

SCOTLAND BILL

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes relate to the Scotland Bill as introduced in the House of Commons on 30 November 2010. They have been prepared by the Scotland Office in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
2. The Notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause does not seem to require any explanation or comment, none is given.

BACKGROUND AND SUMMARY

3. The Bill makes changes to the devolution settlement for Scotland and gives effect to the recommendations as set out in the Commission on Scottish Devolution's (Calman Commission) final report, *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century* published in June 2009. The Bill follows the Coalition Government's commitment to 'implement the proposals of the Calman Commission' in *The Coalition: Our Programme for Government* published in May 2010. A Command Paper setting out the Government's response to the non-legislative recommendations of the report as well as any areas where the Government will not proceed to legislation, is published at the same time.
4. The Bill also makes a number of technical amendments to the Scotland Act 1998 not related to the Calman Commission's report, but which will update the operation of the devolution settlement.
5. The Bill achieves many of its aims by way of amendment to the Scotland Act 1998, which will be referred to as "the 1998 Act" throughout these Explanatory Notes.

OVERALL STRUCTURE OF THE BILL

6. The Bill has 39 clauses (and 5 Schedules).

TERRITORIAL EXTENT AND APPLICATION

7. The Bill extends to the whole of the United Kingdom.

SEWEL CONVENTION

8. At introduction, this Bill contains provisions that trigger the Sewel Convention. As the Bill changes the devolution settlement for Scotland, the Bill contains provisions which alter the legislative competence of the Scottish Parliament (for example, clause 11 relating to air weapons) and provisions which alter the executive competence of the Scottish Ministers (for example, clause 20 relating to the power to prescribe drink-driving limits). The Sewel Convention provides that Westminster will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament.

COMMENTARY ON CLAUSES (AND SCHEDULES)

PART 1: THE PARLIAMENT AND ITS POWERS

Clause 1: Administration of elections

9. This clause transfers certain powers relating to Scottish Parliament elections, which are currently exercisable by the Secretary of State, to the Scottish Ministers. Section 12 of the 1998 Act currently confers powers to regulate the conduct of Scottish Parliament elections on the Secretary of State. These powers have most recently been exercised in the Scottish Parliament (Elections etc.) Order 2010, which was laid before the Westminster Parliament in draft on 18 October 2010.

10. *Subsection (2)* amends section 12(1)(a) and (b) to give the Scottish Ministers the powers to make provisions on the conduct of the Scottish Parliament elections, the questioning of such elections and the consequences of irregularities. The Scottish Ministers are required to consult the Secretary of State before exercising these powers (see *subsection (7)*). The powers of the Scottish Ministers do not extend to those provisions (in particular, in relation to the franchise) which the Secretary of State may make under new section 12A. Section 12(1)(c) is omitted, as the Secretary of State will retain the power to make provisions on the return of Scottish Parliament members other than at an election (see section 12A(1)(d), inserted by *subsection (9)*).

11. *Subsection (3)* amends section 12(2) which clarifies the scope of the order-making powers of the Scottish Ministers to make provisions under section 12(1)(a). Section 12(2)(d) allows Scottish Ministers to combine polls of the Scottish Parliament with other devolved elections where the polls are held on the same day. The powers to combine polls of the Scottish Parliament with UK Parliament or European parliamentary elections are dealt with in clause 2 and are retained by the Secretary of State. The provisions in section 12(2)(b), (e) and (f), which are omitted by this clause, are also retained by the Secretary of State (see sections 12A(1)(b)-(c) and 12A(2)(a) inserted by *subsection (9)*).

12. Section 12(4)(a), which is not amended by the clause, enables the Scottish Ministers to apply established statutory procedures for elections to Scottish Parliament elections, subject to any necessary alterations. Section 12(4)(b) and (c) are replaced by new section 12A(4).

13. *Subsection (6)* enables the Scottish Ministers to make orders as regards the designation of the regional returning officer.

14. *Subsection (9)* introduces new section 12A, which sets out the powers to make provisions about elections that continue to be exercisable by the Secretary of State.

15. Section 12A(1) provides that the Secretary of State may make provision about the registration of electors. By virtue of section 12A(2), this includes disregarding the alterations in a register of electors and other provisions about the content of a register or the effect of registration, but does not include provision about supply or dealing with the register, which may be made by the Scottish Ministers under section 12(2)(a).

16. The Secretary of State may also make provision for modifying the application of section 7(1) of the 1998 Act where a constituency poll is abandoned or notice of it countermanded (equivalent of the current section 12(2)(e)), for modifying section 8(7) to ensure the allocation of the correct number of seats for the region (equivalent of the current section 12(2)(f)), and as to the return of members otherwise than at an election (equivalent of the current section 12(1)(c)).

17. Under section 12A(3), modifications may be made to section 10(4) and (5) of the 1998 Act (which relate to the procedure for replacing regional MSPs who stood on a regional party list). This is the equivalent of current section 12(3).

18. Sections 12A(4)(a) and (b) confer on the Secretary of State the powers about the application and modification of electoral law which are currently provided under sections 12(4)(a) and (c) of the 1998 Act.

Clause 2: Combination of polls at Scottish Parliamentary and other reserved elections

19. This clause amends section 15 of the Representation of the People Act 1985 so as to require that, where Scottish Parliamentary general elections and UK or European

Parliamentary general elections are held on the same day, they are to be taken together. Under section 15(5), the Secretary of State is given the power to make such provision as he thinks fit in connection with the combination of polls. This might include making modifications to the rules which would otherwise apply to the conduct of those elections to ensure that the two polls being taken together are subject to consistent rules. As a result of the amendment made by clause 2, this power extends to a combination of polls which includes a Scottish Parliamentary general election. *Subsection (3)* amends section 15(3) so that the elections other than general elections which returning officers have discretion to combine under section 15(2) include Scottish Parliament by-elections.

Clause 3: Supplementary and transitional provision about elections

20. *Subsections (2) and (3)* make procedural provision in relation to the subordinate legislation powers which are conferred on the Scottish Ministers and Secretary of State under clause 1. An order made by the Scottish Ministers under section 12 of the 1998 Act is subject to the affirmative procedure set out in section 29 of the Interpretation and Legislative Reform (Scotland) Act 2010. This means that it may not be made unless it has been laid in draft before, and approved by, the Scottish Parliament. Regulations made by the Secretary of State under new section 12A may not be made unless a draft of the regulations have been laid before, and approved by, both Houses of the Westminster Parliament. This is consistent with the procedure which applies to orders made by the Secretary of State under the current section 12 of the 1998 Act.

21. *Subsection (4)* amends subsection 7(2)(g) of the Political Parties, Elections and Referendums Act 2000 ('PPERA') so that Scottish Ministers and the Secretary of State are both required to consult the Electoral Commission before exercising the powers to make subordinate legislation in sections 12 and 12A of the 1998 Act which are conferred by clause 1.

22. *Subsection (5)* amends subsection 8(2) of PERPA so that Scottish Ministers may only exercise their powers under section 12(2)(c) in relation to the limitation of election expenses on the recommendation of the Electoral Commission. This constraint is subject to an exception in relation to provision which is made purely to take account of inflation.

23. *Subsections (6) to (11)* make transitional and savings provisions in connection with the transfer of powers in section 12 from the Secretary of State to the Scottish Ministers.

Clause 4: Presiding Officer and deputies

24. This clause amends section 19 of the 1998 Act to allow the Parliament, at any time, to elect one or more deputies in addition to the two deputies who have to be appointed by virtue of section 19(1). This will allow the Parliament to elect additional deputies if and when it is appropriate, for example, if a deputy or the Presiding Officer is ill. These additional deputies may hold office for a shorter period than deputies

appointed under section 19(1) (see *subsection (4)*).

25. The clause also relaxes the existing requirement in section 19(1) on the Parliament to appoint a Presiding Officer and two deputies at its first meeting. Instead, it requires that the Parliament must appoint these officers before it conducts any other proceedings (other than its members taking the oath of allegiance) and, in any event, within 14 days of the election.

26. The clause also amends Schedule 3 to the 1998 Act to require the standing orders to make provision to ensure that all the available officers (that is, those of the Presiding Officer and the deputies who are at any time able to act) do not all represent the same political party.

Clause 5: Scottish Parliamentary Corporate Body

27. This clause amends section 21(2)(b) of the 1998 Act to allow for a minimum of four members of the Scottish Parliament to be appointed as members of the Scottish Parliamentary Corporate Body (SPCB). Currently, the number of MSP members of the SPCB is fixed at four. Any increase in the number of SPCB members will be implemented by a change to the standing orders of the Scottish Parliament.

