



Scotland Bill

[Bill No 115 of 2010-11]

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In 2008 the UK Government established a Commission on Scottish Devolution to review experiences over the first ten years of the Scottish Parliament. The Commission, chaired by Sir Kenneth Calman, was asked to make proposals aimed at strengthening Scotland's position in the UK, improving the financial accountability of the Scottish Parliament, and enabling the Scottish Parliament to serve the people of Scotland better. The Commission made recommendations which form the basis for most of the *Scotland Bill*.

The most significant provisions in the Bill give the Scottish Parliament greater responsibility for raising its own revenue. This is done by reducing the rate of income tax in Scotland by ten percent in each band, allowing the Scottish Parliament to raise as much or as little additional tax as it wishes, devolving certain other taxes, and creating a power to request new taxes subject to approval at the UK level. In addition, the borrowing powers of the Scottish Government are extended. The Bill also changes the boundary of devolved powers by amending some of the reserved matters in the *Scotland Act 1998*. Some new matters are devolved, some are reserved. The Bill also proposes small changes to provisions concerning the Scottish Parliament and the Scottish Government.

The *Scotland Bill* was published on 30 November 2010, and is scheduled for second reading on 27 January 2011. It is subject to a Legislative Consent Motion in the Scottish Parliament, and a committee there is taking evidence to inform the debate on the motion.

While the practical effect of the Bill is primarily on Scotland, it extends to the whole of the UK.

Paul Bowers, Antony Seely, Dominic Webb

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Contributing Authors: Paul Bowers, Scottish Parliament and constitutional aspects, Parliament and Constitution Centre
Antony Seely, taxation, Business and Transport Section
Dominic Webb, block grant, Economic Policy and Statistics Section
Isobel White (elections), Oonagh Gay (Members' interests)
Philip Ward (airguns), Lorraine Conway (insolvency), Tom Powell (health professions), Gavin Colthart (drugs), Louise Butcher (road traffic), and Sally Almandras (sentencing).

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Summary

After the 2007 Scottish Parliament elections the Scottish National Party (SNP) formed a minority administration. It set up a [National Conversation](#) on Scotland's constitutional future, which included the possibility of a policy of independence. In response, opposition parties in the Scottish Parliament united to pass a motion calling for an independent review of devolution, with the aim of securing Scotland's place in the Union. The UK Government set up the Commission on Scottish Devolution, chaired by Professor Sir Kenneth Calman, formerly the Chief Medical Officer for Scotland and for England, to pursue this work. It presented its final report in June 2009.¹

The recommendations of the Commission covered:

- the devolution of some matters that are currently reserved;
- strengthening cooperation between the Scottish and UK Parliaments;
- changes to the committee system and scrutiny in the Scottish Parliament; and,
- changes to the fiscal arrangements so as to allow greater variation of income tax, devolution of some other taxes, and greater borrowing powers for Scottish Ministers.

The fiscal changes were designed to increase the accountability and responsibility of the Scottish Parliament, and the whole package was designed to strengthen devolution.

The Labour Government welcomed the report and conclusions of the Commission, and established a cross-party steering group to look at implementation. This led to a commitment to introduce legislation to effect the great majority of those recommendations which required Government action (many of the Commission's recommendations fell to the Parliaments themselves to implement).

After the 2010 general election the Coalition Government committed to implement the proposals of the Calman Commission.²

The *Scotland Bill 2010-11* is the result of this commitment. It implements a sub-set of the proposals. Some have been excluded because they do not require legislation, some have been deferred pending other developments, and some have been dropped. For instance, the Commission's suggestions on welfare reform have been subsumed within the Universal Credit idea, and will be addressed in a welfare reform bill expected in 2011. Some new items have been brought in, which were not part of the Commission's recommendations, but which are designed to update the devolution arrangements, mostly in light of other legislative developments.

The Bill includes financial provisions which are designed to reduce Scotland's dependence on UK tax revenues. They are intended to incentivise policies aimed at economic development and to increase accountability for spending decisions. The Bill reduces the rate of income tax for Scottish taxpayers by 10% in each band, accompanied by a reduction in the block grant to Scotland. It gives the Scottish Parliament power to raise additional income tax to make up as much revenue as it sees fit. It also gives the Scottish Parliament power to collect "devolved taxes" to create further revenue. Two devolved taxes are specified: stamp duty land tax and landfill tax. The UK versions of these taxes will no longer apply in Scotland,

¹ Commission on Scottish Devolution, [Serving Scotland better: Scotland and the United Kingdom in the 21st century](#), June 2009.

² HM Government, [The Coalition: our programme for government](#), May 2010, p28.

and the Scottish Parliament will be able to replace them with taxes of similar nature set at its own chosen rate. In addition, the Scottish Parliament will be able, in future, to request new taxes, which would be effected by Order in Council subject to approval by both Houses of Parliament and by the Scottish Parliament. Finally, the financial provisions allow far greater scope for borrowing by the Scottish Government, primarily to offset any shortfall that might occur should the revenue from the Scottish rate of income tax and the devolved taxes be less than expected at the transition.

The Bill provides for several adjustments to the subjects which are devolved. Subjects such as administration of elections to the Scottish Parliament, regulation of air weapons, licensing the prescription of controlled drugs to addicts, the national speed limit, and drink-drive limits, which are currently reserved, would be devolved under the Bill. Insolvency, and the regulation of health professions, parts of which are currently devolved, would be reserved in full, as would the regulation of activities in Antarctica. Responsibility for implementing international obligations in Scotland would be shared between the UK and Scotland, where it is currently devolved.

The Bill provides for certain changes to the Scottish Parliament, for instance allowing for temporary deputies to the Presiding Officer in case of illness or incapacity, and for a more graduated approach to breaches of the Members' interests regime. It gives a consultative role to the Scottish Ministers in appointing the BBC Trust member for Scotland and in choosing a Scottish Crown Estate Commissioner.

The *Scotland Bill* had its first reading on 30 November 2010. The Bill's second reading debate is set for 27 January 2011.

The Bill is constitutional, so it will have its committee stage on the floor of the House.

The Bill is subject to the consent of the Scottish Parliament, expressed through a Legislative Consent Motion (LCM). The Scottish Parliament has established a committee to report on the Bill, which is taking evidence from Ministers and others. Its report will inform the vote on the LCM. Should consent be withheld, in whole or in part, it is possible that the Bill might be dropped, or that some provisions would be dropped and others would be implemented, or that a political process would ensue, aimed at reaching an accommodation. However, the UK Parliament would still be able to pass the Bill, since its sovereignty is not diminished by devolution; the undertaking not to legislate on devolved matters without consent is a non-binding constitutional convention.

The House of Commons Scottish Affairs Committee is conducting an [inquiry](#) on the Bill, with a call for evidence by 31 January 2011.

1 Introduction

1.1 Commission on Scottish Devolution

The Commission on Scottish Devolution, known as the Calman Commission, was set up in 2008 by the UK Government in response to a motion passed by the Scottish Parliament, which called for an independent commission to review devolution in Scotland. This motion was supported by the Unionist opposition parties at Holyrood: Labour, the Conservatives and the Liberal Democrats. It was explicitly designed as an attempt to secure the position of Scotland within the UK, and was a counter-proposal to the National Conversation initiative set up by the SNP Scottish Government,³ which included independence as a policy option.

The terms of reference of the Calman Commission were as follows:

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.⁴

More information on the background to the Commission is available in Standard Note 4744, [The Commission on Scottish Devolution – the Calman Commission](#), 4 June 2010.

The Commission published its final report in June 2009.⁵ It found that “devolution has been a real success” which “works well in practice,” and that “the Scottish Parliament has embedded itself in both the constitution of the United Kingdom and the consciousness of Scottish people. It is here to stay.”⁶ The report included 63 recommendations on how devolution should develop further. Many of these needed UK legislation or executive action, others fell to the two Parliaments to introduce. This Paper is concerned with those recommendations that are relevant to the Bill. Detail on the progress of others may be found in the Standard Note referenced above, and in a Scottish Parliament Information Centre [briefing](#).⁷

The Commission grouped its recommendations under the following headings:

Strengthening devolution

We make 24 specific recommendations, which are explained in much greater detail in the section of our Report on Strengthening Devolution, covering a wide range of areas. Examples include: devolving powers for the administration of Scottish elections to the Scottish Government;

- simplifying the law relating to the regulation of charities, to make life easier for those who work in that vital sector;
- devolving the regulation of airguns;
- devolving power to set drink-driving limits and the level of the national speed limit;

³ The formal term at time of writing is “Scottish Executive,” but this Paper follows common usage, which the present Bill would formalise, of referring to the “Scottish Government.”

⁴ HC Deb 25 March 2008, cc7-8WS.

⁵ Commission on Scottish Devolution, [Serving Scotland better: Scotland and the United Kingdom in the 21st century](#), June 2009.

⁶ [Serving Scotland better](#), June 2009, p5.

⁷ SPICe, [The Scotland Bill 2010-11](#), SCO/S3/10/1/6, 2 December 2010.

- devolving responsibility for nature conservation at sea to the Scottish Parliament at an appropriate opportunity;
- creating scope for the two Governments to agree changes to Housing Benefit and Council Tax Benefit in Scotland where these might be needed because of changes in devolved policy

[...]

Strengthening cooperation

Our recommendations to develop mutual respect between Parliaments and Governments – which should be the guiding principle in all their relations – are set out in the section of our Report on Strengthening Cooperation and include:

- introducing a regular “state of Scotland” debate in the House of Commons;
- strengthening the existing mechanisms for both Parliaments to work together, and proposing new ones including a way for the Scottish Parliament to work with the UK Parliament on reserved matters;
- re-invigorating the Joint Ministerial Committees, and making them subject to greater Parliamentary scrutiny and transparency.

[...]

Strengthening the Scottish Parliament

We believe there is scope for some improvements to the Parliament’s committee system, to its scrutiny of legislation, and to various other procedural matters. In the section of our Report dealing with Strengthening the Scottish Parliament, we set out our detailed recommendations.

[...]

Strengthening financial accountability⁸

In the section of our Report on Strengthening Accountability in Finance we set out our detailed recommendations for achieving this. They include:

- cutting basic and higher rates of income tax levied by the UK Government in Scotland by 10 pence in the pound, with a corresponding reduction in the block grant;
- replacing the Scottish Variable Rate of income tax with a new Scottish income tax rate, applying to basic and higher rates of tax and collected as now; a 10 pence rate would replace the reduction in block grant;
- devolving Stamp Duty Land Tax, the Aggregates Levy, Landfill Tax and Air Passenger Duty to the Scottish Parliament, again with a corresponding block grant reduction;
- giving Scottish Ministers additional borrowing powers; and
- strengthening the inter-governmental relationships that deal with finance.

⁸ For background on this section of the report see Library standard note SN/EP/4750, *The Barnett formula: recent developments*, 2 July 2009.

The Labour Government welcomed the Commission's report and conclusions,⁹ and established a steering group, comprising Labour, Conservative and Liberal Democrat representatives, to look at implementation. It published a White Paper, *Scotland's future in the United Kingdom: building on ten years of Scottish devolution*, 25 November 2009.¹⁰ This included an intention to introduce legislation to take forward the proposals, and detailed responses to the Commission's recommendations.

The Scottish Government published a *Scottish Government response to the Commission on Scottish Devolution* on 9 November 2009. It supported some recommendations of the Commission, rejected others, and felt that many required further consideration.¹¹ However, it also complained that "the remit of the Commission was too narrow," so that "from the outset ... it was clear that the Commission would not be able to consider the proposition that Scotland should be an independent country. Federalism was also outwith the Commission's remit." While it had reservations about a number of proposals, it was most concerned about the Commission's recommendations on income tax:

In the crucial area of finance and taxation the Commission's report represents a missed opportunity particularly to offer real and effective fiscal and economic levers for Scotland. The Commission's proposals would deliver less transparency, less accountability and would expose the Scottish Government's budget to significant risks without adequate levers to offset these risks.¹²

1.2 The Scotland Bill 2010-11

The Conservative – Liberal Democrat Coalition Government committed itself from the start to "implement the proposals of the Calman Commission,"¹³ and a similar commitment was included in the Queen's Speech on 25 May 2010.¹⁴

When the Bill was introduced the Secretary of State for Scotland, Michael Moore, made a Written Statement in which he concluded:

The Scotland Bill demonstrates the determination of the coalition Government to ensure that the Scottish Parliament is empowered to meet the needs of the Scottish people. Both the Bill and the accompanying Command Paper [see below] set out the bold reforms the Government are taking to strengthen the Scottish Parliament and the Scottish Government. Once the measures included in the Scotland Bill and this paper are fully implemented, a historic shift in power will have been accomplished. The Scottish Parliament and Scottish Ministers will have more powers, be more accountable, and be able to be more responsive to Scotland's needs within the framework of a strong and stable United Kingdom.¹⁵

Content

The Bill is largely based on the Calman recommendations: most of the Bill derives from them, and most of those that required legislation are in the Bill. However, it does not follow that the Government's implementation is uncontroversial or automatic. As noted below in the

⁹ HC Deb 15 June 2009, cc5-7WS.

¹⁰ Cm 7738.

¹¹ According to Minister for Culture and External Affairs, Fiona Hyslop, "There are 29 recommendations that we accept and a further 20 that either need more clarification or relate to the Parliament." SP OR 27 May 2010, c26630.

¹² *Scottish Government response to the Commission on Scottish Devolution*, 9 November 2009, Annex A.

¹³ HM Government, *The Coalition: our programme for government*, May 2010, p28

¹⁴ HC Deb 25 May 2010 c32

¹⁵ HC Deb 30 November 2010, cc69-71WS.

commentary on clauses, many provisions of the Bill are 'inspired by,' not identical to, the respective recommendations of the Calman report.

There are some recommendations that are not covered in the Bill, most of which were not in need of legislation, others of which are being dealt with in alternative ways. The Government published a Command Paper at the same time as the Bill, *Strengthening Scotland's Future*, in which it went through the recommendations of the Commission, indicating how each will be taken forward.¹⁶ Among those left out of the Bill are the recommendations for social security and welfare reform, reform of charities legislation, the animal health and welfare budget, and food labelling.

Most of the social security and welfare recommendations¹⁷ put forward by the Commission have been deferred pending development of the Universal Credit idea, and may be included in future welfare reform legislation.¹⁸ In addition, the Deprived Areas Fund is due to end in March 2011, and the Government therefore feels that the recommendation to devolve it has been overtaken by events.

The Commission recommended the creation of single statutory definitions of 'charity' and 'charitable purposes,' and changes to allow charities registered in England and Wales to operate in Scotland without having to register there. The Government has deferred these in favour of a five-year review of the *Charities Act 2006*.¹⁹

On the animal health and welfare budget,²⁰ the Government agreed in principle that it should be devolved, to go with the already devolved responsibility for policy in this area, but it felt that there was a conflict between the recommendation to devolve and the continued reservation of exotic disease outbreaks. It has established a Project Board, including representatives of Defra and the three devolved administrations, to look into the matter.

On food labelling,²¹ the Commission had recommended that the devolved power to legislate should be amended so as to prevent divergence of labels within the UK where the differences would be burdensome to business. The Government felt that the law on food labelling was sufficiently constrained by EU legislation that the problem was unlikely to arise.

There are a number of provisions in the Bill that are not derived from the Calman Commission; these are indicated in the relevant sections of this Paper below. Most are relatively technical, for instance adjusting the *Scotland Act 1998* to take account of subsequent developments, unintended consequences, or drafting errors.

Strengthening Scotland's Future indicates an area on which work is still ongoing, which relates to the role of the Lord Advocate as head of the system of prosecutions in Scotland.²² This could lead to Government amendments during the passage of the Bill. Under Schedule 6, para 1(d), to the *Scotland Act 1998*, certain acts of the Lord Advocate, including aspects of criminal procedure, can be addressed as devolution issues, and hence be referred, ultimately, to the Supreme Court for decision as to their validity. This arises when a question is raised as to whether an exercise of functions by the Lord Advocate would be incompatible

¹⁶ Cm 7973, November 2010.

¹⁷ *Strengthening Scotland's Future*, Cm 7973, November 2010, pp63-66.

¹⁸ For further background on this issue see, *Welfare reform and the Universal Credit*, House of Commons Library Standard Note SN/SP/5782, 26 November 2010.

¹⁹ *Strengthening Scotland's Future*, Cm 7973, November 2010, p66-67.

²⁰ Cm 7973, November 2010, p62.

²¹ Cm 7973, November 2010, pp59-61.

²² Cm 7973, November 2010, pp69-70.

with EC law or the European Convention on Human Rights,²³ as happened in the cases discussed in Part 4.4 of this Paper. This is anomalous, given the general lack of right of appeal to the Supreme Court in Scottish criminal matters.

The Calman Commission declined to make a recommendation on this question, sensing that it touched on matters beyond its brief. According to *Strengthening Scotland's Future*,²⁴ the Advocate General convened a group of experts to look into the issue and is now considering its report. If necessary, amendments to the Bill will be tabled.

One other possible amendment may relate to the transfer of powers from Non-Departmental Public Bodies (NDPBs) to Scottish Ministers. *Strengthening Scotland's Future* states that the Bill will include clauses to amend Sections 63 and 93 of the *Scotland Act 1998* to this effect. However, the clauses do not appear in the Bill. It is possible that they will be introduced later. Sections 63 and 93 deal respectively with the transfer of functions from Ministers of the Crown to Scottish Ministers, and with "agency arrangements," under which the functions of a Minister of the Crown may be exercised on his/her behalf by a Scottish Minister. They would be amended, should the relevant clauses appear, such that functions exercisable by NDPBs may be transferred to (or exercised by agency of) Scottish Ministers.

Structure

The Bill is in four parts. The first two effect the non-financial alterations to the boundary of devolved powers, and also make some other changes to the way devolved institutions function. 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 sentencing policy, plus provisions on matters such as interpretation and commencement. There are five Schedules, the majority of which cover consequential amendments.

This Paper addresses the subject matter in a different order. The heart of the package is the financial change, which could be summarised as a reduction in the block grant in return for the right to set the Scottish rate of income tax, collect certain other taxes, and borrow. As a result of this sense that the financial provisions are the weightiest, and the most politically charged, this Paper addresses Part 4 of the Bill first, and then moves to the changes in devolved responsibilities and institutions later.

²³ The same reference of devolution issues also applies to various other acts and omissions, for instance whether an Act of the Scottish Parliament is within its competence.

²⁴ *Strengthening Scotland's Future*, Cm 7973, November 2010, pp69-70. See also Advocate General Lord Wallace's comments to the Scottish Parliament's Scotland Bill Committee, *Scotland Bill Committee Official Report* 14 December 2010, [cc53-54](#).

