



RESEARCH PAPER 98/1
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The Scotland Bill: **Devolution and Scotland's Parliament**

The *Scotland Bill* [Bill No. 104 1997-98] introduces a system of devolution for Scotland as promised in the White Paper *Scotland's Parliament*. This Paper provides an overall view of the Bill and the background to the devolution debate, including the results of the referendum on September 11.

The Bill introduces a new electoral system for the Scottish Parliament, and provides for the Scottish Parliament to have legislative power over all matters not reserved to Westminster. The Bill creates a Scottish Executive, headed by a First Minister. Research Paper 98/2 examines the role and appointment of Scottish Ministers. The Parliament and the Executive will be funded by a block grant, and the tax varying powers of the Parliament are discussed in Research Paper 98/4.

The Bill also removes the statutory requirement of 71 Westminster seats for Scotland, but does not contain any other arrangements to modify the role of Scottish MPs at Westminster. Research Paper 98/3 looks at the West Lothian Question.

Other aspects of the *Scotland Bill* are dealt with in Research Papers 98/2 -98/5.

Oonagh Gay

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Summary

The White Paper *Scotlands Parliament* (Cm 3658) was published on 24 July 1997. Its provisions were summarised and assessed in Research Paper 97/92 *Scotland and Devolution*, together with the provisions of the *Scotland Act 1978*, an earlier attempt at devolution.

On 11 September 1997 74% of those who voted in the referendum supported the creation of a Scottish Parliament, and 63% supported tax-varying powers for that Parliament.

The *Scotland Bill* gives effect to the White Paper's proposals, with no substantial changes. The electoral system to be used is the Additional Member System (AMS). Separate legislation will be necessary to provide for the registration of parties and subordinate legislation will be required to create a new regime for electoral expenses, deposits etc. Some operational aspects of the Scottish Parliament are described in Research Paper 98/2.

The Scottish Parliament and Executive will be funded via a block grant. The Barnett formula is not mentioned explicitly in the *Scotland Bill* but the Memorandum states that the new system will "merely replace the funding for that part of the services under the control of the Parliament which is currently voted by Parliament". The Scottish Parliament will have a limited power to vary the basic rate of income tax by up to 3p.

The Scottish Parliament will have legislative power over all devolved matters. Matters reserved to Westminster are specified in Schedule 5. A Scottish Executive is provided for, headed by a First Minister, and executive functions will be conferred on the Executive in respect of devolved and other matters.

There is provision to remove the statutory requirement that Scotland have a minimum of 71 constituencies at Westminster, but the Bill does not contain any other arrangements to modify the role of Scottish MPs at Westminster.

Other Research Papers cover selected aspects of the *Scotland Bill*: 98/2 *Some Operational Aspects of Scottish Devolution* looks at the position of Scottish ministers, the legislative competence of the Scottish Parliament, the disputes resolution procedure and the standing orders. 98/3 *Some Constitutional and Representational Aspects* examines the impact of devolution on the constitution of the UK and the continuing West Lothian question. 98/4 *The Scotland Bill: Tax-Varying Powers* examines the power given to the Scottish Parliament to vary basic income tax, and 98/5 *The Scotland Bill: The Scottish Parliament and Local Government* looks at the potential impact on local government.

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I Introduction

The White Paper *Scotland's Parliament*¹ was published on 24 July 1997 and is summarised in Research Paper 97/92, *Scotland and Devolution*, which also provides much of the background to the publication of the White Paper. Research Paper 97/61, *The Referendums (Scotland and Wales) Bill*, discusses the legislation paving the way for the referendums held in Scotland and Wales in September 1997. This Paper should be read in conjunction with these earlier Papers for full background.

II The White Paper and the Referendum

A. Initial Reactions

The White Paper *Scotland's Parliament* was debated on 31 July 1997². Donald Dewar noted that the law making powers given to a Scottish Parliament in the White Paper were "much stronger and wider in range[than the 1978 Act] and reflect in part the growth of Scottish Office responsibilities in the past 20 years. They also reflect the fact that, unlike the 1978 proposals; we shall devolve the whole range of Scottish Office functions, with one or two prescribed and limited exceptions, to the Scottish Parliament and the Scottish Executive"(c460) He also noted that the Lord Advocate's responsibilities, financial assistance for industry; forestry, and responsibility for commercial ports and inland waterways would also be devolved, in contrast to 1978 (c460) He summarised other differences as follows:(c460)

A second and crucial difference from 1978-I shall telescope this-is that we have moved to define the reserved rather than the devolved powers, to ensure maximum clarity and stability. Anyone looking at the 1978 Act would see a somewhat grudging document, which would have required frequent updating. There would have been a greater danger-I put it no higher than that-of arguments over vires. We wished to minimise the difficulties of interpretation and to allow for maximum flexibility in future. We have done so.

My third point is that the Secretary of State for Scotland will not have what is sometimes called the governor-general role, which was at the heart of the 1978 Act and was put upon the shoulders of the Secretary of State. The Scottish Parliament and Scottish Executive will have their own direct relationships with the Crown, rather than using the Secretary of State as an intermediary. Legislation passed by the Scottish Parliament will not need to go to the Secretary of State for consideration and approval before it is passed to the Queen for Royal Assent. It is important that we do not have such overriding decisions. It would have sullied the atmosphere and made for great difficulties. I am glad about that particular extension.

Mr. Charles Kennedy (Ross, Skye and Inverness, West): I am grateful to the Secretary of State for giving way on this extremely important point, and I very much agree with his analysis. In the

¹ Cm 3658

² HC Deb vol 299 c 456-552

contrast that he is drawing between the current proposals and those of the late 1970s, he has been sensible enough to recognise the inevitable reduction in the number of Scottish Members of Parliament going to Westminster. When one considers this bold and imaginative White Paper in that respect, it is de facto the case that the office of Secretary of State effectively becomes redundant. If this reaches a successful conclusion, does he anticipate being the last holder of the office of Secretary of State, not just in its present form, but as a meaningful office of state at Cabinet level?

Mr. Dewar: That office certainly will change in character quite radically, because of the 12,000 civil servants and the range of legislative responsibilities passed to the Scottish Parliament. There will, in my view, still be a need for liaison. In the important areas of foreign affairs, defence, economic affairs in particular and fiscal affairs, there will still be a need for a Scottish voice in the Administration of the day, in United Kingdom terms. I do not share the hon. Gentleman's absolutist view on that matter, although I accept that it is something in which his party has believed for a very long time.

What is certain is that the Secretary of State will not have what I referred to as a governor-general role. To be fair if one looks back to 1978, the White Paper made the point that it was expected that the Secretary of State could object to and block a Scottish Parliament Bill on the basis that he did not agree with it as a matter of policy. There was then a considerable outcry and that was diluted in section 38 to the circumstances in which it would or might affect a reserved matter and was not in the public interest. But the override was there in a way that would have made for great difficulties in interpretation. The clarity of the new settlement is important. (c462)

He also gave further details about the proposals to vary income tax by up to 3p in the pound:

We have built in two specific safeguards with which the House will be familiar. First, income from savings and dividends will not be affected by the tax-varying powers. We were influenced heavily in reaching that decision by the need to have a level playing field for the financial services industry in Scotland, which is particularly important in insurance and pensions. Secondly, if the Parliament's power to raise the £450 million-which will be index-linked to preserve its real value-were eroded at some hypothetical future date by changes in the United Kingdom tax structure, an alternative base with the same sort of impact in terms of distribution would be provided by the Treasury.

It is important to recognise that the power may be used to deal with some special project or difficulty. I do not expect that it would simply be added to the block-and-formula sum that is negotiated as a continuously available additional revenue support. I believe that that would constitute a misuse of the power-although, of course, it would be a matter for the Scottish Parliament. The power must be seen in the context of the United Kingdom direct taxation system as a whole. Moreover, I am advised by the Treasury that, of those who currently pay tax in Scotland, 29 per cent. would not have been affected if it had applied this Year. That 29 per cent. consists of those with the lowest incomes in the tax system. (c465)

In response, Michael Ancram, for the Opposition, argued that the Scottish Parliament would soon want more power than that given in the White Paper and that inevitably the Union would be weakened. He raised questions about the post devolution role of the Secretary of State for Scotland, and the role of Ministers from the Scottish Executive when representing the UK in the Council of Ministers(c471-79) Tam Dalyell said that the White Paper did not represent a stable settlement and that the real voice was between the status quo and Scottish independence (c485). He drew attention to the White Paper proposal that there would be provision for transferring further matters from the powers reserved at Westminster by Order in Council, approved by both

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Parliaments (para 4.2) which he feared opened the way for rolling devolution (c 486). Alex Salmond for the SNP noted inconsistencies in the list of subjects to be devolved, including the omission of abortion and broadcasting' but welcomed the White Paper's proposals on Scotland in Europe (c 501-502). The West Lothian question and the possibility of a federal UK were raised by a number of speakers.

On 7 August the Government announced consultation on the role and membership of the proposed independent commission on local government and the Scottish Parliament promised in the White Paper³. Responses to the consultation paper were being considered in November 1997, when Malcolm Chisholm stressed that the Scottish Parliament would have full competence over all local government finance matters.⁴

Press reports speculated on the future of Scottish broadcasting following a Scottish Parliament, noting that network TV shows broadcast from London had bigger audiences than local products⁵. In a speech to the Drum Media Lunch on 29 August 1997 Mr Dewar defended the decision to leave regulation of the media and broadcasting at a UK level.⁶ The White Paper received a broadly favourable press, and became one of the most widely sold government publications ever. 22,500 were sold by 28 July.⁷ However, commentators were concerned that the proposals for Scottish representation on the EU Council of Ministers were unclear, and that the potential for conflict between Edinburgh and Westminster was underplayed.⁸ In an interview with Radio 4's *The world this weekend* on 27 July 1997 William Hague said that the Conservatives would accept a clear vote in the referendum. "If they vote for it in the referendum then they will get a Scottish Parliament and a Welsh Assembly and we will have to respect that for the future".

There were suggestions from a number of sources that the Barnett formula was no longer appropriate for present circumstances; Lord Barnett himself was quoted as saying that "the situation today is totally different. Income per head is higher in Scotland than it was 20 years ago, and the population there has fallen"⁹ Debate over the tax - raising powers of the Parliament had to a certain extent obscured debate over the grant to the Parliament - proportionately much larger¹⁰ The CBI response to the White Paper did not advise a yes or no vote, but concentrated on warning that differential tax rates could adversely impact on competitiveness and opposed Scottish control of non domestic rates.¹¹

³ Scottish Office PN 7/8/97 "Independent Commission on Local Government and the Scottish Parliament - Malcolm Chisholm

⁴ Scottish Office PN 12/11/87 "Scotland's Councils and Scotland's Parliament - A Winning Partnership" See Research Paper 98/5 for further details

⁵ *Scotsman* 28/8/97 "Switching on to Scotland"

⁶ Scottish Office PN 29/8/97

⁷ Scottish Office PN 28.8.97 "Terrific interest in Governments devolution proposals"

⁸ *TLS* 15/8/97 "What happens if the Scots Vote Yes?"

⁹ *Times* 8.9.97 "Beware the auld enemy"

¹⁰ *Scotland on Sunday* 7.9.97 "Finance debate full of red herrings and imbalances"

¹¹ *The Scotsman* 8.9.97 "Who pays new tax? Asks CBI chief"

B. The Referendum Campaign

A special SNP national council conference on 2 August 1997 agreed to support the White Paper proposals and the *Scotland Forward* campaign operated as a cross party lobby for a Yes Yes vote. The presence of the SNP members on the executive of *Scotland Forward* caused concern among some Labour Party members¹². In general, however, the campaign ran smoothly with Labour Party and SNP present on the same platform. Peter Jones¹³ has argued that the choice of Donald Dewar instead of George Robertson as Secretary of State for Scotland meant that the leadership of the SNP could become involved in *Scotland Forward*, particularly after private meetings where Mr Dewar reportedly assured SNP leaders that Westminster could not ignore a majority for independence in a Scottish Parliament:

Robertson, who has a visceral hatred of the SNP, saw Scotland Forward consisting of the Convention's partners plus individual Nationalists and Tories. He did not want the SNP collectively as a campaign partner. Dewar however took a different view; he believed it was important to have the SNP leadership on board in Scotland Forward in order to have the SNP's campaigning machine working on full throttle during the campaign.

While working on the Scottish parliament white paper, he met privately at the House of Commons, firstly with Margaret Ewing, the SNP' parliamentary leader; and then secondly (taking along Henry McLeish Scottish Office minister for constitutional affairs) with Alex Salmond, the SNP leader, and Mike Russell, the SNP chief executive.

The SNP were worried by election campaign statements by Brian Wilson, subsequently appointed a Scottish Office minister, that the Scottish parliament would not be able to make any moves towards independence, that that could only be done through Westminster. Salmond and Russell, while they privately believed independence was more likely to come through a devolved Scottish parliament, feared that any explicit statement in the white paper that there was a 'glass ceiling' on the devolved parliament's ambitions would make it impossible for the SNP to support a 'yes-yes' vote.

Dewar told them that there would be no such statement, although there would many declarations that sovereignty, and therefore the power to make further constitutional changes, would remain at Westminster. However he pointed out that in the practical political world, if there was a majority of SNP representatives in the Scottish parliament and they opted to hold an independence referendum, Westminster could not possibly prevent or ignore such a vote. After all, the Tory government had been unable to prevent or ignore Strathclyde Regional Council's referendum on the privatisation of Scottish water supplies. The SNP's leaders, believers anyway in the gradualist argument that independence is more likely to come through the stepping stone of a devolved parliament, were thus satisfied that there was no fundamental barrier to joining a 'yes-yes' campaign.

A report by Paolo Vestri, the national organiser of Scotland Forward, leaked to the *Scotsman*¹⁴ on the conduct of the campaign noted that slow decision making by the Labour party had led to some delays, but in general cross-party co-operation had been very successful.

¹² *Scotsman* 6/8/97 "Bitter attack over Labour and SNP's Yes Yes link".

¹³ In *Scottish Affairs* Autumn 1997 "The 1997 Devolution Referendum Campaign"

¹⁴ *Scotsman* 30.10.97 "Labour delays hit Yes, Yes campaign"

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Jones also noted that the referendum campaign was conducted almost entirely in the media, with little traditional canvassing, and the Scottish media with the exception of the *Scottish Daily Mail* supported the Yes-Yes option. The *Think Twice* Campaign was closely associated with key Scottish Conservatives such as Lord Fraser of Carmyllie, a former Scottish Office minister and did not attract support from other non- Conservative political figures.

A government advertising campaign on absent votes began on 4 August 1997. Neil McIntosh, former Chief Executive of Strathclyde and its former returning officer, was formally appointed to the position of Chief Counting Officer on 5 August¹⁵. A free booklet summarising the White Paper was issued in the week beginning 14 August, with a free video on demand¹⁶. Total expenditure on the White Paper's publicity campaign, (leaflets, videos and advertising) was put at £720,000 and attacked by the *Think Twice* campaign as partisan. The leaflets cost £258,000, video £85,000 and advertising £343,000¹⁷. Raymond Robertson wrote to the Permanent Secretary of the Scottish Office and the Cabinet Secretary to complain. These complaints were rejected¹⁸.

Tam Dalyell repeated that he would vote for a Scotland Bill on second reading and for a guillotine motion, if necessary, to encourage debate on devolution and that, as promised at his selection conference, he would not form a 'Labour Vote No' campaign or join any other 'Vote No' campaign¹⁹. Mr Dalyell's constituency party made clear that there were no moves to deselect him²⁰.

Donald Dewar reiterated that if Labour were elected to control the Scottish Parliament it would not seek to increase income tax during the term of the Westminster Parliament²¹. The *Think Twice* campaign was considered to be suffering from an identification with the Conservative party²². On 21 August the Governor of the Bank of Scotland, Sir Bruce Patullo, called for a 'Yes-No' vote in the referendum, and expressed disappointment that other corporate leaders had remained silent²³. According to the *Times*,²⁴ several businessmen were concerned about a possible "braindrain" if an additional burden of taxation was payable in Scotland, and a reluctance to invest in Scottish finance if it were seen as semi-detached from the UK. The Chief Executive of the Bank of Scotland subsequently wrote to the *Scotsman* setting out the Bank's view that devolution was a matter for the electorate²⁵. CBI Scotland members generally took a neutral stance.

¹⁵ *Scotsman* 6/8/97 "Man who will hold history in his hands"

¹⁶ Scottish Office PN 14/8/97 "Devolution tacking the proposals to every doorstep in Scotland"

¹⁷ *Scotsman* 15/8/97

¹⁸ "Dewar defends £720,000 for devolution mailshot" SO PN 20/8/97

¹⁹ *Scotland on Sunday* 9/8/97 "Undertakings on Devolution that were never broken"

²⁰ *Scotsman* 28/8/97 "We won't let Dalyell be a Home Rule martyr"

²¹ *Scotsman* 9/8/97 "Labour makes pledge to hold fire on "Tartan tax""

²² *Scotland on Sunday* 17/8/97 "Can they deliver the big message?"

²³ *Scotsman* 22/8/97 "From high on the mound, a grenade tossed at Dewar"

²⁴ *Scotsman* 26.8.97 "Scottish business wary of devolution consequences"

²⁵ *Scotsman* 29/8/97 "Bank's position on the devolution issue"

Pressure for a new Scottish Parliament to introduce PR in local elections grew over the summer with press reports of "sleaze" within the Scottish Labour party and Scottish local government. Michael Ancram was quoted as saying that a Scottish Parliament would be "Paisley writ large"²⁶. The MP for Paisley South, Gordon McMaster, had committed suicide on 30 July, leaving a note blaming colleagues for spreading malicious gossip, and attention focused on allegations of mismanagement in Scottish local government.

The death of Diana, Princess of Wales, on 31 August prompted a moratorium on campaigning until Sunday 7 September and also led to calls from Tam Dalyell for the referendum to be delayed. In response Donald Dewar disclosed that he had considered delay but that the technical obstacles were too great. The date of the referendum was set out in S.1(1) of the *Referendums (Scotland and Wales) Act* and a change would have meant the recall of Parliament from the Summer recess. The campaign had been running since 24 July 1997 and people in Scotland were very well aware of the issues.²⁷

Lady Thatcher expressed her opposition to the White Paper in an article in the *Scotsman*²⁸ arguing that the arrangements would prove unstable. But commentators remarked on the absence of major political figures from the campaign against devolution²⁹. There was speculation that as dual mandates would be permissible, Donald Dewar might combine the role of First Minister of the Scottish Parliament with that of Secretary of State for Scotland.³⁰

Peter Jones has noted that although the results were broadly in line with opinion polls in the summer, in general the referendum campaign was one which threatened to be de-railed by unexpected events:

UNEXPECTED EVENTS

This was a campaign that threatened, like perhaps no other campaign, to be de-railed by unexpected events, Firstly there was the Tommy Graham affair the controversy about the operation of the Labour party in Renfrewshire and the role of Mr Graham, MP for West Renfrewshire, which blew up after the suicide of Gordon McMaster, MP for Paisley South. Secondly there was the death in a car crash in Paris of Diana, Princess of Wales, The first obscured the launch of the campaign in a fog of reporting and speculation about the degree of political corruption in Paisley Labour politics; the second caused the suspension of the campaign for an entire week, unprecedented in modern Politics.³¹

²⁶ *Scotsman* 28/9/97 "Ancram warns sleaze will dog assembly"

²⁷ *Scotsman* 3.9.97 "Poll delay would be wrong, says Dewar"

²⁸ *Scotsman* 9.9.97 "Don't wreck the heritage we all share"

²⁹ *Scotsman* 10.9.97 "Inept opposition renders Yes, No scenario an academic exercise"

³⁰ *Scotsman* 12.9.97 "Yes, Yes headed for victory despite fears over turnout"

³¹ In *Scottish Affairs* Autumn 1997 "A Start to a New Song"

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The result of the referendum was seen as decisive; with 45 per cent of the electorate voting in favour of a Scottish Parliament it surpassed the 1979 threshold of 40 per cent which had defeated devolution in the 1970s. In all, 74.3 per cent of the voters agreed that there should be a Scottish Parliament and 25.7 per cent disagreed on a 60.4 per cent turn out. However 63.5 per cent voted in favour of tax varying powers and 36.5 per cent voted against. All the local government areas recorded a majority of votes in favour, with the lowest being Orkney at 57.5 per cent. The results were more mixed over tax - varying powers with Orkney and Dumfries and Galloway recording a majority against.³² The convenor of Orkney called for a separate Orkney referendum if Orkney council and the Scottish Parliament disagreed over powers devolved to Orkney.³³ Commentators noted the importance of the SNP vote in producing a large majority for devolution.³⁴ All the current 6 SNP MPs are expected to stand for election to the Scottish Parliament.

Labour promised a new system of selecting candidates for the Parliament³⁵ and the Conservative party indicated that it would contest seats in the 1999 elections³⁶. Commentators have noted how proportional representation may well assist a Conservative recovery in Scotland since the party could be expected to win a number of seats.

³² For full details see Appendix and Research Paper 97/113 *Results of Devolution Referendums 1979 and 1997*)

³³ *Scotsman* 13.9.97 "Orkney pushes for its own referendum"

³⁴ *Scotsman* 13.9.97 "Keeping the goalposts in place"

³⁵ *Times* 15.9.97 "Devolution will end "jobs for boys" selection system"

³⁶ *Observer* 21.9.97 "Tory U Turn"

III The Scottish White Paper: some criticisms

The White Paper clearly bears the imprint of the Scottish Constitutional Convention proposals in its *Scotland's Parliament, Scotland's Right*, but in some areas more details are given; probably the most significant change is the acceptance of the need to review the numbers of Scottish MPs, but this is set in a context of a broader review of the rules governing the redistribution of seats throughout the UK. (para 4.5). Some relatively minor changes are of interest, however, such as the White Paper acceptance of dual mandates for Members of the Scottish Parliament (MSPs) so that MSPs could be either local councillors or MPs/peers or both. In general however, British and indeed Scottish political culture has not encouraged dual mandates and the White Paper notes that political parties may develop their own rules on dual mandates (para 9.2)

The influence of the Constitution Unit report *Scotland's Parliament: fundamentals for a new Scotland Act* (and its draft bill) also seems apparent,³⁷ most clearly in the White Paper's acceptance that the legislation will need to specify the powers retained by Westminster rather than the powers devolved. However, a number of Constitution Unit ideas have not made their way into the White Paper, notably proposals for an independent commission to monitor the operation of the Barnett formula or its successor, and proposals for a Secretary of State for Territorial Affairs and the selection of the House of Lords as a final court of appeal for devolution cases.

There has been some detailed comment on the White Paper, from the Law Society of Scotland³⁸ and separately from Professor Iain McLean.³⁹ The main issues raised are covered below.

A. Subjects to be devolved

The Law Society of Scotland noted that the devolution of health might not sit well with the proposed reservation of abortion, human fertilisation and embryology. Professor McLean also queried the exclusion of abortion especially as no justification was given except a reference for a need for a common approach. The Law Society of Scotland also had several other detailed comments on the boundaries between subjects devolved and reserved; one example is the boundary between local electoral law, which is to be devolved, and Parliamentary electoral law, which is not. The Constitution Unit report in 1996 had noted that the Scottish Parliament might want to take steps to remedy some of the deficiencies in the administration of elections, such as easier postal voting or better access for disabled voters which might have a knock on effect on Westminster, or European or Scottish Parliament elections (paras 174-179) Current enthusiasm in some quarters for PR for local government elections may well, if enacted by the Scottish Parliament, require changes in UK legislation to be achieved.

³⁷ *Illustrative Drafts for a New Scotland Bill* Spring 1997

³⁸ *Memorandum of comments by the Law Society of Scotland on the white paper Scotland; Parliament. September 1997*

³⁹ *Scotland's Parliament: issues for discussion* Net publication <http://www.netnexus.org>. 1997.