Clause 6: Bills: statements as to legislative competence

28. This clause amends section 31(1) of the 1998 Act so as to require anyone in charge of a Bill, not just Ministers, to make a statement on or before introduction of the Bill, that the Bill is within the Parliament's legislative competence. The new requirement will apply to backbench MSPs introducing Members Bills, committee convenors introducing Committee Bills and private individuals and organisations introducing Private Bills.

Clause 7: Partial suspension of Acts subject to scrutiny by Supreme Court

29. This clause permits a new procedure under which a Bill may be given Royal Assent where only part of the Bill is subject to a reference to the Supreme Court under section 33 of the 1998 Act. If a Bill is given Royal Assent with only some of its provisions being subject to a reference, those provisions would have no effect until the decision on the reference is made.

30. Currently, under section 32(2)(b) of the 1998 Act, the Presiding Officer of the Scottish Parliament is prohibited from submitting a Bill for Royal Assent if the Advocate General, the Lord Advocate or the Attorney General has referred the Bill to the Supreme Court under section 33 of the 1998 Act. This is so even if just one provision of it is considered to be outwith the competence of the Scottish Parliament.

31. This clause amends the 1998 Act to introduce the concepts of a "limited reference" and a "general reference" to the Supreme Court. New section 33(6) of the 1998 Act (inserted by *subsection (5)*) defines "limited reference" as being a reference to the Supreme Court in which some provisions of the Bill are specified as being unaffected by the reference. A general reference is any other reference (i.e. one in

which the whole Bill is referred to the Court). It is likely that a general reference may be used in relation to short or single purpose Bills for example.

32. A general reference corresponds to a reference under the current section 33. *Subsections (3), (4), (7), (8) and (9)* therefore make minor amendments to the 1998 Act so that the existing provision made in relation to a Bill after a reference has been made apply only in relation to general references. The effect of the amendment made by *subsection (3)* is that a Bill which is subject to a limited reference may be sent for Royal Assent.

33. *Subsection (6)* introduces new section 33A into the 1998 Act, which makes detailed provision in relation to limited references.

34. New section 33A(2) provides that if a limited reference is made, then the provision(s) affected by the reference will not come into force when the Bill becomes an Act of the Scottish Parliament, except in accordance with an order of the Scottish Ministers made under section 33A(6).

35. New section 33A(4) requires the Presiding Officer to publish notice of a limited reference in the Edinburgh Gazette and in such other way as the Presiding Officer considers appropriate.

36. New section 33A(5) provides that the Queen's Printer for Scotland may also publish notice of the limited reference in ways he considers appropriate.

37. New section 33A(6) confers on the Scottish Ministers power to make whatever order they consider appropriate in relation to the coming into force of the affected provisions if the Supreme Court determines that the provisions referred to it are within the legislative competence of the Scottish Parliament. However, this power is subject to any order that may be made by the Court. Any order made by the Scottish Ministers is also subject to annulment in the Scottish Parliament (see *subsection (10)*), which inserts the appropriate reference into Schedule 7 to the 1998 Act.

Clause 8: Members' Interests

38. This clause amends section 39 of the 1998 Act to give greater flexibility to the Scottish Parliament when making provision for a members' interests regime.

39. Section 39 imposes a statutory duty upon the Scottish Parliament to make provision by or under an Act of the Scottish Parliament about members' interests. Provision is currently made in the Interests of Members of the Scottish Parliament Act 2006.

40. *Subsection (2)* substitutes new subsections for subsections (5) to (7) of section 39.

41. New subsection (4A) confers on the Scottish Parliament the power to create

exceptions to the requirements or prohibitions imposed by the provisions made in pursuance of subsections (2) to (4) of section 39. For example, this would enable the Scottish Parliament to make provision, if an excuse for non-compliance is considered to be reasonable by the Parliament, that there may be a finding that there has not been a failure to comply or a contravention.

42. New subsection (5) allows the Scottish Parliament to make provision to impose on a member such sanctions as it considers appropriate if a member fails to comply with or contravenes any provision made in pursuance of subsections (2) to (5). It continues to be able to make provision to exclude members from the proceedings of the Parliament in similar circumstances.

43. New subsection (5A) allows provision made under subsection (5) to include provision that a sanction is not to be imposed in certain specified circumstances. For example, this would enable the Scottish Parliament to make provision, if it considers it appropriate to do so, for a defence of reasonable excuse where there is a failure to comply or a contravention of the requirements stated under section 39(2) to (5).

44. Section 39(6) currently provides that any Member of Parliament who contravenes provision made in pursuance of subsections (2) to (4) is guilty of an offence. New subsection (6) replaces this with a power for the Parliament to make provision in this regard. The penalty for the offence remains the same (see new subsection (7)).

Clause 9: Constituencies, regions and regional members

45. This clause repeals sections 1(2) and (3) of the Scottish Parliament (Constituencies) Act 2004 ('the 2004 Act') as these transitional provisions are spent and no longer required.

46. *Subsection (2)* introduces Schedule 1 which contains amendments reproducing the effect of modifications contained in Schedule 2 to the 2004 Act and makes some other minor amendments to Schedule 1 to the 1998 Act.

Clause 10: Continued effect of provisions where legislative competence conferred for limited period

47. This clause amends section 30 of the 1998 Act, which gives Her Majesty the power by Order in Council to make any modifications of Schedule 4 or 5 which She considers appropriate. It would be possible for such an Order in Council to specify that the modification ceases to have effect at some point in the future, thereby giving the Scottish Parliament legislative competence in relation to a matter for a limited period of time (known as a 'sunsetting clause'). Clause 10 inserts new subsections (5) and (6) into section 30 so that, where an Order in Council includes a sunsetting clause, it may provide that any Act of the Scottish Parliament which is made prior to the sunsetting should continue to have effect notwithstanding the change in the Scottish Parliament's legislative competence.

Clause 11: Air weapons

48. This clause amends Section B4 of Part 2 of Schedule 5 to the 1998 Act to create an exception to that reservation. Section B4 reserves the subject matter of Firearms Acts 1968 to 1997.

49. The amendment gives legislative competence to the Scottish Parliament in relation to the regulation of air weapons within the meaning of section 1(3)(b) of the Firearms Act 1968.

50. The Secretary of State retains the power under section 53 of the Firearms Act 1968 and section 1(4) of the Firearms (Amendment) Act 1988 to make rules and orders relating to specially dangerous weapons.

Clause 12: Insolvency

51. This clause returns to the UK Parliament the responsibility for making law in respect of certain elements of the process for the winding up of companies in Scotland. This responsibility had previously been a matter devolved to the Scottish Parliament under the 1998 Act, which divided responsibility for winding up between the two Parliaments. Accordingly, *subsection (4)* omits the first and second paragraphs of the existing Exceptions to the reservation (which concern the process of winding up, effect on diligence, prior transactions and the insolvency of social landlords). The change made by this clause will leave the UK Parliament with sole responsibility for all aspects of the law covering windings up that take place in Scotland.

52. No change is being made to the responsibility for personal insolvency and receiverships, which are procedures that remain devolved to the Scottish Parliament; or to administrations and company voluntary arrangements, which are procedures that remain reserved to the UK Parliament.

53. This change will allow the UK Parliament, when amending the law on winding up in England and Wales, also to amend the law in Scotland (where appropriate, given the different legal systems).

54. Clause 12 also introduces Schedule 2, which makes consequential and some other minor amendments.

Clause 13: Regulation of the health professions

55. This clause amends Section G2 of Part 2 of Schedule 5 to the 1998 Act to return to the UK Parliament the responsibility for regulating health professionals in Scotland.

56. Section G2 of Part 2 of Schedule 5 to the 1998 Act provides that, subject to two exceptions (which are not relevant for these purposes), the regulation of the health professions is a reserved matter and therefore outside the legislative competence of the Scottish Parliament. “The health professions” are defined in

Section G2 as meaning the professions regulated by the enactments listed there (for example, the Pharmacy Act 1954 and the Dentists Act 1984).

57. The effect of this is that the regulation of any health professions which are not regulated by the enactments listed in Section G2 is within the legislative competence of the Scottish Parliament.

58. To give effect to the recommendation of the Calman Commission on this point, *subsection (2)* of the clause amends the definition of "The health professions" in Section G2 to add to the reservation the regulation of any other profession concerned (wholly or partly) with the physical or mental health of individuals, except any profession regulated by the Regulation of Care (Scotland) Act 2001 (social workers). This provision has the effect of re-reserving to the UK Parliament the regulation of those health professions that are currently within the legislative competence of the Scottish Parliament, including the regulation of any health professions which may be brought into regulation in the future.

59. *Subsections (3) to (6)* of the clause make consequential amendments to the legislation relating to the health professions that are regulated by the Health Professions Council, the General Dental Council, and the General Pharmaceutical Council (the regulators that regulate the few devolved professions) in accordance with the move to re-reserve the regulation of the health professions that are currently devolved to the Scottish Parliament.

