

Scotland and Devolution

Research Paper 97/92

29 July 1997



This Research Paper provides an overview of the devolution debate in Scotland. It traces the attempts to legislate for a Scottish Assembly in the 1970s and examines the passage of the *Scotland Act 1978*. The paper gives a critique of that Act and looks at developments since 1979, culminating in the final proposals of the Scottish Constitutional Convention in November 1995. The manifesto proposals of the major parties for the 1997 general election, and the passage of the Referendums (Scotland and Wales) Bill are summarised. Finally, the White Paper published 24 July 1997 is briefly examined. This Research Paper replaces Background Paper no. 261 *The Government of Scotland* and Research Paper no. 95/131 *The Government of Scotland Recent Proposals*. Research Papers 95/95 *The West Lothian Question* and 95/131 part IV offer a discussion of this topic, and should read in conjunction with this Paper.

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Summary

Devolution or Home Rule has been intermittently on the agenda of Scottish political life for over one hundred years,. Modern concern for the issue dates from the upsurge in the Scottish Nationalist vote in the late 1960s, when both major parties began to reassess their policies in this area. The Labour Government of 1974-79 produced a series of White Papers before embarking on legislation; although the *Scotland and Wales Bill 1976/77* failed to make Parliamentary progress the *Scotland Act 1978* finally received Royal Assent on 31 July 1978. The Act can be seen as a rather unsatisfactory and complicated compromise, and in any case never took effect since the referendum on 1 March 1979 failed to reach the necessary threshold of consent.

Pressure for devolution began to mount again in the late 1980s with the formation of the Scottish Constitutional Convention which attracted the support of large parts of the civic society in Scotland. The Convention published its final proposals in *Scotland's Parliament, Scotland's Right* on 30 November 1995. The Labour Party promised in its 1997 manifesto to create a Scottish Parliament 'firmly based on the agreement reached in the Scottish Constitutional Convention'.

The detailed proposals for a Scottish Parliament with law making and tax-varying powers were unveiled in the White Paper *Scotland's Parliament* (Cm 3658) on 24 July 1997. There were some major differences in from the 1978 Act, notably that the forthcoming legislation would define powers reserved to Westminster rather than those devolved to Scotland, that there would be an income tax-varying power, and that the number of Scottish seats at Westminster would be reviewed by the Parliamentary Boundary Commission for Scotland. The position of Secretary of State for Scotland will remain.

A referendum on the White Paper proposals is due on 11 September. Its status is advisory only since it is a pre-legislative referendum. Further detail on the *Referendums (Scotland and Wales) Bill* is given in Research Paper 97/60 and this paper summarises developments since its Second Reading. An Appendix is also provided which sets out the electorate for that referendum.

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I Scotland

A. Background

The following summary from the *Stair Encyclopaedia* volume on constitutional law neatly encapsulates the current political/constitutional position of Scotland within the UK:¹

516. Historical and general. The government of Scotland is unusual if not unique in the modern world. The Union Agreement Of 1707 created a Parliament for Great Britain. With the exception of those powers which have passed to the European Community as a result of the accession of the United Kingdom in 1973, the central administration of Scotland has been the exclusive responsibility of the British Government since 1707, and the Westminster Parliament has been the sole source of legislative reform. The framework of a unitary state has concealed the existence and development of Scottish administrative machinery while the Scottish legal system has survived and occasionally prospered although dependent for its health on a legislature outwith its jurisdiction.

This phenomenon of a Scottish administration without a government and a Scottish legal system without its own legislature finds no exact parallel elsewhere, and it is doubtful if it could have survived in the United Kingdom if a comprehensive written constitution had constrained and determined the business of government. The informality of our constitutional structure has, however, allowed the development of a sophisticated and efficient Scottish governmental structure, over the last two and a half centuries which, while consistent with the Union Agreement of 1707, would be hardly recognisable to those who enacted it.

Stair also summarised the historical development of the Scottish Office and Secretary of State for Scotland:

In the immediate aftermath of Union the problems were not formidable. While the office of Secretary of State for Scotland existed until 1746, thereafter his responsibilities were subsumed under another minister and for the latter part of the eighteenth century and the greater part of the nineteenth the Home Secretary had the formal responsibility for the government of Scotland. In practice most of the effective power was eventually exercised by the Lord Advocate, and as only a small volume of Scottish legislation was required during this period these informal arrangements were tolerated.

In 1885 the growing burden of government led to the creation (or recreation) of the post of Secretary for Scotland¹, and since 1892 the occupant of this post (who has been a Secretary of State since 1926) has been a member of the Cabinet. At first his responsibilities were primarily law and order and education, although he was also required to supervise the various public boards which multiplied during the last part of the last century and the early part of this. Their responsibilities included local government, agriculture and prisons, while from 1919 a Scottish Board of Health was created, presided over by the Scottish Secretary. Some of these boards became statutory departments, controlled and directed by, but separate legal entities from, the Secretary of State, under the Reorganisation of Offices (Scotland) Act 1928 (c 34).

¹ Vol. 5 para. 516

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517. Modern evolution of the Scottish Office. The most important change in the evolution of the Scottish Office took place in 1939 with the opening of St Andrew's House in Edinburgh as the administrative headquarters of government in Scotland and with the transfer of the functions of the Scottish Office from London to Scotland. Since then Dover House, the London end of the Scottish Office, has had only a skeleton staff and a branch office role.

This reorganisation was also used to vest directly under the Secretary of State the Departments of Agriculture, Education and Health, while the responsibilities that had been transferred from London became part of a new Scottish Home Department, which also covered fisheries and prisons. Although there has been substantial further administrative devolution and reorganisation since 1939, the form and framework of government for Scotland created at that time has been retained until the present time.

Within the Scottish Office there are five non-statutory departments. Education, Development, Agriculture and Fisheries, and Home and Health were created by the administrative reorganisation of 1962, while the Economic Planning Department (renamed the Industry Department for Scotland in 1983) was established in 1973.

It is worth noting that because of the relative concentration of population and economic and political life within the central belt of Scotland a self-contained network of Scottish policy making and political activity has developed, assisted by the large number of Scottish representative/pressure groups, whether independent or part of a branch of a British body.

B. Devolution

Although the extent to which substantial numbers of the Scottish population consented to the Act of Union in 1707 remains in dispute, in general Scotland appeared to prosper as part of the British Empire in the eighteenth and nineteenth centuries. The demand for Irish Home Rule in the nineteenth century which was taken up by Gladstone and led to his proposal for eventual Home Rule all round. A number of Bills on Home Rule for Scotland were introduced by Labour and Liberal Members from 1890 to 1914. None progressed to Committee stage. After the First World War, with the establishment of the Irish Free State and the rise of a Labour party at heart more interested in social and economic problems than constitutional initiatives, political support for Scottish Home Rule died away. Potentially the most significant occasion for Home Rule was the Speaker's Conference of 1919/20 on devolution.² The Speaker (Lowther) proposed Grand Councils for Scotland, Wales and England comprising the MPs for these areas, but a Scottish MP, Murray MacDonald, wanted separate but limited legislatures for these areas. These proposals were not implemented, and although the Liberal party maintained its commitment to Home Rule it became increasingly marginalised politically.³

² *Letter from Mr Speaker to the Prime Minister* Cmnd 692

³ See *Labour and Scottish Nationalism* [1979] by Michael Keating and David Bleiman for details on the evolution of Labour thinking in this area

The Scottish Home Rule Association was founded in May 1886; it emphasised the legislative neglect of Scotland and the need to reform the licensing laws, and the land, game and fishery laws.⁴ The Scottish National Party was founded in 1934, led by John MacCormick; his original aim was to secure a Scottish Parliament within the UK, but during the Second World War separatists favouring independence took charge.⁵ From 1955 its electoral performance increased steadily and in 1967 Mrs Ewing won Hamilton in a by election. By October 1974 it secured 11 seats, becoming the second largest party in Scotland in terms of votes, overtaking the Conservatives; moreover, it was second in a further 42 seats threatening the electoral position of Labour in Scotland. In response both major parties undertook an examination of the merits or otherwise of devolution (as Home Rule had come to be known).

Devolution, as has been discussed in and for Scotland for forty years is generally seen as a way of transforming the present system of substantial administrative autonomy into one of legislative autonomy within the UK. It is not a federal system in the US or German model in that the central state retains ultimate authority over all parts of the state in all matters. It can, however, been seen at the same time as either the stepping stone to total 'separation' from the UK or break-up of the UK itself or as a means of preserving the Union by internal reform. The motive behind devolution therefore has to be addressed - in effect 'why devolution and what is it for?'

Devolution can also be seen as a complex initiative within a state without a codified constitution such as the UK which has a rich and complex constitutional and political history. For example, Northern Ireland had a devolved assembly for much of the twentieth century, Scotland retains its own legal system, yet Wales has undergone a much greater absorption into the English political system (whilst retaining a separate cultural existence).

Vernon Bogdanor has noted:⁶

The fundamental issue raised by devolution is whether the creation of separate parliaments in one or more parts of the country is merely an extension of this recognition of diversity; or whether, by contrast, it extends the principle too far so that the tolerance, the 'tacit understandings' on which the United Kingdom rests, will snap in twain.

These initial questions need to be considered before the more secondary issues of the political and constitutional relationships between the devolved assembly and national assembly, and the distribution of powers and duties between the two, together with a disputes resolution mechanism can be addressed. Yet the experience of the 1970s has shown how complex the practical details can be. The 'West Lothian' question and the question of taxation and financing of devolution caused great problems for the Labour Government, which also decided on different solutions for Scotland and Wales in terms of legislative power.

⁴ Statement of Scotland's Claim for Home Rule "Scottish Home Rule Association 1888" quoted in *Devolution* (1979) by V. Bogdanor p.90. See *Strategies for Self Government* (1996) James Mitchell p.69. There is a full chronology of demands for Scottish Self Government 1885-1995 as an annex

⁵ *Sere Independent and Free: Scottish Politics and the Origins of the SNP 1918-1945* by Richard J Finlay (1994)

⁶ *Power and the People: a guide to constitutional reform* 1997 p.30

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The recent concern of the political establishment with devolution can be dated as beginning with the electoral rise of the SNP in the late 1960s and with the speech of Edward Heath to the Conference of the Scottish Conservatives at Perth in 1968 where he proposed the creation of a directly elected Scottish assembly, and explicitly recognised the need for devolution as a counterweight to the centralising tendencies of the EEC.⁷ A committee, chaired by Sir Alec Douglas Home, was set up to consider the "very reasonable desire of the majority of the people of Scotland to have a greater say in the conduct of their own affairs"⁸ It reported⁹ in 1970 advocating a directly elected Scottish Assembly to deal with Second Reading, Committee and Report stages of Scottish Bills, leaving only the Third Reading and House of Lords at Westminster. This would have replaced much of the work of the Scottish Grand Committee and the Scottish Standing Committee. This scheme could be seen as a natural evolution of Parliamentary practice. Legislative power was therefore not devolved, but the scheme did provide explicit recognition of Scotland's right to a political forum.

The Conservative election manifesto for 1970 promised that the Douglas Home recommendations would 'form a basis for the proposals we will place before Parliament, taking account of the impending reorganisation of local government'. In July the Queens Speech of the new Conservative Government also promised that measures would be produced 'for giving Scottish people a greater say in their own affairs'. However, the Heath Government did not bring forward proposals for a Scottish assembly, presumably as it was awaiting the recommendations of the Royal Commission on the Constitution and as it had introduced reform of local government in Scotland creating a two tier system. But in fact this reorganisation gave Scotland a region - Strathclyde - which contained over half the population of Scotland and as Vernon Bogdanor has noted "If ever a Scottish assembly was set up, local government would have to be re-organised again, since the Assembly would not easily be able to co-exist with Strathclyde".¹⁰

⁷ This became known as the Declaration of Perth

⁸ Sir William McEwan Younger in *New Scotland* no. 15 Summer 1970 quoted in *Devolution* (1979) by V Bogdanor

⁹ *Scotland's Government: the report of the Scottish Constitutional Committee* 1970

¹⁰ *Devolution* p.111

C. The Kilbrandon Report

In December 1968 Jim Callaghan, the Home Secretary, announced a Royal Commission on the Constitution¹¹ which reported in October 1973.^{12,13} The Scottish Secretary of the Wilson Government 1966-1970, Willie Ross, was not an advocate of devolution however, and it was not until 1974 that Labour formally adopted it as a policy, at a special conference of Scottish Labour on 16 September.

The Kilbrandon Commission's terms of reference did not specifically mention devolution, but the committee members interpreted their brief to mean a consideration of change in the constitutional status of Scotland and Wales. The Commission did not present a united report, a minority supported a scheme for devolution to all the regions, and the main body of the report favoured a form of devolution for Scotland and Wales, having rejected both 'separatism' and federalism. It defined devolution as 'the delegation of central government powers without the relinquishment of sovereignty'.¹⁴

The majority of the committee favoured a form of devolution for Scotland and Wales which would establish assemblies with legislative, executive and advisory power. Each would be directly elected with about 100 members with a list of powers which broadly reflected the powers exercised at the time by the Scottish and Welsh Office. An Exchequer Board independent of both Westminster and the assemblies would decide how much money the assemblies needed to maintain the same standards in devolved areas as maintained in the rest of the UK. The number of MPs should, however, be reduced from 71 to 57 in Scotland and 36 to 31 in Wales in line with the UK electorate and the offices of Secretary of State for Wales and Scotland would disappear. The minority report proposed the establishment of seven regional assemblies one each for Scotland and Wales and 5 for England. The assemblies would have roughly the same types of responsibilities as proposed in the majority report, but would also have the right to raise taxes by a sales tax or surcharge on income tax. The recommendations were summarised as follows:

OUR CONCLUSIONS ON DEVOLUTION (PART VIII)

The schemes of devolution which have some measure of support among us are described, and the reasons for that support are given.

The background to our conclusions (Chapter 23)

(170) Devolution could do much to reduce discontent with the system of government. It would counter over-centralisation and, to a lesser extent, strengthen democracy; in Scotland and Wales it would be a response to national feeling (paragraph 1102).

¹¹ The Kilbrandon Committee

¹² Royal Commission on the Constitution

¹³ Cmnd 5460

¹⁴ para. 543 p.165

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(171) We are divided on the question whether as a matter of principle the same system of government should be applied to all parts of the United Kingdom. The majority of us think this is not necessary (paragraphs 1107-1111).

(172) We have regarded our principal function as one of analysis, comprising the identification and presentation of possible forms of devolution and of the arguments for and against them. We are agreed on this analysis, but not on the schemes of devolution preferred (paragraphs 1112-1113).

Scotland and Wales (Chapter 24)

(173) Our preferred schemes all provide for the establishment of Scottish and Welsh assemblies directly elected by the single transferable vote system of proportional representation for a fixed term of four years (paragraphs 1116-1122).

(174) For Scotland eight of us, and for Wales six of us, favour a scheme of *legislative devolution* along the lines discussed in Chapter 17 (paragraphs 1125-1153).

(175) Responsibility for the following matters might be transferred to the assemblies:

To both Scotland and Wales

Local government Education (probably excluding universities)

Town and country planning Youth and community services

New towns Sport and recreation

Housing Arts and culture

Building control Social work services

Water supply and sewerage Health

Other environmental services Miscellaneous regulatory functions

Ancient monuments and historic buildings Agriculture, fisheries and food (with certain exceptions)

Roads Forestry

Road passenger transport Crown estates

Harbours Tourism

To Scotland only

Police Administration of justice

Fire services Legal matters

Criminal policy and administration Highlands and Islands development

Prisons Sea transport

For some other matters, for example consumer protection, railways, road freight, civil aviation and broadcasting, limited powers might be transferred (paragraphs 1131-1133).

(176) The financial arrangements would require an independent exchequer board; the main object would be to give the Scottish and Welsh Governments maximum freedom in expenditure (paragraphs 1134-1139).

(177) Executive authority would be exercised by Ministers appointed by the Crown and drawn from members of the assemblies (paragraphs 1143-1146).

(178) The representation of Scotland and Wales in the House of Commons in proportion to population would be the same as that of England, subject to any allowance for special geographical conditions (paragraph 1147).

(179) The offices of Secretary of State for Scotland and Wales would disappear, but Scotland and Wales would each be represented in the United Kingdom Cabinet by a Minister who would be available to discharge other duties (paragraph 1148).

(180) For both Scotland and Wales two of us favour a scheme of *executive devolution* along the lines discussed in Chapter 18 (paragraphs 1154-1173),

(181) It is an essential feature of this scheme that it should be applied in a more or less uniform way throughout Great Britain (paragraph 1155).

(182) The functions of the assemblies would be built up gradually and the scheme would be generally flexible (paragraphs 1156-1160).

(183) The Scottish and Welsh assemblies (and the corresponding English regional assemblies) would be represented on a statutory council with a right to be consulted on matters affecting the devolved functions (paragraph 1162).

(184) Finance for the assemblies would be negotiated direct with the United Kingdom Government; subject to the implementation of central policies the assemblies would have a substantial measure of freedom in the allocation, of expenditure (paragraph 1163).

(185) Executive authority would be vested in the assemblies (paragraphs 1165-1167).

(186) The offices of Secretary of State for Scotland and Wales would disappear. A Minister of the central government would have general responsibility for regional affairs (paragraph 1169).

(187) Three of us favour a scheme for a directly elected *Welsh Advisory Council* (paragraphs 1174-1183).

(188) The council would be responsible for scrutinising, debating and making, representations to the Secretary of State for Wales about government policies and activities in relation to Wales, including the activities of *ad hoc* bodies; it would replace the existing Welsh Council (paragraphs 1174-1175).

(189) It would operate in part through standing committees covering all aspects of the work of the Secretary of State, and would have clearly defined powers to call for information from the Welsh Office and to question officials (paragraph 1176).

(190) Welsh Ministers would on invitation attend and take part in the council's debates (paragraph 1177).

(191) The council would have the right to nominate some members of the *ad hoc* bodies operating in Wales (paragraph 1178).

(192) The administrative expenses of the council would be met out of central government grant (paragraph 1179).

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(193) One of us favours a scheme for a *Scottish Council* with functions similar to those proposed in the scheme for a Welsh Advisory Council (paragraphs 1184-1187).

(194) The council would also have legislative powers along the lines of those proposed by the Scottish Constitutional Committee, as described in Chapter 20, but extended to enable it in certain circumstances to complete all the Parliamentary stages of Scottish Bills (paragraph 1185).

The report was welcomed by Edward Heath in a statement on 31 October 1973¹⁵ and there was a Lords debate on it on 12 December 1973.¹⁶ The Commons did not have a full-scale debate on the Kilbrandon Report.

D. The Labour Government of 1974-79

In February 1974 the Liberal manifesto favoured the immediate implementation of the Kilbrandon recommendations on elected Parliaments in Scotland and Wales,¹⁷ but the Labour and Conservative manifestos did not mention Kilbrandon at all. However, once in power the Labour Government published a Green Paper in June 1974 *Devolution within the United Kingdom: some alternatives for discussion*.¹⁸ This paper set out in summary the Kilbrandon proposals and those of the memorandum of dissent and gave four schemes (A,B,C,D) based on the various proposals, for public consultation. However, the Government's substantive response to Kilbrandon came in the White Paper of September 1974^{19,20} It noted that no consensus of opinion on the form of devolution existed as major issues remained in the field of finance and economic management, trade, industry and employment, local government, Secretary of State and representation in the UK Parliament.

The Government's proposal was for the creation of directly elected assemblies in Scotland and Wales, with legislative powers for the Scottish Assembly and executive only for the Welsh Assembly. They would be financed by block grant allocated through the Treasury. However, there would be no reduction in the number of Scottish or Welsh MPs and no abolition of the offices of Secretary of State for Wales and Scotland:

27. For Scotland and Wales the Government now propose the creation of directly elected assemblies.

28. While these new institutions will have certain common characteristics and relationships to the central Government, they will naturally have to reflect the differences in governmental structure between Scotland and Wales which already exist. In particular, as explained in paragraphs 5 and 6, Scotland has a distinctive legal structure which is recognised in existing legislative practice.

¹⁵ HC Deb. vol. 863 c.163

¹⁶ HL Deb. 347 c.1157

¹⁷ *Change the Face of Britain*

¹⁸ Office of the Lord President of the Council

¹⁹ *Democracy and Devolution: proposals for Scotland and Wales*

²⁰ Cmnd 5732

29. The Government have therefore concluded that the Scottish assembly should have a legislative role and have legislative powers within fields in which separate Scottish legislation already exists such as, for example, housing, health and education.

30. Taking account of the different structures of law in Scotland and Wales but with the same principles in mind the Government intend that the Welsh assembly should parallel the Scottish counterpart in assuming certain powers of the Secretary of State in respect of delegated legislation. The Welsh assembly would also be given responsibility for many of the executive functions at present carried out by nominated bodies within Wales, and by the Secretary of State himself.

31. The membership, functions and procedures of the assemblies will call for detailed study and consideration. The Government's provisional proposals on some key aspects are as follows:-

- (a) Membership will be on the same system as membership of the United Kingdom Parliament, ie a single member elected for a geographical area. This is simple to operate, easily understood by the public and provides for the clear and direct accountability of the elected representative to his constituents.
- (b) The assemblies will assume some of the executive functions of the Scottish and Welsh Offices, and of the nominated authorities now operating within their boundaries.
- (c) The financial allocation for the functions over which the assemblies have responsibility will be in the form of a block grant voted by the United Kingdom Parliament under arrangements which will take account of both local needs and the desirability of some uniformity of standards of services and of contributions in all parts of the United Kingdom. It will be for the assemblies to judge among competing priorities within Scotland and Wales in the light of their own assessment of their communities' needs: as between, for example, hospitals and roads or schools and houses.
- (d) The assemblies will not be expected to assume existing powers from local government, since this would undermine rather than improve democracy. There will, of course, be a new relationship to be established between the assemblies and local government, and the new authorities created by recent local government reorganisation will require time to settle down in their new functions before this can be achieved.

32. The setting up of Scottish and Welsh assemblies does not, however, detract in any way from the overriding interest of all the peoples of the United Kingdom in the determination of United Kingdom policies as a whole. The United Kingdom Parliament and the central Government Ministers will of course remain fully responsible for the overall interests of the United Kingdom and it is essential that the determination of United Kingdom policies should fully reflect the needs and contributions of all its constituent parts.

33. For this reason the Government regard it is essential that both Scotland and Wales should retain their existing number of Members of Parliament in the United Kingdom Parliament and that there should continue to be Secretaries of State for Scotland and Wales who act as full members of the United Kingdom Government in forming United Kingdom policies. This is especially important in relation to the distribution of resources as between Scotland, Wales and the regions of England: these are fundamentally political decisions and cannot in the Government's view be delegated to a nominated Exchequer Board as the authority to be responsible for this task. It must be determined within the Government itself, with the two Secretaries of State able to speak for Scotland and Wales, and approved in the House of Commons with Scotland and Wales fully represented in it.

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In the October 1974 manifestos, the Conservatives promised to set up a Scottish Assembly and give the Secretary of State for Scotland, acting with the Scottish Assembly, "the power to decide how to spend Scotland's share of the UK budget".²¹ Separate manifestos were published for Scotland and Wales. Labour promised to create elected assemblies in Scotland and Wales and also published separate manifestos for Scotland and Wales.²²

Our changing democracy: devolution to Scotland and Wales published in November 1975²³ by the re-elected Labour Government produced more detailed proposals. The White Paper noted that a draft Bill would be prepared for consultation:

6. Work is in hand on drafting a Bill, which will take account progressively of points made during consultation. It will be published in the spring of 1976. It would not however be feasible then to carry so major a Bill through to Royal Assent in the 1975/76 session. Moreover, the Government believe that it would be wrong to legislate in haste on issues of such very special and lasting constitutional importance. The Bill, when published, will provide the opportunity for debate and for focusing opinion more closely on specific legislative proposals; and the Government will take account of all this in further refining the schemes. They will then introduce a Bill in Parliament at the start of the following session.

