

The Future of Scottish Devolution within the Union: **A First Report**

December 2008

Presented to the Presiding Officer of the
Scottish Parliament and to the
Secretary of State for Scotland,
on behalf of Her Majesty's Government,
December 2008

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In the Spring of this year I was asked to take the chair of the Commission on Scottish Devolution. The Commission is supported by the Scottish Parliament and the United Kingdom Government. This, the First Report of the Commission, sets out our thinking so far, and invites further discussion and evidence on the subjects in our remit.

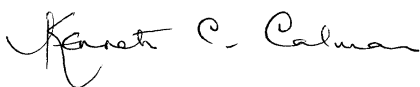
Devolution to Scotland in 1999 was a very significant constitutional development, and one conclusion which we can already draw from our work is that it has been a great success. But constitutions do not stand still. They develop in response to opportunities and pressures as they arise. 10 years after the Scotland Act, our task has been to explore what the scope for further development might be.

In thinking about change, we bear in mind two things that will recur throughout this report. Both are critical elements of our remit. First, how can we help the Scottish Parliament serve the people of Scotland better? The ultimate and only purpose of constitutional change is to help improve people's lives. Secondly, how is change consistent with Scotland's continued place in the United Kingdom, which we value?

Our task is not finished, but in this report we look at the functions of the Scottish Parliament, how it is financed and is accountable to the Scottish people, and how the new Scottish political institutions relate to the rest of the UK. In each of these areas, we set down our current thinking and ask some general and some quite specific questions about possible developments. We will very much welcome responses to these questions from across Scotland and beyond to help us to produce our final recommendations next year.

The members of the Commission come from different walks of life and from across Scotland. All have made significant contributions to public life in Scotland and beyond. I would like to thank them, and the Commission's Secretariat, for their unstinting commitment to this fascinating and important project.

We have been very grateful to those who gave us evidence, and engaged with us as we considered the issues. We will very much welcome responses from across Scotland and beyond to the issues we raise and the questions we set out in this report, to help us produce our final recommendations next year.



Kenneth Calman

2 December 2008

The Commission

- Rt Hon Lord Boyd of Duncansby QC (Colin Boyd) – former Lord Advocate, and Labour peer
- Professor Sir Kenneth Calman KCB (Chairman) – Chancellor of the University of Glasgow
- Rani Dhir MBE – Executive Director, Drumchapel Housing Cooperative
- Professor Sir David Edward – retired Judge of the European Court of Justice
- Lord Elder (Murray Elder) – Labour peer
- Audrey Findlay CBE – former Leader of Aberdeenshire Council, Convener of the Scottish Liberal Democrat Party
- Lord Lindsay (Jamie Lindsay) – former Scottish Office Minister, Conservative peer and Chairman of the Scottish Agricultural College
- John Loughton – youth activist and former Chairman of the Scottish Youth Parliament
- Murdoch MacLennan – Chief Executive, Telegraph Media Group
- Shonaig Macpherson CBE – Chair of the National Trust for Scotland and of the Scottish Council for Development and Industry
- Iain McMillan CBE – Director, CBI Scotland
- Rt Hon Lord Selkirk of Douglas QC¹ (James Selkirk) – former Scottish Office minister and Conservative peer
- Mona Siddiqui – Professor of Islamic Studies, University of Glasgow
- Matt Smith OBE – Scottish Secretary, UNISON
- Rt Hon Lord Wallace of Tankerness QC (Jim Wallace) – former Deputy First Minister and Liberal Democrat peer

¹ Lord Selkirk was known, when a Minister and MSP, as Lord James Douglas-Hamilton.

Commission Secretariat

The Commission is supported by a Secretariat consisting of officials seconded from the UK Government and the Scottish Parliament. The Secretariat advises the Commission on all aspects of its work, and acts as a general contact point for enquiries and public engagement.

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The website contains further information about the Commission and all aspects of its work. In particular, it includes Commission minutes and other papers, transcripts and notes of oral evidence, written submissions, and information about methods of engagement (including an online questionnaire and discussion forum).

Contents

Volume 1: Report

| | | |
|-----------|--|-----|
| Chapter 1 | Introduction | 3 |
| Chapter 2 | Context and background | 7 |
| Chapter 3 | Engagement and evidence-gathering | 20 |
| Chapter 4 | Principles: devolution and the Union | 25 |
| Chapter 5 | The powers and functions of the Scottish Parliament and Scottish Government | 37 |
| Chapter 6 | Financial accountability | 56 |
| Chapter 7 | Relationships between the Parliaments, Governments and institutions | 75 |
| Chapter 8 | Other features of the Scotland Act and the operation of the Scottish Parliament | 94 |
| Chapter 9 | Summary | 99 |
| Annexe A | Reserved matters (from Schedules 4 and 5 to the Scotland Act) | 105 |
| Annexe B | Membership and Summary of Conclusions of the Independent Expert Group | 110 |
| Annexe C | Barnett Worked Example | 114 |
| Annexe D | Shared Competence – Considerations from the EU Approach | 115 |

Volume 2: Evidence

Part 1: Local engagement events

Part 2: Written submissions

Part 3: Oral evidence

Part 4: Other sources

Chapter 1 Introduction

Establishment and remit of the Commission

1.1 The remit of the Commission on Scottish Devolution is:

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

1.2 This remit was agreed by the Scottish Parliament on 6 December 2007 when it resolved to support "the establishment of an independently chaired commission to review devolution in Scotland".²

1.3 The motion, moved by Wendy Alexander MSP, not only set out a remit for the Commission, but also encouraged UK parliamentarians and parties to support it and called on the Scottish Parliament's corporate body to provide "appropriate resources and funding". The motion was given a clear Parliamentary endorsement (by 76 votes to 46 with 3 abstentions). An amendment to the motion by Nicola Sturgeon MSP, which called for a referendum with independence as one of the options, was defeated (by the same margin).

1.4 The UK Government first indicated its support for the Commission in a Written Answer in the House of Lords on 31 January 2008.³ It then pledged to provide resources to support the Commission's work in a Written Ministerial Statement on 25 March 2008.⁴

1.5 The Commission is independent of any political party, and of the Scottish Parliament and the UK Government. It reports to both, and it will be for them to consider how best to take forward the Commission's conclusions and recommendations.

Membership

1.6 Kenneth Calman was announced as the chairman of the Commission on 25 March 2008, and the rest of the membership was confirmed on 28 April, the day on which the Commission first met at the Scottish Parliament.

1.7 Six of the fifteen members of the Commission were nominated by the three political parties that supported the motion in the Scottish Parliament – two each by the Labour, Liberal Democrat and Conservative parties – and bring extensive experience of public life, both at devolved and UK level. The majority of the members, including the chairman, have no direct connection with any political party, but instead bring a wide range of skills and experience from the public, private and voluntary sectors.

1.8 The full membership is listed on page ii and biographies of all the Commission members are available on the Commission's website, www.commissiononscottishdevolution.org.uk.

² The full text of the debate, including the resulting resolution, is available on the Scottish Parliament's website: <http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-07/sor1206-02.htm#Col4133>.

³ http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/80131w0002.htm#column_WA145

⁴ http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080325/wmstext/80325m0002.htm#column_7WS

1.9 The Commission is supported in its work by a Secretariat, including officials seconded from the Scottish Parliament and the UK Government, and based both in Edinburgh and London. It has also been able to draw on practical assistance and resources from both of its “sponsoring” institutions. The Scottish Parliament has, for example, made available committee rooms and other facilities for oral evidence sessions, and provided access to research and information services, while the UK Government has provided meeting rooms, administrative support and assistance with media relations. The Commission is grateful to both institutions for all of this invaluable assistance.

An approach to the task

1.10 From the outset, the Commission committed itself to producing a first report by the end of 2008 and a final report in 2009. Recognising the extent of the challenge involved in addressing its remit within that timescale, the Commission put in place some practical arrangements to enable it to use its resources most effectively and to ensure it had access to the best available information.

1.11 In particular, it agreed to hold meetings of the full Commission approximately once a month, while also establishing a flexible structure of “task groups” to take forward the main strands of activity in between Commission meetings.

1.12 The task groups established are as follows:

- **Principles** – to consider in particular the underlying principles by reference to which the Commission should develop its thinking and its conclusions. Chaired by Kenneth Calman, this group also includes David Edward, Jamie Lindsay and Matt Smith.
- **Functions** – to consider in particular the current boundary between the devolved responsibilities of the Scottish Parliament and the reserved responsibilities of the UK Parliament, and to recommend where that boundary might be moved or otherwise adjusted. Chaired by David Edward, this group also includes Colin Boyd, Jamie Lindsay, Shonaig Macpherson, Iain McMillan, Mona Siddiqui and Matt Smith.
- **Engagement** – to consider how the Commission can communicate as widely and effectively as possible about its work, and gather the evidence and information it needs. Chaired by Murdoch MacLennan, this group also includes Rani Dhir, Audrey Findlay, John Loughton and James Selkirk.
- **Financial Accountability** – to consider the current funding arrangements for the Scottish Parliament and the various alternative options, with a view to recommending ways in which the Parliament’s financial accountability can be improved. Chaired by Shonaig Macpherson, this group also includes Murray Elder, Iain McMillan, James Selkirk, Matt Smith and Jim Wallace.
- **Intergovernmental Relations** – to consider how effectively Ministers, civil servants and parliamentarians at UK and Scottish levels engage with each other, both on domestic issues and in the context of Scotland’s relations with the European Union and other international forums. Chaired by Jim Wallace, this group also includes, Murray Elder, Jamie Lindsay, and Mona Siddiqui.

1.13 Because of the particular complexity of the financial aspects of its remit, the Commission invited Professor Anton Muscatelli, the Principal and Vice-Chancellor of Heriot-Watt University, to chair a group of academics with expertise in public finance and related subjects. The role of this Independent Expert Group is to provide the Commission with

the best available information about funding options in a devolved context, informed by international comparisons. The full remit and membership of the Independent Expert Group is set out in Annexe B.

Information and evidence

- 1.14 The Commission recognised at an early stage the importance of undertaking the widest possible public engagement about its work. It quickly agreed to establish its own website and to seek direct input from interested bodies and individuals by a range of methods. As this strand of the Commission's activity has developed, led by the Engagement Task Group, it has involved everything from an online questionnaire and discussion forum, engagement events around Scotland and beyond, and the wide distribution of a printed leaflet.
- 1.15 A principal theme of the Commission's approach has been the adoption of an "evidence based" approach. This is not just about giving people an opportunity to contribute their views in a range of ways, important though that is. It has also involved the Commission in actively seeking out information and opinion, and in analysing critically the material it has received.
- 1.16 Perhaps the largest volume of information has come through written submissions. In May, the Chairman wrote to a wide range of organisations in all sectors of Scottish and UK public life, inviting initial suggestions for topics the Commission should consider. This was followed in June by a more general invitation to make written submissions. Both consultations were also advertised on the Commission's website, and a total of over 160 submissions have been received. As many of these are from large organisations, on behalf of their members, the submissions represent, in practice, the views of many thousands of people.
- 1.17 Over the autumn period, the Commission has undertaken an extensive programme of oral evidence sessions in which a range of key witnesses – including two former First Ministers and two former Presiding Officers – have been questioned in more detail. Many of these sessions were held in public; others were held privately, but on the basis that an agreed note of the main points would be published afterwards.
- 1.18 The Commission has also commissioned research, for example from University College London's Constitution Unit and from the Scottish Parliament's information centre (SPICe), and received presentations from invited academics. Most significantly, it has had the benefit of the research work on financial accountability carried out by Professor Muscatelli's Independent Expert Group.
- 1.19 The views expressed by the public – at public engagement events around the country, through the online discussion forum, in hard-copy and online questionnaires – have also been recorded and formed an important part of the consideration.

A step towards the Commission's Final Report

- 1.20 This report is the culmination of all the Commission's activity so far – but it is not so much an end-point as a stepping-stone. Our aim with this report is not to set out a draft version of our conclusions, but to demonstrate the progress we have made and invite further dialogue. In doing so, the Commission seeks to promote a better understanding of Scotland's place within the United Kingdom, particularly since the creation of a devolved

Scottish Parliament in 1999; and to look forward to the final report next year, with the Commission's recommendations as to how devolution can now be strengthened and improved on the basis of nearly a decade of experience.

- 1.21 In the chapters that follow, we provide an overview of Scotland's current devolved governance – the origins and main features of the devolution structures; where the boundary between the responsibilities of the Scottish and UK Parliaments lies, and how that boundary is defined and enforced; the strengths and weaknesses of the Parliament's current funding arrangements, and of the possible alternatives; and the various formal and informal means through which Scotland's devolved institutions relate to their counterparts in the United Kingdom and in the wider world. Taken together, these elements of the report are intended to set out a clear map of the landscape, within which the options for change and development can be identified and assessed.
- 1.22 In this way, we want this report to serve as a platform for the second main phase of the Commission's work. By the end of that process, we expect to present a clear and consistent set of recommendations about improving the financial accountability of the Parliament, enabling devolution to serve the Scottish people better and continuing to secure Scotland's place within the United Kingdom. To do that, we need to gather further evidence and conduct further analysis on some of the key issues we have so far identified. We want this report, in other words, to stimulate a more focused round of dialogue and debate on Scotland's future constitutional development.

Chapter 2 Context and Background

What is devolution?

- 2.1 Devolution is a process of decentralisation, in which power and responsibility is moved outwards and downwards, and hence closer to the people. In a Scottish context, it refers in particular to the creation in 1999 of a new Parliament, as the place where many of the most important issues in public life are debated and decided, and laws made, in Scotland.
- 2.2 The creation of the Scottish Parliament was part of a larger policy of devolution instituted by the Labour Government after its election victory in 1997. This was applied in different ways to Scotland, Wales and Northern Ireland – in each case by means of an Act of Parliament passed in 1998. In Scotland and Northern Ireland, although there were a number of important differences of detail, the basic model involved a legislature with the power to pass primary legislation, plus a separate administration formed out of members of the legislature and answerable to it. In Wales, the original model was different – an assembly combining parliamentary and executive functions, and with much more limited legislative powers – although this has since been altered to bring it more into line with Scotland and Northern Ireland, both in terms of structure and (over time) legislative powers. A separate but related process saw a form of devolution to London, with the creation of a directly-elected mayor and assembly.⁵
- 2.3 The result is that the United Kingdom now has a quite distinctive form of partial and asymmetric devolution – partial in that there has so far been no devolution to the largest component nation of the UK, England (other than London); and asymmetric in that devolution differs in nature and extent in each of the nations and territories to which it has been applied. Although the UK Government's programme of devolution marked a substantial change from the earlier Westminster-based status quo, it can also be seen within a longstanding tradition in the UK of making constitutional change organically in response to particular pressures, rather than by sweeping reforms. It is a means for the UK to provide varying degrees of regional autonomy to match the differing needs and circumstances of its component parts, without the more fundamental restructuring of the constitution that a move to a fully federal structure would entail.
- 2.4 Within Scotland, devolution has added a new layer of democratic representation between those existing in the House of Commons and at local government level.

The Union

- 2.5 Scottish devolution also needs to be understood in the context of what preceded it – namely, Scotland's transition from an independent nation, often in rivalry if not open conflict with its larger and more powerful southern neighbour, to a component nation within the United Kingdom (first of Great Britain, then of Great Britain and Ireland, and finally of Great Britain and Northern Ireland).
- 2.6 The first step in this transition was the Union of the Crowns in 1603, through which James VI of Scotland also became James I of England. But Scotland remained an independent

⁵ Apart from the Scotland Act, the other main devolution statutes are the Government of Wales Acts 1998 (c. 38) and 2006 (c. 32), the Northern Ireland Act 1998 (c. 47) and the Greater London Authority Acts 1999 (c. 29) and 2007 (c. 24).

country until the Treaty of Union in 1706 and its implementation the following year by two near-identical Acts of Union, one passed by the old Scottish Parliament and one by the English Parliament.⁶ Together these Acts led to the creation of a new Parliament of Great Britain, sitting at Westminster, as the forum in which the people of Scotland were represented and decisions about its governance taken.

- 2.7 Although there was always a significant disparity of size and wealth between the two countries, this was a voluntary union and a partnership, not a takeover. The United Kingdom has never been a unitary state in which the identities of its component nations have been entirely subsumed. In particular, Scotland has retained the distinctiveness of its legal system, having its own courts and prosecution service and a largely separate body of statute and common law. It has also maintained the structures and traditions of its education system, secured the entrenchment of its Presbyterian national church and in other ways retained a distinctive cultural identity.
- 2.8 Although it had no separate Parliament or government between 1707 and 1999, Scotland has long had a significant degree of administrative autonomy. The pre-devolution Scottish Office, established as a separate territorial department as far back as 1885, had responsibility for a wide range of functions matching those exercised by the main domestic departments of government in England and Wales. It was led by a Secretary of State, part of whose role was to represent Scottish interests within the UK Government and, in conjunction with the Scottish Law Officers, to ensure that Government legislation took proper account of Scottish circumstances.

The process that led to devolution

- 2.9 After the initial controversy that surrounded the events of 1707, Scotland's new status within the Union was largely accepted. However, even from the late 19th century, there were some moves to promote home rule and devolution. This gained momentum in the mid-20th century in response to the rise of Scottish nationalism as an organised political force. The Labour Party was formally committed to home rule during the 1920s but growing ambivalence in the party led to the formation of a strongly devolutionist Independent Labour Party in 1932 and Scottish National Party (SNP) in 1934.
- 2.10 In 1948, a Scottish National Assembly drew up proposals for the establishment of a Scottish Parliament within the United Kingdom. This became the basis for the Scottish Covenant Campaign.⁷ The proposed scheme listed matters to be dealt with exclusively by a Scottish Parliament, those to be reserved to the UK Parliament, and those to be dealt with jointly. The reserved matters were to include the Crown, peace and war, defence, foreign affairs and extradition, treason and alienage, currency, coinage, legal tender, weights and measures and electoral law in so far as affecting the UK Parliament. The scheme also included fairly detailed proposals for the allocation of fiscal powers and tax revenues. The Scottish Covenant Campaign did not, however, make progress.
- 2.11 A by-election victory by the SNP in 1967 brought the issue of home rule back to prominence. At its 1968 conference, the Conservative Party adopted a pro-devolution position (the so-called Declaration of Perth), and a committee chaired by former Prime Minister Sir Alec Douglas-Home went so far as to recommend an elected Assembly with legislative powers.⁸ The following year, the Labour Government established a Royal Commission on the Constitution (with a remit covering all parts of the UK). This eventually

⁶ Union with Scotland Act 1706 (c.11) (Act of the Parliament of England); Union with England Act 1707 (c.7) (Act of the Parliament of Scotland).

⁷ See J.M. MacCormick *The Flag in the Wind* (Birlinn 2008), especially Appendix One.

⁸ This pro-devolution policy was reversed by Margaret Thatcher, after she replaced Edward Heath as Conservative leader in 1975.

reported in 1973, recommending in particular the creation of a devolved Scottish assembly (and a similar body in Wales).⁹

- 2.12 During 1974, with Labour in office as a minority government, devolution to Scotland (and Wales) narrowly became its official party policy (although many within the party remained hostile or unconvinced). A White Paper with detailed proposals was published in September 1974, although it was not until 1978 that legislation to provide for Scottish (and Welsh) devolution was passed into law.¹⁰
- 2.13 The Scotland Act 1978 provided for the creation of a Scottish Assembly consisting of two or three members elected (by first-past-the-post) for each Westminster constituency. The Assembly was to have the power to legislate only on those devolved matters specified in a Schedule, and was to have no power to raise or vary taxes; it was to be funded by block grant.¹¹ There was also to be a devolved Scottish Executive led by a First Secretary and a substantial Department of a (UK) Secretary of State.
- 2.14 The Act required at least 40% of the Scottish electorate to vote in favour of its other provisions in a referendum before they could take effect (the referendum requirement and the 40% threshold having been added by non-Government amendments during the passage of the Bill). When the referendum was duly held in March 1979, although a majority (51.6%) of those voting supported devolution, they amounted to only 32.9% of the electorate, well short of the 40% threshold required. The Government's attempt to repeal the Act in consequence of this outcome led to its defeat in a vote of confidence, and the subsequent election of a Conservative party by now opposed to devolution in principle.
- 2.15 During the 18 years of Conservative government to 1997, supporters of devolution gradually regrouped. A Campaign for a Scottish Assembly was formed to promote the cause of home rule, and to build a broad consensus on what it might involve, which in turn led to the creation of the Scottish Constitutional Convention. At its first meeting, in March 1989, the Convention members signed a "Claim of Right" which asserted "the sovereign right of the Scottish people to determine the form of government best suited to their needs". This was signed by a large majority of Scottish MPs, MEPs and local authorities, together with many other organisations and individuals.
- 2.16 The main players in the Convention itself were the Labour Party, the Liberal Democrats, the Scottish Green Party, the Scottish Trade Union Congress, local government and the Church of Scotland. Many other churches, trade unions and organisations from across civic Scotland also participated. The Scottish National Party was involved in the early stages, before withdrawing in protest that independence was not being considered as an option.
- 2.17 The culmination of the Convention's work was the publication in 1995 of "Scotland's Parliament, Scotland's Right", a detailed blueprint for the composition and powers of a devolved Scottish Parliament.¹²
- 2.18 As a result, when Labour came to power in May 1997 on a manifesto commitment to implement devolution in both Scotland (and Wales), much of the groundwork for the new Scottish Parliament had already been laid. Progress thereafter was rapid. A White Paper, *Scotland's Parliament*¹³, was published in July 1997, and a referendum held on its proposals

9 Royal Commission on the Constitution 1969-1973, Report (Cmnd 5460), also known as the Kilbrandon report after Lord Kilbrandon who chaired the Commission from 1972.

10 In the interim, there was also a Scotland and Wales Bill, introduced in 1976 and defeated in 1977.

11 The Scottish Executive's devolved powers would have been slightly different, and some were to be exercisable only with the concurrence or consent of a UK Minister.

12 http://www.almac.co.uk/business_park/scc/scc-rep.htm

13 <http://www.scotland.gov.uk/government/devolution/scpa-00.asp>

in September of that year. (By contrast with the 1979 referendum, this one preceded the introduction of legislation, and required only simple majority support.)

- 2.19 It was a two-question referendum, the first question on whether a Scottish Parliament should be created and the second on whether it should have tax-varying powers. The Labour, Liberal Democrat and Scottish National parties all campaigned for Yes-Yes votes in the referendum, while the Conservatives supported the rival No-No campaign. Many other organisations and individuals also played an active part in the debate. In the event, both questions were answered in the affirmative – the former by 74.3% and the latter by 63.5%, on a turnout of just over 60%.
- 2.20 Following the referendum outcome, a Consultative Steering Group (CSG) under the chairmanship of the then Minister of State, Henry McLeish MP, was appointed to make recommendations about how the new Parliament should operate in practice. The CSG's first meeting was held in January 1998, the same month in which the Scotland Bill was introduced in the House of Commons, and its report was published in December of that year¹⁴, shortly after the Bill was passed into law as the Scotland Act 1998. As well as making specific recommendations for the Parliament's standing orders and methods of working, the CSG report articulated four general principles to underpin the Parliament's operation – power-sharing, accountability, accessibility and equal opportunities.

The Scotland Act 1998

- 2.21 In broad summary, the Act provides for the establishment of a Scottish Parliament with the power to make laws within certain parameters; the creation of a Scottish Executive to provide a devolved administration appointed by and answerable to the Parliament; a framework for funding the Parliament; a power for the Parliament to vary the basic rate of income tax; and a range of miscellaneous and consequential matters.

The Scottish Parliament – elections and membership

- 2.22 Part I of the Act deals with the Parliament itself – in particular, establishing it as a unicameral legislature of 129 members (MSPs) elected on a regular 4-yearly cycle of elections. The electoral system, based on the model negotiated in the Scottish Constitutional Convention, involves 73 constituency MSPs elected on the traditional "first-past-the-post" basis (as used for elections to the House of Commons) and a further 56 regional MSPs – 7 in each of 8 regions – elected by the "additional member" system.
- 2.23 Under this mixed electoral system, each elector has two votes, one for an individual to serve as a constituency MSP, the other (known as the "regional vote") for an individual candidate or for a list of up to 12 candidates standing on behalf of a political party. Some of the candidates in a party list (or individual regional candidates) may also be contesting a constituency seat in the same region, but the same person may not otherwise have a dual candidacy.
- 2.24 To decide who are returned as the regional MSPs in a region, a sequence of calculations is made, using the "d'Hondt" system (which divides the number of regional votes cast for each political party by a figure one greater than the number of constituency or regional seats that party has already won in that region). This "tops up" the representation of parties whose shares of the constituency contests falls short of their shares of the vote across the region, thus ensuring a high degree of proportionality in the overall distribution of seats in the Parliament.

14 <http://www.scotland.gov.uk/library/documents-w5/rcsg-00.htm>

The Scottish Parliament – office-holders

2.25 The Act also makes provision for the main office-holders in the Parliament. It requires the Parliament, at its first meeting following a general election, to elect three MSPs, one to serve as Presiding Officer and two as deputies. It also requires the establishment of a Scottish Parliamentary Corporate Body (SPCB), consisting of the Presiding Officer and four other MSPs chosen by the Parliament. Finally, it requires the appointment by the SPCB of a Clerk of the Parliament, effectively a chief executive with responsibility for the Parliament's staff and administration.

The Scottish Parliament – powers, protections and responsibilities

- 2.26 Further provisions give the Parliament and its members a number of important legal powers, protections, and responsibilities. These include the power to summon witnesses and documents (s.23); requirements relating to the registration and declaration of members' interests (s.39); and protection against certain legal proceedings – particularly claims of defamation or contempt of court (ss 40-42). These provisions are important because the Scottish Parliament, as a creation of statute, lacks the inherent or assumed powers and privilege of the UK Parliament, and therefore needs some externally-guaranteed powers and privilege to give it a "protected space" within which it can carry out its role robustly without fear of legal challenge.
- 2.27 The most important of the powers conferred on the Parliament by the Act is the power to pass Bills which, when submitted for Royal Assent, become Acts of the Scottish Parliament (ASPs). This power may, however, be exercised only within the limits of the Parliament's "legislative competence", and to the extent that an ASP exceeds those limits, it "is not law" (s. 29(1)).
- 2.28 There are five criteria for the test of legislative competence – an ASP must apply only in or about Scotland; it must not relate to the "reserved matters" listed in Schedule 5; it must not breach certain restrictions set out in Schedule 4; it must be compatible with the "Convention rights" (those articles of the European Convention on Human Rights given statutory effect by the Human Rights Act 1998) and with European Community law; and it must not alter the basis of the Lord Advocate's role in relation to criminal prosecution and the investigation of deaths. Schedule 4 lists various enactments – including the Human Rights Act and, with some exceptions, the Scotland Act itself – and other aspects of the law which are protected from modification by ASPs. Schedule 5 lists the reserved subject-matters, grouped under various heads, which fall within the UK Parliament's exclusive legislative competence.
- 2.29 The Act includes a number of mechanisms to help ensure that the limits of legislative competence are not exceeded. Firstly, the Presiding Officer is required to consider every Bill introduced and state whether it is, in his or her view, within the legislative competence of the Parliament; in addition, where a Scottish Minister introduces a Bill, he or she must state that it is, in his or her view, within competence. Secondly, UK and Scottish Law Officers are given power to prevent a Bill passed by the Parliament from being submitted for Royal Assent if they believe it is outside competence, and may refer the issue to the Judicial Committee of the Privy Council (s.33)¹⁵. The Secretary of State may also block a Bill on other grounds – for example that it might jeopardise national security or international obligations (s.35). Other provisions in the Act set out how the courts are to decide any question about legislative competence that may arise.

15 The jurisdiction of the Judicial Committee on devolution issues will shortly be taken over by the new Supreme Court.

- 2.30 The Act expressly preserves “the power of the Parliament of the United Kingdom to make laws for Scotland” (section 28(7)). In other words, there are no matters that fall within the *exclusive* legislative competence of the Scottish Parliament.

The Scottish Administration

- 2.31 As well as establishing a legislature, the Act provides for a devolved administration. This body, referred to in the Act as “the Scottish Administration”, consists of a First Minister, other Ministers and two Law Officers (the Lord Advocate and Solicitor General for Scotland) – who are referred to collectively as “the Scottish Executive” or “the Scottish Ministers”¹⁶ – together with junior Scottish Ministers, non-ministerial office-holders and civil servants. Only MSPs may be appointed as First Minister, Ministers or junior Scottish Ministers, and these appointments, together with those of the Law Officers, require the Parliament’s approval.¹⁷ Law Officers who are not MSPs may sit and participate in the Parliament’s proceedings, but may not vote. The staff of the Scottish Administration remain members of the UK “home civil service”.
- 2.32 The Act also provides for the general transfer from UK Government Ministers to the Scottish Ministers of statutory and prerogative functions that fall within the Parliament’s “devolved competence”. In general, therefore, Scottish Ministers have “executive competence” wherever the Parliament has legislative competence. However, there is also provision for further executive devolution – either through the creation of shared powers jointly exercisable by UK and Scottish Ministers, or by the transfer to Scottish Ministers of specific powers in areas where Westminster retains exclusive legislative control. There is another important difference – where Scottish Ministers gain powers, UK Ministers lose equivalent powers (or they have to exercise them jointly). Thus, there are areas that fall within the exclusive competence of Scottish Ministers and areas where competence is shared.

Financial provisions

- 2.33 Part III of the Act establishes a Scottish Consolidated Fund (SCF) as the repository for the public funds that constitute the Parliament’s budget. The UK Government is required to make payments into the SCF “from time to time ... of such amounts as [the Secretary of State] may determine”. In other words, there are no statutory limits on the frequency of payments, the amounts involved or the means of calculation of those amounts. The White Paper that preceded the Scotland Bill made clear that actual payments would be made in the form of a block grant, with annual variations made using the same formula (the Barnett formula) that had been used since the late 1970s. This continues to be the system used today.
- 2.34 Other provisions in Part III of the Act give Scottish Ministers and other statutory bodies some limited borrowing powers, require them to keep proper accounts, and subject them to audit by an Auditor General for Scotland whose nomination must be approved by the Parliament.

16 The expression “Scottish Government” was formally adopted by the present administration, having previously been used informally in some contexts. As it has now gained almost universal currency, we use it, where appropriate, in this Report to refer collectively to those who exercise executive functions under the Act.

17 The current administration has adopted a different terminology, referring to Ministers as “Cabinet Secretaries” and junior Scottish Ministers as “Ministers”

The tax-varying power

- 2.35 Under Part IV of the Act, the Parliament is given the power, by passing a "tax-varying resolution", to increase or decrease the basic rate of income tax payable by Scottish taxpayers by up to 3p in the pound. Only a member of the Scottish Executive may move a motion for such a resolution. Supplementary provisions allow for subsequent changes in the UK income tax arrangements, and define more precisely who counts as a Scottish taxpayer subject to the varied rate.

Other provisions

- 2.36 The Act covers a number of other matters. Some relate directly to MSPs and Scottish Ministers, including their remuneration and the form of oath they must take before participating in Parliamentary proceedings. There is provision to deal with cross-border public authorities (public bodies or office-holders whose functions include but are not limited to devolved matters in Scotland). There are various powers enabling devolution to be adapted to changing circumstances, in particular by varying the extent of the Parliament's legislative competence (under s.30) or Scottish Ministers' executive competence (under s.63). Other powers include a facility for the UK Government to amend UK legislation in consequence of Scottish Parliament legislation. Detailed provision is also made about subordinate legislation under the Act, and the modification of existing enactments.

Effect of the Act on the rest of the UK

- 2.37 While the principal impact of the Act is on Scotland, it also makes some significant changes to wider UK governance arrangements. In particular, it changes the rules that the Boundary Commission for Scotland must apply in relation to Scottish parliamentary constituencies, bringing the "electoral quota" (the average number of voters in each constituency) for Scotland into line with that in England. As a result, the number of Scottish MPs was reduced from 72 at the time of devolution to 59 by the time of the UK general election of 2001.
- 2.38 The Act creates the post of Advocate General for Scotland as the UK Government's chief legal adviser on matters of Scots law, taking over this function from the Lord Advocate and Solicitor General for Scotland (who become, under the Act, members of the devolved administration). Together with the other two UK Law Officers (the Attorney General and the Solicitor General), the Advocate General (currently Lord Davidson of Glen Clova QC) provides legal advice and opinions to UK Government departments on a wide range of issues, including human rights, European and constitutional law. The Advocate General also has statutory functions in relation to the oversight of devolution, including helping to ensure that Acts of the Scottish Parliament are within its legislative competence.
- 2.39 Following the creation of a devolved administration assuming most of the functions of the pre-devolution Scottish Office, a separate office, named the Scotland Office, was created (on a non-statutory basis) to support the continuing role of the Secretary of State for Scotland in representing the Scottish interest in the UK Government on reserved matters.

The Scottish Parliament in practice

2.40 The first elections to the new Scottish Parliament were held on 6 May 1999, and the new MSPs first met on 12 May, in the Church of Scotland Assembly Hall on the Mound, Edinburgh – the Parliament’s temporary home for the next five years. Then, on 1 July 1999, the day on which the Parliament acquired its full legislative powers, it was officially opened by Her Majesty the Queen.

Procedure, sitting pattern and types of business

2.41 From the outset, the Parliament had a complete set of standing orders covering all the main aspects of its business – initially in the form of an order under the Scotland Act, but subsequently converted into the Parliament’s own document that it can amend to suit changing circumstances. The standing orders largely implement the recommendations of the CSG report, many of which were intended to mark a departure from the Westminster model, bringing in best practice from other European legislatures. These include:

- giving responsibility for proposing the business programme to a cross-party Parliamentary Bureau, chaired by the Presiding Officer (a more accountable alternative to Westminster’s “usual channels”);¹⁸
- committees with powers to conduct inquiries and scrutinise legislation (thus combining the roles of Westminster select and standing committees) and even introduce their own Bills;
- giving members of the public the right to initiate parliamentary business directly by petition; and
- deferring most votes to a “Decision Time” towards the end of each day’s Chamber business.

2.42 In the initial meetings of each session, the main business is the swearing-in of members and the election of the Presiding Officer and deputies, the other SPCB and Parliamentary Bureau members, and the First Minister, Ministers and junior Ministers. Committees must also be established and their members appointed before a more regular pattern of business can begin.

2.43 The Parliament’s normal sitting pattern involves committees meeting on Tuesdays (morning and afternoon) and Wednesdays (morning only) and plenary meetings in the Chamber on Wednesday (afternoon only) and Thursday (morning and afternoon). Mondays and Fridays are normally used by MSPs for constituency and party business.

2.44 The Chamber business programme consists of a mixture of debates, proceedings on Bills, periods for oral questioning of Ministers, statements and procedural items. Each week begins with a short address by an invited person, usually a faith leader (“Time for Reflection”), and each day’s business concludes with Decision Time (usually at 5 pm), followed by a “Member’s Business” debate (which is concluded without a vote). The half-hour First Minister’s Question Time at noon on Thursday is the most high-profile regular event, at which the main opposition party leaders go “head to head” with the First Minister on the topical issues of the day.

¹⁸ The “usual channels” is a term used to describe the working relationship of the Whips from the different parties and the leaderships of the Government and Opposition at the UK Parliament who agree arrangements and reach compromises about the running of Parliamentary business behind the scenes.

