



HM Government

Scotland analysis: Devolution and the implications of Scottish independence

February 2013



Scotland analysis: Devolution and the implications of Scottish independence

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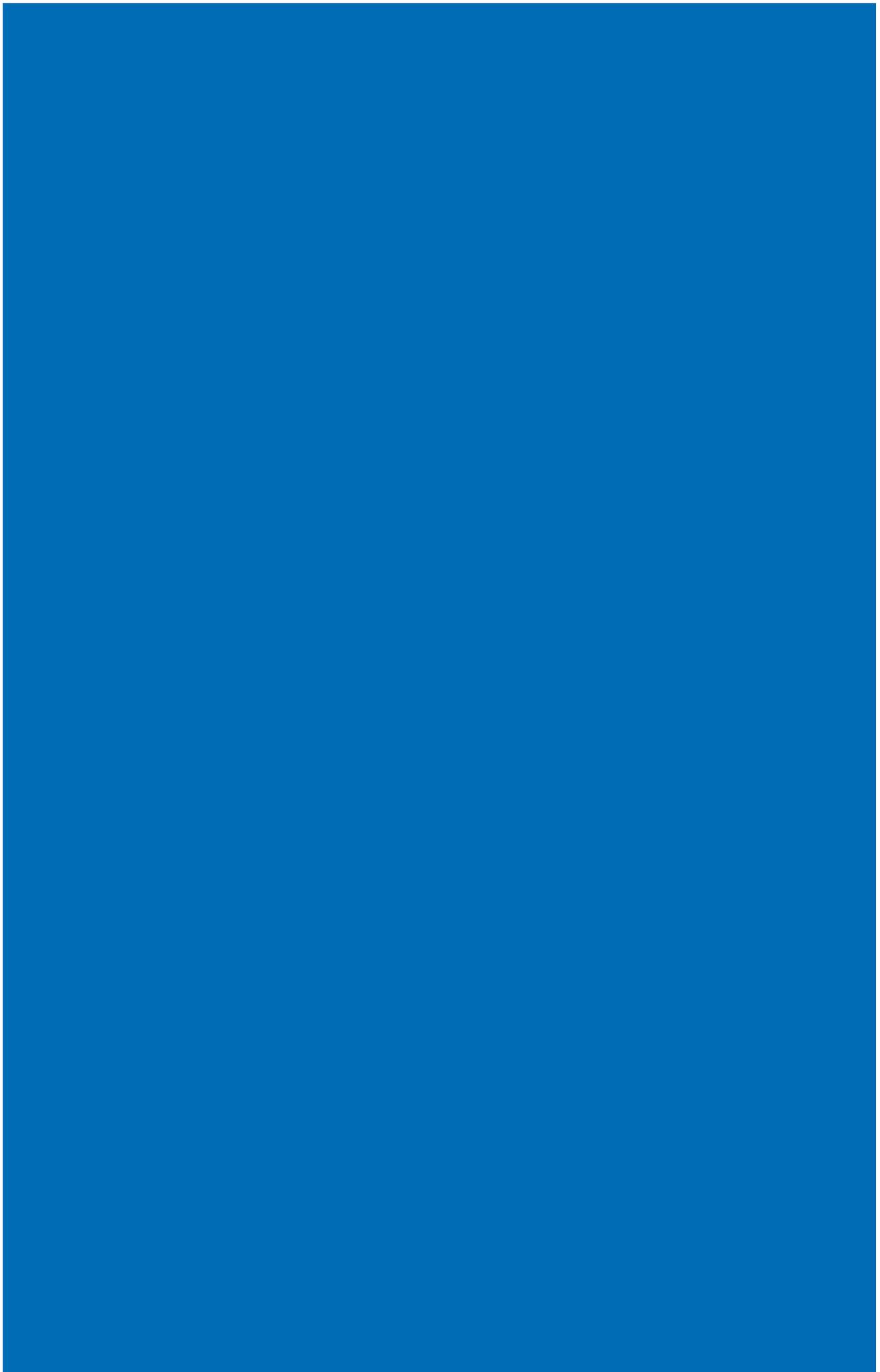
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Executive summary

Scotland's choice

- i. Before the end of 2014 people in Scotland will take one of the most important decisions in the history of Scotland and the whole of the United Kingdom (UK) – whether to stay in the UK, or leave it and become a new, separate and independent state.
- ii. The UK Government, along with many others, believes that both Scotland and the UK are better served by maintaining their partnership. **A strong Scotland is good for the whole of the UK, and a strong UK is good for Scotland.** For three centuries the economic and social dynamism of Scotland has flourished as part of the UK family of nations within a single state. Scotland has played a significant role in the historical success of the UK, to the benefit of people in Scotland and the rest of the UK. (Paragraph 1.2)
- iii. Scotland's success within the UK continues today. Scotland benefits from its close integration within a major global power. **Key decisions are taken in Scotland to address Scottish priorities and needs, while all the citizens of the UK benefit from collective decision-making and collective endeavour at the UK level.** (Paragraph 1.6)
- iv. The UK Government believes that this partnership can and should continue into the future. But the UK Government also recognises that Scotland has the right to leave the UK if a majority of people vote for it in the referendum in 2014: that choice rests with people in Scotland. (Paragraph 2.1)

