scotland Bill Committee, Official Report, 8 September 2011, Col 84
382 Scottish Affairs Committee - Further Supplementary written evidence submitted by The Crown
Estate (2011)
### Table 8 - The Crown Estate – Capital Value, Capital Investment and Receipts

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<td><strong>Capital value (property value)</strong></td>
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<tr>
<td>Total Scotland</td>
<td>139,102</td>
<td>167,860</td>
<td>168,085</td>
<td>170,400</td>
<td>176,367</td>
<td>186,546</td>
<td>215,888</td>
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<td>238,460</td>
<td>232,710</td>
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<td>Total Crown Estate</td>
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<td>4,408,872</td>
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<td>% Scotland/Total Crown Estate</td>
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<td>4.34</td>
<td>4.17</td>
<td>4.19</td>
<td>4.00</td>
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<tr>
<td>Capital investment – Scotland</td>
<td>25,560(^a)</td>
<td>37,600(^c)</td>
<td>1,901</td>
<td>2,057</td>
<td>1,233</td>
<td>1,652</td>
<td>1,523</td>
<td>1,245</td>
<td>2,922</td>
<td>7,400(^e)</td>
<td>4,200(^e)</td>
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<td>785</td>
<td>8,915(^d)</td>
<td>1,928</td>
<td>5,726(^d)</td>
<td>9,923(^e)</td>
<td>1,399</td>
<td>810</td>
<td>1,243</td>
<td>1,903</td>
<td>900</td>
<td>68,400(^f)</td>
<td>3,400</td>
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<tr>
<td>Total capital investment</td>
<td>73,751</td>
<td>206,658</td>
<td>57,302</td>
<td>44,152</td>
<td>63,656</td>
<td>104,666</td>
<td>199,678</td>
<td>185,688</td>
<td>258,116</td>
<td>306,768</td>
<td>394,400</td>
<td>571,000</td>
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<tr>
<td>Total capital receipts</td>
<td>63,645</td>
<td>113,217</td>
<td>42,278</td>
<td>29,323</td>
<td>63,757</td>
<td>166,718</td>
<td>139,694</td>
<td>417,829</td>
<td>328,831</td>
<td>231,490</td>
<td>419,000</td>
<td>406,100</td>
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<td>Percentage Scotland/Total investment</td>
<td>34.66</td>
<td>18.19</td>
<td>3.32</td>
<td>4.66</td>
<td>1.94</td>
<td>1.58</td>
<td>0.76</td>
<td>0.67</td>
<td>1.13</td>
<td>2.41</td>
<td>1.06</td>
<td>1.30</td>
</tr>
<tr>
<td>Percentage Scotland/Total receipts</td>
<td>1.23</td>
<td>7.87</td>
<td>4.56</td>
<td>19.53</td>
<td>15.56</td>
<td>0.84</td>
<td>0.58</td>
<td>0.30</td>
<td>0.58</td>
<td>0.39</td>
<td>16.32</td>
<td>0.84</td>
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</table>

Major acquisitions and sales
1. Forward funding and purchase of Princes Exchange
2. Further expenditure on Princes Exchange
3. Sale of Gallery of Modern Art, Edinburgh and Drummond Moore quarry
4. Sale of Blythswood Square, Glasgow
5. Sale of Charlotte Square, Edinburgh and Whitehill (Hopefield development site)
6. Acquisition of Rhu Marina
7. Improvements at Rhu marina (£1.4m), wave and tidal (£1.5m) and STW (£1.3m) [Note, this reference was not included in the original source table, available at http://www.publications.parliament.uk/pa/cm201012/cmselect/cmscotaf/writev/crown/m38.pdf ]
8. Sale of Princes Street and Princes Exchange, Edinburgh
<table>
<thead>
<tr>
<th></th>
<th>1999/00 £’000</th>
<th>2000/01 £’000</th>
<th>2001/02 £’000</th>
<th>2002/03 £’000</th>
<th>2003/04 £’000</th>
<th>2004/05 £’000</th>
<th>2005/06 £’000</th>
<th>2006/07 £’000</th>
<th>2007/08 £’000</th>
<th>2008/09 £’000</th>
<th>2009/10 £’000</th>
<th>2010/11 £’000</th>
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<tr>
<td><strong>Gross revenue</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total Scotland</td>
<td>11,773</td>
<td>13,597</td>
<td>13,260</td>
<td>12,117</td>
<td>12,269</td>
<td>13,993</td>
<td>14,172</td>
<td>12,751</td>
<td>13,929</td>
<td>17,570</td>
<td>13,152</td>
<td>11,910</td>
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<tr>
<td>Percentage Scotland/Total Crown Estate</td>
<td>6.29</td>
<td>6.64</td>
<td>5.93</td>
<td>5.27</td>
<td>5.16</td>
<td>5.70</td>
<td>5.62</td>
<td>4.86</td>
<td>5.26</td>
<td>6.15</td>
<td>4.39</td>
<td>3.88</td>
</tr>
</tbody>
</table>
Accountability in Scotland

505. The Committee has heard a range of opinion as to whether the CEC are accountable in Scotland, for their operations in Scotland. On the general question of governance of the Crown Estate, the CEC stated--

“We think that the governance of the Crown Estate is very transparent at present. The statutory appointment of a Scottish commissioner is probably a good thing: it will keep things nice and straightforward, and it will offer clarity”.383

506. In written evidence the CEC stated that it “has recognised for some time the need and its desire to strengthen still further working relationships with the Scottish Government and Scottish Parliament” and that their “UK-wide business model creates financial efficiency by avoiding duplicated functions; facilitates communication; and involves all parts of the business in the formulation of corporate policy while ensuring that local circumstances are reflected in decision-making”384.

507. The CEC appear to have made some limited effort to improve the flow of information between themselves and Scottish stakeholders in recent years, stating—

“We try to engage with the Scottish Government and Parliament in similar ways [to the UK Government]. For example we have asked Scottish Parliament Committees whether they wish us to give evidence on our activities and ambitions in Scotland and have invited the First Minister and the Scottish Government to regular formal meetings. We have also been negotiating with the Scottish Government on a memorandum of understanding and are working on another MOU with councils in Highlands and Islands to help us to communicate more formally and clearly and to engage with stakeholder groups so that we understand their objectives and policies and can ensure that we reflect them in our own business plans and objectives”. 385

508. Broadly, evidence to the Committee was that the work the CEC carry out is generally of a high standard, and their professionalism is welcomed by some stakeholders who value the input of the CEC. Others accept that the work CEC does can be useful, but that it need not be carried out by them. For example, Calum Davidson of Highlands and Islands Enterprise stated—

“We work closely with Rob Hastings’s team. They are, in effect, project managers; they are marine experts and do things that we cannot do. At the operational level, they add some value, but there is no need for them to be in the Crown Estate; they could just as easily be in another part of Government”. 386

384 The Crown Estate Commissioners, written submission to the Committee.
385 Scotland Bill Committee, Official Report, 20 September 2011, Col 152.
509. This theme was continued by Linda Rosborough of Marine Scotland who stated that—

“We work well with the Crown Estate. We have good working relationships with its staff and value the expertise that they bring. Marine Scotland’s staff are not experts in setting levels of rent and leases. However, I know from meeting my counterparts in other European countries that they do not have a dual process similar to ours. I also know that when developers are faced with a separate leasing process [for offshore developments] and a licensing process, they are a bit baffled, as are people around Scotland sometimes” 387

510. The Scotland Bill Committee and the Rural Affairs, Climate Change and Environment Committee heard from practitioners who deal with the Crown Estate at the local level on a regular basis. The latter heard from Nick Turnbull of the Association of Scottish Shellfish Growers that they “have had a long-term relationship with the Crown Estate and, in general, [...] have found it to be helpful and willing to listen to any problems over the years” 388.

511. Douglas A. Thomson reflected that the expertise contained in the Crown Estate staff in Scotland should not be lost should any change in the management of Crown property, rights or interests come about 389.

512. The Committee also heard a number of more critical complaints regarding the accountability of the Crown Estate Commissioners in Scotland. In relation to its financial reporting of its Scottish activities and in particular publication of its annual revenue and capital value of the Crown Estate in Scotland, its representatives could not tell the Committee when asked during the meeting why the CEC had stopped publishing figures after 2007-08. 390

513. Councillor Foxley of The Highland Council said—

“We read about the recent leases in the Pentland Firth, and the lease around Tiree in The Herald about 18 months ago, which involved the head of planning in Argyll and Bute Council, next to whom I sat at a meeting the following night. It is totally unacceptable to carry on like that and we all think that we can do far better, working together with the communities and local business interests.” 391

514. Linda Rosborough of Marine Scotland told the Committee that the Scottish Government’s position was—

“… that it is not convinced that the current arrangements for the management of the Crown estate in Scotland reflect Scotland’s best interests and that

388 Rural Affairs, Climate Change and Environment Committee, Official Report, 7 September 2011, Col 63.
389 Douglas A. Thomson, written submission to the Committee.
there are serious accountability, revenue and governance issues that need to be addressed.\footnote{Scotland Bill Committee, \textit{Official Report}, 20 September 2011, Col 193.}

515. Finally, Scrabster Harbour Trust told the Rural Affairs, Climate Change and Environment Committee that—

“In the trust, we have held a long-standing position on the Crown Estate. It is a matter of public record that we believe the focus of the Crown Estate, although it may have altered, remains on revenue maximisation.

We advocate that it would be better for trust ports to own and manage the sea bed for the benefit of the wider community. I will justify that statement using a number of reasons. First is maximisation of local benefit. Secondly, we regard the current arrangements as being a tax and an inhibition on development. Thirdly, addressing the matter would assist trust ports to raise finance. Finally, there is the question of operational flexibility.”\footnote{Rural Affairs, Climate Change and Environment Committee, \textit{Official Report}, 7 September, Col 64.}

\textit{The benefits or otherwise to Scotland of CEC work}

516. One of the issues which has emerged during evidence on the Crown Estate was the range of views as to the benefits the CEC gives to local communities.

517. For example, Community Land Scotland is of the view that—

“Revenues raised in local communities are mostly transferred out with the areas where those funds are generated. This would particularly appear to be the case with regard to the aquaculture industry, where significant income has been levied in remote rural and island communities, but, re-investment has been modest in comparison; The limited re-investment in local communities appears to be largely targeted at promoting the Crown Estate’s own public relations, or promoting future revenue streams, rather than sustainable investment in local communities; Communities feel that they do not have a say in how the Crown Estate manages its resources; There appears to be a lack of transparency and openness in the operation of the Crown Estate, and little interaction or consultation with local communities on development issues and the Crown Estate charges can inhibit development in some of the most remote and fragile communities”.\footnote{Community Land Scotland, written submission to the Committee.}

518. Scottish Land & Estates take a contrary view—

“We believe that there is much more to the Crown Estate’s work in Scotland than the marine assets that CLS focuses on in its submission, and recently published policy paper. The Crown Estate takes a long term approach to land management in Scotland, working in partnership, or as a co-investor, with other legal entities and individuals and, contrary to the arguments put forward by CLS, contributes in many ways to rural communities. There are many examples of where the Crown Estate has worked to benefit the local community, including the gifting of land at Fochabers to the Burn O’
Fochabers Woodland Trust; employment opportunities within fragile rural communities; the provision of affordable housing, and also the provision of opportunities for tenant farmers. The Crown Estate also makes a significant contribution to meeting Scottish Government and local targets in issues as diverse as forestry and the private rented sector. We believe that the Crown Estate embodies sustainable development, stewardship and good practice and should be applauded for the work that they do.\(^{395}\)

**Devolution to Scotland, and further devolution**

519. Opinion is varied regarding the prospect of devolving the Crown Estate to Scotland. The next section of the report seeks to give a flavour of the range of opinion, the balance of which indicates a desire for reform of the current arrangements.

520. The British Ports Authority stated in its written evidence said—

“Our basic position is that we are unconvinced of the benefits of a change to a devolved Scottish Crown Estate. This is a majority view and there are some who take the view that devolution, and in fact much greater local control of Crown Estate revenues, would be beneficial” and “The Crown Estate are essentially a landlord and we do not see how devolving to Scotland would affect this role; so far as we can see, it will always need to be in the position, in terms of promoting the public interest, of getting as good a deal for the tax payer as possible”.\(^{396}\)

521. However, during oral evidence, the British Ports Authority representative agreed that his position was that, far from being unconvinced, he may well be convinced, depending upon what happened after devolution.\(^{397}\)

522. The Scottish Council for Development and Industry (SCDI) stated that whilst its “members have differing views on whether there is a need to reform the legal framework within which the Crown Estate Commissioners operate” and that the—

“question of reform of the legal framework for the Crown Estate may be considered separately from the question of retention of its Scottish revenues. SCDI would support retention of this revenue stream in Scotland, whether or not the legal framework in which the Crown Estate Commissioners operate changes. As economic opportunities grow, the pace of delivery speeds up and the need for close relationships increases. The Crown Estate must continue to strengthen its presence in Scotland and its partnerships, nationally, regionally, locally and with leading industries. SCDI has suggested that The Crown Estate might consider reinstating a “principal officer for Scotland” to head up the organisation and act as the main point of contact for the Scottish Government and key stakeholders”.\(^{398}\)

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\(^{395}\) *Scottish Land & Estates*, written submission to the Committee.

\(^{396}\) *The British Ports Authority*, written submission to the Committee.


\(^{398}\) *Scottish Council for Development and Industry*, written submission to the Committee.
523. The Scottish Council for Voluntary Organisations referred, in its written evidence, to its submission to the Scottish Affairs Committee\textsuperscript{399} which called for “Management and administration of the Crown Estate in Scotland [to] be devolved from the Crown Estate Commissioners to the Scottish Parliament” and “All surpluses from the Crown Estate in Scotland, that under the current system would normally be passed to the Treasury, should be allocated specifically for community benefit in Scotland”.\textsuperscript{400} The Scottish Youth Parliament agreed that income generated from CEC activities in Scotland should be retained in Scotland.\textsuperscript{401}

524. Evidence from J.R. Cuthbert and M. Cuthbert was that “In our view, the CEC needs to be brought much more closely under the democratic accountability of the Scottish Parliament, to ensure better management”. The Cuthberts also provided valuable evidence on some of the CEC’s financial arrangements in Scotland.\textsuperscript{402}

525. In written evidence, Andy Wightman stated—

“There is a broad consensus from [the] evidence that the current role of the CEC in Scotland is an anomaly and that the time has come for this committee to put forward a straightforward and detailed recommendation to end the role of the CEC in Scotland. Such a move will involve no change in the ownership of these rights which will remain in the ownership of the Crown in Scotland. The revenues involved are modest and the UK Treasury will most likely save money. Removal of the CEC’s role would also benefit the renewables sector by simplifying the process of obtaining generating consents. There is a broad consensus that this should all be done as part of a two stage process whereby:-

1. The CEC ceases to have any role or locus in Scotland and its powers are devolved to the Scottish Parliament by removing paras 2(3) and 3(3)(a) in Schedule 5 from the Scotland Act 1998.

2. The Scottish Parliament and Scottish Government instigate a review of all of these diverse rights and puts in place more appropriate arrangements for the management of all the property, rights and interests of the Crown Estate in Scotland”.\textsuperscript{403}

526. The submission from Mr Wightman was one of the most detailed setting out how the “three tests” set by the Secretary of State for Scotland for reform, that they be based on detailed proposals and be capable of establishing a broad consensus, and they should, while clearly benefiting Scotland, not be detrimental to the rest of the United Kingdom. Mr Wightman, in written evidence explored each of these in turn, and asserted that all would be met by his proposal.\textsuperscript{404}

\textsuperscript{399} Available at: http://www.scvo.org.uk/policy/community-news/response-crown-estate-consultation/
\textsuperscript{400} Scottish Youth Parliament, written submission to the Committee.
\textsuperscript{401} Scottish Council for Development and Industry, written submission to the Committee.
\textsuperscript{402} J.R. Cuthbert and M. Cuthbert, written submission to the Committee.
\textsuperscript{403} Andy Wightman, written submission to the Committee.
\textsuperscript{404} Andy Wightman, written submission to the Committee.
527. In written evidence Highlands & Islands Enterprise were keen to point to the collaboration they had with six Highlands and Islands local authorities to form the Crown Estate Review Working Group (CERWG) which reported in 2007. They further stated in written evidence that—

“Since 2007, and the publication of the CERWG report agreement, HIE has taken the position of supporting the full devolution of the activities of the CEC in Scotland to the Scottish Government. In particular, HIE supports the Scottish Government position of devolution of Crown Estate interests in Scotland as a two stage process with, firstly, devolution from Westminster to Holyrood and then, secondly, further devolution downwards from Holyrood to local interests, with this latter stage based on full consultations during the period leading to the enactment of devolution from Westminster”.