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The Law Society in Scotland also queried the reservation to the UK of the security services, given their new role in law enforcement (p6). It noted that the responsibility of the Lord Advocate for the prosecution and investigation of crimes, including those relating to reserved matters were to be devolved, but the accountability of the Lord Advocate was unclear; and asked how he would be accountable to the UK Parliament for reserved UK offences (p13). In response Henry McLeish said that the passing of legislation amending or creating criminal offences, and any special procedure for enforcing them would be reserved to Westminster, and the arrangements described in the White Paper for ensuring that there is communication between the Scottish Executive and parliament and the UK Parliament and government would be available for dealing with the interaction between criminal law and procedure on reserved and devolved subjects.⁴⁰ The Lord Advocate would be accountable to the Scottish Parliament and his independence as public prosecutor would be maintained.

The Law Society considered that the devolution of judicial appointments to the Scottish parliament would be a substantial departure from existing practice and called for a statutory provision declaring judicial independence in any Bill. (p5). In response to Tam Dalyell, Henry McLeish said that the Government did not propose to make specific provision for a judicial appointments commission, and it would be for the Scottish Executive to consider whether such a body should have role to play in identifying candidates for judicial posts.

The transfer of further matters to and from the reserved list by Order in Council proposed in para 4.4 of the White Paper needed further clarification according to the Law Society of Scotland which called for a definition of circumstances where this approach would be adopted on the face of the Bill (p12). In response to questions from Tam Dalyell about the Law Society's comments, Henry McLeish, said that the government envisaged its use to deal with minor changes in the early years of devolution. David Ott has noted that the phrasing of para 4.4 implies that the Scottish parliament could block proposals to reserve further powers to Westminster, since the relevant Orders in Council would need to be approved by Edinburgh.⁴¹ The Constitution Unit report noted that since the UK was not a federal state it was not necessary to establish concurrent powers shared by both the Scottish and Westminster parliaments; but to operate a 'blurred line' system would mean that Westminster's right to legislate in devolved fields should be constrained and that Edinburgh needed a mechanism to allow Edinburgh to operate on reserved territory under certain circumstances (paras 103-4). A model for this latter power is S.5 of the *Northern Ireland Constitution Act 1973* where the Secretary of State has to give consent to Measures containing provisions dealing with reserved matters (paras 110-3).

⁴⁰ Letter to Tam Dalyell 15.8.97 placed in the Library as a 'Will Write' letter.

⁴¹ *Scotman* 25.7.97 "A place for the people in the balance of power"

B. The Sovereignty of Westminster

The Law Society queried whether the sovereignty of the UK Parliament over all matters should be expressed on the face of the Bill, and wondered whether the Bill should contain provisions preventing repeal unless a referendum had been held. Professor McLean was against any such imitation of the S.75 of the *Government of Ireland Act 1920* as it would achieve nothing. The Constitution Unit report noted that any attempt to entrench (or otherwise) would be effective only to the extent that it provided a political rather than legal obstacle to repeal. Jean McFadden and William Bain have argued that " the reality is that the doctrine of the sovereignty of Parliament will continue well into the next millenium, long after any Scottish Parliament will have been established, with all the implications that has for the entrenchment of the legislation. The 'popular sovereignty 'of a bygone age cannot be revived"⁴²

C. The Resolution of Disputes

The Law Society of Scotland considered that the scheme in para 4.16 of the White Paper for ascertaining the vires of the Scottish Parliament was 'fraught' with problems (p15), imposing an 'enormous burden of responsibility' on the Presiding Officer of the Parliament. As a procedural implication there would need to be significant notice requirement before tabling amendments to bills (p16). In the *Northern Ireland Constitution Act 1973* the Clerk of the Assembly was to consider every proposed Measure for vires and to check whether the Secretary of State had given consent to the Measure. (S.5(2)) This was a less onerous task than that given to the Scottish Presiding Officer because of the dominant role of the Secretary of State for Northern Ireland. There was no equivalent power in the *Scotland Act 1978*, but the Constitution Unit report had recommended such a role for the Presiding Officer (para 134) noting that the Scottish Law Commission had proposed it in 1975.

The Law Society of Scotland also considered that the White Paper proposal for vires scrutiny by the UK government before Royal Assent should take place earlier, perhaps when the Presiding Officer gives his or her approval to introduction. It considered that the convention in the Judicial Committee of the Privy Council that two Scottish Lords of Appeal in ordinary sit in Scottish matters might be enshrined in statute. The Government have said that they do not intend to do this.⁴³ The Constitution Unit maintain that the House of Lords should be selected as the final court for devolution and all other constitutional disputes.⁴⁴ Graham Leicester commented that the specification in the White Paper that for the purpose of devolution disputes the Judicial Committee should consist of the Lords of Appeal in Ordinary was puzzling and considered that the Bill should assign the role to the House of Lords from the beginning.⁴⁵ Colin Boyd QC,⁴⁶ writing before the

⁴² "Strategies for the Future: A Lasting Parliament for Scotland?" in St J Bates, ed., *Devolution to Scotland: the Legal Aspects* (1997)

⁴³ Letter from Henry McLeish to Tam Dalyell 15.8.97

⁴⁴ *Monitor Constitution Unit Bulletin September 1997*

⁴⁵ *Scotsman* 25.7.97 "Manifesto promises honoured"

⁴⁶ "Parliaments and courts: powers and disputes resolution" in *Devolution to Scotland: the legal aspects* (1997)
Colin Boyd is now Solicitor General

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publication of the White Paper, has argued that the House of Lords was closest to a supreme court, but historically there was great resistance to the idea that the Lords should have any function in Scottish appeals, and that the Judicial Committee of the Privy Council was preferable, having already taken that function in both the *Government of Ireland Act 1920* and the *Northern Ireland Constitution Act 1973*. He considered that a pre-assent review was a sensible proposal, but thought it unnecessary to provide for the Secretary of State to examine every bill passed by the Scottish Parliament, especially as in practice the UK government would no doubt look at each legislative proposal, without the need for statutory authority. There might be a case for someone other than the Secretary of State to refer a vires question to a judicial body, since political considerations might be suspected. A Law Officer might be a more appropriate person.

D. European Union matters

The Law Society of Scotland noted the White Paper proposals that there would be confidential discussions between the Scottish Executive and the UK government on the development of UK policy on EU initiatives relating to devolved matters; it considered that this was a constitutional weakness, since the Scottish Parliament ought to hold the Executive to account for presenting Scottish views on the EU to the UK (p.20). The Executive members would also not be accountable to the UK Parliament when speaking for the UK in EU councils. The Society made the point that the Scottish Parliament should be able to scrutinise EU policy as well as legislative proposals. It noted that the UK Parliament is to continue to have the ability to legislate to give effect to EU obligations in Scotland but that the White Paper does not make clear whether this power will only be used where legislation had not been enacted by the Scottish Parliament. The White Paper proposal in para 5.8 to make the Scottish Executive directly accountable through the Scottish courts to anyone affected by shortcomings in its implementation of EU obligations was criticised on a number of points as imprecise and possibly in conflict with Community law in *Francovitch*.⁴⁷

Colin Boyd considered that where there were strong reasons when suspecting that a bill was incompatible with a Community obligation having direct effect, or which might have direct effect, for a referral to a judicial body for a decision. He suggested that mechanisms still needed to be put in place to deal with obligations of the UK to the EU, which would require either legislation by the Scottish Parliament in competent areas or reservation to the UK of the power to legislate in devolved areas where necessary to meet international obligations. The White Paper is not explicit in this area, but there is further detail in the Bill.⁴⁸

The Constitution Unit report noted the striking overlap between the range of areas proposed by the SCC for devolution and those already within Community competence (para 316) emphasising the importance of the European dimension in the devolution settlement. The report considered that Scotland needed to secure effective influence above all in the Council of Ministers where real decision making took place (para 340). At present Scottish Office ministers on occasion were on

⁴⁷ *Francovitch v Italy* [1991] 1 E.C.R. 5357 [1993] 2 C.M.L.R.66⁴⁷

⁴⁸ see Part V section J of this Paper for details

delegations to Fisheries or Agricultural councils. The Unit suggested a formal agreement between the Scottish Executive and the UK government on the development and presentation of EU proposals, noting precedents for this in Belgium and Spain. St John Bates⁴⁹ has commented on the need for a statutory agreement to ensure that the UK government gave prompt information to the Scottish Executive on EU policy developments potentially affecting Scotland (p68). Similarly, an agreement by the Scottish Executive to provide information to the Scottish Parliament would be necessary.

E. The role of the Secretary of State

The Constitution Unit maintained that the responsibilities of the Secretary of State post devolution are not sufficient to justify separate representation for Scotland in the Cabinet, but that abolition would be politically impossible as long as the post of Secretary of State for Wales continued in existence.⁵⁰ The Law Society of Scotland questioned the White Paper's proposal that the Secretary of State would support the initial development of the Scottish Parliament. Graham Leicester⁵¹ has emphasised the informal links likely to grow between the Scottish Executive and the UK government and noted "The withering away of the Secretary of State's role is not explicit in the White Paper, but his role is far less important or intrusive than in the 1970s devolution proposals. The timing of any change in the present arrangements probably depends on the fate of the Welsh Secretary, who is given a broad Governor General role under the very different form of devolution proposed for Wales." (p18)

F. The financial arrangements

Professor McLean argued that the White Paper proposals broadly to continue with the Barnett formula arrangements for the block grant to the Scottish Executive was over-generous to Scotland, especially as there had not been a thorough assessment of the 'needs' on which differential grants for the constituent parts of the UK are based since 1979.⁵² Graham Leicester calculated that Scottish spending at present is 25 per cent above English levels, and spending on the services to be devolved was over 30 per cent higher, (p.25)⁵³ but has argued that it was a false assumption from this to require Scottish spending to fall to the same per capita level as in England, since "the UK is a fiscal union. A process of 'equalisation on the basis of need' underpins the UK public expenditure system. This results in net transfers, broadly, from the prosperous South East to other parts of the country. The operation of the UK and spending system in this way is normally hidden in government data which give no regional breakdowns. Devolution will change all that." (p27)

Leicester also noted that the White Paper acknowledged that in future the details of the operation of the formula would be a matter of public record, and that the formula would need to be updated from

⁴⁹ "Devolution in the European Union" in *Devolution to Scotland; the legal aspects* (1997)

⁵⁰ *Monitor* The Constitution Unit Bulletin September 1997

⁵¹ *Scotland's Parliament: a business guide to Devolution* (1997) Scottish Council Foundation

⁵² *Scotland's Parliament: issues for discussion* October 1997

⁵³ *Scotland's parliament a business guide to Devolution* 1997

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time to time but commented "the absence of any formal review procedure for amending the formula may pose some dangers for Scotland in the longer term. Reviewing the formula may fall in future to a government at Westminster which is hostile to devolution and resentful of Scotland's relatively generous share of public expenditure.". (p29).He suggested enshrining in statute the principles underlying the formula based on the principle of equalisation according to need.

Graham Leicester noted that the White Paper suggests safeguards against higher council tax rates; in future council tax benefits and rent rebates would fall within the Scottish block so that extra costs would have to be found within Scotland and the Scottish Parliament will have powers to cap local authorities. He considered it doubtful that any full devolution of power for levying business rates will be given to Scottish local authorities. McLean noted the suggestion in para 7.27 of the White Paper that the Scottish block would suffer reductions if self-financed expenditure by Scottish local authorities began to threaten 'targets set for public expenditure as part of the management of the UK economy'.

G. Tax varying power

Professor McLean has deprecated press and public attention on tax-varying powers which has, he considered, overshadowed the real debate about the Barnett formula. Graham Leicester noted that the White Paper commits the Government to maintaining the real value of the tax variation power against any changes in the UK tax system by indexing the £450m yield but the details of how the indexation would work were not given. He pointed out that the costs of the collection mechanism outlined in the White Paper might come under criticism if the power itself would not be used. He considered that the political pressure to use the power will be at its highest if Scotland were to face cuts in public spending feeding through via the formula. The use of the power would however be unlikely in the first term of the Scottish Parliament as it would take 2-3 years for the collection machinery to be set up. Research Paper 98/4 gives full details of the tax-varying powers in the Bill.

H. Electoral arrangements

Iain McLean noted that the White Paper proposed the d'Hondt system of PR for calculating the election of the additional MSPs, which tends to favour large parties; he proposed the use of the St Lague formula instead.⁵⁴ McLean also proposed using the device suggested by the Hansard Society in 1976, that additional members for each party should be drawn from that party's unsuccessful constituency candidates in descending order of share of vote received, rather than from party lists, to prevent too much power being placed in the hands of party managers. (p.6)⁵⁵

⁵⁴ For background see Research Paper 97/26 *Voting Systems- the alternatives* pp42-4

⁵⁵ See Research Paper 97/26 p35 for background

There is no mention in the White Paper of the voluntary agreement signed between the Labour and Liberal Democrats in the Scottish Constitutional Convention to accept the principle that there should be an equal number of men and women as Members of the first Scottish Parliament. The Agreement is unlikely to be given statutory force.⁵⁶ However political pressure for equal numbers of candidates has continued.

There has been academic debate about the likely outcome of elections under AMS. John Curtice considered in 1996⁵⁷ that AMS offered Labour the prospect of almost permanent power in Scotland, provided that it would accept the Liberal Democrats or Scottish Nationalists as junior partners. However Michael Dyer has argued in response⁵⁸ that the SCC commitment to AMS rather than FPTP means that the main beneficiaries are the SNP and the Conservative party. In a reply Curtice notes that for Labour AMS avoids the worst case scenario of a SNP majority under FPTP.⁵⁹ Over the summer there were press reports that the SNP was considering a rapprochement with the Liberal Democrats which might deny Labour a majority in the Scottish Parliament⁶⁰ An opinion poll by ICM and Democratic Audit published in September 1997⁶¹ predicted that Labour would win 58 seats, SNP 39, Liberal Democrats 20 and Conservatives 12. Labour would therefore be short of an overall majority, and the survey also indicated that party allegiance for elections to Westminster might change for elections to a Scottish Parliament. An earlier survey, by the Scottish Liberal Democrats, published in July, was based on projected results from general election data, and gave the following results: 63 Labour, 28 SNP, 22 Conservatives, and 15 Liberal Democrats.⁶²

Graham Leicester noted that the Scottish Parliament would become up to 20 members smaller if the reduction of the numbers of Scottish MPs was carried through by the Parliamentary Boundary Commission for Scotland. (p19) Professor McLean considered that a reduction in the number of Scottish seats at Westminster would not answer the West Lothian Question as Scottish MPs would still be able to vote on non-Scottish matters at Westminster.

I. Parliamentary arrangements

The assumption has been that the new MSPs will be full-time; the White Paper notes that the Senior Salaries Review Body will set the salaries of MSPs in the first instance (para 9.3). Graham Leicester has noted that the Parliament will be small, compared with Westminster, and that Australian state parliaments sit for only 50-60 days a year and Canadian provincial legislatures sit for 100 days. He

⁵⁶ See "Electing the Scottish Parliament: Smoke filled rooms or greater democracy?" in *Devolution to Scotland: the legal aspects* (1997)

⁵⁷ "Why the additional member system has won out in Scotland" in *Representation* Spring/Summer 1996

⁵⁸ "Scotland's additional Members and the maintenance of Labour power" in *Representation* winter 1996/97

⁵⁹ "A Reply to Michael Dyer" in *Representation* Winter 1996/97

⁶⁰ *Herald* 27.9.97 "Salmond woos the Scottish Lib Dems"

⁶¹ reported in *Observer* 7.9.97 "One in four Scots voters could switch parties" The full report is *Devolution Votes* (Sept 1997) Scarman Trust

⁶² *Scotsman* 23.7.97 and reproduced in Campaign for a Scottish parliament website http://www.cybersurf.co.uk.cscoparl/briefing/elec_sys.html

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thought that the Scottish Parliament should be encouraged to sit for 100 days thus allowing people with other interests to be MSPs.(p19) Although the bulk of the work is expected to be carried out in committees the small number of MSPs would mean that only 10 committees at most could be set up, presupposing a Scottish Executive of 15-20 members. The White Paper does not directly address the workload of the MSPs and whether the constituency-based MSP will develop a different role from the MSPs elected from the European constituencies; Graham Leicester considered that these 56 might be free from constituency workloads and therefore develop policy proposals or campaign regionally.

The Law Society of Scotland was concerned that the White Paper did not make clear on whose advice the Scottish Law Officers would be appointed and queried why the Queen would formally appoint the First Minister but not other ministers, wondering whether Scottish ministers would have direct access to the Crown.(p23-4)

IV Topical Issues

In the weeks immediately preceding the publication of the *Scotland Bill* public attention focused mainly on economic issues. The Treasury Select Committee heard evidence on the origins and workings of the Barnett formula⁶³ from Lord Barnett and there were press reports of disagreements within Cabinet over proposals for a concordat between the DTI, the Welsh Office and the Scottish Office to coordinate inward investment.⁶⁴ Margaret Beckett gave evidence to the Trade and Industry Committee on the work of the DTI, and commented on the concordat.⁶⁵ On 8 December the Treasury published a statement of principles⁶⁶ about the operation of the block budget for the Welsh Assembly and Scottish Parliament reproduced in a written answer on 9 December 1997.⁶⁷ On 22 December the Trade and Industry committee and the Treasury committee published their reports on coordination of inward investment and the Barnett formula respectively.⁶⁸

A. Devolution - a Framework for the United Kingdom?

The *Government of Wales Bill*⁶⁹ and the *Greater London Authority Referendum Bill*⁷⁰ have both recently received Second Readings in the Commons and can be seen as part of the process of

⁶³ HC 341 *The Barnett formula and public spending levels*

⁶⁴ *Scotsman* 5.11.97 "Beckett insists on veto over investment aid"

⁶⁵ HC 308 *The Work of the Department of Trade and Industry* See also an interview with Lord Barnett in *Herald* 12.11.97 "Clamour for Scots money"

⁶⁶ Dep 5621

⁶⁷ HC Deb vol 302 c510-13w

⁶⁸ Trade and Industry Committee First Report HC 355 1997/8 Treasury Committee Second Report HC 341 1997/8

⁶⁹ see Research Paper 97/129 *The Government of Wales Bill :devolution and the national assembly* for details, and references to related papers

devolution begun since the general election in May 1997. At the Second Reading of the *Government of Wales Bill* Ron Davies, Secretary of State for Wales said in relation to further transfers of functions to the National Assembly that "devolution is not an event, but a process"⁷¹ These two models of devolution have significant differences from the Scottish model and some commentators have queried the lack of an overall framework for devolution.

A sub national model for the United Kingdom has frequently been rejected as inappropriate for a state with one part -England- conspicuously bigger than the rest, and the lack of an overall demand for a fully developed regional government system for England has seemingly prevented this alternative option. The Northern Ireland talks⁷² add an extra dimension to the question of a devolution framework⁷³, since a successful outcome could lead to another type of devolved assembly within the UK and one which might receive powers and functions on a rolling basis, as provided for in the *Northern Ireland Constitution Act 1973*. David Trimble, leader of the UUP, has called for a council of the British Isles - a body that would encompass the British Isles and would involve the British and Irish governments and representatives from the devolved assemblies in Scotland, Wales, and Northern Ireland.⁷⁴

As the Constitution Unit noted in 1996⁷⁵ devolution "will open up to scrutiny parts of the political system which have remained relatively hidden to date: distribution of resources, of inward investment, of gains from European policies and the attitude of Whitehall Ministers and departments to national and regional issues. This new visibility will require a greater political trust and tolerance at the centre - and in the regions - and a new appreciation of the British state as a *union* rather than a *unitary* state."

The White Paper on Regional Development Agencies⁷⁶ launched by John Prescott, Secretary of State for the Environment, Transport and the Regions on 3 December is another manifestation of the devolution process; John Prescott noted in his statement that "As we made clear in our manifesto, we are committed to moving, with the consent of local people, to directly elected regional government in England. That complements devolution in Scotland and Wales and the creation of a Greater London assembly. Demand for directly elected regional government varies across England, and it would be wrong to envisage a uniform approach at this stage."⁷⁷

⁷⁰ see Research Paper 97/114 The Greater London Authority (Referendum) Bill for details

⁷¹ HC Deb vol 302 8.12.97 c677

⁷² for background see Research Paper 96/52 *Northern Ireland:current political developments*

⁷³ for a useful summary of the history of devolution in Northern Ireland see Kenneth Bloomfield "Devolution:Lessons from Northern Ireland" in *Political Quarterly* 1996

⁷⁴ UUP Press Release 7.10.97 "Launch of Strand 2 Talks" and *Financial Times* 9.12.97 "Trimble in plea to London and Dublin"

⁷⁵ Constitution Unit Briefing June 1996 *Devolution in the round*

⁷⁶ *Building Partners for Prosperity* December 1997

⁷⁷ HC Deb vol 302 3.12.97 c359

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Richard Caborn, junior minister at DETR, has also floated the idea of some type of federal structure (presumably not strictly federal, but sub-national) in an interview with the *Scotsman*⁷⁸ in which he was reported as saying that "The more you devolve powers to the English regions the more it answers the West Lothian [question]"

Critics of devolution have expressed concern that the process may have no end and may lead to the break up of the United Kingdom. Michael Ancram, for the Opposition, has called for amendments to the *Government of Wales Bill* on the lines of s75 of the *Government of Ireland Act*⁷⁹ to ensure that the supremacy of the Westminster Parliament is explicitly recognised in the devolution legislation.⁸⁰ He expressed concern throughout the second reading debate that the Bill might presage instability:⁸¹

We still believe that the Bill signals the start of a legislative process that, along with its Scottish counterpart, will loosen the bonds that hold together the United Kingdom; it will create new tensions and animosities between the component parts of the United Kingdom, including England, which, unattended, could break the United Kingdom apart. While this Bill does not raise the English dimension as directly as the Scottish Bill, it nevertheless sets out a clear direction away from that spirit of common purpose and unity that lies at the heart of our Union....

Conservative Members still believe in the Union and in the value of the United Kingdom-this unique amalgam of nations, cultures and traditions, which has proved, and can continue to prove, a significant force for good, both at home and beyond.

However, we do not fear reform as long as it is fully thought through and consistent with the maintenance of the United Kingdom. Indeed, it is worth remembering that Conservative Governments began the process of administrative devolution to Wales and set up the Welsh Grand Committee and the Select Committee on Welsh Affairs....

We will continue to fight for the Union. When it is threatened, we will respond. When it is undermined, we will seek to shore it up. We still question the need for the Bill and we question even more the motives behind it. When it is considered alongside last week's White Paper on regional development agencies and the accompanying ministerial comments, it becomes clear that the Government regard the Bill as the first step in the regionalisation of the United Kingdom-we know that England is next in the firing line-and all in the cause of helping to create a Europe of regions. Fragmenting the United Kingdom and weakening the sovereignty of this Parliament is, and must be, a central part of that agenda. Why else would the Government radically change a constitutional structure in the United Kingdom which, by and large, works well?

I warn the House that the Bill moves us significantly closer to the Europe of regions and away from the Europe of nations. In so doing, it is inimical not only to Conservative Members but to the vast majority of people in Wales and the rest of the United Kingdom.