This plan was later abandoned²⁴ and instead the Government published a *Supplementary Statement* in a White Paper in August 1976.²⁵ In addition a statement was made by Michael Foot, Lord President of the Council on 25 May 1976 foreshadowing some of the decisions in the supplementary statement.²⁶

The Government originally proposed²⁷ a directly elected four year fixed term single chamber assembly under First Past the Post. The Kilbrandon Commission had favoured the single transferable vote (see p.6). At the first election there would be two members for each of the 71 Parliamentary constituencies (creating a 142 seat Assembly) and thereafter a review by the Boundary Commission with 1 member per Assembly seat, and each Parliamentary seat allocated 1-3 Assembly seats according to the size of the electorate (para. 33). Peers would have the vote, and the Secretary of State would have general oversight of Assembly elections and rules on election expenses etc. Membership of the Assembly would not be barred to Members of the Commons or Lords. Disqualification was dealt with in Appendix A of the White Paper.

²¹ *Putting Britain first*

²² *Britain will win with Labour*

²³ Cmnd 6348

²⁴ HC Deb. vol. 912 25.5.76 c.271

²⁵ *Devolution to Scotland and Wales: supplementary statement Cmnd 6585* August 1976

²⁶ HC Deb. vol. 912 c.270-284

²⁷ Part III Cmnd 6348

The *Supplementary Statement* concluded, however, that due to low representation in rural or island constituencies it had been decided that every Parliamentary constituency would have two or three Assembly seats producing an Assembly of about 150, to begin at the first elections.²⁸

A Scottish Executive would be formed after each election and it was initially envisaged that the Secretary of State would invite a prospective Chief Executive to form an executive to command the support of the Assembly. (paras. 43-46, Cmnd 6348). The *Supplementary Statement* however, noted 'the Government have now decided that it should be entirely for the Assembly to decide who is to be the Chief Executive' (para. 9). The numbers and pay of the Executive was left entirely to the Assembly in the *Supplementary statement*.²⁹

The Assembly would have power to make both primary and secondary legislation (either under Scottish Assembly Acts or Westminster Acts still applying to Scotland.) The subject areas were local government, health, social services, education, housing, criminal law, physical planning, environment and roads. Further detail was contained in Part III; D of Cmnd 6348. Later private law was included³⁰ together with administration of the courts (para. 25, Cmnd 6585) and oversight of the Scottish Development Agency. Initially the Government planned to give the Secretary of State power to consider whether a Bill which had passed through the Assembly was ultra vires, or unacceptable on general policy grounds.³¹ The *Supplementary Statement* however withdrew this proposal, instead noting 'If there is doubt about the legality of an Assembly Bill, the final decision will lie with the Judicial Committee of the Privy Council' (para. 12) and concluded that the reserve power on general policy matters should be used only if there were unacceptable repercussions on areas for which the Government retained responsibility. It also concluded that the courts should be able to consider through judicial review, whether any Assembly measure was within the devolved powers of the Assembly. A proposed power for the Government to resume responsibility for devolved functions was also dropped.³²

The November 1975 White Paper proposed that Assembly committees to correspond with the main subject fields of the Executive be set up and that 'before the introduction of major new policies or Bills the Executive Member responsible will have to consult the relevant committee of the Assembly, except where the matter is especially urgent or confidential'. (Cmnd 6348). The Executive would be responsible for nominated bodies operating wholly in Scotland on devolved matters. Further detail was given in Appendix E of Cmnd 6348.

The Kilbrandon Commission had considered that a separate Scottish Civil Service would be necessary, but the White Paper proposed instead to retain a unified service. (paras. 81-82). A separate Scottish Commissioner for Public Administration (Ombudsman) was proposed (with

²⁸ Cmnd 6585 paras. 6-8

²⁹ para. 11. In the earlier White Paper this had been the responsibility of the Secretary of State

³⁰ Cmnd 6585 para. 21

³¹ para. 57 Cmnd 6348

³² Cmnd 6585 para. 15

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details at Appendix B Cmnd 6348). Finance would be provided mainly through a block grant from central government³³ but initially the Government proposed a general surcharge on local authority taxation, having rejected a surcharge on income tax as too complex to administer.³⁴ However, the *Supplementary Statement* concluded against this surcharge on local authority rates in the light of comments received. (para. 16).

All international relations, including those with the European Communities, would continue to be the responsibility of the UK Government, but suitable consultative machinery would be arranged between Edinburgh and Westminster. The White Paper proposed enhancing the executive role of the Secretaries of State for Scotland and Wales particularly in the economic field, and saw no case for their abolition. It also expected Parliament to retain its 'full complement of Scottish and Welsh members' (para. 285).

The Government pressed ahead with plans for a single Scotland and Wales Bill to be introduced in 1976/77 Session. In statements on 25.6.76 and 3.8.76³⁵ Michael Foot refused to hold a referendum on the grounds that there had been opportunity for public debate and that the Government had a manifesto commitment. However, on 16 December 1976 on the final day of the Second Reading of the Scotland and Wales Bill John Smith, Minister of State at the Privy Council Office, announced that an advisory referendum would precede the implementation of the Act.³⁶ New Clause 40 was subsequently introduced at Committee stage on 10 February 1977.³⁷ However, a Government timetable motion on the Bill was defeated by 312-283 votes on 22 February 1977³⁸ and the Bill was later withdrawn.³⁹ Only three clauses and the referendum new clause had been debated out of 115 clauses, and 16 days had been spent on the Bill in the Commons.⁴⁰

The *Scotland and Wales Bill* when first introduced outlined no changes of substance from the two White Papers. A Second Reading was secured by 292 votes to 247 on 16 December 1976, but with considerable cross-voting - according to Vernon Bogdanor.⁴¹ 10 Labour MPs voted with the Opposition, and 31 did not vote, while five Conservatives (including Alick Buchanan Smith, a former Shadow Secretary of State for Scotland) voted with the Government and twenty nine did not vote (including Edward Heath and Peter Walker). Conservative attitudes to devolution had shifted following the election of Margaret Thatcher as party leader in 1975.⁴²

³³ The process is described in Appendix C

³⁴ Cmnd 6348 para. 108

³⁵ Vol. 912 c.271, vol. 916 c.1463

³⁶ Vol. 922 c.1736-40

³⁷ HC Deb. Vol. 925 c.1791-1824

³⁸ HC Deb. Vol. 926 c.1234-1366

³⁹ HC Deb. Vol. 933 c.225 14.6.77

⁴⁰ See Research Paper 97/97 *Time Spent on Government Bills of Constitutional significance since 1945*

part VI

⁴¹ *Devolution* 1979 p.154

⁴² *Conservatives and the union: a study of Conservative party attitudes to Scotland (1990)* by James Mitchell p.81-82

Mitchell has noted:

Any doubts remaining about the drift away from devolution were dispelled with the decision to oppose the second reading of the Scotland and Wales Bill in December 1976. The shadow Cabinet met on December 1, two days after the publication of the Bill, and decided to oppose the bill with a three-line whip at second reading. This was despite the statements early on in the Parliament by Buchanan-Smith that the Tories would support Labour's measure of devolution. The decision had been agreed only narrowly - nine members of the Shadow Cabinet favoured the three line whip opposing the bill and seven were opposed.

The day after the shadow Cabinet meeting Buchanan-Smith, George Younger, Malcolm Rifkind, Hamish Gray, Hector Munro and John Corrie met Mrs Thatcher and Atkins to make known their opposition to the three-line whip and appeal for dispensation from shadow Cabinet collective responsibility. For Buchanan-Smith, one week later Buchanan-Smith and Malcolm Rifkind resigned from the front bench. Hector Munro, an Energy spokesman, John Corrie, Scottish Whip, and Russell Fairgrieve, Scottish Chairman, all offered their resignations, but these were refused by Mrs Thatcher. In Scotland, Conservative devolutionists including Brian Meek and Bill Aitken warned of the consequences for Tory support. Heath and Home both supported the right of devolutionists to abstain on the measure.

The appointment of Teddy Taylor as Shadow Scottish Secretary marked a decisive turning point for the party. Whatever pronouncements on devolution were to be made, there could be little doubt that Taylor was a vehement opponent of devolution.

In March 1977 the Labour Government secured a Parliamentary pact with the Liberals, who had opposed the guillotine motion on the *Scotland and Wales* Bill to secure proportional representation and revenue raising powers.⁴³ In the event, the separate *Scotland and Wales* Bills of the following session contained neither policies. On 26 July 1977 Michael Foot made a statement announcing separate Bills for Scotland and Wales in the next session.⁴⁴ A White Paper - *Financing the Devolved Services* (Cmnd 6890) was published the same afternoon. The White Paper discussed the Government's reasons for preferring a system based on expenditure needs rather than revenue raising capacity, citing the greater collection costs of separate systems of taxation (para. 15). However, there might be scope for limited additional taxation. The White Paper stated:

Supplementary Tax Powers

23. As was made clear in the November 1975 White Paper the Government would see no difficulty in principle, and certain advantages in practice, if the devolved administrations were to have powers to raise limited additional revenue to supplement the block funds. In contrast to assignment of United Kingdom revenues this would mean that the devolved administrations would themselves have the final say on the amount of additional expenditure at the margin while the Government and the House of Commons would continue to settle the block funds as appropriate contribution from the pool of national revenues.

⁴³ Vernon Bogdanor *Devolution* (1979) p.158

⁴⁴ HC Deb. Vol. 936 c.313-329

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However, for income tax it considered that "a supplementary income tax would impose a heavy new burden on the PAYE System and would reduce its efficiency as the Government's main revenue collector. Furthermore, because a marginal tax would be at a low rate, the cost of collection could represent as nucleus 20 per cent of the yield" (para 31).

The White Paper maintained its objection to the Kilbrandon proposal for an appointed Exchequer Board to allocate expenditure between the various constituent parts of the UK, first stated in the White Paper of September 1974 since "it is essential that allocations should be made by democratically elected representatives" (para. 68). However, it did propose that an advisory committee about the needs and standards of public services to act as a centre of research should be set up after the creation of the devolved assemblies (para. 72). Its main proposals was a non statutory formula approach:

76. A promising approach would be to relate the total of devolved public expenditure in Scotland or Wales to comparable expenditure elsewhere in the country on the basis of relative need, and to express it as a percentage of comparable expenditure in the country as a whole. The percentage would be maintained over a stated period, after which it would be determined afresh on the same basis of relative needs. The period might be four years, corresponding to the term of the devolved Assemblies. During that period, it would not normally be open to a devolved administration to propose an increase, or to the Government to propose a reduction in the percentage; but increases or decreases in the level of comparable expenditure outside Scotland and Wales automatically lead to corresponding increases or reductions in devolved expenditure.

E. The passage of *The Scotland Act 1978*

The Second Reading of the *Scotland Bill 1977/78* took place on 14 November 1977, with 307 votes for and 263 against. A Conservative amendment declining a Second Reading and calling instead for a constitutional conference to examine defects in the Government of Scotland and recommend reforms was rejected by 265 votes to 313. Eleven Labour MPs voted against Second Reading and four Conservative MPs voted in favour.

The Bill (along with the *Wales Bill*) was immediately guillotined after Second Reading. The timetable motion passed by 313 to 287 on 16 November 1977 a Government majority of 26.⁴⁵ Nine Labour MPs opposed the guillotine and seven did not vote. A number of Labour MPs who had been opposed to the *Scotland and Wales Bill* did not vote against the guillotine on the grounds that they would campaign against devolution in the referendums. The Government was supported by 11 out of 12 Liberals, the three Plaid Cymru MPs, and 11 Scottish Nationalists and the two Scottish Labour Party MPs. Two Conservative MPs abstained. The timetable motion allocated 17 days for Committee, Report and Third Reading stages of the Bill. There were

⁴⁵ This account of the Bill's passage is based on a document produced by the Civil Service College in December 1978 *The Scotland Act in Parliament: a chronological Summary* by P.D. Lindley. It does not list all the Government defeats or amendments to the Bill

Government plans to introduce a revised timetable at Committee stage but the proposals was withdrawn by Michael Foot on 25 January.⁴⁶

On the first day of Committee,⁴⁷ the declaratory Clause 1 of the Bill⁴⁸ was defeated by 184 votes to 199⁴⁹ but the most important backbench amendment to the Bill was introduced by George Cuninghame MP on 25 January and carried by 166 votes to 151.⁵⁰ The amendment required an Order in Council for the repeal of the Act to be laid before Parliament if it was not supported by 40 per cent of the Scottish electorate. An opt-out amendment for the Orkney Isles, moved by Jo Grimond allowing the Islanders to opt-out of the Scotland Act if a majority of their electorate voted no was passed at the last minute before the guillotine fell (c.1547) by 204 votes to 118. An amendment to exclude abortion and family planning matters from devolved health powers was defeated by 162 votes to 179.⁵¹

Conservative amendments for a Speakers Conference on Scottish representation^{52,53} and for a Bill of Rights for Scotland were rejected.⁵⁴ On Report the Government suffered a further defeat when a new clause tabled by Tam Dalyell was carried by 242 votes to 223.⁵⁵ It provided that if a general election was announced before the referendum, the latter could not be held until at least 3 months after polling day

The Bill received an unopposed Second Reading in the Lords at the end of a 2 day debate on 14 and 15 March.⁵⁶ Earlier in the debate, Earl Ferrers, Chief Opposition spokesman on devolution, gave an assurance that the Opposition would not seek to frustrate the Government's timetable or wreck the Bill, while warning of the Opposition's intention to scrutinise parts of the Bill which had not been debated in the Commons. He considered that it would be an "intolerable affront to the people of Scotland"⁵⁷ if the Lords denied them the opportunity of voting in the referendum without discussing the Bill, referring to a amendment denying the Bill a Second Reading tabled by Lord Wilson of Langside and subsequently withdrawn.

⁴⁶ HC Deb. Vol. 942 c.1417

⁴⁷ See Research Paper 97/97 *Time Spent on Government Bills of Constitutional significance since 1945*.

Part VI for a detailed survey of the days spent on this Bill

⁴⁸ This clause had stated that the Scotland Act would not "affect the unity of the UK or the supreme authority of Parliament to make laws for the UK or any part of it"

⁴⁹ HC Deb. 22/11/77 vol. 939 c.1402

⁵⁰ HC Deb. c.1542

⁵¹ HC Deb. vol. 942 17/1/78 c.290

⁵² HC Deb. Vol. 943 31/1/97 c.412

⁵³ Attempts to address the 'West Lothian Question' during the passage of the Bill resulted in S.66 which provided an 'in and out' solution discussed in Research Paper 95/95 6.9.95 *The West Lothian Question* pp 11-12. See also *The Scotland Act 1978* by Bradley and Wade under S.66 The Kilbrandon report discussed it at paras. 810-815

⁵⁴ HC Deb. Vol. 943 1/2/97 c.580

⁵⁵ HC Deb. Vol 944 14/2/78 c.298

⁵⁶ HL Deb. Vol. 389 c.1466

⁵⁷ HL Deb. Vol. 389 c.1202

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Lord Home spoke in favour of proportional representation for Assembly elections and of granting tax-raising powers.⁵⁸ Subsequently in the first Lords Committee day an all party amendment by Lord Kilbrandon was carried by 155 votes to 64 proposing AMS for Assembly elections against Government wishes.⁵⁹ On the second day an all party amendment moved by the Earl of Perth, gave the Assembly the right to decide for itself on its election system by 119 to 100.⁶⁰ A further amendment by the Earl of Perth enabling the Assembly to draw up proposals for its own tax raising powers was carried by 77 votes to 76.⁶¹ An amendment to remove from the Scottish assembly responsibility for abortion was passed against Government wishes by 51 votes to 47 and not subsequently altered in the passage of the Bill (c.494).

A new clause providing for a Speakers Conference on Scottish representation at Westminster after devolution was carried by 102 votes to 93 on the twelfth day of Committee.⁶² At report stage a backbench Conservative amendment requiring the membership of Assembly Committees to reflect the balance of parties in the Assembly was carried by 35 votes to 19.⁶³ The most important amendment was an official Opposition new clause moved by Earl Ferrers which was carried by 99 votes to 72. It prescribed a second vote 14 days after the first on the Third Reading of all Bills not affecting Scotland which would not have been carried if Scottish MPs had not voted.⁶⁴ Amendments on the "West Lothian Question" had suffered from problems of 'scope' in the Commons. Government amendments to the Grimond new clause provided instead for special override power to protect the Orkney and Shetland isles and a constitutional commission and were accepted on the fifth day of report.⁶⁵

A timetable motion giving the Commons three days to consider the 293 Lords amendments; it was carried by 292 votes to 274.⁶⁶ The Lords proposal for the AMS system of election was rejected by 365 votes to 155⁶⁷ after a debate, and the amendment giving the Assembly power to decide on its election system was rejected by 467 votes to 39. (c.744). However, the amendment requiring party balance on committees was accepted by the Government.⁶⁸ On the second day the proposal by Francis Pym to make the second vote procedure of the Ferrers amendment apply to Second Reading instead of Third Reading was rejected on the casting vote of the Deputy Speaker after a tied vote of 286 votes to 286.⁶⁹ The amendment on a Speakers Conference on Scottish representation was rejected.⁷⁰

⁵⁸ HL Deb. Vol. 389 c.1215-1219

⁵⁹ HL Deb. 4/4/78 Vol. 390 c.104

⁶⁰ HC Deb. 11/4/78 Vol. 390 c.480

⁶¹ HL Deb. Vol. 391 4/5/78 c.416

⁶² HL Deb. Vol. 392 16/5/78 c.206

⁶³ HL Deb. Vol. 392 8/6/78 c.1540

⁶⁴ HL Deb. Vol. 393 13/6/78 c.276

⁶⁵ HL Deb. Vol. 393 20/6/78 c.987

⁶⁶ HC Deb. Vol. 953 4/7/78 c.406

⁶⁷ HC Deb. Vol. 953 6/7/78 c.734

⁶⁸ HC Deb. Vol. 953 6/7/78 c.838

⁶⁹ HC Deb. Vol. 958 17/7/78 c.202

⁷⁰ HC Deb. 17/7/78 c.206

In view of the large Commons vote against AMS the Lords decided not to refer it back by 90 votes to 33⁷¹ during Lords consideration of Commons reasons for rejecting Lords amendments. They decided to send back the 'Ferrers amendment'⁷² modified so that the second vote would apply at Second Reading by 104 votes to 81.⁷³

When the Commons considered the returned Lords amendments on 26 July 1978 the revised 'Ferrers' amendment was carried by 276 votes to 175 with the support of Liberal and Nationalist MPs.⁷⁴ The Lords then dropped their remaining amendments on 27 July 1978⁷⁵ and Royal Assent came on 31 July 1978.

The referendums were held on Thursday March 1 1979. Results were available for each region in Scotland and each county in Wales, supervised by a Chief Counting Officer.⁷⁶ Hours of polling were 7am to 10pm.⁷⁷ The electorate used was the Parliamentary electorate, with the addition of peers.⁷⁸

No public funding was available for the Yes and No campaigns unlike in 1975 EEC referendum where £125,000 had been given to each of the two umbrella organisations, on condition that accounts of expenditure were published. In addition, two leaflets had been circulated to each household summarising the Yes and No case, and a separate document setting out the Government's case for a Yes vote. In 1979 no grants were made to campaign organisations, but normal resources were available to ministers in furthering their policies. Umbrella organisations in the form of 1975 did not exist in 1979, and a study of the Scottish referendum⁷⁹ found that as there were no national limits on expenditure and no requirement for public accounts "the public will never know precisely how much was spent on the campaign, where it all came from, nor how the expenditure was broken down". (p.6).⁸⁰

Following a successful injunction brought by Brian Wilson (then anti-devolutionist) and Tam Dalyell and other officials of the Labour Vote No committee against the Independent Broadcasting Authority⁸¹ no party political broadcasts were shown during the referendum

⁷¹ HL Deb. Vol. 395 20/7/78 c.450

⁷² See Research Paper 95/95 *'The West Lothian Question'* p.11-12

⁷³ HL Deb. Vol.395 20/7/78 c.512

⁷⁴ HC Deb. Vol. 954 26/7/78 c.1660

⁷⁵ HL Deb. Vol. 395 c.951-968

⁷⁶ *Scotland Act 1978* Sch. 17 paras. 7.8 *Wales Act 1978* Sch. 12 paras. 7-9

⁷⁷ *Scotland Act Referendum Order 1978* no. 1912 and *Wales Act (Referendum) Order 1978* (SI 1978 no. 1915; 20.12.78

⁷⁸ *Scotland Act 1978* Sch. 17 para. 2 *Wales Act 1978* Sch. 12 para. 2. Note in 1978/79 EU citizens did not have the right to vote in local elections, and voters living overseas did not become eligible for the Parliamentary franchise until the 1985 Representation of the People Act

⁷⁹ *The referendum experience* (1981) ed John Bochel *et al*, David Dewar and Alan Macartney

⁸⁰ For further details about the conduct of the 1979 referendums see Research Paper no. 97/61 *The Referendums (Scotland and Wales) Bill 20.5.97*

⁸¹ *Wilson v I.B.A. 1979 SLT 282*

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campaign.⁸² The court held that although three of the four political party broadcasts planned by the IBA after consultations with the major parties favoured a Yes vote, the statutory duty on the IBA to maintain a proper balance required approximately equal time for the Yes and No cases. Although the BBC was unaffected by the judgement an inter-party agreement could not be made.

The Conservatives were the only party to campaign officially against the Assembly in the referendum campaign, the Scottish conference having voted overwhelmingly to campaign for a 'No' vote in May 1978. On February 14 1979 Lord Home urged voters to vote no. As Mitchell notes his speech was seen by some devolutionists as the single most important event to aid the 'No' campaign. Mitchell commented (p.91):

Home concentrated his attention on James Callagan's launch of Labour's campaign when the Prime Minister had argued that the referendum offered Scots a last chance for devolution. Home categorically rejected this. In declaring his intention to vote 'No', he made clear that he saw this as the only way to ensure that Parliament would correct the defects in the Scotland Act. He outlined five major faults in the Act. First, he felt that an Assembly should raise a proportion of its own revenue. Second, he was critical of the situation whereby Scottish MPs could vote on English bills while no MPs would have a say in devolved Scottish affairs. Home's third criticism of the proposed Assembly was its size. He felt that one hundred members would probably be more than enough and that the 142 proposed would lead to a serious danger of 'over-government'. Fourth, Home was critical of the lack of any machinery by which a bill could be defined as a purely Scottish measure before it was introduced on the floor of the Assembly. His final criticism concerned the system of elections. He favoured the introduction of a system of proportional representation.

Instead Home proposed the creation of a Speaker's Conference to deal with constitutional change, stating that he would hesitate to vote 'No' if he thought that the parties would not keep devolution at the top of their priorities.

Other reasons presented for the relatively low level of active support for the referendum were the influential 'no' campaign of Labour rebels such as Tam Dalyell, and the general unpopularity of the Labour Government in the aftermath of the industrial disputes of 1978/79. Finally, the fragmentation of opinion as to the various reform options meant that the Yes campaign did not mobilise sufficient resources.