The Scotland analysis programme

- v. It is crucial that the referendum debate is properly informed. People in Scotland expect and deserve good information on which to base their decision. The UK Government is therefore undertaking a major cross-government programme of analysis. (Paragraph 0.5)
- vi. **The Scotland analysis programme will provide comprehensive and detailed analysis of Scotland's place in the UK.** It will set out the facts about a range of constitutional, economic and policy issues that are critical to considering Scotland's future. To inform the debate, the work will also set out analysis about the possible implications of independence, as far as these can be known. The programme, which was announced in June 2012, will publish a series of papers throughout 2013 and 2014. (Paragraph 0.7)

- vii. This paper, the first in the series, examines the UK's constitutional setup and the legal implications of independence. Future publications will look at Scotland as part of the UK's economy, Scotland's and the UK's place in the world, and Scotland's future economic performance. (Paragraph 0.11)
- viii. **Clarity about the legal and constitutional framework is vital to any consideration of the key issues in the independence debate** for two reasons. First, understanding devolution and the relationship between Scotland's two governments at Westminster and Holyrood is essential to understanding how modern Scotland works. Second, independence – leaving the UK and becoming a new, separate state – is a very significant legal change. Establishing the legal process for setting up a new state, and the international and domestic consequences of that process, is vital to understanding the choice on offer in the referendum. (Paragraph 0.12)

Scotland's constitution today

- ix. The analysis in this paper makes the case that **devolution – Scotland's constitution today – offers people in Scotland the best of both worlds**. Scotland has always maintained its own distinctive identity, legal and education systems, and other aspects of civic life. But devolution has, in little more than a decade, brought political decision-making on key issues closer to the people affected by it, within the framework of a single UK. (Paragraph 1.18)
- x. This means that a Scottish Parliament and Scottish Government are empowered to take decisions on a range of domestic policy areas, such as health, education and policing, so that specific Scottish needs are addressed. It also means that people in Scotland continue to benefit from decisions that are best made on a UK-wide basis. These contribute to guaranteeing the security of people in Scotland and the whole of the UK, providing significant economic opportunity, representing their interests in the world and allowing resources and risks to be shared effectively. (Paragraph 1.18)
- xi. **Devolution is also a system of government that is flexible and responsive to changing needs and circumstances**. In 2012 the UK Parliament passed a second Scotland Act, which contained the single biggest devolution of financial powers since 1707. Between the landmark devolution Acts of 1998 and 2012, many other powers have been devolved. Most recently, the UK Government was able to deliver its commitment in the Edinburgh Agreement to transfer to the Scottish Parliament the power to hold a legal, fair and decisive referendum on independence. (Paragraph 1.34)
- xii. **That flexibility does not mean that independence would simply be an extension of devolution**. Legally and constitutionally, independence is a totally different proposition. Independence would mean the end of devolution. Devolution ensures that Scotland has a strong position within the UK. Independence would remove Scotland from the UK, along with the benefits that devolution brings. (Paragraph 1.49)

What independence would mean in law and practice

- xiii. To help understand what is meant by independence and some of its possible consequences, **this paper is based on independent expert opinion from two leading authorities on the issue of state formation and how this is seen in international law**. They are James Crawford SC, Whewell Professor of International Law at the University of Cambridge, and Alan Boyle, Professor of Public International Law at the University of Edinburgh. Their full and detailed legal opinion is published with this paper. (Annex A)

- xiv. Professors Crawford and Boyle conclude that, in the event of a vote in favour of leaving the UK, **in the eyes of the world and in law, Scotland would become an entirely new state**. It is not legally possible for two new states to inherit the international personality of the former state. The remainder of the UK (comprising England, Wales and Northern Ireland) would continue as before, retaining the rights and obligations of the UK as it currently stands.¹ There are four main reasons for this (Paragraph 2.16):
- the majority of international precedent, with examples spanning the creation of an Irish state from within the UK, and the break-up of the Soviet Union;
 - the retention by the continuing UK of most of the population (92 per cent²) and territory (68 per cent) of the UK;
 - the likelihood that other states would recognise the continuing UK as the same legal entity as before Scottish independence, not least because of the UK's pivotal role in the post-war world order; and
 - the fact that, on the rare occasions when one state is dissolved and two new states are created peacefully from it, this tends to happen by mutual agreement.
- xv. On the last of these points, **it is hard to envisage any scenario whereby the UK Parliament would ever have a mandate from the people of the rest of the UK to dissolve the UK** by voting the state out of existence, and the UK would therefore assume the position of the continuing state. (Paragraph 2.17)
- xvi. The UK Government's analysis is founded on this expert assessment. It believes that making the full legal Opinion publicly available will enhance the debate about Scottish independence. The Opinion shows very clearly how a new Scottish state could be established. As such, its conclusions are not incompatible with Scottish independence but are essential to a proper understanding of its consequences. (Paragraph 2.26)
- xvii. The concept of a negotiated separation is central to Professors Crawford and Boyle's analysis. Both the UK Government and the Scottish Government have acknowledged the need for negotiations if people in Scotland vote for independence. Both governments accept that these negotiations can only take place after a referendum.³ (Paragraph 2.27)
- xviii. The UK Government has set out clearly its reasons for this conclusion. **Unless people in Scotland choose otherwise, the UK Government will continue to be one of Scotland's two governments and cannot enter into discussions that would require it to act solely in the interests of one part of the UK**. Moreover, the Scottish Government has no mandate from people in Scotland to negotiate the terms of independence unless and until they obtain one in the referendum. (Paragraph 2.43)
- xix. As the Scottish Government has said, in the event of a vote in favour of separation Scotland would not leave the UK immediately. Negotiations would begin, and both governments would enter into them in good faith. The Scottish Government has recently published its proposals for a transition to independence, although this does not address the critical issue of a Scottish state's position in international law.⁴ (Paragraph 2.41)

¹ In the event of independence, the UK without Scotland is referred to as the 'remainder of the UK' or the 'continuing UK' in this paper.

