



Scotland Bill: latest developments

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Author: Paul Bowers
Section Parliament and Constitution Centre

The *Scotland Bill 2010-12* had its third reading in the House of Commons on 21 June 2011, and is now in the Lords, where its committee stage is due to begin on 26 January 2012. It is subject to the Sewel Convention, whereby the UK Government seeks consent from the Scottish Parliament before legislating on devolved matters. A committee of the last Scottish Parliament considered the Bill, and a legislative consent motion was then passed. This recommended changes to the Bill, and called for a new consent motion after any amendments. Changes were made on Report in the Commons, and, after the elections to the Scottish Parliament in May 2011, a new committee was established to consider the Bill. This has now reported, and has recommended that no further legislative consent should be given unless further changes are made.

This note discusses the Committee's report, and sets it in the context of the positions of the UK and Scottish Governments.

Other briefs on the *Scotland Bill* and related issues are:

[Scotland Bill \(HL Bill 79 of 2010-12\)](#), House of Lords Library Note 2011/23, July 2011

[Devolution of tax powers to the Scottish Parliament](#), House of Commons Library Standard Note 5984, 2 November 2011

[Scotland Bill: Committee Stage Report](#), House of Commons Research Paper 11/49, 14 June 2011

[Scotland Bill \[Bill No 115 of 2010-11\]](#), House of Commons Research Paper 11/06, 18 January 2011

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1 The Bill since committee in the Commons

1.1 Report and third reading in the Commons

The report and third reading in the Commons were taken on 21 June 2011.¹

The government introduced a number of amendments and new clauses on report. These are discussed in detail in [House of Lords Library Note 2011/23](#). Briefly, the Bill was amended in the following ways (all moved by the Government):

- Definition of a Scottish taxpayer for the current Scottish variable rate made the same as for the new Scottish rate of income tax (in order to avoid transitional issues)
- A power created under which the UK Government may allow the Scottish Government to issue bonds without the need for further primary legislation (though the Minister made it clear that this was unlikely to be used in the present economic climate)
- Scottish Ministers given a role in approving the appointments of MG Alba board members

¹ Report at cc222-81, third reading at cc281-94

- Power to make an order disqualifying persons from membership of the Scottish Parliament devolved
- Changes made to the way in which appeals on ECHR/EC law grounds over acts and omissions by the Lord Advocate are treated. In future they will not be subject to referral as devolution issues, but may be the subject of an appeal to the UK Supreme Court
- Secretary of State required to consult Scottish Ministers before combining elections if one of them is a Scottish Parliamentary or Scottish local election, and to consult them before making certain other administrative regulations on elections

There were also some technical amendments to correct drafting errors etc.

1.2 Second reading in the Lords

The second reading debate in the Lords took place on 6 September 2011.²

Lord Wallace, for the Government, summarised the Bill as amended in the Commons, stating that,

We continue to believe that the package set out in this Bill and the associated Command Paper will strengthen Scottish Devolution and Scotland's place within the United Kingdom. It provides strong financial accountability to the Scottish Parliament, and the right balance of additional powers. It provides the Scottish Government and Scottish Parliament with new tools to deliver policies in Scotland to respond to new challenges.³

He went on to address the Scottish Government's position:

As is well known, the Scottish Government have expressed their desire to see additions made. We will look at these further proposals and set them against three tests: that the Scottish Government provides detailed proposals to strengthen the Bill; that the proposals maintain the cross-party consensus that has been worked up and developed; and that any such proposals are beneficial to Scotland, without being prejudicial to the rest of the United Kingdom as a whole. I will of course keep the House appropriately informed of any developments in discussions with the Scottish Government, which will operate under a banner of mutual respect.⁴

For Labour Lord Davidson reiterated support in principle:

I repeat the welcome that we gave to the principles guiding the Bill. However, it should be clear that we consider that this Bill should not miss out the areas where the experience of more than 10 years of devolution shows a need for constitutional clarification, at least. We look forward to examining the Bill and its various amendments in Committee.⁵

The Bill gained its second reading without division, and was sent to a committee of the whole House, with the first day of consideration scheduled for 26 January 2012.