528. Highland Council agreed with this view, and summarised its position stating—

“Highland Council consider that it is an historical anomaly that the CEC continue to operate in Scotland and that, as a relatively straightforward matter of good governance and the public interest, the CEC’s responsibilities in Scotland should be devolved to the Scottish Parliament and thereafter, and as appropriate, to local authority level.”

529. More generally, David Sandison of Shetland Aquaculture and the Scottish Salmon Producers Organisation stated—

“We broadly agree with the case that has been made for the role and accountability of the Crown Estate to be transferred and in some way brought more in line with the devolution settlement”.

530. The leader of Highland Council, Councillor Michael Foxley indicated that the status quo was not acceptable, and that management arrangements should be changed stating—

“From the Highlands and Islands perspective, we see the asset – as has been said – as being Scottish; it is owned by Scotland. It is its management that is not devolved. We want the management not only to be devolved to Scotland and to rest purely with the Scottish Parliament in Edinburgh, but to be further devolved to local authorities in the Highlands and Islands and, indeed, directly to harbours and communities.”

531. On the question of further devolution of the functions of the Crown Estate, beyond the Scottish Government, for example to local authority level, David Sandison stated—

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405 Highlands and Islands Enterprise, written submission to the Committee.
406 Highlands and Islands Enterprise, written submission to the Committee.
407 The Highland Council, written submission to the Committee.
408 Rural Affairs, Climate Change and Environment Committee, Official Report, 7 September 2011, Col 70.
409 Scotland Bill Committee, Official Report, 20 September 2011, Col 175.
“There would probably be a wide range of views across the industry about the suggestion of further devolution. Certainly there would be differences of opinion between island authority areas and mainland authority areas [...] I would not like to express a firm opinion about the proposal. It would require further dialogue and discussion at various levels”. 410

532. Some evidence to the Committee explored what could be done with any revenues generated as a result of the transfer of CEC functions to Scotland. Oxfam Scotland felt that revenues should be ring-fenced as they gave an opportunity to act both locally and globally when it comes to utilising the funds”411. They further stated that “those revenues which the Crown Estate in Scotland obtained as a result of offshore renewable energy should be focused to support climate adaptation for vulnerable communities here in Scotland but also for poor communities in developing countries to ensure they can also adapt to the changing climate”412. In a similar vein RSPB Scotland stated “The best and fairest way to benefit all communities in the long term would be to use the financial benefits from exploitation of the Crown Estate to protect and enhance Scotland’s wider environment. This would deliver benefits in the public interest for Scotland’s communities country wide”413.

410 Rural Affairs, Climate Change and Environment Committee, Official Report, 7 September 2011, Col 72.
411 Oxfam Scotland, written submission to the Committee.
412 Oxfam Scotland, written submission to the Committee.
413 RSPB Scotland, written submission to the Committee.
PROPOSALS FOR INCREASED POWERS OVER BROADCASTING MATTERS

Introduction

533. As set out in Schedule 5, Head K1 of the Scotland Act 1998, the subject matter of the Broadcasting Act 1990, the Broadcasting Act 1996 and the BBC are reserved. The section below sets out the background to recent developments in broadcasting policy in Scotland and the proposals to amend the Scotland Bill considered by the Committee.

Scottish Broadcasting Commission

534. In August 2007, the Scottish Government established, under the Chairmanship of Blair Jenkins, the Scottish Broadcasting Commission (SBC). In 2008, in its final report, Platform for Success the SBC made 22 recommendations. These included—

- The creation of a new Scottish Network, a digital public service television channel and an extensive, innovative, online platform, which should be funded out of a new UK public service broadcasting (PSB) settlement and should be licensed and regulated by Ofcom;
- That Ofcom should seek to maintain the current non-news programme obligations in the two STV licenses, maintaining Scottish news and current affairs as an absolute requirement of any new PSB settlement;
- That the BBC Trust should ensure better news coverage of the devolved nations and require that services in future are more fully aligned with the needs and wishes of viewers in Scotland;
- That regulation and support for community radio should be reviewed by Ofcom in Scotland to strengthen this form of broadcasting;
- That Scottish Ministers should have greater responsibility within the UK framework, for those operational functions of broadcasting directly affecting Scotland; and
- That the influence and responsibilities of Ofcom Scotland should be strengthened and there should be specific representation for Scotland on the main Ofcom Board.

535. On 8 October 2008, the Scottish Parliament debated the SBC’s final report and resolved—

“That the Parliament welcomes the Scottish Broadcasting Commission’s final report […] notes that the report reflects the importance of broadcasting to the cultural and economic life of Scotland and accepts that the Parliament should take an active role in considering the broadcasting industry and services as they relate to Scotland; welcomes the key recommendation for the creation of

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a new public service Scottish digital network, ... believes that the Calman Commission should consider the role of the Parliament in playing an active role in scrutinising and promoting the broadcasting industry as it relates to Scotland.\textsuperscript{415}

536. In its final report on its Second Public Service Broadcasting Review: Putting Viewers First, published in 2009, Ofcom considered the SBC’s estimated annual cost of the proposed digital network of £75 million. Ofcom had commissioned a separate analysis\textsuperscript{416} which forecast the costs at a similar level. Ofcom described the £75 million as “a substantial figure in relation to possible UK-wide interventions, as well as in relation to Scotland”.\textsuperscript{417} In discussing the Scottish Government’s support for the SBC’s recommendations, Ofcom recognised—

“[...] that difficult choices will need to be made about the use of scarce resources. These proposals need to be seen in the context of a difficult economic climate and other potential requirements and priorities.”\textsuperscript{418}

537. Ofcom believed that since the SBC had reported, there have been a number of developments. For example, Ofcom had developed the new concept of a strong commercial network with some sustainable public service commitments and a model for how news in the nations could be part of that.

538. In the light of these and other developments, Ofcom believed that there was an alternative model for a Scottish Digital Network that should be considered by the UK and Scottish Parliaments. The alternative would be—

“[...] for the Network to be a competitive fund which would support a series of interconnected initiatives in Scotland-wide television, local television, online and radio. It would be logical for the Network to fund in co-operation with MG Alba”\textsuperscript{419}

539. In its conclusions, Ofcom does not take a view as to which model should be recommended but suggests there are four criteria against which these different models for a Scottish Digital Network should eventually be compared—

- Reach and impact. Ofcom believes that the competitive funding of some additional Scottish content by the Channel 3 licensee offers a greater potential for increased reach but a dedicated channel offers greater certainty of a place for this programming;
- Value for money. Ofcom believes that a fund appears to offer a range of ways to achieve public purposes such as radio programming, however a single institution may offer more cost clarity and certainty with a single set of overheads;

\textsuperscript{415} Scottish Parliament, Official Report, 8 October 2008, Col 11615
\textsuperscript{417} Ofcom 2009 Ofcom’s Second Public Service Broadcasting Review: Putting Viewers First p. 93.
\textsuperscript{418} Ofcom 2009 Ofcom’s Second Public Service Broadcasting Review: Putting Viewers First p. 93.
\textsuperscript{419} Ofcom 2009 Ofcom’s Second Public Service Broadcasting Review: Putting Viewers First p. 93.
• Flexibility. Ofcom believes that a competitive fund might be more flexible in responding to a changing digital environment although some existing broadcast institutions have demonstrated their ability to respond quickly to such changes too; and

• Size of the funding which is available.

Commission on Scottish Devolution

540. On the wider topic of broadcasting in Scotland, the Calman Commission deferred to the work of the Scottish Broadcasting Commission. Instead it focused its attentions on whether the SBC’s recommendations on accountability were likely to be followed. The Calman Commission acknowledged that it had not heard evidence arguing that the SBC’s recommendations on accountability were inappropriate.\(^{420}\) In fact it found that the consensus appeared to be that, if implemented, the recommendations would secure a role for the Scottish Parliament and Scottish Ministers in broadcasting, providing a better outcome for Scottish audiences whilst preserving the advantages that accrue from being part of an overarching UK framework for broadcasting.

541. The Calman Commission found that Ofcom was generally regarded as having established effective links with the Scottish Government and Parliament. The SBC hoped that the UK Government would take advantage of Ofcom’s proposals to increase the scrutiny of broadcasting in Scotland by Scottish institutions.

542. In looking at the BBC, the Calman Commission welcomed the changes it had introduced post devolution but thought these changes should be supplemented by transferring responsibility, subject to the normal public appointments process, for the appointment of the Scottish member of the BBC Trust to Scottish Ministers.

Scottish Digital Network Panel

543. In September 2010, the Scottish Government established, again under the chairmanship of Blair Jenkins, an independent panel to examine options for establishing and funding a Scottish Digital Network (SDN).

544. In its final report\(^{421}\) published on 14 January 2011, the Panel’s recommendations included that—

• an allocation from the television licence fee should be made to fund the SDN;

• interim funding be provided from the proceeds of the auction of the spectrum cleared after the digital switchover in 2012; and

• the SDN be a designated as a PSB.


The Scotland Bill and broadcasting matters

545. In the Scotland Bill as introduced on 30 November 2010,\(^{422}\) Clause 17 (now clause 20) dealt with the Scottish Ministers’ role in the appointment of the BBC Trust member for Scotland. The UK Government believed that clause 17 of the Scotland Bill, which requires a Minister of the Crown to obtain the agreement of the Scottish Ministers before making a recommendation for the appointment of the Scottish member of the BBC Trust, met the spirit of the Calman Commission’s recommendation. The UK Government argued that this was the most appropriate outcome as the appointment is primarily that of a member of a UK body and broadcasting remains a reserved matter.

546. Members of the BBC Trust are currently appointed by the Queen in Council, on the advice of UK Ministers, following an open selection process. The UK Government’s stated intention is that Scottish Ministers will be involved in all steps in the appointment process: deciding selection criteria and advertising; short-listing for interview; interviewing and deciding on a preferred candidate. UK Ministers will retain oversight of the process. However, no appointments would be made in the process without the agreement of the Scottish Ministers.

547. The Scottish Government had supported the Calman Commission’s recommendation but did not believe that the provisions in the Bill actually implement that recommendation. It also did not agree with the UK Government’s argument that it is essential for all members of UK bodies to be appointed by UK Government Ministers. It believed that it should be possible for UK bodies to operate effectively, and with a common purpose, when members are appointed by ministers from different jurisdictions.

Previous Scotland Bill Committee report

548. On a division, the former Committee in Session 3 recommended\(^{423}\) that the Parliament should give its legislative consent to the provisions in the Scotland Bill relating to the appointment of the BBC Trust member for Scotland (clause 17).

549. By contrast, the entire Session 3 Committee made a recommendation\(^{424}\) that Scottish Ministers should also be involved in approving the appointment of MG Alba’s board members and called on the UK Government to reconsider its position in relation to that body.

550. MG Alba (the operating name of the Gaelic Media Service) was established by the Communications Act 2003, to ensure that a wide and diverse range of high quality programmes in Gaelic is made available to persons in Scotland by broadcasting or by other means.

551. Although the Scottish Government funds MG Alba, it is the approval of the Secretary of State that is required for the appointment of a person as a member of the Service, and also for the appointment of a member as their chairman.

\(^{422}\) Scotland Bill 2010-11 Bill 115.
Amendments to the Bill to date in relation to broadcasting

552. At the Report Stage in the House of Commons, a new clause was added by the UK Government. The new Clause deals with the ‘Exercise of functions relating to Seirbheis nam Meadhanan Gàidhlig’ (the Gaelic Media Service) and would amend the 1990 Broadcasting Act, as amended by the Communications Act 2003.

553. The new Clause 21 would mean that Ofcom would need the approval of the Secretary of State and the Scottish Ministers before approving the appointment of members of MG Alba.

554. The Clause dealing with the Scottish member of the BBC Trust was unchanged and became Clause 20 when the Bill was introduced in the Lords.

Scottish Government and broadcasting policy

555. In September 2009, the Scottish Government published a National Conversation paper entitled Opportunities for Broadcasting. The paper contained options for additional powers for the Scottish Government with regard to broadcasting under different constitutional arrangements: either further devolution or independence. These included—

- retaining major UK-wide broadcasting institutions while devolving greater powers to Scottish Ministers;
- adopting measures which could strengthen accountability for broadcasting in Scotland, in particular to establish PSB bodies, such as a SDN;
- greater autonomy in broadcasting policy giving Scotland an opportunity to set priorities for viewers in Scotland; and
- getting the ability to add national events to the free-to-air list.

556. In a paper published in June 2011, the Scottish Government laid out its call for increased powers, which could be included in the Scotland Bill, with regard to broadcasting, namely—

- having the right to establish public service broadcasting institutions;
- being involved in future licence fee setting arrangements;
- having responsibility for approving licensing decisions made by the UK Government for local televisions which will broadcast within Scotland;
- having the ability to intervene in local cross-media mergers that affect Scotland; and

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425 Scotland Bill 2010-11 HL Bill 79.
having the power to add or remove events from the list of those that must be shown live on free-to-air television.

557. This paper also included draft clauses for inclusion in the Scotland Bill which the Scottish Government believe will, by including an exception in the list of reserved matters in Schedule 5 of the Scotland Act 1998 on the establishment, operation, remit and dissolution of corporations to provide PSB, enable it to establish the SDN.

558. In addition, the Scottish Government want the Communications Act 2003 to be amended so that Scottish Ministers would be consulted on any changes to local digital television services in Scotland.

559. In its response to the UK Government Consultation on Local television in September 2011,\(^\text{427}\) the Scottish Government highlighted its strong view that that a national publically funded SDN is the best possible ‘host’ broadcaster for local television services in Scotland.

560. The Scottish Government also commented on the list of possible locations for Scottish local television services, expressing disappointment that the south of Scotland is not included in the Ofcom’s final list of possible locations. At present the south of Scotland is covered not by STV but by the ITV1 licence and receives its news coverage from ITV Tyne Tees.

**Intergovernmental discussions**

561. In the past few months, the Scottish and UK Governments have been involved in ongoing correspondence on broadcasting. In a letter dated 15 November 2011 replying to a letter from Fiona Hyslop MSP, Cabinet Secretary for Culture and External Affairs, Rt. Hon Jeremy Hunt MP, Secretary of State for Culture, Olympics, Media and Sport states that with regard to the licences for channel 3—

> “You may be aware that Ofcom considered the case for a single Scottish licence as a possibility in its last review of public sector broadcasting in 2009. This is already feasible under existing legislation. In practice, however, any such licence could not take effect until Ofcom next renews or auctions the Channel 3 licences and in the case of Ofcom offering renewals, would require the consent of ITV as an existing licence holders (Borders licence).”\(^\text{428}\)

562. The Secretary of State for Culture, Olympics, Media and Sport also confirmed that—

> “[…] the UK Government has committed to considering the Scottish Government’s requests for amending the Scotland Bill, while being clear that any changes must be based on detailed, well evidenced proposals that are


\(^{428}\) Letter from the Secretary of State for Culture, Olympics, Media and Sport to the Scottish Government. Available at: http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/31329.aspx
capable of generating cross-party consensus, and which benefit Scotland without detriment to the UK as a whole.”

563. In her response to a series of questions in the Secretary of State for Culture, Olympics, Media and Sport’s letter, Ms Hyslop provided more information on the Scottish Government’s attitude towards local television provision in Scotland, including its preference for using the proposed SDN to supply local television.

564. She stated that the Scottish Ministers fully acknowledge the importance of independent regulation but such regulation should be carried out against a policy background set by the Scottish Parliament, in relation to local television services which will broadcast in Scotland.

565. She also noted that, in broad terms, in relation to these services, Scottish Ministers should have powers analogous to those currently exercised by DCMS Ministers. As above, the Cabinet Secretary told the UK Government that it acknowledges the role of the regulator, but that role should be carried out against a policy background set by the Scottish Parliament. In her view, the illustrative amendment included within the Scottish Government's June 2011 paper makes clear the power that the Scottish Government is seeking. She said that Ministers take decisions based on the interests of all parts of the UK.