⁷⁸ *Scotsman* 1.12.97 "Exclusive: England's regions will get home rule; Labour promises assemblies in next Parliament"

⁷⁹ S.75 reads "The supreme authority of the Parliament of the United Kingdom shall remain unaffected and undiminished over all persons, matters and things"

⁸⁰ HC Deb vol 302 8.12.97 c697

⁸¹ HC Deb vol 302 c689

Lord Cranborne, Opposition Leader in the Lords, has also argued that once a Scottish Parliament is created it would be bound to challenge Westminster, and ally itself with those who support a Europe of the regions⁸² Lord Alexander has noted that devolution cannot be experimented with (p.115):

The responsibility on those shaping and promoting devolution is the heavier because we have very little room for experiment. It is difficult to try out devolution on a small scale. Nor is it easy to do so in a way which allows the parties to return to previous arrangements if the new system does not work out well. There is no equivalent to cohabitation before marriage to see if a relationship is likely to be successful. Or, to put it another way, there is no question of a 'trial separation'. Many of those who have in the past opposed devolution for Scotland would say with Lord Younger, the former secretary of state, that if at least it is to be done, it should be made workable.

Lord Alexander⁸³ has also argued that the revitalisation of local government would be preferable to devolution, as a regional assembly might add another tier of government and further bureaucracy.

B. Selection of candidates

The major political parties are preparing for the selection of candidates for the first election to the Scottish Parliament. The Conservative party's Strathclyde commission consultation paper *Made in Scotland: the way forward for the Scottish Conservatives and Unionists*⁸⁴ endorsed the recommendations of the Scottish Conservative Candidate Board about candidate selection:

The system of selection of candidates for the Scottish Parliament has been under active consideration by the SCCB. The Commission endorses the recommendations of the SCCB that the system should operate as follows:-

Approved Panel of Candidates

The fundamental criterion for comparability to the List is that the applicant has first been approved by the SCCB for inclusion on the Approved Panel of Candidates.

First Past The Post

Only those who have been successful in securing the candidacy within one of the 73 constituencies should be entitled to apply for inclusion on the list applicable to the Euro Constituency in which the candidate's constituency is located. The White Paper refers to Euro constituencies as the grouping of Parliamentary constituencies on which the regional List will be based. Accordingly, the term "Euro Constituency" is used in this paper.

⁸² *The Chain of Authority* 1997 Politeia Address Seriesp 11

⁸³ Chapter 6 Devolution in *The Voice of the People: a constitution for tomorrow* (1997)

⁸⁴ 13.12.97 The Commission was set up by the Scottish Party Conference at Perth in 1997

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Joint Consultative Committee

Having established the pool of candidates, a joint Consultative Committee should be established to operate on an individual Euro Constituency basis to identify the running order of the appropriate List within the appropriate Euro Constituency and it should be constituted as follows:-

It should have as its Chairman someone whose credentials within the Party are beyond question. The Chairman will be appointed by the Executive. No member should be on the Approved Panel of Candidates for the Scottish Parliament; the core membership should be its Chairman the Convenor, the Chairman of the Scottish Party and the Chairman of the SCCB; and the Head of Campaigns and Operations at Central Office should act as an adviser; it should be constituted on eight separate occasions to coincide with the existing eight Euro Constituencies and should consider the running order of the candidates selected for each Constituency within the appropriate Euro Constituency.

In each instance, the "core" should be expanded by including the chairman of each Constituency Association located in the relevant Euro Constituency and the Chairmen of the Forums in that Euro constituency, where a Constituency Association Chairman is not eligible or declines to serve, the most senior available Officer within that Constituency Association should act as a Deputy; and for the avoidance of doubt, the Constituency Associations of Orkney and Shetland should be regarded separately with each having a vote.

The attractions identified by the SCCB are:-

the Chairman of the appropriate Constituency Associations and Forums (i.e. those who represent the membership on a representative basis) will have a majority over the "core" membership, the intention being to avoid any accusation of "control" by the centre; and despite not having a majority, the "core" members are able to represent and articulate the wider interests of the Party.

In the event of substantial changes to the presumed electoral system in the Scotland Bill the question of candidate selection will be revisited.

The Strathclyde Commission also recommended that the Leader of the MSPs should be elected by an electoral college of MSPs and the party membership. It proposed that the electoral college be balanced 70 per cent MSPs and 30 per cent party members. Nominations would be made by the MSPs at the start of a parliamentary term, or whenever there is a vacancy(p10). Press reports indicated that potential candidates with no link with Scotland would be discouraged from applying to stand.⁸⁵

A survey by the *Scotsman*⁸⁶ indicated that only 12 MPs (including the 6 SNP MPs) had definitely decided to stand for the Scottish Parliament. There have been press speculation about the possibility of senior Labour figures becoming the First Secretary, if elected.

The Liberal Democrats have set up a panel to vet potential candidates, who must be members of the Scottish Liberal Democrats, and a list of approved candidates is being created. Approved candidates will be able to apply for both constituency and region seats, but it is likely that constituency candidates will be selected first, constituency by constituency. It seems likely that

⁸⁵ *Scotland on Sunday* 14.12.97 "Tories ban English rookies from MSP candidate list"

⁸⁶ *Scotsman* 27.12.97 "Hypocrisy claims on parliament rejected"

the Liberal Democrats will allow dual mandates for local councillors so that they could also be a member of the Scottish Parliament.⁸⁷

The SNP have not finalised their procedures for selecting candidates. Potential candidates are being interviewed for an approved list, and it is expected that constituency candidates will be selected in the normal way. Final decisions about how the list candidates will be ordered have yet to be taken. The SNP have said that they have been overwhelmed by applications to stand as a candidate. It has not yet decided whether to permit candidates to stand also for Westminster, or for local councils. Mr Salmond has reportedly promised Michael Russell, chief executive of the SNP, a leading position on a regional list.⁸⁸

There are press reports that the national Labour party leadership would like to establish a role in the selection of candidates, through the panel which will vet candidates. The panel is likely to contain one third of its members from the UK executive, one third from the Scottish executive and one third from the party's 'great and the good' according to the *Scotsman*.⁸⁹ The procedure is to be decided at a meeting of the Scottish executive on 17 January. Final decisions on candidates to be selected are due by the summer of 1998. Labour is expected to ban dual mandates for its local councillors and also for MPs following a first term. Unison have issued a pamphlet⁹⁰ calling for the Scottish Labour Party Executive Committee to have responsibility for overseeing the selection of candidates. It also argued that the Leader of the Scottish Labour Party⁹¹ should be elected by an electoral college.

According to The *Scotsman*⁹² the Scottish Executive is examining whether a plan to pair constituencies to ensure equal representation of men and women would contravene sex discrimination legislation. The Equal Opportunity Commission is to seek views about the possibility of allowing positive discrimination for political parties.

There have also been indications that senior Scottish business people may create their own party to represent business interests in the Parliament.⁹³ The *Scotsman*⁹⁴ has called for individuals to be elected who have achieved something outside of politics.

⁸⁷ *Scotsman* 27.12.97 "SNP claims Rush of would-be candidates"

⁸⁸ *Scotsman* 31.12.97 "Salmond boosts top aides' election chances"

⁸⁹ *Scotsman* 12.12.97 "London keeps key role over Scots parliament elections"

⁹⁰ *Towards a devolved Scottish Labour Party* December 1997

⁹¹ who would become the First Minister if Labour formed a majority in the Scottish Parliament

⁹² *Scotsman* 29.12.97 "Labour calls in lawyers to boost women candidates"

⁹³ *Scotsman* 27.11.97 "New business party may fight Scots elections"

⁹⁴ *Scotsman* 23.12.97 "A new breed of Parliamentarian"

V. *The Scotland Bill*

The Bill was published on 18 December and at a press conference in Glasgow Donald Dewar said:⁹⁵

"My greatest satisfaction today comes from the successful and faithful translation of the White Paper proposals into a Bill. This is another example of the Government's trademark. We promised the Scottish people a White Paper and a referendum. We have kept that promise. The people have asked us to deliver a Scottish Parliament - that is exactly what we will do. And that's a promise."

Mr Dewar also said that the Bill was a genuinely historic document which was a more radical piece of legislation than anyone might have imagined a year ago, and stressed the similarity of the Bill to the White Paper proposals. He commented;

"When the Bill goes to the Lords it will have both the backing of the clear manifesto commitments and the decisive referendum outcome as well as the endorsement of the House of Commons. This should make it difficult for Peers to argue against the Bill in principle, and difficulties in the Upper House will not impress the people of Scotland."

In response Michael Ancram, for the Opposition said⁹⁶

During the referendum campaign, Donald Dewar claimed that he would 'greatly welcome both proper scrutiny and constructive criticism in the parliamentary stage'. We shall hold him to that promise. We shall also demand that it is the whole House which has the ability to examine and debate the key details of the Bill.

It is imperative that Unionists of all parties and of none strive to ensure that this legislation is water-tight, that all its consequences have properly been thought through and that potential tensions and disputes have been mitigated to the maximum possible extent. If these criteria are not met, then we shall be playing straight into the hands of those who seek the destruction of the United Kingdom. Constitutional changes are not to be measured against the best case scenario. They must be tested against the worst case scenario, so that people can be reassured that what is being built has sure foundations and can survive the strain.

Mr Ancram also said that the Conservatives accepted that there would be a devolved Scottish Parliament with limited income tax-varying powers, as the clear wish of the Scottish people. However he highlighted that the consequential constitutional implications for the rest of the UK remained unaddressed, which left untouched would threaten its stability. He also expressed concerns that Scotland's role in Europe might be diminished since Scottish Ministers would no longer be able to attend the Council of Ministers by right.

⁹⁵ Scottish Office Press Notice 18.12.97 "Donald Dewar unveils 'Pathway to a Parliament'"

⁹⁶ Conservative Party Press Notice 18.12.97 "Michael Ancram explains the faults in the Scotland Bill"

The SNP welcomed the Bill;⁹⁷ Alex Salmond said that the Bill was "part of a process not an event in itself. This is an historic day, but it is part of a process that will lead to Independence in Europe." It called for further powers to be devolved, including broadcasting and for the Bill to guarantee Scotland a statutory presence in Europe and the party intends to table amendments in these areas.

The Scottish Liberal Democrats also welcomed the Bill⁹⁸, and Donald Gorrie commented "The Scottish Parliament will mean better better government first for Scotland, and then for the rest of the UK. This is the first step on a road which leads to a federal United Kingdom." The party also called for the inclusion of a clause exempting political parties from sex discrimination legislation so that at least 40 per cent of the Parliament would be female.

Professor Vernon Bogdanor has pointed out that "Northern Ireland had sought devolution to preserve the union with Britain; the motivation was centripetal, whereas in Scotland it is centrifugal... Scotland will come to resemble a province in a federal state and Westminster will be able to exercise its supremacy only under pathological political circumstances." He expected that Scotland would almost always have coalition government under PR and that devolution could not be confined to Scotland and Wales.⁹⁹

Graham Leicester has also noted that the pressures for uniformity in policy making in the United Kingdom will constrain the Scottish Parliament: " We cannot ignore money, Europe or party politics. These three factors have been accepted as given in the UK policy debate up to now. These are forces which bind the Union together and which have helped to provide an accepted framework."¹⁰⁰ He considered that financial constraints and membership of the EU would be major factors in reducing the autonomy of the Scottish Parliament. He also queried the extent to which the major political parties would diverge from UK policies in their manifestos for the Scottish Parliament. Elections.

The Bill in detail

A. Form of the Bill and Commons Proceedings

The *Scotland Bill* is large,¹⁰¹ comprising 116 clauses and 8 schedules over 88 pages (though it is not as large as the current *Government of Wales Bill* which has 149 clauses and 14 schedules

⁹⁷ SNP News Release 18.12.97 "SNP reaction to devolution bill -part of a process not an event"

⁹⁸ Scottish Liberal Democrats Press Release 18.12.97 "Lib Dems welcome Scotland Bill"

⁹⁹ *Times* 22.12.97 "The more we are together"

¹⁰⁰ *Renewal* forthcoming "Scotland how to be different". The article was summarised in the *Herald* 30.12.97 "London will 'hamstring Home Rule parliament"

¹⁰¹ According to the Scottish Office press release, it is 40,000 words in length and took more than 60,000 person hours to complete: SO PN, 18.12.97. There had been earlier speculation that the Government may have produced 'framework' devolution bills, that is relatively brief primary legislation with significant order-making provisions to 'flesh out' the detail of the schemes in Scotland and Wales, perhaps by way of new forms of legislative procedure akin, say, to 'deregulation order' procedure.

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over 129 pages¹⁰²) and, with the current bill on Welsh devolution, is one of the central planks of the government's legislative programme for this session. The size and significance of the Bill mean that the manner of its proposed Parliamentary proceedings will be of significance to its prospects of successful enactment.

The Bill is due to have its Commons second reading debate over two days, on 12 and 13 January. The second reading debate on the *Government of Wales Bill*¹⁰³ was also taken over two days, on 8 and 9 December. This compares with the single day given to the second reading of the *Wales Bill* in December 1977 (and the *Scotland Bill* the previous day) although the second reading of the preceding session's *Scotland and Wales Bill* lasted 4 days in December 1976.¹⁰⁴

As a Bill which is presumably to be regarded as one of 'first class constitutional importance', the committee stage would, if existing practice were followed, be taken entirely on the floor of the House rather than wholly or partly in standing committee 'upstairs'. The theory and practice of this 'convention' is considered in more detail in Research Paper 97/53, *The Commons committee stage of 'constitutional' bills*, 20.5.97. There was speculation before, during and since the general election that the Government may seek to minimise potential difficulties in both Houses by not following such 'conventions' in order to enact its significant programme of constitutional legislation in this Parliament.¹⁰⁵ It was even thought by some that its 'modernisation' programme, to be set in train at the outset of this Parliament, was designed in part to institute new procedures or practices which would smooth the passage of likely contentious legislation.¹⁰⁶

The Modernisation Committee, which reported on 29 July (two days before the summer recess), did indeed examine the committee stage of 'constitutional' bills, and decided to propose no immediate action on this matter, but said that it would return to it in due course.¹⁰⁷ It emphasised that there was no agreed definition of a 'bill of first class constitutional importance', and that technically such bills were no different from any other bill. The Committee did accept that there were "two firmly held and contrary views" on the treatment of such bills, either that the Floor of the House committee stage practice should continue, so that all Members could have the opportunity of participating in consideration of proposals which could affect the powers of Parliament itself (para 78), or that, while matters of constitutional principle could be determined in this way, "detailed and technical issues" would be better dealt with in a committee-type forum (para 79).

¹⁰² That Bill contains, as part of the devolution scheme for Wales, significant provisions on public bodies in Wales

¹⁰³ It was originally due to have a single day (on Monday 8 December), but this was extended in the business statement of 4 December.

¹⁰⁴ For further detail on the Parliamentary proceedings on these Bills, see chapter VI of Research Paper 97/97, *Time spent on Government Bills of constitutional significance since 1945*, 1.8.97

¹⁰⁵ See further on the Parliamentary passage of constitutional legislation in Research Paper 97/97.

¹⁰⁶ On Commons modernisation, see Research Paper 97/107.

¹⁰⁷ *The legislative process*, First report of the select committee on the modernisation of the House, HC 190 of 1997-98, July 1997

The report concluded that "whilst we see no reason why a programme for the passage of such a bill could not be agreed, if agreement were impossible, the Government of the day would presumably feel obliged to fall back upon a traditional timetable motion" (para 80). It would appear, in effect, that the Government and Opposition agreed to differ on this matter, but not allow it to breach the consensus on the Committee on the rest of its proposals, as consensus is generally seen to be valuable (if not essential) to successful change in Parliamentary procedure and practice.

When the House debated the Committee's report in November¹⁰⁸, the Leader of the House, Ann Taylor, emphasised how existing procedures already contain scope for flexible approaches to the legislative process,¹⁰⁹ and did not refer expressly to the committee stage of 'constitutional' bills. However the Shadow Leader of the House, Gillian Shephard, made it clear in her speech that the Opposition would "strongly resist any suggestion that there should be any change" to exist practice (c1071):

Our view to that effect is recorded in the Committee's report. We reject suggestions from some that there might somehow be problems with definition or with ordering such business or that the House is incapable of scrutinising such Bills adequately and in detail ... We on the Opposition Benches accept the report, while putting down a marker about our reservations on the treatment of constitutional Bills.

During Business Questions on 27 November, Opposition Members pursued this matter with the Leader of the House:¹¹⁰

Mr. Bernard Jenkin: Will the Leader of the House stand by the assurance given by the Secretary of State for Wales in a press release issued this morning on the publication of the Government of Wales Bill: *During the Bill's parliamentary progress, it is, of course, open to any hon. Member to put forward changes to the Bill and to have these explored in detail through open debate.*"?

Mrs. Taylor: I am sure that the Bill will get the full attention of all hon. Members, which it deserves. As I said, we are discussing through the usual channels and with other hon. Members the detailed handling of the Bill.

And (c1127)

Mr. Laurence Robertson: Can the Leader of the House be a little more specific about the Committee stage of the Government of Wales Bill, following the point raised by my hon. Friend the Member for North Essex (Mr. Jenkin) and also the hon. Member for Merthyr Tydfil and Rhymney (Mr. Rowlands), who sits on the Government Benches? Will she take into account the fact that, although hon. Members from Wales have a great deal to contribute to such a Bill, so do hon. Members on both sides of the House?

¹⁰⁸ HC Deb vol 300 cc1061-1129, 13.11.97. The report was agreed to without a division.

¹⁰⁹ In particular, in the present context, *S.O. no. 63(3)* permits the splitting of the committee stage between the floor of the House and standing committee, a technique used notably for Finance Bills. See chap IV of Research Paper 97/53.

¹¹⁰ HC Deb vol 301 c1125, 27.11.97

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Mrs. Taylor: I am sure that hon. Members from Wales have a great deal to say, although none of them will be representatives of the Conservative party, because it has no Members for Wales. I have been as fair as possible. The usual channels are discussing the handling of the Bills, and my colleagues and I in the usual channels are happy to receive any representations from any quarter of the House.

Ted Rowlands also asked for consultation over any proposed splitting of the committee stage of the *Government of Wales Bill* between the chamber and standing committee. The Leader of the House acknowledged that there were strong views within the House on these matters: "There is no simple party divide as to how we should handle legislation of this kind...Discussions have begun through the usual channels about the handling of the Government of Wales Bill - and later of the Scotland Bill. We want to try to agree a way forward with all parties in the House...When we have had further discussions, I hope to be in a position to make a more definitive statement about how the Bills will be dealt with"(c1120). See also Welsh questions on 3 December 1997 (c.341-2).

During the press conference launching the *Government of Wales Bill* on 27 November the Welsh Secretary, Ron Davies, did not state definitively how its committee stage would be handled, but he did suggest that, while the key provisions of the Bill would be taken on the floor of the House, it would not be the best use of Parliamentary time for all matters of minute detail to be taken there. He stressed that such matters would depend on the attitude of the Conservative Opposition to the handling of the Bill.

In a speech to the Wales Conservative Council on 29 November, Michael Ancram returned to the committee stage issue:¹¹¹

The Government has refused to address the flaws in its proposals. It is therefore up to the Conservative Party to look after the interests of the UK as whole, and Wales in particular, and make devolution work as best it can. To that end, we shall put down constructive amendments to the Bill in an attempt to remedy its worst failings.

This is why it is vital that the Government follows long-established precedent and allows the Committee Stage of the Bill to be held on the floor of the House of Commons. It should be open to any MP to put forward changes to the Bill and to have these explored in detail through open debate."

Ron Davies has said that he wants the bulk of the Bill to be dealt with in a committee room, away from the floor of the House of Commons. He said that most Members of Parliament will have no interest in the minutiae of the Bill. I have to say that he is wrong. With this Bill, the devil is in the detail - and that detail has implications for both Wales and the United Kingdom as a whole.

¹¹¹ "An unsettled Bill for an unsettled nation", Conservative Party PN 1558/97, 29.11.97

The Conservative Party is going to take a constructive approach to the legislation and table amendments to meet the severe flaws of the Bill as currently drafted. We must not be prevented from looking after the interests of the Welsh people simply to avoid Ron Davies the embarrassment of well-founded criticism from his own backbenchers. The Committee Stage of the Bill must be taken on the Floor of the House.

The devolution bills in the 1970s all had their committee stages on the floor of the House. The *Scotland and Wales Bill 1976-77* had 10 days before the unsuccessful guillotine motion of 22 February 1977, and one day thereafter (a total of 95 hrs 47 mins), but made no further progress. Both the *Scotland Bill* and the *Wales Bill* in 1977-78 were guillotined before their committee stages on the Floor;¹¹² the former having 14 days in Committee of the Whole House (101 hrs 10 min), and the latter 9 days (64 hrs 26 mins). The *Scotland Bill* had 2 days on report and one on third reading (a total of almost 22 hours consideration in the Chamber), and the House spent one day on each of the *Wales Bill's* report stage and third reading (just over 14 hours).

During the second reading debate on the *Government of Wales Bill* on 8-9 December, Ministers were pressed about their proposed handling of its Parliamentary passage, and, for example, the Welsh Secretary said, in response to an intervention from Mr Ancram:¹¹³

Mr. Davies: It is for the House to decide its own procedures. The question of precedent is not one at which I baulk. A precedent is merely something that we do for the first time. As far as I am concerned, this is the first time that a Government of Wales Bill has been introduced by the Government. If it means that we must change our procedures to get the proposed legislation through the House, that suits me.

I think that it would be convenient for the House if we were to have a reasoned debate. I am prepared to discuss with the right hon. Gentleman over the coming months how we should handle the Bill. It seems reasonable to have debates on the key clauses on the Floor of the House, with detailed debate in Standing Committee, so that right hon. and hon. Members who wish to explore the detail of the Bill can do so. With so few Conservative Members in the Chamber, however, there is scarcely any evidence of overwhelming demand on the part of the Conservative party to engage in a lengthy debate on these matters.

We have two days to discuss Second Reading. There will be plenty of time to debate the Bill both on the Floor and in Committee. I hope that the right hon. Member for Devizes will wake up to reality. The Bill is going to proceed. It is in the interests of the Opposition, of the Conservative party and of the Conservative party in Wales that he co-operates to ensure that the Bill is properly scrutinised.

Mr. Donald Anderson (Swansea, East): Is not the reality that it might have been possible to have had all proceedings on the Floor if the Conservatives had not made minor, silly points to seek to drag out the discussions, but come forward with a reasonable timetable? Their response so far has shown that they are not ready to accept the result of the referendum.

Mr. Davies: My hon. Friend is right to make that point. It was clear from day one of the debate on the Referendums (Scotland and Wales) Bill that the Conservative party was determined to delay and frustrate, and to use every tactic to wreck it. That measure sought

¹¹² As was the *Referendums (Scotland and Wales) Bill* this session

¹¹³ HC Deb vol 302 cc673-4, 8.12.97. Nigel Evans made similar points in his speech from the Opposition front bench at the start of the second day's debate, *op cit*, c823, 9.12.97

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only to ask the people of Wales what they thought about the proposition. The attachment of the Conservatives to democracy was so passing that they did not even want that measure to pass.

Mr. Ancram: Is the right hon. Gentleman inviting the Conservative party to put forward a timetable for having all proceedings in Committee on the Floor?

Mr. Davies: No, I am not. The right hon. Gentleman knows that that is not what my hon. Friend the Member for Swansea, East (Mr. Anderson) was saying. I have made it clear that I want the Bill to receive proper consideration. I want the important clauses to be taken on the Floor and an opportunity for detailed examination in Standing Committee. It is no good the right hon. Member for Devizes pouting and shaking his head. I am making it clear that that is what I want to do. If he doubts my good intentions, I suggest that he uses the time-honoured process of going through the usual channels. He will see then that I am sincere about wanting a reasonable debate on the Floor and in Standing Committee. I hope that he will come out of his shell, join the latter part of the 20th century and help us to prepare for the new democracy that we are about to create in Wales. I know that that is an unlikely prospect, but subject to that, the Government will table a motion at the end of Second Reading to achieve it.