Appendix 1 to this Paper tabulates the clauses of the Bill, their derivation in the Calman recommendations or otherwise, whether they devolve or reserve powers, or make other amendments, where they are discussed in *Strengthening Scotland's Future*, and what position the Scottish Government takes on them.

The Scottish Parliament's Information Centre (SPICe) has produced a [paper](#)¹ which tabulates in its three annexes the responses of the UK and Scottish Governments to each Calman recommendation, and, where relevant, the responses of the Scottish Parliament Standards, Procedures and Public Appointments Committee and the House of Commons Scottish Affairs Committee. Annex 3 to the paper provides a table comparing the Calman recommendations with the provisions of the Bill and *Strengthening Scotland's Future*.

¹ SPICe, The Scotland Bill 2010-11, SCO/S3/10/1/6, 2 December 2010. Annexes are SCO/S3/10/1/7, /8 and /9.

Effect

The Bill works primarily by amending the existing *Scotland Act 1998*. The short title is "a Bill to amend the Scotland Act 1998 and make provision about the functions of the Scottish Ministers; and for connected purposes." The Bill therefore creates an opportunity to amend the 1998 Act in ways that go further than the recommendations of the Calman Commission.

In theory, this could include subjects such as the dates of elections to the Scottish Parliament, under Section 2, the electoral system for elections to the Scottish Parliament, under Sections 1, 5 to 8 and Schedule 1, or Scottish representation at Westminster, under Section 86. Reports suggest that Brian Donohoe is preparing amendments which would remove regional list members from the Scottish Parliament or prevent them from opening offices.²⁵

It is worth noting, in respect of Scottish representation at Westminster, that the Government is due shortly to announce a commission on the West Lothian Question. According to Mr Moore:

I have continuing discussions on a range of matters with the Deputy Prime Minister. The Government are committed to establishing a commission to consider the West Lothian question as set out in the 'programme for government' and, as the Parliamentary Secretary, Cabinet Office, my hon. Friend the Member for Forest of Dean (Mr Harper) stated on 26 October 2010, Official Report, column 252W: "we aim to announce our plans for a commission by the end of the year." I will discuss with ministerial colleagues as plans are developed.²⁶

In December 2010 this deadline was revised to "in the new year."²⁷

What sort of effect would the Bill have on devolution as a whole, and Scotland's position within the UK?

From the inception of the Calman Commission to the publication of the Bill successive UK Governments have presented these ideas as ways to improve the existing arrangements for

²⁵ [Scotland on Sunday](#), 12 December 2010.

²⁶ HC Deb 16 November 2010, cc658-9W.

²⁷ HC Deb 15 December 2010, c822W.

the governance of Scotland, and thereby to strengthen devolution as an alternative to independence, not as a step along a path that could theoretically reach it.

In his Written Statement to announce the Bill, Mr Moore characterised it as delivering a commitment to “strengthen and deepen” Scottish devolution, stating that it would “extend and develop” the arrangements set out in the *Scotland Act 1998*.²⁸ The Labour Government’s White Paper in response to the Calman Commission spoke of proposals to “refresh and reinvigorate” devolution in Scotland.²⁹ All the Unionist parties have concurred with the Calman Commission’s basic conclusion that devolution has worked well, but would benefit from some revisions in light of experience. The Scottish Government on the other hand, in welcoming some of the Calman report’s language, suggested that this “points the way forward for effective extensions of Scottish sovereignty,” and, in expressing its unhappiness with the financial provisions, argued that “any new financial arrangements for Scotland must offer a genuine advance.”³⁰ This language of progress and movement contrasts with the metaphors of strength and resuscitation preferred by Unionists.

While it is arguable that the financial provisions in the Bill would lead to some increase in freedom of action for the Scottish Parliament and Government, there is no immediate sense of greater proximity to independence. Indeed, resisting the nationalist argument was, as mentioned earlier, one of the motivations for setting up the Calman Commission, and this was implied in its terms of reference.³¹ The Scottish Parliament would still depend on a block grant from the UK, its existence would still be dependent on the *Scotland Act 1998*, which could still be repealed by the UK Parliament, and it would not have responsibility for foreign affairs, defence or currency. Likewise, the UK Parliament would retain the right to legislate for Scotland. This is stated explicitly in Section 28 (7) of the 1998 Act:

This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.

This is largely for avoidance of doubt. The principles of parliamentary sovereignty and that a Parliament cannot bind its successors would make it virtually impossible for sovereignty within the UK to be given up by Parliament in this way.³²

Procedure: legislative consent

As the *Scotland Bill* has constitutional significance, its committee stage will be taken on the floor of the House.

The Bill is subject to the Sewel Convention.³³ This states the Government’s expectation that the UK Parliament will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament. Since it is recognised that “the United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not [and] it is ultimately for Parliament to decide what use to make of that power,”³⁴ a more precise

²⁸ HC Deb 30 November 2010, cc69-71WS.

²⁹ Cm 7738, *Scotland’s future in the United Kingdom: building on ten years of Scottish devolution*, 25 November 2009, para 1.1.

³⁰ *Scottish Government response to the Commission on Scottish Devolution*, 9 November 2009, paras 4, 24.

³¹ See also Lord Wallace, “Break-up of the UK is not on agenda,” *The Scotsman*, 14 December 2010 [not available online, hard copy only].

³² See, eg, C Himsworth & C Munro, *The Scotland Act 1998*, 2nd ed, 2000, pp36-37.

³³ Further detail on the Sewel Convention is available in House of Commons Library Standard Note 2084, *The “Sewel Convention”*, 25 November 2005, in the *Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee*, Cm 7864, March 2010, and in *Devolution Guidance Note 10*.

³⁴ *Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee*, Cm 7864, March 2010, para 14.

formulation might be that the UK Government will not normally invite the UK Parliament to legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament.³⁵

The Convention is held to apply when the UK Parliament legislates for a devolved purpose (ie on subject matters over which the Scottish Parliament or Ministers have competence) or in a way that changes the legislative competence of the Scottish Parliament or the executive competence of Scottish Ministers.

Consent is signified in a Legislative Consent Motion (LCM). Further, if a Bill passing through the UK Parliament is amended in a way that goes beyond consent signified in an LCM, then it is expected that a new LCM be sought to cover the amended content.

The present Bill includes provisions which qualify for the Sewel Convention under two headings: changing the competence of the Scottish Parliament, and changing the competence of the Scottish Ministers. It has not yet been subject to a vote signifying consent. The Scottish Parliament has established an ad hoc committee to consider the Bill, which will report to the Parliament as a whole to inform its vote on any LCMs before it. The [Scotland Bill Committee](#) has six members, and the Convener is the former Labour leader in the Scottish Parliament, Wendy Alexander. It held its first meeting on 7 December 2010, and, with a seasonal break, has met once a week since, taking evidence from UK Government Ministers, Scottish Government Ministers, and academics, while, at a meeting scheduled for 18 January 2011, it was due to hear from Sir Kenneth Calman.

This is only the second time that the Scottish Parliament has been asked to consider a whole Bill; in the past, most LCMs have concerned specific clauses.³⁶

A memorandum prepared by the last Government for the Scottish Parliament Procedures Committee set out what would happen if the Scottish Parliament withheld its consent for a Bill, either in whole or in part:

The Executive has committed to seeking the Scottish Parliament's consent before the final amending stage in the first House at Westminster. [This means] that, should the Parliament withhold its consent, the UK Government should normally table amendments to excise the provisions subject to the Convention for the final amending stage in the first House if at all possible. In order to table such amendments, the relevant UK department would need to gain agreement across Government through ministerial correspondence. Departments would also have to draft instructions for Parliamentary Counsel. In the case of complex provisions, drafting by Counsel may take some time. Therefore it is important that sufficient time is allowed for seeking such agreement and for the drafting, tabling and scrutiny of amendments in the UK Parliament in order to be able to take account of the will of the Scottish Parliament without creating difficulties in handling legislation at Westminster.³⁷

The memorandum drew attention to two types of Sewel provision: those concerning executive devolution to Scottish Ministers, thus affecting their competence, and those where the UK Parliament is invited to legislate for a purpose that is otherwise devolved:

There is clearly a qualitative difference in Sewel motions executively devolving functions in reserved areas and motions on provisions in UK Bills legislating for a devolved purpose. If the Parliament does not consent to the former the functions in

³⁵ Cabinet Office, [The Cabinet Manual – Draft](#), December 2010, para 286, p101.

³⁶ The previous example was the *Proceeds of Crime Bill 2001-02*.

³⁷ Scotland Office, [Government memorandum on the Sewel Convention](#), February 2005, para 24.

Scotland will be conferred on the Secretary of State. The Government would table amendments in the case of the latter to withdraw the provisions altogether so that they would not apply in Scotland.³⁸

The Scotland Bill contains provisions changing the competence of the Scottish Parliament and Ministers. However, since it also changes the devolution arrangements as a whole, it would seem unlikely that the UK Government, in the event that consent were withheld, would simply leave the executive functions with the Secretary of State and proceed with the rest of the Bill as drafted. One possibility would be for the UK Government to withdraw the Bill or to amend it in line with conditions placed in an LCM. Another option would be for a political process to ensue, aimed at reaching an accommodation through amendments or undertakings. Ultimately, the UK Parliament would still be able to pass the Bill, since its sovereignty is not diminished by devolution; the Sewel Convention is non-binding, and includes the rider that the Government would “not normally” invite Parliament to legislate without consent. However, the experience of devolution so far would suggest that insistence on Parliamentary sovereignty would be seen as a last resort, or for use in an emergency.

Given that the three Unionist parties in the Scottish Parliament are in favour of the Bill, it seems unlikely that consent will be withheld. The SNP currently has 47 seats, the Conservatives and Liberal Democrats have 32 between them, and Labour has 46.

1.3 Initial reactions to the Bill

On 1 December 2010 the Scottish Government submitted a [Legislative Consent Memorandum](#), setting out its views on the Bill, and including a draft LCM. On 7 December 2010 Iain Gray, the Labour leader in the Scottish Parliament, supported by his Conservative and Liberal Democrat counterparts, submitted his own [Memorandum](#) and LCM.

The Scottish Government’s draft LCM, which may be revised in light of the detailed consideration by the Scotland Bill Committee, is as follows:

That the Parliament agrees that the relevant provisions of the Scotland Bill, introduced in the House of Commons on 30 November 2010, relating to air weapons, the misuse of drugs, drink-driving limits, speed limits, Scottish tax on land transactions, and Scottish tax on disposal to landfill, so far as these matters fall within the legislative competence of the Scottish Parliament or alter the legislative competence of the Parliament or the executive competence of the Scottish Ministers, should be considered by the UK Parliament.

Mr Gray’s LCM is wider:

That the Parliament agrees that the provisions of the Scotland Bill, introduced in the House of Commons on 30 November 2010, should be considered by the UK Parliament.

The Scottish Government stated that it supported the devolution of new matters (outside of the financial arrangements), did not support the reservation of certain other matters, and was developing its advice to the Scottish Parliament on the financial provisions. It also called for the implementation through the Bill of some recommendations of the Calman Commission which the UK Government has decided to not to include:

5. Since the publication of the Commission’s final report on 15 June 2009, the Scottish Government has supported early action on some of its recommendations, and has made reasoned criticism of others, proposing alternatives where appropriate. The

³⁸ [Government memorandum on the Sewel Convention](#), February 2005, para 15.

Scottish Government will continue that approach to Parliament's scrutiny of the UK Government's proposals, noting that they differ from the Commission's recommendations. The Scottish Government's initial views on the detailed proposals are set out in the Annex to this memorandum. In general, the Government believes that all the provisions in the Bill would benefit from detailed scrutiny by Parliament, and further development. The Government also believes that Parliament should consider whether some matters recommended by the Commission, but not currently in the Bill, should be included.

6. The Government supports a number of the proposals in the Bill and *Strengthening Scotland's Future*, such as the proposals on air weapons, drink-driving limits, and licensing to treat addiction. The Government does not support the proposals to reserve matters currently devolved to the Scottish Parliament: regulation of certain health professionals (those newly regulated since the Scotland Act) and aspects of the law of insolvency. The Annex also details improvements that could be made to the proposals to achieve the objectives of the Bill more effectively or to provide greater benefit to the people of Scotland. The Scottish Government is developing its advice to Parliament on a number of key issues, in particular the legislative provisions and the practical mechanisms for the proposed system of devolved finance. The Government regrets that the UK Government has not proposed in the Bill legislative measures to secure certain recommendations of the Commission: for example, to give Parliament a role in benefits policy; to devolve marine nature conservation; to provide a role for Scottish Ministers in directions to the Crown Estate Commission; and to devolve Air Passenger Duty and aggregates levy.³⁹

It made a general statement on finance:

The [financial] proposals do not meet the ambition the Scottish Government has for Scotland. The Bill fails to provide Scotland with any significant new economic or financial levers. Approximately 85 per cent of Scottish revenues would continue to flow to the UK Government. The proposals also pose a considerable risk to future Scottish budgets.⁴⁰

It suggested the following issues for the Scottish Parliament to consider when looking at the Bill:

- The operation of the system of devolved finance: the detail of the legislative provisions on income tax, devolved taxes and borrowing, including the flexibility of the provisions to allow improvements and future developments; the mechanisms and agreements between the UK and Scottish Governments necessary to operate the system in practice; and the potential impact of the proposals on the overall size of the devolved Scottish budget in future years.
- The effectiveness of the provisions of the Bill that devolve further responsibilities to the Scottish Parliament and Scottish Ministers, and whether these could be amended to increase the benefits to the people of Scotland.
- The proposals to reserve matters currently devolved to the Scottish Parliament and whether there are any alternative routes that would achieve the objectives sought by the UK Government while respecting and preserving the Parliament's current competence.

³⁹ Scottish Government, *Legislative Consent Memorandum: Scotland Bill*, LCM (S3) 30.1, 1 December 2010.

⁴⁰ LCM (S3) 30.1, 1 December 2010, Annex A, p20.

- The effectiveness of the approaches proposed by the UK Government in *Strengthening Scotland's Future* for recommendations not in the Bill.
- Additional subjects Parliament might propose to the UK Government for inclusion in the Bill (such as responsibility for the dates of Scottish General Elections).
- The future role of Parliament in the Bill's proposals, for example consenting to the exercise of Treasury powers to make regulations, or commence the taxation provisions.⁴¹

The Scottish Government also complained that there was inadequate consultation by the UK Government before the Bill was published.⁴²

It made detailed comments on each clause in the Annex to its Memorandum. Some of these are mentioned in the discussion of clauses in Parts 2, 3 and 4 of this Paper; they are also tabulated as part of Appendix 1.

The Scottish Parliament held a [debate](#) on the Bill (though not on the LCMs) on 9 December 2010. Mr Gray moved as follows:

That the Parliament welcomes the introduction of the Scotland Bill in the House of Commons on 30 November 2010; notes that it is based on the recommendations of the Calman Commission on Scottish Devolution, which were warmly welcomed by the Parliament on 25 June 2009; supports the general principles of the Bill, which will give the Parliament substantial new taxation, spending and other powers, strengthen its relationship with the rest of the United Kingdom and enable it to serve the people of Scotland better, and calls on the Scottish Government to respond positively and timeously to any requests for assistance or analysis from Scottish Government officials from the committee considering the Bill.⁴³

First Minister Alex Salmond moved an amendment to leave out the words from “warmly welcomed” to the end, and add:

and supports the general principles of the Bill in conferring more powers and responsibilities on the Parliament but expresses concern about key aspects of the new system of financing proposed by the UK Government for devolved government, which will further reduce the resources available for public services in Scotland; rejects the UK Government's reservations of legislative competence of the Scottish Parliament; regrets the omission from the UK Government's proposals of important recommendations from the commission, notably on further tax powers, welfare and benefits and the marine environment, and urges the Scotland Bill Committee to scrutinise fully the Legislative Consent Memoranda, the Bill and accompanying documents so that the Parliament can come to a decision on these proposals after ensuring that they are in the interests of Scotland.⁴⁴

Mr Gray said that,

The wider financial powers in the bill will give this Parliament real choices. Those will not necessarily be easy choices, but they will be ours to make about how to tax, spend and borrow. We will have the power to make different choices from those of Westminster if Scotland wants us to, for Scotland's good.

⁴¹ LCM (S3) 30.1, 1 December 2010, para 7.

⁴² LCM (S3) 30.1, 1 December 2010, paras 9 – 11.

⁴³ SP OR 9 December 2010, c31359.

⁴⁴ SP OR 9 December 2010, c31363.

The changes will make us directly and financially accountable to Scottish voters and taxpayers for our decisions. That means that if we take the wrong decisions, and fail to support and grow the Scottish economy, there will be a risk. However, if we get the decisions right, and get Scotland growing again, there will be a prize to be had.⁴⁵

However, he pointed to a “greater reason” for supporting the Bill, because it “moves us to a stronger Scottish Parliament in a strong United Kingdom, which is the overwhelming desire of the Scottish people.”⁴⁶

Scottish Conservative leader Annabel Goldie said,

The Scotland Bill heralds a new era. From now on, the debate will not be about the powers that Scotland has; instead, it will be about how those powers are used. Let us consider what those powers involve. There will be real fiscal accountability. The Parliament will have to think about how it raises money, not just how it spends it. That is a crucial discipline, the absence of which has weakened political responsibility and accountability. The Parliament will now have a real financial stake in the success of the Scottish economy.⁴⁷

Tavish Scott, leader of the Scottish Liberal Democrats, paid tribute to previous Unionist leaders who started the process that led to the Calman Commission:

what they started became the Calman commission, was taken forward by the previous UK Government and will be made law by the present UK Government. The bill is real and will change Scotland, our Parliament and our people’s involvement in the decisions that we make. That is good and it is worth having.⁴⁸

Mr Salmond expressed his concerns, in particular about the financial provisions:

The key question for the Scottish Parliament is how we can grow the Scottish economy. We can do that only through independence or having fiscal responsibility. If we as members of a national Parliament are concerned about ensuring that we preserve the welfare of the Scottish people, we cannot in good conscience accept a provision that would have cost us £8 billion over the past 10 years and introduced a deflationary bias. The challenge for the Scotland Bill Committee and the Parliament is to find a mechanism to grow us into a better future in Scotland.⁴⁹

He repeated his regret that some of the Calman Commission’s recommendations were not reflected in the Bill. He claimed that the Bill included a greater number than did the Labour Government’s White Paper, but “it is not a substantial move forward on many aspects that would benefit Scotland.”⁵⁰

⁴⁵ SP OR 9 December 2010, cc31356-7.