⁸² See *Referendum Experience* ed John Bochel et al (1981) pp 125-126 for background

1,230,937⁸³ electors voted in favour of the Assembly but this represented only 32.9 per cent of the electorate, short of the 40 per cent which was required for the Act to be implemented. Under the terms of the Act 31 per cent voted NO and 36 per cent did not vote.⁸⁴ As the Constitution Unit commented in their report:⁸⁵

75 The amendment in the end proved fatal to the Act. In the referendum on 1 March 1979 Scotland voted in favour - 52% to 48% - but only 32.9% of the electorate had joined the majority. Prime Minister Callaghan tried to play for time and avoid laying the order for repeal of the Act. The 'Frankenstein solution' became the talk of Westminster: that the Act could be suspended for a number of months to be revived by a Labour Government following a general election. But in the event he could not find the support for this that was needed. On 22 March he made a statement setting the end of April as a deadline for concluding all-party talks on improving the Act. The SNP pounced on this vagueness and put down a motion of no confidence immediately. It was followed by one from Mrs Thatcher. Callaghan lost the vote by one, and then the subsequent general election. The order was duly laid on 6 June and the Act repealed. At the same time the Secretary of State announced that all-party talks on devolution would start soon. Labour had argued that the Act should stay on the statute book while the talks went on, but the Conservative Government insisted on wiping the slate clean.

F. *The Scotland Act - an outline*

The key principles of the legislation are summarised below:

- the establishment of a Scottish Assembly elected by first past the post consisting of 145-150 members.
- the creation of a separate Westminster style Scottish Executive, headed by a First Secretary chosen by the Assembly.
- retention of a Secretary of State for Scotland with oversight functions.
- the transfer of legislative powers for a broad range of subjects including health and social services (not social security benefits) education (including universities) housing planning, transport (excluding rail) roads and various Home Office functions relating to the courts, the legal profession, crime and the fire services. Also to be transferred were most matters connected with local government in Scotland, specifically structure and functions, and executive responsibility for the Scottish Development Agency and the Highlands and Islands Development Board (within statutory guidelines set by central government).
- no independent powers of taxation for the Assembly. Finance was to be derived from a non-statutory block grant; however, the Assembly would be responsible for distributing rate support grant to local authorities.

⁸³ 51.6 per cent of votes cast

⁸⁴ For further details see Research Paper 97/61 The Referendums (Scotland and Wales) Bill

⁸⁵ *Scotland's Parliament: Fundamentals for a New Scotland Act* April 1996

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- legislation subject to judicial scrutiny before Royal Assent, and post assent judicial review was also provided for.

G. The Scotland Act 1978 - its detailed provisions

In the authoritative guide to this Act published in 1979 Bradley and Christie noted that "the length and complexity of the Act are due mainly to two factors:

- (a) the elaborate detail with which the areas of devolved powers are defined; (b) the desire of the Government to established controls and safeguards over the exercise of the devolved powers in order to maintain the 'political and economic unity of the UK'.⁸⁶

The Assembly

Part I of the Act together with Schedules 1-6 established the machinery for the creation of the Assembly and the Scottish Executive. The Assembly was to be directly elected by first past the post. Initially the Parliamentary constituencies would be used with two to three members for each constituency (1 for Orkney and Shetland) (S.1) with reviews by the Boundary Commission for Scotland eventually to create simple member Assembly constituencies. A fixed term of 4 years was prescribed, (S.2) but if two thirds or more of the members voted accordingly the Secretary of State would be obliged to dissolve it (S.3). Arrangements for elections, entitlement to vote and qualifications for sitting in the Assembly were based on arrangements for the Westminster Parliament. Peers resident in Scotland would be able to vote. Standing Orders for the Assembly were to include three main stages in the consideration of Assembly Bills (S.26), the disclosure of members pecuniary interests (S.27) and a power to appoint committees on devolved subjects (cs.28) reflecting party balance (S.5-16 and 24-34).

The legislative measures of the Assembly were to be known as Scottish Assembly Acts when passed by the Assembly and approved by the Queen in Council. Within the Assembly's legislative competence on Assembly Act could amend or repeal provisions made by or order an Act of Parliament (S.17-18). It could not amend the *Scotland Act 1978* itself (S.17(2) and Schedule 2 para. 7). By S.19 if the Secretary of State considered that a Bill passed by the Assembly was not within the Assembly's legislative competence, or had doubts on the matter, he would refer the question of competence to the Judicial Committee of the Privy Council; if he considered that an Assembly Bill was not compatible with the United Kingdom's EC or other international obligations, or that legislation to implement such obligations should be passed by Parliament he was to notify the Assembly accordingly, and the Bill would not become law. Under S.65 and Schedule 12 a new constitutional role for the judicial Committee of the Privy Council was envisaged in legal proceedings involving "devolution issues".⁸⁷

⁸⁶ *Scotland Act 1978* A.W. Bradley and D.J. Christie (1978) (The Act in outline)

⁸⁷ Parliament retained full legislative capacity to amend or repeal the Scotland Act and on all matters affecting Scotland. However, under S.17(2) the Assembly could amend or repeal a provision made by or under an Act of Parliament

The Scottish Executive

S.20 of the Act provided for a Scottish Executive headed by a First Secretary formally appointed by the Secretary of State but actually nominated by the Assembly. Other members of the Executive were to be Secretaries and to be drawn from the Assembly (except for a new officer). A Scottish Secretary under S.21 had comparable executive powers to that of a Secretary of State. The staff of the Executive had to be members of the home Civil Service under S.67.

The UK authorities

Part III of the Act governed relations between the Scottish administration and the UK authorities. Agency arrangements might be made for the provision of services (S.35) and the Secretary of State was given an important group of reserve powers to intervene. Under S.38 he could decide that certain Assembly Bills affecting reserved matters (i.e. not devolved to Scotland) should not become law in the public interest. He could also direct that executive action affecting certain reserved matters should or should not be taken (S. 39). The Secretary of State could under S.40 revoke delegated legislation made by the Scottish Secretary which affected reserved powers. Parliamentary approval was necessary before these powers of the Secretary of State could be exercised. The Secretary of State could also intervene to protect the special interests of the Orkney and Shetland isles (S.41) and industrial and economic guidelines prepared by the Secretary of State would be binding on the Scottish Executive (S.42).

Functions

The allocation of legislative and executive powers to the Assembly was the most complex part of the Act. In the *Government of Ireland Act 1920* a general power to legislate for peace and order and good government was given to the Northern Ireland Parliament and a series of "excepted" matters remained with Westminster.⁸⁸ Under the Scotland Act, however, matters were only to be devolved to the Assembly if they fell within subjects listed in the groups set out in Schedule 10, Part I and were not excluded by entries in Schedule 10 Parts II and III. Part III consisted of a list of enactments relating to the groups which were analysed to make clear which parts were devolved or reserved. By basing the division of powers on reference to existing statutes the Act would have required frequent updating to reflect new and amended legislation. Schedule 11 listed matters within the powers of the Scottish Executive but not within the legislative competence of the Assembly.

Finance

Part III dealt with financial arrangements for the devolved services. The Scottish Assembly had no power to raise taxes other than the power to replace rates with a local tax of substantially the

⁸⁸ A further series of powers were 'reserved' for the Council of Ireland. Since this never came into existence these powers were transferred to Stormont in the *Ireland (Confirmation of Agreement) Act 1925*

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same character⁸⁹ and the Administration was dependant entirely on a block fund to be paid annually by the Government. The Act contained no formula governing the block grant payable. Part III contains merely the legal framework necessary to enable block grants for expenditure on the devolved services to be paid from the UK Exchequer to the new Scottish Executive. A Scottish Consolidated Fund was created, together with a Scottish Loans Fund (S.44). There would be a Scottish Comptroller and Auditor General (S.55) and an Assembly Accounts Committee (S.58).

Miscellaneous

S.66 sought to provide that where a Bill in the House of Commons which fell within the scope of S.3 (i.e. a Bill not relating to Scotland but which would have been within the legislative competence of the Assembly had it related to Scotland which received a majority on its Second Reading only by virtue of Scottish MPs) a second vote would take place at least 14 days later and only if a majority were obtained on that second vote, would the Bill be deemed to have been read a second time. Under S.66(2) however the section itself would not come into operation unless it had been approved by a resolution of the House of Commons.⁹⁰

S.69 provided a machinery for achieving a division of responsibility in respect of public bodies which were responsible for reserved as well as for devolved matters. The bodies were listed in Schedule 13. S.76 made interim arrangements for the investigation of maladministration until the Assembly would make its own arrangements.

H. *Scotland Act 1978 - a critique*

Specification of powers

The *Scotland Act* has often been criticised as a unwieldy and complex legislation. Attention has focused on a number of areas, the most prominent being its attempt to categorise the devolved powers in Schedule 10 and 11. Kilbrandon had recommended the enumeration of transferred powers on the grounds that it produced the greatest clarity and precision and was better adapted to the need for flexibility since periodic adjustments would be necessary. Co-operation between the devolved administrators and Westminster could not be relied upon and it might be best to be aware precisely which powers were being devolved.⁹¹ However, the need to specify transferred powers inevitably led to the need to set out reserved powers since exceptions needed to be specified.⁹² The result, as Bogdanor has noted⁹³ is that even the most minor alteration of powers would need legislation at Westminster; reopening battles over devolution. In the absence of a

⁸⁹ Schedule 2 para. 4

⁹⁰ See Research Paper 95/95 '*The West Lothian Question*' for further details

⁹¹ Cmnd 5460 paras.737-745

⁹² See Scottish Law Commission's Memorandum to the Lord Advocate (27/5/75 in response to the September 1974 White Paper

⁹³ *Devolution* (1979) p.169

powerful ministerial voice laying down clear principles of policy the actual demarcation of powers depended on a process of interdepartmental bargaining in Whitehall. The Constitution Unit report *Scotland's Parliament: Fundamentals for a New Scotland Act* (1996) noted that some of the steam went out of the push for legislation when Jim Callaghan replaced Harold Wilson as Prime Minister in April 1976. He himself had been sceptical about devolution. The report commented:⁹⁴

59 Why did the process take so long? There were some difficult technical issues to be resolved, and it did not help that the Government were lukewarm towards devolution in any case. But the bulk of the time was taken up in negotiating between Ministers and their departments precisely which functions and powers could be devolved and which not.

60 That required a huge investment of time and a complex machinery for policy making and negotiation. The Prime Minister himself chaired a committee which held about ten meetings, including three away-days at Chequers, to set strategy, to resolve the major difficulties and to try to maintain collective responsibility in a Cabinet which was divided on the wisdom of devolution. Ted Short chaired a Ministerial committee which met fifteen times. The head of the Constitution Unit chaired a committee of Permanent Secretaries. And a network of Whitehall committees at official level met almost constantly, and were still doing so - Filling gaps, drafting amendments - after the bill had been introduced.

61 The Constitution Unit's remit was simply to deliver a bill on the lines Ministers wanted. This circumscribed their room for coming up with fresh ideas, for example on the financing arrangements (where they pressed the case for revenue raising powers: 'No representation without taxation'), or the West Lothian question (as the question of the future role and level of Scottish representation at Westminster came to be known: see chapter 7). It also dictated a very detailed specification of the powers that were to be devolved: Ministers wanted to be clear about precisely where the dividing line had been drawn. The Royal Commission's report, while accepting that "absolute precision in definition has not been attained in any constitution" (paragraph 739), favoured the listing of transferred rather than reserved powers" and this was the method adopted by the Government.

62 In practice the Constitution Unit found that the only way to achieve the precision Ministers desired was to go through the statute book as it applied to Scotland and Wales and to decide, Act by Act, and sometimes section by section, which could be transferred to the Assemblies and which needed to remain the responsibility of Westminster. Whilst the aim might have been to devolve as much as possible, this means, of going about it meant that the choice between transfer and retention had to be made in each case and was arrived at by bargaining within Whitehall rather than on any clear basis of principle.

63 The Constitution Unit, under the direction of the Lord President, was responsible for conducting the Whitehall negotiation and steering it to a conclusion. The Scottish and Welsh Offices pressed for a greater devolution of powers, while the other departments generally resisted. The Lord President was in overall charge of the policy. He was in the lead in the sense that it was his bill: his responsibility to agree the policy, and to get it drafted. The status of other Cabinet Ministers depended on the point at issue. Whatever the ground rules, in practice the Ministers or officials with the most clout or the most determination proved decisive. If the question was, for example, how far responsibility for health might be devolved, the Health Secretary (as advised by his officials) effectively had a veto unless overruled at Cabinet level. Several issues had to go to the Prime Ministerial committee for resolution.

⁹⁴ The Constitution Unit referred to in the extract below is the Constitution Unit of the Cabinet Office

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The independent Constitution Unit concluded "The 1978 Act encapsulates a devolution settlement reached in rather grudging circumstances" (para.97) and recommended instead an approach based in specifying the powers retained as "quicker to draft, easier to understand, more workable in practice, technically more robust and more durable" (para.96).

The role of the Secretary of State representing the views of the Executive to the Cabinet and the views of the Cabinet to the Executive held obvious difficulties. Bogdanor noted "There will thus be two voices speaking for Scotland - the Executive and the Secretary of State. It is not difficult to imagine which voice will be louder. The Executive will claim to be the genuine representative of Scotland, and when contentious issues arise will not be content to hear its views represented by a Minister who, because of its reduced role, carries little weight in Cabinet discussions".⁹⁵ The veto functions of the Secretary of State in the 1978 Act contained in S.38 allowing him to recommend that Parliament strike down a Scottish Bill or provisions of a Bill on the grounds both that it might affect a reserved power and its enactment would not be in the public interest was very much a compromise between devolutionists and anti-devolutionists, and emphasised the political nature of the judgement of the Secretary of State.

Resolution of disputes

The Act accepted the role of the courts to rule on devolution issues as on any other matter of law. Two separate mechanisms were provided for - firstly there was provision under S.19 for the Secretary of State to refer a proposed Scottish Act to the Privy Council in advance of enactment where the *vires* of the proposed enactment was in doubt. If the Privy Council ruled that the proposed Act, or any part of it, was *ultra vires* then it would not be given approval by the Queen in Council (Royal Assent) and would be returned to the Assembly.⁹⁶ Secondly, where a devolution issue arose in the course of other proceedings the issue could be referred to the appropriate higher court, from whose judgement appeal would lie to the Privy Council.⁹⁷ Bogdanor commented "the detailed categories of powers enumerated in the Scotland Act leave great opportunity for dispute as to their precise scope" (p.173-174). He commented:⁹⁸

With post-assent review, Acts of the Scottish Assembly can be challenged in any court, but the judicial Committee may again be used as the final Court of Appeal on constitutional questions. To determine the validity, as opposed to the construction, of legislation within the United Kingdom will be a novel function for a British court-always excepting the Northern Ireland experience-and it will mean that an Act of the Scottish Assembly will be law only insofar as a court has ruled that it is valid, or if it has not yet been challenged.

Moreover, under its present constitution, the judicial Committee of the Privy Council may not be fully accepted as a reasonable arbiter of constitutional cases arising under the Scotland Bill, since there is no legal obligation for Scottish judges to be members of the Privy Council, or for them to sit on particular cases heard by the

⁹⁵ *Devolution* p. 172

⁹⁶ The Secretary of State could also prevent a bill receiving assent if he thought it incompatible with European Community or other international obligations without reference to the Privy Council

⁹⁷ S.65 and Schedule 12

⁹⁸ pp 175-176

Committee. It is perhaps surprising that no provision was made in the Scotland Act for regulating the constitution of the judicial Committee so as to include a given number of Scottish judges. In the kind of politically charged situation which could so easily arise, it is not difficult to see how Scottish sensibilities might be offended by any imagined under-representation on the Committee.

It is not easy to predict how the judicial Committee will interpret the division of powers in the Scotland Act, because the Act itself does not, as we have seen, provide a publicly intelligible guide for adjudication. The Council of the Law Society of Scotland claimed that since it was difficult to 'trace any discernible principle of rationale upon which the subjects to be devolved have been selected ... this will cause difficulty to the judicial Committee of the Privy Council, or any other court in attempting to provide a corpus of consistent rulings on the legislative competence of the Assembly'. This lack of logic in the allocation of powers in the Scotland Act means that the basis for adjudication remains uncertain, and the actual division of powers will depend upon judicial interpretation. Judicial decisions could therefore amend the distribution of powers very considerably, as has occurred in federal states such as the United States and Canada. The future evolution of government in Scotland may well depend as much upon judges as it will upon politicians.

Colin Boyd QC⁹⁹ considered that the range of European legislation now required a new mechanism for judicial referral; the *Scotland Act* merely referred to the opinion of the Secretary of State in judging whether a Bill was in conformity with Community obligations.

The Constitution Unit Report has commented on the relative merits of the House of Lords and the Privy Council as a final court of appeal, concluding that the House of Lords should supplant the Privy Council.¹⁰⁰

141 But the judicial role of the Privy Council is in decline, and the time may not be so far off when it comes to an end altogether. Appeals will no longer lie from Hong Kong after 1997, and New Zealand may follow. There is also some dissatisfaction with appeals arising from the Caribbean countries. Giving the Judicial Committee a role in devolution issues would breathe fresh life into it. On balance therefore it seems more sensible to avoid the risk of conflict at the top of the judicial hierarchy, to accept the decline of the judicial role of the Privy Council, and to leave the House of Lords as the final court of appeal for devolution issues. The convention by which two Scottish Law Lords invariably sit on appeals emanating from Scotland should continue.

Finance

Bogdanor argued that "for Scotland and Wales the failure to devolve revenue raising powers will fundamentally affect the character of the devolved administrations" (p.202). He considered that the devolved administrations would take on the character of preserve groups bidding for improvements to the block grant mechanisms and that the Westminster Government would be drawn into the proposed expenditure plans of the Assemblies (p.202). The Constitution Unit

⁹⁹ "Parliaments and Courts: Powers and Dispute Resolution" in *Devolution to Scotland: the Legal Aspects* (1977) ed. T.St.J.N.Bates

¹⁰⁰ *Scotland's Parliament: Fundamentals for a new Scotland Act*

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reported that although the Barnett formula¹⁰¹ was designed to bring some convergence over time between relative spending in England, Wales and Scotland. convergence did not appear to have been realised (para. 214).

I. After 1979

The results of the 1979 referendum and general election removed the devolution issue from the forefront of British politics. The election of Mrs Thatcher in May 1979 saw an increase in the Conservatives support in Scotland from 24.7% to 31.4% and a net gain of 6 seats. However, Labour remained the largest party in Scotland. The 1979 Scottish Conservative manifesto had stated "there should be an all party conference or committee to see if we can reach agreement on improvements in one system of Government".¹⁰² However, the all-party talks which were set up in the autumn of 1979¹⁰³ were confined to improvements in the arrangements for dealing with Scottish Parliamentary business rather than any more wide ranging reform. Changes to Scottish Grand Committee procedures were approved on 16 June 1981¹⁰⁴ when the relevant standing orders were changed.¹⁰⁵ A Scottish Affairs Select Committee was also established along with other departmental select committees set up in the 1979 reforms. The election of a noted anti-devolutionist, Neil Kinnock, as Labour leader in 1983 mitigated against an early revival of interest in the topic. Mr Kinnock did give support to the establishment of a Scottish Assembly in a speech in Perth to the Scottish Labour Party on 7 March 1986 and pledged a Scottish Assembly within twelve months of coming to power.¹⁰⁶

There was a resurgence of public and political interest in devolution following the 1987 general election;¹⁰⁷ this was fuelled by the controversy over the introduction of poll tax or community charge in the *Abolition of Domestic Rates Etc (Scotland) Act 1987*.¹⁰⁸ Roger Levy has argued that the Scottish Labour party in the 1980s pushed radical devolution proposals through the Labour party nationally, having accepted the nationalist idea of the Scottish mandate, ie that Conservatives had no mandate to govern Scotland.¹⁰⁹

Support for the SNP increased in the late 1980s, most spectacularly in the SNP victory over Labour at Glasgow Govan by election on 10 November 1988. In November 1987 a *Scotland Bill* was introduced by the Shadow Scottish Secretary, Donald Dewar.¹¹⁰ It proposed widespread

¹⁰¹ a formula devised by Joel Barnett as Chief Secretary to the Treasury in 1978 to ensure that any future changes in the Scottish or Welsh budgets should be calculated as a proportion of the changes in equivalent English spending. See Research Paper no. 97/78 'Public expenditure in Scotland and Wales' for background

¹⁰² *Conservative Manifesto for Scotland* p.24

¹⁰³ See terms of reference given in HC Deb. vol 973 7/11/79 c.232-234W

¹⁰⁴ HC Deb. vol. 6 cc 958-997

¹⁰⁵ for further details on the main changes to Scottish Parliamentary business see Research Papers no. 94/85 and 95/131

¹⁰⁶ *Municipal Journal* 14/3/86

¹⁰⁷ where the Conservatives won only 10 out of the 72 Scottish seats. The Labour manifesto 1987 promised "we shall legislate in the first Parliamentary session to establish a democratically elected Scottish Assembly" [*Britain will win*]

¹⁰⁸ For background see *The Battle for Scotland* (1995) Andrew Marr

¹⁰⁹ *Scottish Nationalism at the Cross Roads* [1990] p.125

¹¹⁰ Bill 50 of 1987/88. It made no progress in the Commons

devolution to a Scottish Assembly on the basis of powers transferred.¹¹¹ The principle of the Bill was debated on 27 January 1988 in an Opposition Day debate.¹¹²

Scottish Constitutional Convention

The Scottish Constitutional Convention arose out of the publication of a *Claim of Right for Scotland* in July 1988 by the Campaign for a Scottish Assembly.¹¹³ The Convention met for the first time on 30 March 1989 and adopted a declaration of policy which acknowledged "the sovereign right of the Scottish people to determine the form of Government best suited to their needs".¹¹⁴

The Convention was attended by two major parties: Liberal Democrats and Labour but boycotted by the Conservatives and SNP after some internal debate. Representatives from a wide range of Scottish civil society have also participated in the Convention: local government, churches, business groups, Scottish TUC, universities, Scottish Convention of Women and from ethnic minority communities. The principle of proceeding by consensus was established at a very early stage by the Executive Committee. A consultation document, *Towards a Scottish Parliament* was approved on 20 September 1989. On St Andrews Day 1990 the SCC presented its report to the Scottish people *Towards Scotland's Parliament* which laid out a broad framework. The proposals were:

- a directly elected Scottish Parliament with a defined range of powers and responsibilities which would encompass sole or shared responsibility for all functions except those retained to the United Kingdom (defence, foreign affairs, central economic and fiscal responsibilities and social security policy);
- a representative office in Brussels, with a statutory entitlement to be included in UK delegations to the Council of Ministers;
- Scottish expenditure to be financed by a system of "assigned revenues" ie all Scottish income tax, and if possible Scottish VAT to be assigned to Scotland; a power to vary the rate of income tax up or down within a defined limit, and there would be a element of equalisation based on a needs assessment starting from the present Barnett formula. (The Barnett formula is described in *Scotland in the Union: a partnership for good*.¹¹⁵ Briefly, it is used within the course of a public expenditure survey to adjust the spending plans for the three territorial departments to reflect changes in comparable programmes in England

¹¹¹ For a detailed examination of the scheme see Appendix B of *Scotland's parliament* Constitutional Unit April 1996

¹¹² HC Deb.vol. 126 c.323-416

¹¹³ This was signed by Donald Dewar and most of the Scottish Labour MPs

¹¹⁴ Minute of Meeting of Convention held at the Church of Scotland General Assembly Hall 30.3.89 Scottish Constitutional Convention

¹¹⁵ Cm 2225 at paras. 2.13-2.16. See also Research Paper no. 97/78 *Public expenditure in Scotland and Wales*

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(or Great Britain in the case of Northern Ireland). It applies only to the Scottish Office 'block');

- an electoral system to be assessed in terms of the following principles: that results be broadly related to the number of votes cast; that effective positive action be taken to bring about equal representation of men and women and to encourage fair representation of ethnic and other minority groups, that a real link between the member and his constituency is made; that it be as simple as possible to understand; that it ensures adequate representation of less populous areas, and that the systems be designed to place the greatest possible power in the hands of the people.