In his speech, Mr Ancram said that the Opposition would not seek to filibuster or unnecessarily to table amendments to the Welsh Bill, and continued (cc 690-2):

I am appalled at the proposal that the Bill not be taken in its entirety on the Floor of the House. I believe that it is a Bill of first-class constitutional importance. It would be an insult to all that the Government have promised to the supporters of devolution in Wales if it were not taken in its entirety on the Floor of the House. It should not in any respect go to a Standing Committee.

In the words of that great socialist, Herbert Morrison, speaking in the Procedure Committee on 18 September 1945,

"you cannot play about with the British Constitution in a Committee upstairs, to put it colloquially."

If I may put it equally colloquially, it is not good enough to claim that a two-day Second Reading debate allows all hon. Members to have their say on the detail of the legislation. Apart from its being in questionable order for them to do so during a debate on the principle, it is impractical and unreal. The devil is in the detail of the Bill, and that detail has implications for Wales and the United Kingdom.

Mr. Ron Davies rose --

Mr. Ancram: As the Secretary of State is about to intervene, I want to ask him a question. How do the proposals square with his press release of 27 November, the day of the Bill's publication, which stated that during its parliamentary progress

"it is, of course, also open to any MP to put forward changes to the Bill, and to have these explored in detail through open debate"?

Perhaps he can explain how that can possibly happen in a Committee upstairs -- or were those words simply for effect?

Mr. Davies: No. Any hon. Member may speak on Second Reading. Any hon. Member may table amendments or new clauses on Report, if there is a Report stage. Third Reading provides a further opportunity. Any hon. Member who wishes to do so may speak on Second Reading and attempt to get a place on the Standing Committee. That includes Conservative

Members, but I suspect that not many of them are dying to serve on the Standing Committee. That is my answer to the question.

I have a question for the right hon. Gentleman. I do not necessarily want to negotiate on this matter across the Floor of the House, but as he has now acknowledged that the Government have the right to get this legislation, and has accepted the fact that it is his role to act constructively in seeking to improve the legislation where appropriate, will he give an undertaking that, if the Government were not minded to have the Bill considered in Committee upstairs, he would agree with the Government, through the usual channels, to have an agreed timetable to take the matter entirely on the Floor of the House?

Mr. Ancram: Obviously, I would want to see the proposed timetable.

Mr. Donald Anderson rose --

Mr. Ancram: If the hon. Gentleman can contain himself, I am answering the question. The right hon. Gentleman has made me an offer and I should have thought that it was more consistent with his statement that it was open to any hon. Member "to put forward changes to the Bill" to discuss it on the Floor of the House. If enough time were given to allow any hon. Member who wanted to propose a change to have it dealt with on the Floor of the House, I should wish to consider that. I shall not negotiate with the right hon. Gentleman at the Dispatch Box -- he would not expect me to -- but I am saying that he is in serious danger of creating a dangerous precedent, which he and others might well come to regret.

Many countries require substantially weighted majorities to amend their constitution in referendums or in their legislature. For better or worse, we have relied on the scrutiny of the whole House of Commons to create a sufficient safeguard where constitutional reform is at issue. That scrutiny is to be jettisoned and the bulk of this comprehensive, if confused, piece of legislation will be relegated to a Committee upstairs instead.

It cannot be for fear of time wasting -- I have dealt with that -- or for reasons of urgency, given the lackadaisical timetable which, despite 18 years in the preparation, has brought us the Bill some seven months after the election and nearly three months after the referendum. Indeed, there are still amendments to come. Surely there cannot be anything more serious than the fundamental reform of the constitution of Wales and the United Kingdom, requiring priority time on the Floor of the House. [Interruption.] I heard what the Secretary of State said, but if he does not change his mind I shall take it as an example of the arrogant contempt with which the Government in general, and the right hon. Gentleman in particular, treat the House of Commons.

Mr. Ron Davies: Is the right hon. Gentleman accusing me of it?

Mr. Ancram: Yes, I do accuse him of it. It lies four square with his patronising approach to those in the Labour party who have genuine worries about the detail of the proposals, and it tallies with his dismissive refusal to have any truck with the genuine concerns of the people of Wales about the Bill. It is a dangerous undermining of our constitutional procedures and it cannot be justified by protestations of administrative convenience or modernised procedures. It may well make the Secretary of State's job easier, but all the procedures of the House should not be for the convenience of Government but for the good of our country and our constitution.

The Bill requires the fullest and most careful scrutiny. It is not a measure for today, which can be changed tomorrow if it does not work. Constitutional reform is not like that, and nor should it be. It is for the long term, and there is an imperative for the House to try to get it right. That description is not applicable to the Bill.

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After the Bill obtained a second reading (by 374-143, a majority of 231¹¹⁴), the Government moved that the committee stage of the Bill be split, with 6 clauses¹¹⁵ to be taken on the floor of the House, and the remainder in standing committee:¹¹⁶

Mr. Win Griffiths: ...From the outset, it was the Government's proposition that consideration of the Bill would be split between a Committee of the whole House and Standing Committee. My right hon. Friend the Secretary of State made it clear yesterday that we intended that the clauses which raised key points of principle would be debated by a Committee of the whole House. That remains our position. [Interruption.]

We appreciate that a great number of technical matters were raised in yesterday's and today's debates. We believe that it is more appropriate that those matters are dealt with upstairs in Committee, where detailed scrutiny can be carried out. [Interruption.] Report and Third Reading will of course be taken on the Floor of the House.

None the less, the Government recognise the concerns raised by the official Opposition, and the motion responds to that. I regret, however, that it was not possible to reach agreement through the usual channels on a reasonable timetable to consider the Bill in its entirety on the Floor of the House -- [Interruption.]The motion will allow key clauses to be debated in a Committee of the whole House. Those will be clause 1, on the assembly itself, which the Opposition specifically requested to be taken on the Floor of the House; clause 4, on the membership of and election to the assembly; clause 22, on the functions to be exercised by the assembly; clause 58, which deals with internal working procedures of the assembly; clause 80, on the assembly's financial arrangements; and clause 118, on the reform of the Welsh Development Agency.

We believe that, in selecting those clauses, we have taken account of views expressed during debates on matters of import by Members on both sides of the House. We have heard much about such matters already. We hope that the proposed motion will allow the House full and proper opportunity to subject the Bill to detailed scrutiny on the Floor of the House, in Committee, and back on the Floor of the House.

Mr. Michael Ancram (Devizes): This motion is quite simply a disgrace. I am not surprised that the monkey rather than the organ grinder has moved it. I remind the House that, yesterday, the Secretary of State asked me whether I would

"give an undertaking that, if the Government were not minded to have the Bill considered in Committee upstairs, he would agree with the Government, through the usual channels, to have an agreed timetable to take the matter entirely on the Floor of the House". -- [Official Report, 8 December 1997; Vol. 302, c. 691.]

Today, I put forward a proposal for seven days in Committee on the Floor of the House and two days on Report -- compared with 17 days in total on the equivalent Bill in 1978. That suggestion has just been brushed aside. The right hon. Gentleman never meant those weasel words yesterday, and that is why he has got his hon. Friend the Under-Secretary to move the motion.

The Government of Wales Bill is the first constitutional Bill ever to be divided in such a way. Such division is a very serious breach of constitutional convention. It casts aside the main

¹¹⁴ *Op cit*, c896. An Opposition amendment declining a second reading was defeated by 375-144, a majority also of 231), c893

¹¹⁵ Clauses 1 (creation of the Assembly), 4 (Assembly voting system), 22 (transfer of functions), 58 (executive committee), 80 (finance) and 118 (WDA).

¹¹⁶ *Op cit*, cc 900-902, extracts. It was approved by 359-159, a majority of 200, c903

check that we have in this Parliament on constitutional legislation. Where other legislatures have weighted votes or referendums with thresholds, in this House we have always taken such Bills in Committee on the Floor of the House so that they could be properly scrutinised.

We are told that the only reason for moving the Bill Upstairs is administrative convenience. We should not use the procedures of the House for the administrative convenience of the Government, because the procedures of the House are here for the Members of the House.

The motion is also in breach of what the Secretary of State for Wales said in the press conference when he launched the Bill. He said:

"it is, of course, also open to any MP to put forward changes to the Bill, and to have these explored in detail through open debate".

How will that occur if the Bill is considered in Committee Upstairs?

.... The motion is a contempt of Parliament, because it covers only six clauses out of 149 clauses and 14 schedules. Enormous areas of the Bill will not be considered on the Floor of the House, although they are of significant interest to all hon. Members.

The nuts and bolts of how the proportional representation list system will work will not be considered on the Floor of the House, because clauses 5, 6 and 7 will not be considered on the Floor of the House. The right of the members of the assembly to set their salaries -- a matter of considerable interest to Hon. Members -- will not be considered on the Floor of the House.

Provisions relating to cross-border regulations, which will affect England, will not be considered on the Floor of the House. The provision to allow the assembly to apply European law in a different way to that in which it is applied in the rest of the United Kingdom will not be considered on the Floor of the House. Most extraordinary of all, the schedules contain provisions that will affect England, Scotland and Northern Ireland, and they also will not be considered on the Floor of the House.

The motion may appear innocuous, and our time for debate is short, but the impact on how the House undertakes constitutional reform is enormous. We well know the contempt that the Secretary of State of Wales and the Government have for the House, and the motion is another example.

.... I seriously ask all hon. Members who value the procedures of the House as the means of checking the executive and safeguarding our constitution to realise that tonight they are being asked to breach a convention that has served the House and our constitution well. We shall oppose the motion. It is an act of constitutional vandalism, and I ask all those who cherish our rights in the House to join me in dividing the House on the motion.

Mr Ancram repeated his central point when commenting on the publication of the *Scotland Bill* on 18 December: "During the referendum campaign, Donald Dewar claimed that he would 'greatly welcome both proper scrutiny and constructive criticism in the parliamentary stage'. We shall hold him to that promise. We shall also demand that it is the whole House which has the ability to examine and debate the key details of the Bill."¹¹⁷

The parties have apparently agreed to take the whole of the committee stage on the floor of the House, and that the Bill will be 'programmed', so that the duration of its Commons stages will be arranged in advance, with around 8 days in Committee of the Whole House:¹¹⁸

¹¹⁷ Conservative Party PN 1664/97, 18.12.97

¹¹⁸ "Scotland Bill set for debate on floor of House of Commons," Scottish Office PN, 19.12.97

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Following discussions between the Government and opposition parties, agreement has been reached on a programme for the committee and remaining stages of the Scotland Bill. They will be debated on the Floor of the House of Commons.

The Rt Hon Donald Dewar MP, Secretary of State for Scotland today welcomed this cross-party agreement on the scrutiny of the Scotland Bill. He said:

"This agreement takes forward the new inclusive approach which was pioneered during the Referendum campaign and we are determined to continue it through the work on the procedures of the Scottish Parliament.

The Scotland Bill itself is a major and far-reaching piece of legislation. It will establish the framework for the Government of Scotland for decades ahead. I want it to be scrutinised thoroughly and constructively in Parliament over the coming months. But I want the debate to be conducted in a spirit of co-operation which recognises that the establishment of a Scottish Parliament is now the settled will of the Scottish people.

"I am delighted therefore that the other parties have agreed that the committee stage of the Bill should be taken on the Floor of the House. This is entirely appropriate for a Bill of this nature. The cross-party agreement on a programme will ensure that it is scrutinised in an enlightened way. Most importantly this agreement is good for the people of Scotland. It will ensure that the legislation reaches the statute book in the best possible shape."

The Conservatives were quoted as being pleased at this development and hoped that the Government would pay attention to any reasoned amendments they put down.¹¹⁹ The House agreed on 22 December on up to 45 minutes being given, at any hour though opposed, to "a Motion relating to Scotland Bill (Programme) in the names of Mr Secretary Dewar, Mrs Ann Taylor, Mrs Gillian Shephard, Mr Paul Tyler and Mrs Margaret Ewing."

The Opposition have tabled a reasoned amendment to the Bill's second reading which acknowledges the decision of the Scottish people in the referendum, but believes that the Bill "is not an acceptable measure because it fails to create a constitutional settlement which is stable and enduring within the United Kingdom; because it undermines Scotland's role both in Europe and within the Government and Parliament of the United Kingdom; and because its lack of clarity on taxes and resources threatens the interests of Scottish business, Scottish people and Scottish jobs."

In the Lords the 1970s *Scotland Bill* had 2 days on second reading, 13 days in Committee, 5 days on report and a day (nearly 3 1/2 hours) on third reading. The *Wales Bill* had one day on second reading, 6 days in Committee, 2 days on report and a day (over 2 1/2 hours) on third. Further time was spent in both Houses considering Lords Amendments and the Commons responses to them. In total 24 days in the Commons and 23 days in the Lords were spent on the *Scotland Bill*, and 17 days in the Commons and 12 days in the Lords on the *Wales Bill*. Both the *Scotland Bill* and *Wales Bill* took 270 days from initial introduction to Royal Assent.¹²⁰

¹¹⁹ "Dewar deal on Scotland Bill will cut debate", *Scotsman*, 20.12.97

¹²⁰ On the Parliamentary passage of the 1970s legislation see Research Papers 97/60, *Wales and devolution*, 97/92, *Scotland and devolution*, and 97/97.

On publication of the current *Scotland Bill*, the Scottish Secretary, Donald Dewar, said:¹²¹

The Bill faces months of detailed scrutiny both inside and outside Parliament. The Bill has been introduced in the Commons. The Second Reading is planned for early January. I expect other parties to cooperate in securing its passage - it is after all the settled will of the Scottish people. When the Bill goes to the Lords it will have both the backing of the clear manifesto commitments and the decisive referendum outcome as well as the endorsement of the House of Commons. This should make it difficult for Peers to argue against the Bill in principle, and difficulties in the Upper House will not impress the people of Scotland

If there is indeed to be a committee stage entirely on the floor of the House, by agreement of all the main parties, then this may well influence the attitude of the Lords, especially on the Opposition benches, to the Bill, as any 'implied threats' about their approach to scrutiny of the Bill, which have been perceived by ministers and other commentators, have tended to be on the basis that the Commons may not have given the Bill 'full' consideration (ie by taking some or all of its committee stage upstairs or by curtailing debate through an opposed guillotine).

The 'notes to editors' in the Scottish office press notice described the 'next steps':

The Scotland Bill is expected to receive Royal Assent during the second half of 1998 in time for elections to the Scottish Parliament in the first half of 1999. A precise timetable for the commencement of the clauses in the Bill, and in particular the assumption by the Parliament and Executive of all their powers, will come later in the secondary legislation.

B. The Electoral System

This is set out in Part I of the Bill. The provisions are unchanged from the White Paper proposals for an **Additional Member System** with 73 Members for individual constituencies - 1 for each Scottish constituency and one each for Orkney and Shetland - with 56 additional Members - 7 from each of the eight new European constituencies set out in the *European Parliamentary Constituencies (Scotland) Order 1996*.¹²² (**Clause 1**) The European constituencies will no longer exist if the *European Parliamentary Elections Bill* is passed¹²³ and so these areas will be known as regions (in Wales electoral regions), but will retain the same boundaries for the present.

Clause 2 provides for elections to take place every four years, unless the Presiding Officer proposes an earlier or later dissolution within one month of the four years. The first election is expected to be in 1999 but Clause 2(1) enables the Secretary of State appoint the day by day, and it may or may not coincide with local government elections on the first Thursday in May. Donald Dewar has announced that 6 May is the intended date for the first election.¹²⁴ Thereafter elections are to be held on a four yearly cycle on the first Thursday in May; local government

¹²¹ SO PN, 18.12.97. Henry McLeish has made similar points about the Lords' attitude.

¹²² that is, not the European constituencies used for the 1994 European elections.

¹²³ for details see Research Paper 97/120 *The European Parliamentary Elections Bill*

¹²⁴ Scottish Office Press Release 21.12.97 "500 days until Scottish Parliament elections"

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elections are on a three year cycle and so elections will only rarely coincide.¹²⁵ **Clause 3** provides for earlier dissolution if Parliament so resolves on a two thirds majority or where the Parliament cannot agree on a First Minister under Clause 43.

The calculations for the **AMS** are set out in **Clauses 4-7**. Clause 4 provides for a list of candidates to be submitted by a registered political party and for independents to stand for a region as long as it is an individual region and the candidate does not appear on a party list and has not been elected for a constituency seat. Independents will also be able to form a group to contest a region but they would first need to register as a party. Clause 5 gives the elector two votes, one for a constituency member and one for the region. The calculations are set out in Clauses 6 and 7. Firstly the constituency members are selected through the usual First Past the Post, then the total number of regional votes for each party and independent candidate is counted in the individual regions and additional seats allocated according to share of the vote. The seven additional members for each region are identified by calculating the number of constituency seats won by each party in the region, and dividing the number of each party's list votes by the number of constituency seats plus one. The party with the highest number of votes after that calculation gains the first additional member. The calculation is then repeated for the second to the seventh additional member, but dividing the number of constituency seats plus one and plus additional member seats allocated in previous rounds. This is a straightforward application of the D'Hondt formula.

Therefore a party which won 30 per cent of the vote, which had already won 30 per cent of constituency seats in the region would win no more additional seats. A party which had won considerable numbers of votes but had not achieved a constituency seat, because its candidates had come second or third, would be compensated with additional members in proportion to its vote share. Parties which had achieved more constituency seats than their proportion of the share of the vote would justify will not however lose their seats.

An example of how the system would work has been given by the *Campaign for a Scottish Parliament* website:¹²⁶

Example 1 - Lothians

“
”

This Euro region comprises 9 individual constituencies (6 in Edinburgh, the two West Lothian seats and Midlothian) plus the 7 additional members to be elected from the lists, producing a total representation of 16 in the Scottish Parliament.

In 1992 Labour won 7 of the individual seats. Its total vote in the Euro region of 37.74% entitled it to a total of 7 of the 16 seats representing Lothians. Labour would therefore not have anyone elected from its list of additional candidates for the Lothians but would hold on to the seven elected in the individual constituencies.

¹²⁵ *Local Government etc (Scotland) Act 1994, s.5*

¹²⁶ <http://www.cybersurf.co.uk/cscoparl/briefing> *10 Electing Scotland's Parliament*

The Conservatives won 2 of the individual constituencies but their overall vote of 27.30% entitles them to a total of 4 of the 16 available seats. The Conservatives would therefore have the top 2 people on their list of seven elected, bringing their total representation in Lothians up to 4.

The SNP failed to have anyone elected in an individual constituency, but their overall vote of almost 19% entitles them to three of the 16 available seats. Therefore the top 3 people on the SNP list of seven would be elected.

Like the SNP, the Liberal Democrats failed to have anyone elected in an individual constituency but their overall vote entitles them to 2 of the 16 seats available. Therefore the top 2 people on the Liberal Democrat list would be elected.

The total result for the 16 seats representing Lothians would then be:

Labour	7 MSPs	all elected in individual constituencies
Conservative	4 MSPs	2 in individual constituencies
SNP	3 MSPs	all from the list
Lib Dem	2 MSPs	both elected from the list

No formal threshold - level of support - which a party must win to achieve is proposed in the Bill, but Democratic Audit ¹²⁷ note that an informal threshold will operate, this is defined by 100 per cent divided by the overall number of seats in each Region (100/15) effectively a threshold of over six per cent. Democratic Audit also note that Scotland's AMS system is much more proportional than Wales, with 43 per cent of elected members being additional members against 33 per cent for Wales. The choice of the D'Hondt formula, rather than the St Lague formula may tend to favour larger parties, and in relation to the *European Parliamentary Elections Bill* currently before Parliament, the Liberal Democrats have argued for the St Lague formula to be used..¹²⁸

Clause 81 of the Bill repeals Rule 1(2) (Scotland to have not less than 71 constituencies) of Schedule 2 to the *Parliamentary Constituencies Act 1986*. This issue is discussed in greater detail below, but it is important to note that if the Parliamentary Boundary Commission for Scotland reduce the number of Westminster constituencies in Scotland this will also affect the overall number of constituencies for the Scottish Parliament. However separate constituencies for the Shetlands and the Orkneys are specifically provided for in Schedule 1 so these two sets of islands are guaranteed separate seats each for the Scottish parliament, even after a reduction of seats for the rest of Scotland.

During the Second Reading of the current *European Parliamentary Elections Bill* the Home Secretary, Jack Straw, promised to consider the arguments for adopting an open list system on the Belgian model for the regional list electoral system proposed for the next European Parliament elections in 1999¹²⁹ The AMS system uses closed lists and there is no provision for

¹²⁷ Democratic Audit *Devolution Votes* 1997 p9

¹²⁸ see Research Paper 97/120 *The European Parliamentary Elections Bill* p30 for details

¹²⁹ HC Deb vol 301 25.11.97 c814 see Research Paper 97/120 *The European Parliamentary Elections Bill* for background

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open lists in the Bill, but it is possible to have an open list variant as used in the regional assembly in Bavaria. Neal Ascherson has suggested that the use of closed lists in any of the new forms of PR planned for introduction is undesirable for promoting democracy¹³⁰

If the Bill is passed this will introduce another proportional representation system into Great Britain; Northern Ireland uses the Single Transferable Vote for local elections and for the European Parliament, but the regional list system is planned for the European Parliament elections in 1999. Voters therefore face a variety of electoral systems within a month of each other in 1999 - local council elections under First Past the Post, Scottish Parliament elections under AMS and European Parliament elections under a regional list. Some voter education will be necessary.

Separate legislation is expected this session to introduce a system of registration of political parties. This legislation will also be required for the *Government of Wales Bill* and the *European Parliamentary Elections Bill*. At the time of writing no further details are available on the form of registration.

Clauses 8-9 set out provisions for **vacancies in regional and constituency seats**. By-elections will only be held when there is a vacancy in an constituency seat where a simple First Past The Post system will be used, and no by-election will be held where a vacancy exists within 3 months preceding a full election of the Parliament. If a vacancy occurs for a regional seat the Regional Returning Officer will notify the Parliament's Presiding Officer of the name of the next highest eligible¹³¹ candidate on the relevant party list. The list applicable is that submitted for the full election which has a maximum of 12 names. However, the regional returning officer must establish that the candidate is "willing to serve" as an Parliament member, so the candidate may decline the seat. Note that it is the candidate who decides on his availability, not the registered party (although the party may wish to influence the decision). There is no provision for alternative procedures to come into play if the relevant candidate is no longer a member of the registered party. If there is no eligible candidate left on the list the seat is left vacant until the next full election.

Clause 10 deals with the **franchise** and is, as expected, confined to those eligible to vote in local government elections, that is, British and Commonwealth citizens and EU nationals who fulfil the residency requirements, but minus overseas voters eligible to vote in Parliamentary elections. This is the same franchise as for the referendum in September.¹³² Voters will not be able to vote in more than one constituency or in more than one region.

¹³⁰ *Independent on Sunday* 30.11.97 "If we're not careful, we'll be rubber stamping someone else's choice"

¹³¹ in terms of electoral law

¹³² for background see Appendix to Research Paper 97/92 *Scotland and Devolution*

More detailed provisions about the conduct of elections will be made under **Clause 11**, as well as procedures for questioning elections, dealing with registration of electors, combinations of polls and limitation of election expenses. The clause provides that existing legislation or rules made under the Representation of the People Acts may be applied for these purposes. The question of the deposit is expected to be dealt with using powers under this clause; as yet there is no official indication of the amount of the deposit, whether for constituency or for regional MPs.

Members of the Scottish Parliament may be British, Irish, Commonwealth or EU citizens under **Clauses 14-15** and may include peers, ministers of religion, Members of the Westminster Parliament and local councillors. Otherwise the normal disqualifications applicable to Westminster MPs under s.1 of the *House of Commons Disqualification Act 1975* will apply. There is provision for an Order in Council to make further disqualification and it is intended that this Order will list membership of public bodies as disqualifying offices; the current list under the 1975 Act is not necessarily appropriate.