566. Finally, the Cabinet Secretary stated that the Scottish Government had consistently been supportive of local television and believed that the Scottish Digital Network was the best way to support local television services in Scotland. In her view, this responsibility should logically accompany that for the Scottish Digital Network as a whole.

567. She remarked that the way in which viewers in the South of Scotland get their Channel 3 service from Gateshead, rather than through STV as for the rest of Scotland, shows the unhappy results that can occur from London-centric licensing decisions.

568. She believed that the possible impact of local television on other media organisations in Scotland - such as the local press - further strengthens the argument for decisions being taken, after due process, by the Government best placed to take account of all the factors - the Scottish Government.

Evidence received

569. The call for evidence from the Committee received five responses which dealt with broadcasting issues. In its submission, Consumer Focus Scotland wrote it was “not convinced that there is a need for further devolution in relation to broadcasting” but believed that the role of the regulator, Ofcom, is important and

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429 Letter from the Secretary of State for Culture, Olympics, Media and Sport to the Scottish Government. Available at: [http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/31329.aspx](http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/31329.aspx)

430 Letter from the Cabinet Secretary for Culture and External Affairs to the UK Government. Available at: [http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/31329.aspx](http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/31329.aspx)

431 Consumer Focus Scotland, written evidence submitted to the Committee.
suggests that the Scottish Government could make greater use of its existing powers to increase the accountability of the regulator to the Scottish Parliament.

570. Ofcom Scotland’s written submission outlined its current arrangements with regard to the powers which the Scottish Government wish to see increased. For example, it pointed out that the Media Ownership (Radio and Cross Media) Order 2011, which came into effect on 15 June 2011, has removed all local cross-media ownership rules.

571. This Order removes a number of restrictions and prohibitions on, for example—

- the number of analogue and digital radio licences one person can own in specified geographical areas, and
- owning a regional Channel 3 licence together with one or more local newspapers with a 20% local market share.

572. Ofcom also points out its increased activities in Scotland, including its interactions with the Scottish Government and Parliament.

573. Dr David Rushton of the Institute of Local Television provided two submissions, including a copy of his submission to the Calman Commission. Dr Rushton’s submission concentrated on the most efficient use of spectrum and where the decisions on the use of spectrum should be made. In his evidence, Dr Rushton argues that—

“Scotland has sufficient spectrum in the TV bands to have an extra public service multiplex (mux) offering three or more video channels to virtually all households. Using signal compressions likely to be introduced in future the number of TV channels uniquely available to Scotland could be greater than ten. The introduction of this so called additional Scottish spectrum or ‘seventh mux’ needs to be the core of the Scottish argument on broadcasting.”

574. Dr Rushton also argues that the decision on any plan for the use of spectrum should be made at a local Scottish level, with the Scottish Government being best placed to carry forward a plan for spectrum use for spectrum, which he states, unlike spectrum in southern and eastern England, is not limited.

575. In Dr Rushton’s opinion, the Scottish Government’s proposed clauses will not give it the necessary powers to overcome a UK Government veto of Scottish spectrum decisions.

576. The submission from the Scottish Community Broadcast Network supported devolution of powers over broadcasting, including the need for an independent Scottish regulator.

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432 Ofcom Scotland, written evidence submitted to the Committee.
433 Dr David Rushton, written evidence submitted to the Committee.
434 Dr David Rushton, written evidence submitted to the Committee.
435 Dr David Rushton, written evidence submitted to the Committee.
436 Dr David Rushton, written evidence submitted to the Committee.
577. Scottish Rugby’s submission concentrated on broadcasting believing that devolution of power to the Scottish Government would improve the television coverage of Scottish rugby, especially ‘grassroots’ games.

578. The Committee also received a written submission from Blair Jenkins (as supplementary to the oral evidence received from Mr Jenkins, see below) and from STV, the holder of the channel 3 licence for central and northern Scotland. In its evidence, STV is concerned that any future changes to the regulatory environment on—

“ [...] broadcasting in Scotland does not result in higher levels of obligations on STV’s licences than is the case elsewhere in the UK. Such eventuality would impact our ability to complete effectively as part of a federal network within a complex and delicate financial model.”

579. STV is also disquieted by the present lack of certainty with regard to the future of the channel 3 licences and the related PSB provision beyond 2014 as STV finds that this makes investment, planning and contracting extremely difficult.

580. In addition, STV asks for the establishment of a single Scotland-wide channel 3 licence and continued protections to safeguard STV’s commercial position afforded by the merger undertakings entered into at the time of the Carlton/Granada merger (2003-4).

581. This merger undertaking was approved by the Competition Commission and led to the introduction of changes in the way advertising slots are sold by ITV. Carlton and Granada controlled 51% of the TV advertising market, and sold slots on behalf of Ulster TV, SMG and the remaining ITV franchisee, Channel. The terms under which both companies sold their airtime is now regulated by a system called contract rights renewal, designed to prevent a combined Carlton and Granada from using their market power to ramp up prices.

582. In his submission, Mr Jenkins highlighted the fact that in the past 12 years the UK Parliament has shown little if any awareness of Scottish broadcasting issues, to the detriment of Scottish interests. He drew attentions to the decline in the PSB obligations by STV which he puts at a drop to 25% of what it did before devolution.

583. Mr Jenkins also pointed out the benefits he believes would be brought to Scotland, and to independent television producers based in Scotland, by the establishment of a SDN.

584. On 25 October 2011, the Committee heard oral evidence from David Mahoney and Vicki Nash from Ofcom Scotland, Blair Jenkins, chair of the SBC,

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436 Scottish Community Broadcast Network, written evidence submitted to the Committee.
437 STV, written evidence submitted to the Committee.
438 STV, written evidence submitted to the Committee.
439 STV, written evidence submitted to the Committee.
440 Blair Jenkins, written evidence submitted to the Committee.
Ken MacQuarrie from BBC Scotland and Bill Matthews the BBC Trust trustee for Scotland. The following key issues were discussed.

Right to establish public service broadcasting institutions

585. The Committee heard that, as all the existing PSBs in the UK were established by statute, if the Scottish Government wished to have this power it in turn this needs to be achieved by means of an amendment to the reservation on broadcasting contained in the Scotland Act 1998.

586. In its evidence, Ofcom told the Committee that one of the major benefits associated with PSB status is that electronic programme guide prominence, “can be achieved through secondary legislation and the UK Government has said that it is considering that in the context of local television”\(^{442}\)

587. The other benefit of PSB status is access to free spectrum, a major benefit for channels 3 and 5. Ofcom explained that—

“in return for those benefits the channels pay a nominal licence fee. The majority of the benefit is offset by the obligations that are imposed on them, which include original production, nations news – nations and regions news, in the case of ITV – out of London production, current affairs and one other obligation [children’s programming]”\(^{443}\)

License fee

588. In his evidence, on the potential funding of a SDN, Blair Jenkins told the Committee that—

“an important point is that now all the political parties agree that the television licence fee is intended for a number of different public service purposes, not just the BBC. Although the BBC will always get the vast majority of the licence fee, that fee is now funding S4C and will make a chunky contribution to the cost of local television. The previous UK Government wished to use part of the licence fee to fund the continuation of regional news on ITV. There is now agreement that the licence fee will fund other things than just the BBC.”\(^{444}\)

589. When questioned on the funding of a SDN, Ken MacQuarrie told the Committee that—

“the BBC’s position on the Scottish digital network has been clear—we welcome plurality in the public space. Our concern is that whatever funding method is put in place should not damage the extant public service provision across all our three platforms in Scotland. The exact funding mechanism will be a matter for bodies such as the Parliament and the UK democratic institutions, but our clear view is that what we have is valuable and should be protected, whatever funding mechanism is put in place.”\(^{445}\)
Licensing decisions for local televisions

590. In its evidence, Ofcom Scotland told the Committee that in the forthcoming channel 3 relicensing process they will—

“acknowledge the interests of the nations, especially in the kind of programming required for the nations.” 446

591. Ofcom have written an interim report for the Secretary of State on whether or not channels 3 and 5 should be relicensed for another 10 years from 2014.447 For the final report, Ofcom will be considering the obligations – and the associated benefits – of public service broadcasting on channels 3 and 5 and recommending to the Secretary of State what might be sustainable for a further 10 years, including issues that relate to the nations.

592. The Committee was interested in the channel 3 coverage for the south of Scotland. The Committee was told that Ofcom knew that there was a lot interest in the possibility of a single Scottish licence for channel 3 but that—

“it does not believe that we will be able to get to a single Scottish licence without the consent of ITV plc; we do not think that we have the powers to impose that in the re-licensing process”.448

Free-to-air list

593. Finally, witnesses were asked about the free-to-air list. This is the list of sporting events which are deemed to be important enough to warrant being made available on Freeview television channels. Presently, the UK Government is responsible for deciding which events are so designated. Although the previous UK Labour Government established a review body (Independent Advisory Panel chaired by David Davies) to look at the list, the present UK Government has decided to retain the current list, set up in 1998, until after the digital switchover is complete in 2012.

594. On this matter, Blair Jenkins believed—

“that working out which sporting events in Scotland it would be right to protect as free-to-air should be a devolved responsibility”449

595. While Ken MacQuarrie told the Committee that—

“some right holders take the view it will imperil their existence if some events become free-to-air. It is a matter of weighing up the impact on the marketplace for the respective bodies.” 450

447 Ofcom, Licensing of Channel 3 and Channel 5: A report from Ofcom to the Secretary of State for Culture, Olympics, Media and Sport, 22 July 2011.
PROPOSALS TO GIVE SCOTLAND A GREATER SAY IN THE EU

Background

596. The Scottish Government has proposed an amendment to the Scotland Bill which would put on a statutory footing Scottish Ministers attendance at Council of the European Union (EU) ministerial meetings, commonly referred to as the EU Council of Ministers.

597. The Council of the European Union ministerial meetings consist of a representative of each Member State at ministerial level, who may commit the Government of the Member State in question and cast its vote (under Article 16 Treaty of the European Union (TEU)). Which ministers attend a meeting depends on which topic is on the agenda. The Council also meets regularly at the level of working groups and ambassadors (referred to as the Permanent Representatives Committee (COREPER)). The Council is responsible for working with the European Parliament to exercise legislative and budgetary functions.

598. The Council meets in ten configurations. These are:

- General Affairs
- Foreign Affairs Council
- Economic and Financial Affairs
- Justice and Home Affairs (JHA)
- Employment, Social Policy, Health and Consumer Affairs
- Competitiveness
- Transport, Telecommunications and Energy
- Agriculture and Fisheries
- Environment
- Education, Youth and Culture

599. Although there are 10 configurations, not all will relate to devolved issues, for instance the General Affairs and Foreign Affairs Councils will relate to purely reserved matters. In addition, where Council configurations do relate to devolved matters, the agenda may not always cover matters of a devolved nature.

600. Each configuration can meet formally and informally. While decisions can only be taken in the formal Council meetings, informal meetings can be useful to exchange views on matters of common concern and to prepare the ground for work in the Council.

Scottish Ministerial attendance at Council

601. The current situation with regard to Scottish Ministers’ attendance at Council of Ministers meetings is governed by the Memorandum of Understanding and the Concordat on Coordination of European Union Policy Issues between the UK Government and the devolved administrations in Scotland, Wales and Northern
Ireland. Under the section on Attendance at Council of Ministers and related meetings it states—

"B4.13 Decisions on Ministerial attendance and representation at Council meetings will be taken on a case-by-case basis by the lead UK Minister. In reaching decisions on the composition of the UK team, the lead Minister will take into account that the devolved administrations should have a role to play in meetings of the Council of Ministers at which substantive discussion is expected of matters likely to have a significant impact on their devolved responsibilities.

B4.14 Policy does not remain static in negotiations and continuing involvement is a necessary extension of involvement in formulating the UK's initial policy position. The role of Ministers and officials from the devolved administrations will be to support and advance the single UK negotiating line which they will have played a part in developing. The emphasis in negotiations has to be on working as a UK team; and the UK lead Minister will retain overall responsibility for the negotiations and determine how each member of the team can best contribute to securing the agreed policy position. In appropriate cases, the leader of the delegation could agree to Ministers from the devolved administrations speaking for the UK in Council, and that they would do so with the full weight of the UK behind them, because the policy positions advanced will have been agreed among the UK interests."

*History of Scottish Ministerial Attendance at Council of Ministers meetings*

602. The Scottish Government has published details on its website of Scottish Ministers attendance at Council of Ministers meetings since 1999. Details are provided in the table below. 452
Table 10 - Scottish Ministerial Attendance at Council of Ministers meetings

<table>
<thead>
<tr>
<th>Year</th>
<th>Formal Councils Attended</th>
<th>Informal Councils Attended</th>
</tr>
</thead>
<tbody>
<tr>
<td>1999</td>
<td>5</td>
<td>1</td>
</tr>
<tr>
<td>2000</td>
<td>8</td>
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</tr>
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<tr>
<td>2010</td>
<td>9</td>
<td>1</td>
</tr>
<tr>
<td>2011 (up to 22 October)</td>
<td>8</td>
<td>0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>135</strong></td>
<td><strong>7</strong></td>
</tr>
</tbody>
</table>

Source: Scottish Government (http://www.scotland.gov.uk/Topics/International/Europe/Our-Focus/Engagement/At-Council)

603. Of the 135 formal Council of Ministers meetings that Scottish Ministers have attended, 76 have been attendance at the Agriculture and Fisheries Council (or Agriculture or Fisheries), 25 have been attendance at the Justice and Home Affairs Council and 16 have been attendance at the Environment Council.

604. Under the current Polish Presidency of the EU, there are plans for 19 informal Councils and 35 formal Council meetings covering all the Council configurations.

605. The Scottish Government has provided the Committee with details of the occasions when a Scottish Government Minister has been refused permission to attend both formal and informal Council of Ministers meetings as part of the UK delegation along with the reason for that refusal. In total, Scottish Government Ministers have been refused attendance to one formal council and 6 informal councils since July 2008. The Scottish Government also said that the refusal to allow the Cabinet Secretary for Justice to attend the formal Justice and Home Affairs Council in September 2009 was the only time a devolved minister had ever been turned down from attending a formal Council in 11 years of devolution.

The Scottish Government's proposed amendment

606. The Scottish Government’s proposed amendment to the Scotland Bill would mean the lead UK Government Minister would lose the right to make decisions about Scottish Ministers attending Council of Ministers meetings, instead giving Scottish Ministers a recognised statutory right (but not obligation) to attend when a non-reserved matter is due to be discussed. This would cover both formal and informal Council meetings. The proposed amendment makes no changes to the

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rules regarding Ministers from the Devolved Administrations in Wales and Northern Ireland attending Council of Ministers meetings.

607. In addition to placing Scottish Ministerial attendance at the Council of Ministers on a statutory footing, the Scottish Government have also proposed that the statutory right would extend to enabling Scottish Government officials to attend European Commission and Council Working Groups where any non-reserved matter is to be discussed.

608. The Scottish Government’s note on EU involvement recognises that in the event Scottish Ministers are given a statutory right to attend Council of Ministers meetings, they will be still be obliged to “support and advance the single UK negotiating line”. 454

609. Two key issues arising from the Scottish Government’s amendment are the size of Member State delegations at Council of Ministers meetings and what the Scottish Government means by attending a Council of Ministers meeting.

610. In terms of the size of Member State Governments’ delegation at Council of Ministers meetings, a paper prepared by the Scotland Bill Committee’s adviser on EU matters, Professor Charlie Jeffery stated that—

“The initial award of such rights elsewhere was also accompanied by concerns about size of delegation. Again, this issue has not led to significant problems in practice. Other member states need to, and do recognise that the constitutional features of fellow member states may require non-standard delegations at Council. Equally sub state governments may need periodically to recognise that being part of a Council delegation may mean – for simple reasons of space – that they cannot always sit in the Council chamber.” 455

611. At present, there are no ‘rules’ as such surrounding the size of each Member State’s delegation at Council of Ministers meetings though there are a limited number of seats available at the table and limits are sometimes set. This issue was raised by David Liddington MP, the UK Government’s Minister for Europe in a letter to Fiona Hyslop, the Scottish Government’s Cabinet Secretary for Culture and External Affairs. In the letter, David Liddington MP wrote—

“As you know, the Presidency sets attendance limits for both formal and informal meetings, and sometimes only one Minister for each Member State can attend.”456

612. The Scottish Government has responded directly to this concern in a response to David Liddington MP on 16 November 2011. The Cabinet Secretary for Culture and External Affairs—

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455 Briefing for the Scotland Bill Committee by Professor Charlie Jeffery
456 Letter from David Liddington, UK Government Minister for Europe to Fiona Hyslop, Cabinet Secretary for Culture and External Affairs 14 November 2011
“I do not believe there will be an issue in practice in managing arrangements around Ministerial attendance. At the most recent Agriculture and Fisheries Council on Monday, there were 6 Ministers (3 from the UK and 1 each from Scotland, Wales and NI) attending to ensure we can advance and protect the UK’s collective interests in Europe.”