Other issues discussed were the possible entrenchment of a Parliament, and special protection for fundamental rights and freedoms within a Scottish law, by a Charter of Rights.

This broad framework was accepted by the plenary session of the SCC. Two working parties were set up to work on preparation and procedures for Parliament, and to consider an electoral system based on the above principles. In January 1992 the SCC executive committee agreed an additional member system as the basis of the proposed new voting system with the ratio between seats elected by first past the post to those by additional member system to be decided in the future. Further work was, however, required on the details.¹¹⁶

The working party on procedure and working arrangements made a series of recommendations, including fixed term Parliaments, the extensive use of Parliamentary committees, public appointments as a responsibility of Parliament, and the Westminster model of the executive in Parliament so that membership of Cabinet would be drawn from the party or parties with a working majority in Parliament. The recommendations from both working parties were approved by the Convention on 27 February 1992.

In the 1992 election Labour's manifesto contained a commitment to establish more immediately to a Scottish Parliament on SCC lines on the basis of an AMS electoral system.¹¹⁷ The Conservatives campaigned on the basis that concessions towards Scottish self government would threaten the Union and might lead to its dissolution. The issue was of growing importance as the campaign progressed with Mr Major highlighting constitutional issues. In the election the Conservatives increased their representation in Scotland to 11 MPs and the result was generally regarded as a vindication of the Major strategy.

¹¹⁶ Scottish Constitutional Convention *Electoral System for Scottish Parliament* January 1992

¹¹⁷ *Time to get Britain working again* 1992

Immediately following the election a new cross party organisation - Scotland United - was formed with the aim of a multi-option referendum on independence, devolution or the status quo. The SNP made a demand for a referendum of this nature a key issue and Donald Dewar, Shadow Secretary of State for Scotland offered initial support to the proposal of an immediate referendum. He said on 20 May 1992 "would it not be a service to democracy and a way of settling a problem that will not go away to put the status quo to a test in a referendum?"¹¹⁸

The Government refused demands for a referendum. After a period of relative silence following the 1992 Election, the Convention set up the Scottish Constitutional Commission in October 1993 to report to the Convention on some detailed aspects of the devolution proposals. The members of the Commission were ten eminent Scots at that time not active in party politics. In particular, it was to make recommendations on proposals for a method of electoral system for the elections to a Scottish Parliament, and gender representation, and the constitutional implications of the establishment of a Scottish Parliament.

The Commission reported in October 1994, with a recommendation for an additional member system of proportional representation (AMS) whereby each elector casts two votes, one for a constituency MP, and one for a candidate from a party list. Individual Members of the Scottish Parliament (MSPs) would be elected on a first past the post basis for the 72 constituencies, plus 40 MSPs elected from a party list on a Euro-constituency basis with 5 additional MSPs allocated for each of the 81 existing Scottish Euro constituencies. This made a total of 112 seats.^{119,120}

The Commission did not endorse a statutory quota system for gender representation, considering that it would raise serious civil liberties issues involving the rights of political parties as free and self-organising structures in a civil society. Instead it recommended the adoption of a target system for the representation of women and ethnic minorities. Each party would be invited to set itself a target to be achieved within five years.

On the more general constitutional issues, the Commission Report rejected proposals to reduce the number of Scottish seats at Westminster, proposing instead that the Convention should promote a general debate on patterns of Westminster representation in the context of decentralisation. It recommended a diminution of the powers of the Secretary of State for Scotland and an investigation of the possibility of entrenchment of the proposed Scottish Parliament.

¹¹⁸ HC Deb. 20/5/92 c.241

¹¹⁹ *Further steps: Towards a Scheme for Scotland's Parliament: A Report to the Scottish Constitutional Convention by the Scottish Constitutional Commission October 1994*

¹²⁰ See Research Paper 97/26 *Voting Systems - The Alternatives* for further detail on this

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The Scottish Constitutional Convention met on 2nd December 1994 to consider the report, but took no decision on whether to accept the recommendations. Instead private discussions continued within the Convention. The Liberal Democrat party appeared to favour a larger number of seats (145) and the Labour Party 112 seats.¹²¹ An eventual compromise of between 120 and 136 was forecast in June 1995.¹²² The issue of size has been seen as crucial for the Liberal Democrats because the larger the Parliament the greater the chance of achieving proportional representation and avoiding the dominance by one party. Tensions also emerged over the summer over the proposed methods of financing the Scottish Parliament, Labour favoured replacing "assigned revenues" with a block grant. Assigned revenues means the assignation to Scotland of income tax paid by Scottish revenues and VAT paid in Scotland on goods and services.

The compromise of 129 seats was arrived at in September 1995; 73 to be elected by first past the post, and 56 through a party list with 7 coming from each of the 8 European constituencies.¹²³

J. The final Scottish Constitutional Convention Proposals

On 17 October 1995 the executive committee of the SCC published *Key Proposals for Scotland's Parliament*, the final document incorporating proposals for the Parliament.

The proposals were presented in final form in *Scotland's Parliament, Scotland's Right* on 30 November 1995. The proposals are summarised below:

- the Scottish Parliament powers to include all areas currently within remit of Scottish Office, so that the Parliament would have sole or shared responsibility for all functions except those retained to the Westminster Parliament ie. defence foreign affairs, immigration, nationality, social security policy and central economic and fiscal responsibilities;
- the subsidiarity principle to apply where a function was shared between the Scottish Parliament and Westminster;
- Scotland's Parliament to be represented on UK Ministerial delegations to the EC/EU and to have the power to appoint representatives to the Committee of the Regions and the Economic and Social Committees;
- the Scottish Parliament to be responsible for the system of local government in Scotland, its financing and its provision of local services. The Convention supported Article 4 of the

¹²¹ *Scotsman* 25/4/95 "Labour proposal upsets constitutional harmony"

¹²² *Scotsman* 9/6/95 "Labour concession on assembly"

¹²³ *Scotsman* 8/9/95 "Rivals hail devolution deal". See also John Curtice in *Representation* Spring/Summer 1996 "why the Additional Member System has won out in Scotland"

European Charter of Local Self Government that local authorities shall, within the limits of the law, have full discretion to exercise their initiative with regard to any matter which is not excluded from their competence nor assigned to any other authority;

- the role of quangos operating in Scotland to be examined by Scotland's Parliament which would 'bring their activities under democratic control where it considers this necessary'. The Parliament would also have powers to ensure that where such bodies remained they would be subject to greater accountability and accessibility.
- one Member of Parliament each for Orkney, Shetland and Western Isles to ensure separate representation.
- acceptance that entrenchment could not be achieved within the concept of supreme Parliamentary sovereignty but in advance of the relevant Scottish legislation. There would be a clear commitment by the Westminster Parliament made through a Declaration that the Act founding the Parliament should not be repealed or amended without the consent of the Scottish Parliament and people directly consulted through general election or referendum.
- an existing body in first instance such as the Appellate Committee of the House of Lords or the Judicial Committee of the Privy Council to resolve disputes as to the relative powers of the UK and Scottish Parliament;
- a Charter of fundamental rights to be adopted by Scotland's Parliament encompassing and improving on prevailing international law and conventions. An expectation that a *Freedom of Information Act* be passed by Scotland's Parliament;
- a Parliament of 129 Members to be established, electors to have two votes, one for 73 constituency members of the Scottish Parliament (MSPs) elected from Westminster constituencies with the addition of two separate Orkney and Shetland constituencies on a first past the post system, and for 56 additional members from a local party list, with seven from each of the eight European constituencies. The votes cast for each party would be counted within the eight constituencies and the seven seats from each would be allocated so that the total representation from each area - including MSPs returned for individual constituencies would correspond as closely as possible with the share of the votes cast for each party in the area;
- a review of the electoral system by the Parliament after the first election, with the assumption that the main principles remain intact;
- endorsement of the cross-party Electoral Agreement which accepts that there should be equal numbers of men and women as members of the first Parliament, and commits the parties to select and field an equal number of male and female candidates for election distributed with a view to the winnability of seats (the cross party agreement has been signed by Scottish Labour and the Scottish Liberal Democrats only.)

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- a single chamber legislature with no role for an upper chamber like the House of Lords;
- a Speaker to be elected by vote of the full Parliament;
- a fixed term of four years for the Parliament unless two thirds of MSPs agree otherwise;
- the Executive to be headed by a chief Minister normally (but not necessarily) being the leader of the largest party; Cabinet membership to be drawn from a party or parties forming a working majority in Parliament.¹²⁴ All Ministers would need to be confirmed by simple majority of the full party. Their role would be to administer Government departments, and to initiate legislation (to be shared with Parliamentary Committee) and to represent the Scottish Parliament;
- adoption of standing orders to provide for the Parliament to operate through a system of Parliamentary committees, for MSPs not to take fulltime outside jobs, and to make appointments to public bodies as open and democratic as possible. Only on the first term of the Parliament would MSPs be able to hold a dual mandate (ie. be a member of the Westminster Parliament, or European Parliament, or a local authority councillor);
- the principle of financial equalisation to be embodied in the establishing Act, with the Barnett formula being used as the basis of the allocation; this would be known as the assigned budget, which would not require annual negotiation;
- the Scottish Parliament to take over the powers currently exercised by the Secretary of State over public expenditure in Scotland;
- a power to increase or decrease the basic rate of income tax by a maximum of 3p in the pound to be given to the Scottish Parliament, but any tax cuts would have to be financed from within the assigned budget. There would be no powers to vary corporate taxation.

Bernard Crick and David Millar produced a revised version of their proposed standing orders for a Scottish Parliament *To Make the Parliament of Scotland a Model for Democracy* (John Wheatley Centre, November 1995). These have not been officially endorsed by the Convention but are intended to be a contribution to the debate. The report recommended a maximum of ten Ministers for the Cabinet, a Steering (or Business) Committee to determine Parliamentary business; a new Public Appointments Committee to scrutinise appointments; the use of standing orders which recognise a political party, a Parliamentary information service to assist both MSPs and the public, and proposals to govern relations between the Scottish and Westminster Parliaments (such as Conciliation or Joint Ministerial Committees) and relations with Europe. Subsequently a *Parliament for the New Millennium* was published in 1997 with proposals for the development of IT within the Scottish Parliament.¹²⁵

¹²⁴ Law Officers need not be MSPs

¹²⁵ John Wheatley Centre: *A report by the Advisory Committee on Telematics for the Scottish Parliament*

The SCC proposals therefore encompassed some of the changes foreshadowed in early 1995, notably the compromise number of 129 Members, and the change from "assigned revenues" to "assigned budget" while any attempt to achieve gender balance by statutory intervention has been ruled out. An attempt at solving the entrenchment dilemma was made by means of a special resolution at Westminster. However, the final proposals did not mention the 'West Lothian Question' or the role of the Secretary of State. Commentators have also doubted whether the proposals, as currently formulated, offer sufficient detail on the resolutions of dispute between the UK and the Parliament of Scotland, and relations with local government and Europe. There is little information on the operation of the assigned budget and the equalisation formula.

In all, the SCC proposals do not address the future relationship of Scotland within the UK specifically the nature of 'devolution' being offered. Devolution as has been discussed for Scotland since the war is generally seen as a way of transforming the present system of substantial administrative autonomy into one of legislative autonomy with the UK, and is not a true federal system.

On the other hand, when the Convention first met on 30 March 1989 it adopted a declaration that the Convention acknowledged "the sovereign right of the Scottish people to determine the Government best suited to their needs"¹²⁶ The Liberal Democrats still wish to see a move towards a federal or quasi federal structure for the UK to deal with purely federal matters such as defence. However, the SCC proposals envisage a large number of functions shared between Scotland and Westminster with little detail of how sharing will operate. A Scottish Charter of Rights would need to co-exist with the UK wide *Prevention of Terrorism Act*.¹²⁷ No independent constitutional court is provided for; countries with experience of operating federal systems such as the US, Canada and Australia have developed judiciaries which are used to determine whether Parliaments or Ministers have acted within their powers.

The SCC proposals bear some resemblance to the earlier twentieth century attempt at devolution - the Northern Ireland Parliament at Stormont. Of course the Northern Ireland experiment was not designed to deal with the "centrifugal" pressures of nationalism¹²⁸ but nevertheless under the 1920 *Government of Ireland Act* Stormont was given broad powers to make laws for the peace, order, and good government of the inhabitants of Northern Ireland, with residual powers at Westminster, including defence, external trade and foreign affairs. Power over income tax also remained at Westminster, although S.25 of the 1920 Act gave the Northern Ireland Parliament power to give rebates on income tax or surtax; this power was never used (Northern Ireland found it impossible to finance from her revenue a level of services equal to those in the UK and a succession of agreements with Westminster determined Stormont's finances by needs, not revenues). Although there were powerful statutory constraints on the autonomy of Stormont, in practice the constitutional relationship with Westminster was quasi-federal as Westminster did

¹²⁶ SCC Minutes of Meeting, Item 9, 30.3.89

¹²⁷ See Malcolm Dickson in *The Herald* 18/10/95 "A blue print in shades of grey"

¹²⁸ see Vernon Bogdanor *Devolution* (1979) p.47

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not take an interventionist role. In particular it did not attempt to regulate the form of electoral system used, so that in 1922 proportional representation in local government was abolished, followed by PR in elections to Stormont in 1929.¹²⁹

The shift from assigned revenues to assigned budget was foreshadowed in *A Parliament for Scotland: Labour's Plan*¹³⁰ which proposed the system subsequently adopted by the Convention. There was some concern within the Convention that the change was adopted to suit the electoral fortunes of the Labour Party. Labour noted that the assignment of taxes to Scotland would have left a shortfall on current Scottish Office expenditure requiring a top-up grant from the Treasury, and considered that a well-established formula-driven public grant would be more stable. However, the change raised fears that the tax-raising powers of the Parliament might be under attack (see below). The Constitution Unit Report^{131,132} noted that the financial arrangements did not promise stability in the longer term as the Barnett formula was under pressure. Mechanisms for keeping the formula under review were required as well as autonomous revenue raising powers.¹³³

The Conservative criticised the assumption that the Barnett formula would simply continue.¹³⁴ Other objections were raised on the basis that the Scottish Parliament should have fuller tax raising powers. Ferdinand Mount argued, in an article sympathetic to devolution, that a "tax varying power of 3p in the pound was insufficient and that to use income tax rather than local taxes was to jumble up local and national revenues".¹³⁵ Both George Robertson and Tony Blair emphasised that the power to vary taxation would be exercised prudently and that Labour had no plans to raise tax.¹³⁶

Labour policy was developed further in June 1996 when press conferences were held in Glasgow and Cardiff; the Shadow Scottish and Welsh Secretaries announced that Labour planned to hold pre-legislative referendums.

George Robertson, Shadow Scottish Secretary said:

Part of the task Tony Blair gave me was not just to ensure the package itself was sound but to work on the details of implementation. In recent months I have been working with Shadow Cabinet colleagues on plans to make sure a Scottish Parliament was enacted as soon as possible after the election.

Let me set out what I personally recommended and what Labour will do.

As soon as Labour is returned to power, a White Paper will be published setting out the details of our plans.

¹²⁹ see B. Hadfield, *The Constitution of Northern Ireland* (1989) for a detailed discussion.

¹³⁰ approved and published by the Scottish Labour Party in March 1995

¹³¹ Scotland's Parliament: *Fundamentals for a New Scotland Act* April 1996

¹³² report published in April 1996

¹³³ *Briefing: Financial Arrangements* 1996

¹³⁴ *Scotsman* 23/3/95 "Clarke's tax warning to Scots"

¹³⁵ *Times Literary Supplement* 11.8.95 "Homage in Caledonia"

¹³⁶ *Herald* 8/12/95 "New Labour and the New Union". See also *The Herald* 9/12/95 "Tartan tax"

The people of Scotland will be asked to endorse the proposals in an early referendum to pave the way for legislation.

There will be no tricks. No fancy franchise. The test will be a straightforward majority of the votes cast.

It is right that a democratic Parliament should be founded on a democratic vote.

There is now overwhelming support for a referendum in Scotland which should no longer be ignored. Politicians should trust the people.

We want to be sure that the democratic system we put in place is stable and durable.

The best security a Scottish Parliament can have is the support of the people

Michael Forsyth recently said this "As Scottish Conservatives we would put up candidates, we would argue our corner and if the Parliament had had the endorsement of the Scottish people, we are not going to abolish it".

Today I challenge him to stick by his word and to repeat his commitment to abide by the view of the Scottish people.

That is the case for a referendum.

He then turned to the question of the proposed Parliament's financial powers:

There is clear evidence that Scotland does support this power but given its importance in the argument we believe this too should be put to the test.

We therefore propose that there should be a second question on the referendum ballot, dealing with the question of taxation. It will give the people the chance to speak. Even the most prejudiced of opponents would surely hesitate to defy a clear expression of popular support.

There is a clear difference between the power of an institution and a pledge from a political party to exercise that power. In the event of the Scottish people voting yes to the taxation power, political parties will still want to think long and hard before entering an election pledged to raise taxes. What matters is to establish firmly and explicitly the principle and we believe Scotland will back it. The Prime Minister and the Secretary of State remain implacably opposed. Let the people decide.

He pledged that the Labour Party would be campaigning for a 'yes' vote on both questions: "The Labour government, led by Tony Blair, will spearhead our principled fight for a more democratic Scotland". He claimed that "the referendum and the popular endorsement it would bring is in itself an important part of [the devolution] process. The intention is to speed to the course of change. There must be no delay. The pledge that a devolution Bill will be on the statute book within the first year of a Labour government will be honoured ... Responsive government closer to the people is a great prize and we believe that today's announcement brings it very much closer".¹³⁷

Ron Davies repeated the party's pledge to legislate for a Welsh Assembly in the first year of a Labour government.

The policy on the referendum underwent further refinement in August when a plan was briefly floated for a second referendum to be called by Scottish Parliament on tax raising powers. The plan was dropped after receiving little support.¹³⁸ The Liberal Democrats, as partners with Labour in the SCC, were hostile to the referendum proposal, and the proposal caused, internal

¹³⁷ *Scottish Affairs* Winter 1997 "Labour's Referendum Plan: Sell-out or Act of Faith?" for further background

¹³⁸ See Research Paper no. 97/10 *Referendum: recent Proposals* p.23 for further details

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dissent in the Labour party. Tam Dalyell expressed opposition to the concept of a prelegislative referendum.¹³⁹

In the immediate run-up to the General Election of May 1997 attention began to focus on the possible form of devolution legislation. The Constitution Unit published *Scotland's Parliament: Fundamentals for a New Scotland Act* in April 1996. It reviewed the lessons of the 1970s, including that the legislation should list only powers retained at Westminster rather than enumerate devolved powers. It also argued for the establishment of an independent Commission to conduct a periodic review of the funding formula. The Unit report expressed doubt that the Secretary of State for Scotland could retain a long term role, and favoured a new Secretary of State for Territorial Affairs responsible also for devolution in Wales and England and possibly Northern Ireland. The West Lothian Question was considered to have no final answer and reducing Scotland's representation was not a simple solution to it given the current composition of Parliament, and the possibility of a new electoral system following a referendum.

James McCormick and Wendy Alexander in the Institute of Public Policy Research (IPPR)'s report *The State and the Nations* (1996) also argued against a Bill based on the 1978 Scotland Act approach for defining those powers left to Westminster. It noted "the reserve powers formula would shift the burden of proof to Westminster, which would have to demonstrate that the Scottish Parliament had strayed into its reserved area of competence, rather than Edinburgh repeatedly having to prove that it was entitled to legislate" (p.104). Bernard Crick has also advocated a short Bill transferring the current powers of the Secretary of State for Scotland to the Parliament in Scotland.¹⁴⁰ Doubts about the long term role of the Secretary of State post devolution were raised. David Heald and Neal Geaghan in *The State and the Nations* advocated a Territorial Exchequer Board charged with conducting needs assessments exercises and stressed the importance of tax-raising powers to enhance accountability and fiscal responsibility.¹⁴¹

There was also concern that the SCC devolution proposals might not prove so popular in practice. Midwinter and McVicar argued that the SCC proposals failed to "address the outstanding issues of Scottish representation and fiscal autonomy and rests on simplistic assumptions that the present Barnett formula will maintain Scotland's advantages, in public spending. These issues will certainly be addressed by a future Conservative Government at the UK level. We have shown the research evidence that support for independence is now strong among a substantial minority of Scots, and that support is unlikely to disappear post devolution. In our view, that real source of political discontent is not to be found in concern for national identity or political autonomy but in the key political issues of the management of the economy and the welfare state".¹⁴²

¹³⁹ *Scotsman* 23/8/96 "Dalyell won't be corralled over home rule initiative"

¹⁴⁰ *Political Quarterly*, Oct/Dec 1995 "Ambushes and Advances: The Scottish Act 1998"

¹⁴¹ *Financing a Scottish Parliament* in *The State and the Nations*

¹⁴² The Devolution Proposals for Scotland: an assessment and a Critique" in *Public Money and Management* October/December 1996

The SNP issued its own consultation paper on 30 September 1995. The proposals were inevitably more radical than those of the SCC but there were some similarities; in that the SNP proposed a single chamber, Parliamentary Committees with an important role in the initiation of legislation, a Westminster type executive and a Bill of Rights. Two types of PR, the alternative vote, and AMS would be used to elect a Parliament of 200 members¹⁴³ with the voting age lowered to 16. The final version of *Citizens not Subjects* was published in February 1997 incorporating the earlier proposals. There has been internal debate in the SNP between those who view devolution as a halfway step to independence and those who believe that devolution would negate that option. In January 1997 Alex Salmond was quoted as saying "I am not conceding our platform of Scottish independence but we won't obstruct devolution".¹⁴⁴ However, SNP policy on the referendum has not been spelt out; the SNP's preference is for a multi option referendum, including a question on independence.

The Conservative Government Response

After the 1992 election the Prime Minister, John Major, indicated that the Government would be reviewing the operation of the Union as it applied to Scotland. This became known as the 'Taking stock' exercise.

In March 1993 the Government White Paper *Scotland in the Union : a partnership for good* was published (Cm 2225). As well as proposals for enhancing the treatment of Scottish business in Parliament the White Paper also contained suggestions for "improving the dialogue between the Scottish Office and the public it exists to serve" (para. 8.5). A central enquiry unit for the Scottish Office was proposed together with outlying Scottish Office information points. The White Paper also highlighted policies to devolve more decision-making within Scotland such as parent-led school boards and the new single tier all purpose local authorities. It concluded by considering that ways had to be found of ensuring that Scotland played a bigger part in the United Kingdom as a whole, and that the White Paper marked 'the start of a continuing reappraisal by the Government of the way the Union works and how it can be improved' (para. 10.13).