² According to Office for National Statistics figures: www.ons.gov.uk/ons/rel/census/2011-census/population-and-household-estimates-for-the-united-kingdom/index.html

³ *Scotland's Future: from the Referendum to Independence and a Written Constitution*, Scottish Government, 5 February 2013, page 11

⁴ Op cit., *Scotland's Future*

xx. The legal Opinion indicates that the UK Government would enter into negotiations representing the continuing state of the UK. Other institutions, such as the institutions of the European Union (EU) and its Member States, would have to become involved in specific cases. The Scottish Government's planned White Paper later this year will set out what the current Scottish Government might hope to achieve in any negotiations. While the Scottish Government has indicated that its preferred timetable would be for negotiations to conclude and a new state to be established by March 2016, it is not possible to predict now the outcome of the negotiations, nor how long they would take. (Paragraph 2.39)

Implications of independence: legal and practical issues at home and abroad

- xxi. However, some conclusions, based on the legal Opinion and other expert analysis, can be drawn at this point about the implications of independence.
- xxii. **On the international stage the UK's membership of key organisations (including the EU, North Atlantic Treaty Organization (NATO), the International Monetary Fund (IMF), G8 and G20) and involvement in treaties would be largely unaffected by Scottish independence.** As a new state, an independent Scotland would be required to apply to and/or negotiate to become a member of whichever international organisations it wished to join. The UK Government could not legally do this on behalf of an independent Scottish state. (Paragraph 3.3)
- xxiii. The position on the EU is particularly significant and complex. **The UK's EU membership would continue automatically. For an independent Scottish state, negotiations would be needed.** Rather than being purely a matter of law, the mechanism for an independent Scottish state to become a member of the EU would depend on the outcome of negotiations and on the attitude of other EU institutions and Member States. It is likely to be a process requiring unanimity across all Member States of the EU. Since an independent Scotland would be a new state there is a strong case that it would have to go through some form of accession process to become a member of the EU. This is the view expressed by the President of the European Commission.⁵ (Paragraph 3.10)
- xxiv. **An independent Scottish state would also have to work through its position on thousands of international treaties** and agreements to which the UK is currently party and which would default to the continuing UK. So too would the other parties to these treaties. Some would be uncontentious, but there are important bilateral arrangements – national security agreements, for example – where the position of an independent Scottish state would be unclear. (Paragraph 3.22)
- xxv. Domestically, the body of law passed by the UK Parliament would continue to apply in England, Wales and Northern Ireland, as it does now. **The UK Parliament would remain sovereign in the continuing UK, but would have no jurisdiction in an independent Scottish state in the event of independence.** So the UK's key national institutions – for example, the Bank of England and the security and intelligence agencies – would operate on behalf of the remainder of the UK as before, but would have no power or obligation to act in or on behalf of an independent Scottish state. (Paragraph 3.31)

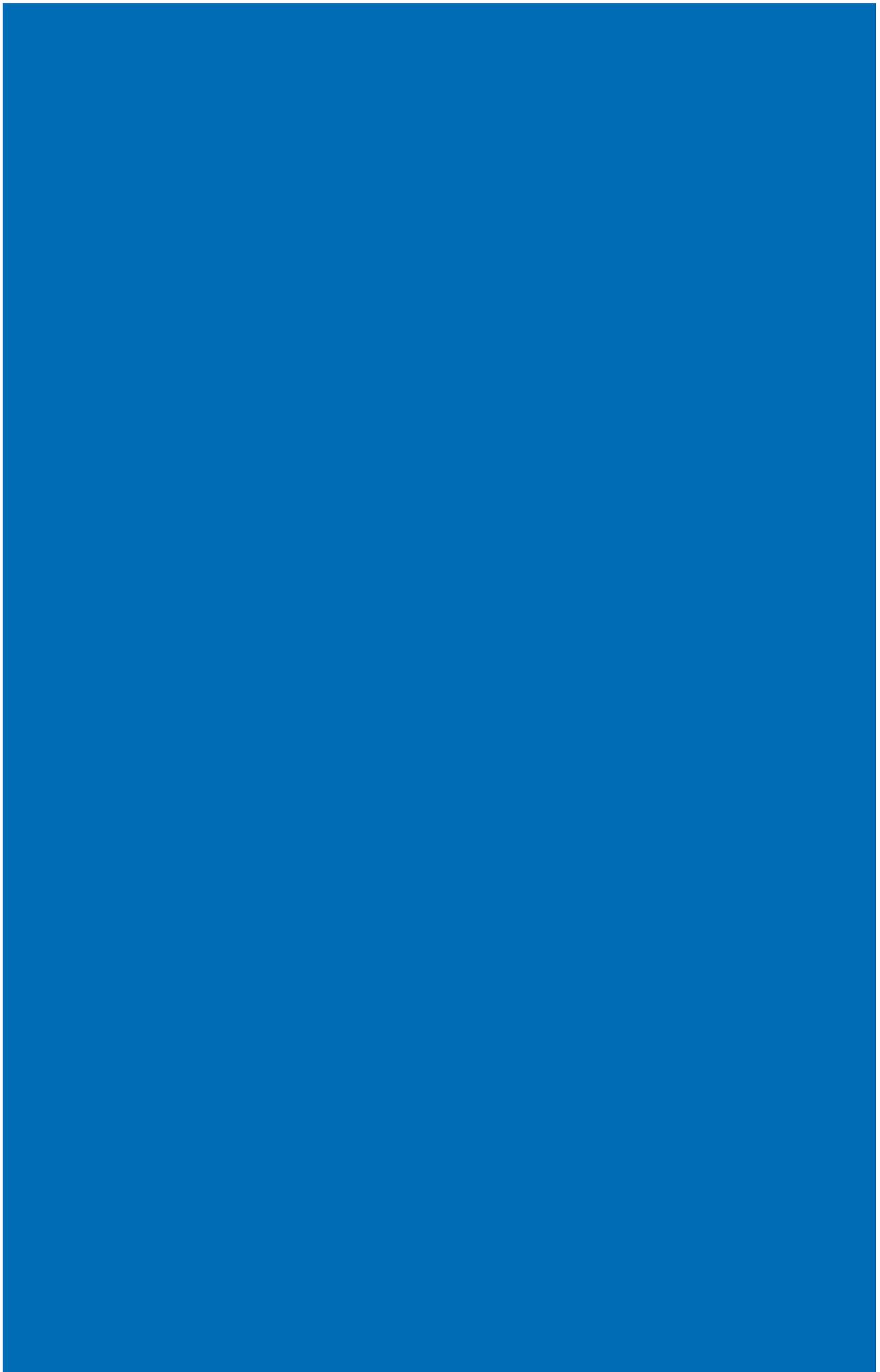
⁵ "The EU is founded on the Treaties which apply only to the Member States who have agreed and ratified them. If part of the territory of a Member State would cease to be part of that state because it were to become a new independent state, the Treaties would no longer apply to that territory. In other words, a new independent state would, by the fact of its independence, become a third country with respect to the EU and the Treaties would no longer apply on its territory." Letter to the House of Lords Economic Affairs Committee, 10 December 2012