Schedule 1 defines both the constituencies and the regions. It provides for the number of seats to be altered following a future review of Westminster constituencies by the Parliamentary boundary commission for Scotland. When the commission undertake a review, it will also be required to include within its report recommendations for alterations in the regions and in the number of members returned for each region following the rules set out in paragraph 7 :

The rules

- 7.- (1) The rules referred to in paragraph 3 are:
1. A constituency shall fall wholly within a region.
 2. The regional electorate of any region shall be as near the regional electorate of each of the other regions as is reasonably practicable having regard, 45 where appropriate, to special geographical considerations.
 3. So far as reasonably practicable, the ratio which the number of regional member seats bears to the number of constituency member seats shall be 56 to 73.
 4. The number of regional member seats for a region shall be-
 - (a) one eighth of the total number of regional member seats, or
 - (b) (if that total number is not exactly divisible by eight) either one eighth of the highest number which is less than that total number and exactly divisible by eight or the number produced by adding one to one eighth of that highest number (as provided by sub-paragraphs (2) to (4)).
- (2) If the total number of regional member seats is not exactly divisible by eight, the Commission shall calculate the difference between-
- (a) the total number of regional member seats, and
 - (b) the highest number which is less than that total number and exactly divisible by eight,
- and that is the number of residual seats to be allocated by the Commission.
- (3) The Commission shall not allocate more than one residual seat for a region.
- (4) The Commission shall divide the regional electorate for each region by the aggregate of-
- (a) the number of constituencies in the region, and

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(b) one eighth of the highest number which is less than the total number of regional member seats and exactly divisible by eight, and, in allocating the residual seat or seats for a region or regions, shall have regard to the desirability of allocating the residual seat or seats to the region or regions for which that calculation produces the highest number or numbers.

8 – (1) For the purposes of any report of the Commission in relation to a region, the regional electorate is the number of persons -

- (a) whose names appear on the enumeration date on the registers of local government electors, and
- (b) who are registered at addresses within a constituency included in the region.

(2) In sub-paragraph (1), "the enumeration date" means the date on which the notice about the report is published in accordance with section 5(1) of the 1986 Act.

Briefly, the principles are broadly those currently governing the redistribution of European constituencies set out in the *European Parliamentary Elections Act 1978*, which is due to be superseded by the *European Parliamentary Elections Bill* currently before Parliament.¹³³ Constituencies must fall wholly within a region, but in addition, if the number of constituency seats is reduced there must be a proportionate reduction in the number of regional seats so that the ratio of 56 to 73 is maintained as far as possible. Thus if the number of constituency seats fell to 60, the number of regional seats would also need to be reduced to 46 to maintain that ratio, giving a Scottish Parliament of 106 members. If the number of constituency seats fell to 57 the number of regional seats would be 44 giving a total of 101.¹³⁴ The Commission is required to ensure that each region receives the same number of seats but where this is not possible, since the number of regions has to be maintained as eight, it will ensure that the number of seats will not differ by more than 1. Thus for illustration, if there were to be 46 seats, some of the regions would have 6 seats and some 5 seats.

The usual Commission procedure with regard to provisional recommendations and local inquiries would apply. Any changes in the number of constituencies, to be implemented by Order in Council under the *Parliamentary Constituencies Act 1986*¹³⁵, would not come into effect until the dissolution of the Parliament. The Scottish Parliament will not be able to determine its own composition.

¹³³ see Research Paper 97/120 *The European Parliamentary Elections Bill*

¹³⁴ *Scotsman* 22.12.97 "Anger at plan to cut MSPs" reported that Mr Dewar had indicated privately that the number of MSPs was likely to be reduced to 112. The final number will be decided by the Parliamentary Boundary Commission, which is independent of the government. There has been some concern at the prospect in the reduction of numbers of MSPs expressed by the SNP.

¹³⁵ The Parliamentary Boundary Commission for Scotland is governed by powers which are to be reserved under Schedule 5

C. Scottish representation at Westminster

Full background to this issue is given in Research Paper 97/92 *Scotland and Devolution*. Under S.3 of the *Parliamentary Constituencies Act 1986* the next review of the Westminster seats for Scotland must take place between 8 to 12 years after the date of the submission of the last report. The commission must therefore submit a report between December 2002 and 2006. It is for the commission to decide when to start so that a review can be completed within these two dates. Any recommendations it makes will not come into effect until the general election after that. Scotland will therefore retain its 72 seats for the next general election, due by May 2002.

As noted above, **Clause 81** amends the Rules for the Redistribution of Seats so that the Rule 1 (2) which guarantees Scotland 71 seats would no longer apply in a future review of Westminster seats. An additional Rule (Rule 3A) is also inserted ensuring that Orkney and Shetland remain a separate constituency.

Amendments to Rule 5 will apply the electoral quota for *England* rather than, say, GB or the UK as a whole, when redistributing seats in Scotland. At present the Commission begin a review by establishing the electoral quota for Scotland by dividing the number of existing constituencies by the total Scottish electorate. A new type of quota was therefore necessary if 71 seats were no longer to form a floor for the number of constituencies. This is likely to reduce the number of Scottish seats since the electoral quota¹³⁶ for Scotland is lower than for England. However the Rules relating to special geographical considerations and the boundaries of local authority areas will still apply and so Scotland is unlikely to be given an allocation strictly proportional to its electorate. It will be up to the Commission to apply the Rules and they are allowed a considerable degree of discretion.. It may be that the Commission will want to use the requirement to have regard to special geographical consideration to give Scotland more seats than a strict application of the quota would warrant.

Nevertheless, the decision to use the English quota, rather than the UK quota means that the reduction will be greater, since the English quota is larger than the UK one. If the present total of 659 seats were distributed solely on a UK quota i.e. the average national electorate, Scotland would receive 59 seats, but if each country had an average electorate equal to the current English electoral quota Scotland would have 57 seats. A major reason for using the English rather than the UK quota is presumably that the UK quota incorporates the existing number of Scottish seats, and so would not represent a clean break with the previous commitment to 71 seats. See Appendix 1 for further details on this topic.

There are no proposals in the *Government of Wales Bill* to reduce the number of seats for Wales, which also has a minimum of 35 seats provided for in the Rules. Currently Wales has 40 seats.

¹³⁶ the electoral quota is a technical term used in the *Rules for the Redistribution of Seats*. It means the average electorate. It is obtained by dividing the electorate in the relevant part of the UK by the number of constituencies in that part.

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Presumably Wales and Northern Ireland will continue to use their separate quotas as provided for in Rule 8, but the position of Scotland may seem anomalous in contrast. However Scotland is the only constituent part of the UK which will have primary legislative powers, unless the current Northern Ireland talks produce a devolved assembly. Many commentators have warned against piecemeal revision of the Rules For the Redistribution of Seats, since it is argued that a fundamental reform is required to prevent the number of seats at Westminster increasing with each general review.¹³⁷

D Legislative Powers of the Scottish Parliament

As foreshadowed in the White Paper the Bill takes a different form from the *Scotland Act 1978* and lists the legislative powers reserved to Westminster, rather than the powers devolved to the Scottish Parliament. In contrast, the *Government of Wales Bill* will list the executive powers transferred to the National Assembly.

The Bill is structured so that the Scottish Parliament may make laws in a matter which is not reserved to Westminster or otherwise outwith the legislative competence of the Parliament. The Scottish Office publication *The Scotland Bill: a Guide* provides a summary as follows:

The Legislative Competence of the Scottish Parliament

16. Clauses 27-34, particularly 27-29, and Schedule 5 are in some respects the heart of the Bill. They establish the Parliament's powers to make laws in relation to Scotland and set out the basis for determining what is devolved and what is reserved.

17. As the White Paper foreshadowed, the Bill lists, in Schedule 5, the matters which are to be reserved to the UK Parliament at Westminster. Any matter not so reserved or otherwise defined in clause 28 as being outwith the competence of the Parliament will fall within the Parliament's powers. The matters which will fall within the Parliament's powers are listed in Annex B to this document, which is based on the list in Chapter 2 of the White Paper.

18. Clause 28 permits the Parliament to legislate in relation to reserved matters in certain limited and specific respects. These are, first, to allow legislation for devolved purposes to make incidental or consequential changes to the terms of a reserved enactment (eg to change the name of a body or a statutory reference), second to permit the Scottish Parliament to legislate on the Scots Private Law consistently for devolved and reserved matters, and thirdly to allow it to make general provisions for Scots Criminal Law which will apply to reserved as well as devolved matters.

19. Schedule 5 sets out the reserved matters in 2 parts. Part I sets out general reservations including the Constitution. Part 11 sets out specific reservations under a number of Heads. The Heads are sub-divided into Sections. The reservations are defined by general

¹³⁷ See Research Paper 95/74 *The Parliamentary Boundary Review for England and Fixing the Boundaries: defining and redefining single member electoral districts(1996)* ed D Butler and I McLean

descriptions of the subject and/or by reference to the subject matter of existing legislation. Annex C shows precisely where in Schedule 5 each of the reserved matters listed in Chapter 3 of the White Paper can be found. The Parliament will have the power to debate both devolved and reserved matters.

20. Clause 29 fulfils the White Paper commitment to provide for a mechanism for adjusting the list of reserved matters as appropriate and as the need arises. An Order under this clause would need to be approved by both Houses of the LTK Parliament and by the Scottish Parliament.

21. It will be outwith the Parliament's powers ("ultra vires") to legislate in a way which is incompatible with EC law or the European Convention on Human Rights (the Human Rights Bill currently before Parliament provides for the Convention to be incorporated in UK law). Law Officers of either the UK Government or the Scottish Executive will be able to refer a Bill of the Scottish Parliament to the Judicial Committee of the Privy Council under clause 32 if they believe that either the whole Bill or some provision in it is not within the legislative competence of the Parliament. (More details of the vires control procedures and composition of the Judicial Committee are described in paragraphs 39-40 below.)

The *Guide* also summarises the areas where legislative powers will be devolved as follows:

Devolved matters

This list is based on the list in Chapter 2 of the White Paper. It shows the main areas where the effect of the Bill will be to devolve legislative competence.

Health

- **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;

Education and training

- **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;
- **science and research funding** except for the UK Research Councils;
- **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

- **local government** including local government finance and local

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*government,
social work
and housing*

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
and transport*

- **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 some planning and environmental issues relating to airports,
- **inland waterways;**

*Law and home
affairs*

- **criminal law** and procedure except for offences created in statute law relating to reserved matters including drugs and firearms;
- **civil law;**
- **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**;
- **tribunals** concerned with devolved matters;
- **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**.,
- **protecting of animals** including protection against cruelty to domestic, captive and wild animals, zoo licensing, controlling dangerous wild animals and game, also control of dogs, boarding kennels and dangerous dogs;

Environment

- **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,
forestry and
fishing*

- **agriculture** including responsibility for implementing measures under the Common Agricultural Policy, and for domestic agriculture including crofting, animal and plant health and animal welfare;
- **food standards**;
- **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 for the Forestry Commission's activities in Scotland;
- **fisheries** including responsibility for implementing measures under the

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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 and the arts

- **sport** including the activities of the Scottish Sports Council;
- **the arts** including the functions of 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;

Other matters

- **statistics, public registers and records** including the responsibilities of the Keeper of the Registers, the Keeper of the Records, and the Register General for Scotland

Schedule 5 of the Bill sets out the reserved matters and is too long to be reproduced in this Paper. The *Guide* has summarised the main reserved powers as follows:

Reserved matters Schedule 5

The table below shows where the reserved matters referred to in Chapter 3 of the White Paper are to be found in Schedule 5 of the Bill.

Matter	Part	Para./ Head ¹³⁸	Section
The Constitution of the United Kingdom			
the Crown	I	1	
the UK Parliament	I	1	
electoral law		2	3
Civil Service	I	7	
dignities and titles of honour	I	2	
UK Foreign Policy			
ability to conclude EU and other international agreements	I	6	
ministry of International Development matters	I	6	
UK defence and national security			
armed forces	I	8	
security services	II	2	8
treason	I	9	
terrorism and subversion	II	2	8
Protection of borders etc			
designation of the UKs land and maritime borders and fisheries limits	I	6	
immigration and nationality	II	2	6
extradition	II	2	11
criminal law in relation to drugs and firearms	II	2	1,4
regulation of drugs of misuse	II	2	1
Stability of UKs fiscal, economic and monetary system			
macroeconomic monetary and fiscal affairs	II	1	1,3,4,5
UK tax concessions	II	1	1
currency	II	1	2

¹³⁸ For material in Part I, this column shows the paragraph number. For material in Part II, this column shows the Head number.

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Matter	Part	Para./ Head	Section
Common markets for UK goods and services			
law on companies and business associations	II	3	1
insurance	II	1	3
corporate insolvency	II	3	32
intellectual property	II	3	4
regulation of financial institutions and financial services	II	1	1,2,4
competition	II	3	3
consumer protection	II	3	6
regulation of the energy supply industries	II	4	1-5
international trade policy and ECGD matters	I II	6 3	5
wireless telegraphy and telecommunications regulation/licensing	I	3	9
regulation of pharmaceutical prices	II	9	4
postal services	I	3	10
weights and measures	II	3	8
technical standards of goods	II	3	7
regulation of time zones	II	11	5
Employment legislation	II	8	1
industrial relations	II	8	1
equal opportunities	II	11	2
health and safety	II	8	2
Employment Service matters	II	8	3
Social security policy and administration			
benefits and Benefit Agency matters	II	6	1
contributions	II	6	1
child support maintenance	II	6	2
occupational and personal pension regulation	II	6	3
related employment policy, services and assistance	II II	8 6	3 1
Regulation of certain professions			
medical , dental, nursing and other health professions	II	7	2
veterinary surgeons	II	7	2
architects	II	7	1
auditors	II	7	3
estate agents	II	3	6
insolvency practitioners	II	3	2
insurance intermediaries	II	1	3
The Civil Service Commissioners	I II	7 11	1
UK Senior Salaries Review Body	I	1	
primary legislation in respect of public service pensions	II	6	3

Matter	Part	Para./ Head	Section
Transport safety and regulation			
regulation of aviation and air safety	II	5	4
regulation of shipping and marine safety	II	5	3
rail safety and regulation	II	5	2
aspects of road traffic regulation	II	5	1
transport security, driver & vehicle licensing and testing, road haulage, vehicle standards, general speed limits	II	5	1-5
marine, air and rail accident prevention and investigation	II	5	2,3,4
technical standards relating to transport of disabled persons	II	5	5
Certain other matters presently subject to UK or GB regulation or operation			
UK research councils	II	3	11
nuclear safety	II	4	4
	II	5	5
control and safety of medicines	II	9	4
reciprocal health agreements	I	6	
designation of assisted areas	II	3	12
Ordinance Survey	II	11	4
regulatory framework of broadcasting and film classification, incl regulatins of video recordings	II	2 10	5 1
licensing of theatres and cinemas	II	2	5
cultural property matters dealt with at UK level	II	10	2,3,4
gambling and the National Lottery	II	2	9
data protection	II	2	2
abortion, human fertilisation and embryology, genetics, xenotrans-plantation and vivisection	II	9 2	1,2,3 7
equality legislation (racial, gender and disability discrimination)	II	11	2

The Bill therefore does not depart from the subject areas outlined in the White Paper which are to be reserved to Westminster.

The assertion of Westminster sovereignty in the law -making process is made explicit in **Clause 27(7): "This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland"**. There was a more wide-ranging assertion in S. 75 of the *Government of Ireland Act 1920* which set out the framework for devolution to Northern Ireland- "the supreme authority of the Parliament of the United Kingdom shall remain unaffected and undiminished over all persons, matters and things in [Northern Ireland]"The *Northern Ireland Constitution Act 1973* is similar to the *Scotland Bill* phrasing: ¹³⁹"this section[s4] does not affect the power of the Parliament of the United Kingdom to make laws for Northern Ireland." ¹⁴⁰

¹³⁹ S.4(4) *Northern Ireland Constitution Act 1973* for background see Research Paper 96/52 *Northern Ireland:Current Political Developments*

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Clause 28 further restricts the legislative powers of the Scottish Parliament to ensure that it could not modify the *Scotland Bill* itself, or affect the law of another country or pass provisions incompatible with ECHR rights or EC law, or remove the Lord Advocate from his position as head of the systems of criminal prosecution and investigations of death in Scotland.

Clause 29 enables modifications to be made to the list of reserved matters in Schedule 5 by subordinate legislation, to be passed by both the Westminster Parliament and the Scottish Parliament under Clause 101 and would appear to mean that subjects could move in both directions, i.e. become reserved or devolved. This is in contrast to the *Government of Wales Bill* Clause 22 which appears to envisage transfers of executive functions in one direction, that is, to Wales.

E. Vires and disputes resolution

A number of mechanisms are provided for in the Bill to ensure that legislation passed by the Scottish Parliament is not outwith its powers.

1. The Scottish Executive has to certify at or before the introduction of a Bill that it would be within the legislative competence of the Scottish Parliament. (**Clause 30**)
2. Standing Orders will ensure that a Bill cannot be introduced into the Parliament if the Presiding Officer decides that it, or any of its provisions, is outside Parliaments competence. However Standing Orders may provide for the Presiding Officer to be overruled, and for the Bill not to be submitted for Royal Assent until a reference has been made to the Judicial Committee of the Privy Council under Clause 32 or 33. (**Clause 31**) the Bill cannot receive Royal Assent if the Judicial Committee have decided that it is not within the Parliament's legislative competence.
3. The Advocate General, the Lord Advocate, or the Attorney General may refer the question of whether a Bill or any of its provisions is within the Parliament's legislative competence to the Judicial Committee. Under **Clause 32** A time period of 4 weeks is stipulated after the passing of the Bill but before Royal Assent.
4. The Secretary of State may intervene under **Clause 33** if he has 'reasonable grounds' to believe that a Bill would be incompatible with any international obligations or if a Bill 'would have an adverse effect on the operation of an enactment as it applies in relation to reserved matters'. This apparently sweeping power is severely qualified by a restriction to its use only for Bills affecting Clause 28 (4) in relation to Scots private law¹⁴¹ and clause

¹⁴¹ Scots private law comprises the principles and rules governing the rights and duties of ordinary private people in their relationship with one another. It also concerns the relations between individuals and the state, or other public bodies, which fall outside the rules of public law granting special rights or immunities. It is entirely dealt with by civil courts,

28(5) consequential matters. In certain areas the Scottish Parliament may legislate in reserved areas to preserve the integrity of Scots private law and so a provision was necessary to ensure that a correct balance was drawn. However there has been a certain amount of concern in the press that the Secretary of State's powers' might be too wide.¹⁴² Officials have stressed that the power is designed simply to ensure that the UK government meets its treaty obligations and that the reasons for its use are highly technical. Moreover, the fact that the secretary of state must have 'reasonable grounds' will apparently bring judicial review of his powers into play.

A Bill may be reconsidered if the Judicial Committee decides that it is not within the Parliament's legislative competence, or if an order is made by the Secretary of State under Clause 33 (**34(3)**). There is no equivalent therefore to the broad powers given to the Secretary of State in the *Scotland Act 1978* where under S.38 he could recommend that a Scottish Bill be struck down on the grounds that it might affect a reserved power and its enactment would not be in the public interest.

There are also provisions for review after Royal Assent under **Clause 91 and Schedule 6**. Where proceedings on a 'devolution issue' may be instituted in the courts of Scotland, England and Wales and Northern Ireland, up to the Judicial Committee of the Privy Council which will be the final court of appeal for devolution issues. This term includes the question of whether an Act of the Scottish Parliament is within its legislative competence and is defined in para 1 of Schedule 6.

F. Executive Powers

This topic is covered in Part II of the Bill. There is to be a separate Scottish Executive under **Clause 41** whose members are all to be drawn from members of the Scottish Parliament (Clauses 42(1), 44(1) and 46(1)). The First Minister is to be formally appointed by the Queen on the nomination of the Scottish Parliament under **Clause 43**. The other members of the Executive are appointed by the First Minister but "he shall not seek Her Majesty's approval for any appointment under this section without the agreement of the Parliament"(Clause 44(1)). It would appear therefore that each individual Scottish minister must be approved by the Parliament. There is no maximum limit on the number of Ministers, although the Scottish Parliament may wish to place a limit in future to prevent domination of the legislature by the executive.

Scottish Ministers may be removed from office by the First Minister. (Clause 44(3)(b)) and must all resign if the Parliament resolves that the Scottish Executive no longer holds the confidence of

under civil procedure. The areas covered include family law, status, charities and voluntary organisations, partnerships, corporations and companies, contract law, employment, delict (the equivalent of the English term tort) property and land law, sale of goods, trusts, succession and insolvency.

¹⁴² *Scotsman* 20.12.97 "Scotland bill's cause for concern"

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the Parliament. (44(3)(c)).The Scottish Law Officers are appointed by the First Minister with the approval of the Parliament(**Clause 45**) but there is specific provision to ensure that decisions by the Lord Advocate in his capacity as head of the systems of criminal prosecutions and deaths in Scotland continue to be taken on an independent basis.Junior Ministers may also be appointed Further details are given in Research Paper 98/2 which offers a broad comparison with current Westminster procedures.

Executive functions are conferred on the Scottish Ministers, to be exercisable by any member of the Scottish Executive , in line with general Westminster procedures.(**Clause 48**). The powers have been summarised in the *Guide* as follows:

Powers, Property and Liabilities of the Scottish Ministers

28. Clauses 48-54 define the powers of the Scottish Ministers and the limits to those powers. They provide in particular for executive and subordinate legislation-making powers in respect of devolved matters to be transferred from Ministers of the Crown (I.e. members of the LTK Government) to the Scottish Ministers. They will ensure that the Scottish Ministers have wideranging powers to act in relation to domestic and European matters, as proposed in the White Paper. Clause 48 also provides for certain functions to be retained by the Lord Advocate. These are, primarily, his prosecution, deaths investigation and Law Officer functions.

29. The Government stated in the White Paper that the Scottish Executive will be responsible for certain functions in areas where law-making powers will be reserved or are a matter for the EU. Clauses 59-60 provide for these additional statutory functions together with any associated property or liabilities to be transferred by Order from the UK Government to the Scottish Ministers or otherwise adapted, for example to require consultation with the Scottish Executive, and for any necessary consequential changes to existing legislation. The Government will publish a draft Order showing which additional executive functions it intends to transfer. A list of the functions it is expected to cover is at Annex D.

30. Clauses 55-58 make provision for the holding of property and the incurring of liabilities by Scottish Ministers and the Lord Advocate. They also enable the UK Government to transfer property and liabilities in relation to devolved matters to Scottish Ministers. The bulk of the transfers are expected to take place when the Parliament and the Executive assume all their powers.

31. Clause 47 empowers the Scottish Ministers to appoint staff who will remain, like Scottish Office staff now, members of the Home Civil Service.

The executive powers to be transferred will be wider than the legislative powers conferred on the Scottish Parliament as noted above. The additional powers will be set out in a draft order and the *Guide* summarises the subject matter as follows in Annex D:

Executive devolution

The White Paper made it clear that the Scottish Executive will be responsible for certain functions in areas in which law-making powers will be reserved. The Government will shortly publish a draft Order showing which executive functions it intends to transfer. The following is a list of the functions the Order is expected to cover.