613. This raises a secondary question as to what the Scottish Government means by statutory right to attend Council of Ministers meetings. The Government have suggested the amendment would give Scottish Ministers the right to sit at the table where appropriate.

**Examples of arrangements in other Member States**

614. Advice to the Committee has been provided for the details of arrangements for sub-member state governments (SSGs) to attend Councils in other Member States, specifically in Austria, Belgium and Germany. In all three instances, there is a statutory obligation allowing SSGs to attend Councils. Whilst these Member States have established the statutory right of SSGs to attend Councils, it should be pointed out that none of those systems are directly analogous to the constitutional set-up in the UK as all three have federal structures whilst the UK has a system of asymmetrical devolution.

615. The advice concludes that each Member State with statutory rights of attendance of sub-state ministers in Council and other bodies does so in distinctive ways which reflect their own state’s legal tradition and constitutional structure, and which have codified to varying extents a common principle: that the internal allocation of constitutional responsibilities to sub-state government creates a claim to participation in the fields of those responsibilities in external, EU decision-making.

616. Except in Belgium, relations between central and sub-state governments are hierarchical. In Germany and Austria, the central government always leads the delegation, even when sub-state representatives lead negotiations. In Belgium, the sub-state entities have equal status with the central government in external affairs that relate to their domestic responsibilities, and in such matters lead for Belgium in all respects.

617. In all three cases, rights to attend Council and other bodies are exercised multilaterally by the sub-state governments, excepting fisheries in Belgium, where Flanders is the permanent and sole lead.

618. The detailed arrangements in Germany touch on the issue of space: the Federal Government will try to secure from the Council Presidency space at the Council table for civil service support for a Länder minister leading for Germany at Council. Each Council Presidency specifies working rules on size of negotiating teams; some may be more permissive than others in allowing bigger teams (in other words there is no fixed, enduring rule on size of negotiating teams, and there

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457 Letter from Fiona Hyslop, Cabinet Secretary for Culture and External Affairs to David Liddington, UK Government Minister for Europe 16 November 2011
458 Briefing paper by Professor Charlie Jeffrey, committee adviser. Not published.
may be opportunity to seek dispensation from the rules that any Presidency sets out). Such rules do as such not restrict the size of the delegation.

619. The detailed arrangements in Germany codify that there will be discussions within the delegation, but outside the Council chamber, on the evolving state of negotiations, in which the sub-state representative(s) take full part. This offers some clarification that not being ‘at the table’ does not necessarily disadvantage the sub-state representatives because they remain part of the delegation in which evolving negotiating options are discussed and agreed.

Evidence received

Do present arrangements work?

620. We are grateful to the European and External Relations Committee (EERC) for its submission to Committee. It the evidence received by the EERC during its deliberations, many of the witnesses suggested that the current arrangements whereby Scottish Ministers are able to attend Council of Ministers meetings with the consent of the lead UK Government Minister are generally working well. However, in their report to us, EERC Members expressed concern that “such arrangements depended too much upon ‘whim’, personal relations between UK and Scottish Government Ministers or chance”.

621. According to the EERC, there was also a feeling that new arrangements were required to address current circumstances. This issue is perhaps illustrated by the current UK Government’s positive stance towards Devolved Administration attendance at Council meetings as demonstrated in the UK Government Minister for Europe’s letter to the Cabinet Secretary for Culture and External Affairs in which he states—

“As you know from my letter to you of 7 September, this Government takes the participation of Devolved Administrations at EU Councils very seriously. The Foreign Secretary has written to his cabinet and Devolved Administration colleagues outlining his policy for attendance at EU Councils of Ministers by Devolved Administration Ministers.”

622. Witnesses giving evidence to the EERC suggested that whilst the informal arrangements had worked in the first 12 years of devolution, it would be beneficial to put the arrangements on to a more formal footing. Professor Michael Keating from the University of Aberdeen told the EERC that—

“We must look to the future, because we are developing a United Kingdom constitution. Although a lot of it still depends on convention, it is increasingly being written down. It is sometimes useful to have a statutory provision that underpins convention, so that everything else follows from it. Although speaking at the Council of Ministers might not be the most important thing, the right to be there underpins a whole lot of other things: the infrastructure,

459 European and External Relations Committee, written evidence submitted to the Committee
460 European and External Relations Committee, written evidence submitted to the Committee
461 Letter from David Lidington, UK Government Minister for Europe to Fiona Hyslop, Cabinet Secretary for Culture and External Affairs 14 November 2011.
the participation in working groups and so on. I see no problem with putting that into statute."462

623. Nigel Miller from the National Farmers Union Scotland told this Committee that up to now, the arrangements had worked but there was concern ahead of the negotiations from the Common Agricultural Policy for 2014-2020.

“The system has delivered until now and has given us scope to get the best outcomes in Scotland. There is more concern as we move up to the next reform of the common agricultural policy, there is greater divergence of approach to agricultural policy between Westminster and Scotland, so it may be more difficult to square that circle."463

624. Chris Bronsdon from the Scottish Green Energy Centre also told the Committee that he felt the current arrangements were working well.

“From the energy perspective, I think that there has been a good working relationship. I know that the minister from Scotland has represented the UK as a whole and that there has been close dialogue, even on matters where there are different views on how to proceed and present a single line on behalf of the UK.”464

625. Whilst accepting the current situation was working, Nigel Miller suggested that the National Farmers Union in Scotland would take some comfort from seeing Scottish Ministerial attendance at Council of Ministers meetings on a statutory footing—

“If it is going to work, I guess that there has to be buy-in from both sides—there has to be some framework that everybody wants to promote. Therefore the voluntary concept looks good, but my view, and probably the view of the union, is that some sort of statutory backstop, or safety net, is probably desirable to ensure that when those preferable mechanisms fail, there is a route to ensure that interests are represented correctly.”465

626. In written evidence to the Committee, the Scottish Chambers of Commerce said—

“The financial provisions of this Scotland Bill are those of most concern to Scottish businesses. We would, however, welcome the prospect of Scotland’s interests being represented directly within the EU where there was a clear difference between these and the interests of the rest of the UK.”466

627. An issue raised by Professor Laura Cram of the University of Strathclyde in written evidence to the European and External Relations Committee surrounded the impact on the Scottish Parliament of the extension of EU competences since the passing of the Scotland Act 1998. Professor Cram wrote—

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463 Scotland Bill Committee, Official Report, 8 November 2011, Col 517.
464 Scotland Bill Committee, Official Report, 8 November 2011, Col 518.
465 Scotland Bill Committee, Official Report, 8 November 2011, Col 523.
466 Scottish Chambers of Commerce, written evidence to the Committee.
“A second point to note is that, since the initial formulation of the Scotland Bill, the scope of EU shared and supporting competences in areas of devolved responsibility or of relevance for devolved affairs has extended in significant ways....supporting competence has often preceded the emergence of shared competence in the EU context. The trend towards extension of supporting competence is of potential importance. Many areas of supporting competence are devolved or have significant devolved interest. Should the EU begin to legislate in these areas, the UK Government not the Scottish Government would formally negotiate any legislation at EU level even when such legislation impacted upon areas of devolved competence.”

628. Professor Cram summed up this situation by describing it as—

“effectively a manifestation of the West Lothian Question in reverse: i.e. a situation in which the UK Government is able, at EU level, to bind Scotland to commitments even in areas of devolved competence or with significant effects on devolved matters.”

Accountability to the Scottish Parliament

629. In written evidence provided to the Committee, Professor Drew Scott from the University of Edinburgh wrote—

“It is important to stress that the argument for the involvement of Sub-state Governments (SSG) in EU deliberations has never rested on – or insofar as I am aware has it ever revealed – a desire by the SSG to engage in an “auxiliary foreign policy” or “parallel diplomacy”. Instead the argument rests on two propositions:

(i) First the constitutional proposition that it is formally appropriate for a Minister who represents the government, and is accountable to the parliament, whose legislative prerogatives are being affected by the proposed EU legislation to attend all relevant EU-level meetings;

(ii) Second the practical argument that the SSG will bring to EU-level deliberations a specific expertise on these matters of sub-state competence which the national government may well lack.”

630. Dr Alex Wright from Dundee University agreed with this proposition in his written evidence—

“One reason why there could be a statutory base for attendance at the Council relates to the issue of accountability despite the lack of transparency over the work of the Council of Ministers. At present, the Scottish Parliament has potentially limited influence over the Scottish Government’s relations with the EU, primarily because it (the Scottish Government) is one step removed from the Council (its interests are formally promoted and defended by the UK Government). If the Scottish Government had the right legally to attend the

467 European and External Relations Committee, written evidence from Professor Laura Cram.
468 European and External Relations Committee, written evidence from Professor Laura Cram.
Council and if necessary to address the Council then at the very least the Scottish Parliament could require Ministers to account for their activities in the Council.”

Size of delegation and representation of Northern Ireland and Wales

631. A key issue for the UK Government is the size of Council of Ministers delegations and how to put Scottish Ministerial attendance on a statutory footing is linked to the affect that this would have on the other Devolved Administrations in Northern Ireland and Wales.

632. Although the European Union does not have ‘rules’ about the size of Member State delegations in the Council of Ministers, there are always, as outlined above, likely to be a limited number of seats at the table.

633. In his evidence to the Committee, Professor Drew Scott told the Committee:

“I do not think that it would work or be desirable for a Government to turn up at every meeting. Some of the difficulties about who should go and whether there are enough seats around the table would, therefore, take care of themselves because Governments do not have the time to play around on committees where they do not have an immediate and important interest. My assumption is that this is a facilitating device rather than a mandating device—it would not mandate a Scottish minister to turn up at every meeting of the Council when a devolved issue was being discussed if there was no direct bearing on that devolved issue in their jurisdiction.

The UK line is almost always similar to the Scottish line; we are not living in a world in which the two jurisdictions are at each other’s throats. They tend to have the same line, and it would be an exception, as a matter of practice, for a Scottish minister to go; however, it should be provided for if it is deemed necessary.”

634. The approach of attending only Council meetings where there is a distinct Scottish interest was emphasised by the Cabinet Secretary for Culture and External Affairs In her letter to the UK Government’s Minister for Europe, she wrote—

“Where there is a willingness to accommodate this (Devolved Ministerial attendance at Council) it can be achieved, and in practical terms we would not exercise the power on every occasion. There is a distinction between the statutory right to attend, and the automatic right to contribute and to accommodate the various areas of expertise and experience. We acknowledge the latter point cannot be assumed into law.”

635. Further evidence of a Scottish Government approach to only attend Councils where there is a clear devolved interest comes could be gleaned from the fact that of the 135 formal Council of Ministers meetings that Scottish Ministers have attended since 1999, 76 have been attendance at the Agriculture and Fisheries

469 Scotland Bill Committee, Official Report, 8 November 2011, Col 503-504.
470 Letter from Fiona Hyslop, Cabinet Secretary for Culture and External Affairs to David Liddington, UK Government Minister for Europe 16 November 2011.
Council (or Agriculture or Fisheries), 25 have been attendance at the Justice and Home Affairs Council and 16 have been attendance at the Environment Council. These policy areas are ones where there is a significant overlap with devolved issues.

636. It should be noted that if Scottish Ministerial attendance at Council is put on a statutory footing as set out in the Scottish Government’s amendment to the Scotland Bill, this would, in the absence of reciprocal arrangements, leave Scotland in a different position from the Devolved Administrations in Wales and Northern Ireland. The UK Government’s Minister for Europe raised the issue in his letter to the Cabinet Secretary for Culture and External Affairs. He wrote—

“As you know, the Presidency sets attendance limits for both formal and informal meetings, and sometimes only one Minister from each Member State can attend. For that reason, I would like to enquire whether you have considered how attendance by ministers from Wales and Northern Ireland would be managed, and whether you have discussed any aspects of this proposal with the other Devolved Administrations. I am sure that you will agree that the UK Government needs to ensure that all the other Devolved Administrations have the same opportunities to be consulted throughout policy creation, and to attend EU Councils where appropriate and practicalities allow.”

637. In response, the Cabinet Secretary for Culture and External Affairs indicated that—

“My Welsh and Northern Irish counterparts are aware of this issue and it is my understanding that we share a common position in ensuring that attendance at Council is guaranteed for all administrations. Indeed as you may recall this support was expressed at a previous JMC(E). To that end I would fully support any proposal from the UK Government to offer a similar statutory right to Wales and Northern Ireland to ensure that we are all on the same elevated footing, but as you will be aware only Scotland has a relevant piece of legislation before Westminster at this time.”

638. It is also worth noting that the asymmetric devolution that currently exists in the United Kingdom means that the Devolved Administrations already have different levels of legislative responsibility and as such, placing Scottish attendance at EU Council on a statutory footing without mirroring that for Wales and Northern Ireland would not necessarily be out of step with the current devolved arrangements in place. This was a point made by Professor Drew Scott in his evidence to the Committee—

“The statutory right that seems to be sought is in recognition of the Scottish Parliament’s legislative prerogatives, which are far and away more significant than those of the National Assembly for Wales as matters stand. Granted, the Northern Ireland Assembly has more legislative prerogatives than the

471 Letter from David Liddington, UK Government Minister for Europe to Fiona Hyslop, Cabinet Secretary for Culture and External Affairs 14 November 2011.
472 Letter from Fiona Hyslop, Cabinet Secretary for Culture and External Affairs to David Liddington, UK Government Minister for Europe 16 November 2011.
Welsh Assembly, but it does not have as many as the Scottish Parliament. The solution is asymmetric as a matter of practice.  

639. The Committee Convener has written on behalf of the Committee to the First Ministers in both Cardiff and Belfast but has not yet received a reply to set out their views on this matter. [may need to amend based on Committee view of responses]  

Value of Scottish Ministers attending Council of Ministers meetings  
640. One reason presented to the Committee as to why it would be beneficial for Scottish Ministers to attend Council of Ministers meetings was provided by Dr Alex Wright. He suggested that Ministerial attendance in Brussels provided a focal point for Scottish stakeholders to gather round and also increased the possibility for greater accessibility to Government. He said in his evidence—

“What struck me when Scottish Office ministers went to Brussels was that they provided a focal point. The case that I recall involved the fishing community and local councils such as Shetland Islands Council. The Scottish Fishermen’s Federation would be there outside the Council of Ministers. If a Scottish minister had been there, they would presumably have come out after the meeting and given a briefing to the fishermen, the island councils and so on. There is an indirect element here—it is not just about the Parliament, but about the various groups in society that are affected by what goes on in Brussels. This is a mechanism or a means whereby the relevant minister can provide a direct brief to those people, and that is quite important, too. It is a softer form of accountability, but it was inherent in the work of the consultative steering group as regards accessibility and engagement with the people of Scotland.”

641. Dr Alex Wright also suggested that much of the reasoning behind the Scottish Government’s amendment was symbolism and amounted to recognition that devolution had been a success for Scotland. He told the Committee:

“It is a recognition of entitlement. Successive devolved Administrations in Scotland under different parties have played the game and respected the ground rules as set out in the memorandum of understanding. When I discussed that with my students last week, we could not think of a single high-profile conflict that had broken out between the two tiers of Government on constitutional matters. It has been a strong relationship. Therefore, it is no bad thing to have that symbolic entitlement, because the Government here has acted extremely responsibly from the word go. It is important. As I said in my opening comments, it would be indicative of the UK and a symbol that the devolution settlement in the UK has been a success. My understanding is that the Foreign and Commonwealth Office is keen to demonstrate the success of devolution in the UK. That is where my comments on symbolism were coming from.”