- xxvi. **An independent Scottish state would therefore seek new institutional arrangements.** It would be open to representatives of a new Scottish state to ask to make use of arrangements that exist within the UK. The principle and terms of any arrangements would be subject to negotiation with the remainder of the UK. The Scottish Government has said that it would seek to continue to use sterling for example.⁶ A formal sterling currency union would only be possible if both parties managed to reach an agreement on conditions that satisfied their economic interests. (Paragraph 3.34)
- xxvii. Another important factor determining domestic arrangements in an independent Scottish state would be the outcome of the negotiations on Scotland's EU membership and the implications of the potential loss of the UK's opt-outs. Currency is just one example of a number of areas where the Scottish Government's stated preference to retain current UK arrangements is at odds with the requirements for new states applying to join the EU and where the process for negotiating Scotland's membership is uncertain and unprecedented. (Paragraph 3.39)
- xxviii. **Detailed negotiations would have to take place on a very large set of institutional arrangements that span the UK.** By way of illustration, when Czechoslovakia was dissolved some 31 treaties and 2,000 sub-agreements were signed.⁷ Many issues remained unresolved more than seven years after the negotiations started.⁸ In a UK context, hundreds of issues would surface, reflecting three centuries of integration. (Paragraph 2.42)
- xxix. **These legal conclusions provide the basis for the analysis in the rest of the Scotland analysis papers that will follow over 2013 and into 2014.** Drawing on this foundation, the programme will analyse the way in which the current system in the UK operates in each area, and, where it is possible, the range of options that could operate in an independent state and how these might work. In this way, the Scotland analysis programme will provide a detailed, rigorous and evidence-based account of the key issues in this historic and vital debate ahead of the referendum.

⁶ 'Opportunities for Scotland's Economy', John Swinney, Glasgow Caledonian University, 11 June 2012: www.scotland.gov.uk/News/Releases/2012/06/Scotland-Economy11062012; Alex Salmond, *Today*, BBC Radio 4, 16 January 2013; Nicola Sturgeon, speaking at a *Times* and BBC debate in late May 2012

⁷ *Issues Around Scottish Independence*, David Sinclair, Constitution Unit, University College London, 1999: www.ucl.ac.uk/spp/publications/unit-publications/51.pdf; Professor Robert Hazell, Constitution Unit, University College London, writing in *The Guardian*, 29 July 2008: www.guardian.co.uk/commentisfree/2008/jul/29/snp.scotland; 'The Dissolution of the Czech and Slovak Federal Republic', 1993, cited in *The Breakup of Czechoslovakia, Research Paper*, R. Young, Institute of Intergovernmental Relations, Queen's University, Kingston, Ontario, 1994, page 42

⁸ *Scottish Independence: A Practical Guide*, Jo Eric Murkens, Peter Jones and Michael Keating, 2002, page 99



Introduction

“Today, we look forward to the time when this moment will be seen as a turning point: the day when democracy was renewed in Scotland, when we revitalised our place in this our United Kingdom.”

First Minister Donald Dewar, speaking at the opening of the Scottish Parliament in 1999

- 0.1 The uniting of the Kingdoms of Scotland and England to form the Kingdom of Great Britain in 1707 is one of the most important moments in our island story. The partnership formed by the Acts of Union, which came into force that year, gave rise to one of the most successful states the world has ever seen. It has been, and remains, hugely beneficial to all the people of the United Kingdom (UK).