Betting, gaming and lotteries

- designation of casino areas, setting of gaming hours and fees for certain licences, registrations, certificates and permits and the power to make regulations concerning the refusal to grant or renew gaming licences;
- powers to issue policy and financial directions to National Lottery distributors (sports and arts) in Scotland;

Police

- administration of firearms licensing;
- payment of grants to police authorities for expenditure on safeguarding national security;

Other Home Affairs matters

- certain powers in relation to extradition from and to Scotland;
- some Crown, church and ceremonial matters (e.g. advising the Crown on Crown appointments, matters relating to Lord-Lieutenants);
- appointment of medical inspectors under the Immigration Act 1971;

Cultural matters

- making undertakings, as part of the Government Indemnity Scheme, in respect of objects loaned to museums in Scotland and determining whether particular items should be accepted in satisfaction of tax where there is a Scottish interest in the item;
- power to make regulations governing the safety of film exhibitions and to grant certificates to film societies;

Tribunals

- functions involving making appointments to and making procedural rules and being consulted about appointments and rules in respect of certain tribunals which are concerned with reserved matters, such as appointments of General Commissioners of Income Tax;

Employment

- issuing of certificates exempting a body from the requirement to insure against employers' liability risks;

Energy

- powers and duties in respect of electricity supply such as the granting of licences, the granting of consent for the construction of a generating station or overhead electricity lines, powers to protect electricity supply;
- powers and duties in respect of civil nuclear installations, such as maintaining a list of sites and the power to appoint inspectors;

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Transport

- certain functions in respect of roads, such as authorising and removing road signs, designating restricted roads, regulating road trials, approving drink driver offenders' courses and other functions in relation to speed limits;
- administration of freight facilities and track access grants;
- functions in relation to airports, such as the imposing duties on aircraft operators to mitigate noise;

Public sector pensions

- establishment and operation of certain public sector pension schemes, e.g. schemes for police, firemen, local government employees, health service employees and teachers.,

Health

- approval of places where terminations of pregnancy may be carried out and the power to make regulations in relation to the termination of pregnancies; and
- enforcing medicines legislation in Scotland.

Clause 49 is phrased so that only functions exercisable, or in reference to Scotland are conferred; reserved matters and the retained functions of the Lord Advocate are not transferred, subject to **Clause 52** which provides for shared powers under a series of enactments. **Clause 50** sets out the scope of powers to make subordinate legislation, broadly as long as if such legislation is within the competence of the Scottish Parliament.

Clause 53 provides that UK ministers can continue to exercise functions in relation to Scotland under S.2(2) of the *European Communities Act 1972* and that the Scottish Executive cannot make subordinate legislation or any other action incompatible with the ECHR or EC law. The Secretary of State has veto powers to prevent or require action if he has 'reasonable grounds' to believe that the Executive's actions are incompatible with international obligations. The Secretary of State may make or revoke subordinate legislation or introduce a Bill into the Scottish Parliament.

The staff to be employed by the Scottish Executive will be members of the Home Civil Service, like the staff to be employed by the National Assembly under the *Government of Wales Bill*. Unlike the Welsh proposals, however, the staff of the Scottish Parliament will be employed by the Parliament, as is the case at Westminster, and will not be civil servants.

G. Financial Provisions

i. General principles

The bill is not expected to result in an increase in overall public expenditure financed by UK taxpayers. However, to the extent that the Scottish Parliament exercises its tax varying powers, general government expenditure will be higher or lower. The power of the Parliament to alter the basic rate of income tax is discussed in detail in Research Paper 98/4 *The Scotland Bill and tax-varying powers*.

Scotland will have a consolidated fund into which the revenues of the Scottish Executive are paid and from which expenditure is made. There is a Northern Ireland Consolidated Fund (established under the Exchequer and Audit Act 1921) but a similar provision for Wales was not included in the Government of Wales Bill. The Scottish Parliament and Executive will take on responsibility for what is now the Scottish Office budget (currently worth some £14½ billion per annum) and those functions (such as inland waterways and Scottish ports) which are being transferred.

The income of the Scottish Parliament and Executive will come from three principal sources. The main form of revenue will be a grant from the UK Exchequer. According to **Clause 61(2)**, this will be "...of such amounts as he [the Secretary of State] shall determine". Non-domestic rate payments will be paid directly into the Scottish Consolidated Fund rather than forming part of the grant from the UK government. Should the Scottish Parliament exercise its powers to increase the basic rate of income tax, it will receive a grant from the Inland Revenue equivalent to the estimated revenue. (If, on the other hand, the Parliament reduces the rate, a similar grant will be paid from the Scottish Consolidated Fund to the Inland Revenue.) There will also be interest and other miscellaneous receipts.

The Scottish Parliament will continue to be subject to public expenditure control. Each year the Parliament will be given an assigned budget. This will include two elements. The smaller element relates to non-domestic agriculture (including the Common Agricultural Policy (CAP) and Hill Livestock Compensatory Allowances) where the level of expenditure is determined by EU policy and the requirements of the programme. The remainder of the assigned budget will be the Scottish 'block', which will, as now, be determined by the block and formula approach. Once the size of the assigned budget has been determined, the Exchequer grant will be determined by deducting elements that are financed from other sources (e.g. local authority self-financed expenditure and grants from the European Union).

During the annual Public Expenditure Survey (PES) round departmental control totals are determined for the following three years.¹⁴³ The starting points for years one and two are the

¹⁴³ The 1997 PES round did not take place pending the outcome of the incoming Government's Comprehensive Spending Reviews.

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existing plans from the previous PES round. The baseline for year three is determined by the Treasury using rules applied to all departments. Typically, this might involve a percentage up-lift on year two. Thereafter, the Barnett formula applies to the Welsh, Scottish and Northern Irish blocks.¹⁴⁴

The Barnett formula works as follows. If there are changes to the budgets of Whitehall departments relating to services for which the Parliament is responsible, then a fixed proportion of the change is applied to the Scottish block. At present, the proportion is 10.66%, which represents the relative populations of Scotland and Wales in 1991.¹⁴⁵ Thus, for example, if £1 billion were added to the health budget for England, £106.6 million would be added to the Scottish block. Generally, there would be no obligation for the Parliament to use any additional resources in the same way as in England. The same procedure would apply in the event of expenditure reductions. It has been announced that in future the formula will be up-dated each year. In its recent note on the Barnett formula, the Treasury states:¹⁴⁶

6. The Government intends that these population shares will be re-calculated annually on the basis of the latest population estimates for England, Scotland and Wales published each year by the Office for National Statistics. The population ratios will next be updated for the purpose of determining changes in the Scottish and Welsh block budgets for 1999-2000.

The same document raises the possibility that provision for expenditure on council tax and housing benefits – which will come into the Scottish block for the first time after devolution – will be subject to an alternative mechanism.¹⁴⁷

It is important to note that the Barnett formula does not determine the overall size of the block, but only provides that the block mirrors negotiated changes in Whitehall departments' budgets: the major determinate of the block is its size in the previous year. Nor does the Barnett formula represent an allocation of expenditure on the basis of expenditure needs. The most recent official needs assessment was conducted in the late 1970s, when devolution was last the subject of legislation.¹⁴⁸

The Barnett formula has no statutory basis and is not mentioned in the Bill. However, the White Paper states that any substantial revision of the formula "...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."¹⁴⁹ The present Government has stated

¹⁴⁴ The Treasury Committee reported on the operation of the Barnett Formula in December 1997 – Second Report HC 341 1997/98. A description of the Barnett formula is also included in Research Paper No 97/78, *Public Expenditure in Scotland and Wales*.

¹⁴⁵ A ratio of 10.06% applies to programmes such as law and order, which are planned on an England and Wales basis.

¹⁴⁶ *Principles to govern determination of the block budgets for the Scottish Parliament and National assembly for Wales*, Dep. Paper 3s/5621

¹⁴⁷ *ibid*, para. 7

¹⁴⁸ HM Treasury, *Needs Assessment Study – Report*, 1979

¹⁴⁹ Cm 3658, para. 7.7

its commitment to the current arrangements for determining the Scottish and Welsh blocks. For example, the following exchange took place at Oral Questions on 27 November:¹⁵⁰

8. **Mr. Randall:** If he will make a statement on the future of the Barnett formula.

Mr. Darling: The Government have made it clear that they intend to keep the existing arrangements. The Government's position was clearly set out in the two White Papers on which the referendum campaigns in Scotland and Wales were fought and won.

In the past it has not been possible to tell from published documentation how the Barnett formula has been applied in a particular PES round. However, the White Paper states that, following devolution, "...the operation of the formula each year will be a matter of public record."¹⁵¹

There may be changes to the Scottish block other than those determined by the Barnett formula. In particular, decisions taken by the Parliament or Executive will sometimes have financial implications for government departments. Similarly, government departments may, on occasion, implement policies that will lead to additional costs for the Scottish Parliament. The Government intends that the long-standing convention whereby the body whose decision results in higher costs meets those costs should apply. Where such decisions are made by the UK Government there will often be automatic compensation for the Parliament via the Barnett formula.¹⁵²

There are some other circumstances in which changes to the Scottish block will be made outside the Barnett formula.¹⁵³ For example:

- The UK government decides to make a uniform general adjustment to public expenditure programmes.
- There are capital receipts from the disposal of assets in which the UK taxpayer (who financed the original purchase) has a continuing interest. The proceeds from other disposals can be recycled within Scotland.
- Self-financed local authority expenditure grows significantly faster in Scotland than England.

The Barnett formula does not apply to in-year changes. Generally the Scottish Parliament and executive will, as now, be expected to contain expenditure within the assigned budget by re-allocating priorities. Additional funds from the UK reserve may be granted in exceptional circumstances and specifically where:¹⁵⁴

¹⁵⁰ HC Deb 27 November 1997 c.1080

¹⁵¹ Cm 3658, para. 7.5

¹⁵² Cm 3658, para. 7.9

¹⁵³ Dep. Paper 3s/5621, *op cit*, para. 9

¹⁵⁴ *ibid*, para. 11

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- The Government is making available provision in-year for equivalent services in England in order to cope with unforeseen and exceptional circumstances affecting the UK as a whole.
- Scotland faces unforeseen and exceptional domestic costs – arising, for example, from a natural disaster – that could not reasonably be absorbed within the existing budget.

Although the Scottish Parliament will have the power to authorise the Scottish Executive to undertake short-term borrowing to cover a temporary shortfall in the Scottish Consolidated Fund, it will not have a long-term borrowing power on its own account.¹⁵⁵

As noted above, the method of determining the assigned budget is not detailed in the bill and there is the possibility of a future UK government wishing to renegotiate the Barnett formula. It has been argued that the bill should be more specific about the long-term financial arrangements. For example, the Constitution Unit now at the School of Public Policy at UCL has stated:¹⁵⁶

The arrangements proposed by the Scottish Constitutional Convention are a sensible basis on which to establish the Parliament, but do not promise stability in the longer term. The Barnett formula, which determines changes in the Scottish Office budget each year by reference to changes in equivalent English spending plans, is under pressure in any event and could not provide a basis for financing eventual English regional government. The bill should aim to promote greater stability (and longer-term applicability throughout the UK) by specifying mechanisms for keeping the funding formula under review and making adjustments when necessary.

The key will be the establishment of an independent Commission to gather reliable data about spending levels and to relate them to relative need. The Commission might conduct a periodic UK needs assessment, say every five to ten years, to inform periodic review of the funding formula. The first such assessment might commence immediately following the establishment of the Parliament. The Commission would make recommendations to central government for approval by the Westminster Parliament. It would also provide an independent audit of the results of applying the formula in practice.

ii The clauses

Clause 61 establishes the Scottish Consolidated Fund and provides statutory authority for the annual grant from the UK Exchequer. It provides that receipts by the Scottish executive are paid into the Fund and allows the Treasury (in consultation with Scottish Ministers) to designate certain receipts as payable to the UK government. Banking services are to be provided by the Office of the Paymaster General. **Clause 62** details the statutory authority that is required for payments to be made from the Fund.

¹⁵⁵ Cm 3658, para. 7.9

¹⁵⁶ Source: <http://www.ucl.ac.uk/constitution-unit/sfin.htm>

Clauses 63 and 64 allow the Secretary of State to lend Scottish Ministers up to £500 million from the National Loans Fund to meet temporary deficits on the Scottish Consolidated Fund or to provide the Fund with a working balance. Interest will be charged on the loans. With Treasury consent, the Secretary of State can increase the maximum level of loans by order. **Clause 67** relates to National Loans Fund loans previously made by the Secretary of State for Scotland under powers to be transferred to the Scottish Executive. Payments of interest and capital on such loans will be paid into the Scottish Consolidated Fund. Repayments of principal will be treated as if they were a loan from the UK Government and will be liable to interest and repayment on terms determined by the Treasury. **Clause 68** requires that the Secretary of State produces accounts of loans made under clauses 63, 64 and 67 and submits these to the Comptroller and Auditor General within eight months of the end of each financial year.

Clause 65 provides that any loans made by the Scottish Executive to a public body shall be liable to a rate of interest that cannot be lower than the lowest rate charged on National Loans Fund loans made that day. A public body established by the Scottish Parliament cannot borrow in a foreign currency without Treasury approval.

Clause 66 relates to the preparation, publication and audit of financial accounts. The auditor is not specified, but must be independent and have the powers to examine the economy, efficiency and effectiveness with which the Scottish Executive has discharged its functions.

Clause 106 relates to existing legislation authorising expenditure from (or requiring payment into) the UK Consolidated Fund and loans from the National Loans Fund. Where this relates to devolved functions the transactions will instead be made through the Scottish Consolidated Fund.

H. Public Bodies

Background on public bodies, NDPBs and quangos is contained in Research Paper 96/72 *The Quango Debate* which looks at the remit of the Commissioner for Public Appointments who was appointed¹⁵⁷ following the Nolan Committee's first report in May 1995. The Commissioner is also Commissioner for Public Appointments in Northern Ireland. A guide to public bodies in Scotland was published by the Scottish Office in 1996.¹⁵⁸ Before the publication of the White Paper and the Bill there were suggestions that a radical reform of quangos in Scotland was necessary. The John Wheatley Centre¹⁵⁹ had published a report in 1997¹⁶⁰ recommending the appointment of a Scottish Commissioner for Public Appointments and a Public Appointments Committee of the Scottish Parliament to scrutinise appointments, as well as power to review the work of quangos in Scotland. Annual lists of appointments to the 36 executive NDPBs and 68

¹⁵⁷ Sir Len Peach was appointed under an Order in Council and no primary legislation was necessary.

¹⁵⁸ *Open and Accountable : Public Bodies in Scotland* Scottish Office 1996

¹⁵⁹ now the centre for Scottish Public Policy

¹⁶⁰ *Quangos: policy proposals for a Scottish Parliament: a report* John Wheatley Centre

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NHS bodies in Scotland are available, the most recent being in December 1997¹⁶¹ The Government have published a consultation document *Opening Up Quangos*¹⁶² which outlined ways to make NDPBs more open, accountable and effective. Independent advisers have been appointed to advise the Secretary of State on appointments, in line with the recommendations of the first Nolan report.

Under the Bill the Scottish Executive will take over powers to appoint to public bodies currently held by the Secretary of State, but subject to the Nolan principles of openness and accountability.¹⁶³ The Executive will also take over the Secretary of State's powers of direction etc. in relation to these quangos under the general transfer of executive power under Clause 49.. The Scottish public bodies will fall within the legislative competence of the Scottish Parliament, where their remit is concerned with matters to be devolved.. These are listed in Appendix 3 to this paper.

Although the Bill provides in **Clauses 23 to 25** powers for the Scottish Parliament to call for witnesses and documents on devolved matters, there is no specific provision for the Parliament to authorise or review appointments to public bodies. This might be the subject of Standing Orders if it was felt appropriate for the Parliament to carry out this role, or the Scottish Parliament could legislate to restructure the appointments process. Nor is there specific provision for a Scottish Commissioner for Public Appointments. The White Paper noted "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 those 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." (para 6.8) It might be argued that there ought to be a separate post of Scottish Commissioner given the Northern Ireland precedent,

In contrast to the *Government of Wales Bill* the Scottish Parliament and Scottish Executive will be able to reorganise across the whole field of Scottish public bodies, including bodies created by Royal Charter such as the National Gallery of Scotland.¹⁶⁴ The National Assembly will only be able to reorganise selected quangos. However there are no specific provisions in the Bill to abolish particular quangos, unlike the *Government of Wales Bill*. The John Wheatley Centre report recommended the abolition of Scottish Homes and the transfer of many of the functions of Local Economic Councils to local authorities, amongst other restructuring of public bodies.

A number of cross-border public bodies receive separate treatment in the Bill. **Clause 83** requires a UK minister to consult the Scottish ministers in relation to the appointment or removal of members of cross-border public bodies and to the exercise of powers by the body. Such bodies

¹⁶¹ *Appointments to Executive Non departmental Public Bodies at 1 December 1997* Scottish Office

¹⁶² Cabinet Office, Office of Public Service November 1997

¹⁶³ for further details see Research Paper 96/72 *The Quango Debate*

¹⁶⁴ However to dissolve a body created by Royal Charter may require a petition for its dissolution by its members to the Queen in Council.

are required to lay reports before the Scottish Parliament, in the same way as their reports are laid before the Westminster parliament. There is also provision in **Clause 84** for subordinate legislation to enable powers to be transferred between Scottish ministers and UK ministers where appropriate. **Clause 85** allows for transfers of property, where an Act of the Scottish Parliament winds up the functions of a cross-border body in relation to Scotland. The bodies are not specified in the Bill, but are set out in Annex E of the *Guide*. The White Paper had noted that " in certain devolved areas where public bodies with a UK or GB remit presently operate it will be for the Scottish Parliament to decide whether to put into place Scottish bodies."(para 2.10) The White Paper however envisaged that in most cases it would be more efficient to continue UK or GB arrangements.

I. Freedom of Information

The Scottish Parliament will be responsible for legislating on freedom of information in devolved areas. Reserved areas will be covered by the Freedom of Information Bill promised in the recent White Paper *Your Right to Know*.¹⁶⁵ The White Paper noted that the FOI legislation would apply across the UK but it would be for the Scottish Parliament 'to determine the approach of the Scottish Executive and other Scottish public bodies to openness and freedom of information within the devolved areas in which it is competent to enact primary legislation'. (para 2.1). UK legislation on FOI is expected in the next Parliamentary session, but it is not expected to be implemented much before the establishment of the Scottish Parliament in 2000. Presumably one of the first acts of a Scottish Parliament would be to legislate for FOI to ensure that devolved areas are covered. Wales will be covered by the UK legislation.

J. The Scottish Parliament and the Implementation of EC Law

Clauses 28, 53 and 54 and Schedules 5 and 6 of the Scotland Bill concern the relationship between Westminster, the Scottish Parliament, EC law and other international obligations of the UK.

i. EC law in the Member States

In joining the EC, member states accepted *inter alia* the primacy of EC law over national law. As the European Court of Justice acknowledged in 1964:

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply

By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the

¹⁶⁵ Cm 3818 December 1997

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Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.¹⁶⁶

Member States have had to accept the direct applicability of the Treaties and of the instruments of Community law, which are enforceable in national courts. Governments and sub-national governments at regional and local level in the Member States are responsible for implementing EC law correctly. Since EC law becomes national law in the Member States, breaches are dealt with by the national courts, although questions on points of EC law may be referred by national courts to the European Court of Justice for a preliminary ruling under Article 177 of the Treaty.

ii. *The Implementation of EC law in the UK*

EC law and the provisions of the Treaties are given legal effect in the UK by virtue of the *European Communities Act 1972* (ECA). In order for the obligations of treaties such as the EC Treaties and the acts emanating from them to become enforceable in UK courts, provision must be made in UK law. The 1972 Act provides this authority and has been amended on several occasions to take account of the requirements of successive Community Treaties (the most recent amendment will allow for the implementation of parts of the Amsterdam Treaty).

Directly effective regulations and decisions are also given statutory authority in the UK under Section 2(1) of the ECA, without the need for further enactment, as was the whole body of EC law already in force at the time Britain joined the Community in 1973. For EC legislation which is not directly applicable, directives, for example, Section 2(2) of the 1972 Act provides the means to implement them in the UK, either by statute or more commonly by Order in Council. Schedule 2 of the Act sets out some exceptions, such as provisions which would increase taxation.

EC Law takes precedence over UK law and if the latter is found by the European Court of Justice to be incompatible with the former, then the Government is obliged to remedy the situation by amending or repealing the existing UK law. The supremacy over national law of EC law and the regard which must be had to other international obligations such as adherence to the Council of Europe's European Convention on Human Rights means that any laws passed by the Scottish Parliament would have to take account of the UK's international obligations so as not to contradict them.

iii. *The Scotland Bill and EC Law*

Clause 28 of the Bill concerns the legislative competence of the Scottish Parliament. Any conflict between Scottish and EC law could mean that the UK would be in breach of Treaty obligations and

¹⁶⁶ *Costa v ENEL* [1964] ECR 585.

possibly subject to a ruling of the European Court of Justice. Clause 28 stipulates *inter alia* that Acts of the Scottish Parliament would be outside the legislative competence of the Parliament if they were incompatible with EC law or the requirements of the European Convention on Human Rights.

Clause 53 of the Bill stipulates that although there would be a transfer of powers to Scottish Ministers with regard to subordinate legislation under clause 49 of the Bill (general transfer of functions) a Minister of the Crown would continue to be responsible where necessary for implementing EC obligations under the ECA for the purposes of Section 2(2) of the 1972 Act (which designates a Minister of the Crown or government department to regulate on EC law). Although the Parliament would have the power to implement EC legislation in certain areas, under clause 54 of the Bill, the Secretary of State would have the power to *direct* that a proposed action not be taken if it were deemed incompatible with EC or European Convention law; or to direct that an action should be taken in order to fulfil European or international obligations. The UK Secretary of State would therefore retain the overall responsibility to direct and ensure proper implementation of EC law in Scotland.

Schedule 5 (6)(1) sets out Reserved Matters and provides for the role of the Scottish Executive to play a role alongside the UK Government in negotiations with the EU. The Scottish Parliament would not have legal personality in the EU and ultimately Westminster would be responsible for the UK's EU and other international obligations. Ministers of the Scottish Parliament could not represent the whole of the UK in international decision-making or other international bodies. Although foreign affairs, the EU and international relations are reserved matters, under 5(6)(2), observing and implementing international obligations such as EC and Convention law in devolved areas are not. Scottish Ministers would also be able to assist Ministers of the Crown in matters relating to those matters reserved under 5(6)(1). Thus, the Scottish Parliament could be involved in the EC legislative process in so far as a Minister of the Scottish Parliament could assist a Minister of the Crown in international forums such as the EU Council of Ministers.

Schedule 6 (1)(e) provides for courts to hear proceedings dealing with “devolution issues”, which would include the question of whether actions of the Scottish Executive were incompatible with EC law or European Convention rights.

iv. The White Paper

The following extract from The Scottish Office guide to the Scotland Bill sets out briefly the proposals in the Government's White Paper on Scottish devolution, *Scotland's Parliament*¹⁶⁷ and the provisions of the Bill:

¹⁶⁷ Cm 3658.