Clause 14: Antarctica

60. This clause re-reserves the regulation of activities in Antarctica. The effect of this clause is that it will no longer be within the legislative competence of the Scottish Parliament to pass Acts which relate to the regulation of activities in Antarctica. The Scottish Parliament has never in fact exercised this competence.

61. *Subsection (2)* provides that the amendment to Schedule 5 takes effect retrospectively, so that it is regarded as having effect from the date that Schedule 5 came into force. The effect of this provision is that executive functions in relation to the regulation of activities in Antarctica are regarded as never having transferred to the Scottish Ministers under section 53 of the 1998 Act (where they would otherwise have been exercisable within devolved competence) and always having been exercisable by Ministers of the Crown.

PART 2: MINISTERS AND THEIR POWERS

Clause 15: The Scottish Government

62. *Subsection (1)* renames the Scottish Executive as the Scottish Government. This empowers the Scottish administration to use the term Scottish Government in formal, legal documents, following the increasing use of that term by the current

Scottish administration and others in the public domain.

63. *Subsection (2)* amends the 1998 Act to reflect this renaming.

Clause 16: Time limit for human rights actions against Scottish Ministers etc

64. This clause inserts a time limit for actions against the Scottish Ministers under the 1998 Act where it is claimed that they have acted incompatibly with Convention rights.

65. In the *Somerville* case in 2007, the House of Lords held, in relation to breaches of Convention rights by Scottish Ministers under the 1998 Act, that actions for such breaches were not subject to the same statutory time limit of twelve months as the Human Rights Act. As a result, there was no time limit on when proceedings could be brought against Scottish Ministers.

66. In response to this, the Scotland Act 1998 (Modification of Schedule 4) Order 2009 (S.I. 2009/1380) was made. This enabled the Scottish Parliament to pass the Convention Rights Proceedings (Amendment) (Scotland) Act 2009 (asp 11), giving a time limit to proceedings brought against Scottish Ministers. But this was appropriate only as a temporary solution. *Subsection (6)* makes essentially the same amendment as was made by the 2009 Act of the Scottish Parliament. Accordingly, the 2009 Order is revoked and the Act of the Scottish Parliament is repealed (see *subsections (2) to (4)*).

Clause 17: BBC Trust member for Scotland

67. This clause inserts new section 90A into the 1998 Act, requiring 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. This process is governed by the Royal Charter for the continuance of the British Broadcasting Corporation.

68. Appointments to the BBC Trust and the designation of members are made by Her Majesty by Order in Council, in accordance with articles 13 and 14 of the Charter. The Secretary of State for Culture, Olympics, Media and Sport makes the recommendation of who should be appointed by Order in Council to the BBC Trust, including the ordinary member who holds the Scottish post.

Clause 18: Scottish Crown Estate Commissioner

69. *Subsection (2)* of this clause amends paragraph 1 of Schedule 1 to the Crown Estate Act 1961 so as to require that one of the Crown Estate Commissioners be appointed as the Scottish Commissioner. Commissioners are appointed by Her Majesty by warrant under the Royal Sign Manual. *Subsection (3)* inserts a new paragraph 1(4A) into Schedule 1 which requires the Chancellor of the Exchequer to make any recommendation to Her Majesty as to whom to appoint as the Scottish Commissioner, and to consult the Scottish Ministers before making that

recommendation.

Clause 19: Misuse of drugs

70. This clause amends provisions of the Misuse of Drugs Act 1971 ('MDA') which relate to the circumstances in which a doctor may prescribe controlled drugs to a person who is addicted to certain drugs. Under section 10(2)(i) of the MDA, the Secretary of State may make regulations to prohibit a doctor from administering, supplying or authorising the administration or supply of certain controlled drugs to a person addicted to controlled drugs, except under and in accordance with a licence issued in pursuance of the regulations. This is known as an 'addicts licence'. The current regulations made under this section are the Misuse of Drugs (Supply to Addicts) Regulations 1997 (S.I. 1997/1001).

71. *Subsections (2)* amends section 10(2)(i) of the MDA. The effect is to give Scottish Ministers the powers to issue addicts licences to doctors acting in Scotland. By virtue of the amendments to section 30 of the MDA in *subsection (6)*, the Scottish Ministers may set terms and conditions in addicts licences and modify or revoke existing licences. The power to make the regulations will continue to be exercisable by the Secretary of State. It is anticipated that the existing Regulations will be amended separately to reflect the change being made by this clause.

72. Section 13(1) of the MDA allows the Secretary of State to give a direction to any doctor who has contravened certain provisions of the MDA relating to drug addicts. A direction under section 13(1) prohibits the doctor from prescribing, administering or supplying or authorising the administration or supply of such controlled drugs as may be specified. *Subsection (3)* further amends the MDA so that the power of direction in section 13(1) is exercisable by the Scottish Ministers rather than the Secretary of State where the contravention in question relates to activities which require an addicts licence and took place in Scotland.

73. Section 14 of the MDA gives the Secretary of State the power to refer cases about directions under section 13 to a tribunal or advisory body constituted under Schedule 3 to the MDA. *Subsections (4) and (5)* provide that those powers are exercisable by the Scottish Ministers where the direction in question is one which would be made, by virtue of *subsection (3)*, by the Scottish Ministers. *Subsection (7)* makes a consequential amendment about the procedure for making tribunal rules.

Clause 20: Power to prescribe drink-driving limits

74. This clause amends sections 8(3) and 11(2) of the Road Traffic Act 1988 ('RTA') to give Scottish Ministers powers to make regulations in relation to the prescribed alcohol limit which applies when driving in Scotland. The RTA includes two offences which apply where the driver of a motor vehicle has consumed so much alcohol that he exceeds the prescribed limit. These are: the offence of causing death by careless driving when under the influence of drink (section 3A(1)(b)) and the offence of driving or being in charge of a motor vehicle with an alcohol concentration

above the prescribed limit (section 5(1)).

75. Under the RTA, Scottish Ministers currently have no powers in relation to the prescribed alcohol limit for driving in Scotland. The amendment to section 11(2) of the RTA and the new subsection (2ZA) provided for by *subsections (5) to (7)* will enable Scottish Ministers to change the prescribed alcohol limit for drivers on Scottish roads.

76. Section 8(2) of the RTA provides a right for certain drivers who have given an evidential sample in breath to substitute for it a sample of blood or urine. This right applies to drivers whose evidential breath sample is not more than the amount specified. Section 8(3) of the RTA allows that amount to be varied – which is needed so that a relationship can be maintained with the prescribed limit under section 11(2) if the latter is changed. The amendment to section 8(3) and the new subsection (4), provided for by *subsections (2) to (4)*, will give Scottish Ministers the power to vary that amount in relation to drivers suspected of having committed a relevant offence in Scotland.

Clause 21: Speed limits

77. This clause amends the Road Traffic Regulation Act 1984 ('RTRA') to give the Scottish Ministers the power to determine the level of the Scottish national speed limit and the power to make regulations to specify traffic signs to indicate that limit.

78. Scottish Ministers already have power to make regulations under section 17(2) and (5) of the RTRA, but only with respect to any particular special road (see the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 1999 (S.I. 1999/1750)). In addition, Scottish Ministers have powers under section 88(1)(a) and (4) of the RTRA to make or continue an Order but only in relation to any road specified in the Order (see the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2000 (S.I. 2000/1563)). For the remaining functions in those subsections, the Secretary of State is required to consult Scottish Ministers (by virtue of S.I. 1999/1750).

79. *Subsections (2) to (4) and (8) to (12)* amend sections 17 and 88 of the RTRA to give Scottish Ministers unrestricted powers to set the speed limits on Scottish roads, without the need to consult the Secretary of State.

80. Additionally, *subsection (6)* inserts new subsection (2A) into section 64 of RTRA to enable the Scottish Ministers to make regulations to specify signs for a Scottish national speed limit. New subsection (2B) requires that Scottish Ministers have the agreement of the Secretary of State to make these regulations. The "Scottish national speed limit" is then defined in new subsection (2C).

Clause 22: Speed limits (supplementary)

81. *Subsections (1) to (3)* of this clause make amendments to the subordinate legislation made under section 63 of the 1998 Act in consequence of the transfer of

functions related to speed limits provided for in clause 21.

82. *Subsections (4) to (7)* of the clause makes transitional provision in relation to the transfer of functions provided for in clause 21.

Clause 23: Implementation of international obligations

83. Clause 23 makes provision so that a single piece of subordinate legislation, made by UK Ministers or following consideration by the UK Parliament, dealing with the observation or implementation of international obligations can have effect throughout the United Kingdom, irrespective of whether or not it deals with matters falling within devolved competence.