Scotland in the UK – past, present, future

- 0.2 In these three centuries of partnership Scotland has seized the benefits of being part of a larger family of nations. Scotland has always been an outward-facing nation and within the UK has projected a global reach in economics and commerce, law, philosophy, the arts and sport and much else besides, punching far above its weight. Scottish people were at the forefront of the development of the modern world – its economy, scientific achievements and innovation, through the Industrial Revolution, and the emergence of liberal democracy and the rule of law.
- 0.3 Today, Scotland benefits from its close integration within a major global power. The Scottish Parliament and Scottish Government are empowered to take decisions on a range of domestic policy areas, such as health, education and policing, so that specific Scottish needs are addressed, while all citizens of the UK benefit from collective decision-making and collective endeavour at the UK level. The UK Government believes this partnership should continue into the future.
- 0.4 Before the end of 2014 people in Scotland will be asked whether they want to end that partnership and leave the UK or continue within it. Alongside many others, the UK Government will make a positive case for the UK.

An informed debate

- 0.5 The referendum presents one of the most important decisions in Scotland's and the UK's history. It is therefore important that the debate – and people in Scotland – is properly informed by analysis, and that the facts that are crucial to considering Scotland's future are set out.

0.6 The UK Government believes that Scotland is better off as part of the UK, and that the UK is stronger with Scotland as a part of it. The onus is on those who want Scotland to leave the UK to set out their proposals for independence and address some of the key questions relating to the implications it would have. Not all of the answers to these questions can be known in advance. This is because some of the details can only be established through negotiations between the representatives of an independent Scottish state, the continuing UK, and other bodies (for example the European Union (EU)). These negotiations would have to take place in the event of a vote for Scottish independence.⁹

The Scotland analysis programme

0.7 On 20 June 2012, the Secretary of State for Scotland announced to the House of Commons that the UK Government was commencing a detailed programme of analysis ahead of the independence referendum.¹⁰ The objective of this programme is to provide comprehensive and detailed analysis of Scotland's place in the UK and how that would be profoundly affected by independence. The outputs of the analysis will provide sources of information and aim to enhance understanding on the key issues relating to the referendum. As such, the programme should be a major contribution to the independence debate.

0.8 On key issues, such as the constitution, the economy, public finances and taxation, defence, energy and welfare, the Scotland analysis programme will examine Scotland's existing arrangements and position as part of the UK. It will also analyse, where possible, some of the potential implications of independence.

0.9 Given there are many unknowns about an independent Scottish state – arising from the many issues that would need to be negotiated in the event of independence – analysing the implications is not straightforward. In some cases it is possible to establish a discrete range of potential consequences, for example through examining precedent or academic literature. To ensure that the work is broad-based and subject to external challenge and scrutiny, the UK Government is being open in its engagement with third parties, including academics, think tanks and other experts, particularly those in Scotland.

0.10 Some of the cross-cutting themes the analysis examines include:

- the opportunity for Scotland to pool risks with the rest of the UK, whether in relation to military or security threats, or economic challenges;
- the scale of the UK, which means Scotland has access to a larger single, domestic market, for example, in which Scottish firms – including in key sectors of defence, energy and financial services – conduct a majority of their trade;
- the UK's influence on Scotland's behalf in international institutions and world affairs, and the support the UK can provide to Scottish businesses and people around the world; and

⁹ The UK Government has set out its position on why negotiations can only take place following a yes vote in a referendum and not before. See Chapter 2 of this paper, paragraphs 2.43 to 2.52, and speech by the Rt Hon. Michael Moore MP of 18 January 2013: www.gov.uk/government/speeches/setting-the-scene-for-2013; and 'Uncertainty of independence can't be wished away'; *Scotland on Sunday*, 13 January 2013 by the Rt Hon. Michael Moore MP: www.scotsman.com/scotland-on-sunday/opinion/comment/michael-moore-uncertainty-of-independence-can-t-be-wished-away-1-2734637

¹⁰ The Secretary of State for Scotland's announcement can be found here: www.publications.parliament.uk/pa/cm201213/cmhansrd/cm120620/debtext/120620-0001.htm#12062086000009 and an explanatory note can be found here: www.gov.uk/government/news/benefits-of-the-uk-to-be-examined-in-detail