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642. Professor Scott, however, disagreed that the issue was about symbolism suggesting instead it related to good governance and ensuring that European legislation reflected the requirements of 27 Member States and also the regions within those States.476

643. Much of the evidence received by the Committee highlighted that there were a limited number of key policy areas where Scotland has distinctive interests which may differ from the rest of the UK and for which it would be helpful if a Scottish Minister could attend appropriate Council of Ministers meetings. Examples of policy areas highlighted were agriculture and fisheries, and justice and home affairs. Nigel Miller from NFU Scotland highlighted the issue from the agricultural sectors’ point of view—

“There is an almost strange disconnection between that very integrated Scottish approach to agriculture and the fact that, in European terms, it is the UK minister who negotiates for Scotland. The relationship between the UK minister and Scotland is quite a strange one. Sometimes there has been a real divergence of approach and of policy. Way back, Nick Brown addressed the issue. He had a system whereby he chaired all the devolveds as the UK minister and appointed his deputy as the English minister. There was therefore a balanced forum in which to try to get a UK policy. That sort of mechanism has now failed—it no longer works. We have concerns about how that linkage works. We would like to see that sort of soft mechanism put back in place. We would be very keen to see the Scottish minister lead on certain areas. As 60 per cent of Less Favoured Area (LFA) land in the UK is in Scotland, it would make perfect sense for a Scottish minister to take the lead on LFA issues. There are other areas where that might be appropriate, too. Our confidence in the process would certainly be greatly increased by a Scottish minister or cabinet secretary being in the room.”477

Agreement of the UK position ahead of the Council of Ministers
644. Whilst not part of the Scottish Government’s proposed amendment to the Scotland Bill, the issue of how the single UK negotiating position is agreed to was raised by a number of witnesses in their evidence. Nigel Miller expressed concern about how the position would be agreed in the Joint Ministerial Committee on Europe in the event that the UK and Scottish positions were different. He gave the example of the upcoming negotiations on the future of the Common Agricultural Policy where he suggested the UK and Scottish Governments have already presented different positions.478 When asked about a framework which could best take account of differing positions, Nigel Miller said—

“I do not think that there is a quick fix. Part of the issue is the relationship between the devolved Administrations and Westminster. My view is that Nick Brown’s approach, although he was before my time, surprisingly, was correct: if you have a UK minister, he should be a UK minister. We have a rather asymmetric devolution in the UK, with English matters being channelled through Westminster while there are devolved Governments or

476 Scotland Bill Committee, Official Report, 8 November 2011, Col 513.
477 Scotland Bill Committee, Official Report, 8 November 2011, Col 515.
478 Scotland Bill Committee, Official Report, 8 November 2011, Col 517.
Assemblies in other parts of the UK. That is not helpful, but given that that is where we are, when UK ministers are dealing with devolved Administrations, there should be a UK minister and some sort of deputy who takes on the role of representing England. There should be an open forum to develop a UK line and those UK lines, at European level, will be quite high-level policy; they will not be particularly detailed and there will be room for a breadth of position that, hopefully, would allow most parts of the UK to function. If that is not being done, the system is failing, so that is the minimum that you should do before setting a policy position.\textsuperscript{479}

PROPOSALS TO DEVOLVE GREATER CONTROL OVER WELFARE AND BENEFITS POLICY

Background

645. The devolution of greater control over welfare and benefits policy was not one of the six areas which the Scottish Government announced in June 2011 as its key priorities for amendments to the Scotland Bill. However, during the early stages of the Committee’s work, and particularly after representations made to us at an informal engagement event with charities, voluntary organisations and other representatives of the third sector, trades union movement, churches etc., a decision was taken to focus part of our work programme on the question of whether the devolution of welfare and benefits should be part of the Scotland Bill and what the problems were in terms of the interaction between reserved matters and devolved competences. These issues were brought sharply into focus as a result of the evidence we received on the UK Government’s Welfare Reform Bill, introduced in the House of Commons in February 2011.\(^{480}\)

646. It should be noted that, in its final report, the Calman Commission made a series of recommendations relating to welfare and benefits\(^ {481}\). These were—

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

- Recommendation 5.20: formal consultation role should be built into Department of Work and Pension’s commissioning process for those welfare to work programmes that are based in, or extend to, Scotland so that the views of the Scottish Government on particular skills or other needs that require to be addressed in Scotland are properly taken into account.

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

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

- Recommendation 5.24: The interpretation provision in relation to “social security purposes” in the Scotland Act should be amended to make it

\(^{480}\) UK Parliament, Welfare Reform Bill. Available at: http://services.parliament.uk/bills/2010-11/welfarereform.html

clear that the reservation refers to social security purposes related to the type of provision provided by the UK Department for Work and Pensions.

647. At the time of introducing the Scotland Bill, the UK Government’s view was that its welfare reform programme (being taken forward via the Welfare Reform Bill) has generally superseded the Calman Commission’s recommendations. The UK Government, therefore, elected not to take forward these welfare-related recommendations in the Scotland Bill. Additionally, it did not see the need for recommendation 5.24.

648. The Welfare Reform Bill provides for the introduction of a ‘Universal Credit’ to replace a range of existing means-tested benefits and tax credits for people of working age, starting from 2013. The Bill follows the November 2010 White Paper, ‘Universal Credit: welfare that works’, which set out the UK Government’s proposals for reforming welfare to improve work incentives, simplifying the benefits system and tackling administrative complexity. Besides introducing the Universal Credit and related measures, the Bill makes other significant changes to the benefits system, specifically it—

- introduces Personal Independence Payments to replace the current Disability Living Allowance;
- restricts Housing Benefit entitlement for social housing tenants whose accommodation is larger than they need;
- up-rates Local Housing Allowance rates by the Consumer Price Index;
- amends the forthcoming statutory child maintenance scheme;
- limits the payment of contributory Employment and Support Allowance to a 12-month period; and
- caps the total amount of benefit that can be claimed.

649. In October 2011, the Parliamentary Bureau considered representations made from voluntary organisations and others setting out a case for the Welfare Reform Bill to be scrutinised in the Scottish Parliament, and specifically for the creation of a new ad hoc committee. The Bureau referred the Bill to the Health and Sport Committee, as lead committee for consideration of its proposals and for consideration of a legislative consent memorandum.

650. As a result of the above, the focus of the Scotland Bill Committee has not been on the merits of the Welfare Reform Bill per se, but the wider question of whether there are documented examples of problems caused by the divergence between reserved and devolved policies in this area and also whether there is merit in amending the Scotland Bill to include new provisions in the welfare area.
Evidence received

Divergence and duplication

651. In his evidence to the Committee, Martin Sime, chief executive of the Scottish Council for Voluntary Organisations (SCVO), highlighted employability as an area where there is divergence of policy between Scotland and the rest of the UK. He noted that in this area there was “dual - or almost contested - responsibility”. He gave an example of the problem, specifically that—

“[…] there are already difficult areas in which services intersect, but from a client’s perspective, they are not connected at all. If a person goes to one end of the high street to visit Jobcentre Plus and to the other end to visit Careers Scotland and Skills Development Scotland, that is a problem. It is not a useful experience for unemployed people not to be able to get all their services in an integrated way and not to have an overarching policy approach being taken.”

652. David Griffiths of charity Ecas concurred. He cited disability benefits as an area where the policy on the benefit was reserved but health, social care, transport and other key issues were devolved, stressing that because of this, there was a danger of divergence in policy.

653. Other witnesses agreed that there were areas where the reserved/devolved split could be problematic, particularly as brought about by the proposals as part of the Welfare Reform Bill. Matt Lancashire of Citizens’ Advice Scotland said—

“Through the Welfare Reform Bill, the UK Government intends to reduce payments to tenants who are considered to underoccupy homes, which will mean that 110,000 households in Scotland will receive an average cut of £13 a week. That diverges in impact on devolved matters because Scotland has a significant lack of one-bedroom properties. Although 44 per cent of working-age housing association tenants need a one-bedroom property, only 24 per cent occupy one. Those who cannot move will have to supplement their rent payment from other income, which could include another welfare payment—such as disability living allowance—that has been reduced. If a tenant cannot make up the difference that will mean rent arrears for local authorities.”

654. More generally, Kate Still of the Wise Group noted that whilst divergence of policy could be a problem in some areas, there was also scope for duplication of effort and resources in some areas and gaps in others, such as the provision of childcare.

655. In their written evidence, SCVO also provided detailed information on a number of other areas where they believe there is an issue with policy divergence. They cite Self Directed Support and DLA/PIP, and the Independent Living Fund.
656. On the former, SCVO said there was a mismatch between Scotland’s Self Directed Support policy and the UK Government’s plans for the assessment procedure for Personal Independence Payment leading to a “...complex and confusing system that is not conductive to the claimant's independence.”

657. On the latter, SCVO said that the decision to reduce ILF support will have a knock-on effect on the Scottish Government’s employability policies, as many recipients use their ILF to support them in continuing or returning to work.

Intergovernmental dialogue and the engagement of the Department of Work and Pensions in Scotland

658. In its report, our predecessor committee made a series of recommendations calling for greater dialogue and engagement between the Department of Work and Pensions (DWP) and the Scottish Government and others in Scotland, specifically through a new welfare-related intergovernmental forum. This was, in part, as a proposal to better improve the problems caused by the split between reserved and devolved policies.

659. In a letter to the Committee, the Secretary of State for Work and Pensions, Rt. Hon Iain Duncan Smith MP, stated that his department had held and would continue to hold, regular discussions with Ministers in all the devolved administrations and their officials, citing a number of meetings, exchanges of letters and telephone calls. He also highlighted the newly created role for the Scottish Government and the 'Scottish Local Authority Association' (sic) on the Universal Credit Senior Stakeholder Board.

660. Some witnesses, whilst broadly supportive of the principle of improved dialogue, were nonetheless critical. For example, David Griffiths said—

“I can see where such a forum might achieve things. To an extent it is happening through the welfare reform scrutiny group that has had meetings with DWP and so on. However, at the end of the day you are still leaving the decisions at DWP, which might note that it is located largely down alongside the Department of Health and that 90 per cent of the population do not live in Scotland. I do not quite see how such a forum would solve the problem beyond its giving Scottish Government more opportunity to express the problem.”

661. Similarly, Matt Lancashire said—

“We are delighted that we can feed our thoughts into the Scottish Government’s welfare reform group and its housing benefit reform group and that those thoughts can be taken forward, whether by Scottish or UK Government departments. The issue that I have with both groups is that I am not sure how far that process is shaping the delivery side of the DWP’s thoughts on implementation of the Welfare Reform Bill in Scotland. To be

487 SCVO, written submission to the Committee.
488 SCVO, written submission to the Committee.
489 Department of Work and Pensions, written submission to the Committee.
490 Department of Work and Pensions, written submission to the Committee.
491 Scotland Bill Committee, Official Report, 4 October 2011, Col 332.
quite honest, it seems that people from the DWP just come to give us presentations then go away again. I am not sure to what extent we are shaping their thoughts."\[492\\]

**Greater devolution of welfare and benefits**

662. Other witnesses went further than simply stressing the need to resolve the problems with divergence and duplication or to improve dialogue and engagement, calling either for a more wholesale devolution of welfare and benefits policy or for certain elements.

663. In its written submission to the Committee, Reform Scotland recommended a significant shift in responsibility of elements of welfare from Westminster to Holyrood.\[493\\] It argued that the split in social protection programmes between Westminster and Holyrood means that policy in relation to alleviating poverty is unfocussed and inefficient. Reform Scotland’s proposals would see the majority of the estimated £15 billion per year of benefits spent by Westminster in Scotland devolved, leaving Westminster primarily with state pensions, as well as some other areas such as statutory maternity and sickness pay.

664. In its written submission, the Scottish Youth Parliament also outlined a survey it had carried out which had showed that a majority of respondents (61.5%) were in favour of devolving control of welfare and benefits to the Scottish Parliament, 20% favoured them remaining reserved to the UK Parliament, with a mechanism set up to allow formal Scottish Government input, and 18.5% supporting them remaining entirely reserved.\[494\\]

665. Martin Sime told the Committee that he thought that welfare should have been part of the original devolution settlement.\[495\\] David Griffiths was more nuanced, stating that he was not particularly advocating one way or another but that the current devolution settlement was “not fit for purpose”\[496\\].

666. The representatives of both Citizens’ Advice Scotland and the Scottish Campaign on Welfare Reform would not commit their organisations on this issue or said that they had no view. Kate Still, however, agreed that welfare should be devolved.\[497\\] In particular for her, greater control over housing benefits and also the management of JobCentre Plus were the priorities.\[498\\] The Scottish Federation of Housing Associations were also supportive of an inclusion of housing benefit matters into the Scotland Bill, stating “we continue to be disappointed that the Scotland Bill remains silent about the scope for change in Scotland to Housing Benefit and its successor by suitable regulation” and calling for an obligation to be added into the Bill to consult the devolved administrations about the principles and

\[493\] Reform Scotland, written submission to the Committee.
\[494\] Scottish Youth Parliament, written submission to the Committee.
administrative arrangements in respect of any reform proposal that interacts with devolved responsibilities. 499

667. In its written submission, Oxfam Scotland presented its case for devolution of social protection powers to the Scottish Parliament. If these were granted, Oxfam Scotland set out its case for a fair welfare system and a fairer taxation system, the establishment of a Community Allowance, and measures to tackle what it describes as the real barriers to employment such as lack of childcare, employer discrimination, below poverty level wages and the lack of jobs. 500

668. The UK Government was not in favour of devolving welfare and benefits policy to Scotland or elements of it. In his evidence to the Committee, the Secretary of State for Scotland argued that “part of the argument for having a welfare and pensions system across the UK is that it is a fundamental part of the social union that people talk about, as it ensures a common set of standards for the way we look after people the length and breadth of the UK.” He stressed that in recognition of the Scottish Government’s significant responsibilities, “we must work very closely in partnership.” 501 He stressed that he wanted to resolve any difficulties caused by divergence in policies. 502

669. In his letter to the Committee, the Secretary of State for Work and Pensions argued that the Welfare Reform Bill was not the appropriate place to reconsider the devolution settlement, noting that the Scottish Government had made six requests for changes to the Scotland Bill, which did not include devolution of welfare benefits. 503 However, in a letter to the Committee dated 7 September 2011, it would appear that the Scottish Government does call for devolution of welfare benefits to Scotland. This states—

“Full tax-raising powers, along with responsibility for the welfare system, would ensure that the Parliament was fully accountable, and provide the maximum policy opportunities to shape the fiscal, economic and social environment in Scotland in line with our country's best interests.” 504

670. Finally, witness attending the Committee’s evidence session on 4 October 2011 were asked whether the Scotland Bill should have include provisions to ensure that both devolved and reserved policies in welfare were joined-up, that duplication was eliminated and that services were better integrated.

671. David Griffiths agreed that it should have been and said that “The Scotland Bill is a missed opportunity for having that discussion.” 505

672. Martin Sime of SCVO said that, “I see no possibility of the bill taking on some of the substantial areas of new powers that we have been talking about today.” 506

499 Scottish Federation of Housing Associations, written submission to the Committee.
500 Oxfam Scotland, written submission to the Committee.
501 Scotland Bill Committee, Official Report, 8 September 2011, Col 85.
502 Scotland Bill Committee, Official Report, 8 September, Col 86.
503 Department of Work and Pensions, written submission to the Committee.
504 Scottish Government, correspondence with the Committee, 7 September 2011.
505 Scotland Bill Committee, Official Report, 4 October 2011, Col 325.
506 Scotland Bill Committee, Official Report, 4 October 2011, Col 343.
He concluded that, overall, his advice to the Committee would be “to kill the bill now” and focus on talking on “the real issues that matter.”\textsuperscript{507}
ANNEX A – MINORITY REPORT

This Report records the views of a minority of Members of the Committee who disagree with conclusions which have been arrived at by a majority vote in the Committee. On a number of issues there may be scope for reasonable disagreement, but on others it is clear that the majority on the Committee have chosen to make recommendations which are not supported by any evidence heard by the Committee and have scant regard to the remit which the Committee was given by the Parliament.

Executive Summary

The Scotland Bill represents a step change in the fiscal powers and financial accountability of this Parliament. It emerged from a thorough and detailed review by the Calman Commission of the powers of the Parliament, and the scope to increase its taxation responsibilities. That work has been subject to intensive scrutiny and challenge but its analysis of the issues has never been seriously questioned.

Nothing in the evidence heard by this Committee or the conclusions they have chosen to draw in any way undermines our view that the Scotland Bill is right for Scotland now. It increases the powers and responsibilities of this Parliament, within the United Kingdom, which is what the Scottish people want. It would be perverse for this Parliament to turn down substantial new powers, or to use minor arguments about detail or propositions which lack a sound basis in evidence as a pretext for rejection. We therefore recommend that it should grant its legislative consent to the Bill.