² See cc156-272

³ HL Deb 6 September 2011, c162

⁴ HL Deb 6 September 2011, c163

⁵ HL Deb 6 September 2011, c168

1.3 Referendum

The passage of the Scotland Bill has become connected to the debate about a referendum on Scottish independence. This is because the Bill would provide one way of creating the powers under which a referendum could be held. The referendum itself is discussed further in Standard Note 5142, [Regulation of Referendums](#).

The UK Government has launched a consultation on its plans in connection with a referendum, [Scotland's Constitutional Future: a consultation on facilitating a legal, fair and decisive referendum on whether Scotland should leave the United Kingdom](#).⁶ This sets out its argument that the Scottish Parliament lacks the legal powers to hold a referendum on independence, and offers ways in which the power could be created.

Briefly, the favoured approach for the UK Government would be to use the Order-making power in section 30 of the *Scotland Act 1998* to devolve the power to hold a referendum, perhaps with conditions attached, such as a timeframe (a "sunset"). Alternatively, the UK Parliament could pass a referendum Act itself, or the *Scotland Bill* could be amended, either to devolve the necessary power or set out the arrangements in detail itself.

The Scottish Government has also launched a consultation on the referendum, [Your Scotland – Your Referendum](#).

In view of the possibility that the *Scotland Bill* might be amended, the Government tabled a motion in the Lords on 24 January 2012 to delay the consideration of clause 10 until the end of the committee stage, because it felt that any amendments on a referendum were best placed before clause 10.⁷

2 The Scottish Government's position

The elections to the Scottish Parliament in May 2011 brought a majority SNP Government to power.⁸ This issued a number of policy statements expressing the changes it wished to see to the Scotland Bill. It presented six papers to the UK Government, covering:

- [borrowing powers](#)
- [the Crown Estate](#)
- [broadcasting](#)
- [excise duty](#)
- [an enhanced role in Europe](#)
- [corporation tax](#)

These are lengthy papers, and readers are referred to the originals for the details in their own terms. The quotations below are all taken from the relevant paper cited above.

2.1 Borrowing powers

In brief, the [borrowing powers paper](#) argued that,

⁶ Cm 8203

⁷ HL Deb 24 January 2012, cc926-7

⁸ The term in the *Scotland Act 1998* is "executive", but this Note follows the convention of common usage, and the fact that the present *Scotland Bill* would change the name to "government."

any borrowing framework for Scotland – whether through the Scotland Bill or through full fiscal responsibility – should be founded on a central principle: ensuring the long-term sustainability of debt obligations.

On capital borrowing, it argued that,

the proposals in the Bill require enhancement and improvement in four key aspects:

- specification of annual limits on capital borrowing;
- a methodology for determining borrowing capacity that is sustainable over the long term;
- the term of repayments for capital borrowing; and
- the impact of the early implementation measures that are proposed.

The Scottish Government proposes that the framework for capital borrowing should be based on the assessment of overall debt sustainability, measured against the total resource base of the Scottish Government to service that debt. It is proposed that:

- borrowing equivalent to 2% of Scottish Government resources be permitted annually; and
- the stock of debt is capped at the equivalent of 20% of Scottish Government resources.

On revenue borrowing, it argued that,

revenue borrowing powers are fundamentally linked to the wider proposals in the Scotland Bill for devolving and assigning taxation. The proposals in the Scotland Bill would effectively expose the Scottish Budget to cyclical fluctuations in revenue and embed a high degree of volatility in Scotland's public finances.

The Scottish Government believes that significant amendments are required to the Scotland Bill provisions, and proposes this framework for sustainable revenue borrowing:

- revenue borrowing should be permitted to cover cyclical variations in income tax receipts, as well as differences between the forecast and outturn level of tax receipts;
- borrowing should be subject to a total limit of 5% of the Scottish Government resource base, in order to help provide a meaningful cushion against volatility in tax revenues; and
- repayments of revenue borrowing should be made over 5 years.

The Scottish Government does not seek borrowing powers to fund any structural deficit in the Scottish Budget and will seek to at least balance its revenue budget over the cycle.