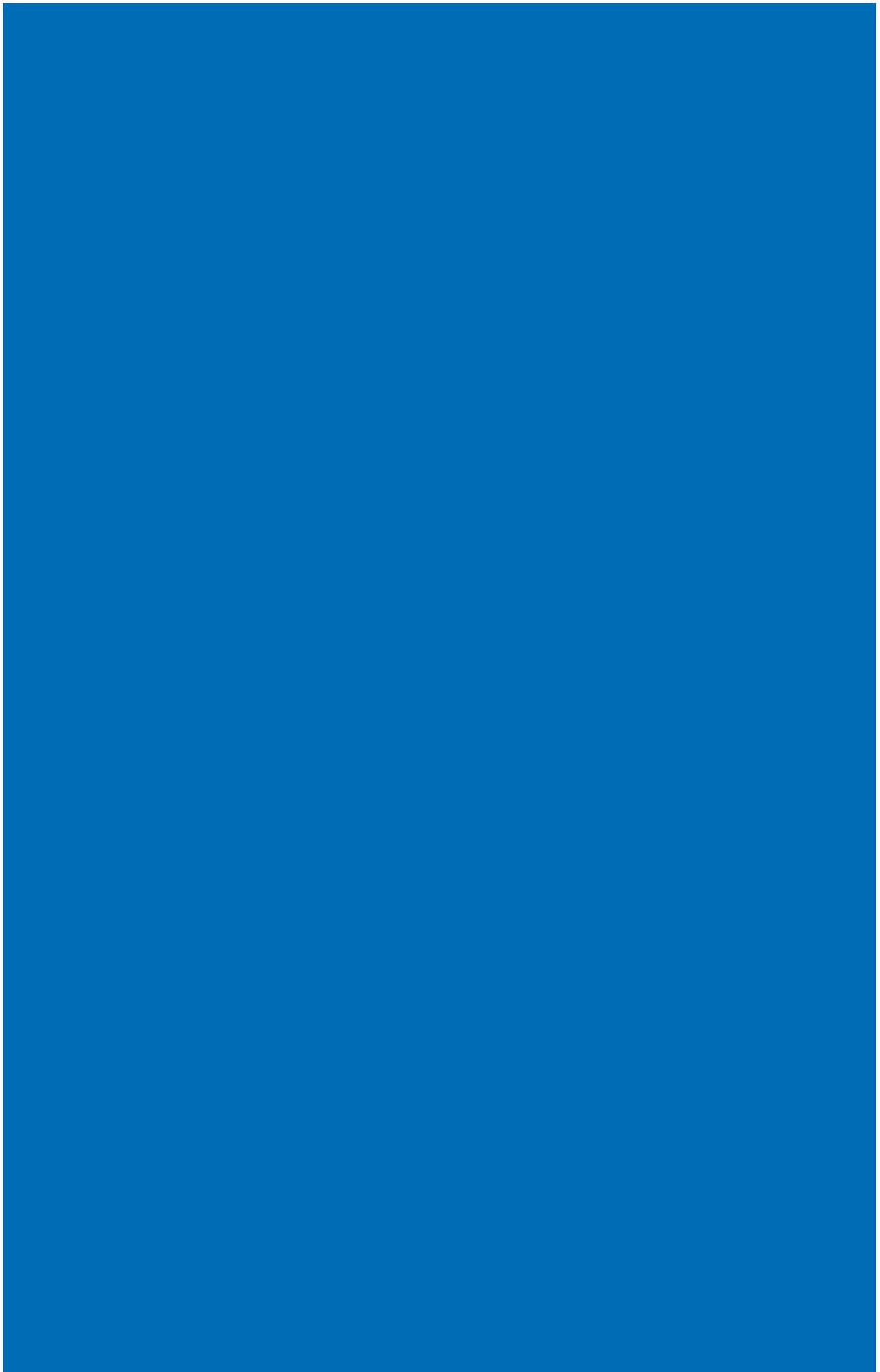
- how integrated Scotland and the other three nations of the UK have become over 300 years, including the hundreds of institutions that are shared across the UK, which support businesses and individuals in their everyday lives. How these functions would be replaced in an independent Scottish state is a significant uncertainty.

Scotland's constitutional present and the legal implications of independence

- 0.11 This first paper in the series seeks to lay the foundations for the rest of the programme by examining both the current legal and constitutional arrangements for Scotland within the UK and some of the potential consequences of independence.
- 0.12 This is because clarity about the legal framework is vital to other aspects of the independence debate. Understanding devolution and the way in which Scotland's two governments and parliaments at Holyrood and Westminster work is crucial to understanding how current arrangements in all the main areas of Scottish life work. And establishing what independence means in legal terms, and how that affects the shape of a new Scottish state, is necessary for an informed debate on the choice being put to the Scottish people in a referendum. All the subsequent papers flow from this analysis.

The structure of this paper

- 0.13 **Chapter 1** sets out in detail how the flexible, effective and popular system of devolution within the UK works for Scotland. It describes how Scottish devolution has evolved and adapted, and how it continues to work to the benefit of people in Scotland.
- 0.14 **Chapter 2** looks at the main points of law around the creation of a new independent state. It seeks to answer the crucial legal question as to whether the formation of a new Scottish state means the creation of two new states, or whether the existing UK would carry on with England, Wales and Northern Ireland. Much depends on the answer to this question and therefore this paper is accompanied by a detailed, independent expert opinion by two of the world's leading experts in the area, Professor James Crawford SC and Professor Alan Boyle, Professors of International Law at the Universities of Cambridge and Edinburgh respectively. This legal Opinion is published as Annex A and provides a comprehensive analysis of this question. The chapter also examines the process of negotiations that would be required to bring the new state into being.
- 0.15 **Chapter 3**, the last chapter, looks at some of the practical implications of the conclusions drawn in Chapter 2. It deals with questions of an independent Scottish state's place in the world. What would be its position – and that of the continuing UK – with regard to key international institutions such as the United Nations (UN) and, crucially, the EU? What would happen to the thousands of treaties which Scotland, by virtue of being part of the UK, is bound by? In the same way, Chapter 3 deals with similar questions in a domestic context, including the most likely options for a process of separation and what that might mean for the new arrangements an independent Scottish state would have to put in place to replace the existing institutions which currently automatically apply in Scotland as part of the UK.