Legislation

- 2.45 Under the Parliament's rules, public Bills may be introduced by Scottish Ministers (Executive Bills), individual MSPs (Members' Bills) or by committees (Committee Bills). There are separate rules for private Bills introduced by non-MSPs.¹⁹
- 2.46 All public Bills follow a three-stage scrutiny process. Stage 1 consists of consideration of the general principles of the Bill and a plenary decision on whether to proceed with the Bill or reject it. In most cases, the Bill is first referred to one or more of the Parliament's committees to consider and report on the Bill. Stage 2 is the main amending stage, and also takes place in a committee. All MSPs may lodge and move amendments to the Bill, but only members of the relevant committee may vote on them. Stage 3 is a plenary stage, and involves a further amending stage followed by a debate on whether to pass the Bill or reject it.
- 2.47 All Bills require to be accompanied on introduction by certain documents – the statements on legislative competence required by the Scotland Act, plus explanatory notes, a financial memorandum and, in the case of Executive Bills, a policy memorandum. In addition, Members' Bills can only be introduced once the member concerned has lodged a proposal which is normally subject to a consultation process and then requires the cross-party support of at least 18 other MSPs. Committee Bills can only be introduced if the Parliament first endorses a proposal presented by the committee concerned in the form of a report.

Committees

- 2.48 There are two main types of committees – mandatory committees (whose remits are set out in standing orders) and subject committees (whose remits are specified in the motions establishing them).²⁰ The mandatory committees – Audit; Equal Opportunities; European and External Relations; Finance; Public Petitions; Standards, Procedures and Public Appointments; Subordinate Legislation – all have different and specialised roles.²¹ For example, the Audit Committee mainly considers reports by the Auditor General for Scotland, the European and External Relations Committee considers the impact of EU legislation; and the Subordinate Legislation Committee scrutinises statutory instruments and the provisions in Bills that confer power to make them. The remits of the subject committees roughly follow the responsibilities of Ministers, and their work largely consists of inquiries that they choose to undertake, plus scrutiny of Bills, subordinate legislation and other business that is referred to them.
- 2.49 Each committee has between 5 and 15 members, whose party allegiance reflects broadly the political balance in the Chamber. Each has a Convener and Deputy Convener, and the distribution of these posts among the parties is similarly proportional. Most committees meet either weekly or fortnightly, and conduct the large majority of their business in public. As well as their formal meetings, some of which take place outside Edinburgh, committees undertake a range of other activities, including commissioning research, undertaking fact-finding visits and organising seminars and other informal events.

¹⁹ In the first two sessions, a significant number of private Bills were introduced, mostly to grant approval for the construction of railways or tram-lines. Since the passing of the Transport and Works (Scotland) Act 2006, which provides for a non-Parliamentary process for authorising such projects, private Bills are likely to be much less common.

²⁰ Mandatory and subject committees are established for the duration of a session. Other committees are sometimes established on an ad hoc basis to consider particular Bills, or to carry out specific inquiries.

²¹ Until early in the current Session, the Procedures Committee and the Standards and Public Appointments Committee were separate.

Other Scottish Parliament activity

- 2.50 As well as being the forum in which MSPs participate in plenary debates and committee meetings, the Scottish Parliament provides MSPs with offices from which they can conduct a range of constituency and party business – both at Holyrood and in their local areas. A wide range of staff provide everything from procedural advice, research and information services through to IT support and catering. It is a venue for many events such as cross-party group meetings, receptions and seminars. The Parliament has also become a major visitor attraction, and is popular both with tourists and with Scots seeking to learn more about how they are represented. It is particularly in demand by school groups. Over 1.5 million people have now visited the Holyrood building since it opened. A large number of delegations from foreign parliaments also visit each year.
- 2.51 The Parliament has, in recent years, developed a number of initiatives to give it more of an international and public profile. These include sending a delegation to the annual Tartan Day (now Scotland Week) celebrations in New York, a successful annual Festival of Politics and the Scottish Futures Forum, aimed at promoting long-term non-partisan research on major social issues. It also hosts youth events, including plenary sessions of the Scottish Youth Parliament.

Developments since 1999²²

Session 1 (1999-2003)

- 2.52 The first Scottish Parliament elections, on a turnout of 59%, gave Labour the most seats (56), but no overall majority. The SNP was the second-largest party (35 seats), well ahead of the Conservatives (18) and Liberal Democrats (17). The Scottish Socialist and Scottish Green parties won one seat each, and there was one independent (Dennis Canavan).
- 2.53 Soon after the election, Labour entered into a coalition agreement with the Liberal Democrats, with the result that the Labour leader, Donald Dewar (then also Secretary of State for Scotland), became First Minister, while Jim Wallace, the Liberal Democrat leader, became his deputy. Donald Dewar's tenure in the Scottish Parliament came to a sad end with his death in October 2000, and he was succeeded as Labour leader and First Minister by Henry McLeish, who in turn resigned in November 2001 and was replaced by Jack McConnell.
- 2.54 Throughout the session, Sir David Steel (Liberal Democrat) was the Parliament's Presiding Officer. George Reid (SNP) and Patricia Ferguson (Labour) – later replaced by Murray Tosh (Conservative) following her appointment as a Minister – served as his deputies.
- 2.55 During the session, 62 Bills were passed and became Acts of the Scottish Parliament – 50 Executive Bills, eight Members' Bills, three Committee Bills and one Private Bill. Some of the most important measures were the abolition of feudal tenure, land reform (including a right of responsible access, and community right to buy provisions), freedom of information and measures to provide for a graduate endowment (in place of up-front student fees) and to repeal section 2A of the Local Government Act 1986 ("clause 28"). Other Acts initiated by the Executive dealt with adults with incapacity, homelessness, housing, local government, mental health, transport and the water environment. The most significant (and controversial) Members' Bills were those introduced by Tommy

²² This section draws on the very helpful report prepared by the UCL Constitution Unit for the Commission, included in Volume 2 and available at: <http://www.commissiononscottishdevolution.org.uk/papers.php>

Sheridan to abolish poindings and warrant sales, and by Mike Watson to ban hunting with dogs. Significant new public offices were created, including an information commissioner, a commissioner for children and young people, a parliamentary standards commissioner, and a public services ombudsman.

- 2.56 Throughout the session, the project to build a new Parliament building at Holyrood became a major controversy as costs escalated and the project over-ran. The site, the design and the construction management process all came under intense scrutiny; during 2000, both the building's principal architect, Enric Miralles, and one of his main supporters and friend, First Minister Donald Dewar, passed away. By June 2001 the Parliament was forced to acknowledge that the cap of £195 million it had attempted to impose in April 2000 was ineffective, and costs continued to rise.

Session 2 (2003-2007)

- 2.57 In the 2003 elections, on a reduced turnout of just over 49%, Labour retained its place as largest party, but with fewer seats (50), and the SNP retained its second place, also with fewer seats (27). The Conservatives (18) and Liberal Democrats (17) were unchanged, while the Scottish Green and Scottish Socialist parties dramatically increased their representation to 7 and 6 MSPs respectively. The Scottish Senior Citizens' Unity Party won one seat, and there were 3 independents (Dennis Canavan, Margo Macdonald and Dr Jean Turner). Labour and the Liberal Democrats again formed a coalition Executive, with Jack McConnell continuing as First Minister and Jim Wallace as his Deputy (succeeded in 2005 by Nicol Stephen, when he became leader of the Scottish Liberal Democrats).
- 2.58 George Reid (SNP) was elected as Presiding Officer, with Murray Tosh (Conservative) and Trish Godman (Labour) as his deputies.
- 2.59 Of the 66 Bills enacted during the Session, 53 were introduced by the Executive, three by individual MSPs, one by a committee. Nine were private Bills, mostly for the authorisation of railway or tram works, promoted by local authorities. Major reforms included a ban on smoking in public places and new controls on anti-social behaviour. Other measures covered animal health and welfare, crofting reform, planning, licensing, the protection of children and school education.
- 2.60 At the beginning of the session, former Lord Advocate Lord Fraser of Carmyllie was appointed to conduct an inquiry into the cost of the Holyrood building project. The inquiry reported in September 2004, shortly before the Parliament finally moved to its permanent new home.²³ By this stage, the total cost was estimated at £431 million, although this was later reduced to £414 million.²⁴ Following the official opening of the building in October 2004, the Parliament finally began to put the controversy over the project behind it.

Session 3 (2007-)

- 2.61 The May 2007 elections saw the Scottish National Party become the largest party in the Parliament by just one seat – 47 seats to Labour's 46 – after an election marred by controversy over large numbers of invalid votes and problems with electronic counting. The Conservatives won 17 seats and the Liberal Democrats 16. The Greens held onto only two of the seven seats they had had in Session 2, while the Scottish Socialists lost all 6 of the seats they had held previously (having split in 2006, with two of its MSPs, including former leader Tommy Sheridan, forming a new party, Solidarity). There was also

²³ The final report can be found at: <http://www.holyroodinquiry.org/>.

²⁴ <http://www.scottish.parliament.uk/nmCentre/news/news-07/pa07-018.htm>.

one independent MSP (Margo Macdonald). Alex Fergusson (Conservative) was appointed the Parliament's Presiding Officer, and Alasdair Morgan (SNP) and Trish Godman (Labour) as his deputies.

- 2.62 After failing to secure a coalition agreement with the Liberal Democrats, the SNP formed a minority administration, with Alex Salmond as First Minister and Nicola Sturgeon as his deputy. Legislation so far introduced by the new administration has been to remove bridge tolls and to abolish the graduate endowment, plus measures on public health and reforming the judicial and courts systems. The administration is also conducting a public consultation on its proposals for a referendum on independence, under the heading of a "National Conversation". The consultation document, *Choosing Scotland's Future*, also includes consideration of options for extending the devolution arrangements.²⁵

Scotland's multi-level governance

- 2.63 While the creation of a new tier of devolved decision-making represents an important constitutional change, it also needs to be seen in the wider context of the multi-level governance of Scotland.

Scottish representation in the UK Parliament

- 2.64 In particular, Scotland remains part of the wider United Kingdom, and continues to be represented in the UK Parliament at Westminster. The Scotland Act provided for the ending of Scotland's previous over-representation in the House of Commons. The number of Scottish constituencies were reduced from 72 to 59 (out of a total of 646), so that the ratio of electors to MPs is now roughly the same in Scotland as it is in England. Scottish MPs, like all other members of the House of Commons, are elected by the simple majority or "first past the post" system. Their constituencies are no longer co-terminous with those used for electing constituency MSPs. There are currently 38 Labour MPs, 12 Liberal Democrats, 7 SNP and one Conservative, plus the Speaker of the House of Commons.
- 2.65 Scottish MPs have the right to participate fully in all Commons business, affecting all parts of the United Kingdom. It is a feature – some would say an anomaly – of asymmetric devolution that Scottish MPs are normally unable to vote on matters affecting Scotland that have been devolved to the Scottish Parliament, but able to vote on the same matters as they affect other parts of the UK. This is usually referred to as the "West Lothian Question" after Tam Dalyell (then MP for a West Lothian constituency), who raised it as an objection to devolution in the 1970s.
- 2.66 The House of Commons has an active Scottish Affairs Select Committee which scrutinises in particular the UK Government's policies in Scotland on reserved matters. It is comprised largely but not wholly of MPs representing Scottish constituencies. There is also a Scottish Grand Committee, consisting of all the Scottish MPs, although this is much less active than before devolution and has held no formal proceedings since 2003.
- 2.67 Within the UK Government, Scotland's interests are currently represented by the Secretary of State for Scotland (the Rt Hon Jim Murphy MP) and a Parliamentary Under-Secretary of State (Ann McKeichin MP). Their role is to maintain the devolution arrangements and represent Scotland, within the UK Government, on reserved matters. In both roles, they are supported by officials in the Scotland Office, based in London and Edinburgh.

25 Information about the National Conversation can be found at: <http://www.scotland.gov.uk/topics/a-national-conversation>.

Scottish local government

- 2.68 Scotland is divided into 32 local authority areas, each of which has a unitary council. This structure was put in place in 1996, replacing the previous system of nine regional authorities and 53 district councils (itself put in place in 1974). The current 32 councils are collectively represented by the Convention of Scottish Local Authorities (CoSLA). There is also a further tier of representation through community councils, whose role is to communicate the views of local people to councils and other public bodies.
- 2.69 The local authority elections, held on the same day as the last Scottish Parliament election in May 2007, were the first to be held under the new system of single transferable vote (STV) introduced by the Local Governance (Scotland) Act 2004. This resulted in a significant shift in the balance of political power, the main changes being a fall of 161 in the number of Labour councillors, and a rise of 187 in the number of SNP councillors. As a result, the number of councils under Labour control fell from 13 to two, while a much larger proportion now have no single party in control – up from 11 in 2003 to 27 today (of which six are governed by a minority single-party administration and 21 by a multi-party coalition).
- 2.70 The current Scottish Government negotiated in November 2007 a "concordat" with CoSLA, as part of which each council negotiates a "single outcome agreement" with the Scottish Government setting out how it will deliver locally on national priorities. The arrangement is intended to give councils both greater flexibility and more responsibility, and is accompanied by new funding arrangements, including a reduction in the amount of "ring-fenced" central funding and a commitment to freezing council tax rates.
- 2.71 Scottish local authorities receive around 80% of their funding from the Scottish Government, with the remainder raised mainly through the Council Tax.

Scottish Representation in Europe

- 2.72 Scotland is represented in the European Union as part of the United Kingdom. Scotland currently has seven of the UK's 78 MEPs, all elected for a single region (with seats allocated using the d'Hondt system of proportional representation).²⁶ The Scottish Parliament also nominates councillors for appointment by the UK Government to serve as part of the UK's representation in the EU Committee of the Regions and Economic and Social Committee.
- 2.73 As the United Kingdom is the Member State, it is UK Government Ministers that represent Scottish interests in the EU Council of Ministers, although the Scottish Government is routinely consulted on matters affecting Scotland, and Scottish Ministers take part in Joint Ministerial Committee (Europe) meetings. The Scottish Government also has its own office in Brussels which works closely with the UK Government's permanent representation to the European Union (UKRep).
- 2.74 Part of the remit of the Scottish Parliament's European and External Relations Committee is to scrutinise EU legislative proposals that relate to devolved matters. Both it and the Scottish Government receive copies of the relevant EU documentation, together with the UK Government's explanatory memorandums.

²⁶ Under this system – similar to that used to elect regional MSPs, as explained in paragraph 2.24 above – seats are allocated to parties in a series of rounds, with the outcome of each round decided by dividing the number of votes polled for each party by the number of seats they have already been allocated, plus one. In 2004, this resulted in Labour, SNP and the Conservatives each winning two seats, and the Liberal Democrats one.

Chapter 3 Engagement and Evidence Gathering

Our approach

- 3.1 At the start of its work, the Commission determined that it would operate in an open and transparent manner, that it would be inclusive of all shades of opinion (within its remit), and that its approach would be rigorously based on evidence.
- 3.2 An engagement programme to help raise awareness of the Commission and to allow the people of Scotland, and the wider United Kingdom, to contribute evidence to it has therefore been a vital component of our work. A detailed strategy to achieve this was published on 1 September 2008 and this Chapter summarises its key aims as well as reporting on the progress we have made in implementing it.

Openness and transparency

- 3.3 Since its establishment, the Commission has worked in an open and accountable fashion. Crucial to this has been our website www.commissiononscottishdevolution.org.uk which covers both our remit and our programme and, as we set out below, provides ways in which people can contribute to our work. The website went live in May.
- 3.4 On the website we have published the minutes of all our meetings, all the written evidence that we have received (other than a small number that we were asked to keep confidential), full transcripts or agreed notes of oral evidence sessions and details of the local events we have held around Scotland, all of which were open to the public, as well as summaries of the discussions that took place at the local events.
- 3.5 Most of our oral evidence sessions were completely open to the press and to the public, and those held at the Scottish Parliament were broadcast live on the internet via webcast. Others were held in private, but on the understanding that an agreed note of the main points would later be published.
- 3.6 Regular briefings have been held with the media both to ensure that the work of the Commission is publicised as widely as possible, and that the media have been able to scrutinise us.
- 3.7 In addition, the Chairman of the Commission has appeared before the UK Parliament's Scottish Affairs Committee to give formal evidence on our approach to this review. We have been invited to return early next year to provide evidence on the First Report.

Engaging with the public

- 3.8 The Commission's central task is to strengthen devolution to improve the lives of the people of Scotland. Ascertaining and analysing their views has therefore been paramount, and we have been committed from the outset to hearing the opinions of as many people as possible. From 1 September we put in place additional mechanisms to allow anyone who wants to contribute to our work to do so, and we have regularly

reviewed progress at monthly meetings of the Engagement Task Group to ensure that we maximise our accessibility.

- 3.9 Our website has been a vital tool in the engagement strategy, and most people have chosen to contribute to our work that way, either emailing a written submission to us or using the on-line questionnaire or discussion forum. And to ensure that we reach the widest possible audience, static pages are available in Gaelic, with the option of translation into other languages on request also provided.
- 3.10 The website has been a well-used resource. The engagement and submission pages, and in particular the questionnaire allowing people to focus on the key issues, have been the most popular parts of the website, with traffic increasing sevenfold since the Commission's direct engagement with the public through a series of public engagement events began in September.
- 3.11 The Commission has also taken the opportunity to embrace new channels of communication. For instance, we have used audio-visual material, including a video message from the Chairman. An on-line diary has provided an insight into the workings of the Commission, and a Facebook group²⁷ has followed our progress. As noted above, some meetings have been webcast allowing people across Scotland, and across the globe, to see the Commission in action.
- 3.12 We have been acutely aware, however, that not everyone has access to the internet and that some prefer not to make their views known on-line. We have therefore distributed a leaflet across Scotland to raise awareness of our work, and give people the option of writing in with their views, or requesting a paper copy of our questionnaire.
- 3.13 That is one of the reasons that the Commission has also embarked on an extensive programme of local public events to consult directly and face-to-face with the people of Scotland and beyond, from all backgrounds, age groups and political persuasions. These meetings have been designed to focus on the issues that affect people's daily lives and to hear their thoughts on the future.
- 3.14 To date, meetings have been held in Glasgow, Dumfries, Inverness, Dundee, Stornoway, Ayr and Newcastle-upon-Tyne. The format for the events has been designed to ensure we engage with and listen to people, and centred on the three main areas of the Commission's work: the experience of devolution within the Union; improving the financial accountability of the Scottish Parliament; and the distribution of functions and inter-governmental relations.²⁸
- 3.15 Those who attended were asked about a range of issues including their expectations of devolution, how the new Scottish institutions had worked in practice and impacted on their lives, whether there was sufficient accountability, whether the funding arrangements of the Scottish Parliament need to be developed and how devolution could be strengthened. We also wanted to hear views on the way in which the Scottish and UK Governments and Parliaments work together, including how they can exercise an influence at a European Union level on matters affecting the whole of the United Kingdom. A summary of the discussions at each of the events can be found in Volume 2 and on our website.
- 3.16 The Commission has been pleased with the success of this programme so far. The majority of events have been over-subscribed, and attended by a wide range of people who were responding to posters, articles in the press, and open invitations either by local

27 <http://www.new.facebook.com/group.php?gid=22212274429>

28 A slightly different format was adopted at the Newcastle-upon-Tyne event to reflect the different perspective of those attending as observing Scotland rather than living in Scotland.

civic organisations or via local radio or Facebook. Feedback forms produced a positive response.

- 3.17 As set out above, the website is updated regularly with new written and oral evidence. This has allowed the people in Scotland and beyond to follow the progress of the Commission and directly consider all the evidence that we receive, as it is being gathered. The Commission feels that this is an important element of any consultation and underlines our open and inclusive approach. It has also enabled the media to comment on submissions, which in turn has stimulated public debate on a range of issues. The Commission has received requests for its questionnaire from people across Scotland so that they too can contribute to this discussion.
- 3.18 We have also worked with the media to raise our profile and highlight ways in which people can contribute to decisions about their future. We have developed and maintained a good relationship with the press and the broadcasters across Scotland, and in particular the regional media which have been highly effective in helping us communicate information about local events. At those events some concern was expressed about a lack of detailed coverage in the media about issues such as financial accountability, and we have been able to respond by holding briefings to cover these issues in more depth.

Gathering evidence

- 3.19 Our direct engagement with the people of Scotland has, so far, proved very effective in concentrating the minds of the Commission on the key issues that impact on everyday lives, which has in turn helped shape our agenda for more formal evidence sessions. The Commission has sought to gather this evidence both in writing and at oral hearings.
- 3.20 Written evidence has been gathered in two phases. First of all, in the first few months of our work we sought suggestions for topics that would require our particular attention. These responses helped us shape the second phase, which commenced in June, of a more general consultation on the experience of devolution and whether there should now be changes to the range of devolved or reserved matters, the funding arrangements and the mechanisms for inter-governmental relations. In both phases we invited submissions by way of letter to interested parties and via the website. The complete list of those from whom we received written evidence and a summary of that evidence is available in Volume 2 of this Report. The vast majority of written submissions are available, in full, on our website.
- 3.21 As well as inviting written submissions, the Commission also commissioned some academic advice. A review of the experience of the first decade of devolution in Scotland was provided by the Constitution Unit in the Department of Political Science at University College, London, and is reproduced in Volume 2.
- 3.22 The Commission has also received a detailed submission of evidence from the UK Government about the operation of devolution. The evidence the Commission has received from retired Senior Civil Servants, former Ministers and former First Ministers has also been very helpful. The Commission has found evidence from those so closely involved in working within devolved structures valuable. In the next stage of our work we would welcome evidence from the Scottish Government, given their responsibility for the exercise of devolved government.
- 3.23 We also recognised the need for impartial expert advice and evidence on how the financial accountability of the Scottish Parliament might be improved. We therefore

invited Professor Anton Muscatelli of Heriot-Watt University to lead a group of experienced academics and practitioners from the UK and abroad. The First Report of this Independent Expert Group was published on 17 November 2008.²⁹

- 3.24 Thirty-eight public oral evidence sessions – thirty-two in Scotland and six in London – have been held to concentrate on specific issues and experiences. Two former First Ministers – Henry McLeish and Jack McConnell – talked to us about their experiences both before and since devolution. Many other organisations gave us the benefit of their experiences including:
- National Farmers Union Scotland;
 - Society of Local Authority Chief Executives;
 - Association of Chief Police Officers in Scotland;
 - Confederation of British Industry Scotland;
 - Scottish Trades Union Congress;
 - the Church of Scotland’s Church and Society Council;
 - Scottish Fishermen’s Federation;
 - Royal Society of Edinburgh;
 - Chartered Institute of Public Finance and Accountancy;
 - Oil and Gas UK;
 - Scottish Council for Development and Industry;
 - UNISON Scotland
 - Law Society of Scotland; and
 - Council of Ethnic Minority Voluntary Organisations.³⁰
- 3.25 We also took evidence in London from some bodies with a UK-wide remit, such as the Food Standards Agency, Health Protection Agency, Ofcom, the Office of Fair Trading, and the Federation of Small Businesses.
- 3.26 Some witnesses – including former Presiding Officers Sir David Steel and George Reid; Sir Muir Russell, former Permanent Secretary of the Scottish Executive, and Lord Grenfell, Chairman of the House of Lords Committee on the EU – preferred to speak to us in more private, less formal meetings. However, in the spirit of transparency, notes of the meetings have been, or will be, made available on the website.

Conclusions and next steps

- 3.27 The Commission welcomes the response that it has received during this first part of its review. Local events have been well attended; on-line surveys have proved popular and useful; and there has been a good profile for the Commission in the media. In addition, an excellent range of written submissions has been collected and the oral evidence

²⁹ The report can be found at www.hw.ac.uk/reference/ieg-first-evidence.pdf

³⁰ A full list is available on the Commission website: <http://www.commissiononscottishdevolution.org.uk/engage/oral-evidence.php>.

sessions have produced important information. The Commission has also fulfilled its ongoing commitment to openness and transparency by publishing nearly all the material it has received, and hearing as much evidence as possible in public.

- 3.28 The common theme throughout all the events we have held – and the evidence we have received – has been an overwhelming feeling that devolution has been a positive change and that work to improve the settlement is timely and important to the people of Scotland.
- 3.29 In Volume 2 we have produced an analysis of the main ideas emerging from the evidence, both oral and written, and a structured synopsis of the main points raised in that evidence, grouped according to the main themes of the Commission's remit. It also includes an index of written submissions and a list of all oral evidence sessions, which together form a basis for all references elsewhere in this Report.
- 3.30 The evidence points very clearly to specific areas on which we will focus in the next phase of work. These areas are set out in the summary and consultation document published alongside this Report.
- 3.31 We will continue our open and inclusive approach in the next phase of our work. We expect to gather further written and oral evidence and to visit different parts of Scotland to ensure that our final conclusions are not just informed by the range of opinion in Scotland but also reflect the realities of how changes to devolution can improve the daily lives of the people of Scotland.

Chapter 4 Principles: Devolution and the Union

The remarkable success of devolution

- 4.1 As we explained in Chapter 2, devolution within the Union came about as a result of a long period of political development. Administrative devolution to Scotland proceeded gradually throughout the 20th century, but at the same time a degree of Home Rule remained a longstanding aspiration of many in Scottish society. This was reflected in the Scottish Covenant movement of the 1940s and 50s, the abortive proposals for a Scottish Assembly in the 1970s and in the cross-party work of the Constitutional Convention of the 1990s.
- 4.2 The culmination of this came in 1997 when the Scottish people voted overwhelmingly for a Scottish Parliament with a broad legislative competence and tax-varying powers, and some key functions reserved to the UK Parliament. During the course of our work to date, we have read and heard a great deal about how effective devolution has been. The first and most important conclusion that emerges from the evidence submitted to us from across Scotland and beyond is that devolution has, without equivocation, proven to be a success.
- 4.3 We have found that the devolved institutions have established themselves in Scottish life, and are widely valued by Scots. Our evidence is backed up by research into public opinion. As Table 4.1 clearly shows, devolution within the Union has consistently remained the preferred constitutional model of the significant majority of people in Scotland. The Commission is aware that it is also important that devolution to Scotland must maintain broad consent across the UK as a whole.

Table 4.1 - Constitutional preference for Scotland³¹

| Scotland should: | 1997 May | 1997 Sept | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 |
|--|-------------|--------------|------|------|------|------|------|------|------|------|------|
| Be independent, separate from UK and EU or separate from UK but be part of the EU | 28 | 37 | 28 | 30 | 27 | 30 | 26 | 32 | 35 | 30 | 23 |
| Remain part of the UK with its own elected Parliament which has some taxation powers | 44 | 32 | 50 | 47 | 54 | 44 | 48 | 40 | 38 | 47 | 55 |
| Remain part of the UK with its own elected Parliament which has no taxation powers | 10 | 9 | 8 | 8 | 6 | 8 | 7 | 5 | 6 | 7 | 8 |
| Remain part of the UK without an elected Parliament | 18 | 17 | 10 | 12 | 9 | 12 | 13 | 17 | 14 | 9 | 10 |

31 Source: Scottish Election Study 1997; Scottish Referendum Study 1997; Scottish Social Attitudes Survey 1999 – 2007.

- 4.4 Listening to the people of Scotland, and talking to many civic organisations and others, we have also found that the devolution settlement is in practice operating successfully. Of course many of those who gave evidence or registered a view said that they were happy about devolution because the Scottish Parliament pursued particular policies of which they approved. That in itself is not necessarily proof of success, and making judgments about specific policies is not within the Commission's remit. But allowing domestic public policy in Scotland to reflect more effectively the views and preferences of the population is clearly an objective of devolution, and it has manifestly been achieved.
- 4.5 The Commission has also based this judgment on the evidence of the vast majority of respondents who praised the way in which the Scottish Parliament went about its business. We heard that the Scottish Parliament was closer to the people it served. The public, interest groups and others felt they had greater opportunity to meet relevant Ministers and MSPs, and so greater understanding and mutual respect had developed. Some groups told the Commission they had initially been sceptical about the value of a Scottish Parliament, but now strongly supported it because of the benefits it brought to their members in Scotland. The NFU Scotland told the Commission "we believe passionately that devolution has been a success for agriculture... I refer to the excellent access that we have and have always had to ministers and party spokespersons".³²
- 4.6 We have also heard a great deal of praise for the transparency and openness of the Scottish Parliament – whether through its approach to committee inquiries, or its innovative use of the internet to make information available and accessible (particularly in the Parliament's early days).³³ Some witnesses noted that the Scottish Parliament was now showing considerable maturity despite its relative youth, as observed by the former presiding officer, George Reid,³⁴ amongst others. The Commission also highlights, and agrees with, the evidence received that the Scottish Parliament has brought about far greater democratic scrutiny of public life in Scotland and of legislative proposals. A number of respondents commented on the shift from poorly attended short late-night debates on Scottish issues in the UK Parliament before devolution, to detailed and well-informed debates in the Scottish Parliament.
- 4.7 Devolution provides the opportunity for the Scottish Parliament and the Scottish Government to respond to the wishes and priorities of the Scottish people. But in doing so, it also provides an opportunity for different policy approaches, methods of delivery, and actions to address difficult challenges, such as the cross-cutting issues which all governments have to deal with. This allows for the comparison of different approaches, and for different parts of the United Kingdom to learn from each other and adopt solutions which are seen to be successful. In order to do this of course, it is necessary for data to be available for such comparisons to be made, and we are aware that this provides challenges for those involved.

Developing the Constitution

- 4.8 Emerging from this evidence are a number of issues about the nature of devolution within the UK. The purpose of this chapter is to analyse these issues to see how devolution might be developed within a continuing Union so as to serve the people of Scotland better.
- 4.9 The Commission starts from the position, inherent in our remit, that Scotland should

³² Oral evidence from Jim McLaren, National Farmers Union Scotland, column 51.

³³ See for example, oral evidence from Lloyd Austin, Scottish Environment LINK, columns 237 and 238.

³⁴ Informal oral evidence from George Reid.

remain an integral and distinctive part of the United Kingdom with Scottish representation at the UK Parliament and a Scottish Parliament exercising a wide range of powers. We were not asked to consider, and do not, whether separation from the rest of the UK would be desirable for Scotland or more generally.

- 4.10 Constitutional arrangements can easily seem abstract and distant from the daily reality of people's lives. The Commission will not propose changes to them simply for the sake of change, or as an end in itself. The purpose of any change is to help develop devolution to serve the people of Scotland better, with due regard to the expectations and interests of people elsewhere in the UK.
- 4.11 In delving deeper into these issues, the Commission has found the analysis of the Scottish jurist and constitutional expert, James (Viscount) Bryce – writing towards the end of the nineteenth century – a helpful guide.³⁵ Bryce said that every political constitution has three main objects:
- to establish and maintain a framework of government under which the work of the state can be efficiently carried on, so as to associate the people with the government, preserve public order and maintain a tolerable continuity of policy;
 - to provide security for the rights of the individual citizen and the protection of minorities; and
 - to hold the State together, and strengthen the cohesiveness of the country, by creating good machinery for connecting the outlying parts with the centre and by appealing to the various motives that will encourage all sections of the population to wish to remain united.
- 4.12 Bryce recognised (as Madison, the father of the US Constitution, had done before him) that a good constitutional arrangement will require checks and balances. Common institutions, common interests (including commercial interests) and a sense of shared identity will draw people together. Divergent interests or priorities, a sense of separate identity or a sense of grievance (real or imagined) will pull people apart. Such tensions and tendencies are unavoidable, but a well-designed constitution will aim to encourage and promote those that draw people together, and counteract the effect of those that tend to drive people apart.
- 4.13 Devolution within the Union involves such a balance³⁶ and our task, after the first decade, is to see how successfully such a balance has been achieved. To do that we need to understand fully the devolution settlement that was put in place in 1999.

Understanding devolution within the Union

- 4.14 The creation of the Scottish Parliament was by any standards a transformational step. A body located in Scotland and directly elected by the people of Scotland now makes many of Scotland's laws. It holds Ministers chosen from within that Parliament accountable for the delivery of domestic public services and public policy in Scotland. It is a tribute to those involved in delivering devolution that, according to the evidence, such a radical step has been so successful.

35 Bryce, *Studies in History and Jurisprudence* (OUP 1901), Vol.1, Essay IV. As a Member of Parliament, Bryce was closely involved in drafting and promoting successive Bills for Home Rule in Ireland and served as Chief Secretary for Ireland. He wrote a definitive work on *The American Commonwealth*, and his approach had considerable influence on the drafting of the Australian Constitution.

36 Bryce cited the entrenched position of Scottish institutions within the British constitution, and the special provisions made for Quebec in the Canadian constitution as examples of measures designed to counteract "centrifugal" tendencies.

- 4.15 One of the reasons for the success of devolution was that, although it created a significant new layer of democratic political accountability, in other respects there was a great deal of continuity with the previous arrangements. The functions of the new Scottish Ministers and the legislative competence of the new Parliament were built closely around the pre-existing administrative responsibilities of the Secretary of State for Scotland. The officials who served the Secretary of State moved across to serve the Scottish Ministers, and the arrangements for setting the Scottish budget were a continuation of the long standing block grant, calculated using a formula which had been operating since the late 1970s.
- 4.16 This incremental and almost organic development has continued since 1999. The Scotland Act contains powers for the devolution settlement to be adjusted through subordinate legislation; and changes can also be made by subsequent primary legislation. These powers have been exercised on a number of occasions, primarily to confer additional executive powers on Scottish Ministers.. An important example of this is the new executive responsibility those Ministers now have for railways.
- 4.17 Such an approach has many strengths. The responsibilities that had accrued to the Secretary of State for Scotland accumulated over many years. Some, like the responsibility for the separate legal and educational systems, were based on historic differences between Scotland and the rest of the United Kingdom. Others were transferred incrementally over the years in response to changing circumstances or political pressures. The former Scottish Office had gathered a set of responsibilities where administrative devolution was practical and could be made to work. This allowed scope for administrative or policy divergence, and for decisions to be taken closer to those affected, within the context of collective UK Ministerial responsibility. Development since devolution has been tailored to allow greater devolved Scottish political choice and responsibility within the UK.
- 4.18 It may be that this careful, incremental development of competence is one of the reasons why there are relatively few problems of overlap between devolved governmental powers and those reserved to the UK. The Commission recognises that there have been problems – some simply of misunderstanding, others of substance – but there have been fewer of them than might have been expected.³⁷ However, after a decade it must be right to look again at this inherited element of the devolution settlement to see if it needs to be developed to allow the Scottish Parliament to serve the people of Scotland better, in accordance with our remit.
- 4.19 We review the functions of the Scottish Parliament and Scottish Government in Chapter 5. In Chapter 6 we consider whether the degree of continuity in the funding system – substantially the same as the system which financed a government department before devolution – makes it more difficult for the new political institution to be sufficiently accountable to the Scottish electorate. Chapter 7 asks whether sufficient has been done to replace pre-devolution coordination *within* a single Parliament and government, with effective post-devolution relationships *between* Parliaments and governments.

The powers of the Scottish Parliament

- 4.20 A striking aspect of the 1999 settlement is not just the extent of the functions devolved to the Scottish Parliament,³⁸ but the way in which functions have been allocated: **unless a function is specifically reserved to the UK Parliament, it is devolved to Scotland.** This

³⁷ The Commission considers these boundary issues in Chapter 5, and also some of their implications for intergovernmental relations in Chapter 7.

³⁸ These are discussed in detail in Chapter 5.

approach has many advantages – not least that there is much greater clarity about the allocation of responsibilities than might have been the case if the failed devolution legislation of 1978³⁹ had been brought into effect.