Much of the White Paper provided background information on, for instance, the development of the machinery of government for Scotland and the separate nature of the Scottish legal system designed to demonstrate that the Union was a partnership "for good" in both senses of the term. Chapter 7 set out a number of ways in which administrative devolution was to be extended in Scotland, in the fields of training, industrial support schemes, Highland and Islands airports, Scottish Arts Council and relocation policy amounting to 'a significant transfer of decision-making power from London to Scotland' (para. 7.15). Critics noted that in many cases responsibility was to be transferred from other government departments to the Scottish Office, rather than a devolution to local authorities or other public bodies in Scotland. The White

¹⁴³ 144 constituency members elected by Alternative vote and 56 members drawn from party lists through AMS

¹⁴⁴ *Herald* 31/1/97 'SNP's declaration of devolution'

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Paper's main Parliamentary proposal was to expand the existing work of the Scottish Grand Committee by a series of procedural reforms: introducing Question Time for Ministers, opportunity for ministerial statements, expanded consideration of primary and secondary legislation, and enhanced scope for general debates (including adjournment debates at the end of each sitting). There were plans for the Committee to meet more frequently in Scotland and in places other than Edinburgh.¹⁴⁵ The proposals were debated on 11 July 1994¹⁴⁶ and standing orders agreed without a division.

Further proposals were unveiled by Michael Forsyth, then Secretary of State for Scotland on 29 November 1995.¹⁴⁷ Scottish Bills coming to the House were to have Second and Third Readings in the Scottish Grand Committee where appropriate, and there was to be greater resort to the 'special standing committee' procedure in Scotland as used in the 1994-95 session for the *Children (Scotland) Bill*. Standing Orders were to be changed to allow participation in debate in Grand Committee by Senior Ministers, including the Prime Minister in an effort to improve ministerial accountability. The new standing orders were approved on 19 December 1995¹⁴⁸ without a division.

In a speech on 30 November 1995 (St Andrew's Day), Mr Forsyth announced a number of non Parliamentary initiatives (as well as expanding on the Parliamentary reforms). In particular he proposed a number of local government reforms designed to remove unnecessary controls, but refused to abolish council tax capping.¹⁴⁹

Another proposal was to revitalise the Scottish Economic Council. He criticised the SCC proposals, in particular the method of election to the Scottish Parliament and the power to adjust the basic income tax by 3p using the term 'the tartan tax'. He also argued that a reduction in Scottish representation at the UK Parliament, would be inevitable and commented on the absence of a revising charter. Commentators consider that the tartan tax offensive by Forsyth was highly effective in persuading Labour to hold a referendum with a question on tax-varying powers.

¹⁴⁵ For further details see Research Papers 94/85 (8.7.94) *Proposed Changes to Scottish Parliamentary Business* and 95/131 (18.12.95) *The Government of Scotland: recent proposals*.

¹⁴⁶ HC Deb. vol. 246 cc 762-803

¹⁴⁷ See Research Paper 95/131 (18.12.95) *The Government of Scotland: recent proposals*

¹⁴⁸ HC Deb. vol. 268 c.1408-1433

¹⁴⁹ For further details see Research Paper no. 95/131 (18.12.95) *The Government of Scotland: recent proposals*

K. The 1997 election - the manifestos

Stephen Dorrell, then Secretary of State for Health was reported as saying in February 1997 in an interview with the Scotsman that a future Conservative Government would abolish a Scottish Parliament set up under a Labour Government,¹⁵⁰ Subsequently, Michael Forsyth, then Secretary of State for Scotland, indicated that abolition would not necessarily follow.¹⁵¹ Subsequently Sir Edward Heath was reported as giving his continued support for a Scottish assembly.¹⁵²

The Conservative party manifesto¹⁵³ commented as follows on Labour and Liberal plans (p.47):

The Labour and Liberal plans to create a Scottish parliament must be rejected because:

Scottish influence in the British parliament and government would be weakened - with the inevitable loss of the office of Secretary of State for Scotland and a large cut in the number of Scottish MPs at Westminster - already admitted by the Liberal Democrat.

Scotland's influence in Europe would be devalued - at present Scotland has a strong voice in Europe, with Scottish Office ministers able to lead the entire United Kingdom delegation where appropriate. According to Robin Cook, following devolution, ministers in the Scottish parliament would only have "observer status".

An extra Tartan Tax imposed uniquely on Scotland - would make Scotland the highest taxed part of the United Kingdom and a less attractive place for companies to locate; penalising those on lower wages; taxing Scottish savings - including pensioners' hard-earned life savings - at a 15% higher rate; undermining the competitiveness of Scotland's financial institutions; creating inflationary pressures as workers seek higher wages to pay the extra tax; and creating an unprecedented differential tax regime within the United Kingdom - the precursor of separatism.

Financial tensions would be created between a Scottish parliament and Westminster - a Scottish parliament, having raised public expectations about what it was capable of achieving, would demand extra money from Westminster. The consequent strife would endanger Scotland's funding, 97% of which would be determined at Westminster.

The West Lothian Question would poison democratic government - with Scottish MPs entitled to vote on English matters at Westminster, while English MPs were debarred from voting on Scottish issues. With Scottish affairs dealt with elsewhere, Scottish MPs would become second class citizens in parliament.

Tensions between a Scottish parliament and local government would be created - it is inevitable that a Scottish parliament would centralise many of the powers held by councils, reversing our policy of giving more powers to local authorities;

Checks and balances on Scottish legislation would be removed - the proposed tax-raising parliament would have no revising chamber.

¹⁵⁰ *Scotsman* 10/2/97 "Dorrell in devolution warning"

¹⁵¹ *Times* 11/2/97 "Proconsul Dorrell slips up"

¹⁵² *Times* 24/2/97 "Party wincing at Heath's tirade"

¹⁵³ *Fighting for Scotland: The Scottish Conservative and Unionist Manifesto* April 1997

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Scots would have to pay for another parliament and more politicians - £80 million to begin with and £40 million every year to be raised through the Tartan Tax or be cut from vital services such as health or education.

The manifesto pledged to develop further the role of the Scottish Grand Committee to require to meet on a specified number of occasions throughout Scotland and "never to endanger our Union by introducing constitutional innovations which are ill-thought out and which would corrode the strong bounds underpinning our Union" (p.48). The manifesto did not cover Conservative reaction to the creation of a Parliament for Scotland or indeed its campaigning stance in a future referendum on devolution.

The Liberal Democrat manifesto: *Make the difference: The Scottish Liberal Democrat manifesto 1997* April 1997 summarised their plans for a Scottish Parliament as follows:

A Home Rule Parliament for Scotland

Scotland is in a unique position. Home Rule for Scotland will both renew democracy in Scotland and clear the log jam to reform across the United Kingdom as a whole. It will provide a new focus for tackling the crucial problems of education, health, crime and jobs. The plan for a Scottish Parliament, as agreed in the Scottish Constitutional Convention, reflects a consensus amongst nearly every major civic and political organisation in Scotland (except the Conservatives and the SNP).

Liberal Democrats were successful in securing a fair voting system which will prevent the domination of Scotland by the central belt or by one party alone.

This Scottish Parliament scheme represents 'the settled will of the Scottish people'.

Scottish Liberal Democrats, as the only Scottish political party to have supported Scottish Home Rule consistently, are in the pivotal position of having been the main brokers of the scheme, and are the best guarantors of its implementation.

We will:

- **Set up a Home Rule Parliament in Scotland** in accordance with the 'Convention Scheme' as a first step to a Federal United Kingdom, with a fair and proportional voting system, powers to raise or lower income tax and fair representation of women. We would also establish a Welsh Senedd, create the framework to make existing regional decision-making in England democratically accountable and enable the establishment of elected regional assemblies.

- **Use the Scottish Parliament to promote Scottish interests** in the European Union, in modernising the Scottish economy, increasing individual opportunity, rebuilding public services such as education and health, and restoring the social cohesion of Scottish society.

- **Make the present functions of the Scottish Office democratically accountable to the elected Scottish Parliament.** We will abolish the office of Secretary of State for Scotland and reduce the number of Scottish MPs at Westminster. We believe that, following these reforms, Scottish Members of the UK Parliament should not participate or vote on matters where there is no Scottish interest.

The Scottish National Party manifesto *Yes We Can Win the Best for Scotland* referred to Citizens not Subjects as the key to its full constitutional proposals, summarised as follows:

The establishment of a single chamber parliament elected by proportional representation which is modern in character and which in gender, ethnic origin and geographical representation accurately mirrors Scottish society as a whole. The franchise will be extended to include all those aged 16 and over. Legislation will require public consultation, may be initiated by public petition as well as by members of the Scottish Parliament, and a system of strong standing committees will supervise and regulate proceedings. Final legislation, having passed the Parliamentary process, will be approved on behalf of the people by the Chancellor of the Parliament, not subject to the mumbo jumbo of Royal assent. The balanced parliament, elected fairly, and a strong investigative committee system will replace the offensive and archaic House of Lords as the mechanisms to ensure properly thought through legislation. Membership of a legislative body secured only by accident of birth or political patronage has no place in a modern democracy.

The SNP propose the reform of the Monarchy which, while allowing the Queen and her successors to remain Head of State, would ensure that their duties and payments were clearly and openly understood. In the absence of the Queen from Scotland the elected Chancellor (Speaker) of the Scottish Parliament will act as Head of State.

The protection of the rights and responsibilities of Local Government will be protected by means of entrenchment in the constitution. Local Authorities will also be elected by proportional representation.

Citizens of Scotland, wherever they have come from, will be full participants in a twenty first century democracy, not subjects of an outmoded and decaying eighteenth century state. That change alone will refresh and invigorate Scottish life.

The Labour party manifesto¹⁵⁴ summarised its policy as follows:

Labour will bring a fresh start for Scotland. We will, with the consent of the Scottish people, legislate for a devolved Scottish parliament. Scotland has its own education system, its own legal system, its own structure of local government and a distinct and proud national identity.

We will act to decentralise power throughout Britain. Subsidiarity is as sound a principle in Britain and Scotland as it is in Europe. Our proposal is for devolution not federation. By devolving power, Parliament will be deciding that some parts of the UK should be governed in a distinct manner. A sovereign Westminster Parliament will devolve power to Scotland and Wales. The Union will be strengthened and the threat of separatism removed.

As soon as possible after the election we will enact legislation to allow the people of Scotland to

vote in a referendum on our proposals, which will be set out in a white paper. This referendum will take place not later than the autumn of 1997. A simple majority of those voting in Scotland will be the requirement. Popular endorsement will strengthen the legitimacy of our proposals and speed their passage through both Houses of Parliament.

We will propose the creation of a Scottish parliament with law-making powers, firmly based on the agreement reached in the Scottish Constitutional Convention, including defined and limited financial powers to vary revenue, and elected by an additional member system. In the referendum we will seek separate endorsement of the proposal to create a Scottish parliament, and of the proposal to give it defined and limited financial powers to vary revenue. The Scottish parliament will extend

¹⁵⁴ *New Labour: because Scotland deserves better* April 1977

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democratic control over the widespread responsibilities currently exercised administratively by the Scottish Office.

The Welsh assembly will provide democratic control of the existing Welsh Office functions. It will have secondary legislative powers and will be specifically empowered to reform and democratise the quango state. It will be elected by an additional member system.

Following majorities in the referendums we will introduce in the first year of the Westminster Parliament, legislation on the substantive devolution proposals outlined in our white papers.

The Scottish parliament will be a modern legislature in tune with Scotland's needs and designed for the 21st century. Its establishment will allow the roiling back of the unelected state. It will also be empowered to give special additional protection to fundamental rights and freedoms in Scots law. In these and many more ways it will bring power closer to the people of Scotland.

In addition the Labour and Liberal Democrat joint Consultative Committee on Constitutional Reform reported on 5 March 1997 on a range of proposals including devolution for Scotland.¹⁵⁵

Scotland

33. Demand has grown in Scotland in recent years for democratic control over Scotland's domestic affairs and for the Scottish Office to act according to the wishes of the people of Scotland. Both the Labour and Liberal Democrat parties have long standing support for devolution to Scotland.
34. Both parties, with other organisations in Scotland, took part in the Scottish Constitutional Convention which was established in 1989. The Convention has since published its final report, Scotland's Parliament, Scotland's Right. That report sets out in detail proposals for the Scottish Parliament.
35. It recommends a Parliament with legislative competence over those matters which are currently the responsibility of the Scottish Office. These matters include health, housing, education, local government and law and order. The Act would include Provision for maintaining a strong and effective system of local government and would enable the Scottish Parliament to make accountable to the people the quangos and public bodies operating in Scotland.
36. The Parliament would be elected by the Additional Member System.
37. The principle of equalisation in finance would continue, with resources being pooled at the centre and allocated on an agreed basis. In addition there would be a power to vary revenue within a defined limit, providing the Scottish with a degree of autonomy over its budget.
38. In June last year the Labour Party announced its intention to hold a prelegislative referendum, and to seek specific endorsement for giving the parliament financial powers to vary revenue. Following the election legislation to hold the referendum would be introduced as soon as possible and a White Paper would be Produced detailing the devolution proposals.

¹⁵⁵ pp 8-9

39. Whilst Liberal Democrats have disagreed with this approach, in particular with the proposal for a second referendum question, they would not seek to frustrate or delay the referendum legislation, which could prejudice the achievement of our common goal - the enactment of the Bill to create a Scottish Parliament in the first session of the next parliament.
40. Both parties have endorsed the Convention's report as the basis for legislation to establish a Scottish Parliament. Both parties would campaign strongly for a positive outcome in that referendum. Following that outcome, both parties would support legislation to establish the Scottish Parliament within the first session of Parliament after the general election.

L. The 1997 election and the immediate aftermath

During the election campaign the issue of sovereignty was raised when Tony Blair was reported as saying to the *Scotsman* that if Labour were elected sovereignty would remain with Westminster and with me "as an English MP".¹⁵⁶ In the article in the *Scotsman*¹⁵⁷ Mr Blair argued that the tax-raising powers of the Parliament would be the same as any local authority "and once the power is given, it's like any parish council, it's got the right to exercise it" while emphasising that the power to increase income tax by 3p would not be used for the next five years. His remarks were interpreted as an attempt to reassure voters in England that devolution did not threaten the fabric of the UK.

However in 1988, the Shadow Secretary of State for Scotland, Donald Dewar and most Labour Scottish MPs had signed the "Claim of Right" (see above) which acknowledged "the sovereign right of the Scottish people". The Secretary for the Campaign for a Scottish Parliament wrote in a letter to the *Scotsman* 19/4/97,¹⁵⁸ that "it would be totally contrary to the whole spirit of the Claim of Right and Scotland's continuing constitutional tradition, for that process to imply an abolition of the sovereignty of the Scottish People or an imperialistic imposition in the Scots of the English tradition".

Following the election of a Labour Government the Scottish Office was given the lead role in formulating the devolution plans, under Donald Dewar with input from a new constitution Secretariat in the Cabinet Office.¹⁵⁹ In May the *Scotsman* reported on the draft bill prepared by the independent Constitution Unit illustrating how its model of 'reserved powers' would operate in legislative terms.¹⁶⁰ Under this model the powers reserved to Westminster are defined rather

¹⁵⁶ *Times* 5/4/97 "Blair accused of insulting the Scots"

¹⁵⁷ 4/4/97 "Sovereignty rests with me as an English MP and that's the way it will stay"

¹⁵⁸ "Principle behind a Scottish Parliament"

¹⁵⁹ In the 1970s the Cabinet Office had taken the lead role

¹⁶⁰ *Illustrative drafts for a New Scotland Bill, with an introduction and commentary*. Constitution Unit Spring 1997. Schedule 2 dealt with powers reserved to Westminster

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than listing the powers devolved as in the 1978 Scotland Act.¹⁶¹ The Unit stressed that the list of powers retained at Westminster was illustrative only.¹⁶²

In June there were some press reports that the details of the SCC plan for a 3p in the pound variation in income tax was under review by the Government.¹⁶³ On 8 July the press reported a division of opinion in the cabinet committee responsible for the devolution legislation with the immediate source of tension being the issue of abortion¹⁶⁴ which appeared to have been reserved to Westminster. Donald Dewar had reportedly been successful in maintaining the current number of Scottish MPs and opposing a reduction in the Barnett formula for Scotland. The Liberal Democrats expressed concern over the reported exclusion of abortion.^{165,166}

The Conservatives lost all their seats in Scotland in the election, and a number of influential figures in the Scottish Conservative party voiced immediate concerns about its anti-devolution policy. However, the new leader, William Hague, addressed the Scottish Conservative and Unionist Conference on 27 June 1997 and reaffirmed that policy:¹⁶⁷

7 The Union

"One of our principles is the staunch defence of the Union. The Conservative Party believes in the Union. We will never, ever abandon it.

"My views are clear. I spent two years as Secretary of State for Wales exposing the time-wasting futility of Labour's devolution plans. I believed they were bad for Britain then. And I believe they are bad for Britain now.

"So now it fails to us, as Conservatives, alone to call the Government to account on constitutional reform. None of the other parties is prepared to do so.. The nationalists won't. And the Liberals don't dare. In this land of golf courses, the Liberals are little more than Labour's caddies. Carrying Donald Dewar's constitutional bags around without complaint.

"But never has a Government been more in need of being held to account than this one. The methods Labour is using to railroad its legislation through Parliament is nothing short of shameful. Along with a big majority has come a dangerous attitude. They have a growing appetite for bullying, & ignorance and contempt for our national institutions.

"We agree that there should be a referendum on devolution, but Tony Blair is determined to impose a referendum in advance of publishing a devolution bill. What a travesty of democracy that is. Asking people to vote for devolution, while denying them the chance to know what they are voting for. What does that say about Labour's opinion of the Scottish people? They want Scots to vote them a free hand, and then let them claim a popular mandate for whatever they concoct in a smoke-filled room.

¹⁶¹ *Scotsman* 9/5/97 "Who will hold the power?"

¹⁶² *Herald* 10.5.97 "Draft Bill 'misinterpreted'"

¹⁶³ *Scotsman* 25/6/97 "Eleventh hour crisis for tartan tax plans"

¹⁶⁴ *Guardian* 8/7/97 "Labour at war over Scots"

¹⁶⁵ *Scotsman* 9/7/97 "Mandelson to the rescue"

¹⁶⁶ The Scottish Office has set up a web site giving information on devolution on <http://www.Scottish-devolution.org.uk>

¹⁶⁷ *Scottish Conservative and Unionist Party News Release* 27/6/97 p.9

The inaugural meeting of the Scotland Forward campaign was held on 17 May.¹⁶⁸ It has been set up as a cross party organisation to maximise the YES, YES vote in the forthcoming referendum, and was hoping to attract support from SNP voters. Alex Salmond issued a statement welcoming the launch of the organisation and reportedly said "It is the content of the White Paper which will determine the SNP's attitude to New Labour's referendum and we shall debate the contents of the White Paper with our national council as soon as it is published".¹⁶⁹ In July press reports indicated that in return for a commitment not to prevent a Scottish Parliament from debating or holding a referendum on independence the SNP would support a Yes vote in the referendum.¹⁷⁰

Think Twice, an independent non-party group set up to prepare for a No No campaign was launched in June 1997 and is likely to concentrate on the arguments against a tax-varying power.

An ICM poll for the *Scotsman* published on 18 June found 72% would vote in favour of a Scottish Parliament, and 61% in favour of tax-varying powers in the referendum.¹⁷¹ The cost of the referendums has been set at £8 million.¹⁷²

On 17 July Donald Dewar announced an international competition to design the Scottish Parliament building. He did not rule out the use of the Old Royal High School but commented on the major renovations necessary for that option to be pursued.¹⁷³

M. The progress of the *Referendums (Scotland and Wales) Bill*

Following the General Election the Referendums (Scotland and Wales) Bill was introduced as the first Bill of the new session.¹⁷⁴ Second Reading was on 21 and 22 May. Donald Dewar, Secretary of State for Scotland noted "if we get the right result, we have moral authority to speed the passage of devolution. That is again a matter for the people and we shall have to see what the results ultimately bring".¹⁷⁵ The Opposition moved an amendment to the motion for a second reading on the basis that it "would ask voters to give blanket approval to proposals in advance of legislation being published, debated, amended or agreed" [c.730]. Michael Howard, for the Opposition argued that a "pre-legislative referendum is designed to pre-empt parliamentary debate" [c.736]. Jim Wallace, for the Liberal Democrats, was concerned that the Government had diverged from the position of the Scottish Constitutional Convention

¹⁶⁸ Its web site is www.Scotland-forward.org.uk

¹⁶⁹ *Scotsman* 16/5/97 "SNP changes tack to back campaign"

¹⁷⁰ *Observer* 20/7/97 "Scots offered vote to quit the UK"

¹⁷¹ Scotland says Yes, Yes with a single voice

¹⁷² £5m for Scotland and £3m for Wales [HC Deb.vol. 295 5/6/97 c.213W]

¹⁷³ Scottish Office PN 17/7/97 "Design Competition for New Parliament"

¹⁷⁴ See Research Paper no. 97/61 *The Referendums (Scotland and Wales) Bill* and House of Lords Library Note 97/005 *Referendums (Scotland and Wales) Bill*

¹⁷⁵ HC Deb.vol. 294 21/5/97 c.721

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commenting "looking at the origins of why the Labour party became attached to the referendum, it was always our concern that it had the wobbles over tax" [c.748]. Mr Wallace said that the Liberal Democrats did not feel bound by Labour's tactical change, particularly since the SCC had produced a clear consensus for a Scottish Parliament (c.749). However, the Liberal Democrats tolerated the referendum for Wales, and their amendment (not selected) referred to "appropriate referendum proposals for Wales" given the higher degree of uncertainty in Wales over the outcome (c.721). Mr Wallace argued for a Scottish Parliament with tax-varying powers (c.750-751).

Alex Salmond, for the SNP, argued once more for a multi-option referendum, including an opportunity to vote for independence (c.769). Donald Dewar, however, contended that the use of multi-option referendums was not appropriate in the context of a specific scheme: "we are trying to establish consent to a specific scheme and not merely to canvass competing options."¹⁷⁶

On second day of the Second Reading debate Peter Hain, for the Government, argued "unless the Government win the referendum devolution in Wales will be dead in the water. There will not be another chance to create a Welsh Assembly or a Welsh Parliament. If Wales votes no to devolution for a second time in a general, Wales can kiss goodbye to devolution".¹⁷⁷ For Plaid Cymru, Ieuan Wyn Jones favoured a multi-option referendum (c.869).

Following the tabling of some 250 amendments, on 3 June a timetable motion for the Bill was passed by the Commons, with some discussion over the precedents for guillotining constitutional bills. Donald Dewar noted as follows: "In 1978 the House, rightly or wrongly, passed two enormously important constitutional Acts - the Scotland Act 1978 and the Wales Act 1978 - most of the proceedings on which took place under timetable motions regulating the committee stage."¹⁷⁸ However, he argued that the Bill was not in fact a constitutional bill: "Other than paving the way for an expression of opinion, by the people of Scotland and Wales, it does not in any way alter this country's constitution" (c.193). In response Michael Howard, for the Opposition pointed out that when Michael Foot proposed the guillotine motion for the Scotland Bill 1977/78 he reminded the House that there had already been 30 days of debate on the legislation (c.198). William Hague noted "The Secretary of State was reduced to saying that the Bill will not alter the constitution, but will simply try to prove the way for doing that. Is not the way in which we conduct our referendums part of the constitution? Are the rules, procedures and arrangements for them not an important part of our constitutional arrangements?" (c.233). On a division, the timetable motion was passed by 420 votes by 154 (c.240). The Bill was immediately considered in Committee and it passed its Third Reading on 4 June by 339 votes to 148 (c.495).