84. *Subsection (2)* inserts a new section 57A into the 1998 Act to allow UK Ministers, concurrently with Scottish Ministers, to implement international obligations in relation to matters within devolved competence. The 1998 Act already allows UK Ministers to act concurrently with Scottish Ministers to implement European Union obligations in areas that are devolved to the Scottish Government. New section 57A will allow UK Ministers to implement international obligations using a similar approach.

85. *Subsection (3)* inserts a new section 118(4A) into the 1998 Act, which qualifies section 118(4). Section 118(4) provides that where subordinate legislation dealing with devolved matters is made, confirmed or approved under a pre-commencement enactment, and the pre-commencement enactment concerned provides for some form of Parliamentary procedure in relation to the subordinate legislation, references in the enactment to “Parliament” (or either House) are to be read as references to the “Scottish Parliament”. The new section 118(4A) effectively provides that any requirement of Parliamentary procedure will be satisfied if either:

(a) the requirements of the pre-commencement enactment are complied with subject to section 118(4) i.e. the procedure is carried out in the Scottish Parliament; or

(b) the requirements of the pre-commencement enactment are complied with disregarding the modifications made by section 118(4) i.e. the procedure is carried out in the UK Parliament.

86. For example, an Order in Council made under the International Organisations Act 1968 (which section 10 of that Act requires to be laid before Parliament and approved by a resolution of each House of Parliament) that deals with devolved matters will be properly made *either* if it is laid and approved by the Scottish Parliament (under section 118(4) of the 1998 Act) *or* if it is laid before and approved by both Houses of Parliament (under section 118(4) as modified by section 118(4A)). This means that it will be possible to make a single Order in Council having UK extent and dealing with both reserved and devolved matters, rather than having two such Orders, one dealing with reserved matters (made following consideration by the

UK Parliament) and one with devolved (following consideration by the Scottish Parliament).

87. The expressions “pre-commencement enactment” and “international obligations” are defined in, respectively, section 53(3) and section 126(10) of the 1998 Act.

PART 3: FINANCE

Clause 24: Taxation: introductory

88. This clause provides the structure within which the Scottish Parliament may legislate on tax. The UK Government is providing for the Scottish Parliament to set a rate of income tax for Scottish taxpayers; it is devolving stamp duty land tax and landfill tax to Scotland and it is making provision for new devolved taxes.

89. Section 28 of the 1998 Act gives the Scottish Parliament the power to make laws, to be known as Acts of the Scottish Parliament, within the limits set out in the 1998 Act. Sections 29 and 30 of, and Schedule 5 to, that Act specify that tax policy is outside the Scottish Parliament’s legislative competence, although an exception is made for local taxes (e.g. council tax and business rates).

90. *Subsection (1)* introduces the amendments made by the clause to the 1998 Act.

91. *Subsection (2)* inserts Chapter 1 (new sections 80A and 80B) of the new Part 4A, the remaining Chapters of which deal with income tax and each of the devolved taxes.

92. Section 80A(1)(a) of the new Part 4A introduces Chapter 2, which provides that the Scottish Parliament may set a rate of income tax to be paid by Scottish taxpayers.

93. Section 80A(1)(b) introduces Chapters 3 and 4, which provide that the Scottish Parliament may legislate in respect of the devolved taxes (that is, taxes on land transactions and disposals of waste to landfill).

94. Section 80A(2) provides that the Part may impose restrictions on that power to legislate in relation to devolved taxes.

95. Section 80A(3) provides that a devolved tax introduced by the Scottish Parliament may not be imposed where to do so would be incompatible with the UK’s international obligations.

96. Section 80A(4) defines a “devolved tax” as meaning a tax specified in the new Part 4A as a devolved tax.

97. Section 80B(1) provides that Part 4A may be amended by Order in Council to provide for additional devolved taxes or to modify the provisions in relation to devolved taxes.

98. Section 80B(2) provides that an Order in Council under this section may modify any enactment, prerogative instrument or any other instrument or document in connection with other provisions made by the Order. Section 80B mirrors the power in section 30 of the 1998 Act to make changes to Schedules 4 and 5 of the Act.

99. *Subsection (3)* of the clause amends section 93 (agency arrangements) of the 1998 Act to provide that the collection and management of a devolved tax is a specified function of Scottish Ministers. This will enable the Scottish Ministers to contract-out the collection and management of devolved taxes, should they wish to do.

100. *Subsection (4)* includes “devolved tax” in section 127 (index of defined expressions) of the 1998 Act.

101. *Subsection (5)* provides that devolved taxes, including their collection and management, are excepted from the reserved tax matters, bringing these taxes within the Scottish Parliament’s power to legislate.

102. *Subsection (6)* specifies the legislative procedure to be used in making any Orders in Council under section 80B, by inserting section 80B into Schedule 7 (procedure for subordinate legislation) of the 1998 Act. The Order will be subject to the Type A procedure; an Order must be laid in draft before, and approved by a resolution of, both Houses of Parliament and the Scottish Parliament.

Clause 25: Amendments relating to the Commissioners for Revenue and Customs

103. This clause amends existing legislation to enable Her Majesty’s Revenue and Customs (HMRC) to disclose information to Scottish Ministers regarding devolved taxes; to make such information confidential and subject to onward disclosure controls; and to ensure that such devolved taxes are neither a function nor an “assigned matter” of HMRC.

104. HMRC has a statutory duty of confidentiality which sets out the circumstances in which lawful disclosure of information held by HMRC can be made. Disclosure may only occur in a limited number of specific circumstances. Devolution of some areas of taxation to the Scottish Government means that amendments are needed to the Commissioners for Revenue and Customs Act 2005 to provide HMRC with the lawful ability to disclose information regarding devolved taxes. Further amendments are required to ensure that devolved taxes do not become a statutory function of HMRC but remain instead a matter for the Scottish Government.

105. The clause sets out amendments to the Commissioners for Revenue and

Customs Act 2005 and the Customs and Excise Management Act 1979 to provide for the role of HMRC in relation to devolved taxes.

106. *Subsections (2) and (3)* amend HMRC's statutory duty of confidentiality at section 18 of the Commissioners for Revenue and Customs Act 2005 so that HMRC may disclose revenue and customs information to Scottish Ministers in connection with devolved taxes.

107. *Subsection (4)* introduces an onward disclosure control forbidding further disclosure of such information without the consent of the Commissioners.

108. *Subsection (5)* makes it a criminal offence for the Scottish Ministers or any other person to unlawfully disclose information in breach of the control added by *subsection (4)*.

109. *Subsection (6) and (7)* provide that the Commissioners and officers of HMRC shall not have functions or "assigned matters" conferred on them in relation to the devolved taxes. This ensures that the Scottish Government remain wholly responsible for devolved taxes.

Clause 26: Scottish rate of income tax

110. This clause deals with the Scottish rate of income tax.

111. *Subsection (2)* provides that Part 4 of the 1998 Act is to be repealed. Part 4 provides that the Scottish Parliament may fix the basic rate of income tax for Scottish taxpayers – this is commonly referred to as the "Scottish variable rate". *Subsection (4)* provides that HM Treasury may, by order, appoint a tax year as the last year for which Part 4 is to have effect.

112. *Subsection (3)* inserts a new Chapter 2, consisting of sections 80C to 80H, into Part 4A of the 1998 Act. *Subsection (5)* provides that HM Treasury may appoint a tax year as the first tax year for which a Scottish rate resolution set under the new provisions is to have effect.

113. New section 80C confers on the Scottish Parliament a power to set a Scottish rate of income tax, for Scottish taxpayers.

114. Section 80C(1) provides that this power is exercisable by resolution.

115. Section 80C(2) provides a signpost to the reader that the rate is to be calculated under section 6(2B) of the Income Tax Act 2007. Section 6(2B) is inserted by clause 27 of this Bill.

116. Sections 80C(3) to (6) provide that a Scottish rate resolution applies for only one tax year. The resolution applies for the whole of that year and may specify only one rate, which must be a whole or a half number. The resolution must specify the

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tax year to which it applies. It must be made before the start of that tax year, but no more than 12 months before the start of that year. Standing orders must provide that only a member of the Scottish Government may move a motion for a Scottish rate resolution.

117. Section 80C(7) provides that if a Scottish rate resolution is cancelled before the start of the tax year for which it is to apply the Income Tax Acts have effect for that year as if the resolution had never been passed. The Interpretation Act 1978 defines the Income Tax Acts as meaning all enactments relating to income tax. If a resolution is cancelled it may be replaced by another Scottish rate resolution provided that that replacement resolution is passed before the start of the tax year for which it is to apply.

118. Section 80D defines a “Scottish taxpayer” for the purposes of Part 4A of the 1998 Act.

119. Section 80D(1) states that a Scottish taxpayer is an individual (and not, for example, a company or a trust) who is resident in the UK for income tax purposes and who also meets condition A, B or C.