- 4.21 This approach is also consistent with the principle of subsidiarity – namely that decisions should be taken by governmental bodies as close as possible to the people who are affected by them, better to reflect their needs and preferences. In our view, this is a helpful way of assessing the optimal balance of centralisation or decentralisation which should apply to the allocation of functions between the devolved institutions and those that operate at UK level. The question should be whether the disbenefits of devolution (for example in terms of cost and complexity or effects on the rest of the Union) outweigh the advantages of decentralised decision-making provided by it. Applying this principle to the allocation of power and responsibility within Scotland is also important, notably in relation to local government, but is not something the Commission has considered as part of its remit.
- 4.22 So to understand the place of devolution within the Union, and the proper balance between devolution and reservation, it is necessary to look closely at the reserved functions. Devolution and the Union are two sides of the same coin: to understand how devolution might develop it is necessary to understand the nature of the Union in which Scotland is embedded. This is particularly important because while the referendum in 1997 endorsed both those powers to be devolved and those that would remain reserved, the truth may be that, in the huge task of setting up the new Scottish Parliament, the powers that were to be exercised at United Kingdom level were inevitably given rather less attention by many in Scotland.
- 4.23 Especially because of the way in which powers are devolved unless specifically reserved, we have also very much borne in mind the significant changes in the landscape since the devolution settlement was designed – such as the new threats posed by global terrorism and the emergence of climate change as one of the world's greatest environmental challenges. The last ten years have also seen changes in the EU and other international institutions, not least the accession of ten new Member States to the EU in 2004. And the UK has also faced crises which have tested the workings of devolution, in relation to areas such as public health and animal health. Recent months have, of course, also seen unprecedented changes in the stability of the global economy, which has had an impact on the lives of everyone in Scotland. All of these may be relevant to the allocation of functions or to the working relations between governments.
- 4.24 The Commission has reviewed these questions from first principles, and asked what devolution within the Union should mean, or, to put the matter another way: what sort of Union is desirable between Scotland and the rest of the UK? Form must follow function: the shape of the constitutional arrangements should be determined by what they are seeking to achieve – in this case the right balance between decentralising power and responsibility so as to serve the people of Scotland better, and sustaining shared interests, identity and citizenship across the Union.

What do we understand the Union to be?

- 4.25 In 1997 the Government's White Paper *Scotland's Parliament* concentrated mainly on creating the new institutions. It articulated the benefits of the Union sparingly, although it identified key aspects of the Union that remain true today:

39 The Scotland Act 1978.

“The Government want a United Kingdom which everyone feels part of, can contribute to, and in whose future all have a stake. The Union will be strengthened by recognising the claims of Scotland, Wales and the regions with strong identities of their own. The Government’s devolution proposals, by meeting these aspirations, will not only safeguard but also enhance the Union.

There are many matters which can be more effectively and beneficially handled on a United Kingdom basis. By preserving the integrity of the UK, the Union secures for its people participation in an economic unit which benefits business and provides access to wider markets and investment and increases prosperity for all. Scotland also benefits from strong and effective defence and foreign policies and a sense of belonging to a United Kingdom.”⁴⁰

- 4.26 In looking at these matters afresh, the Acts of Union provide a useful reference point to start from. Following the Union of Crowns of Scotland and England in 1603, the Union of the Scottish and English Parliaments in 1707 created a Parliament of Great Britain meeting in London. The Treaty of Union declares that England and Scotland shall become one kingdom, with the same monarchy and succession, a single parliament (“the Parliament of Great Britain”), and equal trade and economic rights. Some clauses ensure the continuation of Scottish institutions (such as the legal system). In other respects Scotland adopted the forms existing in England, for example with regard to customs and excise duties, weights and measures, and coinage.
- 4.27 The modern Union has a number of different elements or aspects. Some of these find their roots in 1707, but others have developed since. The relatively simple pattern of government of the 18th century, or even how Government was structured in the last century, does not fit very well with the complex, multi-layered institutions of the 21st century. Different levels of government have overlapping, and sometimes competing, responsibilities. Nevertheless it is helpful to understand the Anglo-Scottish Union at its roots, in terms of its fundamental political, economic and social components. Of course these interact with one another and cannot be easily disentangled, but this division will help us identify how powers or functions can be allocated, finance arranged and relationships managed.

The political Union

- 4.28 The Acts of Union created a political Union, but they were not the last word in political or constitutional developments inside the UK. Over the three hundred years since then, the nations of the UK have evolved common political and constitutional values and institutions, which form the bedrock of our liberties. These values and institutions constitute and, in the Commission’s view must remain, key parts of a political Union. They include, in particular, profound commitments to democracy and the rule of law, and a common citizenship which is based on a set of shared values which help bind the Union together.
- 4.29 The United Kingdom is a constitutional Monarchy where the Monarch symbolises the unity of the State. The UK’s laws are made by the Queen in Parliament, which is a critical unifying institution. The UK’s commitment to democracy developed gradually since the Union of 1707, notably in the step by step extension of the franchise in the 19th and 20th centuries and we now have a common franchise across the UK, and all UK citizens are represented at Westminster. Prior to devolution Scotland was proportionately over-represented there, so that the interests of a smaller partner within the UK were properly

40 *Scotland’s Parliament*, Cm 3658 (London: HMSO, 1997), paragraphs 3.1 and 3.2.

addressed. Now that Scotland has a separate Parliament devoted wholly to Scottish domestic policy, its level of representation in the House of Commons (59 MPs) is approximately proportionate to Scotland's share of the UK population. This representation is, we believe, a vital component in the continuing political Union and we believe this remains crucial, not least so that Scottish MPs can hold the United Kingdom Government to account.

- 4.30 Democracy is not the only characteristic of the Union that is critical to preserving liberties and safeguarding rights. The UK is committed to the rule of law, manifested in the independence of the judiciary. Preserving the rights of individuals and minorities are also core values shared across the Union. The Commission takes it as a given that there is a common commitment across the United Kingdom to:
- uphold the rule of law;
 - uphold the independence of the judiciary by ensuring that judges are independent of the executive and the legislature – and vice versa;
 - safeguard human rights.
- 4.31 The rule of law is fundamental to the constitution of the UK. But this common commitment does not of course imply uniformity in all substantive law or in legal methods or procedures. Scotland retains its own courts and legal traditions. Indeed the position of Scots law was secured by the Act of Union, and has been protected and maintained within the United Kingdom since.
- 4.32 One particular aspect of law, however, is now substantially uniform across the UK, and is embedded in the devolution settlement. That is respect for the rights of individuals, now enshrined in the Human Rights Act 1998. The Scottish Parliament and Scottish Government do not have any power to act in ways which would breach human rights. These and other important rights like the universal franchise are common across the UK. They provide important constitutional protections, and express deep shared commitments which help bind the country together. In this connection, the Commission will consider carefully a submission by the judges of the Court of Session about how the provisions in the Scotland Act ensure compliance by the devolved administration with human rights obligations.⁴¹
- 4.33 The political Union has created a common UK citizenship that embodies shared fundamental freedoms such as common civil and political rights, valued across the UK.⁴² In considering whether any changes might be made to the powers and functions of the Scottish Parliament, the Commission will be careful to avoid anything that might erode the political Union. Common citizenship also implies certain shared social values and rights – and these are discussed below at paragraphs 4.53 - 4.61.

The Union in the international arena

- 4.34 The common democratic values that help bind the Union together are also reflected in the UK's international relations. This aspect of the Union also promotes the common interests of the nations of the Union. This is seen in UK representation abroad, defence and national security. (The Home Rule proposals of the Scottish Covenant movement recognised that "Peace and War, Defence Services and Foreign Affairs" should remain reserved to the UK Parliament – see paragraph 2.10 of Chapter 2.)

⁴¹ Written submission from the judiciary in the Court of Session. This is discussed in paragraph 5.24 of Chapter 5.

⁴² The concept of rights inherent in citizenship has come to replace the earlier concept of protection as subjects of the Crown. Of course the asymmetry of the UK means that political rights are expressed differently. Scotland elects members to two Parliaments, Wales to a Parliament and Assembly, England to one Parliament.

- 4.35 The United Kingdom is a State recognised in international law. Scotland forms part of that State, as well as having an international profile in its own right. The Commission agrees it is good for Scotland to have an international profile. But we are clear that it is the United Kingdom which is obliged, vis-à-vis other States, to discharge the international functions and obligations of the sovereign State of which Scotland is part. We note that Scotland's interests are represented in international affairs as an embedded part of a major power, with a permanent seat on the Security Council of the UN, and with a long tradition of a high international profile in organisations like NATO and the G8.
- 4.36 Scotland also participates with the rest of the UK in the promotion of international development through development programmes (many managed from the Department for International Development's Headquarters in East Kilbride) which are widely regarded as among the best in the world.⁴³ This is one way in which, by acting together, all the nations of the UK can have far greater influence in the world.
- 4.37 Scotland's longstanding Union with England, Wales and Northern Ireland is in its turn embedded in the wider European Union. The Commission has also received evidence that as a significant Member State the UK has considerable influence to help secure EU positions which are in its, and Scotland's, national interest.
- 4.38 The United Kingdom's diplomatic service represents and advances the interests of the whole of the United Kingdom and of all UK citizens throughout the world. As the evidence from the Foreign and Commonwealth Office sets out, the service represents all UK citizens, but also promotes the specific interests of Scotland as well as more general UK ones.⁴⁴ The Commission sees no case for any changes to this arrangement, but notes the importance of the existing mechanisms which ensure the specific interests of each part of the Union are taken into account and represented, especially in relation to EU negotiations impacting on domestic policy. It is greatly to Scotland's advantage that within this framework, special arrangements are made for Scottish representation in, for example, Brussels and Washington.
- 4.39 National defence and security are irreducible functions of the State, and therefore of the Union. The Commission believes that in a world with rapidly changing and uncertain threats, all parts of the UK must join together for defence and security. To say that is not of course to endorse any particular defence or security policy but rather to assert that these issues should be decided at a UK level in the best interests of all UK citizens. In ensuring the defence of the United Kingdom it is right that there be no risk of a lack of clarity. The evidence from the Ministry of Defence refers to the current high level of deployment on operations overseas and highlights the importance of a strong military chain of command operating under a single national political authority and a single defence policy⁴⁵
- 4.40 The UK's armed forces are part of the national heritage of all the countries of the Union, and Scotland has played and continues to play a distinguished role in them.⁴⁷ The community of people associated with our armed forces are part of the glue that holds the UK together. Service personnel and their families show just how deeply rooted the connections between the nations of the Union are. And of course as part of the wider community, they access devolved services. The recent UK Government Command Paper on support for service personnel highlighted this and referred to a number of agreed

43 See for example the OECD Peer Review: http://www.oecd.org/document/43/0,3343,en_2649_34603_36881515_1_1_1_1,00.html.

44 HM Government evidence to the Commission on Scottish Devolution, Chapter 6 – Foreign and Commonwealth Office.

45 HM Government Evidence to the Commission on Scottish Devolution, Chapter 8 - Ministry of Defence.

46 See for example the oral evidence from Veterans Scotland, column 283.

measures on which the UK and Scottish Governments would work closely together to implement.⁴⁷ This is just one illustration of how reserved and devolved responsibilities can engage with one another.

- 4.41 National security deals with a wide range of threats, some of which have changed or developed since the Scotland Act was enacted. These affect key aspects of national life, and the threats to the common infrastructure which supports the life of the nation have broadened in recent years. As the incident at Glasgow Airport in June 2007 illustrates, terrorism does not recognise the Scottish/English border, and its threats are increasingly global. A strong, effective and coordinated Union-wide approach is essential, but this has to be integrated with devolved services such as policing or emergency services.
- 4.42 The Union implies, and indeed requires, that the key functions of defence, national security and international representation are and should remain reserved matters. But their impact on devolved issues and arrangements are already made to reflect that, for example, Scottish representation in FCO embassies, liaison between military and civil powers in contingency planning and police cooperation. It is a strength of the UK's constitutional arrangements that they are sufficiently flexible to allow recognition of Scottish distinctiveness within a single, reserved, policy approach.

The economic Union

- 4.43 As well as a political Union, the UK is also a deeply integrated economic Union. This has its origins in the customs Union and the currency Union that were central to the 1707 Treaty. Over the centuries since then, the UK has developed into a well-integrated single market in goods, services, labour, capital and knowledge.
- 4.44 The history of Scotland, especially in the 19th and 20th centuries, shows how participating fully in a UK-wide market, and through it in a wider global economy, offers the opportunity for business and commerce, whether in manufacturing, services or finance, to flourish. As well as free trade, this market allows for the free flow of talent throughout Britain. This single market promotes economic growth throughout the Union and has been hugely to Scotland's advantage. These benefits are not just historic. As has been seen in recent months, in times of financial and economic turbulence, there are advantages in the capacity to take action at a UK level.
- 4.45 The economic Union is seen clearly in unifying institutions such as the Bank of England and the Financial Services Authority, as well as Her Majesty's Treasury, and Her Majesty's Revenue and Customs. All of these discharge functions in the management of the whole economy, serving the people of Scotland alongside the rest of the UK.
- 4.46 Effective macro-economic management does not require complete uniformity in all matters. Economic development can often be best promoted by coordinated action at the devolved level, benefiting the people of Scotland. This may be a matter of exercising devolved responsibilities effectively in such matters as education or transport which are essential to a thriving economy. Or it may be in interventions to support growth in particular places or sectors of industry or to develop or apply knowledge. The allocation of devolved powers can promote such development, but should not impede the free flow of trade within the United Kingdom. Trade includes the free flows of capital, labour, goods and services.

47 *The Nation's Commitment: Cross-Government Support to our Armed Forces, their Families and Veterans* (Cm. 7424), available at: <http://www.mod.uk/NR/rdonlyres/415BB952-6850-45D0-B82D-C221CD0F6252/0/Cm7424.pdf>

- 4.47 The Commission highlights the free flow of knowledge, which is key to the future prosperity of the nation, and in which Scotland has world-class capabilities. Science, research and higher education are discussed further in Chapter 5, paragraph 5.46.
- 4.48 We see great advantage in this economic Union, in the interests of all of the United Kingdom, and believe it is critical for the future prosperity of Scotland – and that has implications for the scope of devolution. We discuss those implications in later chapters.

A cultural Union

- 4.49 The people and the nations of the United Kingdom have many elements of shared identity, established through history, and expressed in common aspects of culture. These were described by Bryce as “bonds of sympathy”. Not all may be tangible, but they are very real and widespread. A great many Scottish families have relations living or working elsewhere in the UK. Similarly, there are few citizens of other parts of the UK who do not have a family, educational, business or cultural link with Scotland. These connections are a powerful unifying force, and this sense of shared identity is expressed by many institutional links. As well as its constitutional significance, the Monarchy also provides for many people a bedrock of the social and cultural Union. Many social, voluntary, professional, scientific and business organisations operate throughout the country. Amongst these, not-for-profit organisations are able, like businesses, to take advantage of the single market created by the economic Union. Universities take students from across the UK. And on occasions there are shared successes in sport – such as that of the Great Britain Team in the recent Olympics.
- 4.50 As was made clear to us when the Commission held public sessions (not least in Newcastle-upon-Tyne) people throughout the UK see themselves as having simultaneous identities on many levels, be they local, regional or national. This is fundamentally a healthy thing: one of the characteristics of the UK is that it is a tolerant society and that makes it possible for citizens to be proud of their multiple identities, for example, Asian and British, or Asian, Scottish and British. We believe it is a strength of the Union that it embodies and encourages this, rather than seeking to create a cultural uniformity in its different nations and peoples. This is important to many UK citizens in a modern, multicultural society.
- 4.51 This great strength is perhaps most clearly illustrated by that unique national institution, the BBC. The BBC as a public service broadcaster is of course internationally distinctive. But for our purposes what is striking about it is the way it needs to display both Scottish and UK news, comment and entertainment.⁴⁸ The BBC is not without its critics in the way it has gone about achieving this, but the Commission notes its continued efforts to do so. For example in response to the recent BBC Trust report,⁴⁹ the BBC has been devoting greater effort to distinguishing between Scottish, English and UK issues in news coverage.
- 4.52 The multiple identities within the Union promote a richness of culture, and a passion for heritage. They give the Union its diversity, and with diversity allow for breadth of talent and innovation. They stem from the political Union, but now exist independently of it and reinforce it.

48 Written submission from the BBC.

49 The BBC Trust Impartiality Report: BBC Network News and Current Affairs Coverage of the Four UK Nations, June 2008, available at: http://www.bbc.co.uk/bbcctrust/assets/files/pdf/review_report_research/impartiality/uk_nations_impartiality.pdf

The welfare state and the social solidarity implied by shared citizenship

- 4.53 The UK is a welfare state, one of the world's earliest, and one of the best developed. From the introduction of the old age pensions at the start of the 20th century, through the Beveridge Report during the Second World War and the creation of the National Health Service (NHS), the UK has created a system of welfare for all its citizens, which is both comprehensive and substantially uniform. The institutions which embody the welfare state are well-known – especially the NHS, the social security system and the provision of universal education through local education authorities.
- 4.54 A basic feature of the welfare state is that, in general, its cost is borne out of general taxation and its services and support are supplied on the basis of need. This implies a relatively high degree of what is sometimes termed social solidarity.
- 4.55 Some aspects of the welfare state are reserved to the UK Parliament, while others are devolved. The social security system is wholly reserved, and is entirely uniform, while both health and education are devolved to the Scottish Parliament. This may reflect one significant difference between these services. Social security provides support through transfer payments, while the NHS and education in general supply services to individuals.⁵⁰
- 4.56 Health and education were readily able to be devolved to the Scottish Parliament because they had previously been administratively devolved. This had allowed for decentralised management of the NHS, and also reflected the tradition of institutionally distinct Scottish education, but within the overall political responsibility of the UK Cabinet. The principle of subsidiarity points clearly towards Scottish health and education interests being served best through decentralised control. Since devolution, some aspects of healthcare have varied more (e.g. personal care for the elderly) but in practice the most basic principles – such as free health care at the point of need, or universal provision of education – have remained uniform throughout the United Kingdom.
- 4.57 For the future, there are clearly important choices to consider. The principle of subsidiarity might point to further devolution. The current devolution settlement already allows, in principle, for radical differences between the rest of the UK and Scotland in areas where common UK citizenship might suggest greater uniformity. The United Kingdom would be a different sort of Union if healthcare were free in one part but not in another, or if further devolution allowed for entitlement to social security payments to differ in Scotland and England. These considerations raise questions which profoundly affect the nature of the Union and its institutional architecture and financing. And it is possible, in principle, to answer them in different ways.
- 4.58 In our analysis, the choice inherent in these questions impacts not only on the nature of the social or welfare state Union, and the common or shared citizenship which underlies it, but also on how devolution is financed and how functions should be allocated between central and devolved Parliaments and Governments.
- 4.59 Complex choices arise when considering the welfare state and the common social citizenship across Scotland and the rest of the UK. They arise in relation to how uniform or integrated a welfare state the UK should be, and just how much of a common social citizenship should be shared across the UK. The welfare state is based on a principle of

50 The social security system is explicitly redistributive, while other welfare services are less explicitly so.

pooling risks and sharing resources so that need can be met – whether that is the need of individuals or families for social security support, health care or education. This is fundamentally driven by ideas of equity, and at present risks and resources are shared across the whole UK. It does not matter whether an individual who is ill is in Caithness or Cornwall: he or she has free access to health care when and where they need it, supported by the UK taxpayer.

4.60 Devolution, as it currently exists, would in principle allow for a fundamentally different welfare state in Scotland or in England, at least in relation to health or education. But there may be a case for a broadly common social citizenship across the UK. If so, does a common understanding of what that involves need to be more clearly articulated? Alternatively how much scope and support is there for significantly greater divergence in welfare services, with the implications that raises for how they are financed? Would it be better if the Scottish Parliament had unfettered freedom to decide those aspects of domestic policy which constitute the welfare state, including not just health and education but other aspects of social welfare, including social security. It would be a decision for MSPs what kind of social provision was appropriate. It would follow that this aspect of public spending would very likely have to be supported by taxes raised in Scotland.⁵¹ The implications of this choice are discussed in the following Chapters.

4.61 The questions the Commission would in particular welcome views on are therefore:

- The Commission's first main conclusion is that devolution to Scotland has been a success. It is well established in Scottish political life, and is working well in practice. Devolution and the Union are two sides of the same coin, so in order to consider how devolution might develop we have looked carefully at the different aspects of the Union.
- The Commission regards the continuing political Union as a given, in accordance with its remit. But we invite views on the conclusion that any changes in devolution should presume a continued common UK legal and political citizenship.
- Scotland participates in international affairs, defence and security as an integral part of the UK, but with an international profile of its own. The Commission regards this too as in Scotland's interests but invites views on its conclusion that the UK's constitutional arrangements are sufficiently flexible to allow devolved interests to be taken properly into account when they impact on these reserved matters
- The Commission takes the view that the economic Union of the UK is greatly to Scotland's benefit. We invite views on our conclusion that when changes in powers or finance are considered which might allow the Scottish Parliament to serve the people of Scotland better they should not run the risk of significantly undermining that aspect of the Union.
- The United Kingdom is also a social Union, and in particular has a welfare state that is very similar in the different nations. The Commission invites views on whether there should be scope for much greater differences in social provision, and in consequence greater reliance on Scottish tax resources. Alternatively, should devolution be in the context of a common social citizenship across the UK, and if so should the elements of that citizenship be articulated in some way?

51 This is discussed in the report of the Independent Expert Group. The Scottish Government's 'Choosing Scotland's Future: A National Conversation' makes the point explicitly: "For social security to be devolved effectively, Scotland would have to be fully responsible for the financial implications of its decisions in this area." (paragraph 2.29). <http://www.scotland.gov.uk/Publications/2007/08/13103747/0>

Chapter 5 The Powers and Functions of the Scottish Parliament and Scottish Government

Existing Arrangements

- 5.1 The Scottish Parliament and Scottish Ministers have a very wide range of functions. The Parliament can legislate, for example, on all of the following areas:
- health, including how the NHS is organised;
 - education, including pre-school education, schools, colleges, universities and training;
 - justice, including home affairs, courts, prisons, criminal and civil law;
 - local government, its structure, organisation and finance;
 - housing, planning and urban renewal, and many aspects of transport;
 - the environment, agriculture and fisheries.
- 5.2 The powers of the Scottish Ministers to act cover these and a number of other functions. In this chapter we consider the distribution of functions between the Scottish Parliament and the UK Parliament and between Scottish and UK Ministers. We also describe our approach to the question of whether any changes should be made to this distribution, in line with the terms of our remit.

How functions are conferred on the Scottish Parliament and Scottish Ministers

- 5.3 The Scotland Act created the Scottish Parliament and Scottish Ministers, and allocated legislative competence and executive functions to them. In general, the executive functions of Scottish Ministers are powers to act on subjects within the legislative competence of the Parliament. As executive powers largely mirror legislative competence, the Commission has chosen to concentrate on the legislative competence of the Parliament. (In some cases Scottish Ministers have been given additional executive powers, in matters where the Scottish Parliament cannot legislate, and we will consider these as necessary.)
- 5.4 Chapter 2 explains the boundaries of the legislative competence of the Scottish Parliament. The most significant thing about how the boundary between devolved and reserved matters is defined in the Act is that devolution is the default position. Unless the Scotland Act specifically reserves a function to the UK Parliament, it is devolved to the Scottish Parliament. The “reserved matters” on which the Parliament cannot make laws are set out in Schedules to the Scotland Act. These define the “Union” element in the devolution settlement. This approach also implies that where an issue arises that was not foreseen in the Scotland Act, it will be devolved automatically, whether or not that would have been the intention in 1998. As we note in Chapter 4 this approach has advantages, and helps achieve clarity in the allocation of responsibilities.⁵²

⁵² The 1978 devolution legislation did not follow this approach and was in consequence more complex. Other countries, for instance Canada, have constitutions which list functions allocated to both levels of Government.

- 5.5 The Scotland Act recognised that the devolution settlement could not, and would not, remain static. The scheme of the Act had to be robust enough to provide a coherent and comprehensible framework for powers exercised in Scotland by the Scottish Parliament and Ministers, while retaining some flexibility to allow for policy changes at a UK level and to adapt to developments in a fast-changing world. The Act therefore includes mechanisms to allow for alteration of the Scottish Parliament's legislative competence, or to increase or decrease the executive competence of Scottish Ministers.

Reserved matters

- 5.6 The list of reserved matters in Schedule 5 to the Scotland Act is included at Annexe A. It includes matters which are central to the political identity of the United Kingdom, such as the monarchy and the constitution; matters like defence and foreign relations which define the UK in the international arena; and critical aspects of the economic Union including such matters as the currency, macroeconomic management and taxation.
- 5.7 The approach adopted in the Scotland Act (i.e. that everything is devolved unless expressly reserved), and the breadth of devolved competence, was described to us in evidence as "maximalist".⁵³ The result is that the powers devolved to the Scottish Parliament are wide-ranging and constrained only by the express provisions of the Act, so that the Parliament has power over most of the key elements of domestic policy. Since the majority of domestic policy matters have been devolved to the legislative competence of the Scottish Parliament, they have likewise been transferred to the executive competence of Scottish Ministers. This is illustrated by the fact that, as we discuss in Chapter 6, Scottish Ministers' powers include matters which account for some 60% of public spending in Scotland. The approach is also consistent with the principle of subsidiarity, with decisions in a wide range of areas now taken by governmental bodies closer to the people who are affected by them. This is perhaps most simply described as allowing Scottish solutions to Scottish issues in a wide range of domestic policy areas.

The boundary between devolved and reserved matters

- 5.8 The way of defining the boundary between reserved and devolved matters adopted in the Act is relatively simple (the constitutions of many other countries define the responsibilities of both levels of government). But perhaps inevitably the particular allocation of functions made by the Act has created some difficulties in practice, though as we note in Chapter 4 these have not been extensive. The Commission recognises that any such boundary, wherever it is drawn, will produce uncertainty in instances where legislation or executive action in a devolved area has direct or indirect implications for reserved areas. But we believe it is helpful to draw attention to some of the particular problems that have arisen in the hope that we can identify ways to minimise these problems as far as possible.
- 5.9 We discuss in Chapter 7 the mechanisms that exist to determine where the boundary lies between what is devolved and what is reserved in the context of legislation. The ability of the Scottish Parliament to scrutinise legislation effectively and its other procedures and safeguards are examined in more detail in Chapter 8.
- 5.10 As has been mentioned, the powers of the Scottish Parliament and Ministers have not remained static since 1998. The Scotland Act can be modified by a subsequent Act of the UK Parliament. Section 30 of the Scotland Act also provides for modifications to be made

53 Evidence session with Sir Muir Russell, 27 October 2008.

to reserved matters by an Order in Council.⁵⁴ Such an Order may extend the competence of the Scottish Parliament into a new area of responsibility currently listed as reserved or may add an area to the list of reserved matters, thus taking it out of the Scottish Parliament's control. Since the Scotland Act came into force, nine such Orders have been made, none of which "re-reserved" matters already devolved to the Scottish Parliament.⁵⁵

- 5.11 The Scotland Act also provides additional, flexible, powers to alter the functions of Scottish Ministers without amending the legislative competence of the Parliament. Additional functions or powers can be transferred to Scottish Ministers by Order in Council under section 63 of the Act, so far as they are exercisable only in Scotland. This "executive devolution" can be exercised in three ways: where the function is to be exercised by Scottish Ministers instead of UK Ministers; where the function is to be exercised concurrently with UK Ministers; or where the function remains with UK Ministers but may only be exercised with the agreement of, or after consultation with, Scottish Ministers. Fifteen such Orders have been made, extending the functions of Scottish Ministers whilst maintaining reservation of the subject matter (and therefore maintaining a UK legislative framework within which Scottish Ministers must act).
- 5.12 An added flexibility to the devolution settlement is the "Sewel Convention" under which the UK Parliament may exercise its continuing right to legislate on devolved matters in Scotland (or to modify the devolved competence of the Scottish Parliament or Scottish Ministers) but only with the Scottish Parliament's consent. (The nature and operation of the Convention is discussed in more detail in Chapter 7.)
- 5.13 The Convention is used, for example, where a common UK approach to legislation is considered to be in the best interests of Scotland and the UK, or where separate legislation would create legal uncertainty or cause practical difficulties.⁵⁶

Reviewing the powers of the Parliament

- 5.14 A Task Group of the Commission, chaired by David Edward, has led work on examining functions and making recommendations to the Commission as a whole. Commissioners have considered evidence and submissions from a wide range of individuals and organisations, as well as drawing on earlier work such as the report of the Steel Commission.⁵⁷
- 5.15 The Commission applied the principles discussed in Chapter 4 to its consideration of functions and whether evidence exists to justify altering current arrangements. For the reasons discussed in Chapter 4, the Commission believes that certain functions are integral to the effective functioning of the United Kingdom as a sovereign nation-state with international responsibilities, and where devolution would be undesirable in principle because retaining them at UK level is fundamental to the very concept of Union. We therefore do not consider these functions any further in this chapter.
- 5.16 These comprise the monarchy, the UK constitution, defence, national security, foreign affairs, currency and coinage. In addition, certain aspects of management of the UK economy are indispensable to maintenance of the Union. This links back to the

54 An Order in Council is a form of subordinate legislation. Formally speaking, it is made by the Queen (in the Privy Council) but in practice it is made by Ministers in much the same way as for other types of subordinate legislation (orders, regulations etc.).

55 Some orders have ensured that bodies such as the Commission for Equality and Human Rights, created after the Scotland Act, are treated as reserved rather than as devolved (as would otherwise have been the default position under the Act). An example of an Order increasing devolved competence was one that added an exception to the reservation of "rail transport" to give the Scottish Ministers and Parliament responsibility for "the promotion and construction of railways which start, end and remain in Scotland".

56 For example, the Scottish Parliament agreed a Legislative Consent Motion for the Proceeds of Crime Act 2002 on the basis that it was important to have consistency in the law on both sides of the Border and to avoid the inadvertent creation of loopholes.

57 <http://www.scotlibdems.org.uk/files/steelcommission.pdf>.

Commission's assumption, discussed in Chapter 4, that devolution within the Union will continue and that certain functions of the nation-state can therefore be regarded as indispensable.

- 5.17 In this context, a number of submissions to the Commission have raised the issue of weapons of mass destruction (WMD) and whether Scotland should have the right to determine policy in this area. The Scotland Act treats such weapons separately from defence (although both are reserved matters), perhaps because WMD are the subject of international obligations. Whatever may have been the reason for reserving them separately, the Commission considers that policy on WMD must remain a reserved matter for the same reasons as defence.
- 5.18 The Commission has also drawn a distinction between dissatisfaction with a policy (or a belief that devolution may deliver a better policy outcome) and the argument for it to be devolved or reserved. Whilst it is tempting to argue for devolution in a particular area in order to achieve a desired policy outcome, this is not a principled argument for devolution centred on the desirability of having decision making at the most appropriate level. As the Church of Scotland made clear in its submission and oral evidence in relation to nuclear weapons (which the Church has long opposed on principle), it is possible to object strenuously to a particular policy whilst recognising that devolution is not an appropriate way to achieve change.⁵⁸
- 5.19 In considering the allocation of functions there are some cases where it will be most relevant to take into account what works in practice – what might be called a “bottom up” approach. There are other functions which, on “strategic” grounds, are more appropriately considered on the basis of principle – what might be called a “top down” approach. But in all cases both of these approaches will have some relevance to the consideration.
- 5.20 The Commission fully recognises the validity and usefulness of the way in which reserved functions are defined in Schedule 5 to the Scotland Act and understands why such an approach was favoured when the Act was being drafted. However, we have not thought it desirable merely to trawl mechanically through the issues listed in Schedule 5 in order to assess them against the principles we have identified. Instead, in line with our evidence based approach, we have chosen to concentrate on areas where the evidence we have received has indicated that there is either an appetite for a change to current arrangements or that current arrangements are not operating as effectively as they might.

Evidence so far

- 5.21 We have categorised the issues which the Commission has considered within twelve broad themes. This has allowed us to identify where there are issues of common concern or where there appear to be recurring questions about the effectiveness of the current settlement. These are:
- Constitution and institutions
 - Culture, charities, sport and gaming
 - Employment and skills
 - Energy
 - Environment and planning

58 Church of Scotland oral evidence, 10 October 2008, and written submission, 13 June 2008.

- Health and biosecurity
- Justice and home affairs
- Marine and fisheries
- Revenue and tax-raising
- Science, research and higher education
- Social security
- Trade and commerce.

5.22 The issues discussed in more detail below are those about which the Commission has received a number of representations and where it is already clear that further consideration is required. They do not reflect the entire range of submissions made to the Commission which are summarised in Volume 2 of this Report.

5.23 **It should be emphasised that the summaries of the themes outlined below are initial impressions and that the Commission has not reached a final view on any of them.** In conducting its deliberations, the Commission has had regard to the submissions received from organisations and members of the public, from the oral evidence taken both formally and at our engagement events, as well as the arguments that have previously been made about the workings, successes and failures of devolution. Hence areas such as firearms, energy and drugs, which have regularly featured prominently as areas of concern to the Scottish Parliament and others, have been considered by the Commission.

Constitution and institutions

5.24 The Commission has received a submission from the judges of the Court of Session which highlighted concerns about the operation of section 57(2) of and Schedule 6 to the Scotland Act (relating to the resolution of devolution issues and the role of the Lord Advocate as part of the process). The Commission will have to consider carefully the extent to which the issues raised in this submission fall within its remit. In the meantime, the Commission considers it important to draw this submission to the attention of the Scottish Parliament and the UK Government.

5.25 The Commission has received and considered evidence on the electoral system, the civil service in Scotland and the workings of the Scottish Parliament and these points are discussed more fully in Chapter 8.

5.26 Elections to the Scottish Parliament, the House of Commons and European Parliament are reserved, as is the franchise at local government elections.

- There are different systems in place for elections to each body and, since 2004, there has been no co-terminosity between UK and Scottish Parliament constituencies. The Scottish Parliament's electoral system is further discussed in Chapter 8.
- Following the May 2007 Scottish Parliament election the Electoral Commission commissioned the "Gould Report"⁵⁹ which concluded (amongst other things) that the same body should be responsible for the administration of Scottish Parliament and local government elections. The Association of Electoral Administrators and UNISON Scotland, amongst others, have echoed this call in submissions to us.

59 Electoral Commission, *Independent review of the Scottish Parliamentary and local government elections* 3 May 2007, by Ron Gould, available at: http://www.electoralcommission.org.uk/_data/assets/electoral_commission_pdf_file/0011/13223/Scottish-Election-Report-A-Final-For-Web_27622-20316_E_N_S_W_.pdf

- The Commission acknowledges that there may be a case for devolving to the Parliament responsibility for administering its own elections, while reserving to the UK Parliament responsibility for setting a general framework, including the franchise and the voting system to be used. This would be consistent with the principle that matters should be decided at the level closest to those affected unless there is good reason to treat them differently. On the other hand, it may be argued that such issues are of fundamental constitutional importance and should remain reserved.
- The Commission notes the work of Mr Ron Gould as well as evidence received, amongst others, from the Society of Local Authority Chief Executives, which characterises the current system as “complex”.
- **The Commission has not been set up to examine, in any detail, the administration of the electoral system in Scotland but would be interested in views on whether and to what extent responsibility for its administration could be devolved, the practicalities of doing so, the sort of framework in which any such devolved powers should operate and how a suitable level of consistency throughout the UK might be ensured.**

5.27 The Commission has received insufficient evidence to consider the status of the Home Civil Service. However, the Commission believes it can be strongly argued that the existence of a unified civil service is at the very least a desirable component of a political Union, in that it defines the relationships between elected politicians and permanent officials in a consistent way across the Union. On this basis, we begin with a presumption in favour of retaining the existing position, where officials of the Scottish Government remain part of the Home Civil Service.