⁴⁶ SP OR 9 December 2010, cc31357.

⁴⁷ SP OR 9 December 2010, cc31364-5.

⁴⁸ SP OR 9 December 2010, cc31369.

⁴⁹ SP OR 9 December 2010, cc31363.

⁵⁰ SP OR 9 December 2010, cc31361.

2 Finance

2.1 Financial accountability

The current arrangements

The UK has a relatively centralised system for public spending and collecting taxes. Most taxes collected in Scotland go to the UK Treasury. The Scottish Government currently raises about 15% of its budget.⁵¹

The Scottish Parliament currently has some tax-raising powers but these are limited. Scottish Ministers set non-domestic rates and can influence council tax. The Scottish Parliament also has the power to vary the basic rate of income tax up or down by up to 3 pence in the pound (the so-called “tartan tax”). This power has not been used.

There is relatively little official information about the amount of tax raised in Scotland as most is collected at the UK level. The Scottish Government does, however, publish an annual estimate of Scottish revenues. This is shown in the table below. Income tax, national insurance contributions and VAT are the most significant taxes.

Current revenue, Scotland 2008/09	
<i>£ billion</i>	
Income tax	10.7
<i>of which:</i>	
<i>Employment</i>	9.2
<i>Pensions</i>	0.8
<i>Investment</i>	0.8
Stamp duty land tax	0.3
Aggregates levy	0.05
Landfill tax	0.09
Air passenger duty	0.2
Corporation tax (excl North Sea)	2.8
National insurance contributions	8.0
VAT	7.5
Fuel duties	2.1
Non-domestic rates	1.7
Council tax	2.0
Other revenue	8.1
Total current revenue	43.5

Source: GERS 2008/09, Table 4.1

Note: excludes North Sea revenue
only taxes yielding more than
£1 billion or included in the Calman
proposals are itemised in the table

The majority of the Scottish Government’s public spending (currently around £30 billion) is funded by a block grant from the UK Treasury. The size of the block grant is determined by the Barnett formula. This non-statutory mechanism links the increase (or decrease) in funding for Scotland to three factors:

- the increases (or decreases) of budgets of UK Government departments;

⁵¹ *Strengthening Scotland’s Future*, Cm 7973 November 2010 p11.

- Scotland's population relative to England; and,
- a "comparability percentage" which in effect captures the extent to which spending by a UK Government department is comparable with equivalent services carried out by the Scottish Government.⁵²

The Scottish Government is free to spend the block grant as it wishes. Changes in the block grant which arise from changes in, for example, health spending in England, do not have to be reflected in changes in health spending in Scotland.

The arrangements for funding Scotland have been in place since the late 1970s and were largely unchanged by the introduction of devolution.

The Barnett formula has been the subject of some controversy. It has, for example, been criticised for a lack of fairness. In July 2009 a House of Lords Select Committee established to examine the purpose, methodology and application of the formula recommended that it should be replaced with a mechanism which took explicit account of the relative needs of the devolved administrations.⁵³ However, in *Strengthening Scotland's Future*, the Government states that it does not have any immediate plans to replace it:

The UK Government recognises some of the concerns expressed about the current system of devolution funding whereby changes to the block grant are calculated by the Barnett formula, but the UK Government's priority is to reduce the deficit and does not have any plans to change arrangements before the stabilisation of the public finances. However, the block grant will need to be proportionately reduced to reflect the reduced revenues to the UK Exchequer from the taxes the Scotland Bill devolves to the Scottish Parliament. This approach is consistent with the Commission's recommendations. It is also the case that the mix of block grant and devolved taxes could apply to alternative means of deriving the block grant and hence this framework is sufficiently robust to endure into the long term.⁵⁴

It is important to note that a significant part of public spending in Scotland, such as that on social security, is carried out by UK-wide government departments. In 2008/09, UK departments accounted for slightly more than 30% of public spending in Scotland. The remaining 70% is spent either by the Scottish Government or by Scottish local government (which itself receives around 80% of its funding from the Scottish Government).⁵⁵

Public spending in Scotland, 2008/09

	£bn	%
Scottish Government	19.1	39%
Scottish Local Government	14.4	30%
UK government departments	15.1	31%
Total	48.7	100%

Source: HM Treasury, PESA 2010, Table 9.21

⁵² A full explanation of the operation of the Barnett formula is in House of Commons Library Research Paper, *The Barnett formula*, RP 07/91, 14 December 2007. See also HM Treasury, *Funding the Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly: Statement of Funding Policy*, October 2010.

⁵³ House of Lords Select Committee on the Barnett Formula, *The Barnett Formula*, 1st report of Session 2008-09, HL Paper 139, 17 July 2009.

⁵⁴ Cm 7973 November 2010 pp22-23.

⁵⁵ Commission on Scottish Devolution, *Final Report*, June 2009 para 1.115.

It is also worth pointing out that until recently, public spending in Scotland has grown rapidly, as it has in the UK as a whole. Until now, the devolution arrangements have not had to operate during a period of public spending cuts.

The Calman proposals

Under the current arrangements, the Scottish Parliament has wide discretion over the allocation of public spending. Its responsibilities for raising revenue are much more limited. The Calman Commission identified the Scottish Parliament's lack of taxation responsibilities, and associated financial accountability, as a fundamental flaw in the devolution settlement:

the very wide spending powers that the Scottish Parliament has are not matched by its taxation responsibilities. Although the Scottish Parliament controls 60% of identifiable public spending in Scotland, it is responsible in practice for deciding only 10% of the taxation levied in Scotland. Its budget is determined overwhelmingly by the block grant from Westminster. We agree with the judgment expressed in the majority of the evidence received by us that this is not the right balance. It does not allow the Scottish Parliament to be sufficiently financially accountable for its decisions. In particular it does not make it accountable effectively for taking taxation and spending decisions together and, critically, for making the choice at the margin between them.⁵⁶

A similar argument had been made by the Commission chaired by Lord Steel of Aikwood, the former leader of the Liberal Democrats, which published a report in 2006. The Steel Commission proposed a "significant increase in the taxation powers of the Scottish Parliament, coupled with a new needs-based equalisation system for the UK" in part because this would mean "a significant increase in the accountability of the Scottish Parliament and Scottish Executive, undoing the democratic deficit inherent in the current system."⁵⁷

To improve the Parliament's financial accountability, the Calman Commission drew up a series of proposals for increasing the Parliament's powers to impose taxes and borrow money, specifically:

- A reduction in Scotland of rates of income tax by 10p in the pound with a commensurate cut in the block grant;
- Replacement of the Scottish Variable Rate of income tax with a new Scottish rate of income tax. This could be set at 10p to restore the level of funding under the current arrangements. Alternatively it could be set at more or less than 10p and the Scottish Government's budget would be adjusted accordingly. These arrangements would mean that the Scottish Parliament would have to make a decision on tax;
- Income tax on savings and distributions should not be devolved but half the yield assigned to Scotland with a corresponding reduction in the block grant;
- The structure of income tax, including bands, allowances and thresholds, would remain the responsibility of the UK Parliament;
- The following taxes should be devolved to the Scottish Parliament with a corresponding reduction in the block grant:
 - Aggregates levy

⁵⁶ Commission on Scottish Devolution, *Final Report*, June 2009 para 2.34.

⁵⁷ The Steel Commission, *Moving to Federalism – A New Settlement for Scotland: Final Report*, March 2006 p118. The Commission proposed that the Parliament should have control over a select number of devolved taxes, but was not specific as to the precise form this fiscal federalism should take.

- Landfill tax
- Air passenger duty
- Stamp duty land tax;
- The Scottish Parliament should be given the power to legislate for new taxes in Scotland, with the agreement of the UK Parliament;
- The Scottish Parliament should be granted additional borrowing powers to manage cash flow and to increase capital investment, subject to limits;
- There should be a strengthening of the intergovernmental arrangements for dealing with finance; and,
- The changes should be phased in to avoid unexpected variability in Scotland's public finances.

The Command Paper : Strengthening Scotland's Future

Introduction

In its Command Paper, *Strengthening Scotland's Future*, the Government accepts the Commission's central premise, that without greater powers for raising more of its own revenue, the Scottish Parliament "lacks the accountability of devolved legislatures in comparable countries." It goes on to propose, in its words, "the largest transfer of fiscal power from London since the creation of the United Kingdom. The Scottish Parliament will move from raising approximately 15% of its own budget to approximately 35%, a level similar to devolved legislatures in Belgium, Italy, Spain and Australia."⁵⁸ The paper summarises these changes as follows:

- A Scottish income tax to replace part of the UK income tax
- The devolution of land tax and landfill tax
- The power to create or devolve other taxes to the Scottish Parliament
- Extensive new borrowing powers.
- A Scottish cash reserve to manage fluctuations around devolved tax receipts
- A seat for Scottish Ministers on a new UK-Scottish tax committee

....

Under the new system, the Scottish Parliament will be required to set the Scottish rate of income tax every tax year. It will be responsible for the design and level of taxation on land transactions and disposal of waste to landfill. The block grant from the UK Government will be reduced to reflect the new streams of income from the devolved taxes.

The Scottish Parliament will also be able to introduce new taxes applicable only to Scotland, with the agreement of the UK Government and Parliament. It will be given increased powers to borrow both for current and capital spending providing greater choice over how and when to invest in projects that will benefit future generations.

⁵⁸ Cm 7973, November 2010, p11.

Combined, these measures represent a radical, historic and significant change to the financing of public services in Scotland. The accountability of the Scottish Government and the Scottish Parliament to the Scottish people will be considerably strengthened.

Increased financial powers also increase the exposure to risks. Income from taxation is much more likely to vary than that from the established UK Government grant, introducing a degree of risk to that part of the Scottish budget. The new public spending framework therefore provides borrowing powers to help manage this risk. This, combined with the continuance of a significant proportion of income from the block grant from central government, will allow stability and predictability of public service provision in Scotland.⁵⁹

Under the new arrangements, the Scottish Parliament's budget will have two main sources of funding:

- Revenues from devolved taxes, of which by far the most significant will be the receipts from the Scottish rate of income tax.⁶⁰
- A reduced block grant from the UK Government. The grant would fund around 65% of the Scottish Budget, assuming the Scottish Government keeps the current level of income tax.

Strengthening Scotland's Future makes it clear that the Government has no immediate plans to replace the Barnett formula but left open the possibility of using another method of determining the block grant in the future:

The UK Government recognises some of the concerns expressed about the current system of devolution funding whereby changes to the block grant are calculated by the Barnett formula, but the UK Government's priority is to reduce the deficit and does not have any plans to change arrangements before the stabilisation of the public finances.

[...]

It is also the case that the mix of block grant and devolved taxes could apply to alternative means of deriving the block grant and hence this framework is sufficiently robust to endure into the long term.⁶¹

The proposals for reducing the block grant are contained in *Strengthening Scotland's Future* rather than the Bill. Legislation is not required to adjust the block grant. The Barnett formula is a non-statutory mechanism.

Income tax

Under the proposed arrangements, rates of income tax set by the UK Government for Scottish taxpayers would be reduced by 10p in the pound. Assuming no change in the current UK rates of income tax, the rates applying in Scotland would be reduced to 10%, 30% and 40% rather than the 20%, 40% and 50% applying in the rest of the UK. The Scottish Parliament would then levy a single rate of Scottish income tax which would apply in addition to the UK rate. The Scottish Parliament could choose a 10% Scottish rate which would restore the overall rate of income tax back to the levels in the rest of the UK, but could alternatively choose a rate higher or lower than 10%.

⁵⁹ Cm 7973, November 2010, pp 11-12, p21.

⁶⁰ In 2008/09, it is estimated that income tax raised £10.7 billion, compared with landfill tax which raised £85 million and stamp duty land tax, which raised £319 million (Scottish Government, *Government Expenditure & Revenue Scotland 2008-09*, June 2010, Table 4.1 and Box 4.2).

⁶¹ Cm 7973, November 2010, pp22-23.

Two features of this arrangement are worth noting. First, the Scottish Parliament can only choose a single rate which will be applied to all the UK rates; it would not be able to set a different rate to apply to higher rate taxpayers, for example. Second, all elements of the income tax structure such as thresholds, allowances, and the rates which apply in the rest of the UK remain the responsibility of the UK Government. If the UK Government were to change elements of the income tax structure, this would have an effect on the money raised by the Scottish income tax. *Strengthening Scotland's Future* says that a "no detriment" principle will operate in these circumstances:

After the transition period, the UK Government will adopt a principle of 'no detriment', meaning 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.⁶²

Receipts from Scottish income tax will be paid to the Scottish Government. These payments will be based on forecasts made by the Office for Budget Responsibility (OBR).⁶³ During a transitional period, expected to last two or three years, the payments will be based on forecasts and there will be no adjustment to take account the actual revenue collected. For this period, the Scottish Government will not be exposed to any risk that actual tax receipts are more or less than the amount forecast. The Scottish Government will, however, be dependent on the accuracy of the OBR's forecast.

Once this transitional period is over, outturn receipts will be reconciled with actual receipts and an appropriate transfer made between the UK and Scottish Governments. The Scottish Government's income will then be subject to the risk that the outturn receipts might be different from their forecast level. Where the actual amount of tax raised is greater than the forecast amount, the funds will be transferred to a new Scottish cash reserve. This allows funds to be built up to offset other years where receipts are less than forecast, although *Strengthening Scotland's Future* says "any outstanding borrowing will ... have first call on surplus outturn receipts in future years."⁶⁴ Where receipts are below the forecast level, the Scottish Parliament will be able to borrow for a period of up to four years, if the shortfall is more than 0.5% of the Scottish total resource budget and there is no cash reserve. Where the shortfall is less than 0.5%, it is expected that this will be absorbed by the Scottish budget in that year. The Command Paper explains the merits of this approach as follows:

Overall, this model will provide stability within each Spending Review period. The Scottish budget can be maintained each year with unexpected fluctuations in tax revenues being managed by use of the Scottish cash reserve and/or the new current borrowing powers. This facilitates an approach to spending control broadly equivalent to that adopted by the UK Government that determines spending on the basis of estimated tax receipts for the duration of the Spending Review period, with borrowing making up for any shortfall in the outturn tax revenues.

It is also the case that the continuing block grant is fixed during the Spending Review period, irrespective of tax receipts, and so will underpin the stability of the budget available to the Scottish Parliament. When taken alongside the new power to borrow to fund current expenditure and the Scottish cash reserve, this mechanism will ensure stability in the Scottish budget. This system protects public service provision from large fluctuations in tax receipts and delivers the direct financial accountability associated with determining a significant tax. Furthermore, by linking the Scottish budget to the

⁶² Cm 7973, November 2010, pp25-26.

⁶³ The Office for Budget Responsibility was created in May 2010 to provide independent forecasts of the economy and public finances for the Government. For more information, see Library Standard Note, *The Office for Budget Responsibility*, (SN/EP/5657), 15 November 2010.

⁶⁴ Cm 7973 November 2010 p27.

income tax base, it gives the Scottish Parliament a direct stake in the Scottish economy.⁶⁵

Stamp duty land tax and landfill tax

These two taxes will be completely devolved to Scotland. Unlike income tax, the Scottish Parliament will have complete control over the design and operation of each of these taxes, subject to them remaining taxes on land transactions and on waste disposed to landfill respectively. The UK Government anticipates that these taxes will be devolved from April 2015, provided necessary legislation to introduce them has been passed by the Scottish Parliament. If this is the case, the UK-wide versions of these taxes will be “switched off” in April 2015.

New taxes

The Bill allows new tax-raising powers to be devolved to the Scottish Parliament, once approval has been given by both the UK and Scottish Parliaments. In considering a proposed new tax, the UK Government will consider its impact against a number of criteria including its effect on UK macroeconomic policy and the single UK market.

The block grant

Under the Government’s proposals, the block grant will be reduced to reflect Scotland’s new tax raising powers; as *Strengthening Scotland’s Future* comments, “the fundamental principle of the new system of finance is that some of the block grant is exchanged for the scope for the Scottish Parliament to levy its own taxes.”⁶⁶ Changes to the block grant will be introduced in a phased way. Over the current Spending Review period, up to 2014/15, changes to the block grant will continue to be determined by the Barnett formula.

The reductions in the block grant will be phased in as follows:

Phase 1: devolution of smaller taxes

When stamp duty land tax and landfill tax are devolved (currently planned for April 2015), there will be a one-off reduction in the block grant. This deduction will also be applied to all future years. Outturn data for stamp duty land tax is already available and, as the Command Paper notes, the Government believes that accurate estimates of landfill tax can be calculated:

Upon the passage of the Scotland Bill, the UK Government will engage with both the Scottish Government and Parliament on the means of calculating the reduction in block grant associated with the devolution of stamp duty land tax and landfill tax. The resulting calculations will be transparent, published and open to scrutiny or audit by external parties and based on outturn tax receipts data as well as the tax receipts forecast carried out by the independent OBR.⁶⁷

Phase 2: devolution of income tax during transitional phase

During the transitional period from April 2016, the deduction from the block grant will be based on the OBR’s annual forecast of Scottish income tax receipts. During this transitional period, there will be no adjustment to reflect actual receipts. As a result, the risk that actual receipts differ from their forecast level will be borne by the UK Government. In other words, during this period, the Scottish budget will be unaffected if actual receipts come in higher or lower than forecast.

⁶⁵ Cm 7973, November 2010, p28.

⁶⁶ Cm 7973, November 2010, p34.

⁶⁷ Cm 7973, November 2010, p34.

As noted above, payments to the Scottish Consolidated Fund during the transition period will also be based on forecast (rather than actual) tax receipts, based on the rate of Scottish income tax set by the Scottish Parliament.

Phase 3: After the transition period

According to *Strengthening Scotland's Future*, after the transition period, "there will be a one-off deduction to the block grant with the total budget derived by the Barnett formula adjusted proportionately going forward to make the deduction permanent."⁶⁸ The precise details of how this will be done have not yet been spelled out by the Government. *Strengthening Scotland's Future* states that actual outturn receipts from the Scottish income tax will be "instrumental" in deciding how to reduce the block grant. It makes the following comments:

A definitive statement on the correct reduction to the block grant [is] inappropriate at this time.