2.2 Crown Estate

The proposal for the [Crown Estate](#) was to devolve control over management and revenues of the Estate in Scotland. The Crown Estate in Scotland is also subject to an ongoing inquiry by the House of Commons Scottish Affairs Committee.

2.3 Broadcasting

For [broadcasting](#), the proposal was:

- To have the right to establish public service broadcasting institutions;
- To be involved in future licence fee setting arrangements;
- To have responsibility for approving licensing decisions made by the UK Government for local televisions which will broadcast within Scotland;
- To have the ability to intervene in local cross-media mergers that affect Scotland; and
- To have the power to add or remove events from the list of those that must be shown live on free-to-air television.

2.4 Excise duty

The proposal on [excise duty](#) was to have it devolved in order to support policies on responsible drinking:

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

2.5 Enhanced role in Europe

The Scottish Government proposed that its attendance at meetings of the [EU Council of Ministers](#) should be put on a statutory footing, as against the present arrangement whereby the agreement of the lead UK Minister is needed, with a similar right of attendance for officials at Commission meetings where a devolved matter is to be discussed:

The Scottish Government is proposing an amendment to the Scotland Bill to provide Scottish Ministers with a statutory right to be included in the UK delegation attending relevant proceedings of an EU Institution. This would cover attendance at Council of Ministers' meetings (both formal and informal), and attendance of officials at Commission and Council Working Groups, where any non-reserved matter is to be considered. It also covers areas where Scottish Ministers have functions conferred on them directly by Westminster legislation and executively devolved functions under section 63 of the Scotland Act.

2.6 Corporation tax

The proposal on [corporation tax](#) was as follows:

- The Scotland Bill should be amended to devolve corporation tax to the Scottish Parliament, with a like-for-like adjustment to the Scottish Budget. The net cost to the UK Exchequer would be zero;
- Following devolution, the Scottish Government would be responsible for the setting and collection of corporation tax receipts in Scotland;
- The Scottish Government is currently engaging with businesses, investors, trade unions, academics and leaders from the third sector and the public sector regarding the best corporation tax regime for Scotland. This feedback will inform the corporation tax system the Scottish Government will introduce.

3 Scottish Parliament Committee report

The Scottish Parliament's Scotland Bill Committee was established on 9 June 2011. It was chaired by Linda Fabiani of the SNP and had ten other members. It met on 15 occasions, and published its [report](#), in two volumes, in December 2011.⁹

3.1 Legislative consent

The Committee made 45 recommendations, but did not recommend giving legislative consent for the *Scotland Bill* in its current form. The Committee's "overall conclusion and recommendation on legislative consent" was as follows:

On the basis of all of the evidence that we have heard, the responses from the UK Government to the amendments suggested by our predecessor and by others in this new Parliamentary session, the Committee, therefore is unable to recommend that the Parliament approve a Legislative Consent Motion (LCM) on the Scotland Bill unless it is amended in line with the Committee's conclusions and recommendations.

As with the majority of the recommendations, this was subject to dissent. It was agreed on division, by 7 votes to 3 (SNP and Green in favour, Labour, Conservative and Liberal Democrat against).

3.2 Other recommendations

The remaining recommendations are reproduced in the Appendix below. They include:

- giving the Scottish Parliament flexibility over income tax rates for all bands
- increasing the short-term borrowing limit to at least twice the proposed £500 million
- putting all end year flexibility money saved in Scotland into the Scottish cash reserve without the need for Treasury agreement
- devolving air passenger duty and the aggregates levy
- assigning the revenues from excise duties on alcohol consumed in Scotland to the Scottish Parliament
- devolving corporation tax and all associated powers
- devolving regulation of all firearms
- devolving speed limits for all vehicles
- devolving responsibility and powers for all elections in Scotland except UK general elections and European elections
- giving full fiscal autonomy to the Scottish Parliament
- creating enabling provisions to begin the process of devolving welfare and benefits

⁹ Scotland Bill Committee, [Report on the Scotland Bill](#), 1st report 2011 (session 4), SP Paper 49, SB/S4/11/R1, 15 December 2011

The Committee also opposed the re-reservation of corporate insolvency, regulation of the health professions, and Antarctica.