- The Commission has also heard from a number of witnesses who have felt that the close relationship between civil servants working for the Scottish and UK Governments has been a distinct advantage in ensuring that matters are progressed in the best interests of both Governments and of the UK as a whole.
- It can also be argued that civil servants themselves benefit from being part of a much larger organisation with opportunities to move across the border during a career, to the benefit of both UK and Scottish Government organisations.
- A unified service is also cited as an effective basis for the UK's Permanent Representation in Brussels which, although employing staff from various administrations within the UK, retains a shared outlook and diplomatic status.
- In his evidence, former First Minister, Jack McConnell MSP, strongly favoured the retention of a UK civil service.⁶⁰
- On the other hand, the Commission is aware that there are those in Scotland (not least the current Scottish Government) who believe a Scottish civil service to be a necessary part of a devolved settlement and that the Scottish Parliament should have more powers in relation to it.⁶¹
- **The Commission notes the implications for the wider UK civil service would need to be considered, for example, on effective intergovernmental relations.**

5.28 The role of the civil service in supporting the devolution settlement is explored in greater detail in Chapter 7.

60 Oral evidence from Jack McConnell MSP, 1 October 2008.

61 'Choosing Scotland's Future: A National Conversation', paragraph 2.45.

Culture, charities, sport and gaming

5.29 Broadcasting and the regulation of charities and lotteries have been considered by the Commission.

5.30 The subject matter of the Broadcasting Acts 1990 and 1996 is reserved, as is the BBC.

- The current Scottish Government has called for broadcasting to be devolved. The First Minister established a Scottish Broadcasting Commission to conduct an independent investigation into the current state of television production and broadcasting in Scotland and define a strategic way forward for the industry. That Commission, in its recent report⁶² stopped short of recommending further formal devolution at the present time, but did recommend a greater focus on Scotland and a greater role for the Scottish Parliament and Ministers in taking an active role in considering the broadcasting industry and services audiences in Scotland receive, in order to provide a visible and public forum for debate, within a UK framework.
- This is entirely consistent with much of the evidence received by this Commission. We have taken evidence from a number of interested parties, including Ofcom, which has indicated that current arrangements work satisfactorily and the Scottish dimension is adequately represented at a UK level. Whilst there may be concerns about the continued viability of locally orientated content, particularly around news and current affairs, this falls outwith the Commission's remit and is, in any case, a UK-wide, rather than peculiarly Scottish issue. The Commission notes the evidence given by Scottish Screen endorsing the recommendations of the Scottish Broadcasting Commission, in particular that "Scottish Ministers should have greater responsibility, within the UK framework, for those operational functions of broadcasting directly affecting Scotland".
- **Broadcasting is an area about which the Commission has received considerable, if sometimes conflicting, submissions. We would welcome further views as to whether current arrangements are sustainable or whether there are changes to ensure the specific broadcasting needs of Scotland can be addressed. In particular, the Commission would wish to have more precise submissions as to how and whether the responsibilities of Scottish Ministers in respect of broadcasting might be changed.**

5.31 Charities are not a reserved matter and there are separate regulatory regimes on each side of the Border. This has meant that charities which operate from establishments on both sides of the border are subject to concurrent regulations and two differing sets of accounting requirements.

- The Commission has some concern that this may lead to charities restricting their activities in Scotland and we have heard from some witnesses that this may be the case. Many witnesses, including the Scottish Funding Council and the Law Society of Scotland, have raised this matter and expressed concerns that it could lead to problems in the future, but the Commission has yet to receive concrete examples. The Institute of Chartered Accountants in Scotland suggested that each charity operating on a UK wide basis should be able to choose a single regulatory regime to abide by, on the basis of a principle of mutual recognition by the UK and Scottish charity regulators.
- The Commission can see the attraction of allowing UK-wide charities to operate under a single regulator but can anticipate difficulties if one regime is seen to be

62 The final report of the Scottish Broadcasting Commission, Platform for Success, was published on 8 September 2008, and is available at: <http://www.scottishbroadcastingcommission.gov.uk/Resource/Doc/4/0000481.pdf>.

notably less onerous than the other. The purpose of the new system of regulation of charities is to prevent abuses and this requires effective regulation on the ground.

- The Commission is not convinced that there is necessarily a case for further devolution or indeed re-reservation but it seems essential to reach some accommodation that would, consistently with effective regulation, reduce the administrative burdens on charities and ensure a greater degree of consistency between the regimes operating in Scotland and elsewhere.
- **The Commission invites further evidence from practitioners in this area to inform its final recommendations.**

5.32 Betting, gaming and lotteries are reserved matters. The Big Lottery Fund is a UK wide organisation but responsibility for policy and distribution of funds in Scotland is devolved with Scottish ministers responsible for high level policy direction. In its evidence to the Commission the Big Lottery Fund highlights the effectiveness of the current arrangements and raises no concerns. The Commission considers the current arrangements to be sensible and has not been made aware of evidence to the contrary, although some submissions have suggested there is no particularly strong reason for lotteries to be reserved.

Employment and skills

5.33 This theme includes questions of employment policy and industrial relations, equal opportunities, health and safety and sector skills.

5.34 Employment and industrial relations are reserved.⁶³ A number of notable organisations in this area, including the CBI Scotland and UNISON Scotland, have called for them to remain reserved and the Commission believes that this is broadly consistent with the principles underpinning a social and economic Union, particularly those that promote the free flow of capital, goods and labour throughout the UK.

5.35 The subject-matter of much of the Health and Safety at Work etc Act 1974 is reserved. The Health and Safety Executive (a non-departmental public body associated with the UK Department for Work and Pensions) is responsible for protecting the health and safety of people at work across the UK.

- The Commission has heard some arguments that devolving health and safety could be detrimental to the single market currently operating in the UK, but devolution is supported by others who see it as an obvious candidate for Scottish solutions to Scottish issues. CBI Scotland and the Scottish Trades Union Congress, for example, see little merit in devolving health and safety in general (though the STUC would support a greater role for Scottish authorities in enforcement) whilst the Royal College of Physicians of Edinburgh suggests that “lack of freedom to ... make change under health and safety legislation may be impeding enforcement measures” to support policies to tackle smoking and alcohol misuse.
- The Commission has also received evidence that the system for implementing European directives in the area of health and safety does not ensure that proper account is taken of problems of implementation in the Scottish legal system.⁶⁴
- **The Commission would welcome further views on whether there is scope for changes to the arrangements for health and safety legislation.**

⁶³ Except the Agricultural Wages Act.

⁶⁴ Oral evidence from Professor Russel Griggs, 31 October 2008.

- 5.36 A number of witnesses and submissions, including those from UNISON Scotland, the Scottish Council Foundation, the Institute of Directors in Scotland and the Scottish Council for Development and Industry, have drawn the Commission's attention to the distinct labour market needs of Scotland and, in particular, the desirability of having a greater say in policy on migrants in order to attract the skills that the Scottish economy needs. Scotland has historically been a net exporter of people, and this, coupled with an ageing population, has led to calls for policy on immigration to be devolved.
- Scotland has enjoyed certain variations in the law governing immigration in order that the system is better attuned to Scottish needs. The Fresh Talent Working in Scotland Scheme, which operated until recently, enabled students who graduated in Scotland to remain to seek work for two years after graduation. This approach is reflected in the new UK points based system for managed migration.
 - Additionally, the UK Government's Migration Advisory Committee, which advises on occupations where a labour shortage could appropriately be met by managed migration, has been asked to consider the needs of Scotland separately.
 - The Commission can see the attractions of a Scottish dimension within UK immigration policy that allows for greater flexibility and responsiveness, but is not yet convinced that devolution of policy on immigration would be consistent with the key principles of the Union and the need to have a clear and consistent border policy that meets the needs of the UK as whole.
 - The Commission has also heard calls for more distinctive Scottish approaches, for example, a Scottish points-based system (as suggested by the Scottish Council Foundation).
 - **The Commission would be interested in options for variations in migration policy in Scotland to meet specifically Scottish labour market needs as well as reflections on how a distinctly Scottish policy might impact on the UK more generally.**

Energy

- 5.37 Energy, with some exceptions, is a reserved area (although as renewable energy sources are not explicitly mentioned in Schedule 5 to the Scotland Act they can be considered to be devolved, as is the Renewables Obligation in Scotland). Scottish Ministers also have certain responsibilities under the Electricity Act.
- There is a single wholesale electricity market throughout Great Britain and the generation, transmission, distribution and supply of electricity is wholly reserved.
 - Responsibility for consent for power stations of a certain capacity has been executively devolved to Scottish Ministers, as has responsibility for certain overhead power lines. There is also a degree of overlap with the Scottish Parliament's general responsibility for the environment.
 - The Commission's attention has been drawn to the issue of nuclear power and the concern expressed by the UK Government as well as CBI Scotland regarding the potential ability of authorities in Scotland to "frustrate" UK energy policy by the use (or threatened use) of planning powers or devolved executive powers under the Electricity Acts.
 - This is a situation that has gained in prominence in recent years as the UK Government has unveiled an energy strategy in which nuclear power plays an important part. The Scottish Government has made clear its opposition to the siting

of nuclear power stations in Scotland. For example a statement by the Minister for Enterprise, Energy and Tourism⁶⁵ indicated that he would expect the powers that Scottish Ministers have under the Electricity Acts to be used to stop any expansion in nuclear capacity. This is an example of where a particular division of responsibilities, both in terms of legislative competence and executive functions, creates an overlap or ambiguity that has the potential to create real friction.

- This is not a concern confined to the issue of nuclear power. While it is at present unlikely that the Scottish Parliament would adopt a less ambitious target on climate change than that adopted by the UK Parliament, the present distribution of powers do allow for such an outcome and hence the potential for devolved policy in Scotland to jeopardise the UK's ability to meet its international obligations. The issue of how the Governments can work together to avoid problems of this kind is discussed in greater detail in Chapter 7.
- Under existing constitutional arrangements, it is in theory possible for the UK Parliament to legislate to override a decision made under devolved competence although to do so would be contrary to the Sewel convention. However, given the overlapping, or complementary, responsibilities of the UK and Scottish Government in this field, there may be a case to be made for some formal embodiment of shared competence (a concept discussed in Chapter 7).
- Given the enormous national significance of the generation and transmission of energy emphasised by both the UK Government and CBI Scotland, there is an argument for energy policy to remain reserved. Equally, there is a large body of opinion (from organisations like the Scottish Green Party, the Church of Scotland, UNISON Scotland and the Scottish Council for Development and Industry) arguing that devolution of energy policy is an appropriate response to the challenges that lie ahead for Scotland and the UK.
- The Commission is keen, therefore, to look at how interested parties might work together more effectively, or how disputes might most appropriately be resolved, to ensure that the UK's energy needs and international obligations for the use of renewable energy sources are met.
- **In particular, the Commission invites views on whether there are any changes to responsibility for aspects of energy policy that could conceivably be made without compromising the integrity of the UK supply network whilst maintaining consistency with the principles set out in Chapter 4.**

Environment and planning

5.38 As discussed under the energy theme, much of the Commission's focus in the area of environment and planning has been the potential use of devolved planning powers to affect the implementation of policies in reserved areas. A recent example is the UK Government's Energy Act 2008 which has made clear that nuclear power will play a prominent role in the UK's future energy strategy. This contrasts with the stated policy of the Scottish Government not to give permission for new nuclear power stations in Scotland.

- As discussed above, the Commission has taken evidence from individuals and organisations with concerns about the apparent use of ancillary powers (for example,

65 Statement by Jim Mather on the United Kingdom Energy White Paper and Scotland, 31 May 2007, col 324: <http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-07/sor0531-02.htm>

over planning) being used to frustrate or even simply to threaten the implementation of policy in reserved areas. We will be looking further into how disputes of this nature can best be resolved in the interests of the people of Scotland and of the UK as a whole. The same issue may arise in the opposite direction, if the use of reserved powers were to be used to frustrate devolved purposes.

- It is perhaps worth noting that as much of the legislation concerning the environment consists of European Union directives and, because the environment is a devolved matter, Scotland is already able to implement solutions within Scotland which may differ from those that apply elsewhere in the UK. The EU specifies an outcome in a directive, but it is for the competent authority to implement the regime for achieving that outcome.
- **The Commission invites submissions on where the Scottish Government and Parliament's responsibilities for the environment and planning might create the potential for conflict with UK policy in reserved areas and how these frictions might be addressed.**

Health and biosecurity

5.39 The Commission has considered aspects of both animal and human health under this theme.

- Animal health policy is not reserved and the evidence we have received suggests that, in normal circumstances, this is working well for Scotland.
- However, the Commission has concerns that at times of UK-wide emergency (such as national outbreaks of foot-and-mouth disease) the interactions between authorities in Scotland and the UK may not have functioned as effectively as they might. This was reflected in comments from Sir Iain Anderson, who chaired the "lessons learned" enquiries into the most recent outbreaks of foot and mouth disease. Sir Iain also commended the response by Scottish Ministers during the 2001 outbreak, which directly affected Scotland.
- The Commission is also aware of an apparently anomalous position that whilst animal health policy is devolved, the funds made available to respond to exceptional animal health incidents are held and released at a UK level which may curtail the ability of Scottish ministers to set priorities and respond to incidents in a manner consistent with their very proper responsibilities for animal (and human) health. This was raised as a concern by Ross Finnie MSP, a former Scottish Minister with responsibility for the environment and rural affairs, and by Sir Iain Anderson. NFU Scotland has also argued that "it is essential that the devolved administrations are allocated their proportionate share of the budget held at UK level".⁶⁶
- **The Commission is keen to take further evidence on this before reaching its conclusions and invites views, particularly on how animal health protection in Scotland might be most effectively funded both routinely, and in times of emergency. If funds were to be allocated to Scotland for animal health, how should this be calculated given the nature of the Scottish livestock industry which is proportionally larger than England's?**
- The Commission has also taken evidence from the Health Protection Agency (HPA), a UK wide independent body which provides an integrated approach to protecting

UK public health through the provision of support and advice to the NHS, local authorities, emergency services, other arms-length bodies, the Department of Health and the devolved administrations. Part-funded by the Scottish Government for the services it provides in Scotland, the HPA appears to the Commission to be a useful example of a UK organisation which draws on expertise and experience from across the UK in delivering services and advice at a local level.

- Similarly, the Food Standards Agency, a UK body with distinct responsibilities in Scotland, operates effectively within a devolved framework. In its evidence the Agency said that a situation where different administrations are responsible for food standards and labelling could lead to an unhelpful divergence in practice within the UK.
- Health policy is largely devolved, with only a few specific matters remaining reserved. As discussed in Chapter 4, whilst this has meant that people in different parts of the UK are treated differently by, and have different expectations of, their local health service, this is a necessary and desirable aspect of devolution – allowing priorities to be set according to the wishes of those most affected.
- The Commission has received very little evidence about those aspects of health policy, such as abortion, that remain reserved.
- **The Commission would welcome further evidence on the aspects of health policy that remain reserved.**
- The regulation of healthcare professionals is an interesting area in that the reservation only covers those professions regulated by the various Acts listed in Schedule 5 to the Scotland Act. This means that responsibility for regulating other professions is, in effect, devolved. This has led to an apparently anomalous situation where some professions are regulated on a UK-wide basis whilst other very similar and complementary professions are not (e.g. regulation of dentists is reserved, regulation of dental nurses is not).
- Whilst submissions received so far tend to support the continued reservation of those professions currently reserved, the Law Society of Scotland also makes the point that greater clarity in this area would be desirable.
- **Whilst the Commission accepts that the shared aim of the UK and Scottish Government should be to work together to ensure a common framework for health professionals across the UK, it would be interested in views as to whether the approach of the Act is the most effective way of defining responsibilities and guaranteeing consistency to ensure the transfer of skills across the UK.**

Justice and home affairs

5.40 The Commission has considered firearms, offensive weapons and the misuse of drugs under this theme, as well as the operation of tribunals in Scotland.

- The subject-matter of the Firearms Acts 1968-1997 is reserved, as is the subject-matter of the Misuse of Drugs Act 1971 and subsequent Acts dealing with manufacture and trafficking.
- The Commission has taken evidence from individuals and organisations, including representatives of senior police officers in Scotland, who believe that control of some aspects of firearms and drugs might be more effectively exercised at a Scottish level.
- The Scottish Parliament already has powers over offensive weapons not covered by

the Acts cited above and it would be consistent with the Scottish Government's wider responsibility for the criminal justice system and public safety in Scotland for it to be able to exercise greater discretion in this area.

- A similar argument could be made about the misuse of drugs and the Scottish Parliament's responsibility for public health and wellbeing.
- The Commission acknowledges concerns that any change in the status quo could potentially lead to cross-border difficulties and is keen to explore the implications of any change in its next phase of evidence gathering. Evidence from the Association of Chief Police Officers in Scotland suggested that, provided differences in approach were at the margins, this would not lead to any difficulties, but that substantial differences could create problems.⁶⁷
- The Commission has also taken evidence about aspects of road traffic regulation such as speed and drink-driving limits, powers over which, it has been suggested, could more usefully be operated at a more local level.
- **The Commission invites views on the implications of devolving responsibility for firearms, drug misuse and drink driving, and the potential cross-border issues arising from the potential for different policies.**

5.41 The attention of the Commission has also been drawn to the recent report by the administrative justice steering group (chaired by the Rt Hon Lord Philip), *Options for the Future Administration and Supervision of Tribunals in Scotland*, published by the Scottish Consumer Council. This report argues that the "current tribunal system [in Scotland] is complex and fragmented, particularly since the advent of devolution". There are concerns about the perceived independence of processes, about the quality of training and skills and the coherence of the system as operating in Scotland.

- **The Commission has not received direct evidence about tribunals but, as part of its remit to ensure that devolution best serves the interests of the people of Scotland, is keen to understand whether current arrangements are operating satisfactorily and whether the system requires changes in order to function more effectively.**

Marine and fisheries

5.42 The marine environment currently involves a fairly complex interaction of reserved and devolved matters.

- Broadly, the Scottish Parliament has legislative competence up to 12 nautical miles from shore, except in relation to reserved matters which include mapping and scientific research, telecommunications, energy (including the exploitation of hydrocarbons) and marine transport.
- The Parliament also has competence for fishing and marine dredging from 12 to 200 nautical miles. Scottish Ministers have executive responsibilities for the regulation of sea fishing, for the licensing of various offshore activities and in relation to offshore electricity generation.
- The Scottish Government (supported by a number of submissions to the Commission) has called for full devolution of the marine environment in this zone.
- This is a complex area and, as the UK Government acknowledges in its evidence,

⁶⁷ Oral evidence from ACPOS, cols 122–124, 130.

one in which it is important for the two Governments to work closely together. The UK Government published its Marine Bill in April 2008 and Scottish Ministers have brought forward their own Bill relating to those matters within their purview. The Commission is aware there is increasing dissatisfaction with the mixture of responsibilities for marine planning and the marine environment. The Royal Society of Edinburgh has gone so far (in its response to the UK Government consultation and in evidence to the UK Parliament's Joint Committee on the Marine Bill) as saying "we are in danger of implementing legislation that is unworkable at least in the region around Scotland".⁶⁸ The Commission has been aware that the UK and Scottish Governments have been discussing marine planning issues in the context of the proposed legislation, and that proposals for change have recently been announced. We will study them in detail to see whether they address the concerns which have been expressed to us and whether they offer any wider lessons.

5.43 The Crown Estate is responsible for the management of the foreshore and seabed including collection of revenues for their use. The Crown Estate is responsible to UK ministers (and its revenues are given directly to Her Majesty's Treasury). The Commission has received evidence that it would be more appropriate for these functions to be exercised (for Scotland) by Scottish ministers given their wider responsibilities for an integrated marine management system.

- The Commission recognises that the marine environment is an important and difficult area with a number of potentially conflicting interests and differing opinions as to the best way to manage and conserve the natural resources off the Scottish coast.
- **The Commission invites all those concerned to provide further evidence as to the best way to manage the marine environment and how the various authorities involved can better work together.**

5.44 The Commission has also heard a great deal about the importance of fisheries to Scotland and the need for the interests of Scotland in this (and other) areas to be represented effectively at an EU level.

- As the United Kingdom is the EU Member State, representation at Council meetings is led by the responsible UK minister. The Commission has taken evidence from witnesses about how the Scottish dimension is reflected in these discussions and will reflect on whether the existing mechanisms are suitable. Scotland's representation at an EU level is discussed in more detail in Chapter 7.

Revenue and tax-raising

5.45 Fiscal, economic and monetary policy including the issue and circulation of money, taxes and excise duties, government borrowing and lending and control over UK public expenditure are reserved. The Scottish Parliament does have the power to vary the basic rate of income tax payable by Scottish taxpayers by 3p in the pound, up or down, and powers over raising taxes to fund local services. Tax-raising powers and the responsibility for assignment of revenues is a key element of any discussion of devolution and its success, now and in the future, and is discussed comprehensively in Chapter 6.

⁶⁸ Memorandum submitted by the Royal Society of Edinburgh (DMB 111) to the UK Parliament Joint Committee on the Draft Marine Bill, available at: <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtmarine/159/159we111.htm>

Science, research and higher education

5.46 This theme includes university funding and research councils, the relationship between further and higher education as well as animal experimentation and human health issues like embryology and xenotransplantation.

- In the evidence received so far there appears to be a general consensus that the current system of reserved Research Councils funding research in universities across the UK functions effectively and in the interests of Scotland. Submissions from individuals in academia, from the University and College Union and from the Royal Society of Edinburgh, as well as oral evidence taken from the Scottish Funding Council, has suggested that Scotland and the research base benefit from being part of a larger community when it comes to funding research as it facilitates more wide-reaching collaboration.
- **The Commission is minded to recommend that Research Councils continue to operate on a UK-wide basis on the basis of the evidence it has received so far, and the case this evidence makes for ensuring a strong UK-wide research base. Before reaching such a conclusion the Commission welcomes any further evidence.**
- The funding of research in universities should be distinguished from other aspects of university funding. The Commission has received some evidence about the potential impact of the differing arrangements for funding individual students in Scotland and elsewhere in the UK.⁶⁹
- This is an important area and one in which further devolution would almost certainly affect the functioning of the UK as single social unit with a shared and vibrant knowledge base.
- **The Commission invites further views as to the most effective way of ensuring the continued success of higher education in Scotland whilst respecting the differences in policy approach that devolution inevitably creates.**

Social security

5.47 All social security benefits and pensions are reserved and the bulk of them are administered nationally by the UK Department for Work and Pensions (DWP) through one of its agencies. Housing and Council Tax benefits are administered by local authorities (with policy, stewardship and funding remaining with DWP).

- The benefit system is closely linked to social care (for the disabled and vulnerable) and to education and skills (for the unemployed), both of which are devolved and the Commission has received a number of calls for changes to the benefit system to reflect better Scotland's needs and priorities, and related concerns about the current arrangements.⁷⁰
- The model of a UK wide-social security system and its advantages have been discussed in Chapter 4, and the Commission identifies the links between the principles of a welfare state and the implications these have for the financial and functional arrangements of devolution.

⁶⁹ For example, oral evidence from Scottish Funding Council, 6 October, col. 177.

⁷⁰ For example oral evidence from Scottish Trades Union Congress, 10 October 2008, the Association of Scotland's Colleges, 6 October 2008 and from the Scottish Funding Council, 6 October 2008.

- Within this bigger picture, there are questions about some individual benefits (for example housing and council tax benefit and payments from the Social Fund) where it is not necessarily obvious that a wholly uniform national system is the most effective way of targeting welfare provision locally.
- The Society of Local Authority Chief Executives cited welfare benefits, particularly in connection with the welfare to work and social care agenda, as an area worthy of review.
- **As set out in Chapter 4, the initial question the Commission asks is the extent to which a broadly common social citizenship across the UK is desired, and whether there should be scope for significant divergence in welfare services offered.**
- **The Commission would also welcome views on how the current social security arrangements might be made to work more effectively in response to specifically Scottish issues and concerns.**

Trade and commerce

5.48 This theme has included the postal service, aspects of company law and insolvency as well as consumer protection, competition policy and financial services regulation.

- The subject-matter of the Postal Services Act 2000 is a reserved matter, although this does not and should not prevent the Scottish Government or local authorities from working with the Post Office as a service provider to help ensure a quality service for the people of Scotland and one that meets their specific requirements.
- Regulation of anti-competitive practices and agreements, abuse of a dominant position and monopolies and mergers are reserved matters. The Competition Commission and Office of Fair Trading act on a UK-wide basis and a Scottish body to deal with intra-Scottish competition issues might be appropriate.
- The Commission has heard from the Institute of Chartered Accountants in Scotland (ICAS) that the law relating to corporate insolvency (which is partly devolved) has not kept abreast with changes to the law as applying in England and Wales, thus creating difficulties for insolvency practitioners. Indeed, ICAS asserts that the necessary expertise is lacking in Scotland, and has proposed that this responsibility should be exercised at a UK level.
- **The Commission would be keen to hear from practitioners in the field of corporate insolvency as to whether there is support for reserving this subject matter as a whole and, if not, how the problem raised by the Institute might best be resolved. This is an issue on which the Commission would find it particularly helpful to have the views of the Scottish Government.**

Interim conclusions and next steps

5.49 The Commission has reached an initial classification of the key issues considered under the themes outlined above within two broad categories:

- those where the Commission has received substantial or significant evidence and there appears to be a plausible case for further consideration as to the most effective way to exercise a particular function;
- those where an issue may be important and where views have been expressed to the Commission but where we have not yet received sufficient evidence to reach an

informed conclusion whether there is a plausible case for further consideration, and where we shall be seeking further evidence before making recommendations in the Final Report.

- 5.50 **It is important to note that, in drawing these classifications, the Commission is illustrating the priority it is minded to give to particular areas of consideration, rather than indicating preliminary conclusions about where the devolved/reserved boundary should be altered. Other than those functions the Commission considers intrinsic to the Union that have already been mentioned, the Commission has ruled nothing out of its deliberations.**
- 5.51 Those areas that the Commission believes fall into the first category – those for which there is a plausible case for considering in more detail how that function could most effectively be exercised – are:
- the administration of elections
 - broadcasting
 - energy policy
 - animal health and movement (biosecurity)
 - firearms
 - misuse of drugs
 - regulation of health care professionals
 - revenue and tax raising
 - science and research
 - some aspects of the social security system (in particular housing and council tax benefit, the Social Fund)
 - sector skills
 - marine planning.
- 5.52 The second category – those for which the evidence base is as yet insufficient to draw firm conclusions – includes:
- the civil service
 - the Crown Estate
 - lotteries
 - transport (including speed and drink driving limits)
 - competition
 - insolvency
 - tribunals
 - employment law and relevant aspects of immigration
 - health and safety.

5.53 The Commission invites views on all of these matters, in particular those questions and points summarised below, which were noted at the end of each theme .

- Are there any areas that have not been discussed by the Commission where further consideration is required, and if so, what are the key issues for analysis?
- The Commission has not been set up to examine, in any detail, the administration of the electoral system in Scotland but would be interested in views on whether and to what extent responsibility for its administration could be devolved, the practicalities of doing so, the sort of framework in which any such devolved powers should operate and how a suitable level of consistency throughout the UK might be ensured. (Paragraph 5.25)
- Broadcasting is an area about which the Commission has received considerable, if sometimes conflicting, submissions. We would welcome further views as to whether current arrangements are sustainable or whether there are changes to ensure the specific broadcasting needs of Scotland can be addressed. In particular, the Commission would wish to have more precise submissions as to how and whether the responsibilities of Scottish Ministers in respect of broadcasting might be changed. (Paragraph 5.30)
- The Commission has heard views that the separate regulatory regimes for charities on each side of the Border gives rise to practical difficulties. The Commission invites further evidence from practitioners in this area to inform its final recommendations. (Paragraph 5.31)
- The Commission would welcome further views on whether there is scope for changes to the arrangements for health and safety legislation. (Paragraph 5.35)
- The Commission would be interested in options for variations in migration policy in Scotland to meet specifically Scottish labour market needs as well as reflections on how a distinctly Scottish policy might impact on the UK more generally. (Paragraph 5.36)
- The Commission invites views on whether there are any changes to responsibility for aspects of energy policy that could conceivably be made without compromising the integrity of the UK supply network whilst maintaining consistency with the principles set out in Chapter 4. (Paragraph 5.37)
- The Commission invites submissions on where the Scottish Government and Parliament's responsibilities for the environment and planning might create the potential for conflict with UK policy in reserved areas and how these frictions might be addressed. (Paragraph 5.38)
- The Commission is keen to take further evidence on animal health matters before reaching its conclusions and invites views, particularly on how animal health protection in Scotland might be most effectively funded both routinely, and in times of emergency. If funds were to be allocated to Scotland for animal health, how should this be calculated given the nature of the Scottish livestock industry which is proportionally larger than England's? (Paragraph 5.39)
- The Commission would welcome further evidence on the aspects of health policy that remain reserved. (Paragraph 5.39)
- Whilst the Commission accepts that the shared aim of the UK and Scottish Government should be to work together to ensure a common framework for health professionals across the UK, it would be interested in views as to whether

the approach of the Act is the most effective way of defining responsibilities and guaranteeing consistency to ensure the transfer of skills across the UK. (Paragraph 5.39)

- The Commission invites views on the implications of devolving responsibility for firearms, drug misuse and drink driving, and the potential cross-border issues arising from the potential for different policies. (Paragraph 5.40)
- The Commission has not received direct evidence about tribunals but, as part of its remit to ensure that devolution best serves the interests of the people of Scotland, is keen to understand whether current arrangements are operating satisfactorily and whether the system requires changes in order to function more effectively. (Paragraph 5.40)
- The Commission recognises that the management of the marine environment is an important issue and invites all those concerned to provide further evidence as to the best way to manage the marine environment and how the various authorities involved can better work together. (Paragraph 5.43)
- The Commission is minded to recommend that Research Councils continue to operate on a UK-wide basis on the basis of the evidence it has received so far, and the case this evidence makes for ensuring a strong UK-wide research base. Before reaching such a conclusion the Commission welcomes any further evidence. (Paragraph 5.46)
- The Commission invites further views as to the most effective way of ensuring the continued success of higher education in Scotland whilst respecting the differences in policy approach that devolution inevitably creates. (Paragraph 5.46)
- As set out in Chapter 4, the initial question the Commission asks is the extent to which a broadly common social citizenship across the UK is desired, and whether there should be scope for significant divergence in welfare services offered. (Paragraph 5.47)
- The Commission would also welcome views on how the current social security arrangements might be made to work more effectively in response to specifically Scottish issues and concerns. (Paragraph 5.47)
- The Commission would be keen to hear from practitioners in the field of corporate insolvency as to whether there is support for reserving this subject matter as a whole and, if not, how the problem raised by ICAS might best be resolved. This is an issue on which the Commission would find it particularly helpful to have the views of the Scottish Government. (Paragraph 5.48)

Chapter 6 Financial Accountability

Introduction

- 6.1 The Scottish Parliament is responsible for just over half the public expenditure in Scotland, with the remainder the responsibility of the UK Parliament. In this chapter we discuss how public spending in Scotland is decided upon, controlled and managed, and whether any changes might be made to those arrangements to fulfil our terms of reference.
- 6.2 Our work in this area has been greatly assisted by the evidence we have received, and in particular by the Independent Expert Group of economists, political scientists and others chaired by Professor Anton Muscatelli, Principal of Heriot-Watt University, which has reviewed and assembled the academic evidence on funding what they describe as “sub-national or regional” governments. Their first report to us was published on 17 November.⁷¹ Annexe B lists the membership of the Group, and reproduces their conclusions. We are very grateful to them, although of course the use made of their evidence and analysis is the Commission’s responsibility and not theirs.
- 6.3 Before addressing the questions of principle set out by the Independent Expert Group and the implications of our analysis in Chapter 4 of the nature of the devolution within the Union, it will be helpful to set out some of the factual background on public spending in Scotland, how it is determined and managed, and how it is paid for.

Public spending in Scotland

- 6.4 The Scottish Parliament is responsible for the majority of public spending in Scotland, such as spending on health, schools, roads, law and order and so on. Some of these public services are directly under the control of Scottish Ministers, some are delivered by public bodies like Health Boards while others are actually run by local government, but supported by grants from the Scottish Government’s budget. The remainder of public spending in Scotland is the responsibility of the UK Government and Parliament. This includes direct expenditure, the overwhelming part of which is social security payments such as Old Age Pensions, Child Benefit, Jobseeker’s Allowance, and Income Support. Additionally, there is public spending by the UK Government which is “non-identifiable” – that is, it cannot be split up and attributed to individual parts of the country, as it benefits the UK as a whole.⁷² This includes defence spending, the costs of the diplomatic service and debt interest. As the Independent Expert Group report notes, this sort of spending is on what economists term “public goods”, which cannot readily be decentralised inside the country,⁷³ but needs to be taken into account when considering Scotland’s overall fiscal position (which we discuss in paragraph 6.18 below). UK Government expenditure, including a share of the non-identifiable spending, accounts for 40% of all Scottish public spending. All of this spending, devolved and reserved, is supported by taxes levied by the UK Parliament in Scotland and in the rest of the UK.

71 It is available at: <http://www.commissiononscottishdevolution.org.uk/papers.php>.

72 When public spending is analysed on a territorial basis, most is “identifiable”, that is to say spending that can be identified as directly for the benefit of a particular region, such as spending on schools, hospitals, or social security payments. The remainder is “non-identifiable”, about 13% of the total, and includes spending on overseas representation and international development aid, security and defence, the servicing of Government debts, the creation and regulation of financial markets (the Bank of England and the FSA), energy markets (Ofgem) and other market regulation activities

73 The Independent Expert Group notes (in paragraph 1.1.2 of their first evidence) that these goods if decentralised may “tend to be underprovided since territories can gain the benefit without having to contribute”.

The Scottish budget

- 6.5 The total budget of the Scottish Parliament is made up from a number of elements. By far the largest element is set, normally for periods of three years, alongside the budgets of UK Government departments, in the Spending Reviews of the UK Government. This is referred to as a Departmental Expenditure Limit (DEL), by analogy with a Government department. The DEL of the Scottish Parliament was £27.4 billion in a total budget of £33 billion in 2007/08.⁷⁴ It is with this element of public expenditure that we are principally concerned, and which we will refer to as the Scottish Government's budget. Additionally expenditure which is volatile or demand-led is classified as Annual Managed Expenditure (AME) and is set on an annual basis, but the budget for this is less significant for our purposes. An example would be the payment of teachers' or NHS pensions from the superannuation vote. The total budget is mainly financed by a grant paid by the Secretary of State for Scotland, from funds voted by the UK Parliament, to the Scottish Parliament.
- 6.6 The Scottish budget is spent on the wide range of devolved functions and by many different bodies. A relatively small proportion of spending is current expenditure directly at the hands of Scottish Ministers – such as the running costs of central administration and agencies such as the Scottish Prison Service. About one third is NHS spending, and another third is grants to local authorities, supporting services like schools and social work. The remainder includes many other elements, including the budgets of public bodies, grants to universities, etc. The budget includes capital spending on assets such as hospital building or new roads, and capital charges on existing capital assets (which need not concern us here). The Scottish Government is responsible for how it spends this budget. Its spending proposals have to be approved by the Scottish Parliament, and it has to account to the Parliament for the expenditure incurred, and the value for money it achieves.
- 6.7 In addition to these resources, the Scottish Ministers have control or substantial influence over local taxation and local spending financed by it. Local taxation in Scotland amounts to about £4 billion a year, £2 billion from business rates (taxation on non-domestic property, such as shops, offices or factories) and £2 billion from the council tax (on domestic property). Although these taxes are collected by local councils, the level of business rates is decided by Scottish Ministers. Additionally, Scottish Ministers, through their powers to fund local authority spending by way of grants and in other ways, exercise a high degree of influence over the council tax.
- 6.8 Finally, the Scottish Parliament and Scottish Ministers have one additional degree of flexibility, which is known as the Scottish Variable Rate of income tax (SVR). The Parliament has the power (under Part IV of the Scotland Act) to vary the basic rate of income tax applying in Scotland by up to plus or minus 3p in the pound, with any resulting addition to or reduction from tax revenue added to or subtracted from the Scottish Budget. The SVR is limited to the basic rate of taxation on earned income (and does not apply to the higher rate or to unearned income such as bank interest). There is no obligation on the Parliament to use the SVR, and if it does not the basic rate of income tax in Scotland remains unchanged. The SVR may only be exercised on a motion by the Scottish Ministers, and no such motion has ever been proposed, either to increase or decrease income tax. (In 2008 a Scottish Liberal Democrat motion criticising Budget proposals on the basis that they did not use the SVR was defeated.) At the 2008 Budget, HM Treasury estimated that the Scottish Variable Rate would alter the Scottish Budget by a maximum of about £1.1 billion a year.