Going forward, it will always be possible to compare the new Scottish budget derived from the mix of block grant and devolved taxation with what the Scottish budget would have been without the devolution of tax powers. This will provide a means of ensuring that, beyond the initial transition period, any unintended consequences of the proposed system are evident. For example the size of the Scottish budget, and variations to it, will be determined by the growth of the block grant element and the growth of income tax receipts. We would expect the relationship between these two elements to be broadly neutral over time. The block grant element will continue to operate on the same basis as now, but the extent to which the part financed by income tax will grow will depend on decisions made by the Scottish Government – for example choosing different tax rates to those in the rest of the UK, or economic policies which result in the Scottish economy growing at a different pace to that of the UK.

The UK Government will continue reviewing the system to ensure that the relative levels of public expenditure going forward remain consistent with what the Commission described as the social and economic unions between Scotland and the rest of the United Kingdom. This approach is intended to serve as a safeguard to both the Scottish and UK Parliaments once the new arrangements are implemented, for example by limiting the risk of an unintended transfer of resources one way or the other.⁶⁹

Borrowing

The 1998 Act allows Scottish Ministers to borrow for short term current spending. There is a limit of £500 million. This power has not been used and is replaced by extended borrowing powers in the Bill. The Bill allows borrowing for both current and capital spending. Each type of borrowing is subject to a cap.

Current borrowing

The Bill allows borrowing to fund current expenditure, subject to certain limits and controls. Scottish Ministers will be permitted to borrow up to a total of £500 million to fund current spending with a limit of £200 million in any one year. *Strengthening Scotland's Future* explains the circumstances in which this will be permitted:

- A temporary mismatch between tax and spending occurs during the course of the year, due to the irregular nature of tax receipts within that year. This circumstance will affect the receipts from the Scottish taxes on land transactions and disposals to landfill which will be fully devolved and where Scotland will be receiving receipts on

⁶⁸ Cm 7973, November 2010, p35.

⁶⁹ Cm 7973, November 2010, pp35-36.

a cash basis. It will not affect income tax since tax receipts will be paid to Scotland at the beginning of the year based on the Spending Review forecast;

- The difference between devolved tax receipts forecast from the Spending Review and outturn is negative and is above 0.5% of the Scottish resource budget in the relevant year. Discrepancies between forecast and outturn below this threshold would be absorbed from within the Scottish budget, typically by using unallocated provision.⁷⁰

Borrowing to fund current expenditure would also be subject to a number of specific terms and conditions:

- Borrowing would be from the National Loans Fund at NLF rates.⁷¹
- The loan must be repaid within a maximum of four years.
- The Treasury may revise the limit up or down but it will not be reduced below £500 million.

The power to borrow for current expenditure would come into force in April 2015.

Cash reserve

Where tax receipts exceed the forecast, the first call on the excess will be used to pay off debt. Where there is no previous debt, these funds will be paid into a Scottish cash reserve. These funds would then be used when receipts are lower than forecast. The cash reserves would operate in a similar way to local authority cash reserves but would be held with the UK Government rather than commercial banks.

Borrowing for capital

The Bill allows Scottish Ministers to borrow for the purposes of capital funding, subject to Treasury controls and limits. *Strengthening Scotland's Future* argues that this power will enable the Scottish Parliament "to spread the cost of capital investments across the lifespan of the associated assets" and provide it with "a new fiscal lever".⁷² A number of conditions will apply to this borrowing. Scottish Ministers will be permitted to borrow up to a maximum of 10% of the Scottish capital budget (£230 million in 2014/15) in any one year up to a maximum stock of £2.2 billion. The Scottish Government should tell the UK Government about their capital spending plans at each Spending Review or if this is not possible a minimum of six months before the beginning of the financial year. This power will be phased in. For two years, from April 2013, the Scottish Government will be able to borrow for capital spending for specific projects, subject to HM Treasury consent. Wider borrowing powers will be made available from April 2015.

Intergovernmental arrangements

The Government believes that the new funding arrangements will require bilateral discussions between the UK and Scottish Governments. The Government will establish the Intergovernmental Bilateral Committee on Fiscal Devolution. It will be chaired by the Exchequer Secretary to the Treasury and will also include relevant Scottish Ministers and the Secretary of State for Scotland. This is a departure from the Calman recommendation of a committee which would include all the devolved assemblies.

⁷⁰ Cm 7973, November 2010, p38.

⁷¹ The National Loans Fund is the account which brings together all Government lending and borrowing.

⁷² Cm 7973, November 2010, p39.

The Scottish Parliament will receive a report on Scottish income tax receipts as part of the National Audit Office's yearly report on HMRC. Scottish Parliamentary Committees will also be able to ask HMRC Accounting Officers for evidence.

The table below sets out the timetable for implementing these proposals, as envisaged in *Strengthening Scotland's Future*:

Timetable for implementation

From enactment of Scotland Bill

New taxes Scottish Parliament able to introduce new taxes in Scotland provided it has agreement of UK Government

From April 2012

Revenue forecasts independent Office for Budget Responsibility will start providing forecasts of Scottish income tax, landfill tax, stamp duty land tax and aggregates levy receipts. These will be notionally assigned to the Scottish budget to show how much grant funding would be replaced by tax. The Scottish budget would not vary as tax receipts fluctuate while this arrangement is in place.

From April 2013

New borrowing power for capital expenditure This will be subject to Treasury consent for specific projects for the first two years.

From April 2015

Devolution of stamp duty land tax and landfill tax Provided the Scottish Government has legislated in the Scottish Parliament, the UK-wide versions of these taxes will be "switched off". Corresponding reductions will be made to the block grant.

New borrowing power for current expenditure new borrowing power to finance current expenditure to allow for differences between forecast and outturn receipts.

Borrowing for capital expenditure wider capital borrowing powers

From April 2016

New Scottish rate of income tax with transitional arrangements From April 2016, UK rates of income tax reduced by 10p for Scottish taxpayers and Scottish Parliament able to set Scottish rate of income tax. This will allow Scottish Government elected in 2015 to set income tax rate for the following year.

Transitional arrangements in place to prevent adverse shocks or windfall gains to the Scottish budget.,

Source: Scotland Office, *Strengthening Scotland's Future*, pp23-25

2.2 The Bill

Background

Taxation and government borrowing are reserved matters under Schedule 5 to the *Scotland Act 1998*: specifically, “fiscal, economic and monetary policy, including the issue and circulation of money, taxes and excise duties, government borrowing and lending, control over United Kingdom public expenditure, the exchange rate and the Bank of England”, subject to the exception of “local taxes to fund local authority expenditure (for example, council tax and non-domestic rates).”⁷³

The Scottish Parliament has a very limited power to amend its budget through taxation, by exercising the power to vary the basic rate of income tax in Scotland – the ‘Scottish Variable Rate’ or SVR. Under Part 4 of the *Scotland Act 1998* the Parliament may raise or cut the basic rate by up to 3 pence in the pound. When the Act was introduced it was estimated that a 1p change in the basic rate for Scottish taxpayers was equivalent to £150 million in tax receipts, so that in effect the SVR provided the Scottish Parliament with a power to cut or raise tax by up to £450 million, equivalent to about 3% of the Scottish Office's budget at the time.⁷⁴

The SVR clearly had an important symbolic function, underlining the shift in power from Westminster to Scotland. When the House debated the White Paper which foreshadowed the *Scotland Act* the then Secretary of State, Donald Dewar, argued that providing the Parliament with this limited discretion was right, “because it asks the Scottish Parliament to face real financial choices and makes it, in a sense, more directly accountable to the people it represents.”⁷⁵ In a recent piece on the SVR on his blog, the commentator Alan Trench noted:

it's doubtful whether the power was ever intended to be used. I've heard one of those involved in framing it say privately that its real purpose was to forestall Scottish arguments about extra funding through the block grant if the devolved executive were to claim the ‘need’ to cover something, because the power to raise extra revenue would be there in the form of the variable rate.⁷⁶

The Commission took the view that the drawbacks to using the SVR in practice highlighted why the SVR had failed to create financial accountability:

First and most obviously there has never been a political consensus in the Parliament to exercise the power. Additionally, the first ten years of the Parliament's existence have been a time of rapidly growing public spending, and the challenges in managing the growth of that spending wisely may have suggested that further growth from additional taxation was unnecessary.⁷⁷

There may however be other reasons. Evidence such as that from the Institute of Chartered Accountants in Scotland (ICAS)⁷⁸ that estimates that the cost, especially the start-up cost of using the SVR for the first time, would be quite substantial in comparison with the revenue that might be received, especially for variations of less

⁷³ Under section A1 to Part II of Schedule 5 to the *Scotland Act 1998*.

⁷⁴ In its report the Calman Commission observed, “if used to the full this could change the Scottish Budget by little over £1 billion, compared with total spending of around £30 billion” – illustrating the impact of inflation on the original estimate (Commission on Scottish Devolution, *Final Report*, June 2009 p7).

⁷⁵ HC Deb 31 July 1997 c465. The issue is discussed at more length in, *The Scotland Bill : tax-varying powers*, Library Research paper 98/4, 8 January 1998.

⁷⁶ “[The uselessness of the Scottish Variable Rate](#)”, *Devolution Matters blog*, 18 November 2010.

⁷⁷ By 2007, the cumulative under spend of the Scottish Parliament amounted to £1.5 billion.

⁷⁸ Oral evidence from ICAS, 12 September, 2008.

than the full 3p in the pound. More profoundly, however, there is the nature of the power itself. Because the SVR is a power to alter a rate already set by the UK Government, a decision to do nothing has no effect on the budget of the Parliament.

By contrast a local authority which does not take a decision to set a rate of council tax will not be able to levy a tax and would consequently lose the resultant revenue stream. The Independent Expert Group's survey of international practice found the funding of most regional governments worldwide had some transparent connection to tax receipts.⁷⁹

These criticisms of the SVR were reinforced in November 2010 when it emerged that in 2007 the Scottish Government had decided not to renew a contract with HM Revenue & Customs to maintain the IT systems necessary to implement the SVR. In a press notice the Scotland Office stated that this decision meant that if the Scottish Government decided to use the SVR, the longer lead-in times needed to renew IT systems would mean it could not be implemented before April 2013.⁸⁰ The issue was debated at some length in the Scottish Parliament on 24 November 2010.⁸¹

In place of the SVR the Commission proposed a new Scottish rate of income tax, to apply to the basic and higher rates of income tax. As with the SVR, the new rate would not apply to income from savings or dividends although half of the yield from tax on these income sources should be assigned to the Parliament's Budget, with a corresponding reduction in the block grant. Four other taxes should be devolved: stamp duty land tax, landfill tax, aggregates levy and air passenger duty – and the Parliament should have the power to introduce new taxes subject to the agreement of the UK Parliament. Finally, Scottish Ministers should be given additional borrowing powers, to manage cash flow when devolved taxes had been used, or to increase capital investment in any one year subject to an overall limit.

Part 3 of the Bill implements this part of the Commission's report with two important exceptions. First, the UK Government has decided not to assign income tax revenues from savings and dividends, as *Strengthening Scotland's Future* notes:

The technical changes required to identify Scottish savings and distributions in order to assign the associated tax revenue would be equally onerous, complex and costly given the role of third parties such as banks and building societies in withholding and remitting this tax. Furthermore, we are persuaded that assigning tax revenues would not in itself contribute to financial accountability.⁸²

So, the Scottish income tax will apply to income from earnings, pensions and other non-savings sources only. That said, the amounts raised in Scotland from income tax on savings and dividend income are relatively small: in 2008/09 it is estimated that total income tax receipts were £10.7 billion, of which receipts from savings and dividends were £646 million, or just 6% of the total.⁸³

⁷⁹ Commission on Scottish Devolution, *Final Report*, June 2009 paras 3.39-.40. The Independent Expert Group mentioned in this extract was set up by the Commission to advise on improving the Parliament's financial accountability.

⁸⁰ Scotland Office press notice, *Scottish Variable Rate of tax no longer available*, 19 November 2010. See also, "Holyrood 'loses tax varying power' for next three years", *BBC News online*, 18 November 2010.

⁸¹ SP OR 24 November 2010, cols 30725-30766.

⁸² Cm 7973, November 2010, pp 29-30.

⁸³ Scottish Government, *Government Expenditure & Revenue Scotland 2008-2009*, June 2010 p37 (Box 4.1).

Second, the Bill does not include provisions to devolve two of the four taxes on the Commission's list: aggregates levy and air passenger duty, for reasons set out in *Strengthening Scotland's Future*:

Aggregates levy

[The levy] is currently subject to legal challenge in the European Courts and the UK Government does not consider it appropriate to devolve it at this time. The Government will continue to keep the devolution of aggregates levy under review with the intention, subject to the outcome of proceedings in the European Courts, of devolving this tax to the Scottish Parliament in the future. In the interim, the UK Government will assign to the Scottish Government receipts from aggregates levy as it relates to Scotland. From April 2012, an estimate of Scottish aggregates levy will be calculated based on the forecast of UK aggregates levy receipts. This estimated revenue will be allocated to the Scottish Government, with the equivalent amount deducted from the Scottish Government's block grant each year. Although this will not have a financial impact on the Scottish Government's block grant, it will illustrate the amount of revenues that would be attributable to a Scottish aggregates levy were it to be devolved ...

Air passenger duty

The UK Government is exploring changes to aviation duty, including the scope for a per plane duty, as set out in the Programme for Government. The UK Government does not therefore intend to devolve air passenger duty at this time, but will include devolution of this tax base in future work on aviation taxation.⁸⁴

Both taxes raise relatively small sums in Scotland: it is estimated that in 2008/09 the aggregates levy raised £53 million, and air passenger duty raised £154 million.⁸⁵

Introductory

Clause 24 creates a new part, Part 4A, of the *Scotland Act 1998*, setting out the Scottish Parliament's powers to legislate on certain 'devolved taxes', and makes provision for these powers within the Act's legal framework. As noted, the power to create new devolved taxes is to be subject to the approval of *both* the UK and Scottish Parliament. At present the parameters of the Scottish Parliament's competence – broadly speaking, what is reserved to Westminster, and what is not – are set by Schedules 4 and 5 to the Act. Section 30 of the Act provides a mechanism to amend these parameters by means of an Order in Council approved by both the UK and Scottish Parliaments. The Act refers to this type of approval as the 'Type A' procedure. **Clause 24** provides a similar amending power with regard to devolved taxes, so that Orders in Council may specify new devolved taxes, or may amend the devolved tax provisions, and this will also be subject to approval under the Type A procedure.

Strengthening Scotland's Future states that if the Scottish Parliament wished to introduce a new devolved tax, the UK Government would consider the impact "against a number of predetermined criteria", the most important of which would be "the need to ensure that the proposed tax would not impose a disproportionate negative impact on UK macroeconomic policy or impede, to any degree, the single UK market." When making a proposal, the Parliament would have to supply evidence to confirm that these criteria would be met. *Strengthening Scotland's Future* goes on to provide some details of these criteria, and the evidence that would show any new devolved tax met them:

⁸⁴ Cm 7973, November 2010, p32.

⁸⁵ Scottish Government, *Government Expenditure & Revenue Scotland 2008-2009*, June 2010 p36 (Table 4.1).

The Scottish Parliament will be expected to provide supporting evidence confirming a proposed new tax complies with these criteria, which will include:

- the potential for the new tax to create or incentivise economic distortions and arbitrage within the UK;
- the potential the new tax might create for tax avoidance across the UK;
- the impact of the proposed tax on compliance burdens across the UK;
- the compatibility of the new tax with EU Legislation and Rules, such as those covering State Aid and the Single Market, and the Human Rights Act.

The evidence expected from the Scottish Parliament to support such a proposal would therefore include:

- the rationale, intended tax base/taxable activity and expected revenue;
- the expected distributional impact, impact on business and individuals and wider economic impact;
- an assessment of compatibility with the Human Rights Act, EU State Aid rules and other directives;
- plans for the collection and administration of the tax, including means of ensuring compliance;
- an assessment of any interaction of the proposed new Scottish tax with UK-wide taxes (including plans to protect policy and geographical borders). This should include the impact of any new tax on UK tax revenues; and
- any underlying material used to answer the questions above.⁸⁶

In a blog post on this section of the paper the commentator Alan Trench argued that these criteria “are so tight that it’s hard to think of a tax that would in fact qualify”:

[Any new tax] mustn’t create economic distortions or encourage arbitrage within the UK, or create potential for tax avoidance, or affect compliance burden, and must comply with all EU rules and the Human Rights Act. And it will be for the Parliament to prove in detail its proposed tax satisfies these criteria. Only taxes on land have any hope of doing so, and even they will face major challenges. While this provision was always of questionable practical value, it’s now hard to see that it opens up any practical opportunity.⁸⁷

Clause 25 makes provision for HM Revenue & Customs to disclose taxpayer information to Scottish Ministers. The department has a statutory duty of confidentiality and may only pass on information in a limited number of specified circumstances, under Section 18 of the *Commissioners for Revenue & Customs Act 2005*. The clause allows for the department to pass on personal taxpayer information in connection with the collection and management of devolved taxes, but makes it a criminal offence for the information to be passed on any further without the department’s explicit consent. The Scottish Government is to remain wholly responsible for devolved taxes, and to this end **clause 25(6) & (7)** states that the department’s statutory functions may not be extended to include devolved taxes by an Act of the Scottish Parliament.

⁸⁶ Cm 7973, November 2010, p33.

⁸⁷ “The financial provisions of ‘Strengthening Scotland’s Future’”, *Devolution Matters* blog, 14 December 2010.

Scottish rate of income tax

Clause 26 confers the power to set a Scottish rate of income tax by the Scottish Parliament. It sets the criteria for those individuals liable to pay this rate, allows the Treasury to make modifications to the Scottish rate by Order, and allows for the costs of implementing and administering the Scottish rate to be borne by the Scottish Government.

Clause 26(2) withdraws the statutory provision for the SVR: ie, Part 4 of the *Scotland Act 1998*.

Clause 26(3) inserts six sections to the Act dealing with the Scottish rate:

- **Section 80C** allows the Scottish Parliament to set the rate by resolution. The rate is to be charged on all ‘Scottish taxpayers’. The resolution must set the rate for one full tax year, and can only fix the rate at a whole or half number. The resolution must be passed up to 12 months before the start of the year, but no earlier.
- **Section 80D** defines who is to be treated as a Scottish taxpayer. Individuals resident in the UK for tax purposes will be liable to pay the Scottish rate if they meet one of three tests:
 - if they have a “close connection” with Scotland for a given year;
 - if they do not have a close connection with any part of the UK but spend “more days of that year in Scotland” than other parts of the UK, or,
 - if they represent a Scottish constituency in Westminster, Edinburgh or the European Parliament for any part of that year.