120. Section 80D(2) sets out condition A and provides that an individual will meet condition A if they have a close connection with Scotland.

121. Section 80D(3) sets out condition B and provides that an individual will meet condition B if they do not have a close connection with any part of the UK other than Scotland and if they spend more days of that year in Scotland than in any other part of the UK.

122. Section 80D(4) sets out condition C. An individual will meet condition C if, for a whole or part of a year, that individual is a member of Parliament for a constituency in Scotland, a member of the European Parliament for Scotland or a member of the Scottish Parliament.

123. New section 80E defines what is meant by a close connection with Scotland or any part of the UK for the purposes of sections 80D(2) and 80D(3)(a).

124. Section 80E(2) applies where an individual has only one place of residence in the UK in which they live for at least part of the year. It provides that such an individual will have a close connection with the part of the UK in which that place of residence is located. If that place is in Scotland the individual will be a Scottish taxpayer. If that place is in another part of the UK, the individual will not be a Scottish taxpayer (unless they meet condition C).

125. Section 80E(3) applies where an individual has 2 or more places of residence in the UK. It provides that such an individual will have a close connection with the part of the UK in which their main place of residence is located, provided they live in

that residence for at least part of the year and provided the times when their main place of residence is in that place comprise in aggregate at least as much of the year as the times when their main place of residence is in any one other part of the UK. If the times when their main place of residence is in Scotland comprise in aggregate at least as much of the year as the times when their main place of residence is in any one other part of the UK the individual will be a Scottish taxpayer.

126. Section 80E(4) provides that, for the purposes of applying the definition of a Scottish taxpayer, a ‘place’ includes a sailing vessel and other means of transport.

127. Section 80F provides the means of determining the number of days in which an individual spends in Scotland or in another part of the UK.

128. Section 80F(1) provides that an individual spends more days in Scotland than in any other part of the UK if (and only if) the number of days in the year in which they are in Scotland at the end of the day equals or exceeds the number of days in the year in which they are in any other part of the UK at the end of the day.

129. Section 80F(2) provides an exception from the rule in section 80F(1) where an individual arrives in the UK as a passenger and, on the next day, departs from the UK without engaging in activities which are to a substantial extent unrelated to their passage through the UK.

130. Section 80G provides supplemental powers to modify enactments.

131. Section 80G(1) provides that a Treasury Order may exclude the effect of the tax-varying power in relation to any enactment, or provide that its effect is to be modified in relation to any enactment. Several tax reliefs are calculated by reference to gross income before deduction of income tax. The introduction of a Scottish rate raises a number of questions about the rate which should be used in the calculation of reliefs and of income from which tax is deducted at source. The Government wishes to discuss this with relevant stakeholders before coming to a final view on the treatment of such reliefs and, where appropriate, to deal with such matters by secondary legislation once those discussions have taken place.

132. Section 80G(2) gives HM Treasury a power to make an order modifying any enactment as they consider necessary or expedient in consequence of or in connection with the fact that the Scottish Parliament has the power to set a Scottish rate (under section 80C), in the making of any resolution, or the exercise of the order making power in subsection (1). A number of detailed technical consequential amendments are likely to be required to tax legislation as a result of the introduction of the new Scottish rate. It would not be appropriate to set such details out in primary legislation, particularly as the expected date on which the Scottish rate is set for the first time will not be for several years.

133. Section 80G(3) provides that an order made under subsection (2) may, in

particular, postpone temporarily the effect of a resolution in relation to the operation of PAYE. A fundamental part of the PAYE system is the use of tax tables by employers to calculate how much is to be deducted from their employees. If for any reason the Scottish Parliament either did not pass a resolution until shortly before the start of the tax year, or replaced one resolution with another shortly before the start of the tax year, there may be practical difficulties for HMRC, payroll providers and others in making the necessary changes required to properly operate the PAYE system before the start of the tax year. Similar problems may arise if the UK Government were not to make a decision in relation to the main rates of income tax, or to any relevant allowances, until shortly before the start of the tax year. Where such a problem arises in relation to the main rates of income tax the relevant Finance Act will normally contain a provision to deal with the impact on the PAYE system (see, for example, sections 2(3) and 4(3) of the Finance Act 2008). The power provided by section 80G(3) will allow similar provision to be made in relation to the Scottish rate.

134. Section 80G(4) provides that an order under section 80G may, to the extent that HM Treasury consider it to be appropriate, take effect retrospectively from the beginning of the year of assessment in which it is made. It is not uncommon for a Finance Act to receive Royal Assent after the start of the tax year to which it applies and for provisions made under such an Act to be given retrospective effect from the start of that tax year. This power would allow HM Treasury to make any necessary consequential amendments required as a result of such a provision.

135. New Section 80H provides that the Scottish Ministers may reimburse any Minister of the Crown or any government department for administrative expenses incurred by virtue of the new Chapter 2 at any time after the Bill receives Royal Assent. This would include both the implementation and running costs of the new Scottish rate.

Clause 27: Income tax for Scottish taxpayers

136. This clause makes amendments relating to income tax for Scottish taxpayers.

137. *Subsection (1)* of the clause introduces various amendments to the Income Tax Act 2007 (ITA 2007).

138. *Subsection (2)* of the clause inserts new sections 6(2A) to (2C) into ITA 2007.

139. Section 6(2) of ITA 2007 provides that the basic rate, higher rate and additional rate for a tax year (i.e. a year for which income tax is charged) are the rates determined as such by the UK Parliament for that year. Section 6(2A) provides that section 6(2) does not apply to the savings income of a Scottish taxpayer.

140. Section 6(2B) provides that, for the non-savings income of a Scottish taxpayer, the basic rate, higher rate and additional rate are found by:

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- Taking the rates determined under section 6(2);
- Deducting 10 percentage points; and
- Adding the Scottish rate (if any) set by the Scottish Parliament for that year.

141. Section 6(2C) is a signpost to the provisions of the 1998 Act, inserted by this Bill, about the meaning of “Scottish taxpayer” and the setting of the Scottish rate.

142. *Subsections (3) and (4)* amend sections 10 and 16 of ITA 2007. Section 10 ITA 2007 sets out how much of an individual’s income is subject to tax at the basic, higher and additional rates. Section 10 is subject to section 13 ITA 2007 which deals with dividend income (as defined by section 19 ITA 2007). Dividend income is charged at the dividend ordinary, dividend upper and dividend additional rates rather than at the main rates of income tax. The dividend income of Scottish taxpayers will continue to be charged at these rates.

143. Special rules also apply in relation to savings income (as defined by section 18 ITA 2007). Broadly speaking savings income is charged at the starting rate for savings (rather than the basic rate) on so much of an individual’s income up to the starting rate limit for savings as is savings income (see section 12 ITA 2007) and at the basic, higher or additional rate as appropriate thereafter.

144. Section 16 ITA 2007 sets out the rules for determining the extent to which a person’s income consists of savings income or dividend income and for determining the highest part of the person’s total income.

145. *Subsections (3) and (4)* make consequential amendments to sections 10 and 16 to reflect the fact that the Scottish rate does not apply to savings income.

146. *Subsection (5)* amends section 809H ITA 2007. Chapter A1 of Part 14 of ITA 2007 provides for an alternative basis of charge for individuals who are not domiciled in the United Kingdom or not ordinarily resident in the United Kingdom. Such an individual, if resident for income tax purposes in the United Kingdom, may make a claim for the remittance basis to apply. Under the remittance basis, income and gains only come within the charge to UK income tax and UK capital gains tax when they are brought into the United Kingdom. However, an individual who has been resident in the United Kingdom for at least seven of the previous nine tax years, and who wishes to be taxed on the remittance basis, is subject under section 809H(2) of ITA 2007 to a minimum charge to income tax and capital gains tax of £30,000. For the purposes of calculating income tax charged under section 809H(2), *subsection (5)* of this clause disapplies new sections 6(2A) to (2C) of ITA 2007.

147. *Subsection (6)* amends the Provisional Collection of Taxes Act 1968. That Act gives temporary statutory effect to resolutions passed by the House of Commons relating to the rate of various taxes, including income tax. This allows HMRC to

collect the tax until such time as the Finance Bill containing the relevant tax provisions receives Royal Assent and becomes law or until such time as the resolutions cease to have effect. *Subsection (6)* amends the Act so as to include a reference to the rates as calculated in relation to Scottish taxpayers by reference to new sections 6(2A) to (2C) of ITA 2007.

148. *Subsection (7)* of this clause is the commencement provision. The amendments will take effect from the beginning of the tax year appointed by order by HM Treasury under the power given by clause 26(5).