⁷⁴ The full detail of the relationship between the DEL budget, Annually Managed Expenditure, and the overall budget controlled by the Scottish Parliament is set out each year in the Annual Report of the Scotland Office. The details of that calculation are not relevant to the main thrust of our discussion.

- 6.9 Subject to the approval of the Scottish Parliament, the Scottish Ministers have virtually complete freedom on how they spend the Scottish budget. The only substantial constraint imposed by the UK Government in passing over the grant is on the split between capital and current expenditure which is intended to help the UK meet its macroeconomic targets for the economy as a whole. Otherwise the grant from the UK Government comes without “strings attached”. This gives the Scottish Executive and Parliament virtually unfettered discretion in spending decisions, to an extent which, as the Independent Expert Group notes, is much greater than comparable devolved or regional governments in other countries.

Determination of the Scottish budget: the Barnett Formula

- 6.10 As noted in paragraph 6.5 above, the Scottish Government’s DEL, and consequently the block grant from the UK Government which supports it, is set in Spending Reviews held by the UK Government. The way in which this total is calculated is by the same “block and formula” arrangements which set the budget of the Scottish Office before devolution. The formula in question is colloquially referred to as the Barnett formula, after Joel (now Lord) Barnett who was Chief Secretary to the Treasury when it was introduced in 1978, though formula-based approaches to deciding public expenditure in Scotland have a much longer pedigree than that. Since devolution, the way in which the Barnett formula works has been set out publicly in a Statement of Funding Policy⁷⁵ produced in each Spending Round by HM Treasury. It is important to note that the size of the current block grant is exactly what it would have been had the Scotland Act never been enacted. It is also worth noting that the costs of establishing and running the Scottish Parliament have been met from within this block grant – no additional funding was provided to Scotland as a result of devolution.
- 6.11 The Barnett formula is a very simple system for determining the Scottish budget. Just like a UK Government department, the Scottish Government has a “baseline”, essentially the budget from the previous spending review. When spending is reviewed, a revised budget is calculated by adding, or subtracting, from the baseline an amount calculated using the Barnett formula. This amount is a population share of the change in comparable English (and in some cases English and Welsh) spending programmes. This forms the new budget for future years. The “comparable” programmes involve spending on subjects like health which are devolved in Scotland. So if in a Spending Review the health budget in England is increased by £5 billion a year, the Barnett formula will add to the Scottish Budget a population share of that increase. A worked example of a Barnett formula calculation, provided by HM Treasury in its evidence to the Commission, is at Annexe C.
- 6.12 The Barnett formula is deeply embedded in UK Government public expenditure management, alongside the arrangements for Government departments. This is hardly surprising as the formula is substantially the same as before devolution. (What differs is that the method of calculation is now publicly available.) The inherited “baseline” is the largest single determinant of the budget and this has the effect that the Scottish budget is stable and substantially predictable. A contrast might be drawn with how grants to local government (by the Scottish or the UK Government) are calculated: councils do not have a baseline and it is the total grant to them that is calculated in each review, rather than an increment. In consequence, the calculation often includes an element (such as a minimum increase on the previous year’s grant) to provide stability. This is not needed under Barnett.

75 The most recent Statement of Funding Policy can be found at http://www.hm-treasury.gov.uk/pbr_csr07_statement_of_funding_policy.htm.

- 6.13 Table 6.1 below shows the growth of the Scottish Executive/Government's Departmental Expenditure Limit since devolution and identifies the largest elements of actual expenditure in Scotland on certain devolved areas.

| Table 6.1 – Growth in Scottish Devolved Spending inside DEL 1999 to 2008⁷⁶ and actual spending in Scotland on principal devolved responsibilities. | | | |
|--|-------------------------|--------|-----------|
| £ billion Outturn | Education & Training | Health | Total DEL |
| 1999 – 2000 | 4.4 | 6.5 | 14.1 |
| 2000 – 2001 | 4.8 | 6.9 | 15.1 |
| 2001 – 2002 | 5.1 | 5.7 | 16.9 |
| 2002 – 2003 | 5.4 | 6.7 | 18.1 |
| 2003 – 2004 | 5.7 | 7.4 | 20.1 |
| 2004 – 2005 | 6.1 | 7.7 | 21.6 |
| 2005 – 2006 | 6.5 | 8.6 | 23.2 |
| 2006 - 2007 | 7.1 | 9.1 | 25.4 |
| 2007 – 2008 (estimated) | 7.5 | 9.9 | 27.4 |

- 6.14 The Independent Expert Group noted that the block and formula arrangement, as a means of funding devolved government, is unique internationally. It provides stability and predictability, and near-total spending autonomy, and facilitates the management of economic aggregates. But the Group also noted its disadvantages: political accountability for taxation decisions is missing; the Parliament has limited scope to set its own total budget or use tax measures to influence behaviours, and has less incentive to promote economic growth.
- 6.15 In the Commission's view, this present system undoubtedly got the Scottish Parliament off to a good start. Its stability and predictability mean that there have been no wild fluctuations in financial provision. Additionally, the first ten years of devolution have been a time of substantially growing budgets, and (perhaps in consequence) little conflict between the Scottish Parliament and the UK Parliament about total spending levels. At the same time, the near-total spending discretion allowed to the Parliament has enabled the new institution to develop its own policy and spending priorities without constraint from the UK Government or Parliament. However, although the formula is simple, it has not avoided all political concern about its application, for example in relation to Olympics spending or new spending on prisons in England. The content of the Statement of Funding policy, and how it is applied, are matters for the UK Government, and there is no independent oversight of those decisions.

76 Sources: Scotland Office Annual Reports 2004 to 2008; HM Treasury Public Expenditure Statistical Analysis 2001 to 2008

Levels of public expenditure across the United Kingdom

6.16 Levels of public spending in Scotland have been the subject of comment and some of this has been referred to in the evidence and submissions to the Commission. The Independent Expert Group noted discontent about Scottish levels of funding in other parts of the UK. Some commentators regard public spending in Scotland as excessive, either on the basis of unfairness in comparison with other UK regions with comparable or greater needs, or on the basis that the public sector is too large a part of the Scottish economy. Others draw attention to factors – such as high levels of urban deprivation and large rural areas with highly dispersed populations and services – which argue for higher relative spending levels in Scotland justified by need, or make the case for additional public spending to support economic activity. Overall per capita figures for public spending in the different regions of the UK are given in Table 6.2 below.

Table 6.2: Public spending in the UK⁷⁷

| £/head (outturn) | 2002-03 (outturn) | 2003-04 (outturn) | 2004-05 (outturn) | 2005-06 (outturn) | 2006-07 (outturn) | 2007-08 (plans) |
|------------------|-------------------|-------------------|-------------------|-------------------|-------------------|-----------------|
| England | 5,522 | 6,026 | 6,442 | 6,802 | 7,076 | 7,535 |
| Scotland | 6,696 | 7,213 | 7,458 | 8,077 | 8,544 | 9,179 |
| Wales | 6,515 | 6,945 | 7,315 | 7,796 | 8,172 | 8,577 |
| Northern Ireland | 7,437 | 7,868 | 8,294 | 8,672 | 8,990 | 9,789 |
| UK | 5,726 | 6,225 | 6,624 | 7,012 | 7,308 | 7,790 |

6.17 Consideration of whether these levels of spending are justified by need or some other factor, or whether the public sector share of the Scottish economy is too high or low, are beyond our remit. So far as finance is concerned, our remit is focussed on improving the financial accountability of the Scottish Parliament. We accept however that perceptions of equity are very important in allowing public spending allocations to win assent politically, and we recognise that public spending and the way in which it is determined may indeed have implications for economic growth.

Scotland's fiscal position

6.18 A further relevant piece of background is the overall fiscal position of Scotland, that is to say the balance between taxation and public spending in Scotland. An exact calculation of this is not possible as taxation data is not separately collected for Scotland. HMRC collects tax on a UK basis, and of course Scotland is integrated into some UK expenditure programmes such as defence. Nevertheless regular estimates of Scotland's overall fiscal position have been made in the Scottish Executive/Government publication *Government Expenditure and Revenues in Scotland (GERS)*. This has been published annually since 1992. The most recent edition, published in June 2008, incorporated various changes to the measurement of expenditure and some changes in the way the data was presented compared with previous editions.⁷⁸ The GERS publications have not been without controversy but are accepted (as the Independent Expert Group notes) as the best available assessment of Scotland's fiscal position.

⁷⁷ Source: HM Treasury Public Expenditure Statistical Analysis 2008

⁷⁸ GERS is published by the Scottish Government and meets the standards which allow it to be described as a National Statistics publication.

- 6.19 The Independent Expert Group Report provides a detailed analysis of the GERS data. The Group noted that GERS provides only an imperfect guide to what the position would be for an independent Scotland, or one with greater taxation devolution. Within current UK structures (in which taxation revenues from oil and gas in the North Sea continental shelf are treated as assets of the whole UK and not assigned to particular regions), Scotland has a longstanding fiscal deficit. This is illustrated in table 6.3 below. Even if a geographical share of North Sea revenues is attributed to Scotland, Scotland still has a fiscal deficit, although a considerably smaller one. But as the Independent Expert Group notes, these revenues are volatile – having varied in recent years from £1 billion a year to £12 billion. North Sea output is likely to continue to decline in future. The Commission has not yet considered the issues relating to oil and gas revenues and the Independent Expert Group has undertaken to do further work on this question. The Group’s report noted that it was complicated by issues like decommissioning costs (the North Sea is a mature field, and these costs will be tax deductible) and “tax shifting”. The Commission will return to the question of oil and gas revenues at a later stage.

| Figures in £,000 | 2002-03 | 2003-04 | 2004-05 | 2005-06 | 2006-07 |
|--|---------|---------|---------|---------|---------|
| Estimated tax revenues (excluding North Sea) | 32,664 | 34,760 | 37,263 | 39,854 | 42,353 |
| Current Expenditure (including accounting adjustment and capital consumption) | 38,815 | 41,829 | 43,852 | 46,566 | 49,079 |
| Net Capital Investment | 1,895 | 1,817 | 2,461 | 2,910 | 3,489 |
| Net Fiscal Balance (surplus is positive, deficit is negative) | | | | | |
| Excluding North Sea revenue | -8,046 | -8,886 | -9,050 | -9,620 | -10,215 |
| Including North Sea revenue (geographical share) | -3,813 | -5,364 | -4,722 | -1,490 | -2,652 |

Evidence and submissions received

- 6.20 Improving the financial accountability of the Scottish Parliament attracted much attention in the evidence and submissions we have received as well as being the focus of much discussion at our public engagement events.
- 6.21 There were widely differing views on the principle of the Scottish Parliament being funded almost entirely by a block grant, whose size is determined by the Barnett formula. A number of individuals and organisations highlighted the stability this system had provided as beneficial, with some suggesting the means of calculation of the size of the block grant has been advantageous, or over generous, to Scotland. We have also received many representations suggesting that funding by block grant should continue, but with the amounts calculated on the basis of need.
- 6.22 A number of written submissions suggested that the Scottish Variable Rate has not been used because the administrative costs associated with its introduction would be large in relation to the potential revenues. Some have suggested that the limited scope of the SVR – the fact that it applies only to the basic rate of income tax and allows variation only

79 Source: Government Expenditure and Revenue in Scotland 2006 -2007 (Scottish Government, 2008).

by up to 3 pence in the pound – makes it insufficient either to meet economic needs or to provide an adequate degree of accountability or autonomy.

- 6.23 A number have expressed a view that the Scottish Parliament should be responsible for raising all of its revenues, implying full fiscal autonomy (as defined in paragraph 6.30), with some going on to suggest that these could also be used to pay the UK Government for non-devolved matters. The relationship between the autonomy and accountability of the Scottish Parliament is clearly identified in many written submissions and was frequently raised in both oral evidence and public engagement events. Some representations highlighted the lack of accountability arising from the “disconnect between tax raising and public spending” which could be redressed by the devolution of some or all taxes. Others argued for increased autonomy on the basis that it was wrong in principle for one Parliament to be wholly dependent on grants from another, and that the Scottish Parliament should have fiscal powers to help it meet policy objectives. Some of those making this argument directed the Commission to the analysis set out by the Steel Commission. Many contrasted local authorities’ borrowing powers with the Scottish Parliament’s and Scottish Government’s absence of borrowing powers.
- 6.24 The representations we have received, however, reflect a wide divergence of opinion in this area. Against those promoting the devolution of some or all taxes, were those who argued that the Scottish Parliament is already fully accountable for spending, and holds the Scottish Government to account and it did not need further tax powers. Some reject tax devolution for different reasons, arguing that it is either not practicable, economically undesirable or administratively too complex.
- 6.25 The sheer breadth of opinions expressed suggests to us that many of the issues and choices emerging are to some extent mutually conflicting. The spectrum of opinion we have heard in our work very much coincides with those identified and helpfully summarised by the Independent Expert Group.
- 6.26 The Group noted that the present system of funding the Scottish Parliament has the advantages of simplicity, stability, and predictability. It offered however only limited fiscal autonomy and accountability. That is to say that although the Scottish Parliament has a large budget and wide spending powers, it does not have to take responsibility for raising the money it spends through taxation, and was not able to use tax to influence behaviour. The Scottish Variable Rate of Income Tax could raise, at the most, about £1.1 billion (about 4% of the Parliament’s Budget) but the Parliament is under no obligation to exercise it. Voters in Scotland are therefore not necessarily exposed to the choice at the margin between additional spending and additional taxation.
- 6.27 The Group noted that the Barnett formula is not necessarily linked to any measurement of need, and that public consent is important in ensuring the continued legitimacy of any system. (Like the Commission, the Independent Expert Group was not set up or equipped to perform an assessment of relative spending need, or to say what would be an equitable relative spending level in Scotland relative to the rest of the UK or how that would compare with present levels.) The Group also noted that the Barnett formula, unlike fiscal processes in other countries, was a purely administrative arrangement and was not enshrined in law. (The legal basis of the present system is simply the section in the Scotland Act which allows the Secretary of State to make payments into the Scottish Consolidated Fund.⁸⁰)
- 6.28 In considering possible alternative funding systems for the Scottish Parliament, the Independent Expert Group reviewed the international evidence on how sub-national or regional governments were funded. The Group concluded that this showed there was no

80 Section 64. The Scottish Consolidated Fund is the fund through which revenues and expenditures in the devolved budget flow.

ideal solution: most of the other systems considered involve a particular point on a spectrum of possibilities, recognising the trade-offs amongst competing principles. The Group identified these funding principles as follows:

- **Equity:** ensure fairness to all regions of the country;
- **Autonomy:** allow the regional government choice on what and how much to spend, and potentially allowing the use of fiscal powers as policy instruments;
- **Accountability:** ensure that the effect of decisions made at the regional level on tax bills is clear to taxpayers;
- **Stability/predictability:** enable public spending to be managed properly;
- **Simplicity/transparency:** enable taxation decisions to be readily implemented and the justification made evident;
- **Efficiency:** avoiding creating economic distortions by incentivising movements of people and the factors of production.

6.29 For simplicity in our later discussion, we will group these funding principles into three broad groupings:

1. **Equity** – does the funding system allow levels of spending hence a distribution of public services that are accepted as fair?
2. **Efficiency** (in both the economic and administrative senses) – what are the effects of the funding system on the economy (does it impact on macroeconomic management; does it introduce distortions into the economy; are its results stable and predictable), and is it simple or complex to administer and explain?
3. **Accountability** – does the devolved body have the autonomy to make spending and taxation decisions for which the electorate can hold it accountable?

6.30 The Independent Expert Group's report also helpfully sets out the main mechanisms used in funding systems as follows:

- **Tax assignment:** allocating a share of tax revenues from some or all taxes to the sub-national governments. These would most obviously be the tax revenues raised in the relevant part of the nation. This is said to give the regional or sub-national government an incentive to grow the tax base, but does not make them fiscally accountable as they lack autonomy in determining taxation levels.
- **Grant-based systems** may address issues of both "vertical" and "horizontal" fiscal equalization. That is to say, they can make up the "vertical" gap between a sub-national government's tax-raising powers and its spending responsibilities, which is seen in many nations, and they can also allow national governments to redistribute resources "horizontally" across a country to equalise the effects of differing taxable capacity or spending need. Grant based systems are efficient in terms of tax competition, assist with macroeconomic management, and allow sub-national governments predictable revenues. Grants may be unconditional, or un-hypothecated, like the block grant which funds the Scottish Parliament, or may often also be conditional, tied to particular purposes or spending priorities. However, grants too however suffer from a lack of fiscal accountability.
- **Fiscal autonomy (or tax devolution)**, under which sub-national Governments set and raise at least some tax revenues and so exercise some fiscal responsibility. (Full fiscal autonomy implies that devolved spending is wholly financed by taxation raised by

the devolved body, but the term fiscal autonomy is often used as shorthand for greater taxation powers, and sometimes also greater borrowing powers.) The devolution of some taxes has the scope to reduce vertical fiscal imbalances, and so promote strong accountability. But it raises questions of equity, because spending levels across regions are influenced by the distribution of taxable capacity, rather than spending need. Tax devolution also raises potential issues of tax exportation/competition, as differential tax rates may cause businesses or other taxpayers to take decisions based only on tax considerations. Fiscal autonomy produces relatively low predictability in resources for spending, and so it is likely to require borrowing capacity to smooth over fluctuations in revenues. A consequence would be a need for a system for fiscal co-ordination inside the country, so that economic aggregates can be managed.

- 6.31 The Independent Expert Group concluded that to the extent that a region with full fiscal autonomy is to all intents and purposes independent, full fiscal autonomy is not consistent with the maintenance of the Union; the Commission agrees.⁸¹ Later we consider tax devolution.
- 6.32 In reality most existing systems in the world are mixed, and adopt a combination of these means of funding, depending on their history, and the constitutional arrangements and objectives of the countries concerned. **Indeed the single most important conclusion from the Independent Expert Group's work was that the balance between these conflicting principles and the mix of funding mechanisms to be used should be determined not by the technical considerations of funding mechanisms, but by the constitutional objectives that the funding system is designed to support.**
- 6.33 Different countries have chosen to adopt different balances because they have different political or constitutional objectives. Most of these are federal countries (and so it is not straightforward to transfer the mechanisms that they use to meet their objectives into the UK context) but their different systems display the balance they have chosen (often for historical reasons) amongst these considerations. Australia, for example, has an elaborate system of equalisation which is explicitly intended to put each State or Territory into the same fiscal position, taking account not just of their different taxable capacities but also of their different spending needs. Canada, on the other hand, places a higher value on fiscal autonomy and so has a system aimed mainly at the equalisation of taxable capacity among the Provinces, rather than equalisation of spending need. Each of these systems, and those adopted by other countries, reflect where on the balance amongst the competing principles they wish to be, or to put it another way, what sort of federation they are seeking to create and sustain.

Achieving a balance between funding principles

- 6.34 It is clear from these examples that there are tensions between the groups of funding principles described in paragraph 6.29. For example, allowing a devolved government discretion over a wide range of taxation decisions will increase its accountability and autonomy (and so may allow better government, and promote economic growth), but it may reduce efficiency by introducing economic distortions and adding to the cost of tax collection. Funding wholly by grant may enable central government to determine spending levels that it sees as fair in different parts of the country, but reduces the accountability of a devolved government to its electorate and limits its ability to use taxes to influence behaviour. Conversely, requiring a devolved government to rely on taxation raised in its own area will increase its accountability to its domestic electorate but is

81 Independent Expert Group Report, page 15, paragraph 6.3.11.

unlikely to produce a spending level that is seen as fair across the whole country. (To put this another way, by reference back to the discussion in Chapter 4: as resources are pooled only at the devolved level so risks are pooled there also, and may be differently managed than elsewhere in the nation.) On the other hand, a system which always ensures budgets for a devolved government are seen as fair may reduce the incentives on that government to promote economic growth and so increase tax revenues to support its services (although we note that expert opinion is divided on whether this last point has any real significance in practice).

- 6.35 Our remit requires us to consider ways of improving the financial accountability of the Scottish Parliament but for the foregoing reasons, it is clear that any changes suggested in order to do that must be considered alongside their potential effects on equity and efficiency. As the Independent Expert Group concluded, it is necessary to take a view on the nature of the Union itself in order to make a judgment about these trade-offs. This was discussed in Chapter 4: what sort of Union should the United Kingdom be and how much should be devolved within it? In the remainder of this chapter we consider the implications of those choices about the balance of funding mechanisms.

Setting the balance – the economic Union

- 6.36 Our remit also requires us to recommend changes which would enable the Scottish Parliament to serve the people of Scotland better, as well as to continue to secure Scotland's place in the United Kingdom. We attach importance to both these aspects and our analysis of devolution within the Union will help us set the balance in relation to financial accountability. This means, looking forward, that our approach will take account of the international experiences cited above where we noted that financing mechanisms are chosen to support a desired constitutional order. As we discuss in Chapter 4, the Commission regards the maintenance of an economic Union as in the interests of both Scotland and the wider UK. So in considering how to increase the accountability of the Scottish Parliament, we will look at all the options which might give real benefits to the people of Scotland, but we will not recommend changes which would have the effect of significantly undermining that economic Union.

Macroeconomic management

- 6.37 **Inside an economic Union, the autonomy of the Scottish Parliament in relation to taxation (and as well as spending) will impact on the management of the UK economy. That would remain the responsibility of UK-wide institutions, notably HM Treasury and the Bank of England.** So these institutions must have knowledge of, and some influence over, those decisions of the Scottish Parliament that impact upon the UK's fiscal totals. The present system achieves control of these totals in virtually the same way as it did in advance of devolution: the Scottish Budget is in effect determined by UK Government decisions, the balance between capital investment and current spending is set by HM Treasury, and the only short-term borrowing powers available to the Scottish Ministers are from HM Treasury.⁸² Apart from local taxation, the main exception to this is the Scottish Variable Rate of Income Tax, which if exercised would alter the total of UK public spending, though not overall UK public borrowing.
- 6.38 We discuss below other options for increasing the financial accountability of the Scottish Parliament, and whether it should have greater taxation or borrowing autonomy. To the

⁸² Local authorities have powers to borrow on their own account, under a prudential regime, secured on local revenues, although most of this borrowing is from HM Treasury.

extent that it was able to exercise greater fiscal autonomy, notably in relation to borrowing, there would be a need for arrangements (perhaps quite formal ones) as in other countries, both to ensure that overall economic management responsibilities can be discharged, and to involve the Scottish Parliament and Government more closely with the UK institutions responsible for economic management. The Independent Expert Group notes that some other systems have formal agreements between different levels of government to manage the economy better. Fiscal coordination would be essential if fiscal autonomy were increased.

Tax devolution: general

6.39 That the UK is a single market has particular implications for the scope of tax devolution. As the Independent Expert Group notes, goods, capital and services are constantly being traded across the United Kingdom's internal borders. Tax devolution has potential for disruption to that trade, but this has to be balanced against other considerations. As the Independent Expert Group also notes, taxation promotes accountability. And taxation is not solely a revenue-raising instrument; it can be used as a policy tool to give incentives for or to discourage particular behaviours. Governments use taxation powers, for example, to discourage smoking, or to encourage business growth.

Tax devolution: Corporation Tax

- 6.40 Some, for example the Steel Commission, assert that it should be possible for the Scottish Parliament to vary the rates of, or perhaps the liability for, Corporation Tax in Scotland, so as to give it a fiscal lever to promote economic growth. (This discussion is usually couched in terms of allowing the Parliament to introduce a lower rate of taxation, but devolution would also permit a higher rate to be set.)
- 6.41 Clearly, even inside an economic Union, Scottish Ministers have an important economic role. They have significant powers to promote economic growth in Scotland, including through their management of key public services such as education and transport which create the conditions for a flourishing economy, policies such as land use planning, which influence investment decisions, and the ability to offer grants and support to businesses, either directly or through bodies like Scottish Enterprise. (All of these powers have to be exercised consistently with the EU rules on State Aids.) Successive Scottish administrations have had strategies for sustainable economic growth, including in what they see as key growth sectors for the Scottish economy. But they have had few fiscal levers to help them meet such objectives. The one fiscal power exercised by Scottish Ministers is their complete autonomy over both the liability for and level of business rates. These rates raise £2 billion annually from businesses in Scotland, compared with £3 billion in Corporation Tax. Scottish Ministers have complete authority over business rates – they could in principle be abolished or significantly reduced compared with the rest of the UK.
- 6.42 The Commission can see the case for devolving the power to vary Corporation Tax, as it would certainly increase the autonomy of the Scottish Parliament. We have, however, received a number of representations from business bodies arguing for maintaining the present system. We would have concerns if changes were to cause significant distortions inside the UK economy by introducing opportunities for wasteful tax competition within the UK.⁸³ There is a risk that variable rates of Corporation Tax would provide an incentive for businesses – many of which, including the largest Scottish companies, operate throughout the UK – to devise ways of accounting for their profits across the UK so as to

83 This issue was considered in some detail by Sir David Varney's Review of Tax Policy in Northern Ireland, <http://www.hm-treasury.gov.uk/d/varney171207.pdf>.

minimise their tax liabilities, rather than giving them further incentives to generate growth, profit and employment.

- 6.43 So while we can see the arguments for devolving Corporation Tax from a purely Scottish perspective, there are issues which give us pause, and on which we would wish to be reassured by evidence, before we would recommend any such change. Would differential Corporation Tax rates cause business to relocate for tax purposes only, with the result that there might be no increase in economic activity in Scotland despite the lower tax level? Similarly, would it provide large companies with an incentive to assign more of their profits to the part of the UK that imposes lower levels of Corporation Tax, with the result that there would be a reduction in overall tax-take (affecting the rest of the UK the most) but no substantial change in economic activity? There would also be costs involved for businesses in accounting separately for profits earned in Scotland from those earned in the rest of the UK.
- 6.44 Business rates also allow for the possibility of tax competition, but as they are based on the size or a value of property occupied, they are not vulnerable to relocation through accounting practices alone. (This point is discussed, in terms of principle, in the Report of the Independent Expert Group, which notes that taxing mobile factors of production at a sub-national level is less likely to be efficient.) We would also like to be reassured that Corporation Tax variation inside the UK would be implemented in a way that was consistent with EU State Aids rules, though we note that the Independent Expert Group thought that those rules should not significantly constrain the sorts of tax devolution which the Scottish Parliament might exercise.

Tax devolution: indirect taxes

- 6.45 The fact that the UK is an integrated single market has implications for indirect taxes, and hence for the scope to devolve sales taxes like VAT or excise duties, such as those on alcohol or tobacco. We see real problems in having different rates of VAT (or any sales tax) within the UK, particularly as the growth in internet shopping makes geographical differentiation of sales more difficult.
- 6.46 Excise duties carry some of the same risks. Inside a single market, with relatively free access for goods throughout most of the UK, notably through internet selling, the opportunities for tax avoidance through buying in a lower-taxed part of the country are obvious. The problems such distortions create can already be seen in the phenomenon of cross-channel traffic in alcohol between France and southern England. On the other hand, duties, particularly those on tobacco or alcohol, are obvious instruments to address issues such as alcohol consumption or smoking which are serious policy concerns in Scotland. Currently, the Scottish Parliament can restrict the sale of alcohol, but not tax it. The Commission has received no evidence on this subject but would want to be reassured by evidence that economically distorting effects were not likely to be significant before recommending devolution of such powers.

Tax devolution: income tax

- 6.47 Taxes on personal income potentially already include a devolved element in the form of the SVR – although, as we have noted elsewhere, this has never been exercised. The revenue estimates in GERS suggest that income tax is the measure with the largest revenue, although this total will include all receipts from income tax rather than only from the basic rate slice of incomes to which the SVR would apply. Whilst we have received and heard much evidence and opinion relating to the SVR itself, there has been less discussion of the possibility of a wider devolution of income tax.

6.48 Income tax is probably the tax that is most evident and transparent to the electorate. The Independent Expert Group noted that the location decisions of individuals can be influenced by regions having different tax and expenditure systems, but arguably, the electorate endorsed the albeit limited possibility of Scotland having a different rate of income tax to elsewhere in the United Kingdom in the 1997 referendum.

The mix of funding mechanisms

6.49 The extent to which the UK as a social Union has, as discussed in Chapter 4, quite profound implications for the balance chosen between equity and accountability in the design of a financing system, and hence for the fiscal powers available to the Scottish Parliament. That chapter illustrates the range of possibilities including Scotland remaining part of a common UK welfare state, with broadly the same entitlement to free health care and education as the rest of the UK; and a model in which Scotland exercises much greater autonomy and has essentially its own welfare system.

6.50 The first of these sets a higher value on equity across the UK, and implies that the Scottish Parliament's spending is more likely to be supported by pooled UK taxation, and so in practice by a substantial proportion of grant from the UK Parliament. To allow for fiscal accountability, however, the block grant need not be the overwhelming source of revenue for the Parliament.

6.51 Much greater devolution envisages a high degree of autonomy, and so high dependence on Scottish resources and consequently greater fiscal autonomy. So if it were thought desirable that Scotland should be able to operate quite a different kind of welfare state within a political and economic Union, then it is clear that, as equity across the UK would be less of an imperative, greater reliance would be placed on Scottish domestic taxation to support domestic public services, and more emphasis would be given to tax assignment and tax devolution than to grant funding.

6.52 In summary, if devolution within the Union is on the basis of a high degree of commitment to a broad common understanding of the welfare state, and so a common social citizenship, then the mix of funding instruments used might be expected to be weighted towards grant. The grant element then has to be justified on the basis of equity. Tax assignment should be used to the extent that it is thought valuable to link the revenues of the Scottish Parliament to the fortunes of the Scottish economy, so as to give the Parliament an incentive to grow the economy and increase tax receipts. Tax devolution would be designed to ensure that, at the margin, accountability was improved by making the choice between higher or lower levels of both taxation and spending one for the Parliament, and in a way that was perceptible to taxpayers. Tax devolution might also be permitted to give the Parliament some fiscal instruments with which to pursue particular policy objectives.

6.53 At the other end of the spectrum, if there was a greater desire to allow autonomy on welfare issues, power over taxation would be devolved to the maximum practical extent. Tax assignment would also be more used, so that domestic spending was linked to domestic resources, even where for other reasons tax devolution was not possible. Grant would be a lower proportion, and justified only to the extent that there was a residual need for equalisation, perhaps on resource grounds, as is seen in the Canadian system.

6.54 **The Commission at this stage makes no judgement about what point on this spectrum is appropriate and therefore what balance amongst funding mechanisms is best for Scotland.** The degree of uniformity in welfare provisions must, however, reflect the

expectations of the Scottish population. There is a range of points on this spectrum and, in the light of responses to this report, we will work further, with the help of the Independent Expert Group, to identify what different scenarios might be practicable and consistent with our vision of the Union.

Funding mechanisms – issues and options

- 6.55 This is the Commission's first report, and at this stage our aim is to identify the main issues, and the choices open to us to fulfil our remit, so detailed conclusions on finance, and on improving the financial accountability of the Scottish Parliament, would be inappropriate. Nevertheless, a number of important issues and options can be identified at this stage of our work and it is on these that we invite further evidence and comment.
- 6.56 These issues are most readily introduced by a consideration of the various methods of funding the Scottish Parliament identified by the Independent Expert Group in their analysis of how sub-national or regional governments are funded across the world.

Assigned revenues

- 6.57 Assigned revenues are used internationally to give regional governments a source of revenue which is independent of the decisions of central government, although the nature of the tax base and tax rates are decided centrally. (Disagreements about or changes in the proportions of revenue to be assigned appear to be quite common, for example in Germany.) An advantage of assigned revenues in a Scottish context is that they would give the Scottish Parliament a direct financial stake in the fortunes of the Scottish economy, and (at least in principle) a stronger incentive than at present to promote growth in the economy. Tax revenues might be assigned where it was not practical or desirable to allow tax devolution.
- 6.58 Most, if not all, taxes may be capable of full or partial assignment. The following, however, may be worthy of particular attention:
- Value Added Tax (VAT)
 - Corporation Tax
 - excise duties
 - income tax
- (and possibly, subject to further consideration, National Insurance Contributions).
- 6.59 Assignment does however (as the evidence from HMRC shows) face practical challenges which need to be considered as part of the analysis of benefit. Scottish tax revenues are not separately identified (and some, in an integrated economy, are quite difficult to define – for example, should all the Corporation Tax revenue from a company based in Scotland be assigned to Scotland, even if profits are generated by business in England, and vice versa?). Major challenges of estimation are involved, and the breakdown of tax revenues in GERS shows the difficulties involved. Effort and cost would be involved in developing assignment systems. The complexity might be reduced by using simpler principles of assignment, such as population or other formula share, though that might dilute the incentive effect. The effort involved would need to be justified by demonstrable benefits. The evidence as to whether assigning revenues produces an incentive effect that encourages elected politicians to give greater priority than they otherwise would to

economic growth appears to be mixed. At this stage, the Commission does not rule out the use of assigned revenues as part of an overall funding solution. This might, in particular, prove appropriate, in the context of an approach to devolution that aimed to provide greater policy freedom to the Scottish Parliament at the expense of reduced common social citizenship across the UK.

- 6.60 The Commission has not as yet considered the arguments relating to oil and gas revenues and whether these might be assigned and has asked the Independent Expert Group for further analysis of the issues before doing so.