¹⁷⁶ HC Deb. 4/6/97 vol. 295 c.434

¹⁷⁷ c.854 22/5/97

¹⁷⁸ HC Deb.vol. 295 3/6/97 c.192

Amongst the matters discussed in the Commons was the use of the local government franchise for the referendums (and the position of service voters, and EU citizens)¹⁷⁹ the possibility of voting thresholds, or multi-option ballots in Scotland and Wales. There were no amendments to the Bill. Its Second Reading in the Lords was on 17 June and the Committee stage took 3 days (1, 3, 7 July). The Government suffered one defeat when an amendment was passed to ensure that the referendum in Wales was to be held on the same day as the one in Scotland.¹⁸⁰ Lord Williams of Mostyn for the Government argued that the dominance of national media meant that the particular debate for Wales might be swamped by national comment on Scotland.¹⁸¹ However, for the Opposition Lord Mackay of Ardbrecknish considered that just as the general election was held on a single day so should the two referendums.¹⁸² The amendment was carried by 101 votes to 94. Later that evening, Lord Sewel for the Government accepted the principle of an opposition amendment incorporating the Orders planned to govern the conduct of the referendums in a Schedule of the Bill. The Government had previously published on 2 June draft orders to assist debate. They covered topics such as polling, the count and absent voting and were generally designed to apply the existing legal framework with respect to elections to the conduct of the referendum.¹⁸³

On the last day of Committee the Lords debated the merits of publicly funded information, and the Opposition put forward an amendment, later withdrawn, requiring each household in Scotland and Wales to be provided with a free leaflet with statements of the Yes and No campaign cases. In response Lord Williams of Mostyn said the Government were currently considering how best to achieve proper public information but made no commitments.¹⁸⁴ In a PQ answered in the Commons on 15 July, junior minister Henry McLeish said "no state aid will be provided to any party or organisation for the purposes of campaigning at the referendum."¹⁸⁵ At Report stage Lord Williams said that the Government planned to produce leaflets presenting the Government's case for distribution to all households in Scotland and Wales.¹⁸⁶ He was categorical that no public money would be given to campaigning organisations to allow their own publicity to reach households (c.1398). Also at Report stage the Government suffered another defeat when an Opposition amendment limiting tax-varying powers to income tax was passed.¹⁸⁷ The question itself set out on the ballot paper remained unamended, but the Opposition have tabled an amendment for Third Reading (due 29 July) to insert income tax into the second Scottish question.

A Government amendment inserted into Clause 2 a cut-off date of 11 days before the election for new registrations (see Appendix 2). A new Schedule 3 was inserted (c.1369) governing the conduct of the referendums. Amongst other topics it made clear that hours of polling would be

¹⁷⁹ See Appendix 2 "The electorate for the Referendums in Scotland and Wales"

¹⁸⁰ The date or dates are to be set by order without further Parliamentary scrutiny

¹⁸¹ HL Deb. vol. 581 3/7/97 c.356

¹⁸² HL Deb.vol. 581 3/7/97 c.351

¹⁸³ HL Deb. c.403

¹⁸⁴ HL Deb.vol. 581 7/7/97 c.475

¹⁸⁵ HC Deb. vol. 298 c.181W

¹⁸⁶ HL Deb. Vol. 581 22/7/97 c.1317

¹⁸⁷ HL Deb.Vol. 581 21/7/97 c.1225

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7 am to 10 pm, that the two ballot papers for Scotland would be in different colours, and that local officers would certify the result according to local government areas in Scotland (or county or county borough in Wales). The chief Counting Officer would have power to order a recount. Insertion into the Bill meant that the provisions become amendable, but none of the probing amendments tabled by the Opposition on Report were accepted.

A Government amendment was made to the scope of Clause 5 designed to clarify that the provision for expenditure would cover not only advance funds for a Scottish Parliament or Welsh Assembly building but spending by other departments, for example advance expenditure on Inland Revenue and DSS computer systems to cope with the new tax-varying powers. Estimated costs remain unchanged.¹⁸⁸

On 21 July the Government issued guidance for civil servants on political activity for the referendums¹⁸⁹ operative from the date of Royal Assent. It concluded:

"in sum, civil servants should give Ministers their full and normal support in presenting and explaining Government policy on devolution; it is for Ministers alone to campaign politically for the public endorsement of that policy in the referendums" [para 15].

N. The 'West Lothian Question' and Representation at Westminster¹⁹⁰

The issue of the representation at Westminster of the various countries of the UK has been regarded as a central concern of 'Home Rule' or devolution schemes. This section seeks to provide some background statistical information to complement the continuing discussion of the matter. It should not be regarded as a comprehensive analysis of the broad issue of territorial representation at Westminster.

The basic premise of many is that Scotland and Wales are 'over-represented' in the Westminster Parliament. Some would argue that this would have to be 'corrected' in any scheme of devolution for these countries. The case of Northern Ireland is often cited by reference to its apparent 'under-representation' at Westminster during its half-century of devolved government.¹⁹¹

¹⁸⁸ HL Deb c.136

¹⁸⁹ *Devolution Guidance for Civil Servants*, Dept 5189

¹⁹⁰ This is a slightly amended version of section V of Research Paper 95/95, *The West Lothian Question*. Members should consult that Paper for the wider debate(s) subsumed within the so-called 'West Lothian Question'. If time permits, a new edition of the main 'WLQ' Research Paper will be produced later in the year

¹⁹¹ On which see section IV of Research Paper 95/95

Many commentators have noted, most obviously through the arguments of Mr Dalyell himself, that a reduction in Scottish or Welsh representation should not, logically, 'answer' the West Lothian Question.¹⁹² However reduced representation may, in political terms, reduce the alleged English grievance over the 'unfair' and 'inequitable' representation of the various countries at Westminster, and thereby minimise the negative effect of the Question. The level of representation has other obvious political implications in that one political party, Labour, has for many elections won the majority of seats in Scotland and Wales.

Possibly the main defence of the current levels of representation, other than any arguments reflecting the geography and population spread of the various parts of the UK, is the need for the devolved countries to remain fully involved on those national and international matters reserved to the UK Parliament. This type of argument has been used many times over the last 100 years. See for example of this is the Scottish Labour Party's March 1995 document: "Nor can we see any convincing argument that the creation of a Scottish Parliament should of itself lead to a reduction in the number of Scottish MPs at Westminster. The functions that will be retained by the Westminster parliament are extremely significant in themselves and critical for the future well-being of Scots. It is of the essence that our ability to influence these matters is not diminished."¹⁹³

The 1707 Union (Art XXII) gave Scotland 45 seats in the new 558-seat Parliament of Great Britain¹⁹⁴. This was less than a strict population-based allocation¹⁹⁵ would have provided, but this concept, over 100 years before the Reform Acts of 1832, was far less relevant in the early 18th century than in later, more democratic times.¹⁹⁶ This under-representation diminished through the 18th century, due to changes in the relative populations of the home countries, and was further reduced by the Union with Ireland in 1801, when Ireland, with almost one third of the new UK's population, was granted only 100 of the 658 seats.

The 1832 reforms gave Scotland 8 extra seats¹⁹⁷, and Wales including Monmouthshire 4 more seats. The overall size of the House remained at 658, of which Scotland had 53 and Wales 31. At this stage Scotland was under-represented in terms of population, with 8% of the UK's seats but 10% of its population, while Wales was over-represented, with nearly 5% of the UK's seats but less than 4% of the UK's population. In terms of electorate, however, matters were different:

¹⁹² eg "Fewer Scottish MPs would not mean no Scottish MPs voting on English legislation", J McCormick & W Alexander, "Firm foundations: securing the Scottish Parliament" in S Tindale, ed., *The state and the nations: the politics of devolution*, IPPR, 1996, p.115

¹⁹³ *A Parliament for Scotland: Labour's plan*, p.6.

¹⁹⁴ Strictly speaking this was a totally new Parliament, not simply the continuation of the English Parliament at Westminster, although in practice (and in the eyes of many English constitutionalists) it has been often assumed to be such a continuation. The legal basis of the Union as a fundamental constitutional act is a topic well beyond the scope of this Paper.

¹⁹⁵ Data on electorates before 1832 are meaningless so population has been used for the early years of this analysis. From 1832 onwards, however, the figures refer to over- and under-representation in terms of Wales and Scotland's shares of total UK seats compared with the total UK electorate.

¹⁹⁶ Iain McLean in *Political Quarterly* 1995 "Are Scotland and Wales over-represented in the House of Commons?" cites Burke's *Reflections in the revolution in France*: "When did you hear in Great Britain of any province suffering from the inequality of representation? ... The very inequality of representation .. is perhaps the very thing which prevents us thinking or acting as members for districts"

¹⁹⁷ The figures in this section include University seats, where appropriate.

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Scotland had 8% of the total electorate and so was proportionately represented, while Wales had just over 5% of the UK's electorate and so was slightly under-represented.

Further changes in 1867-8 increased Scotland's share to 60 and Wales's to 33 within the 658-seat House. At this date, both countries were slightly under-represented. The 1884-5 reforms raised the number of seats in Scotland and Wales yet again, by 12 and 1 respectively in a House of 670, and this moved both countries into a position of relative over-representation. Scotland had 10.7% of the UK's seats but only 10.0% of its electorate while Wales had 5.1% of the seats but only 4.9% of the electorate.

The combination of further changes in the numbers of seats and changes in the electorates of the home countries meant that, by 1918, Scotland's share of both seats and electorate in the UK were almost equal - the country was proportionately represented - while Wales's share of seats was lower than its share of electorate: it had become under-represented again. The removal of the Southern Ireland seats and the allocation of only 13 seats (including a university seat) for Northern Ireland in the early 1920s, however, boosted the proportionate representation of the 3 mainland countries in a House of 615 seats. In 1922, Scotland had 12.0% of the total seats but only 10.8% of the electorate and Wales had 6.0% of the seats and 5.9% of the electorate. "Scottish representation moved into surplus and Welsh representation back to proportionality as an accidental consequence of the withdrawal of Ireland."¹⁹⁸

The Speaker's Conference of 1944 was crucial to the development of the territorial representation in Westminster, as it led to the institutionalisation of the 'over-representation' of Scotland and Wales within the modern boundary review system¹⁹⁹, and, according to McLean, began the myth that the Union guaranteed Scottish over-representation.²⁰⁰ The changes that came into effect in 1945 meant that Scotland had 11.6% of the UK's seats but only 10.2% of its electorate and Wales had 5.8% of the seats and 5.4% of the electorate. After that, Scotland had more than 11% of the total seats in the UK until the 1997 boundary changes, when its share fell to 10.9%. Scotland's share of the UK electorate has fallen to 9.0% in 1997. Since the war Wales has maintained its share of seats - this rose to 6.1% in 1997 - and electorate.

McLean concludes from his historical survey that "the over-representation of Scotland and Wales arises not from considerations of principle, but from the bargained compromises of 1944, which have been frozen into the legislation governing the allocation of seats."²⁰¹ He considered the West Lothian Question aspect of territorial representation and suggests that, if the 1920s Northern Ireland formula was adopted, ie 2/3 of its proportionate share, Scotland would receive

¹⁹⁸ McLean, op. cit. p.11

¹⁹⁹ see for example the Boundary Commission for Scotland's consideration, in its recent report, of the statutory rules on Scottish representation: *Fourth periodic report*, Cm 2726, February 1995, pp16-19 and appendix D.

²⁰⁰ McLean op cit p12

²⁰¹ McLean op cit p.18

40 seats and Wales 22 after devolution, although he noted the possible legal difficulty of the 45 seats allocated to Scotland by the 1707 Union being regarded as an entrenched legal minimum.²⁰²

1. The effects of over-representation

The following is based on 1997 electorates²⁰³. The fact that both Scotland and Wales have more seats than their share of the UK electorate means that their average electorates - the electoral quotas - are low. Compared with an average constituency size across the United Kingdom of 67,077, Scotland has an average electorate of 55,339 and Wales of 55,563. By contrast, the average electorate in England is 69,578 and that in Northern Ireland is 66,122.

If the present total of 659 seats were distributed on a strict pro rata basis, the four home countries would have the following numbers of seats.

England 549 (compared with the present 529)

Wales 33 (compared with the present 40)

Scotland 59 (compared with the present 72)

Northern Ireland 18 (the same as now).

If each country had an average electorate equal to the current English electoral quota, the numbers of seats would be as follows:

England 529

Wales 32

Scotland 57

Northern Ireland 17

so there would be 635 Members in the House.

At the moment, England has 80.3% of the seats in the House of Commons. If seats were allocated in proportion to electorates, it would have 83.3%. Wales has 6.1% of the seats now; its proportional allocation would be 5.0%. Scotland has 10.9% of the seats; if they were allocated proportionally it would have 9.0%. Northern Ireland's current 2.7% of the seats is exactly the same as its share of the electorate.

²⁰² McLean op cit p.20

²⁰³ ONS Monitor EL97/1. **Electoral Statistics 1997 - New Parliamentary Constituencies**

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2. The Operation of the Boundary Commissions

There are four Parliamentary Boundary Commissions - one for each constituent part of the UK. Their operation is governed by the Parliamentary Constituencies Act 1986 (a consolidated measure) as amended by the Boundary Commissions Act 1992. The Speaker is ex officio chairman of the four Commissions. [Research Note No 92/61, *The Parliamentary Boundary Commissions and the Boundary Commissions Bill* gives further background on the development and operation of the Boundary Commissions]. In carrying out periodic reviews the Commissions are required to give effect to the Rules for the Redistribution of Seats which form Schedule 2 of the 1986 Act. Rule 1(2) states that the number of constituencies in Scotland shall not be less than 71. The broad framing of the Rules allows considerable discretion to Boundary Commissions in interpreting them, but Rule 1(2) is quite explicit. The proposal to lower the number of seats below 71 would therefore require legislation to amend the Rules.

The Speaker's Conference recommendations of 1944 were incorporated into the House of Commons (Redistribution of Seats) Act 1944. This was the first time that Scotland and Wales were guaranteed a minimum number of seats. At this stage redistribution was based on an electoral quota for the whole of Great Britain. This aspect of the Rules underwent modification in 1958 following the case of *Harper v Home Secretary* [195 Ch 238], where the English Boundary Commission's calculation of the electoral quota was unsuccessfully challenged.²⁰⁴ *The House of Commons (Redistribution of Seats Act) 1958* s.3 introduced four different electoral quotas for each part of the UK, resolving the most urgent contradiction in the Rules which had led to the court challenge. However the interaction between the Rules remains ambiguous, and in evidence to the Home Affairs Select Committee in 1986/87 the Home Office concluded that there was an urgent need to deal with the conflict between Rule 1 and Rules 5, 6 and 7 arising from the fact that the number of seats tended to increase. The Committee's report²⁰⁵ concluded that there was a 'fundamental defect' in the Rules. It found that the operation of the Rules had led to a "progressive and cumulative increase in the number of seats in the House of Commons" [para 6]. However it decided not to recommend a change in the disparities of electoral quotas between the constituent parts of the UK as not feasible on political grounds [para 19].

The only legislation which followed the Home Affairs Committee Report was the 1992 Act which speeded up the cycle of periodic reviews, so that reviews must now take place not less than 8 or more than 12 years from the date of submission of the last review. The last review was submitted in 1995, so the next submission of a review is not due until 2003 at the earliest. The end date for general reviews (as opposed to interim reviews) are governed by the 1992 Act and legislation would be necessary to bring forward the submission of the next review. When the Orders in Council giving effect to the most recent reviews for England was debated in Parliament in June 1995, Michael Howard, the then Home Secretary, acknowledged criticism of the tendency for the number of seats to increase, and said that he planned an internal review of

²⁰⁴ For further detail see Research paper 95/74, *The Parliamentary Boundary Review for England Part II* and see also *Fixing the Boundaries: Defining and Re-defining Single Member Electoral Districts* (1996) ed Iain McLean and David Butler

²⁰⁵ HC 97 1986-87

the operation of the Rules,²⁰⁶ during which a wide range of interested parties would be consulted. However the review was in its preliminary stages before the 1997 General Election, and no substantial work or research has been undertaken.

In his statement to the Commons on 24 July 1997 Donald Dewar said:²⁰⁷

The distribution of seats is regularly reviewed by the parliamentary boundary commissions, which follow criteria defined in statute. At present, special statutory provisions stipulate a minimum number of Scottish seats. This has led to Members for constituencies in Scotland representing, on average, fewer constituents than do Members in other parts of the United Kingdom.

Our devolution proposals mean that, in practice, Westminster will no longer be the forum for scrutinising much of Scotland's domestic legislation. This brings into sharper focus the imbalance in the current arrangements. The Government have decided that the requirement for a minimum number of Scottish seats should no longer apply. Primary legislation will be needed. This will be put in place before the next full boundary commission review.

Other statutory requirements, such as the need to give due weight to geographical considerations and local ties, will continue to apply. The actual number of seats allocated to Scotland will be for the boundary commission to recommend, exercising its judgment in accordance with the criteria laid down.

The White Paper noted as follows:

4.5 Scotland's Members of Parliament will continue to play a full and constructive part in the proceedings of the House of Commons. This is right both for Scotland and the United Kingdom because devolution is about strengthening the United Kingdom. The distribution of seats in the House of Commons will be reviewed by the Parliamentary Boundary Commissions which follow criteria defined in statute. At present, special statutory provisions stipulate a minimum number of Scottish seats. The Government have decided that in the next review this requirement will no longer apply. Other statutory requirements, notably the need to give due weight to geographical considerations and local ties, will continue to apply to reviews for Scotland in the same way as they will apply to reviews for other parts of the UK.

O. *Scotland's Parliament - White Paper July 1997*

The White Paper was published on 24 July 1997.²⁰⁸ Donald Dewar stated that "In my time I have seen many devolution schemes: I genuinely believe this is the best and right for Scotland. We have renewed, modernised and improved on the plans agreed within the broad coalition of Scottish interests in the Scottish Constitutional Convention. It will provide a new, stable settlement which will serve Scotland and the United Kingdom well in the years to come".²⁰⁹

²⁰⁶ HC Deb vol 565 14 June 1995 c.802

²⁰⁷ HC Deb. Vol. 298 c.1042

²⁰⁸ *Scotlands Parliament* Cm 3658

²⁰⁹ HC Deb. Vol. 298 24/7/97 c.1041

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1. Summary

He summarised the White Paper as follows:²¹⁰

Let me outline what we propose. The Scottish Parliament will have the power to make the law of Scotland in devolved areas. Entrusting Scotland with control over her own domestic affairs will better allow the people of Scotland to benefit from, and contribute to, the unity of the United Kingdom. The Scottish Parliament will hold to account an Executive headed by a First Minister which will operate in a way similar to the United Kingdom Government. Together, the Scottish Parliament and Executive will be responsible for the wide range of domestic matters which affect everyone living in Scotland, including health, education and training; local government; housing; social work; aspects of economic development; transport, the law and home affairs; the environment, including the natural and built heritage; agriculture, fisheries and forestry; sport and the arts. The details are in the White Paper.

A key aspect of the Scottish Parliament's role will be to create and maintain an effective oversight of other Scottish public bodies, the health service and particularly local government. We expect the Scottish Parliament and Executive to complement and not encroach on democratically elected local government.

Let me tell the House why this is an advance on any scheme that has gone before and why I believe that not only the time is right but the scheme is right.

The Parliament will have extensive law-making powers. Unlike in 1978, the full range of the Scottish Office's functions will be devolved. This will provide the opportunity to make a real difference in the areas that matter.

The legislation will define reserved matters, not devolved matters, and the Scottish Parliament will be able to exercise its law-making powers in all areas that are not specifically reserved to Westminster.

The relationships between the Scottish Executive, the United Kingdom Government and the Crown will provide clarity and stability for the future.

The Parliament will have the discipline and responsibility of defined financial powers.

The Scottish Executive will be closely involved with the United Kingdom Government in European decision making.

Throughout the White Paper, our guiding principle is to trust the Scottish people to make the right decisions on their own behalf. The detailed procedures, the working arrangements and the practical issues relating to the governance of Scotland will properly be left to the Parliament and the Executive, answerable, as they will be, to the Scottish electorate.

The United Kingdom Parliament is, and will remain, sovereign in all matters, but, as part of our resolve to modernise the constitution, Westminster will be choosing to exercise that sovereignty by devolving legislative responsibility to the Scottish Parliament, without diminishing its own powers.

Those matters more appropriately dealt with on a United Kingdom basis will remain at Westminster. They will include the constitution of the United Kingdom; foreign policy; defence and national security; the stability of the United Kingdom's fiscal, economic and monetary system; common markets for United Kingdom goods and services; employment legislation; some health issues, including abortion; social security matters, and most aspects of transport safety and regulation.

After devolution, Scotland's Members of Parliament will continue to play a full and constructive role in the proceedings of this House. That is right both for Scotland and for the United Kingdom, because devolution is about strengthening the United Kingdom.

The distribution of seats is regularly reviewed by the parliamentary boundary commissions, which follow criteria defined in statute. At present, special statutory provisions stipulate a minimum number of Scottish seats. This has led to Members for constituencies in Scotland representing, on average, fewer constituents than do Members in other parts of the United Kingdom.

Our devolution proposals mean that, in practice, Westminster will no longer be the forum for scrutinising much of Scotland's domestic legislation. This brings into sharper focus the imbalance in the current arrangements. The Government have decided that the requirement for a minimum number of Scottish seats should no longer apply. Primary legislation will be needed. This will be put in place before the next full boundary commission review.

²¹⁰ HC Deb. c.1041-1044

Other statutory requirements, such as the need to give due weight to geographical considerations and local ties, will continue to apply. The actual number of seats allocated to Scotland will be for the boundary commission to recommend, exercising its judgment in accordance with the criteria laid down.

There will continue to be a Secretary of State for Scotland who will work with the new Scottish Parliament and represent Scottish interests within the United Kingdom Government. The staff of the Scottish Executive will continue to be part of a unified home civil service. The Scottish Executive and the United Kingdom Government will work closely together at ministerial and official level. The stability of the system is of the utmost importance. The White Paper sets out detailed arrangements for these working relationships and for resolving any disagreements.

The people of Scotland will continue to benefit from the influence that the United Kingdom has as a major state within the European Union. Relations with the European Union will remain the responsibility of the United Kingdom Government, with the Scottish Executive making an effective and appropriate contribution to United Kingdom decision making on Europe. Ministers in the Scottish Executive will have an opportunity to participate in relevant meetings of the Council of Ministers and in appropriate cases could speak for the United Kingdom.

There will be a Scottish representative office in Brussels; this will complement the role of the Office of the United Kingdom Permanent Representative to the European Community and will allow the Scottish Executive to operate more effectively in Europe. The Scottish Executive will have an obligation to implement EU legislation on devolved matters. Our proposals are very much in line with developments across the European Union.

The financial framework for the Scottish Parliament will be based on the present "block and formula" arrangements for the Scottish Office, known as the Barnett formula, adapted to match the range of the Scottish Executive's future responsibilities and to maintain and improve transparency and accountability. This will give the Scottish Parliament the ability and freedom to approve spending decisions that are fully in accordance with Scottish needs and priorities.

As an integral part of these financial arrangements, the control of local government expenditure, non-domestic rates and other local taxation will also be devolved to the Scottish Parliament, with appropriate safeguards to protect all UK taxpayers. The Government's objective is to

ensure that Scotland's spending decisions are taken in Scotland, in the light of Scottish circumstances.

Subject to the outcome of the referendum, the Scottish Parliament will be given power to increase or decrease the basic rate of income tax set by the UK Parliament by up to 3p. The Parliament will have a guaranteed right to raise or to forgo up to £450 million-index-linked-irrespective of changes in the UK income tax structure. Liability will be determined by residence in Scotland, according to Inland Revenue rules. The tax-varying power will not apply to income from savings and dividends. The Inland Revenue will administer any tax variation, with the Scottish Parliament meeting the administrative costs.

