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Select Committee on the Constitution

17th Report of Session 2010–12

Scotland Bill

Report

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Scotland Bill

Introduction

1. The Scotland Bill is a measure of clear constitutional significance. It will amend the Scotland Act 1998, conferring new competences on the Scottish Parliament, re-reserving some powers to the United Kingdom, conferring new powers on the Scottish Ministers, and making considerable reforms to fiscal matters and to public finance in Scotland.
2. While we do not consider that the Bill raises any issues of constitutional concern to which the attention of the House should be drawn, we publish this report in order to assist the House in its deliberations on the Bill. We do so because of the clear constitutional importance of the Bill.
3. The Scotland Bill was introduced into the House of Commons in November 2010. It completed its passage through that House in June 2011. During this period, in May 2011, a Scottish parliamentary election was held in which the Scottish National Party (SNP) won an overall majority of seats in the Scottish Parliament (the first time this has been achieved by any political party in Holyrood). The electoral success of the SNP has significantly affected the political climate in which the Scotland Bill finds itself. This is not least because, while the Bill is supported by all three main parties at Westminster, it is only partially supported (and is partially resisted) by the Scottish Government.

The background to the Bill

4. The Bill implements many of the recommendations of the Calman Commission (“Calman”). Calman was established in 2008 by the United Kingdom Government in response to a motion passed by the Scottish Parliament. Calman’s final report was published in June 2009.¹ Calman was supported by all three main parties at Westminster. It was set up by these parties (who formed the Opposition in the Scottish Parliament) in response to the establishment by the Scottish Government of a “national conversation” about the future of Scotland.² Calman’s terms of reference specifically referred to “the position of Scotland within the United Kingdom”: thus, Calman was designed to consider the working of Scottish devolution to date and to make recommendations for its improvement. Calman did not consider more radical options such as secession from the Union or Scottish independence. Both the Calman Commission’s report and the Scotland Bill which has followed from it are therefore based on the premise that devolution is the preferred constitutional framework both for Scotland and for the United Kingdom (albeit that aspects of devolution as established in the 1998 Act may need to be reformed).
5. Calman’s report was welcomed by the then UK Government, who published a White Paper outlining how its various recommendations might be implemented.³ The Coalition Government was similarly enthusiastic about

¹ Commission on Scottish Devolution, *Serving Scotland Better: Scotland and the United Kingdom in the Twenty-first Century* (June 2009).

² See <http://www.scotland.gov.uk/Topics/a-national-conversation>.

³ Scotland’s Future in the United Kingdom: Building on Ten Years of Scottish Devolution, Cm 7738 (November 2009).

taking Calman forward. It published its own White Paper alongside the present Bill.⁴ This spirit of cross-party support for the broad aims of the Bill continued as it progressed through the House of Commons. We have very recently published a report on the process of constitutional change in which we concluded that "government operates within a constitutional framework which should be respected and treated with care by all those who seek to change it."⁵ In this light we welcome the extensive deliberation which has preceded the introduction of this Bill.

6. During the course of its passage through the House of Commons the Bill was subject to two full committee inquiries. The Scottish Affairs Committee of the House of Commons published a report on the Bill which focused on its financial provisions.⁶ The Committee was broadly supportive of the provisions in the Bill. Additionally, a Scotland Bill Committee of the Scottish Parliament published a lengthy report on the Bill in which it recommended that the requisite Legislative Consent Motion ("LCM")⁷ should be passed.⁸ The Scottish Parliament duly passed a LCM in respect of the Bill on 10 March 2011 (the LCM was overwhelmingly supported, by 121 votes to 3).
7. The Bill was amended during its passage through the House of Commons. Some of the amendments are significant.⁹ These amendments will require a second LCM to be passed for the Sewel Convention to be complied with.¹⁰ A new Scotland Bill Committee has accordingly been established in the Scottish Parliament.
8. It should be noted that, while the report of the Calman Commission formed the basis for the Scotland Bill, not all of Calman's recommendations have found their way into the Bill. Calman recommended, for example, that aspects of food labelling should be re-reserved, but the Government disagree and the matter is not provided for in the Bill. Calman recommended that certain powers with regard to welfare (namely, Housing Benefit and Council Tax Benefit) be considered for devolution, but the Welfare Reform Bill has overtaken this recommendation in its proposal for the creation of a new Universal Credit. Calman likewise recommended that powers with regard to charities and marine conservation be considered for devolution. Again, the Government have provided reasons for not including these matters within the Scotland Bill for the time being.¹¹

The Bill

9. The Bill is in four parts. The three substantive parts concern: the Scottish Parliament and its powers (Part 1); Scottish Ministers and their powers (Part 2); and finance (Part 3). Part 4 contains miscellaneous and general provisions.