Grants from central government

- 6.61 In almost all systems of finance worldwide sub-national or regional governments tend to have greater autonomy over spending than over tax-raising. This is true even in systems which allow a larger degree of autonomy, not least because it is much easier to have variations in spending policies than in tax arrangements in different parts of one country. (Indeed experience internationally suggests that it is becoming increasingly difficult to maintain taxation differentials within countries.) In the jargon, these governments have large vertical fiscal imbalances, and in most countries these are addressed in whole or in part by grants from central government. The Scottish Parliament, is unusual in this context in that it has much wider legislative competence than many comparable governments, but greater dependence on central grants than them.
- 6.62 Grants of this sort nevertheless have many practical advantages. They can be simple to administer and allow central government scope to allocate resources to different parts of the country in accordance with their priorities, such as the equitable provision of public services. They can also avoid creating economic distortions. Grants can be made with conditions attached or without.
- 6.63 As already noted, the Commission considers that the current system in Scotland of unconditional grant funding, has got the Scottish Parliament off to a good start. In particular the fact that the grant has been made in a way that allows the Parliament almost complete autonomy over spending has been a great advantage. It is of course entirely consistent with the wide legislative competence of the Parliament that its spending freedom should be so unconstrained, and the Commission is of the view that conditionality of grant (such as is for example often imposed on grants to local government) would be inappropriate for grants to a Parliament.
- 6.64 If grants are to continue as a major element the Scottish Parliament's funding the question arises as to the basis on which they are justified and calculated. If devolution within the Union implies a common social citizenship, then it is clear that grant should be used to ensure that as welfare risks are pooled at UK level, so are the appropriate level of resources. Grant is the mechanism to use to ensure that this can be done fairly, and so it must therefore be justified and defended on equity grounds. It follows also, as we noted above, that a broad common understanding of the nature of the welfare services supported must be shared. This is not about central government attaching conditions to grant, but rather about there being a common view agreed in some way, on a long term basis, between national and devolved governments and Parliaments of the nature of the Union which the funding system supports.
- 6.65 Securing agreement about the basis for grant funding is one thing, but deciding the level of grant to pay to a devolved region is a separate issue. Such decisions are by no means easy to make, even within a broad general consensus. Relevant factors are likely to include the relative level of taxable resources available within the region, the relative costs of providing public services in the region, and the region's relative need for such services,

especially where it is agreed they should be provided to a common standard, and where the costs involved are related to the size and composition of the population.

- 6.66 It is no part of the Commission's remit to make an assessment of this sort. Such judgements are always complex, and invariably seriously politically contested. Making them can be highly expensive and time-consuming. Perhaps the most developed example of such work is the Australian Commonwealth Grants Commission, whose mission is, taking account of different tax resources and different needs, to put all the States and Territories in the same fiscal position – so that, if they provide a typical level of services at an average level of efficiency they should have to levy the same rates of taxation. This is a major undertaking, and the Commission, which operates on a rolling five year cycle, costs on average about (Aust)\$8 million a year to run.
- 6.67 The Commission has come to no view on whether such an arrangement would be appropriate for Scotland, or indeed for wider use inside the UK. That decision seems to us to depend on how significant a proportion of the total revenues of the Scottish Parliament are determined by central grant, and so how significant any changes that would result for such a major exercise would be. The Commission is firmly of the view that stability and predictability in public spending is beneficial for the management of public services and for the members of the public who depend upon them. We would therefore not wish to see any changes resulting from our eventual recommendations resulting in sudden or step changes (up or down) in the budgets available for those services.

Tax devolution

- 6.68 There are two arguments for devolving to the Scottish Parliament more taxation responsibility that it currently has. The first is that it might improve the fiscal accountability of the Parliament beyond the existing fiscal powers of the SVR and the scope to influence local taxation. Tax devolution should enable voters to see the effect of the Parliament's decisions on spending reflected in their tax bills, as well as on the services they receive. The second is that flexibility in relation to taxation might be useful as a policy instrument. At this stage of our deliberations, the Commission has concentrated on the former, though we recognise that there may be scope for tax powers which have the second objective.
- 6.69 Such freedoms must be tested against whether they would benefit the people of Scotland but they have to be exercised in the context of the framework of the Union and in particular, in the Commission's view, of the integrated economy of the UK. Our view in relation to any tax variation is that we would want evidence that it would not result in significant economic distortions before we could recommend its use as a policy tool. Within an economic union, we do not see scope for variation of VAT. We would also need to be persuaded by evidence that the risks of devolving duties on alcohol and tobacco, for example, would not outweigh any advantages from doing so, and we seek further evidence on this.
- 6.70 The most obvious tax to consider as a candidate for further devolution is Income Tax. It is not so evidently subject to the same considerations discussed above (although in principle different rates of income tax might influence people's decisions about where to live). And of course there is already scope for the Scottish Parliament to vary the basic rate of income tax on earned income in Scotland by up to 3p in the pound (in either direction).
- 6.71 Within Scotland, it is estimated that about 2.5 million people pay income tax, around 2 million of whom pay at the basic rate only. The vast majority of these tax payers will be among the four million or so voters in Scotland. Income tax is a readily perceptible tax, in

that voters see the effect of tax decisions on monthly salary statements and weekly pay-packets, and rates of income tax are highly politically sensitive. On the face of it, therefore, further devolution of income tax is a good candidate for improving the financial accountability of the Scottish Parliament.

- 6.72 However, it is worth considering why the existing power to vary income tax in Scotland – the Scottish Variable Rate - has not so far been used. First and most obviously there has never been a political consensus in the Parliament to exercise the power. Additionally, the first ten years of the Parliament’s existence have been a time of rapidly growing public spending, and the challenges in managing the growth of that spending wisely may have suggested that further growth from additional taxation was unnecessary.⁸⁴ It might be argued that, since public spending is not now expected to grow at the same rate, the budgetary pressures will force the Parliament to address much more seriously whether or not to exercise this power, thus promoting accountability within the present system.
- 6.73 There may however be other reasons for the lack of serious or regular public debate about the use of the Scottish Variable Rate. First, we have evidence such as that from ICAS⁸⁵ that estimates that the cost, especially the start up cost of using the SVR, particularly for the first time, would be quite substantial in comparison with the revenue that might be received, especially for variations of less than the full 3p in the pound. More profoundly, however, there is the nature of the power itself. Because the SVR is a power to alter a tax-rate already set by the UK Government, a decision to do nothing has no effect on the budget of the Parliament. By contrast a local authority which does not take a decision to set a rate of council tax will not be able to levy a tax and would consequently lose the resultant revenue stream. The Independent Expert Group’s survey of international practice did not identify any comparable arrangement to the SVR which allows revenue to be secured without the necessity to take a taxation decision. This has led the Commission to wonder whether some sort of obligation to make a positive choice about the rate of income tax applying in Scotland might improve the accountability of the Scottish Parliament. Some ideas of this kind were put to us in evidence and we would be interested in suggestions as to how such a proposal might be made to work.⁸⁶
- 6.74 The SVR applies to the basic rate of income tax and not to the higher rate. Extending it to include the higher rate would increase the maximum yield for the present 3p variation by about 30% to £1.4 billion,⁸⁷ still less than 6% of the Scottish Parliament’s present budget. Extending the SVR to the higher rate of income tax might, however, add to the administrative compliance costs of the system. The Commission has received little evidence on whether the power should, as at present, apply to basic-rate taxation only, or be extended to include the higher rate, and what if any arrangements might be made for unearned income such as bank interest. We do note the evidence submitted by UNISON Scotland saying that because the SVR applies only to the basic rate of income tax, any increase would have a regressive (as opposed to progressive) effect, and we would welcome further evidence at this point. The Commission has also heard suggestions that the scope of the SVR could be widened and thus be made more flexible, and again would welcome proposals and evidence on this point.
- 6.75 The Commission has not as yet given detailed consideration to other taxes which might be candidates for devolution. One tax which generates substantial amounts of revenue is National Insurance Contributions (NICs),⁸⁸ and it might be seen as a candidate for improving the Scottish Parliament’s financial accountability. But it is closely linked to

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

85 Oral evidence from ICAS, 12 September, 2008.

86 For example, see the minutes of the 4th meeting of the Financial Accountability Task Group, available at <http://www.commissiononscottishdevolution.org.uk/papers.php>

87 See “A Fairer Way”, report to Scottish Ministers by the Local Government Finance Review Committee, 2006.

88 It is the only tax which is comparable to Income Tax and VAT in revenues collected.

benefit entitlements (for such contributory benefits as Old Age Pensions and Jobseeker's Allowance) which are reserved; and it is mostly paid by employers rather than employees, so the scope for direct accountability is reduced. Furthermore, the UK National Insurance Fund is not subsidised by general taxation suggesting that the yield from NICs is closely hypothecated to UK social spending. The Commission invites further evidence on this but on the face of it NICs do not appear to be a good candidate for devolution so as to improve accountability, even if a clear decision were taken to disentangle Scotland from the UK welfare state. We therefore invite views from those who think that there is scope to devolve NICs but are not minded to make any proposal to change.

- 6.76 As noted above, the Commission has not yet considered the issue of oil and gas revenues and await the further advice of the Independent Expert Group before doing so. We note that these revenues are substantial, though volatile, and could potentially have a significant impact on Scotland's overall fiscal position, though not obviously increase the financial accountability of the Scottish Parliament to voters.
- 6.77 Similarly the Commission has received little evidence on any other taxes which could be candidates for devolution. This range of smaller taxes – estimated in GERS as totalling £2 billion of revenue in Scotland compared to the estimate of total tax receipts in Scotland of £42 billion – include such taxes as air passenger duty, vehicle excise duty, stamp duty on property, insurance premium tax, landfill tax and aggregates levy. They may not be capable of doing much to improve financial accountability but might be useful instruments to assist with devolved policy objectives and we invite further evidence and submissions on this. We note also that the Steel Commission proposed that the Scottish Parliament should have the power to levy additional new taxes (or indeed abolish existing ones). Apart from local taxation, all taxation is currently reserved, and the Commission would welcome evidence on whether this is the right approach, or whether more specific reservation of individual existing taxes would be better, so as to allow greater freedom to the Scottish Parliament to create new taxes as policy instruments.

Borrowing

- 6.78 Governments will generally borrow for two reasons. They borrow over the short term to allow spending to continue whilst tax receipts fluctuate. This is in part a scheduling effect (for example income tax receipts will increase as the deadline for submission of tax returns nears) but can also be to overcome differences between anticipated or forecast revenues and actual receipts. Governments also borrow over the longer term to fund capital investment, reflecting that the benefit from capital investment will continue into the future.
- 6.79 Governments seek to manage overall borrowing as part of their overall macro economic management, as exemplified by the UK approach to fiscal management and the EU Stability and Growth Pact. The servicing costs naturally impact on a government's ability to deliver public services. Governments effectively borrow against future tax revenues, which at the national level are usually broad and thus spread the risk over a large number of tax bases.
- 6.80 A number of suggestions have been made that the Scottish Government should be able to exercise borrowing powers. Some evidence on this has been drawn together by the Independent Expert Group and the Commission wishes to give further consideration to this. It is clear that borrowing powers are linked to the scope for revenue raising, as the greater the dependence on uncertain flows of revenue the greater there is a need to be able to borrow so as to smooth over revenue fluctuations and allow a consistent profile of spending. Similarly, lenders will be more likely to lend to a body which has revenue raising powers against which borrowing might be secured.

6.81 Borrowing is sometimes suggested however simply as a way in which to add to the spending power available to Scottish Ministers. This needs more careful thought. Borrowing to support capital expenditure is now in effect done for the Scottish Government by HM Treasury when the total of the Scottish Departmental Expenditure Limit is determined. If additional revenue was to be available to the Scottish Government then we would be interested in evidence on whether that should not be able to be used to support additional capital spending rather than only be used for immediate current expenditure. Significant borrowing powers however require effective means of fiscal coordination for macro-economic management.

Questions for consultation

6.82 The Commission would therefore welcome evidence or submissions on the questions listed below.

- Do the broad principles identified at paragraph 6.28 which we have grouped into equity, accountability and efficiency, provide the correct framework to analyse potential mechanisms or systems that could be used to fund the Scottish Parliament? Should one be weighted above the others and why?
- The Commission recognises that there are three generic mechanisms that may be used to fund the Scottish Parliament: the assignment of tax revenues, the devolution of taxes and block grant from the UK Government - are there any others which might apply?
- What are the potential benefits and costs of allowing a Scottish variation of existing excise duties such as those on alcohol and tobacco?
- Would allowing the Scottish Parliament to determine a Scottish rate of Corporation Tax produce wasteful tax competition, as raised in paragraph 6.42 above?
- What might be the potential benefits and costs of allowing the Scottish Parliament to determine a Scottish rate of other existing taxes?
- Is the Commission correct to reject National Insurance Contributions as a potential tax to be devolved to the Scottish Parliament?
- Should the Commission consider extending the powers of the Scottish Parliament to allow them to create new taxes whilst maintaining the reservation on existing taxes?
- The Commission would welcome views on whether the scope of the SVR could be widened and thus be made more flexible, and what the impact of this would be?
- Are there any potential costs and benefits of extending the Scottish Variable Rate to the higher rate of Income Tax?
- Are there any ways in which the Scottish Parliament could be required to make a tax decision, so that its revenue would be affected if it did not?
- Is the Commission's analysis of the issues in relation to borrowing correct?

Chapter 7 Relationships between the Parliaments, Governments and Institutions

Introduction

- 7.1 A vital element of the success of any devolution settlement – particularly in a non-federal context – is the strength of the relationships, both formal and informal, between Governments, Parliaments and the other institutions of the state.
- 7.2 In a United Kingdom, with shared interests and shared sense of citizenship, the Commission believes that the Governments within the Union should work together in partnership to achieve the greater good of all citizens. The Commission therefore believes that effective and transparent relationships between the Parliaments, Governments and the institutions of State are of the utmost importance.
- 7.3 The Commission has examined how relationships have developed and been maintained, how disagreements between Governments have been discussed and resolved and whether the formal mechanisms put in place in the late 1990s have proven sufficiently robust given the new challenges and changes to the UK's political landscape over the last ten years. The Commission has also looked at the way in which the Scottish and UK Parliaments interact, taking into account sensitivities around their respective functions and accountabilities. Both Scotland and the UK enjoy relationships with the European Union and other international institutions. Because foreign affairs are reserved these overlap with the relationship between the UK Parliament and the Scottish Parliament
- 7.4 In the huge effort and enthusiasm of the setting up of the new Scottish Parliament, the powers that were to be exercised at a UK level were given rather less attention by many in Scotland. Insufficient attention may have been given to the implications of devolution for the wider UK constitution. This has had considerable bearing on the relationships (both formal and informal) that have developed since the creation of the Scottish Parliament in 1999.
- 7.5 Finally, whilst our remit does not make any specific reference to local government, we recognise that the good governance of Scotland also crucially depends on an effective relationship between the Scottish Parliament and Government and Scotland's 32 local authorities, not least given the fact that 80% of councils' income comes from Government, principally through the Revenue Support Grant. Paragraphs 2.68 to 2.71 of Chapter 2 deal with the position of local authorities in Scotland's political landscape today. Whilst we make no specific recommendations with regard to relationships between these two tiers of government, we do endorse the view that the Scottish Parliament and Scotland's councils should work closely together, each respecting the powers and responsibilities of the other. This relationship was considered in some detail by the McIntosh Commission which reported in 1999, and many of its conclusions remain valid today.⁸⁹

89 *Moving Forward Local Government and the Scottish Parliament – The Report of the Commission on Local Government and the Scottish Parliament* (Edinburgh, 1999).

Commission Approach

- 7.6 A Task Group of the Commission, chaired by Jim Wallace, has led work on examining the state of intergovernmental relations and making recommendations to the Commission as a whole. Commissioners have considered evidence and submissions from a wide range of individuals and organisations, as well as drawing on earlier work such as the House of Lords Constitution Committee's 2003 report. *Devolution: inter-institutional arrangements in the United Kingdom*.⁹⁰

Current arrangements

- 7.7 Intergovernmental relationships since devolution have involved a mixture of informal and formal mechanisms which appear from the evidence presented to the Commission to date, to have been characterised by varying degrees of success, particularly as time has progressed.
- 7.8 The mechanisms that were created at the time of the Scotland Act 1998 and the creation of the Scottish Parliament and Government continue to exist but the evidence presented to the Commission has raised a question as to their initial, and continuing, effectiveness. A Memorandum of Understanding and supplementary agreement on the Joint Ministerial Committee represent the significant institutional underpinnings of the devolution settlement, but on a day-to-day basis contact is maintained, and policy progressed, through direct links between UK Government departments and their Scottish counterparts, as well as through multi- and bilateral meetings at ministerial level. Former Scottish Rural Development Minister Ross Finnie MSP expressed concerns that the established formal machinery, whilst essential, did not allow the flexibility needed to resolve issues at an appropriate level.⁹¹
- 7.9 Complementing these high level contacts are working links at individual team level within the civil service. These have included, for example, links between teams taking Bills through the UK Parliament and their contacts in the Scottish Government which are supposed to ensure a useful flow of information and that areas of concern are flagged, addressed and, if necessary, referred upwards at an early stage.
- 7.10 Apart from intergovernmental links, there are, inevitably, many complex inter-agency links involving interaction between non-governmental organisations involved in the formulation and delivery of public policy. The importance of the relationship between, say, the Local Government Association and the Convention of Scottish Local Authorities in lobbying (both) administrations and sharing with each other experiences and expertise has perhaps been a neglected area for consideration in looking at the way in which devolution has affected the provision of services across the UK.
- 7.11 The UK's relationship with the European Union is also an important factor and one in which the UK Government is required effectively to represent the interests of Scotland (and other parts of the United Kingdom) even in areas which are the devolved responsibility of the Scottish Parliament and Government.
- 7.12 Finally, there is the relationship between the Scottish and UK Parliaments including the operation of the Sewel Convention (the subject of reports by both the Procedures

90 House of Lords Constitution Committee, 2nd Report of Session 2002-03, *Devolution: Inter-Institutional Relations in the United Kingdom*.
<http://www.parliament.the-stationery-office.com/pa/ld200203/ldselect/ldconst/28/28.pdf>

91 Oral Evidence from Ross Finnie MSP, 9 September 2008.

Committee of the Scottish Parliament and the Scottish Affairs Committee in the House of Commons.⁹²) The Sewel Convention itself is discussed further below.

The Memorandum of Understanding

- 7.13 The Memorandum of Understanding between the UK Government and the devolved administrations underpins the day-to-day operation of the devolution settlement and sets out the principles that underlie relations between them. It is a statement of political intent, and is not binding in law. It sets out principles for good communication and co-operation between the administrations. The most recent Memorandum was presented to the UK Parliament in December 2001 and to the Scottish Parliament in January 2002.⁹³
- 7.14 Key to the principles enshrined in the Memorandum is that of co-operation. This includes the possibility that administrations may choose to undertake activities on behalf of one another and that each administration will seek to supply information reasonably requested by another but within certain limits. How co-operation works in practice is a matter for interdepartmental Concordats and for the overall management of relations between the UK Government and Scottish Government.
- 7.15 Although dispute resolution procedures are not laid out in the Memorandum itself the terms of reference of the Joint Ministerial Committee (about which more follows) allows for the consideration of “disputes between ... administrations”. The Secretary of State for Scotland is also charged with “the promotion of good relations” and ought to be consulted “in any significant area of disagreement”. Nevertheless, there exists no definitive or legally binding means of resolving differences of opinion or approach between administrations, aside from the procedures in the Scotland Act which deal with legislative competence.
- 7.16 The Memorandum also discusses matters which are not the subjects of formal Concordats. These include the freedom for devolved legislatures to debate non-devolved matters, as well as the UK Government’s responsibility to represent Scotland’s interests in matters which are not devolved. In such cases, the Scottish Government agreed to provide to the UK Government any relevant factual information and expert opinion available to them.

Concordats

- 7.17 There are extensive informal, bilateral contacts between UK departments and the devolved administrations, at ministerial and official level. As indicated above, one of the underpinning principles of devolution set out in the Memorandum of Understanding is that:
- ‘The UK Government and the devolved administrations believe that most contact between them should be carried out on a bilateral or multi-lateral basis, between departments which deal on a day-to-day basis with the issues at stake.’
- 7.18 Bilateral relations between the UK Government and the devolved administrations are underpinned by a series of departmental Concordats. A Concordat is a guide to the working relationship between Ministers and officials. It is not an exhaustive description of the relationship. Some Concordats – on Co-operation of European Policy Issues, on Financial Assistance to Industry, International Relations and Statistics – are supplementary to the Memorandum of Understanding. Others have been reached bilaterally between UK Government departments and their equivalents in Scotland. They tend to share

92 *The Sewel Convention* (SP Paper 428, Session 2), and *The Sewel Convention: the Westminster Perspective* (HC (2005-06) 983).

93 <http://www.justice.gov.uk/docs/odpm-dev-600629.pdf>

common features in terms of placing an emphasis on co-operation and information sharing, rather than formalising relationships.

7.19 Some Concordats are clearly out-of-date and may not properly reflect the political or administrative changes that have taken place since they were agreed. For example, a number of UK Government Departments and their functions have changed since the Concordats were concluded and although provision is made for regular reviews of Concordats this does not appear to have been much exercised (albeit no particular consequences).

The Joint Ministerial Committee

7.20 The MoU provides for a Joint Ministerial Committee (JMC) consisting of UK Government, Scottish, Welsh and Northern Irish Ministers, to provide some central co-ordination of the overall relationship.

7.21 The terms of reference for the JMC are:

- “(a) to consider non-devolved matters which impinge on devolved responsibilities, and devolved matters which impinge on non-devolved responsibilities;
- (b) where the UK Government and the devolved administrations so agree, to consider devolved matters if it is beneficial to discuss their respective treatment in different parts of the United Kingdom;
- (c) to keep the arrangements for liaison between the UK Government and the devolved administrations under review; and
- (d) to consider disputes between administrations. It should be noted that the MOU makes no provision for the resolution of such disputes: it merely provides a forum at which they can be aired.”

7.22 The JMC has not met as regularly as was originally envisaged. (Until the meeting earlier this year the most recent plenary JMC meeting had taken place in 2002.) As discussed later in this chapter, this may reflect the political make-up and shared aspirations of the devolved and UK administrations in the early years of devolution. In line with the Memorandum of Understanding, the majority of cooperation between the administrations has been on a bilateral or multi-lateral basis, e.g. the Finance Quadrilateral between Finance Ministers.

7.23 While domestic JMCs were in abeyance for some time, the Committee has continued to meet regularly in its European format, JMC(E), to agree the UK line in negotiations at European Councils. A concordat on co-ordination of European Union policy issues forms part of the Memorandum of Understanding and its supplementary agreement on the JMC. Again, the fundamental principle here is for issues to be dealt with bilaterally or via correspondence, without automatic or instinctive recourse to JMC(E).

7.24 JMC(E) usually meets in advance of the major European Council meetings (generally four times a year). The meetings are attended by UK Government departments as well as the devolved administrations in order to discuss and agree lines for the UK to adopt. All scrutiny documents are shared with the devolved administrations to allow them to participate fully in preparatory discussions.

Cabinet Office co-ordination

7.25 The UK Government charges the Cabinet Office with co-ordinating the mechanics of

devolution, in addition to co-ordinating the UK Government's own policy on devolution (devolution strategy being part of the remit of the Ministry of Justice).

- 7.26 Perhaps the most important element of the role of the Cabinet Office is to provide (together with counterparts in devolved administrations), the Secretariat for the JMC, as well as for JMC(E). The Cabinet Secretary also hosts a weekly meeting to which the Permanent Secretaries of the devolved administrations are invited. This allows for interaction of ideas and exchange of information at an official level.

A unified civil service

- 7.27 The position of the civil service in Scotland was explicitly considered as part of the 1997 White Paper *Scotland's Parliament* which concluded that maintaining a united Home Civil Service across Scotland, England and Wales was important for a number of reasons including as a means of safeguarding common standards of professionalism and political neutrality, securing an integrated approach to policy making and ensuring good lines of communication.
- 7.28 While the "Civil Service of the State" remains a reserved matter under the Scotland Act, Scottish Ministers are responsible for most appointments (subject to oversight by the Civil Service Commissioners). The Permanent Secretary of the Scottish administration is appointed by the Prime Minister after consultation with the First Minister.

Representation of Scotland's interests in the EU

- 7.29 It is the responsibility of the UK Government to determine and promote the UK policy on developments in the EU. In doing so the UK Government has a responsibility to ensure that the interests of the devolved administrations are fully represented on EU matters which relate to (or have an effect on) devolved responsibilities. The process by which UK policy is formulated is discussed in the evidence to the Commission from the UK Government,⁹⁴ and involves regular consultation through informal and formal routes, culminating in the JMC(E) process discussed at paragraphs 7.23 and 7.24.
- 7.30 The UK Representation to the EU (UKRep) is responsible for promoting UK Policy on the EU through influencing, negotiating and lobbying so that decisions made in the EU reflect UK interests. UKRep works closely with the Scottish Government's EU Office in Brussels (SEEUO), which was established in 1999, in order to facilitate UKRep's activities in areas of particular interest to Scotland. SEEUO and UKRep maintain close working relations with regular dialogue and formal meetings. Scotland also benefits from Scotland House in Brussels from which the Scottish Government and a number of other Scottish organisations and representative groups work together.
- 7.31 With the agreement of UKRep and the relevant lead UK Government department, Scottish Ministers can, and do, attend Council or other Ministerial level meetings in the EU as part of a UK delegation, and undertake other lobbying or negotiating activities, often pursuing specifically Scottish interests within the framework of an agreed UK policy position.

The role of the Secretary of State for Scotland

- 7.32 The role of the Secretary of State for Scotland is to promote the devolution settlement and to act as guardian of it. The Secretary of State promotes partnership between the UK Parliament and the Scottish Parliament, and the UK Government and the Scottish

⁹⁴ HM Government Evidence to the Commission on Scottish Devolution, Chapter 6 – Foreign and Commonwealth Office, paragraphs 15 – 29.

Government. The Secretary of State also continues to represent Scottish interests in reserved matters within the UK Government, advising the UK Government about any distinctive Scottish aspects that arise for reasons other than the impact on devolved matters and supporting them in presenting UK Government policies in Scotland. The Scotland Office, which supports the Secretary of State, was established on 1 July 1999, following devolution. The Scotland Office maintains working relationships with the Scottish Executive, but is entirely separate from it, remaining part of the UK Government.

- 7.33 The Secretary of State also retains certain limited executive functions, notably in relation to the financial transactions between the UK Government and the Scottish Government and in relation to parliamentary elections. Scotland Office Ministers also make orders (subordinate legislation) under the Scotland Act, including orders to alter the legislative competence of the Scottish Parliament or the executive competence of Scottish Ministers. Around 200 such orders have been made so far. The Scotland Office has an important role in facilitating the delivery of the work of the Scottish Government and the UK's legislative programme through the operation of the Sewel Convention.
- 7.34 The Secretary of State also has the power under section 35 of the Scotland Act to prohibit a Scottish Parliament Bill from being submitted for Royal Assent in certain circumstances (this is discussed further below).

Legislative competence

- 7.35 The Scotland Act provides for the mechanisms that interpret and manage the boundaries between what is devolved and what is reserved, and thereby the legislative competence of the Scottish Parliament. There are distinct roles for Scottish Ministers, the Presiding Officer of the Scottish Parliament, for UK Ministers and for Scottish and UK Law Officers.
- 7.36 In the case of Bills introduced by Scottish Ministers, the Minister responsible must "state that in his view the provisions of the Bill would be within the legislative competence of the Parliament". For all Bills, the Presiding Officer must "decide whether or not in his view the provisions of the Bill would be within the legislative competence of the Parliament and state his decision". In both cases, the statement is an opinion (albeit informed by legal advice) and is not a definitive statement of the law.
- 7.37 Under section 33 of the Scotland Act, any one of three Law Officers (the Advocate General, the Lord Advocate or the Attorney General) may refer a question of a Bill's legislative competence to the Judicial Committee of the Privy Council⁹⁵ within four weeks of the passing of the Bill. The Bill may not be submitted for Royal Assent within that period unless all three Law Officers have waived their right to make such a reference. It is of note that this power has not been used to date.
- 7.38 Separately, under section 35, the Secretary of State may prevent a Scottish Parliament Bill from being submitted for Royal Assent if he or she "has reasonable ground to believe would be incompatible with international obligations or the interests of defence or national security" or would modify the law as it applies to reserved matters in ways that the Secretary of State considers would have an adverse impact on the operation of that law. Again, this power has yet to be used.
- 7.39 The legislative competence of the Scottish Parliament has not remained static since 1998. The Scotland Act can be modified by subsequent Act of the UK Parliament, and the Act itself also provides for modifications to be made to it by an Order in Council. Such an Order may extend the competence of the Scottish Parliament into a new area of

⁹⁵ This jurisdiction is to be transferred in due course to the new Supreme Court.

responsibility currently listed as reserved or add an area to the list of reserved matters, thus taking it out of the Parliament's control or preventing it coming within that control in the first place. Since the Scotland Act came into force, nine such Orders have been made, none of which "re-reserved" matters already devolved to the Scottish Parliament. For example, the Scotland Act 1998 (Modifications of Schedule 5) Order 2002 amended Schedule 5 to devolve to the Scottish Parliament competence over "the promotion and construction of railways which start, end and remain in Scotland".

The Sewel Convention

- 7.40 The "Sewel Convention" is a key mechanism through which the UK and Scottish Governments and Parliaments have worked together since 1999. The Convention ensures that the "sovereign" UK Parliament respects the legislative competence of the Scottish Parliament.
- 7.41 During the passage of the Scotland Bill, the then Parliamentary Under-Secretary of State, Lord Sewel, announced on behalf of the Government:
- "We would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland, without the consent of the Scottish Parliament".⁹⁶
- 7.42 The scope of the Convention has since been widened, so that it now covers any provision in a UK Parliament Bill that:
- falls within the devolved legislative competence of the Scottish Parliament;
 - alters the executive competence of the Scottish Ministers; or
 - alters the legislative competence of the Scottish Parliament.
- 7.43 Where a provision in a Bill introduced in the UK Parliament falls within the scope of the Sewel Convention, Scottish Ministers may seek the consent of the Scottish Parliament through a "Legislative Consent Motion" (LCM) – previously called a "Sewel motion".⁹⁷ At the Scottish Parliament, all proposed LCMs are first considered by a subject committee, and then by the Parliament as a whole. If the motion is agreed to, the Parliament's consent is conveyed to the UK Parliament. If the Scottish Parliament withholds consent, the Convention normally commits the UK Government to remove the provisions in question.⁹⁸
- 7.44 Since 1999, 87 Sewel Motions or LCMs have been moved in the Scottish Parliament on a wide-range of policy areas. All have been passed, although in some cases after amendment.
- 7.45 Both the Scottish Parliament Procedures Committee⁹⁹ and the House of Commons Scottish Affairs Committee¹⁰⁰ have considered the application of the Convention and concluded that it is a necessary requirement of devolved governance, and that it works well. The Scottish Parliament revised its internal scrutiny procedures following the

⁹⁶ House of Lords, 21 July 1998.

⁹⁷ The Scottish Parliament's Standing Orders provide that any MSP may seek the Parliament's consent. This covers a situation (which has not arisen) where Scottish Ministers in a minority administration are opposed to legislation by Westminster, but the majority of MSPs are, or may be, in favour.

⁹⁸ In practice, with UK Government Bills, agreement with the Scottish Government is normally secured before the Bill receives clearance for introduction from the Cabinet Committee on Legislation.

⁹⁹ 7th Report, 2005, *The Sewel Convention* (SP Paper 428), available at: <http://www.scottish.parliament.uk/business/committees/procedures/reports-05/pr05-07-vol01.htm>

¹⁰⁰ Fourth Report of Session 2005-06, *The Sewel Convention: the Westminster Perspective* (HC 983), available at: <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmselect/983/98302.htm>

Procedures Committee report, and the House of Commons and the UK Government also agreed some changes to procedures in the UK Parliament and UK Government.

- 7.46 The Commission notes the constructive way in which the Convention has been used. A recent example is the Climate Change LCM agreed on 20 December 2007.¹⁰¹ The main purpose of the (UK) Climate Change Bill is to provide a statutory framework for actions to mitigate climate change by reducing emissions. The environment is a policy area that is (broadly) devolved in Scotland, but the UK Government and the present Scottish Government appreciated that it was sensible to work together in order to make a substantial impact on emissions, given the global challenge of climate change. The LCM enabled the UK Parliament to legislate to introduce targets, trading schemes and a new Climate Change Committee with a UK-wide remit.
- 7.47 The Commission finds it notable that the Sewel Convention is the only Parliamentary mechanism that exists to oversee any element of the management of the devolution settlement.

International comparisons

- 7.48 The Commission has touched upon the processes for intergovernmental relations found in other countries with devolved or federal systems and intends to look more closely at this area before reaching its final conclusions. It seems clear that informal contacts play an important role in even the most developed structures abroad and this appears to us to be both inevitable and not necessarily undesirable in itself.
- 7.49 The Commission notes that older federations based on a Westminster model such as Canada and Australia have tended not to build intergovernmental structures formally into their constitutions preferring to allow them to remain flexible, not enshrined in legislation and not judicially enforceable.
- 7.50 The Commission has looked at the example of the Council of Australian Governments established in 1992 to oversee collaboration between state, territory, local and central governments. The Council's role is to initiate, develop and monitor the implementation of policy reforms that are of national significance and which require cooperative action by Australian governments (including, interestingly, reform of Commonwealth and State/Territory roles in environmental regulation, the use of human embryos in medical research, counter-terrorism arrangements and restrictions on the availability of handguns). The Group is due to meet four times in the course of 2008 and is supported by a standing secretariat based within the Department of the Prime Minister and Cabinet. The Commission has also already taken evidence from the Australian Commonwealth Grants Commission which exists to make recommendations as to the allocation of federal resources to states and territories based on need, thus putting a key aspect of intergovernmental relations on a formal and quasi-independent basis.
- 7.51 In Canada, a federal-provincial agreement in 1985 included a five-year commitment to annual conferences but this was not subsequently renewed. Instead, there has been a recent reliance on less formal, less frequent "First Ministers' Meetings" chaired by the Prime Minister. These meetings are not supported by a standing secretariat and have occurred only five times in the last ten years.
- 7.52 European examples looked at by the Commission include Spain, where a Conference of Presidents brings together the heads of government of the seventeen autonomous

101 <http://www.scottish.parliament.uk/business/legConMem/LCM-2007-2008/pdf/ClimateChange-LCM.pdf>.

communities of Spain, the leaders of the cities of Ceuta and Melilla and the head of the Spanish Government. The aim of the meeting is to encourage cooperation and to adopt agreements, but there is no defined scope or formal processes. Sitting below these high level meetings are legally enshrined Sectoral Conferences made up of the relevant Spanish Government minister and his seventeen counterparts which aim to achieve cooperation in specific policy areas.

- 7.53 Federal states such as Germany and Belgium tend to have more formal structures and safeguards written into their constitutions or basic laws. In Germany the second chamber of the federal legislature, the Bundesrat, represents the interests of each of the sixteen German Länder. There are also contacts at executive level through the Conference of the Heads of Government of the Federation and the Länder which has a legal basis in the Standing Orders of the Federal Government. In Belgium, conflicts over the distribution of powers of the Federal Government, Regions and Communities are settled judicially either through the Council of State or in the Court of Arbitration. Conflicts of interest (as opposed to points of law) are officially dealt with by a linguistically balanced Concertation Committee composed of the federal prime minister, five ministers of the federal government and six members of the regional and community governments which has sixty days to reach a consensus. The Commission notes that this option is rarely exercised and that, in practice, such disputes are generally dealt with informally by the parties concerned.
- 7.54 The Commission observes with interest the various ways in which other jurisdictions resolve difficulties and coordinate policy and recognises that the mechanisms employed reflect the political and cultural peculiarities of different nation states and regions. Whilst we are keen to learn from good practice elsewhere, we appreciate that the mechanisms underpinning intergovernmental relations in the UK must suit the needs and histories of the domestic institutions concerned.