Strengthening Scotland’s Future notes that the Bill retains the definition of a Scottish taxpayer set in the *Scotland Act* for the purposes of the SVR, though it simplifies its presentation “to make it clear that a Scottish taxpayer is a UK taxpayer either resident in Scotland or whose closest connection is with Scotland.”⁸⁸ In a survey of its members on the Calman proposals, the Chartered Institute of Taxation found that “the two biggest issues, by some distance [are] ... how to minimise the burdens on employers of Scottish taxpayers, and how to define a Scottish taxpayer.”⁸⁹ It is worth noting that as the SVR has not been used at all, the viability of this definition has not been tested in the courts.

In its impact assessment on the Bill the Scotland Office notes that “most of the compliance costs to employers associated with the creation of a Scottish income tax have already been met”:

When the Scotland Act 1998 created the Scottish variable rate (SVR) of income tax, employers and software providers made changes to payroll 'software so that they could operate a different rate of income tax for those employees who were defined as Scottish taxpayers. As is proposed now, those employees who were identified by HMRC as falling within the definition would be issued with an S prefixed tax code, and employers' software was changed so that it could receive the S prefixed tax codes and operate different rates of income tax against that code. This means that most existing payroll software already provides for a different rate to be operated not only against the basic rate but against the higher rates also.

⁸⁸ Cm 7973, November 2010, p29.

⁸⁹ CIOT press notice, *Scotland Bill: tax experts highlight important technical issues*, 30 November 2010.

Consequently, five years ahead of the expected commencement date, many employers will already be largely compliant because of the earlier changes performed in readiness for the SVR. This enables the administrative burdens associated with this Bill to be kept to a minimum. This preparedness applies to all payroll software used in the UK, not just in Scotland, so cross border issues, such as would arise with a single employer employing both Scottish and rest of UK taxpayers is already largely accommodated.

The department goes on to conclude that it would not be “possible [nor] ... appropriate” to determine the compliance costs businesses might face as “additional compliance costs may arise if the Scottish Government seek processes that differ from the Scottish rate”:

The current assumption is that those defined as Scottish taxpayers would pay one single rate of tax on income in each taxable band which would be shown as one single deduction on payslips and P60 forms. If for example, the Scottish Government wishes to apply a higher degree of transparency to the Scottish income tax by requiring employers to identify amounts paid to the UK Exchequer and to the Scottish Parliament then the compliance burden would change ...

Other areas that may incur additional compliance costs relate to the treatment of certain tax reliefs and income, for example, gift aid and the tax reliefs available for contributions to pension schemes ... Until the policies underpinning these matters are defined, it is not possible to make estimates around any related compliance and administrative costs.⁹⁰

- **Section 80E** defines the meaning of a “close connection” with part of the UK. For those with only one place of residence in a part of the UK, this is where their close connection will be, provided they live there for at least part of the year. For those with two or more places of residence in the UK, their close connection is where their “main place of residence” is found, provided they have lived there for part of the year, and this place has been their main residence for as much time over the year as any other place in the UK.
- **Section 80F** provides the day count test to assess if someone without a close connection to any part of the UK is a Scottish taxpayer. Someone is said to have spent a day in the UK if they are there at the end of the day, *unless* they have arrived that day as a passenger, leave the next day, and do nothing “to a substantial extent unrelated” to their passage. Individuals who spent at least as many days in a year in Scotland as in any other part of the UK will meet this day count test.

This issue came up at a roundtable discussion of the Calman proposals in September 2010, attended by Scottish MSPs, and representatives of the two main accountancy bodies in Scotland, there were concerns about the practicalities of this test. As a report of the proceedings noted,

as the definition [of a Scottish taxpayer] currently in the *Scotland Act* relies on the number of days spent in Scotland in the course of the tax year, the status of a taxable person will not be able to be finalised for any year until he or she has spent the requisite number of days either inside or outside Scotland. Whether an individual should be treated as a Scottish taxpayer can, therefore, change during the year, with consequential complications in the application of PAYE.⁹¹

⁹⁰ Scotland Office, *Impact assessment of the Scotland Bill*, 30 November 2010 p7.

⁹¹ “Round and round the table”, *Tax Adviser*, November 2010.

- **Section 80G** allows for the Treasury to introduce secondary legislation to modify or disapply the impact of the Scottish tax rate. As *Strengthening Scotland's Future* notes, “the Scotland Bill’s taxation powers are only enabling provisions and will require the implementation arrangements to be defined in secondary legislation.”⁹² **Section 80G(3)** states that this legislation may apply to the operation of PAYE, and the date at which a change in the Scottish rate would be accounted for – but it is not exclusive in this respect. The Explanatory Notes to the Bill state that the Treasury is to discuss with relevant stakeholders the practical implications of the Scottish rate – including the way in which the Scottish rate might affect the way certain tax reliefs are assessed, as several reliefs are calculated by reference to gross income before the deduction of tax.⁹³
- **Section 80H** allows for Scottish Ministers to reimburse the UK Government for “administrative expenses” incurred by virtue of the Scottish rate, after the Bill receives Royal Assent.

The Bill’s impact assessment gives an “early, provisional estimate” that the setup costs to make the necessary changes to HMRC’s IT systems would be £40-45 million, “approximately £13 million of which would fall in the Spending Review 2010 period” and that annual running costs would be around £4.2 million a year; these estimates are based on the assumption that the Scottish Government chose a ‘low visibility’ system “whereby one income tax payment is identified on Scottish taxpayers’ payslips and P60s which would allow a single UK PAYE system to be operated. The alternative ‘high visibility’ system would necessitate splitting income taxes paid between Scotland and the UK and would be associated with higher administrative and compliance costs.”⁹⁴

Clause 26(4)-(6) provides for the Treasury to determine by Order when the Scottish Parliament is given the authority to set the Scottish rate, and prohibits the Parliament from setting the rate for an earlier tax year or setting a SVR for a future year. **Schedule 3** makes a number of consequential amendments.

Clause 27 makes a series of amendments to tax law to implement the Scottish rate. The rates of income tax are set out in section 2 of the *Income Tax Act 2007*; at present there are three rates: a basic rate of 20%, a higher rate of 40% and an additional rate of 50%. **Clause 27(2)** amends this provision to allow for the imposition of the Scottish rate on non-savings income only. For Scottish taxpayers this rate structure is amended first by deducting 10 percentage points from each rate, and then adding the Scottish rate set by the Scottish Parliament. Under **clause 27(5)** the Scottish rate will not apply to individuals taxed on the ‘remittance basis’ - that is, individuals whose domicile, or permanent home, is outside the UK, and who have elected to pay a minimum charge to be taxed only on income or capital gains ‘remitted’, or brought into, this country. The clause also makes consequential amendments to the statutory procedure for tax changes to be implemented, prior to the passage of the annual Finance Bill.

Scottish tax on land transactions

Clause 28 inserts two sections to the Act to allow the Scottish Parliament to introduce a new devolved tax on land transactions in Scotland:

- **Section 80I** defines the scope of the tax as covering the “acquisition of an estate, interest, right or power in or over land in Scotland”, as well as the acquisition of “the benefit of an obligation, restriction or condition affecting the value” of these items. The tax may apply irrespective of the residence of any party to the transaction or where any

⁹² Cm 7973, November 2010, p20.

⁹³ Bill 115-EN, para 131.

⁹⁴ Scotland Office, *Impact assessment of the Scotland Bill*, 30 November 2010, p8.

formal document which effects that transaction is executed. Similarly it will apply regardless of whether the transaction is effected by a formal document or not. *Strengthening Scotland's Future* emphasizes the point that the tax's design and administration "will be a matter for the Scottish Parliament."⁹⁵

- **Section 80J** exempts statutory bodies from the tax – Ministers of the UK and devolved governments along with corporate bodies associated with legislative assemblies in the UK. It also excludes any transaction relating to land below mean low water mark from the scope of the tax. This reflects the current scope of stamp duty land tax (SDLT): as the department's online guidance states, "the tax is limited to the acquisition of land situated in the UK, the boundary being the low water mark of every part of the UK which borders the sea. It does not extend to the bed of the territorial sea but piers, jetties and similar structures, with one end attached to the UK, do comprise part of the UK."⁹⁶

Strengthening Scotland's Future notes that it will be for the Scottish Government to decide which authority will be responsible for collecting both this tax, and the other devolved tax on landfill: "it may choose to set up a contract with a commercial operator or an existing executive agency such as Registers of Scotland, or, it may approach a UK Government department such as HMRC to undertake the work."⁹⁷ As a consequence the impact assessment of the Bill gives no estimates for the administrative or compliance costs of devolving these taxes "as by its very nature, the future of these taxes in Scotland will be entirely a matter for the Scottish Parliament."⁹⁸ That said, the Command Paper takes the view that "there is no reason in principle" why the compliance burden on those buying land should increase:

There will be a single set of rules for Scotland and one for the rest of the UK. Those engaged in the purchase of multiple properties in both Scotland and elsewhere in the UK in a single transaction may experience an increase in compliance burden as two tax returns may be needed. As the devolved tax will be levied on transactions of land in Scotland it will affect anyone choosing to purchase Scottish property, whether resident in Scotland or elsewhere. In practice, the burden will be on the conveyancing and legal professionals acting for the parties choosing to purchase Scottish property. Scottish land already needs to be registered separately from land in England, Wales and Northern Ireland so any additional compliance burden should be minimal.⁹⁹

Clause 28(2) exempts any transaction which is liable to SDLT from the devolved tax. In effect this ensures the tax will not be introduced until SDLT is withdrawn in Scotland.

Clause 29 makes provision for SDLT to cease to apply in Scotland for any transaction with an "effective date" on or after a given day. **Clause 29(4)** allows for the Treasury set this date by Order; this is expected to be in April 2015 though as *Strengthening Scotland's Future* notes, "this will depend on the necessary legislation to introduce the devolved taxes being passed by the Scottish Government."¹⁰⁰ The Notes to the Bill comment that the "effective date" of a transaction is normally the date on which a purchase contract is completed.¹⁰¹ As a transitional measure, **clause 29(5)** determines that any contract "entered into and substantially performed" before the Scotland Bill receives Royal Assent will remain liable to SDLT, subject to certain exceptions listed in **clause 29(6)**.

⁹⁵ Cm 7973, November 2010, p30.

⁹⁶ HM Revenue & Customs, *Stamp Duty Land Tax online Manual*, para SDLTM00040.

⁹⁷ Cm 7973, November 2010, p30.

⁹⁸ The Scotland Office, *Impact Assessment of the Scotland Bill*, 30 November 2010, p9.

⁹⁹ Cm 7973, November 2010, p31.

¹⁰⁰ Cm 7973, November 2010, p30.

¹⁰¹ Bill 115-EN, para 157.

A series of consequential amendments to the legislation underpinning the operation of SDLT, set out in Part 4 of the *Finance Act 2003*, are made in **Schedule 4**. In addition, **Schedule 4** places a requirement on the Scottish Government to disclose “relevant information” on Scottish land transactions that is in their possession or under their control to HMRC; as *Strengthening Scotland’s Future* notes, “the SDLT return collects data for the Valuation Office Agency that is used in other parts of the tax system and for wider HMRC compliance work. The Bill provides for the Scottish Government to provide this data in future in respect of Scottish land transactions, from information in their possession.”¹⁰²

Scottish tax on disposals to landfill

Clause 30 inserts one section to the Act to allow the Scottish Parliament to introduce a new devolved tax on landfill disposals in Scotland:

- **Section 80K** defines the scope of the tax, as covering the “disposal of material as waste made by way of landfill.”

Clause 30(2) provides that the tax may not be charged on any disposal made prior to a given date, which is to be the date at which UK-wide landfill tax is withdrawn from Scotland.

Strengthening Scotland’s Future notes that the new tax may require a separate tax return for waste disposed in Scottish landfill, depending on the design of the tax, though “in principle ... there should be little or no increase in the compliance burden for taxpayers operating a single site.” Operators with sites in Scotland and elsewhere in the UK may clearly see a rise in their costs in administering two taxes.¹⁰³

Clause 31 makes provision for landfill tax to cease to apply in Scotland, from a given date to be appointed by the Treasury. Consequential amendments to the legislation underpinning the operation of landfill tax, set out in the *Finance Act 1996*, are made in **Schedule 5**.

Borrowing

Clause 32 amends the borrowing powers of Scottish Ministers. It amends Sections 66 and 67 of the *Scotland Act 1998* to allow borrowing in a wider range of circumstances and sets out the conditions which apply to such borrowing.

This clause re-enacts the parts of the 1998 Act which allow borrowing to provide a working balance for the Scottish Consolidated Fund and to manage in-year volatility of receipts. It extends the power to allow borrowing across years to meet current expenditure where receipts are lower than their forecast value, subject to rules determined by the Treasury. The clause also allows borrowing to fund capital spending, subject to Treasury approval. New subsection 1(A), which is inserted by this clause, specifies that borrowing for capital spending must be in the form of a loan. The Explanatory Notes make it clear that this may be a loan from the National Loans Fund (through the Secretary of State) or from a commercial bank. It may not be in the form of gilts or bonds issued by Scottish Ministers.

The 1998 Act set a limit of £500 million on borrowing. **Clause 32** specifies that this limit should now apply to borrowing for current expenditure. This limit may be varied up or down by the Secretary of State by Order and with the consent of the Treasury. The limit may not be below its initial £500 million level.

Clause 32 sets the cap on borrowing for capital spending. The aggregate outstanding must not be more than £2.2 billion. This figure may be varied upwards or downwards by the

¹⁰² Cm 7973, November 2010, p31.

¹⁰³ Cm 7973, November 2010, p31.

Secretary of State by Order and with the Treasury's consent but cannot be below the initial £2.2 billion.

2.3 Issues

Financial implications for Scotland

One of the main points of dispute about the Bill is its effect on the Scottish Government's budget. The Scottish Government has argued that if the Scotland Bill's financial proposals had been in place since devolution started in 1999, Scotland's budget would have been around £8 billion lower than under the current arrangements. The £8 billion is a cumulative figure over the eleven years between 2000/01 and 2010/11 and is equivalent to 2.8% of Scotland's DEL budget over this period.¹⁰⁴ Speaking in a debate in the Scottish Parliament on 9 December 2010, First Minister Alex Salmond said:

The key question for the Scottish Parliament is how we can grow the Scottish economy. We can do that only through independence or having fiscal responsibility. If we as members of a national Parliament are concerned about ensuring that we preserve the welfare of the Scottish people, we cannot in good conscience accept a provision that would have cost us £8 billion over the past 10 years and introduced a deflationary bias. The challenge for the Scotland Bill Committee and the Parliament is to find a mechanism to grow us into a better future in Scotland.¹⁰⁵

The Scotland Office has described the Scottish Government's figures as "both partial and misleading."¹⁰⁶ It has emphasised the sensitivity of comparisons of this type to the initial reduction in the block grant which will be made when the Scottish Government starts to receive income tax revenue. The Scotland Office notes that the value of Scottish income tax receipts could have been equivalent to between 15% and 20% of the Scottish budget, depending on which year between 1999/00 and 2014/15 is taken. The Scotland Office has published its own calculations of the impact on Scotland's budget, based on the average ratio of Scottish income tax receipts to the Scottish budget. On this basis, there would be a cumulative reduction of around £700 million between 1999/00 and 2010/11 under the Bill's proposed arrangements. Taking the entire period to 2014/15, however, the Bill's arrangements increase Scotland's budget by around £400 million compared with the status quo.

A paper by Professor Andrew Hughes Hallett and Professor Drew Scot argues that between 2000 and 2008, UK public spending grew more rapidly than Scottish income, which determines tax revenue. As a result, the authors argue that the rate of Scottish income tax would need to increase each year, just to keep up with the rest of the UK:

Finally it is worth calculating what these arrangements would mean for revenue flows to the Scottish Parliament. If the new tax revenues are to fill the gap created by the reduction in the block grant, Scottish incomes (which determine her income tax revenues) must grow at least as fast as UK public spending (which is what determines the annual uplift to the block grant). This has not happened for a long time. Over the period 2000-2008, data on the growth of UK public spending and Scotland's GDP show that public spending growth in the UK has outstripped the growth in Scottish incomes by an average of 0.21% per year. This implies a gap that gets larger by an

¹⁰⁴ There is assumed to be no difference in funding in 1999/00. The £8 billion is in 2010/11 prices. Details of the calculation are set out in a document submitted to the Scotland Bill Committee of the Scottish Parliament, *Scottish Government - a note on the estimated impact of the Scotland Bill Income Tax Proposal on the Scottish DEL Budget from 1999/00 to 2010/11*.

¹⁰⁵ SP OR 9 December 2010, col 31363.

¹⁰⁶ Scotland Office, *A technical note on modelling the potential impact of the Scotland Bill income tax measures on the Scottish budget*.

additional £81m in revenue lost to the Scottish government each year, cumulating to £1.2bn lost after 5 years. Thus, if the Scottish government wants to restore lost funds and lost spending, it will be forced to raise income tax rates every year – by 0.21p in the pound, or by 1p every 5 years, just to keep pace with the rest of the UK. It is not hard to predict the effect of that on business conditions, on living standards and the ability of the Scottish economy to grow and create jobs. These proposals therefore come at a cost: those who depend on frontline public services are going to pay a very steep price for a little extra accountability.¹⁰⁷

These examples illustrate that comparisons of Scotland's budget under the Bill's proposals with the current arrangements are likely to be sensitive to the time period used. The status quo essentially links Scotland's budget to levels of public spending in England. The new system will partially replace this with revenues from taxation raised in Scotland. Hence, broadly speaking, the current arrangements are likely benefit Scotland when public spending in England is rising quickly relative to Scottish tax receipts. The proposed system is more likely to benefit Scotland when Scottish tax receipts are growing rapidly relative to public spending in England.

The table below shows that the trends in income tax and public spending can be very different, depending on the time period chosen. The table should be regarded as a rough guide to the trends rather than giving the precise figures which affect Scotland's budget. For example, the table shows total public spending rather than the departmental expenditure of the departments which drives the Barnett formula and the income tax figures are for the UK rather than Scotland. Despite these caveats, it is clear that public spending grew more quickly than income tax receipts in the earlier period. It is not surprising, therefore, that comparisons based on this period show the current arrangements tend to favour Scotland compared to the Bill's proposals. Looking forward, the position is reversed with income tax receipts forecast to grow more rapidly than public spending.