A minority report was made by four members of the Committee, the Labour, Conservative and Liberal Democrat members, which was published as Annex A in volume 2 of the main report. This described the majority report as “not legislative scrutiny but political posturing.”

The Scottish Parliament is expected to debate the report, and to decide whether or not to give legislative consent to the Bill, although no motion has been tabled as yet.

3.3 Scottish Government’s response

The Scottish Government issued a statement on the Committee’s report:

Commenting on the Scotland Bill Committee's report published today, Cabinet Secretary for Parliamentary Business & Government Strategy Bruce Crawford said:

"I welcome this report, and trust that the UK Government will give careful attention to its findings - as the Secretary of State for Scotland rightly pledged to do.

"We await the UK Government's response to the Committee Report with interest.

"The priority for the Scottish Government is strengthening the Parliament's ability to build sustainable economic growth, and create new jobs and prosperity - which the people have clearly voted for. That is why we are keen to make progress on improving the Scotland Bill, and the Scottish Government and Parliament will be in a position to consider the matter of legislative consent once the Westminster coalition has taken the opportunity to give the report's recommendations the 'care and attention' Mr Moore confirmed they would, and come forward with their proposals."¹⁰

3.4 Implications for the Scotland Bill at Westminster

There are a number of options as to what could happen next. The UK Government could go ahead with the Bill as it stands, without consent from the Scottish Parliament, taking it through committee in the Lords and seeking the approval of both Houses in the normal way. This would be technically feasible: section 28 (7) of the *Scotland Act 1998* provides, for the avoidance of doubt, that the legislative power of the Scottish Parliament “does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.” The Sewel Convention, under which legislative consent is sought, is only a political undertaking, not a legal obligation. However, there would be considerable political implications were this to happen, not least in the context of a proposed referendum on independence.

Alternatively, the UK Government could amend the Bill in line with the Committee’s recommendations, in which case it would seem likely that consent would be given, or it could amend it in some other way and then seek consent on a compromise basis. Either of these amendment options would entail sending the Bill back through the Commons after it completes its Lords stages.

¹⁰ Scottish Government, [Scotland Bill Committee’s report](#), 15 December 2011

Appendix: recommendations of the Scottish Parliament's Scotland Bill Committee

Overall conclusion and recommendation on legislative consent

On the basis of all of the evidence that we have heard, the responses from the UK Government to the amendments suggested by our predecessor and by others in this new Parliamentary session, the Committee, therefore is unable to recommend that the Parliament approve a Legislative Consent Motion (LCM) on the Scotland Bill unless it is amended in line with the Committee's conclusions and recommendations.¹

Other recommendations

Recommendation 1 - We recommend that the Bill be amended so that the Scottish Parliament has flexibility over income tax rates for all bands.²

Recommendation 2 - The Committee understands that the final costs of implementing the new Scottish income tax will be dependent on the approach chosen for some of the specific areas, for example, around overall transparency. However, the Committee recommends that a final cost estimate should be provided to the Scottish Parliament before any substantive work begins. The Committee also believes that any cost estimate should be open to challenge and scrutiny by the Scottish Government. The Committee believes that the cost of the introduction of the new Scottish Income Tax powers should be met by the UK Government as initiators of the policy.³

Recommendation 3 - The Committee recommends that HMRC does as much as possible to reduce the costs to individuals, businesses, the public sector and other organisations associated with the administration of the rate of the Scottish rate of income tax.

Recommendation 4 - In terms of the issue of the accountability of HMRC, the Committee recommends that, in relation to the Scottish income tax, the relevant accountable officer at HMRC should be accountable to the Scottish Ministers and should be obliged to attend meetings of committees in the Scottish Parliament if requested.⁴

Recommendation 5 - The Committee believes that the option of a distinctive Scottish tax department within HMRC should be considered by the UK Government.⁵

Recommendation 6 - The Committee recommends that there is a new legislative requirement inserted into the Bill in order that the Scottish Parliament can give its consent before the financial provisions take effect.⁶

Recommendation 7 - The Committee believes that it is important that the effects of the grant adjustment mechanism are monitored on a regular basis and we recommend that the mechanism is reviewed after a number of years and adjustments made to correct for any bias if necessary.