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5	Relations with the European Union	
5.1-3	Relations with the EU reserved to the UK Government	Paragraph 6 of Part I of <i>Schedule 5</i> provides for the reservation of international relations, which includes relations with the EU.
5.4-6	Policy formation and negotiation	Paragraph 6 of Part I of <i>Schedule 5</i> provides for the Scottish Ministers to assist Ministers of the Crown in EU relations.
5.7	Scrutiny of EU legislation	No legislative provision is required to permit the Scottish Parliament to scrutinise EU legislative proposals and for the UK Government to take the views of the Scottish Parliament into account.
5.8	Implementation of EU legislation	<p>Paragraph 6(2)(a) of Part I of <i>Schedule 5</i> provides that the Scottish Parliament and Executive will be responsible for observing and implementing Community obligations in Scotland in relation to matters which are not reserved matters.</p> <p><i>Clause 28</i> provides that an Act of the Scottish Parliament will be ultra vires if it conflicts with Community law.</p> <p><i>Clause 49</i> has the effect of transferring to Scottish Ministers the powers and responsibilities of Ministers of the Crown to make regulations or otherwise act to give effect to Community obligations for Scotland in relation to devolved matters. <i>Clause 53</i> provides for UK Ministers to continue to have the competence to undertake measures under section 2(2) of the European Communities Act 1972. It also provides that a Scottish Minister has no power to make subordinate legislation or to act in a way that is incompatible with Community law.</p> <p><i>Schedule 6</i> provides for courts to hear proceedings dealing with “devolution issues”, including whether actions of the Scottish Executive are incompatible with Community law.</p>
5.9-12	Links with European institutions	No legislative provision is required to give effect to these links, which might include the setting up of a representative office in Brussels.

v. *Criticisms and Comments on the Bill*

There has been some criticism that proposals and pledges in the White Paper have fallen short of expectations. The White Paper pledged the Government's commitment to "the closest possible working relations and involvement" with the Scottish Executive on EU matters. However, there is no provision in the Bill either for the establishment of direct links between Scotland and the EU, such as the setting up of a representative office in Brussels, for the scrutiny of EU legislative proposals by the Scottish Parliament or for the UK Government to take the views of the Scottish Parliament into account. The White Paper stated:

The Scottish Parliament will be able to scrutinise EU legislative proposals to ensure that Scotland's interests are properly reflected. The UK Government will take into account the views of the Scottish Parliament and the UK Parliament may also wish to do so in its scrutiny processes.

It leaves the arrangement of the scrutiny procedure to the Scottish Parliament and Executive. Any office the Scottish Parliament set up in Brussels would complement the UK Representation in Brussels (UKREP) and not substitute for or replace it.

Other criticisms have concerned the implementation of EC law. In an article entitled "London 'will hamstring' Home Rule Parliament", the *Herald*¹⁶⁸ quoted the director of the Scottish Council Foundation, Graham Leicester, as stating that the new parliament would not be the radical body many people expected, and that:

... the UK's membership of the EU will mean that the Home Rule parliament will not be able to go its own way on areas it controls, such as transport, training, and the environment, unless those policies conform to Brussels norms.

This comments acknowledges the now well-established acceptance by the Member States of the supremacy of EC law over national and sub-national law.

Alex Salmond, the leader of the Scottish Nationalist Party, pointed out shortly before publication of the Bill that:

There will be nothing in the bill to define the parliament's ability to represent Scotland in Europe – even though there was a substantial section dealing with this in the white paper.¹⁶⁹

The absence of specific provisions would not affect the Scottish Executive's right to set up its own office in Brussels (as many regional governments in Europe have done) to liaise with

¹⁶⁸ 30 December 1997.

¹⁶⁹ *The Scotsman*, 18.12.97.

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UKREP in the formulation and presentation of UK policy in the EU institutions. The devolution minister Henry McLeish has also proposed the setting up of a European Affairs committee in the new Parliament to scrutinise EU proposals. It would also have the power to invite witnesses from Scotland, the UK and Europe. At a conference of local authority, business and European representatives in Edinburgh on 5 December 1997, Mr McLeish explained that the Scottish Parliament, under the scrutiny guidance of the proposed committee, could implement EU laws separately from the UK Government, “allowing the distinctive Scottish conditions and the requirements of Scotland’s separate legal system to be met”.¹⁷⁰

K. Scottish Law Officers: the Lord Advocate, the Solicitor General for Scotland and the Advocate General for Scotland

The Lord Advocate is the senior law officer of the Crown in Scotland and a minister of the Crown. He has charge of and is generally responsible to Parliament for the operation of three government departments, the Crown Office, the Lord Advocates’ Department and certain aspects of the work of the Scottish Courts’ Administration. His office has no exact English counterpart, although his responsibilities are in some ways analogous to those of the Attorney General combined with certain functions carried out by the Lord Chancellor in England and Wales.

The Lord Advocate is responsible for the system of prosecution in Scotland. He is assisted in this task by the second Scottish law officer, the Solicitor General. Both law officers are practising advocates, as are the Advocates Depute to whom they delegate most of their work. Collectively the law officers and Advocates Depute are known as “Crown Counsel”. The central organisation in which they work, alongside a small staff of civil servants headed by the Crown Agent, is known as the Crown Office.

The Lord Advocate is also the Government’s senior legal adviser in Scotland. The areas over which he has responsibility in this capacity include the scrutiny of proposed legislation, the drafting of legislation applicable to Scotland and the provision of legal advice and assistance to government departments involved in civil litigation. He is also the person who sues and is sued on behalf of the Crown and all Government departments in Scotland. He is assisted in these tasks by the Lord Advocate’s Department, for which he is responsible.

Ministerial responsibility for certain aspects of the law of Scotland concerned with the administration of justice, including the jurisdiction and procedure of Scottish courts in civil proceedings, the law of evidence and the law relating to the prescription and limitation of actions, the law relating to arbitration and the law relating to fatal accident inquiries also rests with the Lord Advocate. In exercising these functions he is assisted by the Scottish Courts Administration, which is answerable to him in relation to these matters, but answerable to the Secretary of State in respect of a number of other matters, such as the organisation and staffing of the courts. The Lord Advocate is also responsible for the Scottish Law Commission, as a result of which means he is closely involved with law reform generally.

¹⁷⁰ *The Scotsman*, 6.12.97.

The Stair Memorial Encyclopaedia on the *Laws of Scotland* notes¹⁷¹ that as a Scottish legal minister, the Lord Advocate is also concerned with certain other functions of a legal/ministerial nature, in relation to which the nature of his responsibility is somewhat blurred. These functions relate primarily to the reform of the private law, the administration of the courts and various judicial and quasi-judicial tribunals, and relations generally with the legal profession in Scotland, including the operation of the Legal Aid Scheme. In England and Wales ministerial responsibility for these areas rests with a single minister, the Lord Chancellor, who has a department consisting of lawyers and administrators to assist him. Stair notes that:

In Scotland, however, ministerial responsibility for this wide range of functions is spread, somewhat illogically, between the Secretary of State for Scotland and the Lord Advocate. In some areas, the role of the Lord Advocate is largely that of a legal adviser to the Secretary of State, while in others he has a very real *de facto* responsibility, the *de jure* responsibility resting with the Secretary of State. As the Secretary of State is unlikely to have been a practising lawyer, he can have no personal professional experience of or acquaintance with the working of the legal system or the personalities of the legal profession. The situation is further confused by the fact that certain legal functions lie with the Lord President of the Court of Session who, as head of the judiciary, is of course well acquainted with the legal system, but who is not a minister answerable to Parliament.

The Stair Memorial Encyclopaedia on *The Laws of Scotland* notes that it is not easy to delineate precisely the extent of the Lord Advocate's part in this triumvirate, although the authors go on to attempt to do so in some detail¹⁷².

The *Scotland Bill* seeks to provide for the greater part of the criminal justice system in Scotland to be devolved, including the courts, the criminal law including evidence and procedure as well as the police and prisons. Exceptions to this include will drugs, firearms and road traffic law, where Scotland shares a common approach in statute law with the rest of the UK. It is intended that the Lord Advocate and the Solicitor General should be the Law Officers of the Scottish Executive. They will cease to be members of the UK Government and a new law officer to the UK Government, to be called the Advocate General for Scotland, will be appointed to advise the UK Government on Scots law. A Scottish Office news release of December 12th 1997 reporting a speech made by the Solicitor General for Scotland, Colin Boyd QC, to a conference on "Business, Governance and the Scottish Parliament", summarised the rationale behind these changes in the Lord Advocate's role as follows¹⁷³:

The Solicitor General went on to outline the history and the future role of the Law Officers in Scotland. He said, "Since the responsibilities of the Lord Advocate for the investigation and prosecution of crime will be devolved and since the Scottish Executive will also require the advice of Law Officers on legal matters, it is appropriate that the Law Officers of the Scottish Executive should be the Lord Advocate and the Solicitor General". They would be on hand to advise the executive on the operation of the Scotland Act itself and the issues of European Community Law and the European Convention on Human Rights.

¹⁷¹ 1987 Vol. 5 para. 538

¹⁷² *ibid.* paras. 538-542

¹⁷³ Scottish Office News Release 12.12.1997

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At the same time it was recognised that the UK Government would continue to need advice on Scots law. “Since the Lord Advocate and the Solicitor general will devolve they will cease to be members of the UK Government. It was, therefore necessary for the Government to give careful consideration to how that advice might best be provided and the consequences for the UK Government of the devolution of the Lord Advocate and Solicitor General”. “That advice will be provided by the new Law Officer to the UK to be called the Advocate General for Scotland. It is intended that the holder of that office should have Ministerial status and should be Scots lawyer of considerable eminence and authority”.

A useful discussion of the implications of devolution for Scottish legal institutions, including the Lord Advocate, can be found in Gordon Jackson QC’s chapter on “Devolution and the Scottish Legal Institutions in T. St J.N. Bates’ book *Devolution to Scotland: The Legal Aspects*.¹⁷⁴

¹⁷⁴ 1997 p.51-62

Appendix 1 Election and referendum statistics

1. Additional Member System

The electoral system proposed for the Scottish Parliament involves 73 members elected on a first-past-the-post basis (one from each of the current Westminster parliamentary constituencies plus an additional seat created by splitting Orkney and Shetland into two seats) and an additional 56 members elected from local party lists — seven from each of the eight regions¹⁷⁵. Electors will have two votes, one for the first-past-the-post member and a separate vote for the additional member. The votes cast for each party in the additional member section will be counted within the eight regions and the seven seats from each will be allocated so that the total representation from each area — including members returned for individual constituencies — corresponds as closely as possible to the share of the votes cast for each party in the additional member section of the ballot (see Part V B The Electoral System, for details.)

Table 1 shows how the 129 seats in the Scottish Parliament would be allocated on the basis of voting in the general election on 1 May 1997 by assuming that people vote in the additional member section of the ballot exactly as they did for their first-past-the-post members¹⁷⁶. Of the 56 seats allocated on the additional basis, 22 each would be won by the Conservatives and the SNP, 7 by Labour and 5 by the Liberal Democrats. Looking at total seats won, Labour would still be somewhat over-represented (49% of the seats with 46% of the vote) and the other parties under-represented.

Of course, this analysis is fairly crude because people may vote differently in Scottish Parliament elections from general elections. In addition, electors can split their two votes. ‘Ticket-splitting’ can occur for a number of reasons (preventing single-party dominance, dislike of local candidates), but will perhaps be most common where voters think that their party of first preference is unlikely to win a first-past-the-post seat but more likely to win an additional member seat from the list section. In this case, voters may vote tactically in the first-past-the-post section but for their party of choice in the additional member section.

The likelihood of such ticket-splitting is borne out in a recent analysis by Democratic Audit which polled 1,152 people in Scotland in the few days after the general election and asked them how they would cast their votes in a Scottish Parliament election¹⁷⁷. The survey found that there would be little change in the allocation of first-past-the-post seats compared with the general

¹⁷⁵ The regions are the revised European Parliament constituencies (to be replaced by lists for European Parliament elections) which each contain between seven and ten Westminster seats.

¹⁷⁶ In practice, this is extremely unlikely to be the case; in addition, the more representative electoral system itself may encourage people to vote for smaller — and new — parties, thereby affecting the index of proportionality.

¹⁷⁷ Source: Dunleavy et. al. *Devolution Votes: PR Elections in Scotland and Wales* (Democratic Audit Paper No. 12, September 1997), Table 5

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election, but that because of ticket-splitting, the distribution of additional member seats would be very different. The survey showed the SNP winning 30 additional member seats rather than 22 and the Liberal Democrats doubling to 10 seats from 5. On the losing side were the Conservatives (down more than half to 10 seats from 22) and Labour (winning 6 seats rather than 7).

Proportionality

The ‘deviation from proportionality’ is a measure of how closely the seats allocated to each party correspond to the votes cast for it¹⁷⁸ — in an election where each party received exactly the same share of seats as votes, this would be zero. As such, it can only be calculated on the basis of an actual election result, and the score will vary within any given system from election to election. The deviation from proportionality for the current first-past-the-post system was 21% in Great Britain as a whole based on the recent general election¹⁷⁹.

The estimate for the Scottish Parliament is 2.8%, assuming that votes cast in both the first-past-the-post and additional member sections were as in the 1997 general election. The same system (AMS) is proposed for the Welsh Assembly. However, there are relatively fewer additional than first-past-the-post members (20 and 40 respectively), and four, rather than seven, additional members in each electoral region. For both these reasons, the Assembly would be less representative, with a deviation from proportionality score of 9.0%¹⁸⁰.

2. Referendums: 1979 and 1997

Tables 2 and 3 show, respectively, the results of the referendums in Scotland in 1979 and 1997 in each electoral area. Table 4 shows the change in voting for and against devolution between the two referendums. A full explanation of the referendums results can be found in Research Paper 97/113 *Results of Devolution Referendums*.

The number of people voting ‘yes’ increased from 51.6% in 1979 to 74.3% in 1997 for the Scottish Parliament and 63.5% for tax-varying powers. The proportion of the electorate voting ‘yes’ rose from 32.5% in 1979 to 44.7% for the Scottish Parliament and 38.1% for tax-varying

¹⁷⁸ It is calculated as the sum of the difference between the share of the seats won by each party and its share of the votes cast (divided by 2).

¹⁷⁹ Source: Dunleavy et al *Making Votes Count* (Democratic Audit Paper No. 11, September 1997), p5

¹⁸⁰ Again, assuming that votes cast in both the first-past-the-post and additional member sections were as in the 1997 general election.

powers. Thus if there had been a 40% threshold in 1997, the Scottish Parliament would have been approved but without tax-varying powers¹⁸¹.

The turnout in Scotland in 1997 was 60.2%¹⁸², below the turnout in 1979 of 63.0%¹⁸³. The turnout in 1997 was also well below the turnout in the May general election of 71.3%¹⁸⁴. More people voted on the Scottish Parliament question than the tax-varying powers question, although this may be partly because of confusion amongst voters which led to larger number of spoilt ballots on the tax-varying powers question¹⁸⁵.

Local results

In 1979, six of the twelve regions voted 'for' and six voted 'against'. In 1997, all unitary authority areas voted in favour of a Parliament — ranging from 57% in Orkney to 85% in West Dunbartonshire — and all but two areas (Orkney and Dumfries and Galloway) voted for tax-varying powers.

In 1979, none of the regional council areas met the 40% threshold for the proportion of the electorate voting 'yes'. In 1997, more than 40% of the electorate voted for the Scottish Parliament in seven of the same twelve areas. The increase in the proportion of voters voting 'yes' between 1979 and 1997 ranged from 18 %-points in Tayside to 35 %-points in Shetland.

There was virtually no correlation between turnout and the proportion of people voting 'yes' in either 1979 or 1997. However, there was a strong connection between how areas voted in 1979 and 1997: 80% of the variation in the proportion voting 'yes' in 1997 can be explained by how areas voted in 1979. There was also an extremely close correlation in 1997 between how areas voted for the Parliament and how they voted on tax-varying powers: 97% of the variation in voting for tax-varying powers can be explained by how different areas voted for Parliament.

¹⁸¹ even adjusting the electorate for deaths, dual registration and convicted prisoners in prison would not have increased the figure to 40%.

¹⁸² higher of number voting on Parliament or tax-varying powers question as a percentage of the electorate. Only Fife reported more people voting on the tax-varying powers question.

¹⁸³ for proper comparison, 1979 figure *unadjusted* for purposes of calculating whether 40% of those eligible had voted in favour (the threshold set in the Scotland Act); in Scotland as a whole, the electorate was reduced by 40,200 for deaths, students and nurses registered at more than one address and convicted prisoners in prison.

¹⁸⁴ Source: Rallings and Thrasher *Britain Votes 6*, Table 1

¹⁸⁵ there were 7,000 more spoilt ballots on the tax-varying powers question compared to 6,300 fewer votes (see Table 3).

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3. Westminster representation

Table 5 shows representation in the House of Commons by constituent country in the UK. The number of electors per seat (the so-called 'quota') is 17% lower in both Scotland and Wales than in the UK as a whole.

If the UK quota were to be applied to each of the countries in the UK, with no special consideration given to geographical considerations, the number of seats in England would increase by 20, with 13 fewer seats in Scotland and 7 fewer in Wales (no change in Northern Ireland).

If the England quota were applied to the other countries in the UK, the overall size of the House would fall by 24 seats to 635 (15 fewer seats in Scotland, 8 in Wales and 1 in Northern Ireland).

Table 1

Scottish Parliament under AMS assuming 1997 general election result (a)

	Con	Lab	LDem	SNP	Other	Total
<i>Votes cast:</i>						
Central Scotland	41,583	236,667	20,624	93,291	6,527	398,692
Glasgow	27,366	193,427	23,352	61,633	14,677	320,455
Highlands and Islands	37,206	61,974	63,362	61,189	5,421	229,152
Lothians	73,363	175,354	56,957	70,353	5,719	381,746
Mid Scotland and Fife	77,495	146,988	46,436	92,901	3,660	367,480
North East Scotland	82,079	113,021	69,164	95,503	6,362	366,129
South of Scotland	86,769	166,354	51,312	73,110	6,147	383,692
West of Scotland	67,198	189,565	34,155	73,570	4,914	369,402
Scotland	493,059	1,283,350	365,362	621,550	53,427	2,816,748
<i>Seats won on first-past-the-post basis:</i>						
Central Scotland	0	10	0	0	0	10
Glasgow	0	10	0	0	0	10
Highlands and Islands (b)	0	2	5	1	0	8
Lothians	0	8	1	0	0	9
Mid Scotland and Fife	0	6	1	2	0	9
North East Scotland	0	5	2	2	0	9
South of Scotland	0	6	2	1	0	9
West of Scotland	0	9	0	0	0	9
Scotland	0	56	11	6	0	73
<i>Seats won on additional basis:</i>						
Central Scotland	2	1	0	4	0	7
Glasgow	1	2	1	3	0	7
Highlands and Islands	2	2	0	3	0	7
Lothians	3	0	1	3	0	7
Mid Scotland and Fife	3	1	1	2	0	7
North East Scotland	4	0	1	2	0	7
South of Scotland	4	1	0	2	0	7
West of Scotland	3	0	1	3	0	7
Scotland	22	7	5	22	0	56
<i>Total seats won:</i>						
Central Scotland	2	11	0	4	0	17
Glasgow	1	12	1	3	0	17
Highlands and Islands (b)	2	4	5	4	0	15
Lothians	3	8	2	3	0	16
Mid Scotland and Fife	3	7	2	4	0	16
North East Scotland	4	5	3	4	0	16
South of Scotland	4	7	2	3	0	16
West of Scotland	3	9	1	3	0	16
Scotland	22	63	16	28	0	129
Share of seats	17.1%	48.8%	12.4%	21.7%	0.0%	100.0%
Share of votes	17.5%	45.6%	13.0%	22.1%	1.9%	100.0%
Seats if exactly proportionate	23	59	17	28	2 (d)	129
<i>Change from current system</i>	<i>1</i>	<i>-4</i>	<i>1</i>	<i>0</i>	<i>2</i>	<i>0</i>
Deviation from Proportionality (c):	2.8%					

Notes: (a) assumes votes cast in both first-past-the-post and additional member sections were as in 1997 general election (no other constituency-level data available on which to base estimates); uses d'Hondt system.
 (b) assumes both Orkney and Shetland won by LDem in first-past-the-post section.
 (c) calculated as the sum of the difference between each party's % of seats and % of votes (divided by 2); in an electoral system where each party received exactly the same share of seats as votes, this would be zero.
 (d) the Referendum Party would have won 1 seat, but many small parties would not be entitled to any seats, even in a strictly proportionate system (the quota at the last General Election would have been 21,800 -- votes cast divided by 129 seats plus 1).

Sources: House of Commons Library Elections database & Rallings and Thrasher *Britain Votes 6*
 Boundary Commission for Scotland *Second Supplementary Report of the European Parliamentary Constituencies* (Cm 3289)

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Table 2

Scottish Devolution Referendum, 1 March 1979

(a) alphabetical list

Do you want the provisions of the Scotland Act 1978 to be put into effect?

	Turnout (a)		Yes			No		
	%	number		%	%		%	%
			vote	elect.		vote	elect.	
Borders	66.4	51,526	20,746	40.3	26.7	30,780	59.7	39.7
Central	65.9	130,401	71,296	54.7	36.0	59,105	45.3	29.9
Dumfries and Galloway	64.1	67,401	27,162	40.3	25.8	40,239	59.7	38.2
Fife	65.3	160,688	86,252	53.7	35.0	74,436	46.3	30.2
Grampian	57.2	196,429	94,944	48.3	27.6	101,485	51.7	29.5
Highland	64.7	88,247	44,973	51.0	33.0	43,274	49.0	31.7
Lothian	65.9	373,642	187,221	50.1	33.0	186,421	49.9	32.9
Orkney	54.1	7,543	2,104	27.9	15.1	5,439	72.1	39.0
Shetland	50.3	7,486	2,020	27.0	13.6	5,466	73.0	36.7
Strathclyde	62.5	1,105,118	596,519	54.0	33.7	508,599	46.0	28.7
Tayside	63.0	184,807	91,482	49.5	31.2	93,325	50.5	31.8
Western Isles	49.9	11,151	6,218	55.8	27.8	4,933	44.2	22.1
Scotland	63.0	2,384,439	1,230,937	51.6	32.5	1,153,502	48.4	30.5
<i>adjusted (b)</i>	<i>63.6</i>				<i>32.9</i>			<i>30.8</i>

(b) ranked by % of voters voting yes

Do you want the provisions of the Scotland Act 1978 to be put into effect?

	Turnout (a)		Yes			No		
	%	number		%	%		%	%
			vote	elect.		vote	elect.	
Western Isles	49.9	11,151	6,218	55.8	27.8	4,933	44.2	22.1
Central	65.9	130,401	71,296	54.7	36.0	59,105	45.3	29.9
Strathclyde	62.5	1,105,118	596,519	54.0	33.7	508,599	46.0	28.7
Fife	65.3	160,688	86,252	53.7	35.0	74,436	46.3	30.2
Highland	64.7	88,247	44,973	51.0	33.0	43,274	49.0	31.7
Lothian	65.9	373,642	187,221	50.1	33.0	186,421	49.9	32.9
Tayside	63.0	184,807	91,482	49.5	31.2	93,325	50.5	31.8
Grampian	57.2	196,429	94,944	48.3	27.6	101,485	51.7	29.5
Dumfries and Galloway	64.1	67,401	27,162	40.3	25.8	40,239	59.7	38.2
Borders	66.4	51,526	20,746	40.3	26.7	30,780	59.7	39.7
Orkney	54.1	7,543	2,104	27.9	15.1	5,439	72.1	39.0
Shetland	50.3	7,486	2,020	27.0	13.6	5,466	73.0	36.7
Scotland	63.0	2,384,439	1,230,937	51.6	32.5	1,153,502	48.4	30.5
<i>adjusted (b)</i>	<i>63.6</i>				<i>32.9</i>			<i>30.8</i>

(a) excludes spoilt ballots (3,133 in Scotland as a whole).

(b) electorate reduced by 40,200 when calculating whether 40% of those eligible had voted in favour; reductions were for deaths, students and nurses registered at more than one address and convicted prisoners in prison.