⁴ Strengthening Scotland's Future, Cm 7973 (November 2010).

⁵ Constitution Committee, 15th Report (2010–2012): *The Process of Constitutional Change* (HL Paper 177), para 26.

⁶ Scottish Affairs Committee, 4th Report (2010–2012): *The Scotland Bill* (HC Paper 775).

⁷ This was formerly known as a Sewel Motion.

⁸ Scottish Parliament Scotland Bill Committee, 1st report, 2011.

⁹ See further below: an example is clause 17, which was added at report stage in the House of Commons.

¹⁰ See the Explanatory Notes to the Bill, para 8.

¹¹ The differences between Calman's recommendations and the Bill as presented to Parliament, and the reasons for those differences, are fully analysed in the report of the Scottish Parliament Scotland Bill Committee, *op. cit.*

Part 1 of the Bill (The Scottish Parliament and its Powers)

10. Part 1 of the Bill devolves to the Scottish Ministers certain functions as regards the administration of elections, and related matters (clauses 1 to 3). Legislative competence in relation to the regulation of air weapons is also devolved to the Scottish Parliament (clause 11).
11. Part 1 re-reserves to the United Kingdom certain aspects of insolvency law. Under the Scotland Act 1998 insolvency in Scotland is a matter of shared competence between Westminster and Holyrood. As amended by clause 12 of the Bill insolvency in Scotland will be entirely reserved to Westminster. Certain powers to regulate health professionals in Scotland are likewise re-reserved to the United Kingdom (clause 13), as is a power (never exercised by the Scottish Parliament) to regulate activities in Antarctica. This reservation is expressed to have retrospective effect (clause 14).
12. **There is nothing in Part 1 of the Bill that raises an issue of constitutional concern that should be brought to the specific attention of the House.**

Part 2 of the Bill (Scottish Ministers and their Powers)

13. Part 2 of the Bill formally renames the “Scottish Executive” the “Scottish Government” (clause 15).
14. Clause 17 is constitutionally significant, as well as controversial. It concerns the designation as “devolution issues” of acts and failures to act by the Lord Advocate when acting as the head of the system of criminal prosecution in Scotland when those acts or failures to act are alleged to raise an issue of incompatibility with Convention rights or EU law. At present such acts and failures to act are classified as devolution issues, which means, among other things, that they may find their way to the United Kingdom Supreme Court, notwithstanding the fact that ordinarily that Court has no jurisdiction over Scots criminal law. An expert group (chaired by Sir David Edward) reported to the Advocate General for Scotland in November 2010. It unanimously recommended that acts and failures to act by the Lord Advocate when acting as the head of prosecutions in Scotland should no longer be classified as “devolution issues” but that the Supreme Court should not lose its constitutional jurisdiction to ensure that the United Kingdom acts consistently with its international obligations under the ECHR and under EU law.¹²
15. Clause 17 gives effect to the recommendations of Sir David Edward’s expert group. The clause was added to the Bill at report stage in the House of Commons. The effect of clause 17 is as follows: acts and failures to act of the Lord Advocate, when acting as the head of the system of criminal prosecutions in Scotland, are no longer to be classified as devolution issues, but will instead be subject to a statutory right of appeal to the Supreme Court; exercise of this right of appeal must be with the leave of either the High Court of Justiciary or the Supreme Court; the test to be applied by the Supreme Court in an appeal coming before it via this route will be whether or not there has been a miscarriage of justice.

¹² See <http://www.oag.gov.uk/oag/223.81.html>.