Recommendation 8 - The Committee agrees with its predecessor that the proposed annual and overall limits for short-term borrowing need to be recalculated on a more principled basis than the UK Government has done. We recommend that the required amount should be at least twice the current proposed level of £500 million.⁷

Recommendation 9 - The Committee also recommends the Scottish Government examine the case for establishing its own independent revenue forecasting service similar to the Office for Budget Responsibility.

Recommendation 10 - The Committee also recommends the Scottish Government examine the case for establishing its own independent revenue forecasting service similar to the Office for Budget Responsibility.

Recommendation 11 - The Committee agrees with the Scottish Government that the repayment period proposed by the UK Government would benefit from being extended to five years to increase the likelihood of the Scottish Government being able to repay without undue pressure on finances. We recommend this change to the UK Government.

Recommendation 12 - Furthermore, we welcome the establishment a Scottish cash reserve but, as did our predecessor, the Committee recommends going further to ensure that this includes all Scottish End Year Flexibility money saved in Scotland without the need for Treasury agreement, so that in the future, Scottish ministers will have total discretion over the Scottish budget.

Recommendation 13 - The Committee is concerned at the somewhat arbitrary borrowing limits proposed by the UK Government and we believe that a 'prudential' capital borrowing framework should be in place, based on the Scottish Government's ability to pay. However the Committee recognises that the UK Government has an interest in the control of the overall Public Sector Borrowing Requirement (PSBR) of which borrowing by the Scottish Government would form part. We recommend these changes to the UK Government.

Recommendation 14 - The Committee recommends that there is a need to go further and remove any residual legal and technical obstacles to the ability of the Scottish Government to have full range of debt instruments to hand in order to decide the best option for Scotland.⁸

Recommendation 15 - In respect of Landfill Tax, we recommend that the Scottish Government gives consideration to retention of the Landfill Communities Fund.

Recommendation 16 - The Committee has received evidence citing frustrations with the way in which the UK Government sets these taxes. We see a strong case for devolving air passenger duty and the aggregates levy to the Scottish Parliament and would see this as an opportunity for the Scottish Government to reform these taxes so that they are more effective environmental taxes and fairer on the industries on which they are levied. We recommend these changes to the UK Government.

Recommendation 17 - The Committee recommends that the revenues from excise duties on alcohol consumed in Scotland are assigned to the Scottish Parliament. As alcohol misuse and duty revenues are more closely related to consumption, the Committee recommends using consumption as the basis to assign revenues to the Scottish Government.⁹

Recommendation 18 - The Committee recommends that all powers associated with corporation tax are devolved to Scotland. This would include the ability to set the rate, decide on reliefs, allowances etc. In short, devolve the totality of corporation tax to the Scottish Parliament. This will provide Scotland with the ability to decide itself how to use this lever as a tool for greater economic growth.¹⁰

Recommendation 19 - This Committee believes that the details on how the financial provisions will work are simply too vague at this stage and are such that agreeing to the Bill

is like signing a blank cheque. We therefore recommend that the UK Government should amend the Bill to insert a joint approval process in relation to the financial provisions.¹¹

Recommendation 20 - The Scotland Bill currently proposes the re-reservation of powers to Westminster in the areas of corporate insolvency, regulation of the health professions and Antarctica. As a matter of principle, the Committee does not believe that any powers should be re-reserved and we recommend that legislative consent is not given to these provisions.¹²

Recommendation 21 - The Committee welcomes the provision in the Bill to devolve powers to regulate most air weapons. However, the Committee recommends that this be extended to cover the regulation of all firearms.¹³

Recommendation 22 - The Committee recommends that there is a case to be made to extend the current powers in the Scotland Bill and devolve responsibility for the speed of all classes of vehicle, not just the maximum speed of vehicles on roads, which might therefore enable the Scottish Ministers, on a pilot basis, to alter the speed limits on specific roads for other types of vehicles such as HGVs.