The majority of the Committee argue that the powers proposed in the Bill are not enough. For those who want Scotland to be an independent country no devolved powers will ever be enough. We respect their right to argue for independence, however they may choose to define it, but that is not what this Committee was asked to do. It also makes hard to discuss with them the merits of devolving particular responsibilities within the UK or not and leads to absurdities such as recommending that no power should ever in any circumstances be re-reserved from Scotland to Westminster or that it is better to refuse a temporary grant of legislative competence – and have no additional powers at all - just because it is not conferred permanently. This blinkered approach does not serve Scotland well.

At a time of great economic uncertainty, it is right to ask whether there are more economic powers which could be devolved to enable the Scottish Parliament and Government to contribute to Scotland’s economic growth. In fact, the most important levers that government has to promote sustainable long term growth are already devolved – education and training, industrial development, land use planning, transport, infrastructure investment and so on. The Scotland Bill will enhance this by devolving new taxation powers and creating substantial new borrowing capacity.
It makes no sense whatsoever for Scotland to try to run a separate monetary or fiscal policy from the rest of the UK. Our economy is too integrated, and the ill-thought-through arguments that the Committee has heard on ‘fiscal autonomy’ have completely failed to consider the problems which arise when monetary and fiscal policies are separated – problems all too evident in the European Union at present.

Scottish Ministers have continued to press for the full-scale devolution of corporation tax. The Committee heard evidence from a number of witnesses, including business people, to the effect that corporation tax should be cut. We heard little about how it might be devolved. The Scottish Government has no plan for how a fully devolved corporation tax would work within the UK. Especially it has no plan whatsoever on how the problems of tax competition and tax avoidance - which even it acknowledges are real – can be avoided. **We are absolutely opposed to allowing the Scottish Government to make Scotland a tax haven for businesses to avoid paying corporation tax that they would otherwise pay to support public services across the whole UK.**

It is very striking that the Scottish Government expends more time and effort in arguing for powers it does not have than using the tax powers it does have to help business at a time of difficulty. In our view, the analysis of the previous Scotland Bill Committee of these issues remains the most persuasive: if the UK Government can find a way to devolve corporation tax for Northern Ireland as a genuine regional economic development tool that avoids the tax avoidance problems, then Scotland (and Wales) should be party to those discussions also.

The Committee agrees that income tax is the right basis on which to build fiscal devolution and we welcome that conclusion, however much we may disagree with the others. Like the last Scotland Bill Committee, we heard some evidence claiming that income tax was a declining tax, and so would inevitably lead to a reduction in the Scottish Budget. As the analysis of the last Committee comprehensively demonstrated, **these claims of so-called “deflationary bias” are without foundation, and we welcome the fact that Scottish Ministers have ceased to make the extravagant and unfounded claims they made in the last Parliament.**

The majority of the Committee conclude that the Parliament should be able to vary the rates of income tax for the different tax bands independently. They argue that this will enable Scotland to counteract the “effects of fiscal drag”. Since there is no evidence that fiscal drag is a real problem – and indeed the comprehensive analysis by the previous Scotland Bill Committee demonstrated that over the long run it was not likely to be – this is no more than a pretext. It seems that the motivation is to enable the Parliament to increase taxes on basic rate taxpayers without affecting higher and additional rate taxpayers (who may be more mobile) or to cut the rates for the well off in the hope of attracting more of them to declare their income in Scotland. **Unlike the majority of the Committee, we are opposed to a power that was intended to allow top rate taxpayers to avoid income tax by claiming to reside in Scotland. The Scotland Bill should not be a charter for tax dodgers, whether of the individual or corporate variety.**
A further argument put to the Committee by the Scottish Government was that it was risky for the Scottish Budget to rely solely or mainly on income tax, because it was subject to cyclical variation. Other taxes should be devolved to reduce this risk. The majority of the Committee duly accepted this line. It is however clearly nonsensical. The only additional tax which the Scottish Government actually argues should be wholly devolved in the Bill is corporation tax – and that is hugely more cyclical than Income Tax. In fact under the Scotland Bill the vast majority of the budget will continue to be supported by UK Block grant – which is supported by every tax, collected not just in Scotland but across the whole of the UK, as well as by the UK’s borrowing capacity, and so is a much more stable and less cyclical source of income than an additional devolved tax.

The most important question that remains to be resolved about the Scotland Bill is how, in the long run, the central grant which supports the Scottish Budget should be adjusted to take account of the new stream of tax revenues to which the Scottish Parliament will have access. This was considered in great detail by the previous Scotland Bill Committee and we agree with their recommendations.

The Scottish Government sought to argue that the Bill's tax provisions should not be commenced without its agreement, and that this agreement should be made contingent on agreeing the amount of grant adjustment. Even they however have had to accept that the long run amount of grant adjustment cannot be calculated without bringing the tax provisions into effect to gain experience of their operation and yield. Instead the majority of the Committee have proposed an elaborate and almost certainly unworkable procedure for putting the financial provisions into operation. It appears to be based on an assumption that the UK Government will be determined to find ways to defraud the Scottish budget of relatively small sums in the calculation of the grant adjustment – when the reality is that the grant they presently make is already determined by them under the Barnett formula which all governments have been punctilious in observing, even though it has no statutory force.

In fact the evidence shows that one of the most important factors in determining the precise effect of grant adjustment will be its timing in relation to the economic cycle, and it may well be in Scotland’s interest to proceed as quickly as possible with this for that reason. Nevertheless, in the long run, we strongly agree that the aim of the process should be to ensure that the Scottish Parliament is able to benefit from the effects that devolved policy actions have in successfully promoting economic growth and thus increasing tax revenues.

We propose a simple system based on the assumption that both governments will work in good faith:

- The tax provisions should be commenced by the UK Government, after consultation with the Scottish Ministers;
- The initial grant reduction for the transitional period should be as currently proposed, so that there is no gain or loss to the Scottish Budget from uncertainties in the tax yield;
The formula and timing for the final grant change should be discussed and agreed in the Joint Exchequer Committee on the basis that so far as possible it neither cuts not gives an unfair bonus to the spending power of the Scottish Parliament. This needs no provision in the Bill, and we note with approval the undertaking which the Secretary of State for Scotland has given the Committee that this is his intention. We expect Scottish Ministers to work in good faith to ensure this.

The Scotland Bill will give the Scottish Government substantial new borrowing powers, which we welcome. Short-term borrowing is needed to cope with the fluctuations in tax revenue, and we welcome that fact that the UK Government has accepted the recommendation of the previous Committee and removed the requirement for the first £125 million of any shortfall to be absorbed by spending reductions. There are also recommendations from the present Committee in relation to short term borrowing which we can support. So far as capital borrowing is concerned we welcome the additional capacity this will give the Scottish Government to make capital investments, and also the flexibility the UK Government has shown in allowing early access to pre-payments for, for example, the Forth Bridge. However we recognise that some constraints on borrowing are inevitable, especially at a time of economic challenges. We agree with the previous Committee that the total amount of borrowing and the amount to be added in any one year should be calculated on the basis of devolved capacity to repay them, and in this context we note that the UK Government will have a power to increase the amounts in future.

Most of the non-financial provision of the Bill are widely welcomed, and we share that view. On the matter of the powers of the Supreme Court, we welcome the work of Lord McCluskey’s Review Group in persuading the Scottish Government to change its position, and accept that the Supreme Court must be the final UK court responsible for constitutional and human rights issues. The Advocate General for Scotland has shown commendable willingness to adapt his proposals to meet the concerns expressed and secure the traditional position of the High Court at the apex of the Scottish criminal system, and we urge the Scottish Government now to resolve the minor outstanding differences.

So far as the Crown Estate is concerned, we accept that there are real issues to consider, but this Committee has looked at them through the lens of whether more powers should be devolved to Holyrood rather than consider the bigger picture. We recommend that the matter be further considered in the round by both Governments, taking into account the recommendations of the Scottish Affairs Select Committee when they are published, and in that context we are not averse to more of the functions which the Crown Estate Commissioners discharge being devolved and carried out in Scotland.

The majority report makes a recommendation about devolving social security. The recommendation makes little sense in its own terms, and certainly could not be added to the Scotland Bill. It is not based on any substantial evidence received about why or how welfare provision should be devolved. This recommendation should simply be disregarded.
There are other recommendations in the majority report from which we have had to dissent; they have been incorporated although the Committee acknowledges it has taken no oral or written evidence on them. This is a further example of doctrinaire posturing rather than serious legislative scrutiny.

**The Main Thrust of the Scotland Bill**

The provisions of the Scotland Bill implement the recommendations of the Commission on Scottish Devolution, which was set up following a debate in this Parliament, which undertook extensive consultation across Scotland, and whose Report was welcomed here. The Scottish Parliament welcomed the Scotland Bill and the previous Scotland Bill Committee gave it extensive scrutiny. This Committee was asked to review the response to that Committee’s recommendations and comments on the Bill.

In the Scottish Government evidence essentially two propositions were made. The first was that the Bill did not go far enough, and the second that it had a series of alleged defects or dangers. We deal with each of them below.

We respect the views of members of the Scottish National Party who believe that Scotland should be an independent country, separate from the rest of the United Kingdom. However that is not what the Scotland Bill is about: it devolves powers to the Scottish Parliament within the UK. That is in line with what the Scottish people want. What those powers should be, how responsibility should be split between the two levels of Government and the two Parliaments which serve Scotland, and how they should work together was the subject of very detailed and careful consideration by the Calman Commission.

The majority of the Committee however take a different approach. They see the Bill as nothing other than an opportunity to transfer as many powers as possible to Holyrood, on the basis that each transfer of power is one step closer to independence, whether or not that makes sense within the context of a United Kingdom. This approach runs through all the report — seeking taxation powers that would be used in a beggar-my-neighbour way to attract tax revenues from the rest of the UK by offering lower tax rates, or demanding powers over any reserved area where that sounds even remotely plausible, whether or not they have heard any evidence on the subject.

The most extreme aspect of this is to assert that as matter of principle no power or responsibility should ever move from Holyrood to Westminster – whatever the merits of the case. So when the Calman Commission recommended some very modest adjustments to devolved powers – eg on the regulation of the health professions or to clarify extra territorial jurisdiction over Antarctica - these proposals are rejected out of hand on dogmatic grounds. This approach vitiates the whole purpose of Bill scrutiny: it also undermines any genuine arguments that the majority may make for devolving any particular responsibility.

The Bill has now reached a time for decision. It is clear that it can never satisfy the aspirations of those whose only aim is to gain as many powers as possible so as to facilitate a move to independence. Nor should it.
The Bill does however represent a step change in the financial powers of this Parliament. About one-third of devolved spending will now be paid for by taxes decided in Scotland, and the Bill contains mechanisms to increase that further by devolving more taxes in future. Two more potential devolved taxes have been identified - Aggregates Levy and Air Passenger Duty - and the UK Government is committed to taking them forward at a later stage. Substantial new borrowing powers are proposed, which would give the Scottish Government greater flexibility to invest in Scotland’s infrastructure. The scope for that could arguably be greater; but it would be folly to turn them down now on grounds of dogma. It is time for the Scottish Government to step up to the mark, accept new powers and the responsibilities that go with them, rather than merely argue for devolution in theory.

There are issues of detail and points which will need further clarification and development in the Bill. No major constitutional change could ever be without them. There are also areas where further progress may well be needed in future. However, as we explain in detail below, none of the pretexts and excuses which have been advanced to reject the Bill hold water. It is in our view time to move forward and to take on new fiscal and financial powers and responsibilities. Accordingly the Parliament should give its consent to the Bill.

**Economic Powers**

A recurring theme in the evidence of the Scottish Ministers to the Committee was that the Bill did not give them sufficient economic powers. Of course this claim has to be seen in the context of their aspiration to be wholly responsible for the management of the economy of an independent Scotland – although recent developments cast doubt on how independent that management would be. Nevertheless at a time of great economic uncertainty when people are concerned about their jobs and financial security, it is right to ask whether the Scottish Parliament has the right devolved powers to promote economic growth in Scotland.

This issue was considered in some depth by the Calman Commission. They noted that the scope of devolved powers had to be considered in the context of the fact that the UK has a deeply integrated economy, from which Scotland benefits. Goods and services are traded constantly across the border, and many companies operate throughout the UK. The UK is an economic, fiscal and monetary Union and there is a single macroeconomic framework operated at a UK level by the Treasury and the Bank of England. The Commission concluded, and we agree, that this economic Union should continue and should not be disrupted by destabilising changes to devolved powers.

The Commission also noted, however that within this macroeconomic framework there is very substantial devolution:

> “Many of the policy instruments to promote economic growth are already devolved. In particular, education, land use planning, economic
development, transport, enterprise and skills training all directly influence productivity and hence are major determinants of economic growth.”

Some of those who gave evidence to the Committee argued for much greater tax devolution, but none of them addressed the question of whether it makes sense to completely devolve fiscal policy while leaving monetary policy at the UK level. In our view that makes no sense at all, and the risks it brings are graphically illustrated by the present Eurozone crisis. However one fiscal tool which does merit detailed consideration is corporation tax.

Corporation Tax

The Committee once again considered whether corporation tax should be devolved. We cannot accept its conclusions, which appear to be based more on wishful thinking than evidence, and fail to engage with the serious practical questions which would have to be addressed if these powers were to be exercised in a devolved Scotland.

Corporation tax in Scotland was estimated to raise about £2.5bn in 2009-10, the most recent year for which figures have been published. This is around 6% of non-oil revenue in Scotland. In yield therefore it ranks well behind income tax and national insurance contributions, and is closer in scale to non-domestic rates (£1.8bn) than to Value Added Tax (£7.3bn) as a source of revenue. The Calman Commission did not recommend devolving corporation tax to the Scottish Parliament, principally because of the potential economic inefficiencies that could be caused by firms making decisions on tax considerations rather than commercial factors.

This was considered again in detail by the last Scotland Bill Committee. Their conclusions bear repeating

“The Committee does not believe that Scotland should seek to maximise its tax income by becoming a tax haven for companies operating elsewhere in the UK. We therefore support the UK Government in not at this stage devolving corporation tax in the Scotland Bill.

The Committee notes that international experience does show some scope for differentiation of corporation tax, and that there are arguments that it can be used as an economic development tool, especially by small countries. It is therefore not something we would wish to rule out entirely for the future, especially if schemes were being developed within the UK which avoided the worst of the distortions that might be created.”

There has been a great deal of discussion about tax devolution and economic growth. The previous Scotland Bill Committee spent a great deal of time considering assertions made by Scottish Ministers about the linkage between a given percentage of tax devolution and additional economic growth. These were comprehensively demolished by its analysis and such assertions are no longer

made by Scottish Ministers. It now seems common ground that the question is not who exercises tax powers but what use is made of them and of the many other powers of government which can influence growth over the long run.

The Scottish Government has however continued to press for the devolution of corporation tax, to be able to use it as a tool to promote economic growth. They presented to the Committee a paper which argued the case for cutting the rate of corporation tax, and the economic benefits which might flow from doing so.

Unfortunately cutting the rate of corporation tax and devolving it are not the same thing. The UK Government already has plans to reduce corporation tax, and there is widespread support amongst all political parties for reducing the burden on business. Indeed there is worldwide a tendency for tax on corporate profits to be reduced, partly for these reasons and partly in recognition of the fact that profits tend to be mobile and move to the lowest tax jurisdiction.

There is therefore no dispute that reducing corporation tax can be used to encourage investment; nor that an independent Scotland would have to take its own tax decisions. The question is whether a system for devolving corporation tax within the UK can be designed without unacceptable distorting effects of the sort that concerned the Calman Commission and the previous Scotland Bill Committee.

Here the Scottish Government paper fell sadly short. The Exchequer Secretary to the Treasury asked a number of pertinent questions about how devolution might be made to work in practice but the response from the Cabinet Secretary for Finance was simply to brush them aside

“Your letter raises a number of technical and administrative issues with devolving corporation tax. I note that nearly all of these have been covered in our discussion paper and you will no doubt be dealing with similar issues with respect to Northern Ireland and your consultation there.”

The truth of the matter, however, is that these important issues were simply sidestepped in the Scottish Government papers. The most important of them, however, was addressed in evidence by a number of witnesses: that is whether “profit shifting” by companies would result in serious economic distortions.