16. A further review group, appointed by the First Minister, examined the matter again, reporting on 27 June 2011 (chaired by Lord McCluskey).¹³ It broadly supported the conclusions of the Advocate General's expert group, albeit with qualification. It recommended that clause 17 of the Scotland Bill be amended such that leave to appeal to the Supreme Court in this context may be granted only if the case raises a point of general public importance or a point that ought otherwise to be considered by the Supreme Court. The review group argued that this amendment would be consistent with other avenues of appeal to the Supreme Court. In our assessment, **notwithstanding the legal and political controversy, there is no constitutional objection to clause 17.**
17. Clause 18 re-legislates in an Act of the United Kingdom Parliament the rule already legislated for by Scottish Parliament¹⁴ that there is a one-year time limit for actions brought under the Scotland Act 1998 in relation to Convention rights (there is a like time limit in the Human Rights Act 1998, but the House of Lords had ruled in the *Somerville* case¹⁵ that the Scotland Act contained no such time limit).
18. Clauses 20 to 21 concern broadcasting. Clause 20 requires a Minister of the Crown to obtain the agreement of the Scottish Ministers before making a recommendation for the appointment to the BBC Trust of the ordinary member who will hold the Scottish post. Clause 21 extends the powers and responsibilities of the Scottish Ministers with regard to the Gaelic Media Service.
19. Clause 22 requires that the Scottish Ministers are consulted with regard to the appointment of the Scottish Commissioner to the Crown Estate Commissioners.¹⁶
20. Clause 23 devolves powers from the Secretary of State to the Scottish Ministers as regards the Misuse of Drugs Act 1971.
21. Clauses 24 to 26 devolve powers to the Scottish Minister in the area of road traffic (specifically as regards drink-driving limits and speed limits).
22. **There is nothing in Part 2 of the Bill that raises an issue of constitutional concern that should be brought to the specific attention of the House.**

Part 3 of the Bill (Finance)

23. Three major changes are made by this part, as follows.
24. First, part 4 of the Scotland Act 1998 provides that the Scottish Parliament may adjust (by up to three percentage points) the basic rate of income tax for Scottish taxpayers. This power has never been exercised. It is known as the "Scottish variable rate". The Bill will repeal Part 4 of the Scotland Act 1998 and will replace powers with regard to the Scottish variable rate with a new power to set a rate of income tax for Scottish taxpayers (clauses 28 to 32). This will operate as follows: the rates of income tax set annually by the United Kingdom Government will be reduced for Scotland by 10p in the pound. The Scottish Parliament will then levy a single rate of income tax

¹³ See <http://www.scotland.gov.uk/About/supreme-court-review>. This is the review group's initial report. We understand that a final report may be published later in the year.

¹⁴ Convention Rights Proceedings (Amendment) (Scotland) Act 2009.

¹⁵ *Somerville v Scottish Ministers* [2007] UKHL 44.

¹⁶ See further below on the Crown Estate.

which will apply in Scotland in addition to the UK rate. The Scottish Parliament could choose a 10% Scottish rate (which would restore the overall rate of income tax back to the levels for the rest of the UK) or it could choose a higher or a lower rate. Under the Bill the Scottish Parliament will be able to choose only a single rate, which will apply to all the UK rates of income tax. Other elements of the UK's income tax structure (thresholds, allowances and the like) will remain the exclusive responsibility of the United Kingdom Government (and Parliament).

25. Secondly, two taxes are devolved: namely, stamp duty and the landfill tax (clauses 33 to 36). That is to say, these UK taxes will cease to be collected in Scotland and, in their place, the Scottish Parliament may legislate for an alternative. The Calman Commission had recommended that, in addition to these taxes, two further taxes should be devolved: namely, the aggregates levy and air passenger duty. In their White Paper¹⁷ the Government explained why they did not propose to implement these proposals for the time being. Clause 28 of the Bill will, if enacted, introduce a new section 80B into the Scotland Act 1998, under which further taxes may in the future be devolved (by Order in Council, subject to the approval of both Houses of Parliament in Westminster and of the Scottish Parliament).¹⁸
26. Finally, the borrowing powers of the Scottish Ministers are extended, subject to limits set by HM Treasury (clause 37).
27. The Scottish Parliament Scotland Bill Committee reported in March 2011¹⁹ that the result of these changes would be that the Scottish Parliament will have control over about one third of its revenues “to complement the virtually complete spending discretion it already has”.²⁰ The clear purpose behind these provisions is to extend the degree to which the Scottish Parliament (and Scottish Ministers) are responsible for raising (as well as for spending) public money and, thereby, to increase the extent to which they are held accountable for this by the people of Scotland. The aim, in the words of the House of Commons Scottish Affairs Committee, is to tackle the “strong element of both a grievance and a dependency culture in Scottish politics”.²¹ The Secretary of State for Scotland said in a Ministerial Statement on 13 June 2011 that “the Bill will provide Scottish Ministers with a total of £12 billion worth of financial powers, and it represents the largest ever transfer of financial power from Westminster to Scotland”.
28. The proposals in part 3 are the most politically contested of the measures contained in the Bill. The Scottish Government consider that they do not go far enough to deliver fiscal autonomy for Scotland. **Notwithstanding this political controversy, there is nothing in Part 3 of the Bill that raises an issue of constitutional concern that should be brought to the specific attention of the House.**