Chapter 1:

Scotland's constitution today

Summary

- Devolution within the United Kingdom (UK) means that a Scottish Parliament and Scottish Government are empowered to take decisions on a range of domestic policy areas, such as health, education and policing, so that specific Scottish needs are addressed.
- Equally, devolution means that, on issues where all the citizens of the UK benefit from collective decision-making and collective endeavour, decisions are taken at the UK level. These contribute to guaranteeing the security of people in Scotland and the whole of the UK, providing significant economic opportunity, representing their interests in the world and allowing resources and risks to be shared effectively. For example, Scotland stood together with the rest of the UK in supporting UK banks through the financial crisis and its aftermath.
- Devolution can and does adapt to meet changing circumstances within the UK, through the transfer of major new powers and other adjustments to the settlement since 1998. The Scotland Act 2012 devolved important new financial powers to the Scottish Parliament for the first time, which come into effect over the next three years. This is the largest transfer of financial powers to Scotland since the creation of the UK.
- Devolution is also a flexible, efficient and collaborative system of government. The processes established under devolution may not attract much public attention. They are often concerned with detailed policy or technical issues. But they enable two governments to work together effectively to serve and further the interests of Scotland and its people.
- Most recently, that flexibility enabled the UK Government to deliver on the commitment made in the Edinburgh Agreement to transfer the power to hold a legal, fair and decisive referendum on independence to the Scottish Parliament.
- Ultimately, devolution operates within the UK, and means that in Scotland people have the benefit of two parliaments and two governments. Legally and constitutionally, independence is a different proposition. Independence would result in an end to devolution – and the benefits it brings – rather than a continuation of it.

The establishment of devolution in Scotland

- 1.1 The creation of a parliament in Scotland in 1999, directly elected by people living in Scotland and responsible for the delivery of domestic public policy and services, was a transformational moment in Scottish history. The Scottish Parliament has quickly become a core part of public life and an institution that is accepted and respected by people in Scotland.¹¹
- 1.2 Although devolution began in 1999, its origins are rooted in a long history. The Acts of Union of 1707 united the parliaments of Scotland and England, resulting in the formation of a single Parliament of Great Britain at Westminster. It also marked the beginning of a single multi-national state,¹² which has become one of the most successful partnerships of nations in history. Scotland, although smaller in population terms than England, has played an indispensable role in the development of the state ever since, from the contributions its citizens have made to establishing democracy and the rule of law, to the development of modern industry, science, philosophy, culture, sport and the arts.
- 1.3 Yet from the outset, a unique set of Scottish institutions and systems continued to exist and flourish within the UK, supporting a strong Scottish culture and distinct civic life. These included the Scottish education system, the Church of Scotland and Scots law. During the 19th century, there were calls for Scotland's separate institutions to be given political recognition and greater administrative support, which led to the creation of the post of Secretary of State for Scotland and the establishment of the Scottish Office in 1885.¹³ In the early part of the 20th century the public sector in Scotland, headed by the Scottish Office, developed into a substantially decentralised apparatus of government in Scotland.
- 1.4 Throughout much of the 20th century there were various movements within Scotland arguing for greater democratic devolution rather than purely administrative reforms. These culminated in 1979 when the UK Government held a referendum in Scotland on the principle of establishing a Scottish Parliament with sweeping powers over domestic policy. This was passed by a majority of nearly three to one, and a question on whether the Parliament should be able to vary taxes was passed by nearly two to one.¹⁴
- 1.5 Having served the needs of people in Scotland for over a decade, the story of devolution did not end when the new Parliament opened its doors. As the passage of the Scotland Act 2012 has shown, devolution continues to evolve and adapt to meet the needs of Scotland today and in the future. Independence, however, would bring that process and its benefits to an end.

¹¹ *Final Report of Commission on Scottish Devolution*, page 55. Scottish Social Attitudes Survey 2012: www.scotcen.org.uk/media/1021490/ssa12briefing.pdf

¹² *The British Isles: A History of Four Nations*, Hugh Kearney, 2006, pages 212–8; Colin Kidd, 'Integration: Patriotism and Nationalism' in *A Companion to Eighteenth Century Britain*, HT Dickinson (ed.), 2006, pages 371–2

¹³ *Constitutional and Administrative Law* (3rd edn, 2000), Hilaire Barnett, pages 56–7

¹⁴ www.parliament.uk/briefing-papers/RP97-113.pdf

How Scotland is governed

- 1.6 There is a clear principle underlying the establishment of the Scottish Parliament and devolution across the UK. That is the importance of bringing the exercise of political decision-making closer to the people affected by it, where that will best serve the interests of people in Scotland. This means that Scottish responses can be developed to address Scottish issues.
- 1.7 It also means that people, wherever they happen to live in the UK, can draw on the UK's collective decision-making to: guarantee their safety and security; represent their interests in the world; and ensure that natural and financial resources are shared fairly and that risks are pooled effectively. Through devolution within the UK, people in Scotland can have the best of both worlds.
- 1.8 Before considering how devolution has been put into practice by UK and Scottish parliaments and governments, as well as the benefits it has brought, it is important to understand how the system established in 1998 operates. Under devolution, the Scottish Parliament at Holyrood has responsibility for everything that is not explicitly 'reserved' to the UK Parliament in Westminster.¹⁵ While the UK Parliament retains the power to legislate in all areas, the UK Parliament does not normally legislate in relation to devolved matters except with the consent of the Scottish Parliament. People in Scotland therefore have two parliaments and two governments serving their interests, within the UK. The people of Wales and Northern Ireland also benefit from devolution, but each settlement is different, reflecting the circumstances of each and the flexibility and responsiveness of the partnership of the four nations within the UK.
- 1.9 Devolution has given the Scottish Parliament responsibility for the National Health Service (NHS), for education, and for civil and criminal law, including responsibility for the justice system, policing and prisons in Scotland. The Scottish Parliament is also responsible for local government, including its structure and financing, housing, regeneration and the planning framework in Scotland. It has powers to deliver economic development in Scotland, including financial support to businesses and industry. And it has responsibility for policies relating to road, rail, air and sea transport in Scotland, farming and fisheries, sport, and the arts.
- 1.10 Decisions on all of these domestic matters were devolved to Scottish ministers and the Scottish Parliament by the Scotland Act 1998. This policy responsibility is matched with spending power: around two-thirds of Scotland's public spending is controlled by the Scottish Parliament and the Scottish Government.¹⁶