Corporate profits are a mobile tax base. Companies have a very strong incentive to recognise profits wherever the tax charge will be lowest, and they have many ways of ensuring that this can happen. As the Calman Commission and the previous Scotland Bill Committee realised, this has the potential to create serious problems for devolution. Many of the witnesses who appeared before this Committee – even those who were supportive of devolution – agreed that this was a problem that needed to be addressed. The CBI put the matter very plainly

“The CBI has long believed that the interests of the UK, including Scotland, are best served by a unitary CT tax system, especially given the mobile nature of the underlying tax base. This provides the simplest environment for UK and foreign businesses and investors to operate in, and minimises
the potential for distortion of economic activity through artificial profit diversion.”

Mr Graham Gudgin, a strong supporter of devolving Corporation Tax in Northern Ireland, saw the problem too:

“I share the Confederation of British Industry Scotland’s frustrations with the Scottish Government’s discussion paper on corporation tax, in that it is exceedingly one-sided.

The bigger question is profit shifting, which is a matter for the Treasury rather than for individual regions.”

So did Mr Ben Thomson of Reform Scotland:

“Corporation tax is becoming difficult to pin on corporations that are, more and more, choosing to pay tax wherever they want in the world—which, of course, will be in environments that have the lowest tax. I see that all the time in businesses; indeed, I am dealing with Luxembourgish and Belgian companies on exactly that issue.”

The point was illustrated most strikingly by Mr Martin Tognieri, formerly of Scottish Development International and Locate in Scotland:

“Corporation tax has a massive effect on tax receipts and I do not think that anything better illustrates it than that example. Ireland, with 1 per cent of Europe’s population, attracted 95 per cent of all the corporation tax that Microsoft paid in Europe.

The number of corporations that are moving to places such as Luxembourg and Belgium, where corporation tax rates are less than 5 per cent. That illustrates that corporates are incentivised to choose a location on the basis of corporation tax, where those corporation tax receipts are then realised.”

It is very disappointing therefore that the Scottish Government produced no proposals for dealing with this very real problem. All they say is

“The Scottish Government is committed to establishing a fair and transparent corporate tax system which attracts and retains genuine economic activity and will work with the UK Government to minimise any profit shifting. In practice, significant institutional and accounting rules already exist both within the UK and internationally to ensure that profit shifting does not happen.”

However as the Microsoft example demonstrates, wishing the problem away is not the same as addressing it.

The Scottish Government’s unwillingness to make serious, detailed proposals about how their corporation tax aspirations might be made to work in practice is regrettable. All this calls into question whether they are serious in making
propositions for more devolution or see them merely as rhetorical devices in support of their more ambitious aims. Similarly, their rhetoric on business taxation sets out a case for cutting it; but their behaviour in office has been to increase business taxation through non-domestic rates. We find it increasingly hard to take these proposals at face value.

In these circumstances it is perfectly plain that no case beyond assertion and wishful thinking has been made for the full scale devolution of corporation tax to Scotland. If however the UK Government were to decide on devolution of corporation tax rate setting in Northern Ireland, and a method were devised which avoided the problems of profit-shifting and brass-plating (and some suggestions have been made to do so) then we would agree with the previous Committee that Scotland should be at the table to discuss its application here.

Reliance on Income Tax

The principal tax to be devolved under the Scotland Bill scheme is income tax. There is general agreement that this is appropriate. Income tax is paid by a large proportion of the population, and is a highly visible tax. Unlike some other taxes (such as corporation tax) it is less susceptible to shifting of the tax base from one place to another, and so is suitable for decentralisation. Some witnesses argued in evidence that income tax was a declining tax and so reliance on it would be a risk to the Scottish Budget. In particular it was argued that the effects of ‘fiscal drag’ would over time reduce the yield of income tax. The majority of the Committee use this as a justification for recommending that the Scottish Parliament should be able to vary the higher rates of income tax separately. The data do not support this assertion (and so have been ignored) and the recommendation would not follow even if the facts were as the majority of the Committee have chosen to believe.

Over a very long period rates of income tax in the UK tended to decline, as the UK moved to higher indirect taxes, notably VAT. The income tax base typically did not decline, as incomes grew in real terms, and nor did income tax yields. Fiscal drag is said to take place as tax thresholds stay still or grow with inflation rather than incomes levels. If this happens it adds to tax yield, as more people are brought into taxation at lower income levels, and more are drawn into paying the higher rates.

These questions were looked at in great detail by the previous Committee which produced a comprehensive analysis and demonstrated that this effect did not reduce income tax yields overall, and was unlikely to do so in future. It may be found at para 407 onwards of their full report. The table below from para 423 of their report (numbered as Table 7) summarises the clear evidence that income tax is anything but a declining tax base.
Table 7: UK personal income tax revenue as a percentage of (a) total tax revenue and (b) public expenditure

<table>
<thead>
<tr>
<th></th>
<th>1985</th>
<th>1995</th>
<th>2005</th>
<th>2007</th>
<th>2009</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Tax</td>
<td>26.1</td>
<td>29.0</td>
<td>29.2</td>
<td>29.8</td>
<td>30.4</td>
</tr>
<tr>
<td>Revenue</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Public</td>
<td>22.3</td>
<td>23.7</td>
<td>27.2</td>
<td>28.2</td>
<td>32.9</td>
</tr>
<tr>
<td>Expenditure</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Note: 2009 figures estimated by SPICe using data from the IMF and OECD Tax Revenue Statistics.

Whether the fact that fiscal drag effects might differ for Scottish tax yield from a single flat rate structure and so lead to a fiscal drag effect was also examined in detail by the previous Committee. They concluded that if any effect existed it was a much smaller problem than had been suggested, and could, if need be, be reflected in the grant adjustment mechanism; over the long run there should be no need to raise taxes because of it. We agree with this analysis, and see no need to change the Bill to deal with it.

Access to the Higher Rates of Income Tax

The Scotland Bill follows the scheme recommended by the Calman Commission which is for a single Scottish rate of income tax applicable across all the bands of earned income. This has advantages of simplicity and clarity, as the majority of the Committee acknowledge. It is easy to understand, and relatively simple to administer. As the Chairman of the Commission explained to the Committee, a figure of 10 pence was chosen because it split the basic rate on income tax – which is paid by all taxpayers and the only rate paid by the majority of them – equally between the UK and Scottish Governments, so fulfilling the Commission’s objective of sharing the income tax base between the two governments.

The Commission also recommended that the structure of the tax system and the degree of progressivity in it was a matter for the UK government. This recognises the generally accepted view that distributive polices such as spending are best dealt with at subnational level and redistributive policies such as progressive taxation and welfare at the national level.

Other schemes might have been devised, such as splitting the revenues from all bands or allowing the Scottish Government to set different rates from each band. Allowing different rates to be set for different bands (within some constraints) was recommended for Wales by the Holtham Commission, explicitly so that the Welsh administration could cut the higher rates and attract more wealthy people to pay their taxes in Wales. The mobility of higher and additional rate tax rate payers is a significant issue under any system, as even a 1p change in tax rate might be reduce or increase taxes by a good deal of money for a very high earner. At the extreme the incentive on such taxpayers to move their domicile elsewhere might have a noticeable effect on tax yield and so act as a constraint on the scope to
make tax decisions. This risk may exist but has not been shown to be significant, and in any event taxpayer behaviour is one of the things that a government inevitably has to take into account in setting tax rates.

The previous Committee again looked at this in great detail, and acknowledged that this is a balanced decision but concluded that the scheme in the Bill should be followed. We agree. In particular we do not think that it would be right to create flexibility in the tax system with the intention of making Scotland a tax haven, cutting rates of the additional or higher rate tax payers only so as to encourage them to pay taxes in Scotland and not elsewhere in the UK, or exempting them from increases which would then fall regresively on basic rate taxpayers. The Scotland Bill is intended to increase the taxation power of this Parliament, not to encourage tax avoidance.

Basket of Taxes

The majority of the Committee have accepted the argument that the proposals in the Scotland Bill make the Scottish Parliament overly dependent on income tax, and because it rises and falls across the economic cycle, and imports risk into the Scottish budget. They conclude that this risk would be reduced by devolving more taxes (notably corporation tax). This is a muddle-headed approach and we disagree with it.

Making the Scottish Parliament more dependent on taxes it raises itself is a key element of accountability, and does indeed import both short- and long-term risks into the Scottish Budget. In the long run the budget will be more closely linked to the earnings of Scottish residents and so to the success of the Scottish economy, but in the short run it will be exposed to cyclical and seasonal fluctuations in tax revenues. The Scotland Bill does in fact contain a number of powers for the Scottish Government to control and manage those risks, but it is important first to put them into context and to consider whether adding more taxes would increase or decrease them.

As the majority report acknowledges Scottish income tax will be about 15% of the Scottish Budget. Aside from local taxes – council tax and non-domestic rates - the remainder of the budget comes from UK block grant, which is stable and predictable and not subject to the same cyclical fluctuations as tax revenues. The value at risk is therefore small compared to budget – even if income tax were to fall short of expectations by 5% in a year that is less than 1% of the budget – and well within the short-term borrowing powers of the Scottish Government.

Devolving further taxes would in this scenario actually increase the risk to the budget. This is most notably true of corporation tax which is by far and away the most volatile of the major taxes (save for offshore oil revenues) so adding it to the basket would add risk, and not reduce it. It would substitute another volatile, cyclical revenue stream for a revenue stream of grant which is supported not only by all Scottish taxes, but by all UK taxes and the UK’s borrowing capacity. Here again what we see is a dogmatic desire to claim more powers rather than a proper analysis of the evidence.
Excise Duty

One of the proposals made by the Scottish Government to the Committee was that Excise Duty should be devolved. The Committee duly took evidence from a range of bodies on this. Many of the witnesses from bodies connected with health promotion agreed that, because Scotland had a particular problem with alcohol and alcohol misuse, taxation on alcohol in Scotland should be increased to discourage consumption.

Scotland does have a drink problem, and it is clear that the price of alcohol is a factor, and an important policy question. However the evidence demonstrated there are real practical problems with differential alcohol taxation within the UK. Excise duty is collected in effect at the point of manufacture, wherever that takes place in the UK, and not at the point of consumption.

Whether for these reason or others, the Scottish Government abruptly reversed its position. Alcohol taxation was no longer to be devolved in any meaningful sense of that word. Instead however the Treasury was in future to assign the amount of alcohol revenues estimated to arise from consumption in Scotland – offset by a reduction in the Block grant of a per capita share of the UK yield of the duty. However because the Scottish Government delayed announcing their changed position the Committee heard no evidence on this proposition for assignment of tax revenues - other than an estimate from the UK Government that it appeared to be a request for a budget increase of £250m. As a form of public policy making this is little better than a farce.

Borrowing

The borrowing powers in the Scotland Bill are a welcome addition to the flexibility afforded to the Scottish Parliament under the devolution settlement. They will allow the Scottish Government short-term borrowing so as to deal with fluctuations on the amount of tax income it receives. In this context we welcome the additional flexibility announced by the UK Government in not requiring the first £125 million of any shortfall to be absorbed by spending reductions, but allowing access to short-term borrowing instead. There are also recommendations on short-term borrowing from this Committee with which we can agree, especially where they echo the detailed work of the previous Committee.

On capital borrowing, we also agree with the views of the previous Committee, and note that the UK Government has amended the Bill to allow for the possibility of bond issuance by the Scottish Government; we welcome this approach. We accept that there will have to be limits on the amounts of borrowing that can prudently be afforded and here again we agree with the recommendations of the previous Scotland Bill Committee. We note that the Bill contains powers to increase the borrowing amounts from the levels specified.

Non-Financial Provisions

For the most part the non-financial provisions of the Bill are uncontroversial, and consist of minor additions to devolved powers, on the basis recommended by the
Calman Commission. We have noted elsewhere our disparagement of the dogmatic view that no power should ever be transferred from Holyrood to Westminster even if the matter is trivial and the case for doing so unanswerable.

The majority of the Committee have made recommendations in relation to the Crown Estate Commissioners which we do not think should be taken forward in the context of the Scotland Bill, but should be considered in a broader context. It is worth noting that the Calman Commission made recommendations about the Crown Estate Commissioners on the basis that they were a reserved body whose activities impinged on devolved matters. Their recommendations were intended to improve the scope for dialogue and intergovernmental working in respect of them. The previous Committee took further evidence on their work and its effects in Scotland, as has the present committee. In addition the Scottish Affairs Select Committee at Westminster have been conducting an Inquiry into their work.

It is perhaps not surprising that the views of the Scottish Government are that the management of the Crown property in Scotland presently managed by the Crown Estate Commissioners should be fully devolved, and we accept that there is a case for greater, if not necessarily full-scale, devolution some of which may be to local authorities or communities. That does however require a fuller review or inquiry into the work of Crown Estate, how the Commissioners go about their work in Scotland, and what the options are in respect of the different categories of Crown property, rather than simply a decision on devolution or not on the basis of the limited evidence and argument seen so far.

The Scotland Bill contains one provision related to the BBC, to do with the appointment of the Trustee for Scotland. This is generally accepted as a sensible reform. The majority Report however makes a series of wide ranging recommendations about devolving control of public service broadcasting, and the Scottish free to air list, as well as proposals about a Scottish Digital Channel.

We do not support devolution of control over the BBC or public service broadcasting – nor indeed did the Broadcasting Commission set up by the Scottish Government. Broadcasting issues more generally, such as a Scottish Digital Channel, are a subject on which the Committee took little evidence and which are not in our view suitable to be pursued in a Bill about the devolution settlement.

The majority report contains further recommendations on non-financial issues which are based on little evidence or in some cases no evidence at all. Wholesale devolution of the social security system and dismantling the UK Welfare State is recommended in the by going. Recommendations are also made to devolve all firearms control, and control of all elections – even though no witness appearing before the Committee discussed the matter. That something is thought to be the aspiration of the Scottish Government was enough for the majority of the Committee. We cannot agree. This is not legislative scrutiny but political posturing.

David McLetchie MSP, James Kelly MSP, Richard Baker MSP and Willie Rennie MSP December 2011
ANNEX B – EXTRACTS FROM THE MINUTES

1st Meeting, 2011 (Session 4), Tuesday 21 June 2011

Declaration of interests: The oldest member of the Committee, Adam Ingram, invited members to declare any relevant interests. The following relevant interests were declared—

James Kelly declared that his brother Tony Kelly is a practising solicitor;

John Mason declared that he is a member of the Institute of Chartered Accountants in Scotland; and

Joan McAlpine declared that she writes a regular column for The Scotsman for which she is remunerated.

Choice of Convener: The Committee chose Linda Fabiani as its Convener.

Choice of Deputy Convener: The Committee chose James Kelly as its Deputy Convener.

Work programme: The Committee considered its approach to developing its work programme. Members asked SPICe to provide further briefing material and research for them. Members also agreed to invite Scottish Government ministers to the next meeting of the Committee and to ask for copies of the formal submissions being made by the Scottish Government to the UK Government.

2nd Meeting, 2011 (Session 4), Tuesday 28 June 2011

1. Decision on taking business in private: The Committee agreed to take items 4 and 5 in private.

2. The Scotland Bill - evidence from the Scottish Government: The Committee took evidence from—

John Swinney MSP, Cabinet Secretary for Finance, Employment and Sustainable Growth, Bruce Crawford MSP, Cabinet Secretary for Parliamentary Business and Government Strategy, Graeme Roy, Senior Economist, Office of the Chief Economic Adviser, Paul McGhee, Principal Policy Analyst, Capital and Risk Division, David Rogers, Deputy Director, UK Relations, Elections and Constitutional Development Division, and Gerald Byrne, Team Leader, Constitutional Change Team, Scottish Government.

3. Proposed call for evidence: The Committee considered a proposed call for evidence and agreed a number of changes. The Committee further agreed that a revised draft would be circulated to members for final agreement before issuing.
Finally, members agreed to clarify the remit of the Committee with the Parliamentary Bureau.

4. **Work programme (in private):** The Committee considered proposals for witnesses as part of its work programme and the details of a business planning day to be held in the summer recess.

5. **Consideration of the Scotland Bill (adviser) (in private):** The Committee agreed to seek approval for the appointment of a panel of advisers.

### 3rd Meeting, 2011 (Session 4), Tuesday 8 September 2011

1. **Decision on taking business in private:** The Committee agreed to take items 3 and 4 in private.