Changes in UK public spending and income tax receipts

% change, nominal terms

	1999/00 to 2009/10	2010/11 to 2015/16
Public spending	+94%	+8%
Income tax	+48%	+39%

Sources: HM Treasury Public finances databank Table B1, OBR Economic and fiscal outlook, November 2010, Table 4.12 and Supplementary Tables, Current receipts. HMRC Statistics, Table 2.8

Notes: Income tax figures for 1999/00 - 2009/10 are net receipts; forecasts are gross of tax credits

A note prepared by the Scottish Government makes a number of other criticisms of the proposed financial arrangements, including:

- they fail “to provide Scotland with any significant new economic levers.” In particular, a range of key taxes, including corporation tax, green taxes, fuel duty, North Sea revenues and excise duties are not devolved.
- Scotland receives a smaller proportion of income from the higher rates of income tax where, historically, there has been the most growth in receipts. As a result, Scotland's budget will be squeezed.

¹⁰⁷ Andrew Hughes Hallett and Drew Scott, *Scotland: A New Fiscal Settlement*, 3 June 2010.

- The proposed capital borrowing arrangements are more restrictive than those faced by local authorities and some other public bodies such as Transport for London.
- The current borrowing power does not mitigate cyclical fluctuations in revenues but only cases where forecast revenues are different to outturns.¹⁰⁸

The Scottish Government has also argued that the administrative costs of the new tax system should fall on the UK Government, rather than on the Scottish budget, as proposed.¹⁰⁹

Writing on the potential impact of these measures, BBC Scotland's political editor, Brian Taylor, observed that for supporters of the Bill the new powers represented an opportunity, whereas for its opponents they constituted a threat:

The opportunity/threat emerges when the calculation is founded upon actual tax revenues in Scotland. That might be, say, four or five years after 2015 implementation. Then Scotland receives what Scotland actually earns in income tax. Supporters say that would incentivise Holyrood and the Scottish Government to bolster income tax. Hence, the opportunity.

Detractors say there is a deflationary problem inherent in the system: partly because income tax revenues are currently depressed but, more fundamentally, because Scotland would gain a relatively limited proportion of the upper tax bands where, arguably, growth would be highest. Further, those detractors say that growth would be hard to sustain without being able to deploy the full range of economic and fiscal levers - including other taxes.¹¹⁰

Fluctuations in tax revenue and forecasting issues

Under the proposed arrangements, Scotland will become more dependent on tax revenue it raises itself. Tax revenue fluctuates with the economic cycle and so the new system will expose the Scottish budget to more risk. The Scottish Government's latest estimates of income tax revenue show that it increased by 8 or 9% a year in nominal terms between 2005/06 and 2007/08 but fell by 5% in 2008/09 as the financial crisis began to have an effect.¹¹¹ Under the new arrangements, fluctuation in tax revenue will have a more direct impact on Scotland's budget than under the current block grant system. Nevertheless, the block grant will continue to make up a substantial element of the Scottish budget which will provide a degree of stability.

The new system will also depend on forecasts of tax revenues. During the transition period, the income received by Scotland from the level of income tax it sets and the deduction from the block grant will both be based on a forecast, with no subsequent reconciliation to the actual tax received.¹¹² This means that making accurate forecasts will be important. Making such forecasts, even at a national level, is not straightforward, however. As the OBR noted in its November 2010 forecast, "public sector receipts are highly dependent on the path of the economy and so projections are subject to ... risks and uncertainties".¹¹³ The actual level of receipts can differ from the level forecast even at the beginning of the financial year. For example, the April 2009 Budget forecast income tax receipts (gross of tax credits) of £140.5

¹⁰⁸ Scottish Government, *Scotland Bill Financial Provisions*, November 2010.

¹⁰⁹ *Legislative consent memorandum from the Scottish Government*, LCM (S3)30.1, 1 December 2010, pp24-25. The UK Government's position is set out in the Bill's *Impact Assessment*, p8.

¹¹⁰ "Paying for the Bill", *Blether with Brian: BBC News online*, 30 November 2010.

¹¹¹ Scottish Government, *Government Expenditure & Revenue Scotland 2008-09*, June 2010, Table 4.2. Figures are for all income tax receipts and therefore include tax paid on savings and dividends.

¹¹² Cm 7973 November 2010 p25, pp34-35.

¹¹³ Office for Budget Responsibility, *Economic and fiscal outlook*, Cm 7979, November 2010, para 4.9.

billion.¹¹⁴ The latest estimate is that income tax yielded £144.9 billion – over 3% higher than forecast at the beginning of the financial year.¹¹⁵ The further ahead tax receipts are forecast, the greater scope for their eventual outturn to differ from the forecast value.

At the moment, there are no official forecasts of Scottish income tax revenues, although estimates of past receipts are published by the Scottish Government and HMRC. The OBR will thus be starting from scratch when it starts making forecasts of Scottish taxes in April 2012.

Do the tax powers go far enough?

Some commentators have argued that the proposed system does not go far enough and that more financial powers should be devolved to the Scottish Parliament. Not only would this increase the accountability of the Scottish Parliament, but it would give it a greater incentive to improve Scotland's economy as it would keep more of the tax revenues generated by economic growth. More fiscal powers would also give the Parliament further policy instruments to improve Scotland's economic performance. The Campaign for Fiscal Responsibility, which describes itself as an independent, non-party political coalition, argues for greater financial powers for the Scottish Parliament and describes the Calman proposals as "limited". Its website sets out its position:

A Scottish Parliament with far greater responsibility for raising the money it spends would lead to better government in Scotland. It would make politicians more accountable for the financial decisions they take while giving them both the incentive and the fiscal tools necessary to achieve improved public services and faster economic growth – vital in the current economic circumstances. Further, it would help to foster a healthy relationship between Westminster and Holyrood.

All of the main Scottish and UK parties agree that the Scottish Parliament should have greater financial powers. The debate is now about which powers should be devolved and when. Much has changed in the last year and the opportunity now exists to go further than the limited financial proposals outlined in the Calman Commission report.

Therefore, we are calling for the control of most current taxes to be devolved to the Scottish Parliament as soon as possible.¹¹⁶

In its response to *Strengthening Scotland's Future*, the think tank Reform Scotland also argued that the proposals for improving financial accountability did not go far enough:

The UK Government's Command Paper, based on the Calman Commission's report on Scottish devolution, recommends greater tax-raising powers for the Scottish Parliament. But they stop well short of allowing Holyrood to raise all the money it spends which, according to Reform Scotland, is a fundamental defect in the current devolution settlement.

'Although the Command Paper is a step in the right direction, we believe this was a golden opportunity to correct Holyrood's lack of financial accountability to the Scottish electorate,' said Reform Scotland chairman Ben Thomson. 'Unfortunately, it is an opportunity wasted. It is disappointing that in certain respects it does not even accept the Calman recommendations since it doesn't devolve Air Passenger Duty to the Scottish Parliament and does not fully devolve control over Stamp Duty. However, as this is a Command Paper we hope that it will lead to further debate on the issue and the UK Government will be prepared to extend the proposals following consultation.'

¹¹⁴ HM Treasury, *Budget 2009*, HC 307 April 2009 p231 (Table C6).

¹¹⁵ Office for Budget Responsibility, *Economic and fiscal outlook, Fiscal supplementary tables*, Table 1.1.

¹¹⁶ <http://cfr.co.uk/>.

[...]

Mr Thomson said that had the Command Paper recommended a greater degree of fiscal autonomy for Holyrood this would have provided a real incentive to introduce policies which encourage economic growth and deliver value for taxpayers' money. It would also have given the Scottish Government and Parliament the fiscal tools they need to increase growth. He said the current economic crisis only strengthened the case for the Scottish Parliament to be given more responsibility for its own financial affairs and it was, therefore, a pity that the Labour Government had not been bolder in its approach.

He added: 'Under the Calman recommendations and now this Command Paper, the Scottish Parliament will still be dependent on a block grant from Westminster for more than two-thirds of its budget. 'The biggest weakness of these proposals is that they do not deliver financial accountability. Real financial accountability requires that a government is responsible for raising all, or at least the vast majority, of the revenue that it requires to meet its spending commitments. 'If additional fiscal powers are to have a real impact on the governance of Scotland and on the performance of the Scottish economy, they must be of a scale that is great enough to address the fundamental defect of the current devolution settlement – its lack of financial accountability.'¹¹⁷

¹¹⁷ Reform Scotland Press Release, [New Holyrood Powers Welcome But Don't Go Far Enough, Says Reform Scotland](#), 25 November 2010.

3 Adjustments to devolved powers

The Bill makes a number of changes to the boundary of devolved responsibilities. It devolves various powers, some to the Scottish Parliament (legislative devolution), others to the Scottish Government (executive devolution), and it reserves some matters which are currently devolved.

3.1 Elections¹¹⁸

The *Scotland Act 1998* reserves to the UK government responsibility for elections to the House of Commons, the European Parliament and the Scottish Parliament. The Secretary of State for Scotland is therefore responsible for the conduct of UK Parliamentary, Scottish Parliamentary and European Parliamentary elections in Scotland, and for the franchise at all elections (including local government elections) in Scotland. Scottish Ministers are responsible for local government elections in Scotland and legislation relating to their conduct. 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. The Bill makes provision for the transfer of some, but not all, of the Secretary of State's powers relating to these elections.

Background

The 2007 elections in Scotland

The Commission on Boundary Differences and Voting Systems was established in 2004 to look into the consequences of having four different voting systems in Scotland, and different boundaries between Westminster and Holyrood. The *Local Governance (Scotland) Act 2004* had made provision for the introduction of the Single Transferable Vote system at local elections in Scotland, while the *Scottish Parliament (Constituencies) Act 2004* had removed the link between Westminster and Scottish Parliament constituencies.

This Commission, chaired by Sir John Arbuthnott, formerly Principal and Vice-Chancellor of the University of Strathclyde, published a report on 19 January 2006. The Commission recommended that the Scottish Parliament and local government elections should be held on different days. This would “reduce the complexity of voting, potentially reduce voter confusion and help keep the number of invalid votes to a minimum. It would also reduce administrative complexity in the planning, management and counting of elections, and enhance the transparency of the electoral process, especially allowing attention to be focused on local issues.”¹¹⁹

The Scottish Government disagreed with the recommendation of the Arbuthnott Commission that the local and Scottish Parliament elections should be ‘de-coupled’. The combined elections were held on 3 May 2007. The combined elections therefore used three different voting systems: First Past the Post and the Additional Member System for the Scottish Parliament elections, and the Single Transferable Vote for the local elections, the latter being used for the first time.

Electors in Scotland had two ballot papers on 3 May 2007, one for the Scottish Parliament which contained both the ballot for the Regional Members and for the Constituency Member and had to be marked with a ‘x’, and the ballot paper for the local government elections, which were being conducted under the STV system and on which candidates had to be

¹¹⁸ This Section contributed by Isobel White.

¹¹⁹ *Putting Citizens First: Boundaries, Voting and Representation in Scotland*, Commission on Boundary Differences and Voting Systems, 2006, p50. For further details see Library Standard Note [SN/PC/3918](#), *The Arbuthnott Commission and Scottish elections*, 21 May 2007.

ranked in numerical order. When the results were announced it was apparent that there had been a substantial number of spoilt ballot papers.

The then Secretary of State for Scotland, Douglas Alexander, made a statement on 8 May 2007 on the conduct of the elections:

A great deal of wholly legitimate public concern has been expressed about certain aspects of last Thursday's elections, and I entirely share that concern. It focuses mainly on three areas: the arrangements for the administration of postal ballots, the operation of e-counting machines, and the significant numbers of spoilt ballot papers on the night. When it became apparent in the early hours of Friday morning that difficulties were emerging, I contacted Professor Sir Neil McIntosh, the Scottish electoral commissioner. I expressed to him my concern that these issues be addressed as part of the statutory review of the Scottish elections that the commission is obliged to undertake, and as a matter of urgency.¹²⁰

The Gould report

The Electoral Commission commissioned an independent external review of key aspects of the 2007 elections in Scotland which was led by Ron Gould, former Assistant Chief Electoral Officer of Canada. The Commission had a statutory duty to report on the elections but decided that the full range of issues, including the involvement of the Commission in the arrangements for the election, should be examined by objective experts. These issues included the high number of rejected ballots; the electronic counting process; the arrangements for postal voting; the decision to combine the polls, and the decision to combine the two parliamentary votes on one ballot sheet.

The [Independent Review of the Scottish Parliamentary and local government elections 3 May 2007](#) (the Gould report) was published in October 2007. The review concluded that there should be a single "jurisdictional entity" with responsibility for elections in Scotland:

Our discussion on electoral legislation; roles and relationships; planning and timing; the combination of these elections; the design of ballot papers; the electronic count and other issues related to the implementation of these elections has often led to questions related to jurisdictional responsibility. As long as the responsibilities for the decisions which have an impact on the Scottish parliamentary and local government elections are divided between the Scotland Office and the Scottish Government, it cannot be guaranteed that these electoral processes will be conducted effectively, due to the fragmentation of the legislation and decision-making in this context. As a result, we would recommend that exploratory discussions take place with a view toward assigning responsibility for both elections to one jurisdictional entity. In our view, the Scottish Government would be the logical institution.¹²¹

The Calman Commission report

The Calman Commission considered whether the legislative responsibility for the Scottish Parliament's electoral system should be devolved to the Scottish Parliament itself and whether the administration of elections should be devolved. The Commission concluded that it was not persuaded, on the evidence before it, that legislative responsibility for the electoral system should be devolved.¹²² However, it did recommend that Scottish ministers should be made responsible for the administration of Scottish Parliament elections:

¹²⁰ [HC Deb 8 May 2007 c22](#).

¹²¹ *Independent Review of the Scottish Parliamentary and local government elections 3 May 2007*, p111.

¹²² *Serving Scotland Better: Scotland and the United Kingdom in the 21st century*, 5.17.

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

The Commission also endorsed another recommendation of the Arbuthnott Commission (see above) that there should be a further review of the electoral system after the 2011 Scottish Parliament elections.

The Bill

The Coalition Government agreed with the Calman report's general approach to the devolution of electoral administration, as noted in *Strengthening Scotland's Future*:

Accordingly, the Scotland Bill includes a clause to transfer to Scottish Ministers certain of the executive functions which are currently the responsibility of the Secretary of State for Scotland relating to the conduct of elections (under section 12(1)(c) of the Scotland Act 1998). These functions are described in a non-exhaustive list in section 12(2).¹²³

However, the Government said that some elements of the electoral administration powers should remain vested in the Secretary of State for Scotland, "in particular the franchise and the combining of Scottish Parliament polls with polls at other reserved elections." The Scottish Government has welcomed the provisions of the Bill as far as they go, but argues for full legislative devolution in respect of Scottish Parliament elections.¹²⁴ It also has concerns over the division of responsibilities between UK and Scottish Ministers.

The Explanatory Notes give further details, but briefly the provisions of Clauses 1 to 3 are as follows.

Clause 1 of the Bill makes a series of changes to Section 12 of the *Scotland Act 1998* to give Scottish Ministers the powers to make provisions on the conduct of Scottish Parliament elections, the questioning of such elections and the consequences of irregularities. This requires a close reading of the *Scotland Act* in order to understand the changes in detail. Scottish Ministers must, however, consult the Secretary of State for Scotland before exercising these powers. Clause 1 also inserts a new Section 12A into the 1998 Act which gives the Secretary of State powers to make provisions about the registration of electors in Scotland. This is presumably to make arrangements for the introduction of individual registration.¹²⁵

Clause 2 amends Section 15 of the *Representation of the People Act 1985* which relates to the combination of polls. Where Scottish Parliamentary general elections are held on the same day as UK general elections or European Parliament elections, they are to be combined.

Clause 3 requires regulations made by the Secretary of State under the new Section 12A (see above) to be laid in draft and approved by both Houses of the UK Parliament. The Scottish Ministers and the Secretary of State must consult the Electoral Commission before they exercise their powers to make subordinate legislation under the provisions of Section 12 and 12A of the 1998 Act.

The *Political Parties, Elections and Referendums Act 2000* had made provision for the transfer of the function of reviewing boundaries from the Boundary Commissions to the

¹²³ *Strengthening Scotland's future*, Cm 7973, November 2010.

¹²⁴ Scottish Government, *Legislative Consent Memorandum: Scotland Bill*, LCM (S3) 30.1, 1 December 2010, Annex A, pp5-6.

¹²⁵ For further details about individual registration see section 6.6 of [Library Research Paper 10/55](#), *The Parliamentary Voting System and Constituencies Bill*.

Electoral Commission. This transfer of powers did not and will not now take place.¹²⁶ **Clause 9** governs **Schedule 1** of the Bill, which amends Schedule 1 to the *Scotland Act 1998* to reflect that the responsibility for reviewing the boundaries will remain with the Boundary Commission for Scotland.¹²⁷ This provision is one of those not deriving from the Calman Commission.

3.2 Air weapons¹²⁸

Background

Firearms law is currently a reserved matter. However, arguing that Scotland has a significantly bigger problem with airgun-inflicted injury and death than the rest of Great Britain, the Scottish Parliament has called for the right to make its own laws on air weapons. The current law on possession and use of air guns in Great Britain is summarised in a House of Commons Library Standard Note.¹²⁹

In 2005 two-year-old Andrew Morton was killed when he was hit in the head by an airgun pellet in Easterhouse, Glasgow. His parents subsequently launched a campaign to ban airguns in Scotland which received all-party support. A press report expanded on the background to this story:

Scottish government figures show that the number of airgun offences have halved in the past 12 years. In the year 1995-96, there were more than 1,150 offences involving airguns, while by 2007-08, that figure had dropped to 567. Injuries to people from airguns also decreased, from 355 in 1995 to 92 in 2007-08. Since 2001-02, however, six people have been killed by airguns, where previously there were none. (...) Pest control and conservation experts argue that airguns are essential for dispatching vermin within contained areas such as gardens and farms, as well as trapped mink.¹³⁰

In June 2008 Scottish Justice Secretary Kenny MacAskill wrote to the then Home Secretary Jacqui Smith seeking permission to run an airgun licensing pilot scheme in Scotland which would make it illegal to possess an airgun without a permit. According to a press report, the Home Office “gave the letter and proposal only a cautious response and hinted that recent changes in the law should be allowed to bed in before any more amendments”.¹³¹ The “changes in the law” is a reference to provisions in the *Violent Crime Reduction Act 2006*, which, according to the Home Office, were developed in consultation with Scottish ministers.

The Calman Commission showed itself mindful of the practical difficulties that could arise from having different firearms laws in different parts of Great Britain:

5.154 The Commission has also taken account of the concerns expressed by a number of sporting associations (and the UK Government) that a different regime for firearms control in Scotland could inhibit the free movement of legally held weapons used for sporting purposes (both in terms of hunting and target shooting). At present, authorities under the Firearms Acts are valid across Great Britain (as are certificates issued in Northern Ireland, although not vice versa) and whilst there are understandable concerns that different regimes could introduce an additional layer of complexity and greater bureaucracy, it is not inconceivable that some sort of mutual-

¹²⁶ See Section 1 of Library Standard Note [SN/PC/3222](#), *Parliamentary constituency boundaries: the fifth periodical review*, for further details.