Clause 28: Scottish tax on transactions involving interests in land

149. This clause is one of a series which together provide the mechanism for bringing to an end the collection and management of stamp duty land tax (“SDLT”) in Scotland and allowing the Scottish Parliament to bring in its own land transaction tax.

- Clause 24 grants to the Scottish Parliament the power to legislate for their own devolved taxes.
- Clause 29 disappplies SDLT by excluding land transactions in Scotland from the SDLT charge, from a date to be appointed by HM Treasury.
- Clause 28 defines the scope of this devolved tax, broadly a transaction tax applying to acquisitions of interests in land in Scotland.
- Schedule 4 contains further amendments relating to the disapplication of SDLT to Scotland and provides for the supply of information about land transactions in Scotland to HMRC.

150. SDLT is a transaction tax which applies to acquisitions of a chargeable interest in land. The definition of “chargeable interest” at section 48 of the Finance Act 2003 includes an estate, interest, right or power in or over land in the United Kingdom.

151. The tax is to be fully devolved by excluding acquisitions of interests in land in Scotland from the charge to SDLT and granting a power to the Scottish Parliament to tax those acquisitions. The devolved tax will apply regardless of the residence of any party to the transaction.

152. Clause 28 introduces Chapter 3 (sections 80I and 80J) of new Part 4A of the 1998 Act (as inserted by clause 24) which provides for the devolved Scottish tax.

153. New section 80I provides for the devolved Scottish tax. Subsection (1) provides that a tax charged on certain acquisitions relating to land in Scotland is a devolved tax. Subsection (2) makes clear that such a tax may apply regardless of whether or not the transaction is effected by means of a formal document or the residence of the parties to the transaction.

154. New section 80J provides that certain transactions and statutory bodies are not subject to the devolved tax. Subsection (1) excludes transactions to the extent that they relate to land below mean low water mark. Subsection (2) excludes Ministers of the UK and devolved governments and corporate bodies associated with legislative assemblies in the UK.

155. *Subsection (2)* ensures that the devolved tax cannot apply to a land transaction to which SDLT applies and thereby links commencement of the tax to the disapplication of SDLT in Scotland under clause 29.

Clause 29: Stamp duty land tax: disapplication of UK tax

156. SDLT is a transaction tax which applies to acquisitions of a chargeable interest in land. The definition of “chargeable interest” at section 48 of the Finance Act 2003 includes an estate, interest, right or power in or over land in the United Kingdom.

157. Clause 29 provides for SDLT to be disappplied by reference to the “effective date” of a land transaction for SDLT purposes. This is normally the date on which the purchase contract is completed but may be earlier if the transaction is “substantially performed” (that is, if the consideration for the transaction is paid or the property is occupied) before this date.

158. *Subsection (1)* introduces the amendments to the SDLT provisions in Part 4 of the Finance Act 2003.

159. *Subsection (2)* amends the definition of “chargeable interests” in Section 48 by limiting it to interests in land in England and Wales or Northern Ireland.

160. *Subsection (3)* introduces Schedule 4. Part 1 of Schedule 4 contains further amendments relating to the disapplication of SDLT in Scotland and Part 2 provides for the supply of information about land transactions in Scotland to HMRC, as this information will no longer be available to HMRC from land transaction returns.

161. *Subsection (4)* applies the amendments introduced by the clause to land transactions with an effective date on or after a date appointed by HM Treasury.

162. *Subsection (5)* makes transitional provisions to ensure that SDLT continues to apply to transactions where a contract is entered into on or before the date on which the Scotland Bill receives the Royal Assent.

163. *Subsection (6)* disapplies the transitional rules in *subsection (5)* where certain events in relation to the transaction occur after Royal Assent.

Clause 30: Scottish tax on disposals to landfill

164. This clause is one of a series which, together, provides the mechanism for bringing to an end the collection and management of landfill tax in Scotland and

allowing the Scottish Parliament to bring in its own tax on disposals of waste to landfill.

165. This clause sets out the scope of the Scottish Government's power to introduce a Scottish landfill tax.

166. Currently landfill tax is charged on the disposal of waste to landfill in the UK. The UK Government has decided to fully devolve landfill tax to Scotland. Clause 31 disapplies the existing landfill tax in Scotland.

167. Together with clause 24, this clause provides the Scottish Parliament with the power to introduce a Scottish landfill tax.

168. *Subsection (1)* introduces Chapter 4 (section 80K) of new Part 4A of the 1998 Act.

169. In new section 80K:

- *Subsection (1)* provides that a tax charged on disposals to landfill made in Scotland is a devolved tax for the purposes of this part.
- *Subsection (2)* provides a definition of a disposal to landfill for the purposes of this part.

170. *Subsection (2)* refers to clause 31(4) and provides that tax cannot be charged on disposals made prior to a date to be specified by a Treasury Order.

Clause 31: Landfill tax: disapplication of UK tax

171. *Subsection (1)* introduces the amendments to the existing landfill tax provisions in Part 3 of the Finance Act 1996.

172. *Subsection (2)* limits the existing landfill tax, to disposals made in England, Wales or Northern Ireland.

173. *Subsection (3)* introduces Schedule 5, which makes amendments consequential upon the disapplication of landfill tax in Scotland.

174. *Subsection (4)* provides for the date of these changes to be set out by a Treasury Order.

Clause 32: Borrowing by the Scottish Ministers

175. This section amends sections 66 and 67 of the 1998 Act to revise the circumstances under which the Scottish Ministers may borrow to set out the main controls and limits on such borrowing.

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176. This clause enables the Scottish Ministers to borrow – subject to HM Treasury’s controls and limits - for the following purposes:

- a) to meet a ‘temporary excess of sums paid out of the Scottish Consolidated Fund (SCF) over the sums paid into the fund’; i.e. – this means that the Scottish Government can borrow to manage excessive in-year volatility of receipts, where actual income differs greatly from the forecast receipts for that month;
- b) to provide a working balance to the SCF, i.e. enough balance to ensure cash-flow;
- c) to meet the differences between forecast and outturn receipts for devolved taxes; and
- d) to fund capital expenditure.

177. The Scottish Ministers will be able to run up to £2.7bn of outstanding debt, of which up to £500m of debt can be from current borrowing and £2.2bn of debt from capital borrowing.

178. Scottish Ministers will be able to borrow from the Secretary of State for the purposes ((a) to (c) above) and from wider sources in addition to the Secretary of State for capital borrowing (purpose (d) above).

179. *Subsection (1)* introduces the amendments to 1998 Act.

180. *Subsection (2)* introduces the amendments to the existing borrowing provisions in Section 66 of the 1998 Act.

181. *Subsection (3)* replaces subsection (1) in Section 66. It:

- re-enacts sections 66(1)(a) and (b) of the 1998 Act which enable Scottish Ministers to borrow temporarily from the Secretary of State to provide a working balance to the SCF and to manage excessive in-year volatility of receipts; and
- extends the Scottish Ministers borrowing powers to include borrowing across years to fund deviations between forecast and outturn receipts of the devolved taxes.

182. New subsection (1A) enables the Scottish Ministers to borrow to fund capital expenditure, subject to HM Treasury’s approval. The borrowing must be in the form of a loan either from the National Loan Fund (through the Secretary of State) or from

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another lender, such as a commercial bank. The clause does not allow Scottish Ministers to issue Scottish gilts or bonds as the clause requires borrowing to be by way of a loan.

183. New subsection (1B) defines capital expenditure. The definition of capital expenditure is drawn from the rules (provided by HM Treasury to the Scottish Government) governing the preparation of the accounts under section 70 of the 1998 Act.

184. *Subsection (4)* is a consequential amendment to take account of the fact that not all borrowing need be from the Secretary of State.

185. *Subsection (5)* introduces the amendments to the existing borrowing provisions in section 67 of the 1998 Act.

186. *Subsection (6)* specifies that the £500m limit applied to the aggregate outstanding of principal sums borrowed under the existing section 66(1) –which appears on the face of the 1998 Act - now applies to the borrowing powers listed in new section 66(1), i.e. current borrowing.

187. *Subsections (7) to (8)* amend section 67(3) of the 1998 Act and allow the Secretary of State, by Order and with the consent of HM Treasury, to revise the £500m limit on the Scottish Ministers' current borrowing either upwards or downwards, although never below the initial £500m. These provisions enable the Secretary of State to increase the amount from time to time, for example, to keep pace with inflation or to meet exceptional circumstances. Orders under this section are subject to the approval of the House of Commons through the draft affirmative procedure.

188. *Subsection (9)* inserts a new section 67A into the 1998 Act which includes further provisions on capital borrowing.

189. New section 67A(1) provides that the aggregate outstanding of principal sums borrowed under new section 66 (1A) – borrowing to fund capital expenditure - must not exceed £2.2 billion. This provision, together with that in section 67, means that the total aggregate outstanding of principal (both current and capital) cannot exceed £2.7 billion.