Let me now turn to the arrangements for the Scottish Parliament itself. The Scottish Parliament will consist of 129 members, 73 directly elected on a constituency basis, plus 56 additional members—seven from each of the current eight European Parliament constituencies allocated to ensure that the overall result more directly reflects the share of votes cast for each party. Eligibility to vote will be based on residency.

In the late 1970s there was, without doubt, a fear that a Scottish Parliament would be dominated by one point of view; the fear was that minorities, geographical or political, would be less than fairly represented. The changes in the electoral system now proposed have ended that possibility. The composition of the Parliament will fairly reflect opinion throughout Scotland.

The Government want to see people who represent the widest possible range of interests coming forward for election to the Scottish Parliament.

Hon. Members: Including Tories.

Madam Speaker: Order.

Mr. Dewar: The aim must be equal opportunities for all—women, members of ethnic minority groups and disabled people. The selection of candidates is, of course, a matter for individual political parties, but we hope that others will follow our lead in encouraging women representatives.

The Government are determined to have a Parliament building worthy of the new century and ready to provide working conditions which will encourage open and accessible government. It is for that reason that a number of possible sites in Edinburgh, including the old Royal High School, are under consideration.

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Subject to the passage of the Referendums (Scotland and Wales) Bill, the people of Scotland will make their historic choice in the referendum on 11 September. Theirs is the judgment that matters. I believe that they will endorse our proposals. As soon as possible following that referendum, we shall introduce the legislation to establish a Scottish

Parliament. Once that legislation has been enacted, we can look forward to elections in the first half of 1999. The Government's target is for the Scottish Parliament to assume its full responsibilities in January in the year 2000. That, indeed, will be a new Parliament for a new millennium.

In response Michael Ancram for the Opposition said (c.1045):

The White Paper leaves relations between Scotland and the rest of the United Kingdom in a state of flux. It singularly fails to answer the central constitutional and economic questions, which, left unanswered can lead only to grave instability and long-term constitutional turmoil. The importance of those vital questions on the long-term viability of the proposals has been belatedly conceded by the U-turn announced on the number of Scottish Members of Parliament at Westminster, which flies in the face of 20 years of Labour rhetoric.

He also raised concerns about the proposal allowing a Scottish Executive member to speak on behalf of the UK at the European Council of Ministers while not being answerable to the UK Parliament; he restated Conservative objections to tax-raising powers for the Scottish Parliament. Jim Wallace, for the Liberal Democrats gave a warm welcome to the White Paper (c.1047) while maintaining his party's federalist beliefs. Alex Salmond for the Scottish Nationalists asked whether the White Paper would interfere with the 'sovereign right' of the Scottish people to determine their own constitutional future (c.1049). In response Mr Dewar said "if I did try to build such barriers, they would be futile and without effect. At the end of the day, in practical politics, what matters is what the people want" (cc 1049).

William Hague has indicated that a future Conservative Government would not abolish a Scottish Parliament, and the SNP executive confirmed on 27 July that it would support a Yes Yes campaign in the referendum.²¹¹

The White Paper 'Summary of the Proposals' was as follows:

What the Scottish Parliament can do

The Scottish Parliament will have lawmaking powers over a wide range of matters which will be a Scottish Executive headed by a First Minister which will operate in a way similar to that of the UK Government and will be held to account by the Scottish Parliament. The Scottish Parliament and Executive will be responsible for:

- **Health** including the National Health Service in Scotland and public and mental health;
- **Education and training** including pre-5, primary, secondary, further and higher education; and training policy and programmes;

²¹¹ *Guardian* 28/7/97 "SNP ditches independence or nothing to back Yes in vote for Scottish Parliament"

- **Local government, social work and housing** including local government structure and finance; social work; the voluntary sector; housing policy; area regeneration; building control; and the statutory planning framework;
- **Economic development and transport** including responsibility for the economic development of Scotland; financial and other assistance and support for Scottish business and industry; promotion of trade and exports; inward investment; tourism; functions in relation to the energy sector; the administration of the European Structural Funds; and a range of road, rail, air, sea transport and inland waterways matters;
- **The law and home affairs** including most civil and criminal law and the criminal justice and prosecution system including police and prisons; fire services; legal aid; parole, the release of life-sentence prisoners and alleged miscarriages of justice; certain Crown, church, ceremonial and local government electoral matters; and civil defence and emergency planning;
- **The environment** including environmental protection policy and matters relating to air, land and water pollution; the natural and built heritage; and water supplies, sewerage, flood prevention and coastal protection;
- **Agriculture, fisheries and forestry** including The Scottish Office's existing responsibilities for promoting agriculture and fisheries in Scotland and those of the Forestry Commission in Scotland;
- **Sport and the arts** including the Scottish Sports Council, the Scottish Arts Council and the national institutions;
- **Research and statistics** in relation to devolved matters.

Scotland in the United Kingdom

The legislation setting up the Scottish Parliament will specify those powers which are reserved to the UK Parliament. These matters include the **constitution** of the United Kingdom; **UK foreign policy** including relations with Europe; **UK defence and national security**; the stability of the UK's **fiscal, economic and monetary system**; **common markets** for UK goods and services; **employment legislation**; **social security**; and most aspects of **transport safety and regulation**.

The new constitutional arrangements

Scotland will remain an integral part of the United Kingdom, and The Queen will continue to be Head of State of the United Kingdom. The UK Parliament is and will remain sovereign.

Scotland's MPs will continue to play a full and constructive part at Westminster. The number of Scottish seats will be reviewed.

The Secretary of State for Scotland will work with the new Scottish Parliament and represent Scottish interests within the UK Government.

The Scottish Executive and the UK Government will work closely together at both Ministerial and official level.

There will be arrangements for resolving disagreements about whether legislation is within the powers of the Scottish Parliament.

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Relations with the European Union

Relations with the EU will remain the responsibility of the UK Government, but the Scottish Executive will be involved as closely as possible in UK decision-making on Europe.

Ministers of the Scottish Executive will participate in relevant meetings of the Council of Ministers and in appropriate cases could speak for the United Kingdom.

The Scottish Parliament will be able to scrutinise EU legislative proposals.

There will be a Scottish representative office in Brussels to further Scotland's interests and complement the role of UKREP.

The Scottish Executive will have an obligation to implement EU legislation on devolved matters. The UK Parliament will continue to have the ability to legislate to give effect to EU obligations in Scotland.

The Scottish Parliament will set the framework within which other Scottish public bodies - local government, non-departmental public bodies and health bodies operate. The detailed arrangements will be for the Scottish Parliament and Scottish Executive to develop.

The financial framework for the Scottish Parliament will be closely based on existing arrangements for financing the Scottish Office, and will allow the Scottish Parliament to approve spending decisions in accordance with Scottish needs and priorities.

The control of local authority expenditure, non-domestic rates and other local taxation will be devolved to the Scottish Parliament.

Subject to the outcome of the referendum, the Scottish Parliament will be given power to increase or decrease the basic rate of income tax set by the UK Parliament by up to 3p. Liability will be determined by residence in Scotland. Income from savings and dividends will not be affected.

The Inland Revenue will administer any tax variation, with the Scottish Parliament meeting the administrative costs.

Electoral

The Scottish Parliament will consist of 129 members, 73 directly elected on a *arrangements* constituency basis, plus 56 additional members (7 from each of the 8 current European Parliament constituencies) allocated to ensure the overall result more directly reflects the share of votes cast for each party.

Eligibility to vote will be based on residency.

Parliamentary arrangements

Each Scottish Parliament will have a 4-year fixed term.

The Scottish Parliament is expected to adopt modern methods of working; and to be accessible and responsive to the needs of the public. Detailed arrangements will be left to the Scottish Parliament itself.

Making it happen

The Government are looking at options available in Edinburgh for the Scottish Parliament building.

The staff of the Scottish Executive will continue to be part of a unified Home Civil Service.

The annual running costs are estimated to be between £20 and £30 million a year i.e. about £5 per year per head of Scottish population.

Next steps

Scotland will be asked to vote on 11 September in a referendum on the proposals set out in this White Paper.

Following a positive referendum result, legislation to establish a Scottish Parliament will be brought forward as soon as possible.

Once the legislation has been enacted, elections to the Scottish Parliament will be held in the first half of 1999, and the Parliament will become fully operational in the year 2000.

2. Devolved and Reserved Powers

Chapter two of the White Paper explained in greater detail the devolved matters over which the Scottish Parliament will have legislative power:

2.4 All matters that are not specifically reserved - see Chapter 3 - will be devolved. Devolved matters over which the Scottish Parliament will have legislative power include:

- **health** generally including overall responsibility for the National Health Service in Scotland and public and mental health; also the education and training of health professionals and the terms and conditions of service of NHS staff and general practitioners;
- **school education** including pre-5, primary and secondary education, the functions of Her Majesty's Inspectorate of Schools and teacher supply, training and conditions of service;
- **further and higher education** including policy, funding, the functions of the Scottish Higher Education Funding Council (SHEFC) and student support;
- **the environment** including environmental protection, matters relating to air, land and water pollution and the functions of the Scottish Environment Protection Agency; water supplies and sewerage; and policies designed to promote sustainable development within the international commitments agreed by the UK;
- **the natural heritage** including countryside issues and the functions of Scottish Natural Heritage;
- **the built heritage** including the functions of Historic Scotland;
- **flood prevention, coast protection and reservoir safety**;
- **agriculture** including responsibility for implementing measures under the Common Agricultural Policy, and for domestic agriculture including crafting, animal and plant health and animal welfare subject to suitable coordination arrangements to ensure consistency within the UK where required under European law or to protect the public, animal or plant health or animal welfare;
- **food standards**: the relationship between the powers to be exercised by the Scottish Executive and the proposed Food Agency and the degree of UK co-ordination required to protect the public will be considered in the White Paper on the Agency to be issued in the autumn;
- **forestry**: the Secretary of State for Scotland's functions, including his power of direction over the Forestry Commission, will be transferred to the Scottish Executive, as will responsibility for finance

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for the Forestry Commission's activities in Scotland. The financial arrangements will be agreed on a fair and equitable basis taking into account the interests of UK tax Payers in a suitable division of the receipts from the business activities of the Commission;

- **fisheries** including responsibility for implementing measures under the Common Fisheries Policy, subject to suitable co-ordination arrangements to ensure effective discharge of UK obligations; domestic fisheries matters including inshore sea fisheries, salmon and freshwater fisheries and aquaculture;
- **sport** including the activities of the Scottish Sports Council;
- **the arts** including the functions of the National Library of Scotland, the National Museums of Scotland, the National Galleries of Scotland, the Scottish Museums Council, the Scottish Arts Council, and Scottish Screen and support for Gaelic;
- **inland waterways;**
- **criminal law** and procedure except for offences created in statute law relating to reserved matters including drugs and firearms;
- **civil law** except in relation to matters which are reserved;
- **electoral law** in relation to local government elections;
- **judicial appointments** subject to the appointments of the Lord President of the Court of Session and the Lord Justice Clerk being made by The Queen on the advice of the Prime Minister on the basis of nominations from the Scottish Executive;
- the **criminal justice and prosecution** system;
- the **civil and criminal courts** including the functions of the Scottish Courts Administration and the Court of Lord Lyon;
- **tribunals** concerned with devolved matters and the Scottish Council on Tribunals;
- **legal aid;**
- **parole**, the release of life sentence prisoners and alleged miscarriages of justice;
- **prisons** including the functions of the Scottish Prison Service and the treatment of offenders;
- the **police and fire services** including fire safety;
- **civil defence and emergency planning;**
- functions under various **international legal agreements** in devolved areas, for example relating to child abduction and the reciprocal enforcement of Maintenance Orders;
- **liquor licensing;**
- **protection of animals** including protection against cruelty to domestic, captive and wild animals, zoo licensing, controlling dangerous wild animals and game;

- **science and research funding** where supported through SHEFC and where it is undertaken in support of other devolved matters;
- **training policy and lifelong learning** including all the training responsibilities presently exercised by The Scottish Office;
- **vocational qualifications** including the functions of the Scottish Qualifications Authority;
- **careers advice and guidance**;
- **local government** including local government finance and local domestic and non-domestic taxation;
- **social work** including the Children's Hearings system;
- **voluntary sector** issues:
- **housing** including the functions of Scottish Homes;
- **area regeneration** including the designation of enterprise zones;
- **land-use planning and building control**;
- **economic development** including the functions of Scottish Enterprise, Highlands and Islands Enterprise and the local enterprise companies;
- **financial assistance to industry** subject to common UK guidelines and consultation arrangements to be set out in a published concordat;
- **inward investment** including the functions of Locate in Scotland,
- promotion of **trade and exports** including the functions of Scottish Trade International;
- promotion of **tourism** including the functions of the Scottish Tourist Board;
- **passenger and road transport** covering the Scottish road network, the promotion of road safety, bus policy, concessionary fares, cycling, taxis and minicabs, non-technical aspects of disability and transport, some rail grant powers, the Strathclyde Passenger Transport Executive and consultative arrangements in respect of public transport:
- appropriate **air and sea transport** powers covering ports, harbours and piers, the provision of freight shipping and ferry services, the activities of Highlands and Islands Airports Ltd and planning and environmental issues relating to airports;
- **statistics, public registers and records** including the responsibilities of the Keeper of the Registers, the Keeper of the Records, and the Registrar General for Scotland.

Among the areas to be devolved not included in the *Scotland Act*, are economic development, financial and other assistance to industry, universities, training matters, and the police and prosecution system (para. 2.2).

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The Scottish Executive will also exercise executive responsibility over these devolved matters, and in addition, it will be responsible for administrative functions in areas where law making powers are reserved or are a matter for the EU (para. 2.7). The statutory duties of Ministers of the Crown in Scotland would be transferred to Ministers of the Executive in relation to devolved matters. The Scottish Executive would be accountable to the Scottish Parliament and would have a similar relationship to that Parliament as exists between the UK Government and Parliament (para. 26).

The matters reserved to the UK Parliament are as follows:

3.3 The matters which the Government propose to reserve in the light of these considerations are listed below in general terms:

- **The constitution of the United Kingdom** including the Crown, the UK Parliament, electoral law, the Civil Service and the award of dignities and titles of honour;
- **UK foreign policy** including the ability to conclude European Union and other international agreements in both reserved and devolved areas and Ministry of International Development matters;
- **UK defence and national security** including responsibility for the armed forces and the security services, treason and other provisions for dealing with terrorism or subversion related to these matters;
- **The protection of borders and certain matters subject to border controls** including designation of the United Kingdom's land and maritime borders and fisheries limits, immigration and nationality, extradition, the criminal law in relation to drugs and firearms, and the regulation of drugs of misuse;
- **The stability of the UK's fiscal, economic and monetary system** including macroeconomic, monetary and fiscal affairs (except the tax varying and local taxation powers devolved under the Government's proposals), the granting of UK tax concessions and the currency;
- **Common markets for UK goods and services** at home and abroad including the law on companies and business associations, insurance, corporate insolvency and intellectual property, regulation of financial institutions and financial services, competition policy (subject to satisfactory rights of representation in the Scottish interest), consumer protection, regulation of the energy supply industries and international trade policy and Export Credit Guarantee Department matters;
- **Employment legislation** including industrial relations, equal opportunities, health and safety and the matters for which the Employment Service is responsible;
- **Social security policy and administration**, including benefits and the matters for which the Benefits Agency is responsible, contributions, child support maintenance and occupational and personal pension regulation and related employment policy, services and assistance;
- **Regulation of certain professions** primarily where these are currently dealt with under UK statutes, including medical, dental, nursing and other health professions. The Civil Service Commissioners, the UK Senior Salaries Review Body and primary legislation in respect of public service pensions will also be reserved matters;
- **Transport safety and regulation** including regulation of aviation and shipping, marine and air safety, rail safety and regulation (except for appropriate oversight by the Scottish Executive of Scottish passenger rail services), and some aspects of road traffic regulation.

- **Certain other matters presently subject to UK or GB regulation or operation** including the UK Research Councils, nuclear safety, the control and safety of medicines, reciprocal health agreements, the designation of assisted areas, the Ordnance Survey, the regulatory framework for broadcasting and film classification (including the regulation) of the distribution of video recordings, the licensing of theatres and cinemas, cultural property matters dealt with at UK level, gambling and the National Lottery and data protection. In addition a number of matters in the health sector, including abortion, human fertilisation and embryology, genetics, xenotransplantation and vivisection will be reserved in view of the need for a common approach. Equality legislation (covering racial, gender and disability discrimination) will be reserved.

3.4 The Government believe that reserving powers in these areas will safeguard the integrity of the UK and the benefits of a consistent and integrated approach.

Chapter 4 noted on the issue of sovereignty:

4.2 Under the Government's proposals, the UK Parliament will devolve wide ranging legislative powers to the Scottish Parliament. Scotland will of course remain an integral part of the United Kingdom. The Queen will continue to be Head of State of the United Kingdom. The UK Parliament is and will remain sovereign in all matters: but as part of the Government's resolve to modernise the British constitution Westminster will be choosing to exercise that sovereignty by devolving legislative responsibilities to a Scottish Parliament without in any way diminishing its own powers. The Government recognise that no UK Parliament can bind its successors. The Government however believe that the popular support for the Scottish Parliament, once established, will make sure that its future in the UK constitution will be secure.

The White Paper argued that the 1978 Act approach of defining devolved powers would have required frequent updating and might have given rise to regular legal arguments about whether particular matters were or not devolved, and therefore preferred the approach of the *Northern Ireland Constitution Act 1973* by defining matters reserved to the UK Parliament. However, there would be provision to transfer further matters by Order in Council approved by both Parliaments (para. 44). This is not intended to be 'rolling devolution' but to adjust the boundaries where necessary. The Government signalled that a reduction in the number of Scottish MPs at Westminster was likely:

4.5 Scotland's Members of Parliament will continue to play a full and constructive part in the proceedings of the House of Commons. This is right both for Scotland and the United Kingdom because devolution is about strengthening the United Kingdom. The distribution of seats in the House of Commons will be reviewed by the Parliamentary Boundary Commissions which follow criteria defined in statute. At present, special statutory provisions stipulate a minimum number of Scottish seats. The Government have decided that in the next review this requirement will no longer apply. Other statutory requirements, notably the need to give due weight to geographical considerations and local ties, will continue to apply to reviews for Scotland in the same way as they will apply to reviews for other parts of the UK.

See Section N for background on this issue, and see p.78

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Ministers of the Scottish Executive will be accountable to the Scottish Parliament. Since the responsibilities of The Lord Advocate are to be devolved the White Paper considered that the Law Officers of the Scottish Executive should be the Lord Advocate and the Solicitor General for Scotland. However, 'the traditional independence of the Lord Advocate as public prosecutor will be maintained'. (para. 4.8). A new post of Scottish Law Officer to the UK Government will be created to offer advice to the UK Government on Scots law. (para. 4.9).

3. Secretary of State and Disputes Resolution

The White Paper acknowledged that the role of the Secretary of State would change:

4.12 The role of the Secretary of State for Scotland will be to secure the passage and implementation of the legislation to establish the Scottish Parliament; and then to support its initial development. Once the Scottish Parliament is in being, and the Scottish Executive established, the responsibilities of the Secretary of State for Scotland will change. The focus will be on promoting communication between the Scottish Parliament and Executive and between the UK Parliament and Government on matters of mutual interest; and on representing Scottish interests in reserved areas.

4.13 The Scottish Executive will need to keep in close touch with Departments of the UK Government. Good communication systems will be vital. Departments in both administrations will develop mutual understandings covering the appropriate exchange of information, advance notification and joint working. The principles will be as follows:

- the vast majority of matters should be capable of being handled routinely among officials of the Departments in question;
- if further discussion is needed on any issue, the Cabinet Office and its Scottish Executive counterpart will mediate, again at official level;
- on some issues there will need to be discussions between the Scottish Executive and Ministers in the UK Government.

4.14 Representatives of the UK Government (usually the Secretary of State for Scotland) and the Scottish Executive will meet from time to time, to discuss particular issues or simply to take stock of relations. These arrangements will be updated regularly to reflect the evolution of administrative conventions of co-operation and joint working.

The provisions on dispute resolution were as follows:

4.15 The Scottish Executive and the UK Government may from time to time take different views of the Scottish Parliament's legislative powers. There will therefore be procedures for identifying and resolving any such difficulties. The Government believe that, given an open and constructive relationship between the UK Government and the Scottish Executive, problems will usually be resolved quickly and amicably.

4.16 In drafting legislation for consideration by the Scottish Parliament, the Scottish Executive will take legal advice to ensure that the provisions brought forward are within the Scottish Parliament's powers. In any cases of uncertainty, there will be consultation with the Scottish Executive Law Officers and as necessary more widely. It will be for the Presiding Officer of the Scottish Parliament to satisfy

himself or herself that legislation, whether brought forward by the Executive or by others, is *intra vires* before giving approval to introduction. These pre-legislative checks will ensure that any potential difficulties are identified at the earliest possible point. During the Parliamentary passage of legislation, it will fall to the Presiding Officer to certify that all amendments selected for debate are within the remit of the Scottish Parliament. UK Government Departments will be able to discuss any concerns which they might have with the Scottish Executive at that stage.

4.17 Prior to a Scottish Bill being passed forward from the Presiding Officer to receive Royal Assent, there will be a short delay period to ensure that the UK Government is content as to *vires*. In the event of a dispute between the Scottish Executive and the UK Government about *vires* remaining unresolved, there will be provision for it to be referred to the judicial Committee of the Privy Council. For this purpose the judicial Committee will consist of the Lords of Appeal in Ordinary. At least five Law Lords will sit in any case. The size and composition of the Committee will be decided by the Senior Law Lord (or, in his absence, the next senior Law Lord who is available) who will also decide where the Committee is to sit in any particular case. As appropriate, this might be in Edinburgh. The judicial Committee will also be able to hear any subsequent disputes about devolution issues in relation to secondary legislation and Acts of the Scottish Parliament after Royal Assent.

4.18 Special arrangements will be needed for the handling of questions of international relations, and for the exercise of domestic powers which are capable of affecting the UK's international relations. The guiding principle is that the UK should be able to speak with one voice in the international arena and to advance policies (for example in international negotiations) which take proper account of the interests of all parts of the UK. It will also be essential that the UK Government is in a position to implement obligations it has undertaken in good faith internationally or which are imposed on the United Kingdom by international law.

4.19 For these principles to be implemented effectively where devolved areas of responsibility are involved, arrangements will be made for the Scottish Executive to play a part in the conduct of international negotiations through close liaison with the Whitehall Departments concerned; or in appropriate cases through direct representation on the UK delegation. The Scottish Executive and Parliament will also, where necessary, implement the international obligations which fall on the UK Government and Parliament.

4.20 The implications for devolution of incorporating the European Convention on Human Rights into domestic law will be dealt with as part of the process of legislating for incorporation. The Government will be setting out their proposals for this in a White Paper to be published later this year.

The *Northern Ireland Constitution Act 1973* also provides for the Clerk to the Assembly to consider '*vires*'.

4. Scotland and the European Union

A separate chapter (Five) on relations with the European Union proposed that Scottish Executive Ministers officers would participate in UK policy making on EU matters including participation in EU Council meetings:

5.4 EU policies and legislation will have a considerable effect on many of the matters for which the Scottish Parliament will be responsible. The UK Government wishes to involve the Scottish Executive as directly and as fully as possible in the Government's decision making on EU matters. It is part of the Government's intention that Scottish Executive Ministers and officials should be fully involved in discussions within the UK Government about the formulation of the UK's policy position on all issues which touch on devolved matters. This will require, of course, mutual respect

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for the confidentiality of those discussions and adherence to the resultant UK line, without which it would be impossible to maintain such close working relationships.