¹²⁷ The Scotland Act 1998 was amended by the *Scottish Parliament (Constituencies) Act 2004* to provide for a planned transfer of these responsibilities.

¹²⁸ This section contributed by Philip Ward.

¹²⁹ *Air guns*, Library standard note [SN/HA/3641](#), 22 December 2010. Northern Ireland has its own firearms laws.

¹³⁰ “Whitehall agrees to hand Holyrood power over airguns,” *Times*, 23 November 2009.

¹³¹ “SNP seeks gun pilot scheme north of border”, *Scotland on Sunday*, 8 June 2008, p4.

recognition arrangement could be reached that would allow firearms certificates issued in one jurisdiction to be accepted in another (providing safeguards were felt to be adequate), especially given the economic importance of shooting in Scotland.

5.155 The UK Government has argued that any ban on a firearm which it is currently legal to possess would need to be underpinned by a compensation scheme. It argues that where such firearms are currently unregulated (e.g. air guns), it would be difficult to prevent them being legally and cheaply acquired in one jurisdiction and passed off for compensation in another which had introduced a ban. This is not an argument against devolution itself as much as it is a caution to a devolved administration making difficult policy decisions it believes to be in the best interests of its citizens. Whilst there would undoubtedly be practical considerations and potential difficulties in any divergence of approach to firearms control they do not preclude the development of robust mechanisms for managing cross-border problems, information sharing and good communications.¹³²

That noted, the Commission accepted that “devolving competence for firearms would be in line with the Scottish Parliament’s wider responsibilities for the criminal justice system” and recommended that “the regulation of airguns should be devolved to the Scottish Parliament”. It concluded as follows:

5.157 The Commission is persuaded (...) that there may be merit in devolving legislative competence for air weapons about which the Scottish Government has made particular representations to the UK Home Office. It appears to the Commission that if there is appetite to deal with air weapons differently in Scotland than south of the border then the advantages of enabling the Scottish Parliament to do so outweigh the disadvantages. The Commission notes that air weapons have been clearly defined in legislation and recommends that powers over weapons of this kind are devolved to the Scottish Parliament. This could be achieved through an Order under the Scotland Act.

The concerns raised by the Home Office are also set out in the Department’s written submission to the Commission, which is available on the Commission’s website.¹³³

A body representing airgun users objected to the proposal to devolve powers over their regulation:

The British Association for Shooting and Conservation (BASC) will oppose any move – as suggested by the Calman Commission – to devolve power over airgun law to Scotland.

The current government in Westminster has resisted all calls to devolve firearms legislation. BASC has been involved in the discussions and is currently meeting Conservative Shadow Ministers to confirm the Party’s policy in the event of a change of government. BASC has consistently opposed devolution of firearms law and maintains that different legal regimes across the UK would create confusion, compromise law enforcement, do nothing for public safety and disadvantage the law abiding shooting community.

BASC director of firearms, Bill Harriman, said: “The call for devolution of firearms control powers is an overtly political initiative that is not evidentially based. Scottish statistics show a low level of firearms incidents, which are in decline. Education and

¹³² *Serving Scotland better: Scotland in the United Kingdom in the 21st century: final report*, June 2009 (see pp187-8 on firearms).

¹³³ HMG Scottish Office, *Government evidence to the Commission on Scottish Devolution*, November 2008, pp52-3.

enforcement of existing legislation is undoubtedly the best way to address any problems.”

The vast majority of people who use airguns do so lawfully and there are already sufficient powers available to deal with the small minority who break the law. BASC believes that a new airgun law that only applies in Scotland will be almost impossible to enforce, and BASC will strongly argue against it.¹³⁴

Following what the press described as “intensive discussions” between the then Home Secretary, Alan Johnson, and Scottish Secretary, Jim Murphy, the UK Government seemingly had a change of mind.¹³⁵ In a statement to the House on the Government’s response to the Calman Report, Mr Murphy announced the devolution of powers to regulate airguns:

On the power to regulate air weapons, the Government have kept controls under close scrutiny and there are encouraging signs that recent changes are having an effect. However, the Government agree in principle to devolve the regulation of air weapons to the Scottish Parliament.¹³⁶

Following the change of Government in 2010, the undertaking given by the previous Government in respect of airguns is to be honoured.

The Bill

Firearms are currently a reserved matter. **Clause 11** creates a specific exception to the reservation in the case of certain air weapons, by amending Section B4 of Part 2 of Schedule 5 to the *Scotland Act 1998*. The scope of the exception is limited to the category of “air weapons” referred to in Section 1(3)(b) of the *Firearms Act 1968*.

The implication is that the proposed exception would apply to “air rifles, air guns or air pistols” provided they do not fall within Section 5(1) of the *Firearms Act 1968*, and are not of a type declared to be specially dangerous by rules made by the Secretary of State under Section 53 of the 1968 Act.

Section 5(1) of the 1968 Act is a lengthy list of prohibited weapons which has been added to over the years in response to emerging threats. It includes “any air rifle, air gun or air pistol which uses, or is designed or adapted for use with, a self-contained gas cartridge system”. Section 53 of the 1968 Act gives the Secretary of State power to make rules prescribing the “form of certificates” under the Act and “prescribing any other thing which under this Act is to be prescribed”. The Secretary of State may designate “specially dangerous” air weapons and prohibit them, under section 1(4)(c) of the *Firearms (Amendment) Act 1988*. This power also remains reserved.

In response to Clause 11, the Scottish Government commented on the Secretary of State’s continuing reserved power in respect of “specially dangerous” air weapons:

Exercise of this power would effectively adjust the boundary of reserved and devolved competence. Normally such adjustments are made under the Scotland Act, or by primary legislation subject to the Sewel Convention. In this case, the power would lie with UK Government Ministers and would not be subject to any procedure in the

¹³⁴ BASC press notice, [BASC opposes devolution of airgun law](#), 18 June 2009.

¹³⁵ “Whitehall agrees to hand Holyrood power over airguns,” *Times*, 23 November 2009.

¹³⁶ [HC Deb 25 November 2009, c548](#).

Parliament. The Scottish Government has therefore proposed that the relevant power should only be exercised with the consent of the Scottish Parliament.¹³⁷

While supportive of the provision to devolve some aspects of air weapon regulation, the Scottish Government has reiterated its belief that “firearms legislation as a whole needs to be reviewed” and warned that it “will continue to press for the responsibility for firearms legislation to be passed to the Scottish Parliament in its entirety”.¹³⁸ For its part, the UK Government confirms that “there will remain a single regime to cover all other firearms on a consistent basis.”¹³⁹

The Scottish Government has given details of how it will proceed once it has its new power:

When powers on air weapons are passed to Scotland, we will establish a Scottish Firearms Consultative Panel involving all key stakeholders. One of its first tasks will be to develop and consider the merits of a pilot licensing scheme for air weapons. This would enable us to test the practicalities of air weapon licensing. It would also test whether or not air weapon licensing can operate effectively without wider reform of the firearms legislation. Any pilot would take place in one or more parts of Scotland.¹⁴⁰

3.3 Insolvency¹⁴¹

Clause 12 deals with corporate insolvency. In general this is already a reserved matter, but some aspects of the winding up process have been devolved hitherto, largely for legal reasons.¹⁴² Specifically, the *Scotland Act 1998* reserves, in relation to business associations:

- (a) The modes of, and grounds for and the general legal effect of winding up, and the persons who may initiate winding up;
- (b) liability to contribute to assets on winding up;
- (c) powers of courts in relation to proceedings for winding up, other than the power to assist proceedings;
- (d) arrangements with creditors; and,
- (e) procedures giving protection from creditors.¹⁴³

But the Act devolves:

- (a) the process of winding up, including the person having responsibility for the conduct of a winding up or any part of it, and his conduct of it or of that part;
- (b) the effect of winding up on diligence; and,
- (c) avoidance and adjustment of prior transactions on winding up” and “floating charges and receivers, except in relation to preferential debts, regulation of insolvency practitioners and co-operation of insolvency courts.

¹³⁷ Scottish Government, *Legislative Consent Memorandum: Scotland Bill*, LCM (S3) 30.1, 1 December 2010, Annex A, p9.

¹³⁸ LCM (S3) 30.1, 1 December 2010, Annex A, p9.

¹³⁹ HM Government, *Strengthening Scotland's future*, Cm 7973, p53.

¹⁴⁰ Scottish Government website, *Weapons – firearms – what the Scottish Government is doing* [downloaded 14 January 2010].

¹⁴¹ This section contributed by Lorraine Conway.

¹⁴² England and Scotland have different legal systems.

¹⁴³ Schedule 5, Part 2, Section C2.

In effect, the Act currently divides responsibility for the winding up of a company between the two Parliaments. The legal position is best described in the final report of the Calman Commission:

the ways in which winding up of a company can happen, and the grounds for doing so, are reserved. This prevents there being different circumstances under which winding up can happen in different parts of the UK. The reservation of the general legal effect of winding up allows for a consistent legislative response to court rulings affecting insolvency. The “process of winding up” – which is devolved – refers to procedural issues arising in practice (for example, who would need to be served with information or documents about the case, and by what timescales, by various parties to proceedings).¹⁴⁴

Insolvency practitioners have questioned the necessity of duplicating work in Scotland and the potential this allows for divergence in policy and practice. Given that the *Scotland Act 1998* reserved company law as a whole to the UK Parliament, it is argued that the current division of responsibility for liquidation between the UK and Scottish Parliament should be ended. In its final report, the Calman Commission concluded that devolution had produced an unsatisfactory state of affairs relating to corporate insolvency in that:

- there is an absence of clarity as to where responsibility lies for drawing up the rules to be followed by insolvency practitioners dealing with corporate insolvencies;
- there are unnecessary and confusing divergences between the insolvency rules applying in England and Scotland; and
- there have been unnecessary and damaging delays in introducing new rules in Scotland.¹⁴⁵

The Commission recommended that the UK Insolvency Service, with appropriate input from the relevant department(s) of the Scottish Government, should be made responsible for laying down the rules to be applied by insolvency practitioners on both sides of the border. This should be achieved by UK legislation.¹⁴⁶

Responding to this recommendation, the Scottish Government disagreed with the Commission's conclusion that devolution has produced an unsatisfactory state of affairs relating to corporate insolvency. It did not agree that delays in implementing changes to Scotland's Insolvency Rules had caused any damage and reiterated that the Scottish Government was committed to the implementation of modern insolvency legislation for individuals and businesses in Scotland:

The division of responsibility between devolved and reserved areas is clear, although not always correctly understood in some of the evidence presented to the Commission. For example, ICAS told the Commission that primary legislation is reserved and secondary is devolved, which is not correct. There are differences between Scottish and English and Welsh rules. This is because the underlying legal framework is different. It may be that creditors do not always appreciate that the law in Scotland is different.

We do not agree that the delays in implementing Enterprise Act related changes to Scottish Rules have caused any damage. These amendments, which were introduced

¹⁴⁴ Commission on Scottish Devolution, *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century*, 15 June 2009.

¹⁴⁵ *Serving Scotland Better*, June 2009, para 5.275.

¹⁴⁶ Recommendation 5.23.

in December 2008, are of a technical nature and their delay did not have any serious impact on corporate insolvency practice in Scotland. The Scottish Government was right to prioritise the modernisation of personal bankruptcy. The Scottish Government has a programme of reform for corporate insolvency. We recently introduced further legislation on limited liability partnerships and intend to improve the transparency of Scottish rules by disentangling personal and corporate processes.¹⁴⁷

In its Legislative Consent Memorandum, the Scottish Government reacted to the relevant provisions in the Bill by reiterating its opposition in principle to using reservation as a solution to perceived problems arising from divided responsibilities. It also stated its belief that “the arguments for reserving this specific competence are weak.”¹⁴⁸

Clause 12 of the Bill reserves to the UK Parliament sole responsibility for all aspects of the law covering the winding up of companies that take place in Scotland. The list of reserved matters in Part 2 of Schedule 5 of the *Scotland Act 1998* would be amended to include formerly devolved matters connected to winding up, and the exceptions (i.e. things that are not reserved) would be modified in the reverse way, to remove those matters. Schedule 2 to the Bill would make amendments consequential on these changes.

It should be noted that no change is being made to the responsibility for administrations and company voluntary arrangements; these insolvency procedures remain reserved to the UK Parliament. Similarly, personal insolvency (ie, bankruptcy, but known as ‘sequestration’ in Scotland) and receivership procedures remain fully devolved to the Scottish Parliament.¹⁴⁹

3.4 Regulation of health professions¹⁵⁰

Clause 13 would amend the *Scotland Act 1998* to return responsibility for regulating all health professions in Scotland to the UK Parliament.

The 1998 Act reserves the regulation of the health professions that had been regulated by previous enactments, including doctors, dentists, opticians, pharmacists, nurses, midwives, and veterinary surgeons amongst others. However, where statutory regulation of health professions has been introduced subsequent to the 1998 Act this has been devolved to the Scottish Parliament. This is because the reservation in the 1998 Act was based on a list of enactments regulating relevant professions; those professions for which the regulatory enactment was not on the list fell to the Scottish Parliament by default. According to the UK Department of Health this means that currently the regulation of operating department practitioners, dental nurses, dental technicians, clinical dental technicians and orthodontic therapists is devolved.¹⁵¹

The Calman Commission concluded that there should be a consistent approach to the regulation of health professions across the UK. This was to provide clarity and assurance of common standards for patients, and to ensure the recognition of training and the mobility of professionals. The Commission therefore recommended that regulation of all health professions, not just those specified by the 1998 Act, should be reserved to the UK Parliament.

¹⁴⁷ [The Scottish Government Response to the Commission on Scottish Devolution](#), 9 November 2009.

¹⁴⁸ Scottish Government, *Legislative Consent Memorandum: Scotland Bill*, LCM (S3) 30.1, 1 December 2010, Annex A, p10.

¹⁴⁹ Sequestration has always been subject to a separate legal framework from England and Wales (as the *Scotland Act* recognises in the exceptions made in Schedule 5).

¹⁵⁰ This section contributed by Tom Powell.

¹⁵¹ Commission on Scottish Devolution, *Serving Scotland Better: Scotland and the United Kingdom in the 21st century*, June 2009, para 5.144.

To give effect to the Commission's recommendation, clause 13 of the Bill amends Section G2 of Part 2 of Schedule 5 to the 1998 Act. In sub-clause 13(2) it amends the definition of "The health professions" in Section G2 to add to the reservation the regulation of any other profession concerned (wholly or partly) with the physical or mental health of individuals, except any profession regulated by the *Regulation of Care (Scotland) Act 2001* (social workers). This provision would have the effect of reserving back to the UK Parliament the regulation of those health professions that are currently within the legislative competence of the Scottish Parliament, including any health professions which may be brought into regulation in the future.

The Scottish Government has reacted to this clause by repeating its objection in principle to the use of reservation as a way of tackling the issues that arise from divided responsibilities. It prefers inter-governmental working as an alternative.¹⁵² It also argues that this particular reservation is anomalous since health is largely devolved, the health service in Scotland has developed separately from the rest of the UK, and Scottish Ministers are responsible to the Scottish Parliament for the design and delivery of health services.

3.5 Antarctica¹⁵³

The *Scotland Act 1998* does not reserve activities in Antarctica. This means that any regulation of activities by the Secretary of State under the *Antarctic Act 1994*, including permits to allow expeditions, will not be valid in respect of Scotland. The Secretary of State has not had the power to issue permits, for instance to Scottish institutions, nor indeed to undertake any other activities concerning Antarctica and Scotland, since Section 53 of the 1998 Act transferred such executive actions to the Scottish Ministers.

Clause 14 addresses this situation by inserting the regulation of activities in Antarctica into the list of reservations in Part 2 of Schedule 5 of the 1998 Act. It has retrospective effect, being regarded as having been included in Schedule 5 all along. This is presumably to remove any doubt as to the legitimacy of activities already regulated.

This clause did not derive from the Calman Commission's recommendations.

3.6 Misuse of drugs¹⁵⁴

Under provisions of the *Misuse of Drugs Act 1971*, doctors are prohibited from prescribing certain controlled drugs in the treatment of drug addiction unless they have a licence issued by the Secretary of State. The *Misuse of Drugs (Supply to Addicts) Regulations 1997*, as amended, specifies these drugs as cocaine, diamorphine (heroin), the synthetic opioid dipipanone, and related compounds.

Clause 19 of the present Bill amends the *Misuse of Drugs Act 1971* to permit Scottish Ministers to issue, modify or revoke such licences for doctors acting in Scotland, and to exercise related enforcement powers, as recommended by the Calman Commission.

The Bill achieves this change by requiring that these licences apply only to a doctor acting at a specified address. Where this address is in Scotland, Scottish Ministers are given authority. This will require amendment of the *Misuse of Drugs (Supply to Addicts) Regulations 1997*, which remains reserved to the Secretary of State.

¹⁵² Scottish Government, *Legislative Consent Memorandum: Scotland Bill*, LCM (S3) 30.1, 1 December 2010, Annex A, pp11-12.

¹⁵³ This section is by Paul Bowers as a constitutional matter, but questions about Antarctica in general should be addressed to the subject specialist, Elena Ares.

¹⁵⁴ This section contributed by Gavin Colthart.

There have been calls to implement more formalised heroin prescribing/administration schemes throughout the UK for a small subset of problem users. While there are no signs that this is likely at present, the drugs problem in Scotland is particularly entrenched, and there is special concern there for a more formalised approach.

3.7 Road traffic¹⁵⁵

Clause 20 of the Bill would enable Scottish Ministers to set a different blood alcohol limit to apply for drink driving offences in Scotland. This could in theory mean that in future there would be a different 'drink drive limit' in Scotland than in England and Wales. There has long been a debate about the merits or otherwise of reducing the drink drive limit. Full details are available in [House of Commons Library Standard Note 788, *Driving: alcohol*](#).

Clauses 21 and **22** of the Bill would enable Scottish Ministers to set separate speed limits for roads in Scotland and to make Regulations establishing different speed limit signs to indicate those limits. In theory, this could mean that Scotland could have a higher or lower national speed limit than England and Wales, and the signs to indicate that speed limit would be different to those elsewhere in the UK. Further information on the setting of speed limits can be found in [House of Commons Library Standard Note 468, *Roads: speed limits*](#).