Recommendation 23 - We further recommend that the UK Government should devolve a more extensive set of powers (including limits, penalties and the responsibility for random testing). We see no logic behind a partial devolution and it would make far greater sense to devolve all associated powers.¹⁴

Recommendation 24 - The Committee recommends that the UK Government should amend the Scotland Bill to devolve responsibility and powers for all elections that take place in Scotland, except those to the UK and EU Parliaments.¹⁵

Recommendation 25 - The Committee is content to recommend legislative consent to this clause [misuse of drugs] in the Bill.

Recommendation 26 - The Committee is content to recommend legislative consent to this clause [Scottish Government/Scottish Executive] in the Bill.

Recommendation 27 - The Committee recommends that appointments to the BBC Trust and MG Alba should be devolved to Scottish Ministers.¹⁶

Recommendation 28 - We welcome the proposals of the McCluskey Review Group in relation to the scope of the compatibility review which will continue to be undertaken by the Supreme Court and as noted above [in the report] in relation to its powers of disposal. We welcome the recognition given the Advocate General to the strength of these arguments and recommend that the Bill is amended along these lines.

Recommendation 29 - We recommend that the proposals of the McCluskey Review Group relating to certification should be adopted.¹⁷

Recommendation 30 - We recommend that the Supreme Court's considerations should be limited strictly to the compatibility question, referring the case back to the High Court for disposal. This would preserve a clear distinction between the separate roles of the two courts, with the High Court firmly as the only Court which interprets the miscarriage of justice test, which is an aspect of Scots criminal law.

Recommendation 31 - The Committee has serious concerns regarding this provision [Partial suspension of Acts of the Scottish Parliament]. We believe that it has the potential for

introducing significant unintended consequences and delay in the enactment of legislation. As such, we do not consider that this should be part of the Scotland Bill and we recommend that the clause is removed.¹⁸

Recommendation 32 - We recommend that the clause [Continued effect of provisions where legislative competence is conferred for a limited period] is removed as we would like to see these powers being conferred on a more permanent basis.¹⁹

Recommendation 33 - As with our predecessor, the Committee is content to recommend legislative consent to this clause [Time limits for human rights actions against the Scottish Ministers] in the Bill.

Recommendation 34 - We recommend that the clause [Implementation of international obligations] should be removed.²⁰

Recommendations 35 - The Committee recommends that there should be further devolution with different outcomes to match the nature and circumstances of the various Crown property, rights and interests involved.

Recommendations 36 and 37 - We recommend that powers be devolved to the Scottish Parliament to regulate Public Service Broadcasters. Furthermore, we recommend that there should be greater involvement of the Scottish Government in future decisions on licence fee matters.²¹

Recommendation 38 - Additionally, we recommend that the Scottish Digital Network should be the focus for local TV in Scotland and we urge there should be greater involvement of the Scottish Government in debates at a UK level on this.²²

Recommendation 39 - We recommend that powers should be devolved to the Scottish Parliament to decide on the content of the Scottish free-to-air list.²³

Recommendation 40 - This Committee is content to recommend the conclusions of the Scottish Government's submission to the UK Government on this matter [statutory right to attend EU meetings] and we agree that the Scotland Bill should be amended to this effect.²⁴

Recommendation 41 - We recommend that the UK Government gives consideration as to how to amend the Scotland Bill to include enabling provisions which would begin the process of devolving welfare and benefits to the Scottish Parliament and that it works with the Scottish Government on the detail of how and when this would happen.²⁵

Recommendation 42 - The Committee recommends that the UK Government only proceed with the Scotland Bill if it has secured the clear legislative consent of the Scottish Parliament and met any conditions within that legislative consent motion.²⁶

Recommendation 43 - The Committee recommends that the Scotland Bill be amended to devolve the full range of financial powers to the Scottish Parliament.²⁷

Recommendation 44 - The Committee considers that, should the UK Government proceed with the current financial provisions within the Bill, it would be unacceptable for these to be enacted without express agreement of the Scottish Parliament. Therefore, the Committee recommends that the Scotland Bill be amended to include a mechanism for joint approval.²⁸

Recommendation 45 - We recommend that the Bill be amended to provide full fiscal autonomy for the Scottish Parliament and enable the devolution of welfare and benefits.²⁹