2. **The Scotland Bill - evidence from the UK Government:** The Committee took evidence from—

   Rt Hon Michael Moore MP, Secretary of State for Scotland, Rt Hon David Mundell MP, Parliamentary Under Secretary of State, Alisdair McIntosh, Director, and Laura Crawforth, Head of Constitutional Policy, Scotland Office.

3. **Consideration of the Scotland Bill (advisers) (in private):** The Committee agreed to appoint a panel of advisers.

4. **Work programme (in private):** The Committee agreed its work programme

### 4th Meeting, 2011 (Session 4), Tuesday 13 September 2011

1. **The Scotland Bill:** The Committee agreed to take item 4 and all future reviews of evidence heard in private.

2. **The Scotland Bill:** The Committee took evidence from—

   Sir Kenneth Calman.

3. **The Scotland Bill - evidence on the income tax, bonds and borrowing etc. issues:** The Committee took evidence from—

   Derek Allan, Tax Director, Institute of Chartered Accountants of Scotland; Raymond Kelly, Secretary of the Scottish Branch, Chartered Institute of Taxation; Jim Cuthbert; Margaret Cuthbert; Professor Chris Heady, University of Kent.
4. **The Scotland Bill (in private):** The Committee agreed to write to Professor Alex Kemp for further information.

5th Meeting, 2011 (Session 4), Tuesday 20 September 2011

**The Scotland Bill - evidence on Crown Estate issues:** The Committee heard evidence from—

Rob Hastings, Director of its marine estate, and Alan Laidlaw, Head of new business development rural, The Crown Estate;
Councillor Michael Foxley, Leader, The Highland Council;
Andy Wightman;
David Whitehead, Director, British Ports Association;
Calum Davidson, Director of Energy and Low Carbon, Highlands and Islands Enterprise;
Lorne MacLeod, Director, Community Land Scotland;
Linda Rosborough, Acting Director Marine Scotland, Scottish Government.

**Review of evidence (in private):** The Committee discussed the evidence heard at today’s meeting.

6th Meeting, 2011 (Session 4), Tuesday 27 September 2011

**The Scotland Bill - evidence on the devolution of corporation tax:** The Committee took evidence from—

Ben Thomson, Chairman, Reform Scotland;
Garry Clark, Head of Policy, Scottish Chambers of Commerce;
Martin Togneri, former Chief Executive, Scottish Development International.

**The Scotland Bill - evidence on air passenger duty and aggregates tax:** The Committee took evidence from—

Amanda McMillan, Managing Director, Glasgow Airport;
Richard Bird, Executive Officer, British Aggregates Association.

**The Scotland Bill - evidence on excise duties:** The Committee took evidence from—

Campbell Evans, Scotch Whisky Association;
Dr Evelyn Gillan, Chief Executive, Alcohol Focus Scotland;
Patrick Browne, Scottish Beer and Pubs Association.
The Scotland Bill - evidence on corporation tax and creating a favourable environment for businesses: The Committee took evidence from—

Jim McColl, Clyde Blowers;  
Norman Springford, Chief Executive, APEX Hotels;  
Professor Andrew Hughes Hallett, University of St Andrews and George Washington University.

The Scotland Bill - evidence from UK Ministers: The Committee took evidence from—

David Gauke MP, Exchequer to the Secretary to the Treasury, HM Treasury.

Review of evidence (in private): The Committee reviewed the evidence heard at today's meeting.

7th Meeting, 2011 (Session 4), Tuesday 4 October 2011

The Scotland Bill: welfare and benefits: The Committee took evidence from—

Matt Lancashire, Social Policy Officer, Citizens' Advice Scotland;  
Kate Still, Director of Development and Delivery, The Wise Group;  
Martin Sime, Chief Executive, Scottish Council for Voluntary Organisations;  
David Griffiths, Member of SCVO Policy Committee and Chief Executive, ECAS;  
Maggie Kelly, Co-ordinator/Policy and Campaigns Officer, Scottish Campaign for Welfare Reform and The Poverty Alliance.

The Scotland Bill: Review of evidence The Committee reviewed the evidence heard during today's meeting.

8th Meeting, 2011 (Session 4), Tuesday 25 October 2011

The Scotland Bill - evidence on broadcasting issues: The Committee took evidence from—

Blair Jenkins, Former Chair, Scottish Broadcasting Commission;  
Bill Matthews, Trustee for Scotland, BBC Trust;  
Ken MacQuarrie, Director, BBC Scotland;  
Vicki Nash, Director, and David Mahoney, Director of Policy, Content & Standards, Ofcom Scotland.

The Scotland Bill - evidence on the role of the UK Supreme Court and other issues: The Committee took evidence from—

Richard Keen Q.C., Dean, and James Mure Q.C., Faculty of Advocates;
The Scotland Bill - Review of evidence  The Committee reviewed the evidence heard to date and agreed a number of follow up actions.

9th Meeting, 2011 (Session 4), Tuesday 1 November 2011

The Scotland Bill - evidence on the role of the UK Supreme Court: The Committee took evidence from—

Paul McBride Q.C., Senior Counsel, Black Chambers;
Lord McCluskey, Chair, and Sheriff Charles Stoddart, Member, Supreme Court Review Group;
Frank Mulholland Q.C., The Lord Advocate;

The Scotland Bill: The Committee took evidence from—

Alan Trench, Honorary senior research fellow, Constitution Unit, University College London.

The Scotland Bill: Review of evidence (in private): The Committee reviewed the evidence heard to date.

10th Meeting, 2011 (Session 4), Tuesday 8 November 2011

The Scotland Bill - evidence on EU issues: The Committee took evidence from—

Professor Andrew Scott, University of Edinburgh;
Dr. Alex Wright, University of Dundee;
Nigel Miller, President, NFU Scotland;
Chris Bronsdon, Chief Executive Officer, Scottish European Green Energy Centre.

The Scotland Bill - evidence on fiscal autonomy in other states/regions and devolution of taxes: The Committee took evidence from—

Dr. Graham Gudgin, Northern Ireland Economic Reform Group and Senior Research Fellow at the Centre For Business Research, University of Cambridge;
Professor Rosa Greaves, University of Glasgow;
Alastair Sutton, Adviser to UK Crown Dependencies, Brick Court Chambers.
The Scotland Bill - review of evidence (in private): The Committee reviewed the evidence heard to date.

11th Meeting, 2011 (Session 4), Thursday 17 November 2011

Decision on taking business in private: The Committee agreed that its consideration of a draft report should be taken in private at future meetings.

Scotland Bill - evidence from UK and Scottish Government Ministers: The Committee took evidence from—

John Swinney MSP, Cabinet Secretary for Finance, Employment and Sustainable Growth, Bruce Crawford MSP, Cabinet Secretary for Parliamentary Business and Government Strategy, Gary Gillespie, Chief Economic Adviser, Graeme Roy, Senior Economist, Office of the Chief Economic Adviser, Sean Neil, Finance Directorate, and Gerald Byrne, Team Leader, Constitutional Change Team, Scottish Government;
Rt. Hon Michael Moore MP, Secretary of State for Scotland, Rt. Hon David Mundell MP, Parliamentary Under Secretary of State, Laura Crawforth, Head of Constitutional Policy, and Alisdair McIntosh, Director, Scotland.

12th Meeting, 2011 (Session 4), Tuesday 22 November 2011

The Scotland Bill (in private): The Committee considered a draft report along with its advisers.

13th Meeting, 2011 (Session 4), Tuesday 29 November 2011

The Scotland Bill (in private): The Committee considered a draft report.

14th Meeting, 2011 (Session 4), Tuesday 6 December 2011

The Scotland Bill (in private): The Committee discussed its final report.

15th Meeting, 2011 (Session 4), Tuesday 13 December 2011

The Scotland Bill (in private): Following a number of divisions, the Committee agreed its final report.
ANNEX C - ORAL AND ASSOCIATED WRITTEN EVIDENCE

1st Meeting, Tuesday 21 June 2011

Official report 21 June 2011

2nd Meeting, Tuesday 28 June 2011

Official report 28 June 2011

John Swinney MSP, Cabinet Secretary for Finance, Employment and Sustainable Growth
Bruce Crawford MSP, Cabinet Secretary for Parliamentary Business and Government Strategy
Graeme Roy, Senior Economist, Office of the Chief Economic Adviser
Paul McGhee, Principal Policy Analyst, Capital and Risk Division
David Rogers, Deputy Director, UK Relations, Elections and Constitutional Development Division,
Gerald Byrne, Team Leader, Constitutional Change Team, Scottish Government.

Scottish Government – Crown Estate

3rd Meeting, Thursday 8 September 2011

Official report 8 September 2011

Rt. Hon Michael Moore MP, Secretary of State for Scotland, and Rt. Hon David Mundell MP, Parliamentary Under Secretary of State, Scotland Office.

Secretary of State for Scotland
Annexe

4th Meeting, Tuesday 13 September 2011

Official report 13 September 2011

Sir Kenneth Calman
Derek Allan
Raymond Kelly
Jim Cuthbert;
Margaret Cuthbert
Professor Chris Heady

ICAS
Chartered Institute of Taxation
Jim and Margaret Cuthbert
5th Meeting, Tuesday 20 September 2011

Official report 20 September 2011

Rob Hastings
Alan Laidlaw
Councillor Michael Foxley
Andy Wightman
David Whitehead
Calum Davidson
Lorne MacLeod
Linda Rosborough

Crown Estate
Highland Council
Andy Wightman
British Ports Association
Highlands and Islands Enterprise
Community Land Scotland

6th Meeting, Tuesday 27 September 2011

Official report 27 September

Ben Thomson
Garry Clark
Martin Togneri
Amanda McMillan
Robert Bird
Campbell Evans
Dr Evelyn Gillan
Patrick Browne
Jim McColl
Norman Springford
Professor Andrew Hughes Hallett

Reform Scotland
Scottish Chambers of Commerce
British Aggregates Association
Scotch Whisky Association
Scottish Beer and Pubs Association
7th Meeting, Tuesday 4 October 2011

Official report 4 October 2011

Matt Lancashire
Laurie Russell
Martin Sime
David Griffiths
Maggie Kelly

Scottish Council for Voluntary Organisations
Scottish Council for Voluntary Organisations (2)

8th Meeting, Tuesday 25 October

Official report 25 October 2011

Blair Jenkins
Bill Matthews
Ken MacQuarrie
Vicki Nash
David Mahoney
Richard Keen Q.C;
James Mure Q.C
Michael Clancy
Christine O'Neill
Alan McCreadie

Ofcom Scotland
Faculty of Advocates
Law Society of Scotland

9th Meeting, Tuesday 1 November 2011

Official report 1 November

Paul McBride Q.C
Lord McCluskey
Sheriff Charles Stoddart
Frank Mulholland Q.C
Rt. Hon. the Lord Wallace of Tankerness Q.C
Paul Johnston
Alan Trench

Lord McCluskey
Lord Advocate
Alan Trench
Alan Trench (2)
10th Meeting, Tuesday 8 November

Official report 8 November

Professor Andrew Scott,
Dr. Alex Wright
Nigel Miller
Chris Bronsdon
Dr. Graham Gudgin
Professor Rosa Greaves
Alastair Sutton

Professor Andrew Scott
Dr Alex Wright

11th Meeting, Thursday 17 November

Official report 17 November

John Swinney MSP, Cabinet Secretary for Finance, Employment and Sustainable Growth
Bruce Crawford MSP, Cabinet Secretary for Parliamentary Business and Government Strategy
Gary Gillespie, Chief Economic Adviser
Graeme Roy, Senior Economist, Office of the Chief Economic Adviser,
Sean Neil, Finance Directorate
Gerald Byrne, Team Leader, Constitutional Change Team, Scottish Government;
Rt. Hon Michael Moore MP, Secretary of State for Scotland
Rt. Hon David Mundell MP, Parliamentary Under Secretary of State
Laura Crawforth, Head of Constitutional Policy,
Alisdair McIntosh, Director, Scotland Office.
Other written evidence

Aberdeen Greenspace
Aberdeen Greenspace - Appendix 2
Bumblebee Conservation Trust
Campos, Dr Tontxu
CBI Scotland
Chartered Institute of Public Finance and Accountancy (CIPFA)
Children 1st
Citizens Advice Scotland
Citizens Advice Scotland - Parliamentary briefing
Clackmannanshire and Stirling Environment Trust
Consumer Focus Scotland
EB Scotland
Edward, Boyd, McMenamin, Mullen (Expert Group appointed by the Advocate General for Scotland)
Report of the Expert Group to the Advocate General for Scotland
Faculty of Advocates, The
Federation of Small Businesses (FSB)
Froglife
Gardner, Bill
Hughes Hallett, Professor and Scott, Professor
ICAEW Scotland
ICAEW Scotland - Appendix 2
JUSTICE
Law Society of Scotland
Lord Advocate
Lord McCluskey
Lord President of The Court of Session
Low Incomes Tax Reform Group
National Secular Society
Occupational and Environmental Health Research Group
Oxfam Scotland
PriceWaterhouseCooper
Reform Scotland
Road Haulage Association
RSPB Scotland
Rushton, Dr David
Rushton, Dr David - second submission
Scottish Building Federation
SCDI
Scottish Community Broadcast Network
Scottish Countryside Alliance
Scottish Federation of Housing Associations
Scottish Financial Enterprise
Scottish Human Rights Commission
Scottish Land & Estates
Scottish Landfill Communities Fund Forum
Scottish Property Federation
Scottish Rugby
Scottish Television
Scottish Wildlife Trust
Scottish Youth Parliament
Thomson, Douglas A
Waterways Trust Scotland, The
WREN (Waste Recycling Environmental Ltd
Supplementary evidence

Crown Estate
Crown Estate (13 October 2011)
Crown Estate Annexe (13 October 2011)
Glasgow Airport
Highland and Island Enterprise (18 October 2011)
Highland and Island Enterprise (27 October 2011)
Justice
Law Society of Scotland
Law Society of Scotland - ECHR
Lord McCluskey and Sheriff Stoddart
Scottish Beer and Pub Association
Scottish Federation of Housing Associations
Scotch Whisky Association
Scotch Whisky Association 2
Sir Kenneth Calman
Additional documents for consideration

Submission received from the Scottish Government on broadcasting - June 2011
Submission received from the Scottish Government on borrowing powers and bonds - June 2011.
Submission received from the Scottish Government on the Crown Estate - June 2011
Scottish Government Discussion paper - Corporation Tax: Options for Reform - August 2011
Submission received from the Scottish Government on Excise Duties - October 2011
Submission received from the Scottish Government on EU involvement - August 2011
Submission from the Cabinet Secretary for Parliamentary Business - 12 August 2011
Letter from the Secretary of State for Scotland and the Chancellor of the Exchequer - 13 June 2011
Letter from the Cabinet Secretary for Finance and Growth to Wendy Alexander - 21 February 2011
Letter from the Secretary of State for Scotland - 6 September 2011
Annexe from the Secretary of State for Scotland - 6 September 2011
Letter from the Minister for Parliamentary Business and Government Strategy - 7 September 2011
Letter from the Secretary of State for Scotland - 22 September 2011
Letter from the Cabinet Secretary for Finance, Employment and Sustainable Growth - October 2011
Letter from the Exchequer Secretary to the Treasury to the Scottish Government on excise duties - October 2011
Letter from the Exchequer Secretary to the Treasury to the Scotland Bill Committee
Annexe from the Exchequer Secretary to the Treasury to the Scotland Bill Committee - October 2011 (3636KB pdf)
Letter from the Cabinet Secretary for Justice to the Scotland Bill Committee - October 2011
Letter from the Cabinet Secretary for Finance, Employment and Sustainable Growth to the Exchequer Secretary to the Treasury
Letter from Department of Work and Pensions - November 2011
Letter from the Foreign and Commonwealth Office - November 2011
Letter from the Department for Culture, Media and Sport - November 2011
Annexe to Letter from Department for Culture, Media and Sport November 2011
Letter from the Cabinet Secretary for Culture and External Affairs to the Department for Media, Culture and Sport - 16 November 2011
Letter from the Cabinet Secretary for Parliamentary Business and Government Strategy (17 November follow up)
Letter from the Cabinet Secretary for Parliamentary Business (22 November follow up)
Corporation Tax Modelling - Technical Report (22 November follow up)
Letter from the Lord Advocate - UK Supreme Court - 5 December 2011
Letter from the Secretary of State for Scotland - 9 December 2011
Members who would like a printed copy of this *Numbered Report* to be forwarded to them should give notice at the Document Supply Centre.