Both of these changes regarding road traffic law were recommended by the Calman Commission.

¹⁵⁵ This section contributed by Louise Butcher.

4 Changes relating to Scottish Parliament and Scottish Government

4.1 Scottish Parliament

Two clauses of the *Scotland Bill* make changes to certain details in the operation of the Scottish Parliament.

Clause 4 is primarily concerned with allowing the election of additional deputies to the Presiding Officer, who could operate for a limited period in the event of illness or some other unavailability. Clause 4(3) would allow the election of one or more deputies at any time, while clause 4(4) would allow these to hold office for a shorter period than those deputies who are elected for the whole parliamentary term under Section 19(2) of the *Scotland Act 1998*. Clause 4(6) would require that the Standing Orders of the Scottish Parliament prohibit a situation in which the people active in the roles of Presiding Officer and deputies (ie, including temporary deputies) all represent the same party.

This clause also relaxes the time for electing the Presiding Officer and deputies from the first meeting of the Scottish Parliament after an election, to a period of 14 days from the election and before any business other than swearing in. This is in reaction to the difficulties that were caused after the 2007 election, when the close result made parties reluctant to lose a member to the role of Presiding Officer, who does not vote.¹⁵⁶

Clause 5 changes the number of Members of the Scottish Parliament (MSPs), aside from the Presiding Officer, on the Scottish Parliamentary Corporate Body from four to “at least four.” This greater flexibility is to provide for any future emergence of additional parties in Scotland, so that each could be represented on the Corporate Body. It follows a recommendation of the Standards, Procedures and Public Appointments Committee (SPPA) of the Scottish Parliament, which followed a recommendation of the Calman Commission to conduct a review of provisions in the *Scotland Act* that constrain the procedures or working arrangements of the Scottish Parliament.¹⁵⁷

4.2 Legislation

Clause 6 extends to backbench MSPs the same requirement that applies to Scottish Ministers to make a statement when they introduce a bill, that they believe its provisions would be within the legislative competence of the Scottish Parliament.

Clause 7 allows for the referral of parts of Scottish Parliament bills to the Supreme Court. At present, the *Scotland Act 1998* allows the UK and Scottish law officers to refer a whole bill to the Supreme Court, to decide whether it falls within the legislative competence of the Scottish Parliament. The referral may relate to one or more provisions, but the referral affects the whole Bill, which cannot be submitted for Royal Assent until the Supreme Court has completed its deliberations.¹⁵⁸ The changes made by Clause 7 would create a distinction between a “general reference,” where the whole bill is of concern, and a “limited reference,” where some provisions are not concerned. In the case of a limited reference to the Supreme Court, Royal Assent may still be given to the bill, but those provisions which have been referred may not come into effect until the reference has been decided. If the Supreme Court decides that they do fall within the Scottish Parliament’s competence, then the provisions will come into force by order of the Scottish Ministers.

This clause does not derive from a recommendation of the Calman Commission. The Scottish Government has concerns over it, arguing that referral of parts of a bill may make

¹⁵⁶ *Strengthening Scotland’s future*, Cm 7973, November 2010, p48.

¹⁵⁷ Cm 7973, November 2010, p49.

¹⁵⁸ *Scotland Act 1998*, Sections 32 to 34.

other parts unworkable, and may lead to uncertainty over their legal effect.¹⁵⁹ It is also concerned that partial referral may be used more often than referral of full bills as at present.

Clause 10 concerns those cases where the competence of the Scottish Parliament is modified to include new matters for a limited period of time. The Calman Commission recommended that a mechanism should be available to allow the Scottish Parliament to legislate on reserved matters for a limited period. A transfer of competence from the UK to Scotland can be made by Order in Council under Section 30 of the *Scotland Act 1998*. An example of a transfer occurred in 2009 in the aftermath of the *Somerville* case (see below). It was recognised that this was intended to be temporary, but it could not be specified as such in law; indeed the present Bill is being used to reverse that transfer.

Section 30 would be amended by Clause 10 to make it explicit that transfers of competence may be for a limited period, and to ensure that any provision passed during that period will continue to have effect after the competence has ended (after the ‘sunset’ of the Order).

4.3 Members’ interests¹⁶⁰

Section 39 of the *Scotland Act 1998* provided for a register of interests for MSPs. It also made failures to register or declare certain interests and breaches of the paid advocacy rule criminal offences. The Bill was enacted in the aftermath of the concern over ‘sleaze’ in British politics, where there were major accusations at Westminster against Neil Hamilton and others for failures to register which were investigated by the Commons rather than under the criminal law. This led to concerns about the effects of parliamentary privilege, and the then Leader of the House, Ann Taylor, established a Joint Committee on Parliamentary Privilege. This reported in 1999.¹⁶¹ The devolved institutions established in Scotland, Wales and Northern Ireland were not accorded parliamentary privilege, but were instead given statutory powers to regulate their affairs and protect free speech.¹⁶²

Subsequently, the Scottish Parliament passed legislation to regulate registration and investigation of allegations. It created the statutory office of Scottish Parliament Standards Commissioner¹⁶³ and established a Standards Committee which drafted a [Code of Conduct](#). In the current Scottish Parliament there have been some modifications of the standards regime. In May 2009 the [Review of Scottish Parliamentary Corporate Body Supported Bodies Committee](#) proposed the creation of a new Ethical Standards Commission, from the merger of the Office of the Standards Commissioner and the Office of the Chief Investigating Officer to the Standards Commission for Scotland, along with the Office for the Commissioner for Public Appointments. Provision for these changes was made by the [Scottish Parliamentary Commissions and Commissioners etc. Act 2010](#), and this new arrangement will come into effect on 1 April 2011.

In the previous Scottish Parliament legislation was enacted on the registration of interests, and there were difficulties in dealing with the inflexibilities of Section 39 of the 1998 Act.¹⁶⁴ In particular the Parliament was prevented from providing defences to certain offences in appropriate circumstances, for example, when an MSP had a reasonable excuse for failing to register an interest within the specified time limit. As a result minor or excusable breaches were subject to the same criminal sanctions as deliberate major breaches.

¹⁵⁹ Scottish Government, *Legislative Consent Memorandum: Scotland Bill*, LCM (S3) 30.1, 1 December 2010, p7

¹⁶⁰ This section contributed by Oonagh Gay.

¹⁶¹ Parliamentary Privilege Joint Select Committee, *Parliamentary Privilege*, HC 214 1998-99, 30 March 1999.

¹⁶² *The Regulation of Parliamentary Standards – A Comparative Perspective*, Annex to the Eighth Report from the Committee on Standards in Public Life, *Standards of Conduct in the House of Commons*, Cm 5663, 2002.

¹⁶³ *Scottish Parliamentary Standards Commissioner Act 2002*.

¹⁶⁴ [Interests of Members of the Scottish Parliament Act 2006](#).

The [Calman Commission](#) concluded that there was “a case for some amendment of section 39 of the Act to allow for additional discretion to be exercised in how the key principles of probity that it aims to protect are translated into law.”¹⁶⁵ The UK [Government agreed](#) that the Scottish Parliament should have the flexibility to set its own regime for Members’ interests, but noted that full implementation would require a specific Act of the Scottish Parliament and until this was enacted, the current provisions would remain in force.¹⁶⁶

Clause 8 would remove subsections (5) to (7) of Section 39 of the 1998 Act, which relate to offences and penalties. It would substitute provisions allowing for exceptions to be stipulated in any Members’ interests rules, for sanctions to include not only, as at present, exclusion from proceedings of the Scottish Parliament or a fine, but also such other sanctions as the Scottish Parliament saw fit, and for the rules to include circumstances in which sanctions should not be imposed.

4.4 Scottish Ministers

A number of relatively small changes are made to the powers of Scottish Ministers.

Clause 15 renames the Scottish Executive as the Scottish Government. This brings formal usage into line with general usage. This clause does not stem from the Calman Commission.

Clause 16 is technical; it replaces an existing amendment to the *Scotland Act 1998* with another, which is almost identical, for reasons of constitutional propriety. The 1998 Act as passed did not impose a time limit on human rights cases against Scottish Ministers taken under that Act. This was upheld in a House of Lords judgement in the *Somerville* case,¹⁶⁷ relating to “slopping out” in Scottish prisons. The lack of a time limit was in contrast to the provisions of the *Human Rights Act 1998*, which created a 12 month limit, and it allowed claimants a second, more permissive route than applied in the rest of the UK. Following the *Somerville* case, an Order was made under Section 30 of the *Scotland Act 1998* to allow the Scottish Parliament competence to amend that same Act so as to impose a time limit.¹⁶⁸ However, it was recognised at the time that this was a temporary solution, and that significant amendments to the 1998 Act should be made by primary legislation in the UK Parliament. Clause 16 makes that amendment: it introduces a one year time limit in all human rights cases brought under the Act, with the exception of those brought by the Law Officers. This is another clause that does not derive from the Calman Commission.

Clause 17 requires a Minister of the Crown to obtain the agreement of the Scottish Ministers before recommending a person for appointment to the Scottish post on the BBC Trust. The Calman Commission had recommended that this power should be devolved in full, a position supported by the Scottish Government.¹⁶⁹ The UK Government argues that consultation is more appropriate, since “the appointment is primarily that of a member of a UK body, the BBC Trust, and broadcasting remains a reserved matter.”¹⁷⁰

Clause 18 concerns the Crown Estate. It creates a specific Scottish Crown Estate Commissioner, moving on from the present arrangement whereby there is an understanding

¹⁶⁵ *Serving Scotland Better*, 15 June 2009, para 6.111.

¹⁶⁶ Cm 7973, November 2010, p48.

¹⁶⁷ *Somerville (AP) (Original Appellant and Cross-respondent) v. Scottish Ministers (Original Respondents and Cross-appellants) (Scotland) Etc*, House of Lords, 2006-07, [2007] UKHL 44.

¹⁶⁸ The Order was the *Scotland Act 1998 (Modification of Schedule 4) Order 2009* (SI 2009/1380); the Scottish Parliament added the time limit by the *Convention Rights Proceedings (Amendment) (Scotland) Act 2009* (asp 11). Clause 16 repeals/revokes these two instruments.

¹⁶⁹ Recommendation 5.4; see also Scottish Government, *Legislative Consent Memorandum: Scotland Bill*, LCM (S3) 30.1, 1 December 2010, p15.

¹⁷⁰ Cm 7973, November 2010, pp58-59.

that Scottish interests will be represented in the composition of the Crown Estate. Scottish Ministers will be consulted on the appointment of this Scottish Commissioner. The Scottish Government does not believe that this clause fully addresses the issues raised in the Calman report: details on its argument are in its Legislative Consent Memorandum on the Bill.¹⁷¹

The Scottish Government is responsible for the implementation in Scotland of international obligations borne by the UK, by virtue of Section 53 of the *Scotland Act 1998*, which made a general transfer of functions from Ministers of the Crown to Scottish Ministers. **Clause 23** amends this by adding a continuing power for Ministers of the Crown to implement these obligations in Scotland. This is in addition to, not instead of, the power of Scottish Ministers, which will continue. It mirrors the arrangement already in place for EU obligations, under Section 57, and for acts to implement decisions of the United Nations Security Council, under Section 56. The rationale for Clause 23 is that it is sometimes more convenient to implement international obligations at a UK level, rather than dividing responsibility, and in particular that it is unnecessary to duplicate subordinate legislation when it achieves the same end.¹⁷² This implies that UK secondary legislation would be used in areas that are otherwise devolved; it is not clear from the face of the Bill what sort of decision-making process would govern the choice as to which Ministers should act. This is another provision that was not part of the Calman Commission recommendations.

4.5 Sentencing¹⁷³

Clause 33 would amend the maximum penalties that can be applied to criminal offences created in subordinate legislation made under powers conferred by the *Scotland Act 1998*. This does not derive from a recommendation in the Calman report, but would reflect the *Criminal Proceedings etc. (Reform) (Scotland) Act 2007*, which made a number of reforms to summary justice.

¹⁷¹ LCM (S3) 30.1, 1 December 2010, pp16-17.

¹⁷² Cm 7973, November 2010, pp68-69, and Explanatory Notes to the Bill, Bill 115 - EN.

¹⁷³ This section contributed by Sally Almandras.

Appendix 1 – Summary information on nature of clauses

The table below gives a guide to the origin of the clauses of the Bill, by reference to the Calman Commission and *Strengthening Scotland's Future*. The heading given for the provisions of each clause is rough, and should not be regarded as a definitive title.

The third column indicates whether the provisions of the clause derive in some way from a recommendation of the Calman Commission. Where a recommendation number is given, this does not imply that the clause embodies the recommendation exactly, but rather that it is related to it and addresses the same issues. The fifth column indicates whether the provision devolves or reserves matters, or if it simply amends the present arrangements in some other way. The responses of the Scottish Government, in the final column, are derived from its Legislative Consent Memorandum, submitted on 1 December 2010.¹⁷⁴

Clause	Provision	Origins in Calman?	Reference in Cm 7973	Devolved/reserved/amended	Scottish Govt response
1 – 3	Administration of elections	Rec 5.1	p51	Devolved	Supports administrative devolution, but would like legislative devolution as well
4	Deputy Presiding Officers	Rec 6.7	pp48-49	Amended	Supports
5	SP Corporate Body	Rec 6.8	p49	Amended	Supports
6	Bills: statement of competence	Rec 6.5	pp49-50	Amended	Considers unnecessary but does not oppose
7	Partial suspension of Acts subject to Supreme Court scrutiny	No	p69	Amended	Considers unnecessary and believes there are arguments against
8	Members' interests	Para 6.108-111	p47	Amended	Believes this is a matter for Scottish Parliament itself
9	Transferring functions back to Boundary Commission for Scotland from Electoral Commission	No	p69	Amended	Supports
10	Continued effect of provisions made under temporary competence	Rec 4.15 and para 4.173 - 182	pp50-51	Amended	Believes it would be better not to have temporary competence in any case; invites Scottish Parliament to consider
11	Air weapons	Rec 5.13	pp52-53	Devolved	Supports, although would like firearms legislation in general to be devolved
12	Insolvency	Rec 5.23	pp57-58	Reserved	Opposes
13	Health professions	Rec 5.12	pp55-56	Reserved	Believes current system works, opposes policy intention of the clause, and invites Scottish Parliament to make

¹⁷⁴ Scottish Government, *Legislative Consent Memorandum: Scotland Bill*, LCM (S3) 30.1, 1 December 2010.

					recommendations that would maintain its role
14	Antarctica	No	p68	Reserved	Does not oppose
15	Scottish Government	No	p67	Amended	Supports
16	Human rights time limits	No	pp67-68	Amended	Some concerns but does not oppose
17	BBC Trust	Rec 5.4	pp58-59	Amended	Prefers the direct appointment by Scottish Ministers as in Calman Report; invites Scottish Parliament to consider the arguments
18	Crown Estate	Rec 5.9	p63	Amended	Believes Bill does not fully address issues raised by Calman Commission; invites Scottish Parliament to consider adequacy of Clause 18
19	Prescribing controlled drugs	Rec 5.14	p55	Devolved	Supports, subject to clarification of financial implications
20	Drink drive limit	Rec 5.15	p53	Devolved	Supports
21 - 22	Speed limit	Rec 5.16	p54	Devolved	Supports, but believes it should go further
23	International obligations	No	p68	Amended	Does not support
24, 26 - 27	Scottish rate of income tax	Rec 3.1	pp26-30	Devolved	Does not support in current form
24, 28 - 31	Other taxes	Rec 3.2, 3.3	pp30-33	Devolved	Supports, although would like to see Air Passenger Duty and Aggregates Levy devolved as well, as recommended in Calman
32	Borrowing	Rec 3.7	pp36-40	Amended	Supports for capital borrowing, though with reservations; does not support in present form for revenue purposes
33	Sentencing	No	p68	Amended	Supports

Appendix 2 – Further information

Commission on Scottish Devolution

The Commission on Scottish Devolution (Calman Commission):

<http://www.commissiononscottishdevolution.org.uk/>

House of Commons Library Standard Note 4744, The Commission on Scottish Devolution – the Calman Commission, 4 June 2010:

<http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-04744.pdf>

Labour Government's White Paper, Scotland's future in the United Kingdom: building on ten years of Scottish devolution, Cm 7738, 25 November 2009:

<http://www.official-documents.gov.uk/document/cm77/7738/7738.pdf>

Scottish Government, Scottish Government response to the Commission on Scottish Devolution, 9 November 2009:

<http://www.scotland.gov.uk/Publications/2009/11/09152544/0>

Scottish Affairs Committee, *Commission on Scottish Devolution*, HC 255 2009-10, 3 March 2010:

<http://www.publications.parliament.uk/pa/cm200910/cmselect/cmsscotaf/255/25502.htm>

Scotland Bill

UK Parliament

The *Scotland Bill* gateway, which includes links to the Bill, explanatory notes, progress and other useful sources:

<http://webapplications.parliament.uk/BillGateways/session/2010-11/bill/scotland.html>

Written Ministerial Statement on introduction of the Bill, HC Deb 30 November 2010, cc69-71WS.

Command Paper published alongside Bill, indicating Coalition Government's approach to the recommendations of the Calman Commission, including those not addressed in the Bill, *Strengthening Scotland's Future*, Cm 7973, November 2010:

<http://www.official-documents.gov.uk/document/cm79/7973/7973.pdf>

Scotland Office webpage on the Bill:

<http://www.scotlandoffice.gov.uk/scotlandoffice/14682.html>

Scotland Office, *Impact Assessment of The Scotland Bill*, 30 November 2010:

http://www.scotlandoffice.gov.uk/scotlandoffice/files/Impact_Assessment.pdf

Scottish Parliament

Scottish Parliament webpage on the Bill, including the Legislative Consent Memoranda (the motions are contained in the memoranda):

<http://www.scottish.parliament.uk/business/legConMem/LCM-2010-2011/ScotlandBillLCM.htm>

Scottish Parliament webpage for its Scotland Bill Committee:

<http://www.scottish.parliament.uk/s3/committees/scotBill/index.htm>

SPICe briefing for Scottish Parliament's Scotland Bill Committee, including comparative tables in annexes:

<http://www.scottish.parliament.uk/s3/committees/scotBill/papers-10/sbp10-01.pdf>

Debate in Scottish Parliament on the Bill, SP OR 9 December 2010, cc31355-407:
<http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-10/sor1209-01.htm>

The *Scotsman* and Reform Scotland held a Fiscal Powers conference on 14 December 2010 to discuss the financial provisions in the Bill. The *Scotsman* published coverage of this throughout the week, including a supplement on 16 December 2010.