Evidence so far – an overview

- 7.55 The Commission has received submissions and taken evidence, both formally and informally, from individuals involved in the drafting of the Scotland Act, from former Ministers at the Scottish and Scotland Offices as well as MSPs and former Scottish Ministers. The Commission has also heard from organisations that operate in both Scotland and other parts of the UK as well as at a European level in order to get a sense of their level of satisfaction with the way in which governments work together to resolve differences or achieve shared goals.
- 7.56 The Commission has not been surprised to learn just how much reliance there appears to have been on informal working relationships, many of which were built up before devolution and which might not be expected to be easily replicated once incumbents have moved on from the posts they currently occupy. The Commission also notes that the common political leadership of the UK Government and the Scottish Executive in the earlier years of devolution may have lent itself to a relatively unstructured approach to intergovernmental relations.
- 7.57 That said, the Commission is surprised that none of the recommendations of the 2003 report of the House of Lords Constitution Committee¹⁰² appear to have been acted upon. The evidence that the Commission has received appears to indicate that little has changed since the time of the Report's publication in 2003 and that, therefore, an early

102 House of Lords Constitution Committee, 2nd Report of Session 2002-03, Devolution: Inter-Institutional Relations in the United Kingdom.

opportunity to put intergovernmental relations onto a more robust footing may have been missed. In particular, the Commission has concerns about the apparent lack of formal contacts between Ministers from the UK and Scottish Governments. While the Commission recognises that the fact that the Joint Ministerial Committee did not meet between 2002 and 2008 may actually have been an indication that the institutions of devolution were working well, we believe (from the evidence taken so far) that there is value in communication being seen to be happening and for there being a formal, accessible mechanism available for such discussions. The Commission does not believe that there should be meetings simply for the sake of having meetings and is keen to explore how relations might be put onto a more regularised basis without detracting from the value of existing everyday contacts and placing too onerous a burden on administrations. These, and a number of other issues, are considered in more detail below.

Issues for further consideration arising from evidence

7.58 As has been outlined the Commission has heard a variety of views on the existing arrangements and how they have developed since 1999. This section examines these issues and provides some analysis of the evidence received and highlights those areas the Commission has identified for further consideration.

Relations between the Parliaments

7.59 The Commission has considered inter-parliamentary relations and how the UK and Scottish Parliaments might interact more effectively and serve their respective and shared constituents better.

7.60 At present there are no formal relations, and from the evidence we have seen, relatively sparse informal relations, between the UK and Scottish Parliaments. One exception to this would appear to be the regular contact among the Chairs of the respective European scrutiny committees of the two Houses of Parliament and the devolved Parliament and Assemblies. The Commission has received evidence suggesting that this lack of contact is a cause for concern, but without firm proposals about how this might best be addressed. The Commission therefore wishes to consider the possible options further.

7.61 The Commission has heard proposals for the establishment of joint parliamentary committees, either as standing committees to consider a range of issues of mutual interest, or as ad hoc committees to focus on particular areas where the boundaries between devolved and reserved matters overlap. The Commission would welcome proposals as to the most sensible way to address issues of mutual concern to both Parliaments..

7.62 Amongst evidence on this issue, calls for UK Government Ministers to appear before the Scottish Parliament more regularly were strongly supported (particularly where they are responsible for matters which are reserved but which have a particular impact in Scotland). The Commission notes that UK Ministers have appeared before Scottish Parliament Committees in the past – for example the Rt Hon Peter Hain MP when Minister for Europe appeared before the Scottish Parliament's European and External Relations Committee on 5 November 2001.¹⁰³ However, in general, there is no requirement for UK Government Ministers to do so. We are aware of a few cases where Scottish Ministers have appeared before UK Parliament committees. For example, Wendy

103 <http://www.scottish.parliament.uk/business/committees/historic/europe/or-01/eu01-1402.htm>

Alexander MSP, then Minister for Communities, appeared before the Scottish Affairs Select Committee on 22 March 2000.¹⁰⁴ More recently, on 26 February 2008, the Deputy First Minister, Nicola Sturgeon MSP, and the Minister for Parliamentary Business, Bruce Crawford MSP, appeared before the Justice Select Committee as part of its inquiry into devolution.¹⁰⁵

- 7.63 The Commission notes that a number of UK-wide bodies maintain separate relationships with both Parliaments; notable in the evidence the Commission has received was the BBC, which lays its reports before the Scottish Parliament. Senior executives have given evidence to Scottish Parliament committees on a number of occasions. Ofcom and the Food Standards Agency also provided helpful evidence about how these relationships can be developed effectively.
- 7.64 A further proposal which the Commission believes merits further consideration is that there should be a standing meeting of the Speaker of the House of Commons, the Lords Speaker, the Presiding Officer of the Scottish Parliament and the Presiding Officers of the Welsh and Northern Ireland Assemblies. The Commission can see that this would send a strong signal to the legislatures of the importance of having regard to matters of mutual interests.
- 7.65 The Commission has yet to reach a view and will be seeking more evidence and advice on the practicalities of such closer working. The Commission does believe, however, that it is likely to be in the interests of the Scottish people and of the Union as a whole for the UK and Scottish Parliaments to have a closer relationship with each other, as well as with the devolved assemblies in other parts of the United Kingdom.

Relations between MPs, MSPs and MEPs

- 7.66 Relations between MPs and MSPs have been highlighted as an area the Commission should consider. At present there are no formal relationships between MPs and MSPs and whilst the Commission is sure that some do work closely, we have been surprised to hear evidence about how little contact there is between MPs and MSPs.¹⁰⁶ This has also been expressed as a frustration by members of the public at the Commission's engagement events held around Scotland to date. The Commission has heard that attempts were made in the early days of the Scottish Parliament to establish principles regulating relationships between MSPs and MPs but these attempts had proved unsuccessful as MPs had simply objected to the very idea of such principles.¹⁰⁷
- 7.67 The Commission also notes that interactions between Members of the European Parliament and their counterparts both in the UK and Scottish Parliaments do not appear to be as developed as in some other Member States. For example, the Commission has heard that German MEPs have the opportunity to sit as full (but non-voting) members of parliamentary committees in their respective sub-national parliaments, allowing them better to represent the interests of their constituents and giving the parliaments a greater insight into what's happening in Brussels. The Commission can see advantages in facilitating greater participation by MEPs in deliberations at the Scottish Parliament, particularly those that have a European dimension.
- 7.68 The Commission recognises that a degree of political reality is needed when considering levels of cooperation between MPs, MSPs and MEPs who may be of different political parties and who may have fought election campaigns against one another (and indeed

104 <http://www.publications.parliament.uk/pa/cm199900/cmselect/cmsscota/59/0032201.htm>

105 <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmjust/uc75-iv/uc7502.htm>

106 See for example, the oral evidence from Prof. Russel Griggs; Lord Steel of Aikwood; Jack McConnell.

107 Informal oral evidence to the Commission from the Rt Hon George Reid.

may do so again). However the Commission is concerned that the evidence it has heard suggests that individual constituents may be suffering as a result of the absence of such a relationship – for example through MPs taking on constituency cases that should be dealt with by the MSP or vice versa, or constituents being passed from pillar to post.

Relations between the Governments

- 7.69 When the new Scottish Administration was established in 1999 it almost wholly comprised civil servants who had been working in the Scottish Office. They moved from serving a Secretary of State for Scotland who was bound by the collective responsibility of the UK Cabinet and was accountable to the UK Parliament, to serving a new First Minister for Scotland and a Cabinet accountable to the new Scottish Parliament. It is of note that the level of both interest in, and scrutiny of the work of the civil servants in the Scottish Administration increased very substantially.
- 7.70 The civil servants of the new administration in Scotland already had relationships with their counterparts in the UK Government departments, formed on the basis of traditional civil service inter-departmental working and co-operation. There was little immediate impact on the continuation of these relationships. Indeed some of those civil servants involved at the time have commented that for many in the civil service the change made relatively little difference to those in UK Government departments – they still consulted their colleagues and shared information often in much the same way. It has been observed that one of the main reasons for ready co-operation in the early days was the broadly similar political direction, and the close relationships between the UK Government Ministers and the new Scottish Ministers, which is discussed further below. There were notable exceptions, where the changes required new approaches and ways of working. For example the Foreign and Commonwealth Office and Cabinet Office established new arrangements to ensure Scottish interests were represented effectively in agreeing the UK position on EU matters – particularly those where the policy was now devolved. These changes led to the creation of the JMC(Europe) machinery – the one element of the JMC machinery which has met consistently since its inception.
- 7.71 The Commission has heard a significant range of evidence that the relations between the UK Government and Scottish Executive in the early years of the Scottish Parliament were informal and were able to rely on the pre-existing political relationships. As Henry McLeish put it: “when the Parliament was established in 1999, there was a great deal of familiarity and political kinship and we did not give enough importance to the machinery of government that we had established”.¹⁰⁸
- 7.72 That is not to say there were not disagreements between the Scottish Executive and UK Government in the early years of the Scottish Parliament – quite the contrary, as the evidence from the former First Ministers, amongst others, shows. The significant factor was the manner in which disagreements were resolved – informal discussions which often had a political dimension. There were two distinct results of this informal approach: firstly the formal structures were, at best, underused and secondly, there was little or no transparency or scrutiny of the discussions and negotiations between the Governments.
- 7.73 We have heard a large body of evidence to suggest that the familiarity and relationships that existed initially between Ministers and their officials has gradually eroded. Some of these links, however, remain through Senior Civil Servants, but informal links of this nature will continue to erode as officials with experience and relationships predating 1999 retire or move on.

108 Oral Evidence from the Rt Hon Henry McLeish, 12 September 2008, col 22.

- 7.74 Even if there were a return to having political leadership from the same political party in both the UK Government and the Scottish Government, the clock would not turn back to 1999. Ministers and officials would not share the common experience of the administrative devolution which existed prior to the creation of the Scottish Parliament. Increasingly political parties have more distinctive arms in Scotland, reflecting the change in focus following the devolution settlement. Ensuring effective intergovernmental relationships are therefore no longer a simple issue of politics, but one of good governance.
- 7.75 The 2007 foot-and-mouth disease outbreak illustrates an important issue of poorer working relationships between administrations. Giving evidence to the Commission, Sir Iain Anderson gave the example of the issue of derogation from the rules on drivers' hours which arose during the outbreak:

"This was a clear cut issue: in order to relieve the main pressure on hill farmers the Scottish Executive decided they needed to permit an extension of permitted drivers' hours in order to get animals in lorries from A to B whilst subject to the additional requirements of disinfection etc but this wouldn't fit with EU standards. So policy was formulated in Scotland and taken to DEFRA. DEFRA then had to take the case to the Department for Transport as the competent authority in this area. Scottish officials and ministers were in despair for a month whilst nothing happened. The point was that DEFRA didn't properly understand the case, it didn't put sufficient pressure on DfT which didn't take it seriously. They thought it was another case of the Scots seeking an unjustified economic benefit while completely missing the animal welfare issues involved."¹⁰⁹

Sir Iain strongly believed that a new plan for dealing with such an outbreak was required, including ways of improving Scottish input for submissions to the EU. He added that now is the time to do that and "*not in the middle of a war*". The representation of Scotland within the EU is discussed further below.

- 7.76 The existence of a Scottish Parliament and distinct Scottish Administration since 1999 has, understandably, led to divergence in policy with an increasing emphasis on Scottish specific policy approaches. This inevitably leads to a need for discussions between Governments. Returning to the evidence from the Henry McLeish, he described this and the lost familiarity as "two currents [that] are taking us further away from the dialogue and relationship that existed [pre-] post-1999".¹¹⁰
- 7.77 In response to the observed decline of informal relations, much of the evidence the Commission has received calls for stronger and more effective formal machinery. As has been noted, the primary formal mechanism that was established, the JMC, has not met as regularly as originally envisaged.
- 7.78 The UK Government has shown a recent renewed commitment to the JMC¹¹¹, and First Minister Alex Salmond has also called for more structured and more formal relationships between the UK Government and the devolved administrations and in particular for the JMC(E) to meet more often¹¹². The revival of the JMC came in a plenary meeting in London on 25 June 2008, chaired by the Justice Secretary on behalf of the Prime Minister. This meeting also reaffirmed a common commitment to the JMC and suggested possible

109 Oral evidence from Sir Iain Anderson, 9 September 2008.

110 Oral evidence, from Henry McLeish, col. 24.

111 HM Government evidence to the Commission on Scottish Devolution, Chapter 4 – Cabinet Office, notes that the Prime Minister asked the Rt Hon Paul Murphy MP to oversee the JMC and a Joint JMC Secretariat was reconstituted.

112 Scottish Parliament Official Report 21 June 2007 cols. 1009 ff. "I have long advocated the reinvigoration of the JMC ... I am also clear that the JMC has to fulfil all of its terms of reference, including the need to consider disputes between the administrations – something that was lost when the JMC process fell into abeyance in 2002".

developments with a new JMC(Domestic) level of the machinery proposed, building on the existing JMC machinery.¹¹³

Relations between the civil servants

- 7.79 In addition to the arguments discussed in Chapter 5 regarding the reservation in the Scotland Act which covers the civil service, the Commission has heard significant evidence regarding the role of a unified civil service in ensuring the effective operation of the intergovernmental relations.
- 7.80 A number of witnesses, including former First Minister Henry McLeish and former Permanent Secretary Sir Muir Russell have told the Commission that they remain unconvinced about the desirability of a separate Scottish civil service. In relation to the interests of Scotland in EU matters, forthcoming research on EU Environmental Law in Scotland suggests that the existing arrangements, with a unified civil service appear to be working in support of Scottish interests.¹¹⁴
- 7.81 Others have cited specific concerns that expertise within the civil service did not always transfer to the Scottish Government at the time of, or since, devolution: this was a particular view expressed by ICAS in relation to the law on corporate insolvency as part of a wider concern that particular provisions would be best dealt with at a UK-wide level.¹¹⁵ The Commission does not believe that the lack of expertise in a particular area of devolved responsibility is of itself any justification for re-reservation but notes ICAS's argument that re-reserving those devolved aspects of corporate insolvency could bring greater coherence to the full legislative process in this instance. This may, however, be one of the practicalities taken into consideration in deciding how a function is most effectively exercised. The Commission believes that where there is a lack of expertise in one Government, it will often be of mutual benefit for the Governments to share experience and expertise. In this context, the Commission notes the evidence of the Health Protection Agency highlighting the importance of ensuring that expertise could be effectively shared or pooled in relation to radiation biology.¹¹⁶

Relations among UK-wide bodies and agencies

- 7.82 The Commission welcomes the positive evidence it has received that those civil and public servants at the operational end simply make the system work – often through a range of formal and informal mechanisms. There was a general sense in the evidence that this relied heavily on good will, but few suggested that this good will did not exist and would not continue to exist.¹¹⁷ The Commission recognises that such reliance on good will is not without risks, and believes this underlines the importance of the existence – and use – of formal mechanisms to ensure that if informal mechanisms and relationships fall into disrepair there is an alternative in place.
- 7.83 There are areas where we have heard that UK-wide organisations may treat the Scottish dimension as an afterthought. For example, in his evidence Professor Russel Griggs told the Commission that the Health and Safety Executive only directly employs lawyers trained in English law meaning that legal advice on Scots law is contracted out. Former Scottish Rural Development Minister Ross Finnie MSP, speaking of his experience as a Minister who had to deal frequently with the UK Government and the other devolved

113 Joint Statement from the Joint Ministerial Committee - <http://www.scotlandoffice.gov.uk/our-communications/release.php?id=3676>

114 Forthcoming research on the implementation of EU environmental law in Scotland, by Andrea Ross, Hazel Nash and Colin T Reid.

115 Oral evidence from the Institute of Chartered Accountants in Scotland, 12 September 2008.

116 Oral evidence from the Health Protection Agency, 5 November 2008.

117 See for example oral evidence from Grahame Pearson, 26 September 2008; ACPOS, 26 September 2008; Food Standards Agency, 5 November 2008; Health Protection Agency, 5 November 2008.

administrations, spoke of the problem faced by UK Ministers and officials who appeared to have difficulty distinguishing between when they were speaking for the UK and they were only speaking for English interests. He and Sir Jon Shortridge (former Permanent Secretary to the Welsh Assembly Government) thought civil service understanding of devolution within UK ministries had got weaker over the years since 1999.

- 7.84 As well as evidence from the UK Government, the Commission has taken evidence directly from non-departmental-public-bodies and agencies which operate on both sides of the Border. In general, this appears to demonstrate that many UK wide bodies ensure they have effective arrangements for ensuring Scottish specific issues are taken on board. For example Ofcom has established a Director for Scotland and have governance mechanisms to ensure that relevant issues are flagged up and taken into account at an early stage.

Governmental representation internationally

- 7.85 At a European level, the Commission has heard evidence from those who have been closely involved in the processes that for the most part, the UK Government does effectively represent Scottish interests and that Scottish Ministers are fully involved in the processes leading to a UK position being agreed and put forward. In addition to the seven Scottish MEPs, Scotland enjoys its own official representation in Brussels and a good working relationship with UKRep (the UK's permanent diplomatic representation to the European Union). In his evidence to the Commission, Jack McConnell MSP stated:

“There are regions, devolved regions elsewhere in the European Union who looked jealously at the role that Scotland had within the UK delegation, and the role that Scotland had inside the UK in the determining of positions. I think by and large the relationship did work well and we in Scotland were able to influence the UK position and we were able to be part of the UK's representation. And where necessary, we were able to go outwith that and conduct discussions, provoke dialogue, speak to Commissioners, influence the decisions that were going on on our own terms sometimes too”.¹¹⁸

- 7.86 However, the Commission has also received representations that Scotland's interests are not adequately represented in the EU. The Commission particularly notes the concern expressed about Scottish interests not being effectively represented to the European Union by the “competent authority”. The Commission also heard evidence of difficulties over the transposition of Council Directive 89/48/EEC concerning a general system for the recognition of higher education diplomas when the UK department responsible for implementation did not properly liaise with Scottish authorities to ensure the Scottish perspective was properly considered.¹¹⁹
- 7.87 The Commission again reflects on the comments of former Scottish Rural Development Minister Ross Finnie MSP, mentioned above. The Commission also notes with interest the evidence of the National Farmers Union Scotland who commented that historically these meetings were attended by two UK Government Ministers, the Minister of State who represented England, and the Secretary of State who chaired and took a view for the whole of the UK.
- 7.88 In light of this evidence, the Commission have identified some particular issues that they wish to explore further. The first is the transparency of the process by which the UK

118 Jack McConnell MSP in his oral evidence to the Commission, <http://www.commissiononscottishdevolution.org.uk/uploads/transcript-1-October.pdf>.

119 Oral evidence from the General Teaching Council for Scotland, 14 October 2008.

Government position is arrived at, and the transparency of how this position is represented at the EU level (including the current role of Scottish Ministers). The Commission is keen to explore how these processes might be made more open to scrutiny by the Scottish Parliament. The Commission also wishes to explore whether there is scope for a more prominent or a more formal role for Scottish Ministers in negotiations in which Scotland has a major, or even the most significant, interest. As we say in Chapter 4, we will not propose change for the sake of it but only where it will be of benefit, and in this regard notes the comments of the Scottish Fishermen's Federation about EU representation – "we are more concerned about what is said than who says it".¹²⁰

Issues of conflicting use of powers

- 7.89 A further key issue the Commission has considered is that of the potentially conflicting exercise of powers by the UK Government and the Scottish Government. The example discussed in Chapter 5 was the potential use of planning powers or devolved executive powers under the Electricity Acts to block the development of nuclear power stations. The Commission recognises that this is an issue under the political spotlight at this time and makes no specific comment about whether the perceived threat of a use of a devolved power in this way is right or wrong. However, the Commission recognises the potential for problems such as this to arise more widely in the future.
- 7.90 One concept that might usefully be explored further is the possibility of shared competence in areas where this potential for difficulty is readily identifiable. This is discussed further below in paragraphs 7.92 to 7.99. Here the Commission focuses on how the UK Government and Scottish Government might approach the resolution of these potential problems through formal and informal mechanisms.
- 7.91 The Commission believes that the Governments in the United Kingdom should work together in partnership to achieve the greatest good for all citizens. The Commission recognises there will not always be agreement of what this good is, and therefore there will always be situations where the use of a devolved power can operate counter to a policy in a reserved area, or vice versa. The Commission sees no immediate answer to this dilemma and wishes to explore in further detail both the options for improved inter-governmental mechanisms to resolve potential disputes and the more radical approaches that might be considered in relation to shared or concurrent competence.

Shared competence

- 7.92 Legislative devolution or autonomy may take many forms. In some countries, the constitution prescribes in some detail the respective powers and functions of the central or federal legislature and government and those of the regions, provinces or states. Other constitutions are less prescriptive. Some accept that there should be an area of "shared" or "concurrent" competence where both levels of government may legislate or exercise executive authority. This is notably the case in the European Union where the exclusive competences of the Union are rather limited and the Union shares competence with the Member States over a wide range of activity.
- 7.93 The scheme of the Scotland Act seeks to draw as clear a line of demarcation as possible between the competences 'reserved' to the United Kingdom Parliament and those that are, by implication, devolved to the Scottish Parliament. The Act is somewhat less prescriptive as regards reserved and devolved executive or administrative powers and

¹²⁰ Oral evidence from the Scottish Fishermen's Federation, 10 October 2008.

functions. Nevertheless, the underlying principle is that that which is not expressly reserved is, by implication, devolved (as explained in Chapter 5).

- 7.94 In its call for submissions and evidence, the Commission asked whether it would be desirable to introduce an area or areas of shared or concurrent competence. Very few of those who responded on this issue came out in favour of this idea. There were, broadly speaking, two objections: first, that it would create unnecessary and undesirable uncertainty and, second, that it would blur the lines of political and executive responsibility, so that those responsible could not be held to account.
- 7.95 There were, however, those – notably former First Minister Jack McConnell – who argued the contrary point of view. Mr McConnell suggested that lines of responsibility were already blurred, and a degree of shared or concurrent competence would force the United Kingdom and Scottish Parliaments and Governments to work together and co-operate more closely than they do at present:
- “I think lines of accountability are already blurred ... I actually think the public would welcome politicians being forced, through shared competencies, to work together.”¹²¹
- 7.96 In addition, as is clear from the discussion earlier in paragraphs 7.89 to 7.91 and in Chapter 5, recent developments, notably in relation to energy, climate change and animal health, have led to a situation in which, although there is not shared or concurrent competence, there is a degree of overlapping competence where the policies pursued by one level of government may be stymied, frustrated or made more difficult to achieve by action or inaction on the part of the other. So, although the Scotland Act aims to provide a clear allocation of powers, responsibilities and functions, legislation cannot always produce total clarity or cope with unforeseen changes of circumstances.
- 7.97 The Commission therefore considers that the possibility of introducing some form of shared or concurrent competence should not be ruled out at this stage. It is, however, important to consider in greater detail what checks and balances might be required to make such a system work well in practice. In that connection, the Commission considers that the existing arrangements in the European Union offer some useful ideas – these are discussed in more detail in Annexe D.
- 7.98 In the Scottish context, a list of shared or concurrent competences could be long or short. It might, for example, be provided that, in so far as competence is neither expressly reserved nor expressly devolved, it is shared. This would be a radical departure from the existing arrangements that would involve drawing up a new list of those competences that are expressly devolved as well as those that are expressly reserved. Alternatively, one might, as at present, list the reserved competences, add a list of shared competences, and leave all other competences as being, by implication devolved.
- 7.99 The Commission considers this to be an interesting issue, with considerable complexities, and whilst recognising that the majority of evidence received does not favour any form of shared competence, invites further submissions on this issue.

Interim conclusions

- 7.100 The Commission believes that there exists a fundamental concept of partnership between the constituent parts of the United Kingdom. There is a legitimate expectation that this concept of partnership extends to the Governments and Parliaments of the UK,

121 Jack McConnell MSP oral evidence, available at: <http://www.commissiononscottishdevolution.org.uk/uploads/transcript-1-October.pdf>.

which should work together in the common interests of UK citizens. A key way in which this aim can be realised is through the relations between the Governments and the Parliaments.

- 7.101 In the interests of this partnership, and taking a lead from proposals made at its engagement events around the country, the Commission recommends that a simple explanation of who is responsible for what (whether local council, MEP, MSP, MP, Scottish Government or UK Government) should be available to all those concerned (Scots and others). This links in with the observations made in Chapter 5 that many in Scotland cannot easily understand where responsibilities lie, or the interactions between the responsibilities of different parts of the machinery of the state.
- 7.102 There are clear links between work on intergovernmental relations and on the functions of the Scottish Parliament and Government. Some of the blurring around the edges of devolution and the tensions inherent in the devolved / reserved boundary might be alleviated by more effective processes for resolving disputes or reaching agreed, acceptable compromise positions. The Commission will consider the two elements together in reaching conclusions about the allocation of functions in its Final Report. There are also considerations about a more radical departure from this boundary, as discussed in paragraphs 7.92 – 7.99 through options for shared competence, and again the Commission will reach its final conclusions on this in its Final Report.
- 7.103 The Commission believes that, for all their informality, intergovernmental relations in the first ten years of devolution have run relatively smoothly. We acknowledge that this may have been to do with personalities, the political realities of the times and a general willingness amongst those involved to make the existing settlement work. The Commission does not, however, consider that the lack or lack of use of formal mechanisms for discussion and dispute resolution is sustainable over the years ahead as new challenges emerge and priorities for both the UK and Scottish Governments inevitably change. Whilst we have reached no firm conclusions yet, the Commission believes that the revitalisation of existing machinery for intergovernmental relations, a closer relationship between the UK and Scottish Governments as well as a prominent role for Scotland in representing the UK at a European level, where appropriate, are areas that are worthy of further and fuller consideration. We therefore invite further evidence on these matters as set out in more detail below.

Questions for consultation and requests for further evidence

- 7.104 In light of these interim conclusions, and the discussion of the key issues above, the Commission is seeking further views on a number of points concerning the relationships between the Parliaments, the Governments and the Institutions.
- **Is the absence of formal relations between the UK and Scottish Parliaments a cause for concern?**
 - **In the absence of existing links, the Commission considers there is a case for establishing at the very least a formal link for the purposes of sharing information and establishing common interests between the UK and Scottish Parliaments. One view put to the Commission is that this link could be formed by way of a regular discussion between the Speaker of the House of Commons, the Lord Speaker and the Presiding Officers of the devolved legislatures. The Commission would welcome views on this proposal.**

- The Commission has heard suggestions for the establishment of joint committees of both Parliaments, either on general issues of mutual interest, or focused on particular areas, and welcomes comments as to whether this would be a sensible way to address issues of mutual parliamentary concern, and proposals as to how this might be achieved.
- The Commission has noted the apparent weakness of links between MEPs and MSPs, and is interested in whether greater participation by MEPs in deliberations at the Scottish Parliament, particularly those that have a European dimension, would be helpful – perhaps through (non-voting) membership of appropriate Scottish Parliament committees.
- The Commission believes there should be regular, structured meetings between officials and Ministers of the UK and Scottish Governments, on a formal and informal basis and welcomes views on how this might be best achieved.
- The Commission recognises and welcomes the recent revival of the JMC machinery. The Commission strongly believes formal mechanisms are an important part of ensuring effective relationships between the governments of the UK. The Commission wishes to seek further views on whether the JMC is the most effective mechanism for this or whether alternatives to the JMC should be considered or changes made to the JMC, and invites comments on this.
- The Commission recognises the valuable role a unified civil service has played in ensuring effective relationships between the UK Government and Scottish Government, and welcomes views on whether this is both sustainable and desirable in the longer term.
- The Commission notes a perception amongst some that Scotland may not be consistently represented in the EU by the UK Government. The Commission welcomes views on how the representation of Scottish interests can be made more transparent.
- The Commission notes the perception that, where a UK Government Minister speaks for both England's interests and those of the UK, this may give rise to a lack of transparency or apparent conflict of interest. One suggestion made was that the relevant Secretary of State chair meetings with devolved Ministers seeking to agreed a UK wide position, with a UK Minister of State or Parliamentary Under-Secretary representing the view of England. The Commission would welcome views on this.
- The Commission recognises there may be a number of areas where the predominant UK interests in EU matters are Scottish. In such circumstances the Commission is interested in views on how Scotland might be seen to be able to make more direct representations within the EU.
- The Commission believes that all the Governments of the United Kingdom should work together in partnership to achieve the greatest good for all citizens. The Commission recognises there will not always be agreement of what this good is and therefore there will always be situations where the use of a devolved power can operate counter to a policy in a reserved area, or vice versa. The Commission wishes to explore in further detail both the options for improved inter-governmental mechanisms to resolve potential disputes and the more radical approaches that might be considered in relation to shared or concurrent competence, and welcomes further views and evidence on these approaches.

Chapter 8 Other features of the Scotland Act and the operation of the Scottish Parliament

Introduction and context

8.1 The principal purpose of the Scotland Act is to create the Scottish Parliament, and to define its powers and functions. In Chapter 5, we consider the boundary it draws between devolved and reserved functions. In this chapter, we consider a number of other aspects of the Act where issues have arisen that might suggest a need for some review. In some instances, we consider the scope for devolving further responsibility to the Parliament itself. We also refer briefly to some features of the Parliament's internal procedures which are not derived directly from the Act, where these are relevant to the issues raised.

The size of the Parliament and the electoral system

8.2 The scheme developed by the Constitutional Convention envisaged a Parliament of 129 members, and that is what the Scotland Act delivered. It did this by requiring 73 constituency MSPs to be returned for the then 72 parliamentary constituencies (with Orkney and Shetland returning separate MSPs although sharing an MP), and then by requiring seven regional MSPs to be returned from each of eight regions (as previously used as European Parliament constituencies). However, it also required the Boundary Commission for Scotland, at its next review, to redraw the parliamentary constituencies so as to bring Scotland broadly into line with England in terms of electoral quota (the number of electors per constituency) – thus reducing the number of Scottish MPs by around 13.¹²² Under the Act as first enacted, this reduction would have carried through automatically to the number of constituency MSPs and in turn required a proportional reduction in the number of regional MSPs.¹²³ The net effect would have been to reduce the size of the Parliament to around 104 MSPs within a few years of its creation.

8.3 In the event, this reduction did not happen. The UK Government, having consulted on the implications of this reduction in 2001, introduced legislation to amend the Scotland Act so as to decouple the Scottish Parliament constituencies from those used for elections to the House of Commons.¹²⁴ As a result, the number of Scottish MPs has indeed fallen to its current total of 59, while the number of MSPs remains at 129. However, as a result, the constituency boundaries are no longer co-terminous.

8.4 Taken together with the Parliament's introduction of the single transferable vote (STV) for local government elections in Scotland and the move to electing Scottish MEPs on a national rather than a regional basis, Scotland now has a complex mixture of electoral systems at the four different levels of elected government (local authority, Scottish Parliament, House of Commons, European Parliament).

¹²² Scotland Act, s.86.

¹²³ Paragraph 7(3) of Schedule 1 to the Act (as originally enacted) required the Boundary Commission, in reviewing the regional boundaries, to maintain (so far as reasonably practicable) a ratio of 56:73 between the number of regional and constituency seats.

¹²⁴ Scottish Parliament (Constituencies) Act 2004, which replaced Schedule 1 to the Act in its entirety. The statement by the Secretary of State announcing the decision is at: http://www.publications.parliament.uk/pa/cm200203/cmhansrd/vo021218/debtext/21218-08.htm#21218-08_spmi0

- 8.5 It was this that prompted the UK Government to establish a Commission in 2004, chaired by Sir John Arbuthnott, to consider the effects of these different electoral systems and in particular of having separate constituencies for the Scottish Parliament and the House of Commons. In its final report¹²⁵ published in January 2006, the Arbuthnott Commission recommended retention of the existing electoral system, albeit with the closed regional lists replaced by open lists and with a further review after two elections to consider a further move then to STV. (One member, in a dissenting opinion, argued for the immediate replacement of the current system with STV.) It also recommended revising the constituency and regional boundaries to align them with local authority areas.¹²⁶ The Parliament's electoral system has not, so far, been altered in consequence of the Arbuthnott recommendations.¹²⁷
- 8.6 The Commission has had a number of submissions on the related issues of the size of the Parliament and its electoral system. Few have argued for a reduction in the number of MSPs, but there have been a number of concerns raised about the electoral system. The first is that it creates two categories of MSPs, one of which has to devote considerable time to dealing with constituency casework, while the other is free to "cherry-pick" issues from across a wider region. The second is that because the majority of MSPs are still elected by "first past the post", the system as a whole is still capable of generating a distribution of seats that is less than fully proportional to the shares of votes cast. A third concern is that the use of "closed" lists for electing regional MSPs gives too much power to the political parties at the expense of the voters. Most of those who have raised these objections advocate a move to STV. Others submissions, however, point out that the current system was the product of careful thought and negotiation within the Constitutional Convention, and that the Arbuthnott Commission has only relatively recently given careful consideration to the alternatives.
- 8.7 As is discussed in Chapter 7, we are aware of some, at least anecdotal, evidence of friction between regional MSPs and constituency MSPs, and MPs in some parts of the country. One of the contributory factors here appears to be that a political party has the option of fielding the same person as a constituency candidate and as part of a regional list in the region that includes the constituency.¹²⁸ The result is that many of those returned as regional MSPs have stood unsuccessfully in a constituency within their region – creating the perception that the system rewards failure and that regional MSPs are "second class" members or "runners up", detracting from the noted benefits of regional MSPs, in particular in ensuring more proportional representation.
- 8.8 The Commission has not reached any conclusions about the continuing suitability of the Scottish Parliament's electoral system. This is too complex a topic to consider in sufficient detail in the time we have available to cover a much broader remit. The Arbuthnott Commission was better equipped to consider the options available, and completed its work relatively recently. At this stage, therefore, we simply note the concerns that have been raised with us and the conclusions that were reached by the Arbuthnott Commission.
- 8.9 The separate question of whether the Parliament should be given further responsibility for the administration of elections is considered in Chapter 5.

125 *Putting Citizens First: Boundaries, Voting and Representation in Scotland* – available at <http://www.scotlandoffice.gov.uk/uploads/Final%20version%20of%20report.pdf>.

126 The report made other recommendations on boundaries, voting (including the separation of Scottish Parliament and local elections, the design of the ballot paper, and the use of electronic voting) and representation.

127 In its response, the UK Government rejected the recommendation to move to open lists: <http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm070123/wmstext/70123m0001.htm#07012337000068>. A separate response was issued by the then Scottish Executive: <http://www.scotland.gov.uk/News/Releases/2007/01/23105546>.

128 Scotland Act, s.5(7). The Arbuthnott Commission recommended retention of this option.

Unicameralism and the scrutiny of legislation

- 8.10 Closely related to the nature of the Scottish Parliament's electoral system is the fact that it is a unicameral, or single-chamber, Parliament. The proportional nature of the electoral system, together with the strength of the committee system in the Parliament, was intended to provide checks and balances equivalent to those provided within the UK Parliament by the House of Lords.
- 8.11 There is no doubt that a proportional electoral system – which makes it unlikely that a single political party will gain an overall majority of seats – offers some safeguards against the risk of untrammelled executive power which Lord Hailsham described as an “elective dictatorship”. In addition, the Scotland Act requires committee memberships to reflect the balance of political parties, with the result that most administrations are likely to face scrutiny of their policies and legislation by committees on which their supporters constitute at best a narrow majority (and a minority administration is likely to have only minority support on any committee).
- 8.12 All the same, the Commission has heard suggestions that, although the committee system has been in many respects successful, voting in committees tends to break down on party lines, particularly in the consideration of legislation. As a result, it has been put to us that the committees are not always able to provide scrutiny that is sufficiently detached or effective.
- 8.13 This is closely tied to another strand in some of the submissions we have received, namely concerns about the effectiveness of some aspects of the Parliament's legislative procedures. The main concern is that legislation can be too rushed, particularly in the final amending stages, and that outside interests do not have time to consider the implication of proposed amendments and feed in their views to MSPs before the proceedings on those amendments take place. Another concern is that entirely new provisions are sometimes introduced by amendment, including at the final amending stage shortly before the legislation is passed, thus bypassing earlier consultation and scrutiny processes. The net effect may be legislation that is not sufficiently robust and may require amendment within a relatively short time. We were particularly struck by the fact that former First Minister Jack McConnell was one of those voicing such views.¹²⁹ While we recognise that these are matters the Parliament has previously debated and has the capacity to address, we would be interested in hearing further views from those who share our concern to ensure that the legislation passed by the Parliament is of the highest quality possible.
- 8.14 Some submissions have suggested introducing a non-elected element – a “senate” or special committee of appointed persons – to provide detached and expert scrutiny of legislation. However, others are strongly opposed, and we certainly detect no general appetite for such a fundamental departure from the Parliament's existing constitution. Indeed, as noted above, many believe the existing committee system is quite sufficient as a scrutiny mechanism. We also believe any such proposal would raise formidable obstacles about legitimacy and practicality. We are therefore not inclined to pursue further, in the second phase of our work, the idea of introducing any second chamber or unelected element at a formal level.
- 8.15 Nevertheless, there may be scope for making the Parliament's procedures for scrutinising legislation more robust and effective, for example by allowing more time for consideration by outside interests of amendments that have been proposed, by separating the second main amending stage from the decision to pass a Bill, or by

129 Oral evidence by Jack McConnell MSP.

prohibiting amendments that raise new issues at a late stage. While these are ultimately matters for the Parliament itself to decide, we would be interested in hearing suggestions from those who, like us, wish to enhance public confidence in the devolved legislative process.