190. New sections 67A(2) and 67A(3) allow the Secretary of State, by Order and with the consent of HM Treasury, to revise the £2.2 billion limit either upwards or downwards, but never below the initial £2.2 billion. Orders under this section are subject to the approval of the House of Commons through the draft affirmative procedure (this is provided for by *subsection (10)*).

191. Section 67A(4), (5) and (6) contain further rules on Scottish Ministers'

borrowing to fund capital spending. In particular:

- a) Subsection (4) provides that lenders are not bound to make enquiries into the power to borrow (such as checking whether the Scottish Government has breached its borrowing limits or is acting without HM Treasury approval). In the absence of such a provision, lenders could fear that doubtful vires could render loans unenforceable and could see the Scottish Government as a risky borrower.
- b) Subsection (5) states that Scottish Ministers are prohibited from mortgaging or charging any property as security for money which they have borrowed.
- c) Subsection (6) provides that any security given in the breach of subsection (5) is unenforceable.

PART 4: MISCELLANEOUS

Clause 33: Maximum penalties which may be specified in subordinate legislation

192. Section 113(10) of the 1998 Act specifies the maximum penalties that may be applied to criminal offences created in subordinate legislation made under powers conferred by the 1998 Act (for example, orders made under section 104 of the 1998 Act, which may make provision in consequence of any provision made by or under an Act of the Scottish Parliament).

193. Currently section 113(10) restricts the penalties which can be imposed on new criminal offences created in subordinate legislation under the 1998 Act to a maximum of three months imprisonment or a fine not exceeding level 5 on the standard scale on summary conviction and a maximum of two years imprisonment, on conviction on indictment.

194. *Subsection (2)* of the clause substitutes section 113(10) with new subsections (9A), (9B) and (10).

195. New subsection (9B) changes the maximum penalties which may be applied to offences created in relation to Scotland to reflect summary justice reforms made by the Scottish Parliament in the Criminal Proceedings etc. (Reform) (Scotland) Act 2007. The maximum penalties which may be applied to offences created in relation to England and Wales and Northern Ireland remain the same (as provided for in new subsection (10)).

196. *Subsection (3)* of the clause provides a power for Her Majesty, by Order in Council, to amend subsection (9B) or (10) so as to change any period of imprisonment or amount of fine specified there. *Subsection (4)* of the clause amends Schedule 7 to the 1998 Act to provide that Type A procedure is applied to such orders. Paragraph 2 of Schedule 7 defines Type A procedure as meaning that no recommendation to make

the legislation is to be made to Her Majesty in Council unless a draft of the Order has been subject to the affirmative procedure in both Houses of Parliament and also the Scottish Parliament.

Clause 35 – Power to make consequential and transitional provision

197. This clause confers powers on the Secretary of State or the Treasury to make consequential or transitional provision by order.

198. *Subsection (1)* of this clause gives the Secretary of State the power, by order, to make provision consequential on Parts 1 and 2 and section 33 of the Bill.

199. *Subsection (2)* gives the Secretary of State the power, by order, to make transitional or saving provision in connection with the coming into force of those provisions of the Bill.

200. *Subsection (3)* gives the Treasury the power, by order, to make provision consequential on clause 29 or 31 and transitional or saving provision in connection with the coming into force of any provision of Part 3.

201. *Subsection (4)* provides that provision under the clause may amend, repeal or revoke an enactment passed or made before the Bill is passed.

202. *Subsection (5)* defines ‘enactment’ for the purposes of this clause.

203. *Subsection (6)* provides that where a statutory instrument made under this clause containing an order under subsection (1) or (2) amends or repeals primary legislation then it is subject to draft affirmative procedure in both Houses (otherwise *subsection (7)* provides for negative procedure to apply.)

204. *Subsection (8)* provides that any instrument made by the Treasury under subsection (3) which amends or repeals any provision of an Act is subject to draft affirmative procedure in the House of Commons (otherwise *subsection (9)* provides for negative procedure in the Commons to apply).

Clause 36 – Transitional provision for Scottish statutory instruments

205. This section is a transitional provision which ensures that references to sections 28 and 29 of the Interpretation and Legislative Reform (Scotland) Act 2010 have effect as intended even though those sections are not yet in force.

Clause 38 – Commencement

206. *Subsection (1)* of this clause provides for certain provisions to come into force on the day the Act is passed.

207. *Subsections (2)* provides for certain other provisions to come into force 2 months after the Act is passed, including most of the provisions of Part 3 (finance). But this is subject to *subsection (3)*, which provides for certain clauses dealing with

finance to have effect according to their own provisions. In relation to the provisions for income tax, this is because they need to take effect *in relation to a particular tax year*, rather than from a particular date. The provisions in sections 26(1) to (6) and section 27(7) enable the Treasury to specify the relevant tax year in each case. In relation to SDLT and landfill tax, the Treasury needs to have discretion to disapply those taxes, so as to synchronise with the coming into force of the two devolved taxes in Scotland. The provisions in sections 29(4) (SDLT) and 31(3) (landfill tax) give the Treasury this discretion.

208. *Subsection (4)* provides that sections 26(7) and Schedule 3 and section 32 of the Bill come into force on such day as the Treasury may, by order made by statutory instrument, appoint.

209. *Subsection (5)* provides that the other provisions of the Bill not dealt with in subsections (1) to (4) of the clause come into force on such day as the Secretary of State may, by order made by statutory instrument, appoint.

210. *Subsection (6)* provides that the Secretary of State or the Treasury may appoint different days for different purposes.

SCHEDULES

Schedule 1: Amendments of Schedule 1 to the 1998 Act

211. Section 1(1) of and Schedule 1 to the 2004 Act replaced Schedule 1 to the 1998 Act which makes provision for constituencies, regions and regional members in relation to the Scottish Parliament. The 2004 Act removed the link between the constituencies for the Scottish Parliament and those for the House of Commons. It also made provision in the substituted Schedule 1 to the 1998 Act to reflect a planned transfer, from the Boundary Commission to the Electoral Commission, of the function of reviewing the boundaries of the constituencies and regions. Schedule 2 to the 2004 Act then made transitional modifications to Schedule 1 to the 1998 Act until such time as that transfer of functions to the Electoral Commission took place.

212. The transfer of functions from the Boundary Commission for Scotland to the Electoral Commission did not and, it is now clear, will not take place. So *paragraphs 2 to 7* of Schedule 1 reproduce permanently the effect of the transitional modifications contained in Schedule 2 to the 2004 Act. Thus Schedule 1 to the 1998 Act will reflect the fact that the functions of reviewing boundaries will remain with the Boundary Commission for Scotland.

213. *Paragraph 8* of Schedule 1 substitutes paragraph 1(2)(c) of Schedule 1 to the 1998 Act to provide that, in addition to the Orkney Islands and the Shetland Islands, the constituencies are provided for by an Order in Council under paragraph 6 of Schedule 1 to the 1998 Act. Similarly, *paragraph 9* of Schedule 1 substitutes paragraph 2(2) of Schedule 1 to the 1998 Act to provide that the regions are the

regions provided for by an Order in Council under paragraph 6 Schedule 1 to the 1998 Act. Currently, these paragraphs of Schedule 1 to the 1998 Act contain a specific reference (by name) to the latest Parliamentary and European Constituencies Orders made under paragraph 6 of Schedule 1. The new wording of these paragraphs ensure that the paragraphs do not have to be textually amended each time new Orders in Council under paragraph 6 are brought forward.

214. *Paragraph 10* corrects an error made in Schedule 1 to the 2004 Act and replaces the definition of local areas with the correct term as defined under the Local Government etc (Scotland) Act 1994.

Schedule 2: Insolvency

215. *Paragraph 1* removes the duty of the Accountant in Bankruptcy (a statutory office-holder, appointed by Scottish Ministers) to include details of windings up in Scotland on the register of insolvencies that the Accountant in Bankruptcy is required to maintain. In future, information on windings up of companies in Scotland will be recorded on the register maintained by the registrar of companies (as is the case in England and Wales). The provision also removes the duty of the Accountant in Bankruptcy to keep statistical information about windings up for the purpose of its annual report.

216. *Paragraphs 2 and 5*: As the windings up of companies progress, liquidators (insolvency practitioners appointed as office-holders in windings up) are required by the Insolvency Act 1986 to file certain documents relating to the windings up with the registrar of companies. The 1998 Act modified some of these filing events to require that, in Scotland, some documents be filed with the Accountant in Bankruptcy instead of the registrar of companies (and that some documents be filed with both). The Accountant in Bankruptcy uses this information to prepare the winding up part of the register of insolvencies referred to above. As this part of the register will no longer be maintained by the Accountant in Bankruptcy, these provisions remove the 1998 Act modifications to the Insolvency Act that require winding up documents be filed with the Accountant in Bankruptcy. All documents required to be filed in windings up that take place in Scotland in future will be sent to the registrar of companies, as in England and Wales. The 1998 Act also modifies certain notification requirements in relation to receivership. Since receivership is to remain a devolved matter, those modifications continue to have effect and the relevant notifications must continue to be made to the Accountant in Bankruptcy.