Further issues

29. The Scottish Government have said that the Scotland Bill should be amended in six ways. Three of these were made clear prior to the May

¹⁷ Strengthening Scotland's Future *op. cit.*, p 32.

¹⁸ Under the Scotland Act 1998 this form of dual parliamentary approval is known as “Type A” procedure: see Schedule 7 to the Act, para 2.

¹⁹ Above, para 17.

²⁰ *Ibid.*

²¹ Above, p 4.

election; three of these appear to have been added since then. The first three are that Scotland should have control of corporation tax and of revenues from the Crown Estate in Scotland, and that Scottish Ministers should have new capital-borrowing powers. One of these has now been provided for in the Bill (see clause 37 on borrowing powers). On corporation tax, the Calman Commission rejected the notion that this tax should be devolved.²² It is under consideration with regard to Northern Ireland, however, and the House of Commons Northern Ireland Affairs Committee reported in May 2011 that “In principle, we support the devolution of the power to vary corporation tax to the Northern Ireland Executive”.²³ It may be, therefore, that this issue will be re-opened as regards Scotland, too. On the Crown Estate, this is a matter that seemingly remains contentious between the UK and the Scottish Governments (this was recognised, for example, by the Scottish Parliament Scotland Bill Committee).²⁴ The House of Commons Scottish Affairs Committee is currently undertaking an inquiry into the matter.

30. The three additional matters raised more recently by the Scottish Government are that powers should be devolved to Scotland with regard to broadcasting and control of alcohol duties, and that the Scottish Government should be accorded greater influence in Europe. In response to these various demands, the Secretary of State stated in the House of Commons as follows: “the Scottish Government have asked for further amendments to the Bill. We have made it clear that we will listen and that we are willing to consider further amendments if they satisfy some key tests. First, any further amendments must be based on detailed proposals. We must be convinced, by evidence and detailed analysis ... Secondly, any further amendments must demonstrate that they will deliver clear benefits to Scotland, without prejudice to the rest of the United Kingdom. Thirdly, any further amendments must generate cross-party consensus, which the measures set out in the Bill have achieved.”²⁵ **We endorse the first two of these tests, and we ask the Government to specify what they mean in this context by “cross-party consensus”.**
31. Finally, the House may wish to note that there are two big issues that the Scotland Bill does not address (these omissions are deliberate). The first is the “West Lothian Question”, on which the Coalition Agreement undertook to establish a commission, which, to date, has not yet been established. The second is the calculation of the block grant according to the Barnett formula. Commentators seem agreed that the Barnett formula will one day need to be re-calibrated,²⁶ but the Government’s view is that this is not the time to undertake such a task.²⁷

²² Above, para 3.113.

²³ Northern Ireland Affairs Committee, 1st Report (2010–2012): *Corporation Tax in Northern Ireland* (HC Paper 558), para 41.

²⁴ *Op. cit.*, paras 164–6.

²⁵ HC Deb 21 June 2011 col 284.

²⁶ See Select Committee on the Barnett Formula, Report (2008–2009) (HL Paper 139). See also, the Government response to this report (Cm 7772).

²⁷ Lord De Mauley has informed the House that “The Government have no plans to change the Barnett formula at present but we will continue to keep all aspects of public spending under review” (HL Deb 15 June 2011 col 870).