- 8.16 A separate concern that has been raised relates to the statutory mechanisms aimed at ensuring the Parliament does not legislate beyond the limits of its powers – in particular the requirement on the Presiding Officer to state, at the time a Bill is introduced, an opinion on whether the Bill is within the Parliament’s legislative competence. Questions have been raised, for example, about the independence of the advice on which this statement is based and about the value of the statement when it gives no reasons and when the advice is not published. It has also been pointed out that the Parliament’s rules do not prevent a Bill which is the subject of a favourable statement on introduction being amended in ways that would take it outside legislative competence (although there are separate statutory mechanisms that can prevent a Bill that is considered to be outside competence being sent for Royal Assent).¹³⁰ The Commission has no concluded view on this matter, but may wish to give it further consideration.
- 8.17 There have also been suggestions for the Parliament to reconsider the merits of having general-purpose committees that both conduct inquiries and scrutinise Bills, thus combining what are in the House of Commons the functions of public bill committees (formerly known as “standing” committees) and departmental select committees. According to Jack McConnell, this combination of roles perhaps enabled Scottish Parliament committees to scrutinise Bills in a more detached and considered way than their Commons equivalents, but it also contributed to them being more partisan and less objective in their inquiry work.¹³¹ There have also been concerns that the volume of legislation referred to particular committees can make it difficult for them also to conduct their own inquiries. This was particularly a problem in the first session of the Parliament, when the burden of legislation referred to the Justice and Home Affairs Committee prompted its replacement with two separate Justice Committees.

Statutory limits on the Parliament’s procedures

- 8.18 The Scotland Act imposes a range of constraints on the ways in which the Parliament can operate. Some of these are imposed directly, and some indirectly (either requiring the Parliament to legislate in certain ways, or to include certain rules within its standing orders). We are aware that in some instances, these have given rise to practical problems.
- 8.19 Sir David Steel, for example, mentioned the inflexibility of the requirement on the Parliament to appoint two Deputy Presiding Officers – which prevented an additional deputy (or a temporary Presiding Officer) being appointed when he was absent for health reasons during the Parliament’s first session.¹³²
- 8.20 Similarly, the requirement on the Parliament to appoint the Presiding Officer and deputies “at its first meeting following a general election” caused practical problems at the beginning of this session, when the closeness of the result made the main parties reluctant to “give up” a member to the non-partisan role of Presiding Officer. The Parliament was, in the event, able to get round the statutory constraint by deeming its first meeting to have continued on a later day – which in turn raises the question of whether the statutory constraint serves a useful purpose.¹³³

130 Written submission by Iain Jamieson.

131 Oral evidence from Jack McConnell MSP.

132 Oral evidence from Lord Steel of Aikwood.

133 <http://www.scottish.parliament.uk/business/chamber/mop-07/mop07-05-14.htm>

- 8.21 A rather different example is the extent to which section 39 of the Act limits the Parliament's discretion in legislating in relation to members' interests. In particular, the Act makes any breach of certain requirements referred to in the section criminal offences (and specifies the penalties applicable), thus preventing the Parliament from including defences to inadvertent or minor infringement.¹³⁴
- 8.22 Different again are the various provisions that impose requirements about what the Parliament's standing orders must provide – including:
- minimum stages in the scrutiny of Bills (section 36)
 - rules for the preservation of order (Schedule 3, paragraph 1)
 - that proceedings are generally to be held in public (Schedule 3, paragraph 3)
 - for the reporting and publishing of proceedings (Schedule 3, paragraph 4)
 - that the Presiding Officer and deputies cannot all be from the same political party (Schedule 3, paragraph 5)
 - for political balance on committees (Schedule 3, paragraph 6(2))
 - that Crown consent to Bills requiring it must be signified during proceedings (Schedule 3, paragraph 7).
- 8.23 The Commission can understand why it was considered appropriate to include such requirements in the Scotland Bill, when the priority was to provide some initial certainty in the procedural arrangements, thus enabling relatively inexperienced parliamentarians to find their feet. However, it would be quite consistent with that early approach now to advocate loosening or even removing these external constraints, so as to hand over to a maturing Parliament greater responsibility for how it conducts its own business. We could see merit in that argument, although we also recognise that there may be a case for retaining the current balance between giving the Parliament broad discretion to develop its own procedures, while maintaining a framework of minimum external guarantees for the integrity of the process. This is an issue on which we would be interested to hear further views, including from current or former MSPs.

¹³⁴ See, for example, the opening speech by Bill Butler MSP, the member in charge of the Interests of Members of the Scottish Parliament Bill, in the Stage 1 debate: Official Report, 14 December 2005, especially cols 21692-3.

Chapter 9 Summary

9.1 The remit of the Commission is:

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

- 9.2 This first report is not so much an end-point as a stepping-stone. It demonstrates the progress we have made and invites further dialogue. We want it to promote a better understanding of Scotland’s place within the United Kingdom, now that there is a Scottish Parliament; to explore the scope for change to fulfil our remit, and to look forward to the final report next year.
- 9.3 We have tried to base our work on as wide a range of evidence and opinion as possible. We have taken formal evidence, arranged engagement events with people across Scotland, and elsewhere in Britain. We have taken submissions in writing, orally and on the web. We are very grateful to all who have contributed. The result has been a significant evidence base for this first report.
- 9.4 This report begins the second main phase of the Commission’s work. By the end of that, we expect to present a clear and consistent set of conclusions and recommendations. To do that, we need to gather further evidence and conduct further analysis on the key issues identified in this report. We want this report to stimulate a more focused round of dialogue and debate on Scotland’s future constitutional development.

Principles – devolution and the Union

- 9.5 In this report we do however reach some broad conclusions, and identify some important principles. First of all, the creation of devolved institutions in Scotland has been a great success. They have established their position in Scottish life, and have grown to reflect Scottish interests and priorities within a wider Union. But if we are to consider developing devolution further within the Union, we need a better understanding of the nature of that Union - so that we can consider how devolution within it might be strengthened.
- 9.6 We do this from the starting point that Scotland should remain an integral and distinctive part of the United Kingdom with a Scottish Parliament exercising a wide range of powers but with Scottish representation at Westminster, and with the key unifying institutions of the Westminster Parliament, a common franchise, a shared commitment to the rule of law and respect for the rights of individuals embodied in the Human Rights Act. This common citizenship is consistent with having different cultural identities in different parts of the UK, and with the ‘bonds of sympathy’ and relationships that bind the UK together.
- 9.7 We believe it vital to the interests of the people of Scotland and the wider United Kingdom that the UK Parliament and Government will continue to be responsible for national defence and security, representing Scotland in international affairs. Within a nation state, this is clearly the right solution, but it does have implications for the distribution of powers between the different levels of government and for financial arrangements.

- 9.8 With the rest of the UK, Scotland forms a deep and well-integrated single market, and an economic Union which is to the benefit of all its citizens. Such a Union does not require complete uniformity in all domestic policies, as history shows. We will consider possible changes to the distribution of functions between the Scottish and UK Parliaments, or to financial arrangements, to see whether they offer the opportunity for the Scottish Parliament to serve the people of Scotland better, but in doing so we will be careful not to make recommendations which would undermine that aspect of the Union.
- 9.9 Complex choices arise when considering common social citizenship across Scotland and the rest of the UK which is implied in the welfare state. They arise in relation to how uniform or integrated a welfare state the UK should be, and just how much of a common social citizenship should be shared across the UK. The welfare state is based on a principle of pooling risks and sharing resources so that need can be met – whether that is the need of individuals or families for social security support, health care or education. This is fundamentally driven by ideas of equity, and at present risks and resources are shared across the whole UK. It does not matter whether an individual is ill in Caithness or Cornwall: both have access to free health care when and where they need it, supported by taxes paid across the UK.
- 9.10 Devolution, as it stands, would in principle allow for a fundamentally different welfare provision in Scotland or in England, at least in relation to health or education. There may be a case for broadly common social citizenship across the UK, even though there will be some scope for Scottish differences, and if so, does a common understanding of what that involves need to be more clearly articulated? Alternatively, should there be scope and what support is there for significantly greater divergence in welfare services offered in response to differing preferences, with the implications that raises for how they are financed?

The powers and functions of the Scottish Parliament and Government

- 9.11 The powers devolved to the Scottish Parliament are wide ranging and constrained only by the express provisions of the Scotland Act, with the result the Scottish Parliament has power over most of the key elements of domestic policy. The Scottish Parliament can legislate, for example, on health, education, justice (including home affairs, courts, prisons, criminal and civil law), local government, housing, planning and urban renewal, and many aspects of transport, as well as the environment, agriculture and fisheries. The responsibilities are similarly very wide, covering over half the public spending in Scotland. The approach is consistent with the principle of subsidiarity, with decisions in a wide range of areas taken by the governmental body closest to the people who are affected by them. This is perhaps most simply described as allowing Scottish solutions for Scottish issues in a wide range of domestic policy areas.
- 9.12 The Commission has looked carefully at which functions are devolved and which reserved to the UK, to see where there is evidence to justify altering current arrangements, bearing in mind the principles we set out.
- 9.13 We believe that certain functions are integral to the effective functioning of the United Kingdom as a sovereign nation-state with international responsibilities, and where devolution would be undesirable in principle because retaining them at UK level is fundamental to the very concept of Union. These comprise the monarchy, the UK constitution, defence, national security, foreign affairs, currency and coinage. In addition,

certain aspects of management of the UK economy are indispensable to maintenance of the Union. These we will not consider further.

9.14 We have considered issues falling into twelve broad themes:

- Constitution and institutions
- Culture, charities, sport and gaming
- Employment and skills
- Energy
- Environment and planning
- Health and biosecurity
- Justice and home affairs
- Marine and fisheries
- Revenue and tax-raising
- Science, research and higher education
- Social security
- Trade and commerce.

9.15 Within each of these themes a number of issues have been raised. We have not reached a final view on these issues but at this stage of our work we have split them into two broad categories:

- Those where the Commission has received substantial or significant evidence and there appears to be a plausible case for further consideration as to the most effective way to exercise a particular function - here we include broadcasting; energy policy; animal health and movement; firearms; misuse of drugs; regulation of health care professionals; and marine planning among others.
- Those where an issue may be important, but where we have not yet received sufficient evidence to decide whether there is a case for further consideration, and where we shall be seeking further evidence before deciding whether to make recommendations - here we include the civil service; insolvency; employment law and relevant aspects of immigration; and health and safety among others.

Financial accountability

9.16 Our remit requires us to look specifically at improving the financial accountability of the Scottish Parliament. This has been a very significant part of our work so far. We have been greatly assisted in this by the evidence we have received, which covers a broad spectrum of opinion. In particular we have been helped by an Independent Expert Group of economists, political scientists and others, chaired by Professor Anton Muscatelli, Principal of Heriot-Watt University. They analysed the key principles of how sub-national governments are funded across the world. We are very grateful to them, although of course the Commission is responsible for the use we have made of their work.

- 9.17 We believe that the present funding arrangements have undoubtedly got the Scottish Parliament off to a good start. But as the Independent Expert Group notes, those arrangements have strengths and weaknesses, especially in relation to accountability. But any system of funding involves trade-offs between **equity, efficiency and accountability**. We agree with the Independent Expert Group that these can conflict, and that choosing among them requires us to have a view on the sort of Union we are looking for. The balance between conflicting principles should be determined not by technical considerations, but by the constitutional objectives that the funding system is designed to support.
- 9.18 The **Commission recognises that there are** three generic mechanisms that may be used to fund the Scottish Parliament – **the assignment of tax revenues, the devolution of taxes** and block grant from the UK Government. The mix of funding mechanisms to be used will be determined by the balance between the conflicting principles, and so, ultimately by the sort of Union which Scotland forms with the rest of the UK.
- 9.19 We have given preliminary consideration to how the individual funding mechanisms might be used in Scotland, and to the question of borrowing powers for the Scottish Parliament. We regard the maintenance of an economic Union in the UK as in the interests of Scotland, we have looked at the effect of each of them on the free flow of trade inside this integrated single market. This has led us to seek further views and evidence, for example in relation to some aspects of tax devolution.
- 9.20 So our consideration of finance follows from our discussion of the nature of the Union. As well as being an economic Union, the UK has a shared social citizenship. Greater tax devolution would be associated with less shared social citizenship, while high dependence on grant funding implies some common expectations about the need for welfare services like health and education. We have not reached a view on the appropriate point in what is a spectrum of possibilities, but we do recognise that this must reflect the expectations of the Scottish population. In the next phase of our work, with further help from the Independent Expert Group, we will identify the possible combinations of the funding mechanisms and their implications for the nature of the Union.
- 9.21 We have come to no conclusions on these issues and are seeking further representations and evidence.

Relationships between Parliaments and Governments

- 9.22 A vital element of the success of any devolution settlement is the strength of the formal and informal relationships between Parliaments, Governments and the other institutions of the state.
- 9.23 The Commission has examined how relationships have developed and been maintained, how disagreements between Governments have been discussed and resolved. We ask whether the formal mechanisms put in place in the late 1990s have proven sufficiently robust given the new challenges and changes to the UK's political landscape over the last ten years. We have also looked at the way in which the Scottish and UK Parliaments work with one another, and how both relate to the institutions of the European Union.
- 9.24 Relations between the Scottish Executive and the UK Government were for the first two terms of the Scottish Parliament often informal, and pragmatic. To quite an important extent they were based on the relationships between individual politicians and officials in London and Edinburgh established before devolution. For all their informality,

intergovernmental relations in the last ten years have run relatively smoothly. This may have been to do with personalities, the political realities of the times and a general willingness amongst those involved to make the settlement work. However, we do not think that lack of use of formal mechanisms for discussion and dispute resolution is sustainable over the years ahead, as new challenges emerge.

- 9.25 We see clear links between our work on intergovernmental relations and on the functions of the Scottish Parliament and Government. The boundary between devolved and reserved responsibilities has been skilfully drawn, but there are inevitably areas of overlap or uncertainty. Legal mechanisms exist for settling issues about legislative competence. But overlapping or concurrent executive responsibilities might be better dealt with if there were more effective processes for resolving disputes or reaching agreed, acceptable or compromise positions. The Commission will consider the two elements together in reaching conclusions about the allocation of functions in its Final Report.
- 9.26 We believe that within the UK there ought to be an expectation that the Parliaments, Assemblies and Governments of the UK should work together in the common interests of UK citizens, even though there will sometimes be political differences between them. In the interests of this partnership, and taking a lead from proposals made at its engagement events around the country, the Commission recommends that a simple explanation of who is responsible for what (whether local council, MEP, MSP, MP, Scottish Government or UK Government) should be available to all those concerned (Scots and others).
- 9.27 On this issue as on others we have not yet reached firm conclusions, but the Commission believes that the revitalisation of existing machinery for intergovernmental relations, and a closer relationship between the UK and Scottish Parliaments are areas that are worthy of further and fuller consideration and invites further evidence on these matters.

Other features of the Scotland Act and the operation of the Scottish Parliament

- 9.28 The principal purpose of the Scotland Act is to create the Scottish Parliament, and to define its powers and functions. A number of other aspects of the Act have arisen in the evidence we have received, and may suggest a need for review.
- 9.29 We received a number of submissions relating to the size of the Scottish Parliament and the electoral system. The continuing suitability of the Scottish Parliament's electoral system is too complex a topic to consider in sufficient detail in the time we have available to cover a much broader remit. The Arbuthnott Commission was better equipped to consider the options available, and completed its work relatively recently. At this stage, therefore, we simply note the concerns that have been raised with us and the conclusions that were reached by the Arbuthnott Commission.
- 9.30 The Scottish Parliament is a unicameral, or single-chamber, Parliament. The proportional nature of the electoral system, together with the strength of the committee system in the Parliament, was intended to provide checks and balances equivalent to those provided within the UK Parliament by the House of Lords. The Commission has heard a range of evidence on this subject, and whilst many believe the existing committee system is quite sufficient as a scrutiny mechanism, others have made alternative proposals for a second chamber or an unelected element in the scrutiny of legislation. We believe any such proposals would raise formidable obstacles about legitimacy and practicality. We are therefore not planning to pursue them in the next phase of our work.

9.31 All the same, there may be scope for making the Parliament's procedures for scrutinising legislation more robust and effective, particularly in the final amending stages of Bills. While these are ultimately matters for the Parliament itself to decide, we would be interested in hearing suggestions from those who, like us, wish to enhance public confidence in the devolved legislative process.

What next?

9.32 We want to do our job with the engagement of the people of Scotland, and the wider United Kingdom. So we will continue our open and inclusive approach in the next phase of our work, gathering further written and oral evidence from different parts of Scotland. Our final conclusions must reflect the realities of how changes to the devolution settlement can improve the daily lives of the people of Scotland. To help us do this, we will produce a shortened version of the questions in this report to help structure our next round of engagement.

ANNEXE A - Reserved matters (from Schedules 4 and 5 to the Scotland Act)

Protected enactments

The powers of the Scottish Parliament are constrained by Schedule 4 to the Scotland Act which provides that, subject to certain exceptions set out in Part II of the Schedule, the Scottish Parliament cannot modify (or confer power on Scottish Ministers to modify) certain enactments. These include:

- Four “constitutional” enactments
 - The provisions of the Acts of Union relating to freedom of trade
 - the Private Legislation Procedure (Scotland) Act 1936
 - Key provisions of the European Communities Act
 - The Human Rights Act
- Statutory provisions relating to
 - designation of enterprise zones
 - rent rebate and rent allowance subsidy and council tax benefit
- The law on reserved matters – both statute law and common law – subject to certain qualifications.
- The Scotland Act itself and enactments modified by it (with certain exceptions)

Schedule 5 to the Act sets out some “general reservations” (Part I) and then a long list of “specific reservations” (Part II).

General reservations

- Key aspects of the Constitution, including the Crown, the Union, the UK Parliament, and the continued existence of Scotland’s higher courts.
- Registration and funding of political parties
- Foreign affairs and international relations
- the civil service (other than sheriff clerks, procurators fiscal, and officers of the higher courts).
- Defence (other than some aspects of civil defence and sea fishing enforcement)
- Treason

Specific reservations

The specific reservations are set out under 12 main heads, each with a series of sub-heads. In some cases, there are exceptions, illustrations and interpretations.

- Financial and economic matters

- o Fiscal, economic and monetary policy, except local taxes to fund local authority expenditure (for example council tax and non-domestic rates)
 - o The currency
 - o Financial services, except bank holidays
 - o Financial markets
 - o Money laundering
- Home affairs
 - o Misuse of drugs
 - o Data protection
 - o Elections (elections to the House of Commons, European Parliament and Scottish Parliament, and the franchise at local government elections)
 - o Firearms
 - o Entertainment (essentially videos and films)
 - o Immigration and nationality
 - o Scientific procedures on live animals
 - o National security, interception of communications, official secrets and counter-terrorism
 - o Betting, gaming and lotteries
 - o Emergency powers
 - o Extradition
 - o Lieutenancies
 - o Public access to information held by most public bodies
- Trade and industry
 - o Business associations, except “particular public bodies” and charities
 - o Insolvency, except some aspects of winding up and receivership
 - o Competition, except regulation of aspects of the legal profession
 - o Intellectual property, except plant varieties
 - o Import and export control, except food, animals, plants, etc
 - o Regulation of sea fishing outside the Scottish zone, except in relation to Scottish fishing boats
 - o Consumer protection, except food safety
 - o Product standards, safety and liability, except in relation to food, agricultural, pesticide products etc.
 - o Weights and measures
 - o Telecommunications and wireless telegraphy, except certain police powers

- Posts and postal services
- Research Councils, including funding of scientific research
- Designation of assisted areas under the Industrial Development Act 1982
- Industrial Development Advisory Board
- Protection of trading and economic interests (under emergency powers, etc.)
- Energy
 - Electricity, except aspects of environmental protection
 - Oil and gas, except some aspects of offshore activity and production and movement of gas
 - Coal, except environmental protection
 - Nuclear energy, except environmental protection and the Radioactive Substances Act 1993
 - Energy conservation, except the encouragement of energy efficiency
- Transport
 - Road transport, except aspects of road safety
 - Rail transport, except aspects of grants for rail services, some strategic functions, the transfer of functions of passenger transport executives, and the promotion and construction of railways wholly within Scotland
 - Marine transport, except ports etc., hazards to navigation and financial assistance for bulk freight services to the Highlands and Islands
 - Air transport, except some matters to do with airports and aerodromes
 - Transport of radioactive material
 - Technical specifications for public passenger transport for disabled persons
 - Carriage of dangerous goods
- Social security
 - Social security schemes, except aspects of
- Social welfare services
- Welfare services for the chronically sick and disabled
- Payments towards maintenance of children
- Industrial injuries benefit
- promotion of the welfare of children in need
- advice and assistance for young persons formerly looked after by local authorities
 - Child support, except aliment
 - Occupational and personal pensions

- War pensions
- Regulation of the professions
 - Architects
 - Specified health professions. The “reserved professions” are identified by reference to the Acts governing them. Consequently, regulation of new professions, such as pharmacy technicians, is not reserved.
 - Auditors
- Employment
 - Employment and industrial relations, except agricultural wages
 - Health and safety, including the Health and Safety Executive and the Employment Medical Advisory Service, but excluding some aspects of fire safety
 - Job search and support, except careers services and aspects of Scottish Enterprise and Highlands and Islands Enterprise
- Health and medicines
 - Abortion
 - Xenotransplantation
 - Embryology, surrogacy and genetics
 - Medicines, medical supplies and poisons
 - Welfare foods
- Media and culture
 - Broadcasting
 - Public lending right
 - Public indemnity for objects on loan to museums, etc
 - Acceptance of property in satisfaction of tax
- Judicial remuneration
- Equal opportunities legislation, except for the encouragement of equal opportunities and the imposition of duties on public office-holders
- Control of weapons of mass destruction
- Ordnance survey
- Timescales, time zones, and summer time, except the computation of periods of time, bank holidays, Term Days and Quarter Days
- Regulation of activities in outer space

Part III of Schedule 5

Part III of Schedule 5 makes clear that:

- Scottish public authorities are not reserved, even if they have “mixed functions” (functions relating to both reserved and devolved matters), unless they are “cross-border public authorities”
- “reserved bodies” include all bodies mentioned in Part II of the Schedule, including the Research Councils, plus the bodies that are now amalgamated in the Equality and Human Rights Commission
- with certain exceptions, “giving financial assistance to commercial activities for the purpose of promoting or sustaining economic development or employment” is not reserved.

ANNEXE B - The Independent Expert Group

Chair

Professor Anton Muscatelli [Chair], Principal and Vice-Chancellor Heriot Watt University

Other members based in the United Kingdom

John Aldridge, former Finance Director at the Scottish Executive

Professor David Bell, Professor of Economics, Stirling University

Professor Julia Darby, Professor of Economics, University of Strathclyde

Dr Sandra Eden, Senior lecturer in Tax Law, Edinburgh University

Professor Charlie Jeffery, Professor of Politics, Edinburgh University

Professor Iain McLean, Official Fellow in Politics, Nuffield College, Oxford, and Professor of Politics, University of Oxford

Jeremy Peat; Director of the David Hume Institute; former Group Chief Economist at the Royal Bank of Scotland and a former economic adviser at HM Treasury and the Scottish Office

Professor David Ulph, Professor and Head of School of Economics and Finance, St Andrews University, former Director of Analysis at HM Revenue and Customs.

Members based overseas

Professor Robin Boadway, Professor of Economics Queen's University, Kingston Ontario Canada

Professor Clemens Fuest, Professor of Economics at the Faculty of Economics and Social Sciences of the University of Cologne; Chairman of the Scientific Advisory Committee of the German Federal Ministry of Finance

Professor Andrew Hughes-Hallett Professor of Economics and Public Policy, George Mason University, Virginia, USA, and; Professor at St.Andrews University School of Economics and Finance.

Conclusions from Independent Expert Group Report

- 1 In reviewing the evidence relevant to how the Scottish Parliament might be funded, we start with some observations on the present system. Barnett is internationally unique: no other country operates anything remotely like it for funding a sub national government. It provides stability and predictability of funding and near total autonomy of spending decisions for the devolved administrations in the United Kingdom. At the same time, the current funding arrangements facilitate the centralised management of economic aggregates. It is a pragmatic solution to the funding question and is near costless to implement. It represents continuity with pre-devolution arrangements, but as a result, some of the relativities of the previous system have been perpetuated.
- 2 But whilst Barnett offers real strengths, its disadvantages are clear. With no substantive tax raising power, the Scottish Parliament is funded by a block grant, needed to address a near total vertical fiscal imbalance. Voters are not exposed to tax and spending decisions at the margin, meaning that a degree of political accountability for the taxation which supports spending decisions is missing. The disconnection between revenues and economic performance also means that the incentives to develop growth are secondary rather than immediate.
- 3 The current arrangements also mean that the Scottish Parliament lacks a degree of autonomy - its scope to influence the size of its budget is limited whilst it is not able to use fiscal measures to influence behaviours.
- 4 The lack of autonomy and accountability issues both resonate in Scotland, even though the linkage between these properties and efficient government or economic growth are not proven.
- 5 At the same time, the funding allocated to the Scottish Parliament is causing increasing levels of discontent in other parts of the UK where the equity of the existing arrangements is now challenged. Equity has been a significant dimension to UK public expenditure decisions for many years: indeed reference to meeting needs equitably has been the main justifying criteria within the centralised public spending system. It was certainly routinely used to justify spending allocations for Scotland before devolution and indeed before Barnett was introduced. But the Scotland of 2008 is a very different place to the Scotland of the mid 1970's when a needs assessment concluded that public expenditure per head in Scotland needed to be 16% over the UK average to maintain parity of service provision. This report does not attempt to provide any assessment of the relative needs of the constituent parts of the United Kingdom. Indeed, a needs assessment now, given the policy divergences brought on by devolution, would be a difficult and controversial exercise. The equity issue is important however, as the continuance of the substantively higher level of public expenditure in Scotland compared to England will become increasingly difficult to defend unless empirically justified. The relative decline in Scotland's population compared to England means that convergence which might be expected under the Barnett formula for Scotland will be deferred.
- 6 The combination of pressures for change, both from within Scotland and from the rest of the UK, has resulted in serious doubts being cast over the long term continuation of the Barnett formula in its current form. This view is confirmed to a degree by the Welsh Assembly Government decision to review the Barnett funding arrangements for Wales, although this is motivated by a different sentiment.
- 7 But as the analysis of experiences from around Europe and the rest of the world demonstrate, none of the alternatives necessarily meet the conflicting desiderata of autonomy, accountability and equity. All the implemented systems we describe are in fact

some mix of the possible mechanisms available. Some, such as Germany and Canada use a system of tax sharing or assignment “topped up” by grants to ensure equal access to public services. Furthermore, neither system is without controversy. The Australian model of an independent body - the Commonwealth Grants Commission - is seen by many as a paradigm of best practice, although it does result in the Australian States lacking some accountability. It is noteworthy that the Commission itself is necessarily a significant administrative body, although any departure from Barnett will almost certainly require greater administrative effort as new systems are put in place. This is especially the case for any arrangement that would incur the decentralisation of the UK’s currently highly centralised tax system.

- 8 In considering alternatives, Scotland's fiscal position, as expressed in the Scottish Government’s “Government Expenditure and Revenue in Scotland” (GERS) publication, is obviously relevant. So is the existing operational framework which is simply not conceived to support a system of collecting taxes at a devolved level. The GERS data suggests that a self financing Scotland within the Union would see a substantive reduction in the budget available to both the Scottish Parliament and to UK Government expenditure in or on behalf of Scotland, or a prevailing need for fiscal transfers to Scotland from the UK Government. Even if a proportion of natural resource taxation revenues were to be allocated to Scotland – and it is not clear on what basis this would be justified - the volatility of oil prices means this would not deliver a stable revenue stream.
- 9 However, we strongly recommend that the economics and politics of natural resource taxation are given further detailed consideration. This is not a straightforward proposition for many reasons. For example, any devolution of oil and gas exploitation tax revenues would need to address the issue of decommissioning costs, most of which are allowable for tax purposes. This would require some settlement at UK level as decommissioning costs will be for fields which have yielded tax revenues from North Sea oil and gas exploitation in the past that have accrued to the UK Treasury. In view of this recommendation, the Independent Expert Group will provide further evidence on natural resource taxation in due course.
- 10 It is also the case that whilst one might wish to develop alternative means of financing the Scottish Parliament, Barnett applies elsewhere in the United Kingdom. This could potentially restrict the policy options that might be brought forward for financing the Scottish Parliament.
- 11 Commensurate with our brief, this report does not recommend a particular ideal solution. Indeed, this first evidence demonstrates that one probably does not exist. Our intention has been, however, to demonstrate that each option is associated with certain trade-offs. Barnett alone has substantial deficiencies. A sophisticated system of needs based equalisation grants has attractions, perhaps when complementing a degree of autonomy or tax sharing or assignment, but it necessarily becomes controversial and resource intensive.
- 12 Systems based on tax assignment do have attractions, both in terms of delivering (in principle) an incentive to deliver policies promoting economic growth and a relative operational simplicity. In Scotland’s case, financing by tax assignment would clearly need to be supplemented by some further payment from the UK Government.
- 13 Tax decentralisation certainly addresses the accountability concerns, although the scope of its application in Scotland might be constrained by EU Law. It could also lead to businesses and individuals facing additional compliance burdens and as well as a number of undesirable second order effects such as tax shifting and exportation. We have concerns that full fiscal autonomy may not be readily compatible with the maintenance of the United Kingdom and as noted above, it is difficult to find examples of full fiscal

autonomy which do not involve regulation by the national government, as in the case of the Basque countries and Spain.

- 14 Any system of devolved finance not solely based on a certain block grant, such as Barnett, creates the need for some degree of borrowing (whether from markets or the national government) by the devolved authorities to smooth fluctuations in tax revenues. As in countries where borrowing is currently allowed at sub-national government level (particularly in Eurozone countries where sub-national versions of the 'stability pact' have been introduced), an intergovernmental system of co-ordination would need to be introduced between HM Treasury and the devolved administrations to ensure the coordination of overall UK fiscal policy and the management of economic aggregates
- 15 Overall, we believe that the selection of an alternative means of financing the Scottish Parliament that will deliver increased financial accountability has to be a judgement based on the trade offs we have sought to identify. This judgement is dependant on the choices made by the Commission regarding the appropriate constitutional structure. In other words, it is necessary to first have a clear view on the very nature of the union with the rest of the United Kingdom prior to working through the trade-offs of different approaches to territorial finance.

ANNEXE C – The Barnett Formula: a worked example

The following is based on a worked example of how the Barnett formula operates provided in the HM Treasury evidence to the Commission.¹³⁶

If for example:

- the Government decides to increase the DEL budget of the Department of Innovation, Universities and Skills by £100 million; and
- the comparability percentage for that particular department for each devolved administration is 79 per cent (because that Government department carries out some expenditure at an all United Kingdom level); and
- the population proportions are 10.08 per cent for Scotland, 5.84 per cent for Wales and 3.43 per cent for Northern Ireland of England's population;

then the following changes are added to each Devolved Administration's overall budget:

- for Scotland, £100 million (change in Government department's budget) x 79 per cent (comparability percentage) x 10.08 per cent (population proportion as a percentage of England's) giving a net change of £7.96 million;
- for Wales, £100 million (change in Government department's budget) x 79 per cent (comparability percentage) x 5.84 per cent (population proportion as a percentage of England's) giving a net change of £4.61 million; and
- for Northern Ireland, £100 million (change in Government department's budget) x 79 per cent (comparability percentage) x 3.43 per cent (population proportion as a percentage of England's) giving a change of £2.71 million. This amount is then abated by 2.5 per cent to reflect the fact the Northern Ireland Executive do not require funding to meet Value Added Tax costs incurred as these are refunded by HM Customs and Excise. The net change for Northern Ireland is therefore £2.64 million.

¹³⁶ HM Government evidence to the Commission on Scottish Devolution, Chapter 5 – HM Treasury.

ANNEXE D – Shared competence – considerations from the EU approach

- 1 One consequence of the “listing” approach to legislative competences (as opposed to administrative functions) is that it does not allow a distinction to be made between strategic decisions that ought to be taken at UK level and measures of implementation that could be taken at the devolved level. In this respect a possible model is the European directive.
- 2 A directive is a form of legislation which is

“binding as to the result to be achieved, but leaves to the national authorities the choice of form and methods”(European Community Treaty, article 249).

In other words, the directive is “framework” legislation at the EU level within which the national authorities (including national Parliaments) must work while, in theory at least, leaving scope for them to take account of national differences.
- 3 One can envisage that a similar type of legislative technique might be adopted at the UK Parliament by which, in effect, the UK Parliament could use its reserved powers to impose a strategic framework on the devolved Parliaments and Assemblies without usurping their devolved powers and allowing them a reasonable margin of discretion in implementation. Adoption of this technique would not necessarily require amendment of the Scotland Act, though it would require a change of legislative culture.
- 4 Another possible approach would be to develop the formulae adopted in the Lisbon Treaty¹³⁷ which sets out the three basic principles of conferral, subsidiarity and proportionality (Article 5 of the Treaty on European Union):

“1. The *limits* of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

“2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

“3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

“4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.”
- 5 Two points should be noted in particular. First, a distinction is drawn between the *limits* of competence (conferral) and the *use* or *exercise* of competences (subsidiarity and proportionality). Second, the principle of subsidiarity is formulated in a way that is

¹³⁷ The Treaty of Lisbon, 13 December 2007,
<http://www.official-documents.gov.uk/document/cm72/7294/7294.pdf>

different from, and more precise than, the traditional but rather vague formula that decisions should be taken as close as possible to the citizen. It focuses on the question whether it is *necessary* for the “higher” jurisdiction (the EU) to act.

- 6 Operation of the three principles is buttressed by the obligation of “sincere (or loyal) co-operation” set out in Article 4(3):

“Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

“The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

“The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.”

- 7 Within that overall context, the treaty (Article 2 of the Treaty on the Functioning of the EU) deals with competences under three heads:

- Exclusive competence of the EU
- Competence shared by the EU and the Member States
- Competence remaining with the Member States.

Alternative format versions of this report are available on request.

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