Source: FWS Craig *British Electoral Facts, 1832-1987*

Table 3
Scottish Parliament Referendum, 11 September 1997

(a) alphabetical list

	Turnout (a)		Parliament		Tax-varying powers						
	%	number	Yes vote	% elect.	Yes vote	% elect.	No vote	% elect.			
City of Aberdeen	53.4	90,615	65,035	71.8	38.3	54,320	60.3	32.0	35,709	39.7	21.0
Aberdeenshire	56.7	96,499	61,621	63.9	36.2	34,878	36.1	20.5	45,929	47.7	27.0
Angus	60.0	51,921	33,571	64.7	38.8	18,350	35.3	21.2	24,089	46.6	27.8
Argyll and Bute	64.6	45,248	30,452	67.3	43.5	14,796	32.7	21.1	19,429	43.0	27.8
East Ayrshire	64.5	60,557	49,131	81.1	52.3	11,426	18.9	12.2	17,824	29.5	19.0
North Ayrshire	63.1	67,235	51,304	76.3	48.2	15,931	23.7	15.0	43,990	65.7	41.3
South Ayrshire	66.4	60,070	40,161	66.9	44.4	19,909	33.1	22.0	33,679	56.2	37.2
Borders	64.4	53,915	33,855	62.8	40.5	20,060	37.2	24.0	27,284	50.7	32.6
Clackmannan	65.8	23,496	18,790	80.0	52.6	4,706	20.0	13.2	16,112	68.7	45.1
Dumfries and Galloway	63.1	73,482	44,619	60.7	38.3	28,863	39.3	24.8	35,737	48.8	30.7
East Dunbartonshire	72.3	58,642	40,917	69.8	50.4	17,725	30.2	21.8	34,576	59.1	42.6
West Dunbartonshire	63.4	46,109	39,051	84.7	53.7	7,058	15.3	9.7	34,408	74.7	47.3
City of Dundee	55.3	64,805	49,252	76.0	42.1	15,553	24.0	13.3	42,304	65.5	36.1
City of Edinburgh	59.8	216,732	155,900	71.9	43.0	60,832	28.1	16.8	133,843	62.0	36.9
Falkirk	63.4	69,595	55,642	80.0	50.7	13,953	20.0	12.7	48,064	69.2	43.8
Fife	60.9	167,008	125,668	76.1	45.8	39,517	23.9	14.4	108,021	64.7	39.4
City of Glasgow	51.2	244,375	204,269	83.6	42.8	40,106	16.4	8.4	182,589	75.0	38.3
Highland	60.3	99,982	72,551	72.6	43.8	27,431	27.4	16.5	61,359	62.1	37.0
Inverclyde	60.0	40,625	31,680	78.0	46.8	8,945	22.0	13.2	27,194	67.2	40.2
North Lanarkshire	60.4	149,073	123,063	82.6	49.9	26,010	17.4	10.5	107,288	72.2	43.5
South Lanarkshire	62.8	147,670	114,908	77.8	48.9	32,762	22.2	13.9	99,587	67.6	42.4
East Lothian	64.9	45,190	33,525	74.2	48.2	11,665	25.8	16.8	28,152	62.7	40.4
West Lothian	62.3	71,537	56,923	79.6	49.6	14,614	20.4	12.7	47,990	67.3	41.8
Midlothian	64.9	39,660	31,681	79.9	51.8	7,979	20.1	13.1	26,776	67.7	43.8
Moray	57.5	36,944	24,822	67.2	38.6	12,122	32.8	18.9	19,326	52.7	30.1
Orkney Islands	53.2	8,290	4,749	57.3	30.5	3,541	42.7	22.7	3,917	47.4	25.1
Perthshire and Kinross	62.7	65,342	40,344	61.7	38.7	24,998	38.3	24.0	33,398	51.3	32.1
East Renfrewshire	68.0	45,826	28,253	61.7	41.9	17,573	38.3	26.1	23,880	51.6	35.0
Renfrewshire	62.4	86,924	68,711	79.0	49.3	18,213	21.0	13.1	55,075	63.6	39.5
Shetland Islands	51.3	8,705	5,430	62.4	32.0	3,275	37.6	19.3	4,478	51.6	26.4
Stirling	65.5	42,630	29,190	68.5	44.9	13,440	31.5	20.7	25,044	58.9	38.5
Western Isles	55.3	12,566	9,977	79.4	43.9	2,589	20.6	11.4	8,557	68.4	37.6
Scotland	60.2	2,391,268	1,775,045	74.3	44.7	614,400	25.7	15.5	1,512,889	63.5	38.1
									870,263	36.5	21.9

(a) higher of number voting on Parliament or tax-varying question (only Fife had more people voting on tax-varying question) as a percentage of the electorate; excludes spoilt ballots (in Scotland as a whole, 11,986 for Parliament question and 19,013 for tax-varying powers).

Source: Scottish Office

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Table 3
Scottish Parliament Referendum, 11 September 1997
(b) ranked by % voters voting yes for Parliament

	Turnout (a)		Parliament				Tax-varying powers							
	%	number	Yes		No		Yes		No					
			vote	% elect.	vote	% elect.	vote	% elect.	vote	% elect.				
West Dunbartonshire	63.4	46,109	39,051	84.7	53.7	7,058	15.3	9.7	34,408	74.7	47.3	11,628	25.3	16.0
City of Glasgow	51.2	244,375	204,269	83.6	42.8	40,106	16.4	8.4	182,589	75.0	38.3	60,842	25.0	12.8
North Lanarkshire	60.4	149,073	123,063	82.6	49.9	26,010	17.4	10.5	107,288	72.2	43.5	41,372	27.8	16.8
East Ayrshire	64.5	60,557	49,131	81.1	52.3	11,426	18.9	12.2	42,559	70.5	45.3	17,824	29.5	19.0
Clackmannan	65.8	23,496	18,790	80.0	52.6	4,706	20.0	13.2	16,112	68.7	45.1	7,355	31.3	20.6
Falkirk	63.4	69,595	55,642	80.0	50.7	13,953	20.0	12.7	48,064	69.2	43.8	21,403	30.8	19.5
Midlothian	64.9	39,660	31,681	79.9	51.8	7,979	20.1	13.1	26,776	67.7	43.8	12,762	32.3	20.9
West Lothian	62.3	71,537	56,923	79.6	49.6	14,614	20.4	12.7	47,990	67.3	41.8	23,354	32.7	20.3
Western Isles	55.3	12,566	9,977	79.4	43.9	2,589	20.6	11.4	8,557	68.4	37.6	3,947	31.6	17.4
Renfrewshire	62.4	86,924	68,711	79.0	49.3	18,213	21.0	13.1	55,075	63.6	39.5	31,537	36.4	22.6
Inverclyde	60.0	40,625	31,680	78.0	46.8	8,945	22.0	13.2	27,194	67.2	40.2	13,277	32.8	19.6
South Lanarkshire	62.8	147,670	114,908	77.8	48.9	32,762	22.2	13.9	99,587	67.6	42.4	47,708	32.4	20.3
North Ayrshire	63.1	67,235	51,304	76.3	48.2	15,931	23.7	15.0	43,990	65.7	41.3	22,991	34.3	21.6
Fife	60.9	167,008	125,668	76.1	45.8	39,517	23.9	14.4	108,021	64.7	39.4	58,987	35.3	21.5
City of Dundee	55.3	64,805	49,252	76.0	42.1	15,553	24.0	13.3	42,304	65.5	36.1	22,280	34.5	19.0
East Lothian	64.9	45,190	33,525	74.2	48.2	11,665	25.8	16.8	28,152	62.7	40.4	16,765	37.3	24.1
Highland	60.3	99,982	72,551	72.6	43.8	27,431	27.4	16.5	61,359	62.1	37.0	37,525	37.9	22.6
City of Edinburgh	59.8	216,732	155,900	71.9	43.0	60,832	28.1	16.8	133,843	62.0	36.9	82,188	38.0	22.7
City of Aberdeen	53.4	90,615	65,035	71.8	38.3	25,580	28.2	15.1	54,320	60.3	32.0	35,709	39.7	21.0
East Dunbartonshire	72.3	58,642	40,917	69.8	50.4	17,725	30.2	21.8	34,576	59.1	42.6	23,914	40.9	29.5
Stirling	65.5	42,630	29,190	68.5	44.9	13,440	31.5	20.7	25,044	58.9	38.5	17,487	41.1	26.9
Argyll and Bute	64.6	45,248	30,452	67.3	43.5	14,796	32.7	21.1	25,746	57.0	36.8	19,429	43.0	27.8
Moray	57.5	36,944	24,822	67.2	38.6	12,122	32.8	18.9	19,326	52.7	30.1	17,344	47.3	27.0
South Ayrshire	66.4	60,070	40,161	66.9	44.4	19,909	33.1	22.0	33,679	56.2	37.2	26,217	43.8	29.0
Angus	60.0	51,921	33,571	64.7	38.8	18,350	35.3	21.2	27,641	53.4	31.9	24,089	46.6	27.8
Aberdeenshire	56.7	96,499	61,621	63.9	36.2	34,878	36.1	20.5	50,295	52.3	29.5	45,929	47.7	27.0
Borders	64.4	53,915	33,855	62.8	40.5	20,060	37.2	24.0	27,284	50.7	32.6	26,497	49.3	31.7
Shetland Islands	51.3	8,705	5,430	62.4	32.0	3,275	37.6	19.3	4,478	51.6	26.4	4,198	48.4	24.8
Perthshire and Kinross	62.7	65,342	40,344	61.7	38.7	24,998	38.3	24.0	33,398	51.3	32.1	31,709	48.7	30.4
East Renfrewshire	68.0	45,826	28,253	61.7	41.9	17,573	38.3	26.1	23,580	51.6	35.0	22,153	48.4	32.9
Dumfries and Galloway	63.1	73,482	44,619	60.7	38.3	28,863	39.3	24.8	35,737	48.8	30.7	37,499	51.2	32.2
Orkney Islands	53.2	8,290	4,749	57.3	30.5	3,541	42.7	22.7	3,917	47.4	25.1	4,344	52.6	27.9
Scotland	60.2	2,391,268	1,775,045	74.3	44.7	614,400	25.7	15.5	1,512,889	63.5	38.1	870,263	36.5	21.9

(a) higher of number voting on Parliament or tax-varying question (only Fife had more people voting on tax-varying question) as a percentage of the electorate; excludes spoilt ballots (in Scotland as a whole, 11,986 for Parliament question and 19,013 for tax-varying powers).

Source: Scottish Office

Table 4
Change in voting for/against devolution in Scotland, 1979 and 1997(a)
 alphabetical list

	Yes			No		
	% of Vote 79	change	% of Electorate 79	% of Vote 97	change	% of Electorate 79
<i>1979 areas</i>						
Borders	40.3	22.5	26.7	59.7	-22.5	39.7
Central	54.7	21.7	36.0	45.3	-21.7	29.9
Dumfries and Galloway	40.3	20.4	25.8	59.7	-20.4	38.2
Fife	53.7	22.4	35.0	46.3	-22.4	30.2
Grampian	48.3	19.3	27.6	51.7	-19.3	29.5
Highland	51.0	21.6	33.0	49.0	-21.6	31.7
Lothian	50.1	24.4	33.0	49.9	-24.4	32.9
Orkney	27.9	29.4	15.1	72.1	-29.4	39.0
Shetland	27.0	35.4	13.6	73.0	-35.4	36.7
Strathclyde	54.0	24.1	33.7	46.0	-24.1	28.7
Tayside	49.5	18.1	31.2	50.5	-18.1	31.8
Western Isles	55.8	23.6	27.8	44.2	-23.6	22.1
Scotland	51.6	22.7	32.5	48.4	-22.7	30.5
<i>adjusted (a)</i>			32.9			30.8

(a) voting on Scottish Parliament in 1997.

(b) electorate reduced by 40,200 when calculating whether 40% of those eligible had voted in favour; reductions were for deaths, students and nurses registered at more than one address and convicted prisoners in prison.

1997 results fitted to 1979 areas on the following basis:

Borders (Borders); Central (Clackmannan, Falkirk, Stirling); Dumfries & Galloway (Dumfries & Galloway); Fife (Fife); Grampian (City of Aberdeen, Aberdeenshire, Moray); Highland (Highland); Lothian (City of Edinburgh, East Lothian, West Lothian, Midlothian); Orkney (Orkney); Shetland (Shetland Islands); Strathclyde (Argyle & Bute, East Ayrshire, North Ayrshire, South Ayrshire, East Dunbartonshire, West Dunbartonshire, City of Glasgow, Inverclyde, North Lanarkshire, South Lanarkshire, East Renfrewshire, Renfrewshire); Tayside (Angus, City of Dundee, Perthshire & Kinross); Western Isles (Western Isles)

Sources: Scottish Office; FWS Craig *British Electoral Facts, 1832-1987*; Local Government etc. (Scotland) Act 1994 (Schedule 1)

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Table 5

UK Parliamentary representation by country, 1997

	<u>Actual situation</u>				<u>On UK quota (a)</u>		<u>On England quota (b)</u>	
	<u>electors</u>	<u>seats</u>	<u>electors per seat</u>	<u>difference from UK</u>	<u>seats</u>	<u>change</u>	<u>seats</u>	<u>change</u>
England	36,806,467	529	69,577	4%	549	20	529	..
Wales	2,222,533	40	55,563	-17%	33	-7	32	-8
Scotland	3,984,406	72	55,339	-17%	59	-13	57	-15
Northern Ireland	1,190,198	18	66,122	-1%	18	0	17	-1
UK	44,203,604	659	67,077	..	659	..	635	-24

Notes: (a) 67,077 electors per seat.

(b) 69,577 electors per seat.

.. - not applicable

eligibility to vote in Scottish Parliament elections will be based on the local government electoral register

Source: ONS Series EL No. 24 *Electoral Statistics, 1997*

Appendix 2 Scotland and Wales - a comparison of the devolution bills

This Appendix provides a short description of the differences between the *Government of Wales Bill* (GOWB) and the *Scotland Bill* (SB)¹⁸⁶ reflecting the fact that the National Assembly has mainly executive powers whereas the Scottish Parliament can make primary legislation.

Status of Parliament/Assembly

The National Assembly is a body corporate acting on behalf of the Crown. (GOWB Clause 1). Both are public bodies for the purposes of the *Prevention from Corruption Acts 1889-1916* (GOWB, Clause 78 SB Clause 39). The Scottish Parliament is a body corporate (SB Clause 20) and will be known as the Scottish Corporate Parliamentary Body under Schedule 3. It may be treated as a Crown body for employment or management of property.

Staff of Parliament/Assembly

The National Assembly staff are civil servants. (GOWB Clause 35). Both staff and members are classified as Crown servants for the purposes of the *Official Secrets Act 1989* (GOWB Clause 79). The staff of the Scottish Parliament will be headed by a Clerk (SB Clause 20) and the Corporate Body has authority to appoint other members of staff. Scottish Parliamentary staff will not be civil servants.

Standing Orders

The GOWB provides for a statutory Commission to draw up the standing orders for the National Assembly, and contains detailed provisions as to the contents of the standing orders to include different types of committees, openness, accountability and integrity (Part III).

The SB does not provide for a statutory Commission to draw up the standing orders and there is much less detail about their contents, apart from the regulation of members interests (SB Clause 21, Schedule 3). A list of the statutory contents of the standing orders is set out in Part IV of Research Paper 98/2.

Salaries

Salaries and allowances are payable to members of the National Assembly (GOWB Clause 16) and the Scottish Parliament and Executive (SB Clause 76).

¹⁸⁶ As introduced in the Commons, as Bills 88 and 104 respectively

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Members

Assembly Members and Members of the Scottish Parliament must take an oath of allegiance to the Crown (GOWB Clause 20, SB Clause 79). Members of the Scottish Executive are required also to take the oath (or equivalent).

Legislative powers

The National Assembly has power to make secondary legislation in the areas where executive functions have been transferred to it (GOWB Clause 22, 43). It may also reform certain Welsh public bodies by transferring functions by order (GOWB Clause 28, 29).

The Scottish Parliament has power to make primary and subordinate legislation in any area not reserved to Westminster, or otherwise outside its powers (SB Clauses 27-29,50 and Schedule 5).

Executive Powers

The National Assembly is to gain transferred executive functions under an Order in Council in areas set out in Schedule 2 of GOWB. There is no separate Welsh executive as such. Instead the Assembly will elect an Assembly First Secretary and establish committees. The leaders of the Committees (Secretaries) and the First Secretary will form the Executive Committee (GOWB Clauses 52,58).

The Scottish Executive holds executive power in unreserved areas in Scotland, and the First Minister must be a member of the Parliament (SB Clause 42). The First Minister is chosen by the Parliament (Clause 43) and he appoints and dismisses Ministers who are members of the Parliament (Clause 44).

Finance

Both the National Assembly and the Scottish Parliament are financed through a block grant (GOWB Part IV, SB Part III). The Scottish Parliament has a tax-varying power of 3p in the pound for basic rate income tax, (SC Part IV). A new office of Auditor General for Wales is set out in GOWB clauses 90-103. There is provision for audit arrangements by the Scottish Executives, but details will be left to the Executive (SB Clause 66).

Secretary of State and Disputes Procedure

The Secretary of State for Wales is entitled to attend and participate in the Assembly about the Governments' legislative programme (Clause 32).

The Secretary of State for Scotland has various powers to veto legislation or proposed actions in certain circumstances (SB Clause 33, Clause 54).

The GOWB provides for special judicial procedures for devolution issues (Schedule 6). The final court of appeal is the Judicial Committee of the Privy Council. The SB has similar provisions in schedule 6, and in addition the Secretary of State has veto functions described above, and the requirement that the Scottish Executive certify that a Bill is within the legislative competence of the Parliament, (Clause 30) and that the Presiding Officer satisfy himself of that competence (Clause 31).

Elections

Both the National Assembly and the Scottish Parliament will use the Additional Member System (GOWB Clauses 2-9 SC Clauses 1-9). The Scottish version is however more proportional with 73 constituency seats and 56 additional seats, compared to 40 constituency seats and 20 additional member seats in Wales (GOWB Schedule 1, SC Schedule 1). There is provision to reduce the number of Scottish seats if its total of Westminster constituencies is reduced, as is likely following the abolition in the Act of the rule that Scotland must have a minimum of 71 seats (Clause 81). Wales' representation at Westminster is unaffected by the GOWB.

The franchise will be the local government electorate in both Scotland and Wales (GOWB Clause 10, SC Clause 10). The National Assembly is a 4 year fixed term (GOWB, Clause 3, but the Scottish Parliament can be dissolved early on a two-thirds resolution (SB Clauses 2-3). Otherwise it operates on a four yearly term.

To operate AMS a further piece of legislation is required to create a system of registration for parties. This legislation is expected this session.

Miscellaneous

The GOWB reorganises certain public bodies, and provides for statutory partnerships with local government and the voluntary sector.

The SB creates a new post of Advocate General, in the UK Government (Clause 82), and the post of Lord Advocate will be confined to the Scottish Executive. The First Minister will

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nominate judges other than the Lord President of the Court of Session or Lord Justice Clerk (Clause 89). The Scottish Parliament will be responsible for introducing its own Freedom of Information Act in relation to areas which are not reserved to Westminster.

Appendix 3 Scottish Public Bodies

Scottish public bodies whose remit falls within matters to be devolved and therefore within the competence of the Scottish Parliament were set out in Annex F to the Scottish Office publication *The Scotland Bill: a guide:-*

SCOTTISH PUBLIC BODIES

This list which follows is of Scottish public bodies which have a remit which is concerned with matters to be devolved and which therefore will be entirely within the legislative competence of the Scottish Parliament. It includes non-departmental public bodies (NDPBs), certain nationalised industries, tribunals and public corporations and health bodies. Both executive and advisory bodies are listed. It does not include bodies with remits covering reserved matters or any "cross-border public bodies" with a UK or GB wide remit or which are concerned with reserved and devolved matters (these are listed in Annex E).

Executive bodies

- The Accounts Commission for Scotland
- Scottish Agricultural and Biological Research Institutes - Governing Bodies
 - Hannah Research Institute
 - Macauley Land Use Research Institute
 - Moredun Research Institute
 - Rowett Research Institute
 - Scottish Crop Research Institute
- Crofters' Commission
- Deer Commission for Scotland
- Highlands and Islands Enterprise
- National Galleries of Scotland
- National Library of Scotland
- National Museums of Scotland
- Parole Board for Scotland
- Royal Botanic Garden, Edinburgh
- Royal Commission on the Ancient and Historical Monuments of Scotland
- Scottish Agricultural Wages Board
- Scottish Arts Council
- Scottish Children's Reporter Administration
- Scottish Community Education Council
- Scottish Conveyancing and Executry Services Board
- Scottish Council for Educational Technology
- Scottish Enterprise
- Scottish Environment Protection Agency
- Scottish Further Education Unit
- Scottish Higher Education Funding Council
- Scottish Homes
- Scottish Hospital Endowments Research Trust
- Scottish Legal Aid Board
- Scottish Medical Practices Committee
- Scottish Natural Heritage
- Scottish Qualifications Authority
- Scottish Screen
- Scottish Sports Council
- Scottish Tourist Board

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<i>Advisory bodies</i>	Scottish Water and Sewerage Customers Council Advisory Committee on Dental Establishments Advisory Committee on Sites of Special Scientific Interest Ancient Monuments Board for Scotland Building Standards Advisory Committee Central Advisory Committee on Justices of the Peace (Scotland) Children's Panel Advisory Committees Extra Parliamentary Panel General Teaching Council for Scotland Health Appointments Advisory Committee Hill Farming Advisory Committee for Scotland Historic Buildings Council for Scotland Justices of the Peace Advisory Committees Local Government Boundary Commission for Scotland Local Government Property Commission Police Advisory Board for Scotland Royal Fine Art Commission for Scotland Scottish Advisory Committee on Drug Misuse Scottish Advisory Committee on the Medical Workforce Scottish Agricultural Consultative Panel Scottish Consultative Council on the Curriculum Scottish Crime Prevention Council Scottish Economic Council Scottish Industrial Development Advisory Board Scottish Police College Board of Governors Scottish Records Advisory Council Scottish Standing Committee for the Calculation of Residual Values of Fertilisers and Feeding Stuffs Scottish Studentship Selection Committee Scottish Valuation and Rating Council Secretary of State for Scotland's Advisory Group on Sustainable Development Secretary of State's Advisory Group on Scotland's Travelling People Secretary of State's Advisory Panel of Economic Consultants Secretary of State's (Electricity) Fisheries Committee
<i>Nationalised industries</i>	Scottish Transport Group Highlands and Islands Airports Ltd Caledonian MacBrayne Ltd
<i>Tribunals</i>	Children's Panels Dairy Produce Quotas Tribunal Education Appeals Committees Independent Schools Tribunal Lands Tribunal for Scotland National Health Service Discipline Committees National Health Service National Appeal Panel National Health Service Tribunal Police Appeals Tribunal Registration of Establishments Appeal Tribunal (Social Work) Pensions Appeal Tribunal for Scotland Rent Assessment Panel for Scotland Self-Governing Schools Appeal Committees Valuation Appeals Committee
<i>Public corporations</i>	East of Scotland Water Authority North of Scotland Water Authority West of Scotland Water Authority
<i>Health bodies</i>	Common Services Agency of the Scottish Health Service

Health Boards
Health Education Board for Scotland
Local Health Councils
Mental Welfare Commission for Scotland
National Health Service Trusts
National Centre for Training and Education in Prosthetics and Orthotics NHS
in Scotland Professional Advisory Committees
Post Qualification Education Board for Health Service Pharmacists in
Scotland
Scottish Council for Postgraduate Medical and Dental Education Scottish
Health Advisory Service
Scottish Hospital Trust
State Hospitals Board for Scotland

Certain Ministerial functions in relation to certain bodies concerned with reserved matters will be transferred to the Scottish Executive as a matter of executive devolution. These include the following:

Fireman's Pension Scheme Appeal Tribunal Police Pensions Appeal
Tribunal
Horserace Betting Levy Appeal Tribunal Misuse of Drugs Tribunal

In addition the Scottish Executive will appoint General Commissioners of Income Tax and to reflect its responsibility for justice matters generally will be consulted about appointments and procedural matters in relation to a number of tribunals concerned with reserved matters.