217. In the case of winding up of building societies, friendly societies and industrial and provident societies, the documents will be sent to the Financial Services Authority instead of the Accountant in Bankruptcy, as happens for the winding up of these entities in England and Wales.

218. *Paragraphs 7 and 8*: these provisions amend the regime governing the advertisement of meetings of creditors in creditors' voluntary liquidations that are required to be held pursuant to sections 95 and 98 of the Insolvency Act 1986. These

sections, which apply across Great Britain, were amended (but only applying to England and Wales) by the Legislative Reform (Insolvency) (Advertising Requirements) Order in 2009, to provide the liquidator or company with the discretion as to how best to advertise the meeting of creditors. Legislative Reform Orders amend primary legislation but cannot generally be used to change the law relating to matters within the legislative competence of the Scottish Parliament. Accordingly, the pre-existing requirement that the meeting of creditors be advertised in a newspaper, in all cases, was preserved for Scotland. The paragraph 7 and 8 amendments remove this preservation, thereby harmonising the position across Great Britain.

219. The effect of sections 95(2A) and 98(1A), as amended by paragraphs 7 and 8, is that creditors' meetings will in future be mandatorily advertised in the Edinburgh Gazette, with the liquidator or company having the discretion whether to advertise it by other means if they see fit.

220. Paragraphs 7(4) and 8(4) extend the effect of the Legislative Reform (Insolvency) (Miscellaneous Provisions) Order that was made in 2010, which removed the need for notices of the meeting of creditors to be sent 'by post'. This is a consequential effect of permitting notices to be sent via electronic means (see comments on paragraph 22).

221. *Paragraphs 10 to 13:* The Legislative Reform (Insolvency) (Miscellaneous Provisions) Order 2010 inserted provisions into the Insolvency Act 1986 to :

i) allow the office-holder to hold meetings of creditors whereby those attending and taking part in the meeting can do so remotely, i.e. they need not be in the same place at the chair of the meeting (paragraph 10);

ii) allow insolvency office-holders to communicate any information that they are required to send under the Act or rules (to any person), by making it available on a website rather than sending it to them in hard copy or electronically (paragraph 11);

iii) provide that any references in the Act to a thing in writing, also includes that thing in an electronic form (other than where stated elsewhere in section 436B) (paragraph 12); and

iv) allow the liquidator the power to compromise debts and claims without the need for the sanction of the liquidation committee (a committee of 3-5 members, elected by creditors from their number, which assists the liquidator as and when required) (paragraph 13).

222. As with other changes made by means of a Legislative Reform Order, the new sections only applied to England and Wales and to reserved Scottish procedures. Paragraphs 10 to 13 remove the exclusions that were applied to windings up in

Scotland in the inserted sections, thereby harmonising the provisions for windings up across Great Britain.

Schedule 3: Scottish rate of income tax: consequential amendments

223. This Schedule makes consequential amendments relating to the Scottish rate of income tax.

224. *Paragraph 1(2)* amends section 110 of the 1998 Act. That section provides that the Secretary of State may, by order, provide that individuals are, or are not, to be treated as if they were Scottish taxpayers (as defined for the purposes of the Scottish variable rate) for social security purposes. *Paragraph 1(2)* makes consequential amendments to that section as a result of the repeal of the Scottish variable rate and the introduction of the new Scottish rate.

225. *Paragraph 1(4)* amends Schedule 7 to the 1998 Act and sets out the relevant parliamentary procedure that is to apply to orders made under the new section 80G of ITA 2007 (as inserted by clause 26 of this Bill). Such orders, other than those made under section 80G(3), are subject to the draft affirmative procedure and in accordance with the normal conventions relating to tax legislation are to be laid before the House of Commons only. Orders under section 80G(3) are subject to the negative procedure and are also to be laid before the House of Commons only.

Schedule 4: Scottish tax on land transactions: consequential amendments

226. This Schedule contains amendments relating to the disapplication of SDLT in Scotland and provides for the continuing supply of information about land transactions in Scotland to HMRC after SDLT is disapplied.

227. *Paragraph 1* amends section 28 Finance Act 1931 to prevent a requirement to produce an instrument transferring land to the Commissioners for Revenue & Customs from applying to Scottish transactions, once SDLT is disapplied in Scotland.

228. The remainder of *Part 1* of the Schedule makes consequential amendments to Part 4 of the Finance Act 2003.

229. *Part 2* of the Schedule provides for the supply by an office-holder of the Scottish Government or Administration of information about Scottish land transactions to HMRC. The information to be provided corresponds with the particulars formerly required by section 28 of the Finance Act 1931 but is limited to information in the possession of, or under the control of, the office-holder. It is to be supplied as required by, and in such a form as, HMRC may reasonably specify.

230. The Part also provides that information acquired by HMRC under it is to be treated as acquired in connection with a function of HMRC, for the purposes of the Commissioners of Revenue & Customs Act 2005.

*These notes refer to the Scotland Bill
as introduced in the House of Commons on 30 November 2010 [Bill 115]*

Schedule 5: Scottish tax on landfill: consequential amendments

231. This Schedule contains amendments to the Finance Act 1996 relating to the disapplication of landfill tax in Scotland.

FINANCIAL EFFECTS AND PUBLIC SECTOR MANPOWER

232. As paragraph 233 below specifies, the tax clauses in the Bill are enabling. As such, the financial effects and the effects on public sector manpower depend on a number of issues, in particular on decisions made by the Scottish Parliament or approaches under discussion with stakeholders currently taking place.

SUMMARY OF THE IMPACT ASSESSMENT

233. As eight of the 39 clauses in the Scotland Bill relate to changes to the tax system, a partial Regulatory Impact Assessment (RIA) has been completed. As the tax clauses in the Bill are enabling and the ultimate compliance and administrative costs depend either on approaches to a number of areas currently under discussion with stakeholders or decisions by the devolved administration, it is not possible to provide detailed costs at this stage as would be expected in a full RIA. Indeed as implementation does not begin until 2015, the Government has the opportunity to refine its approach in these areas. The RIA does set out a number of areas where choices about implementation will impact upon costs and commits to their detailed consideration, along with conducting the appropriate tests (in particular Competition assessment, Small Firms Impact test and Rural Proofing).

234. This partial RIA will be available through the Vote Office and in the House Libraries.

COMPATIBILITY WITH THE EUROPEAN CONVENTION OF HUMAN RIGHTS

235. Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement before Second Reading about the compatibility of the provisions of the Bill with the Convention rights (as defined in section 1 of that Act).

236. The appropriate Minister has made a statement pursuant to section 19 of the Human Rights Act 1998 to the effect that in his view the provisions in the Bill are compatible with Convention rights.

237. While this Bill confers powers on the Scottish Parliament or Scottish Ministers, such as the making of regulations of air weapons, the transfer of the conduct of elections, or the powers to prescribe drink driving limits, it is not thought

that any human rights incompatibility will arise. This is because those powers are being transferred from the UK Parliament or Ministers; they are not new powers. It should also be noted that, by virtue of sections 29(2)(d) and 57(2) of the 1998 Act, the Scottish Parliament and Scottish Ministers have no power to make legislation or otherwise act incompatibly with Convention rights.

238. Clause 16 amends section 100 of the 1998 Act to insert a time limit for actions against the Scottish Ministers where it is claimed that they have acted incompatibly with Convention rights. The time limit is twelve months, or such longer period as the courts considers equitable in the circumstances, and is consistent with the time limit that applies to actions brought under the Human Rights Act 1998. A time limit is capable of giving rise to issues under article 6 and article 1 of protocol 1 of the Convention, but it is considered that this provision is compatible with those articles as it pursues a legitimate aim, and complies with the principles of proportionality and legal certainty. The clause does have retrospective effect but the Minister does not consider this to alter the human rights assessment, given the scope for the court to extend the time limit where it is equitable to do so.

239. The Bill also enables the Scottish Parliament to vary the rate of income tax and to create new taxes in place of stamp duty land tax and landfill tax in Scotland, as well as providing the Scottish Parliament with new borrowing powers. These have been examined individually to determine whether those provisions comply with Convention rights.

COMMENCEMENT

240. Commencement of the provisions of the Bill is specified in clause 38.

SCOTLAND BILL

EXPLANATORY NOTES

These notes refer to the Scotland Bill as introduced in the House of Commons on 30 November 2010 [Bill 115]

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