5.5 Our proposals are designed to give the Scottish Parliament and Scottish Executive the opportunity to work constructively for the common interests of Scotland and the UK. The success of such a close working relationship, and the ability to sustain it, will depend upon the way in which the Scottish Parliament and Executive respond to that opportunity.

5.6 The Government also propose that Ministers and officials of the Scottish Executive should have a role to play in relevant Council meetings and other negotiations with our EU partners. Policy does not remain static in negotiations; and continuing involvement is a necessary extension of involvement in formulating the UK's initial policy positions. The role of Scottish Ministers and officials will be to support and advance the single UK negotiating line which they have played a part in developing. The emphasis in negotiations has to be on working as a UK team; and the UK lead Minister will retain overall responsibility for the negotiations and determine how best each member of the team can contribute to securing the agreed policy position, so that, in appropriate cases, Scottish Executive Ministers could speak for the UK in Councils. They would do so with the full weight of the UK's status as a large member state behind them, because the policy positions advanced will have been agreed among the UK interests.

A scrutiny role for the Scottish Parliament was envisaged (para. 5.7) and there would be an obligation on the Scottish Executive to ensure the implementation of EU obligations which concern devolved matters. The UK Parliament would continue to have the ability to legislate to give effect to EU obligations in Scotland. The Scottish Executive would be directly accountable through the courts for non-implementation or enforcement of EU obligations (para. 5.8). The Scottish Executive would be responsible for making proposals to the Scottish Parliament on Scottish nominations to the Committee of the Regions and the Economic and Social Committee (para. 5.9). Finally, a separate Scottish representative office in Brussels was proposed to complement the work of UK REP.

5. Quangos and Local Government

The Scottish Parliament would have the power to legislate in respect of 95 public bodies listed in Annex A to the White Paper and would be able to investigate and monitor their activities and alter their structure (para. 2-7-2.8). The Scottish Parliament would need to investigate whether separate Scottish bodies were needed in areas where public bodies (including regulators) had a UK or GB Remit (paras. 2.10-2.11). In any case the Scottish Parliament would have powers to require submission of reports and presentation of evidence in areas devolved to Scotland.

The White Paper stated : "the Government do not expect Scottish Parliament and its Executive to accumulate a range of new functions at the centre which would be more appropriately and efficiently delivered by other bodies within Scotland" (para. 6.2). It went on:

6.3 The Government believe that the new arrangements should be based on the following principles:

- the Scottish Parliament should set the national framework within which other Scottish public bodies operate;
- local authorities, NDPBs and other Scottish public bodies should be open and accountable to the Scottish people either through the Scottish Parliament and its Executive or in the case of local authorities directly through local elections.

6.4 The establishment of a Scottish Parliament will provide an opportunity to reexamine the roles and responsibilities of some of these bodies. The Government recognise that the relationship between the Scottish Parliament and Scottish Executive and local authorities is particularly crucial to the good governance of Scotland and the effective provision of services to its people. That is why the Government will shortly establish an independent committee to study how to build the most effective relations between the Scottish Parliament and Scottish Executive and a strong and effective local government. The committee's report will be laid before the Scottish Parliament.

6.5 The Scottish Parliament will have general responsibility for legislation and policy relating to local government. The Scottish Parliament will have the power to set the framework within which local government operates and to legislate to make changes to the powers, boundaries and functions of local authorities. The Scottish Executive will be responsible for supporting local authority current expenditure and for controlling and allocating capital allocations to Scottish councils. It will also be responsible for the system of local taxation.

6.6 The Government believe the Scottish people will be served best by a Scottish Parliament and Scottish Executive working closely with strong democratically elected local government. The Government demonstrated their commitment to local government by signing the Council of Europe Charter of Local Self-Government on 3 June, only a month after coming into office. It will be for the Scottish Parliament and its Executive to determine the details of their relationships with local authorities and funding and taxation arrangements for local government in the light of developments between now and the establishment of the Scottish Parliament, and the recommendations of the independent committee.

6.7 The Government recognise that some executive functions of government are best delivered by public bodies established for the purpose provided that democratic accountability is ultimately retained by Ministers. However the Government are concerned at the extent to which Scotland's vital public services are now run by unelected bodies.

6.8 The Scottish Executive will have responsibility for all Scottish public bodies whose functions and services will be devolved, and will be accountable to the Scottish Parliament for them. The Scottish Executive will assume the responsibilities of Ministers of the Crown in relation to these bodies. The Scottish Executive will be required to put arrangements in place to ensure that appointments to Scottish public bodies are subject to independent scrutiny and conform to the Commissioner of Public Appointments' Code of Practice.

6.9 The Scottish Parliament will be responsible for ensuring that the needs and priorities of Scotland are reflected in the development of the National Health Service in Scotland. It will be for the Scottish Parliament to decide the details of its relationship with health bodies, including funding arrangements.

6.10 Overall, the Government intend that relationships between the Scottish Parliament and its Executive and local government and other public bodies should be complementary, with the emphasis on solutions which give the best possible service and value for money to the people of Scotland. The Government wish to leave detailed arrangements for the Scottish Parliament and its Executive to develop for themselves.

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6. Financial Arrangements

Chapter 7 dealt with financial arrangements, proposing a continuation of the "block and formula" system of funding which has applied since the late 1970s.²¹² A system of assigned expenditure was explained as follows:

7.5 The Scottish Parliament will have an overall assigned budget broadly comparable to the present overall budget of the Secretary of State for Scotland. The majority of the assigned budget will be a new Block and, subject to paragraph 7.7 below, any future changes to the Block will be determined through the formula based arrangements which have become known as the "Barnett formula". The details of the operation of the formula each year will be a matter of public record.

7.6 In practice, therefore, the Scottish Parliament's assigned budget, like the Secretary of State's budget at present, will be determined each year largely through the Block arrangements. The annual changes to the new Block will be calculated by reference to the existing formula, providing continuity with current arrangements. That means that each year the new Block will be adjusted by the population share of changes to comparable English or English and Welsh programmes.

7.7 The formula will be updated from time to time to take account of population and other technical changes. Any more substantial revision would need to be preceded by an in depth study of relative spending requirements and would be the subject of full consultation between the Scottish Executive and the UK Government.

7.8 Once the amount of the assigned budget for any forthcoming year is determined the Scottish Executive, subject to the consent of the Scottish Parliament and to its legal obligations, will have complete freedom to allocate resources across the programmes within the assigned budget.

7.9 Decisions taken by the Scottish Parliament or Executive will sometimes have financial implications for Departments of the UK Government. Similarly, UK Government Departments may on occasion implement policies which will lead to additional costs for the Scottish Parliament. Generally, it will be right, in line with long-standing conventions, for the body whose decision leads to higher or extra costs to meet those costs. This general rule will continue to apply between the Scottish Parliament and Executive and UK Government Departments. Many of the UK Government's decisions will result in automatic adjustments for Scotland through the Barnett formula.

7.10 Once the proportion of the assigned budget which requires Exchequer funding has been determined, the UK Parliament will be invited to vote the necessary resources through a grant. Further elements of the assigned budget will be covered, as at present, by funding from the European Union and by borrowing by local authorities and other public bodies, to fund their capital spending. The Scottish Parliament will have power to authorise the Scottish Executive to undertake short-term borrowing to assist in the short-term matching of income and expenditure. It will not have a long-term borrowing power on its own account.

No independent Territorial Exchequer Commission is therefore proposed to administer the Barnett formula and no detail about the future development of the formula is given. Annex B gave further detail on the proposed adjustments to the Scottish Block consequent upon the new responsibilities of the Scottish Parliament and Scottish Executive.

²¹² See Research Paper 97/78 *Public expenditure in Scotland and Wales* for background

The tax-varying powers are planned to operate on income tax with a maximum variation of 3p in the pound giving a maximum additional revenue of £450m. The White Paper noted: "It is of course possible that the future changes to the UK income tax structure might reduce the value of the product of the Scottish Parliament's tax-varying power. In these circumstances, the Parliament's ability to raise or forgo up to £450m through the tax system will be preserved. This sum will be index linked to maintain its real value." (para. 7.13).

Further details on tax liability were given:

7.15 Savings and dividend income under current arrangements will not be subject to the Scottish Parliament's 3p basic rate power as it is taxed only at the lower or higher rate. The Government believe that savings and dividend income should in future remain exempt from any income tax variation power, in order to ensure that such income is taxed on a consistent basis throughout the UK, thus avoiding economic distortion.

7.16 The test of liability will be residence - a well established concept in tax law. A Scottish resident will be an individual who is resident in the UK for income tax purposes and who in any tax year either spends at least half of his time in Scotland (when in the UK) or whose principal home is in Scotland. These concepts will be set out in legislation.

7.17 Any tax due to the Scottish Parliament will be collected by the Inland Revenue. Normal arrangements would apply. Self-employed taxpayers would pay through their Self Assessment. Employees would pay through PAYE with their employers operating a special tax table which would reflect any varied rate set by the Scottish Parliament.

7.18 The direct costs to the Government of establishing the mechanisms for tax variation in Scotland is estimated at around £10m. Running costs for the Government of collecting the tax are expected to be around £8m per annum, but may vary depending upon whether or not the Scottish Parliament chooses to vary the rate of tax. The Scottish Parliament will meet the administration costs incurred by the Inland Revenue.

7.19 Collection through PAYE will also generate additional costs for employers. Their setting up costs are estimated to be around £50m (which could be phased) and running costs at around £6-£15m. Costs will vary from employer to employer. For illustrative purposes, an employer with 5 Scottish resident employees, (most cases in practice) would typically face setting-up costs in the range £50-£100. A larger firm, with 200 Scottish resident employees operating PAYE could expect set up costs in the range of £700-£1,400, around £5 per employee. Once the legislation enacting the tax-varying power is in place, the Government will publish a formal compliance cost assessment, following consultation with employers.

The White Paper acknowledged the power of the Scottish Parliament over local government finance: "The Scottish Parliament's control of the powers and functions of Scottish local government should extend to the financing of local government expenditure. This represents continuity with long established arrangements". (para. 7.21). The Scottish Parliament would have powers to control local authority current expenditure (including capping), and to determine the form of local taxation, both domestic and non-domestic (paras. 7.23-7.26). There will be a general obligation on the Parliament to ensure effectiveness and its arrangements. (para. 7.27).

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7. Electoral arrangements for the Scottish Parliament

Electoral arrangements follow the proposals of the Scottish Constitutional Convention. 73 constituency MSPs are proposed (1 for each Scottish constituency plus one for each of Orkney & Shetland) with 56 additional Members (7 from each European constituency) selected from party lists.²¹³

The electoral register used will be the local government register and will therefore include peers and EU citizens but not overseas voters. UK Commonwealth and EU citizens will be eligible to stand as well as peers, priests and ministers of religion. The minimum age for candidature will be 21. The White Paper urged political parties to offer candidates representing all sections of the community including women, ethnic minorities and people with disabilities, but there will be no statutory quotas applicable to candidates. (para. 8.5),

Responsibility for the electoral system and for Parliamentary boundaries would be reserved to Westminster:

8.7 The integrity of the UK will be strengthened by common UK and Scottish Parliament boundaries. Responsibility for Scottish Parliamentary electoral arrangements and constituencies will be reserved matters; the Parliamentary Boundary Commission for Scotland will continue in being, and future changes in electoral arrangements for the Scottish Parliament will therefore be a matter for the UK Parliament, subject to consultation with the Scottish Parliament. Any changes in Westminster constituencies will result in changes to Scottish Parliamentary constituencies; and may also lead to consequential adjustments to the size of the Scottish Parliament so as to maintain the present balance between constituency and additional Member seats.

Annex C gave further details on the proposed electoral system:

C. 1 Each elector will be entitled to cast 2 votes: one for a constituency MSP and one for the party of his/her choice,

C.2 Votes for constituency MSPs will be counted on a "first-past-the-post" basis in the same way as for elections to the UK Parliament so the candidate who receives most votes will be elected.

C.3 Votes for additional Members will be counted on the current European Parliamentary constituency basis and 7 Members will be elected from each of the current 8 European Parliamentary constituencies in Scotland. In the event of changes to these European Parliamentary constituencies in the future, the Parliamentary Boundary Commission for Scotland will make appropriate arrangements for the Scottish Parliament. Additional Member seats will be allocated correctively, that is to say that account will be taken of the number of constituency seats gained within the European Parliamentary constituency, on the following basis:

²¹³ See Research Paper 97/26 *Voting Systems - The Alternatives* for background

C.3.1 The number of votes cast for each party within the European constituency will be counted.

C.3.2 The number of votes cast for each party will then be divided by the number of constituency MSPs gained in Parliamentary constituencies contained wholly within the European constituency plus one

C.3.3 The party with the highest total after the calculation in C.3.2 is done gains the first additional Member

C.3.4 The second to seventh additional Members are allocated in the same way but additional Members gained are included in the calculations.

C.4 The Government intend to legislate for the registration of political parties so as to provide the means of identifying the political parties which win nominate the additional Members.

Therefore if the number of Scottish MPs at Westminster were to be reduced following the review the number of MSPs would also be likely to decrease.

8. The Scottish Parliament's organisation

Finally the White Paper proposed to leave much of the internal arrangements for the Scottish Parliament to decide. It will draw up its own standing orders, with some minimum requirements (para. 9.8) noting only that there should be a four year fixed term Parliaments, that dual mandates would not be prohibited,²¹⁴ and that a Presiding Officer would 'ensure the efficient conduct and administration of Scottish Parliamentary business and chair sessions of that Parliament' (para. 9.5). A First Minister would be appointed by the Queen:

9.6 The First Minister will head the Scottish Executive and will be appointed by The Queen on the advice of the Presiding Officer after the Scottish Parliament has nominated a candidate, who will normally be the leader of the party able to command the majority support of the Scottish Parliament. The First Minister will (with the approval of The Queen) appoint other Ministers; and will determine portfolios.

9.7 The Scottish Law Officers will be appointed by Royal Warrant. The Scottish Law Officers need not be MSPs: if not MSPs, they will be entitled to attend and speak, but not vote, in proceedings of the Scottish Parliament and its committees.

Committees were expected to take a major role in the work of the Parliament (para. 9.9). The building itself had to be appropriate for modern-day needs including IT. (paras. 10.1-10.6). The White Paper noted that a range of funding options were available including the Private Finance Initiative (para. 10.7). The staff of the Executive would be drawn largely from the Scottish Office, but staff serving the Scottish Parliament would be servants of that Parliament (paras. 10.10-10.11). All officials of the Executive will hold office under the Crown on terms and

²¹⁴ That is, that a MSP could also be an MP at Westminster or a local councillor

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conditions of service which will be determined in accordance with the provisions of the Civil Service Management Code - thereby remaining members of the Home Civil Service. (para. 10-11). The Secretary of State's staff and staff for the UK Scottish Law Office would be the responsibility of the UK Government. (para. 10.14).

Total additional annual running costs for the Scottish Parliament were estimated at between £20-£30m (para. 10.17). No substantial expenditure could be incurred before Parliament had approved the principle of legislation for a Scottish Parliament. (para. 11.6). Elections to a new Scottish Parliament would be expected in the first half of 1999 with full operation from the year 2000.

9. Conclusion

A detailed examination of the White Paper is beyond the scope of this Paper. It is, however, worth noting that Scottish devolution looks set to be the process which sets in train a whole series of constitutional changes for the UK. For example, the introduction of AMS for Scotland hastens the registration of political parties throughout the UK and the announced review of the number of Scottish seats unlocks the issue of Westminster representation from all the constituent parts of the UK. There are a number of areas where the White Paper offers only tentative conclusions - it seems that the Scottish Parliament and Executive will determine the shape of Freedom of Information legislation (para. 4.10) and of a Scottish Ombudsman (para. 4.11) and its audit arrangements (para. 7.27). The incorporation of the European Convention of Human Rights and its effect on plans for devolution is left until the White Paper on the ECHR (para. 4.20) promised for later in 1997. The impact on the rest of the UK of legislative devolution in Scotland is not covered in this White Paper. The debate which follows its publication will inevitably examine these topics in some depth.

Appendix 1

(please refer to hard copy)

General elections in Scotland, 1959 to 1997

	Con	Lab	LDem(a)	SNP	Other	Total
Seats won						
1959	31	38	1	-	1	71
1964	24	43	4	-	-	71
1966	20	46	5	-	-	71
1970	23	44	3	1	-	71
1974 (F)	21	40	3	7	-	71
1974 (O)	16	3	41	11	-	71
1979	22	44	3	2	-	71
1983	21	41	8	2	-	72
1987	10	50	9	3	-	72
1992	11	49	9	3	-	72
1997	-	56	10	6	-	72

(a) Liberal to 1979; Liberal-SDP Alliance 1983 and 1987.

(b) Provisional.

Sources:

FWS Craig British Electoral Facts 1832-1987 Tables 1.32 to 1.40, 4.01

C Rallings & M Thrasher Britain Votes 5 page 162

General election results, 1 May 1997 (Research Paper 97/49) Tables 3, 6, 10

Appendix 2

The electorate for the referendums in Scotland and Wales

Clauses 1(3) and 2(3) of the *Referendums (Scotland and Wales) Bill* provide that the electors for referendums will be those entitled to vote in local government elections in Scotland and Wales. Electoral registration officers maintain separate lists of voters entitled to vote in local government elections as the categories vary from those entitled to vote in Parliamentary elections. Peers may vote in local elections (but are disqualified at common law for parliamentary electors) as may EU citizens. Donald Dewar, Secretary of State for Scotland, said at Second Reading that there were 123 peers resident in Scotland.²¹⁵ There are an estimated 12,000 EU citizens in Scotland and 1,500 overseas voters registered in Scotland.²¹⁶

EU citizens were given the franchise for both local and European Parliament elections following *Article 8* of the *Maastricht Treaty*. The Local Government elections (*Changes to the franchise and qualification of Members regulations 1995 SI 1948*), gave EU citizens the franchise in local elections from 1 January 1996. A separate letter 'G' is used to denote EU citizens in the register, 'K' for EU citizens registered for both local and European Parliamentary elections, and L is used for peers (E if an overseas voter). EU citizens are subject to automatic registration since under regulation 29 of the *Representation of the People Regulations SI no 1081*, it is an offence for a householder to fail to complete the registration form including for EU citizens.²¹⁷ Overseas electors are excluded from the local government franchise.

The choice of the local government franchise caused some comment during the passage of the Bill as it enfranchised EU citizens but not overseas electors. In the *Scotland Act 1978* and the *Wales Act 1978*, the franchise chosen was parliamentary with the addition of peers. It is important to note, however, that in 1978, EU citizens did not have the right to vote in any type of elections, and that there was no system of overseas voters. It was S.1-3 of the *Representation of the People Act 1985* which allowed for the first time people resident abroad to register as a voter for Parliamentary and European Parliament elections. Initially the legislation applied only to those people abroad for up to five years, but it was subsequently extended in the *Representation of the People Act 1989* to a period of 20 years. Such voters are identified by the letter 'F'. An overseas voter must make a declaration to register on an annual basis. In order to qualify, a person must have been included in a register of parliamentary elections in a UK constituency. It is in that constituency that the elector will be registered as an overseas voter. He may not choose another constituency in which to register. There are special provisions for people reaching the age of 18 while resident abroad. They may only be registered in the constituency where they were last resident. Section 1 (3) (d) of the *1985 Act* ensures that the overseas elector is registered in the constituency in which he was resident on the last qualifying date (10 October) in respect of which he was registered. This is to prevent overseas electors from choosing

²¹⁵ HC Deb 21/5/97 c.728

²¹⁶ HL Deb. Vol 581 3/7/97 c.322

²¹⁷ However, for European Parliament elections the registration is voluntary

another constituency in which they have resided previously and where they might still appear on the register.

At Committee stage, Henry McLeish, for the Government, defended the franchise chosen and argued that residency should be the most important qualification.²¹⁸

The key criterion for deciding who should vote, in terms of our proposals, must be residency. Many hon. Members have confirmed today that that is the sensible, logical and effective way in which to proceed. I accept that people in parts of the United Kingdom other than Scotland and Wales will have a genuine interest. As hon. Members who have promoted the amendments have demonstrated by their own actions, eligibility to vote must depend on more than just interest

The principle has been well established in previous referendums. For example, in 1973 the people of Northern Ireland voted on the constitutional status of that part of the UK. In 1975, people in all parts of the UK voted on continued membership of the EC. In 1979, the people of Scotland and Wales voted on the devolution plans of the time. On each occasion the principle of residency was applied.

The position of service voters was also raised in the debates. Members of the forces and their spouses (as well as British Council employees and certain Crown servants working abroad) make a service declaration which continues in force until cancelled (a separate type of declaration applies for non-armed forces personnel).

No service declaration is specially made for local government elections and any declaration made for the purposes of parliamentary elections has effect also for local government elections (S.15(5) of the *Representation of the People Act 1983*). The declaration states that the elector resides in the UK on the date of the declaration or would have done if not for being a member of the forces, or a spouse. The declaration includes the address where the elector resides or would have been residing, and this address determined the constituency in which the elector is entitled to vote. Where an elector cannot give an address (because, for example, he has sold his house) an address where he has resided in the UK should be given.²¹⁹ The service declarations are transmitted to the appropriate Electoral Registration Officer, and the elector is treated as resident on the qualifying date. Problems may therefore arise when a Scottish regiment is posted to England before being sent abroad, as their service declarations may apply to non-Scottish constituencies. Lord Mackay of Ardbrecknish referred to servicemen stationed in Colchester on 10 October, who may have decided to make their declaration in respect of Colchester rather than an address in Scotland not knowing that a referendum would take place within a year.²²⁰ In response Lord Williams said that 'the example of the personnel in Colchester necessarily involves the conscious decision of registering there to vote. That conscious decision having been made, I do not

²¹⁸ HC Deb. 3/6/97 vol295 c.273

²¹⁹ S.16 (d) of the *1983 Act*

²²⁰ HL Deb vol. 580 c.1223, 18/6/97

believe it to be unreasonable to stick to the normal practice that one is eligible to vote wherever one registers, and that is the position'.²²¹

Special provision was made by the *Referendum Act 1975* (as noted by Michael Fallon at Committee stage [HC Deb 3/6/97 c.263]) for the referendum in EEC membership for service voters stationed abroad to vote [S.1(5)] but this predates the current system. In 1975, service personnel had to re-register annually and had to make the declaration not more than 6 weeks before departure and before 1976 only twenty-five per cent of service personnel were registered to vote.²²²

In order to qualify as a local government elector (and as a Parliamentary or European Parliament elector) a person must be resident in the applicable area on the qualifying date (10 October). It is possible to be added to the electoral register after the annual date on which it comes into force (16 February) but only if the voter met the residency requirement in that area on the qualifying date.²²³ A person who has moved in after that date will not have the right to be registered in the new area. Under S.11(3) of the *Representation of the People Act 1983*, additions to the register can still be made up to the close of nominations of candidates at an election. This cut off date will not be relevant for the referendum and so the Bill substitutes a provision creating a cut-off date for alternatives 11 days before each referendum polling day.²²⁴

There is also provision for postal and proxy votes. An application to vote by post, or proxy for an indefinite period at a local election will remain in force for the referendum and a person will be able to apply for a postal or proxy vote if he would have been entitled to apply at a local government election.²²⁵

²²¹ HL Deb c.1223

²²² HC Deb 23/11/78 c.706W

²²³ N.B. It is the Electoral Registration Officer not the applicant, who determines whether the requirement is met, under S.5 of the *Representation of the People Act 1983*

²²⁴ Clause 2

²²⁵ Schedule 3 "Conduct of the Referendums etc"

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