¹⁵ Scotland Act 1998: www.legislation.gov.uk/ukpga/1998/46/contents: see Schedule 5 of the Scotland Act 1998, summary of the Scotland Act 2012 (current powers) and key permanent Statutory Instruments.

¹⁶ Total identifiable spend under Scottish Parliament/Government control was 67 per cent for 2011–12, Country and Regional Analysis 2012, Table A.21: Identifiable expenditure on services for Scotland, Wales and Northern Ireland in 2011–12, Office for National Statistics (ONS): www.hm-treasury.gov.uk/9802.htm. When public spending is analysed on a territorial basis, most is 'identifiable'. That means that spending can be identified as directly for the benefit of a particular region, e.g. on schools or hospitals. However, a small proportion (14 per cent in 2010–11) is non-identifiable because it cannot be split up and attributed to individual parts of the country as it benefits the UK as a whole. This mainly relates to defence, foreign affairs and debt interest.

1.11 The UK Government and the UK Parliament are responsible for those areas that are essential to the integrity of the state and where all people across the UK benefit from a common approach. Key areas of responsibility in Scotland reserved to the UK Parliament include providing for the defence and national security of UK citizens, macro-economic policy, foreign affairs, immigration, broadcasting, energy,¹⁷ social security and pensions, and the constitution. The UK Government acts on behalf of people in Scotland, Wales, England and Northern Ireland in the majority of these matters.¹⁸ The people of the whole of the UK decide how these powers are exercised through their representatives in the UK Parliament.

The flexibility of devolution

1.12 That does not mean that the boundaries between what is reserved and devolved were fixed under the 1998 Act. Devolution is a flexible and responsive system of government that has proved capable of adapting to new circumstances and needs in a highly integrated multi-nation state. Significant changes to the devolution settlement were brought in by the UK Government last year through the Scotland Act 2012 in response to recommendations from the Commission on Scottish Devolution or 'Calman Commission'.¹⁹

1.13 A central pillar of the Scotland Act 2012 is the extensive devolution of further financial powers to the Scottish Parliament. The key measures that will come on stream over the next three years are to:

- enable the Scottish Parliament to introduce new 'devolved taxes', with the consent of the UK Parliament; and
- devolve to the Scottish Parliament the power to set a Scottish rate of income tax – this means that all rates of income tax in Scotland will be reduced by 10 pence in the pound, and it will be for the Scottish Parliament to set a Scottish rate of income tax, which could result in rates in Scotland being lower than in the rest of the UK, the same, or higher.

1.14 With the implementation of the 2012 Act, the Scottish Government will fund a higher proportion of the spending for which it is responsible, rising from around 16 per cent today to a third by 2016–17.²⁰ Taken together, this represents the greatest devolution of fiscal powers since 1707, and provides evidence of how devolution has evolved over time.

1.15 Under the 2012 Act the power to borrow to fund capital projects and to set the drink-driving limit and a Scottish national speed limit was also devolved to the Scottish Parliament. In addition, Scottish ministers can now administer aspects of elections to the Scottish Parliament, determine maximum criminal penalties, and preside over

¹⁷ Energy is not wholly reserved. The relevant reservations in the area of energy are described under Heading D in Schedule 5 of the Scotland Act 1998, www.legislation.gov.uk/ukpga/1998/46/contents: see Schedule 5 of the Scotland Act 1998, summary of the Scotland Act 2012 (current powers) and key permanent Statutory Instruments.

¹⁸ Devolution works differently in Scotland, Wales and Northern Ireland and not all of the same matters are devolved. Further details of how devolution works can be found at: www.cabinetoffice.gov.uk/content/devolution-united-kingdom

¹⁹ The Commission was established in 2008 by the United Kingdom Government in response to a motion passed by the Scottish Parliament. It was set up and supported by all three main parties at Westminster (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.

²⁰ Government Expenditure and Revenue Scotland 2010–11: www.scotland.gov.uk/Topics/Statistics/Browse/Economy/GERS; Office for Budget Responsibility 2010–11: budgetresponsibility.independent.gov.uk/wordpress/docs/Dec-2012-Scottish-tax-forecast28946.pdf

appointments to the Trust of MG Alba (the Gaelic Media Service) and of the member for Scotland to the Trust of the BBC (British Broadcasting Corporation).

- 1.16 It is not just major pieces of legislation such as the Scotland Act 2012 which demonstrate the flexibility of devolution. The framework established under the 1998 Act contains provisions allowing UK ministers to make adjustments (through secondary legislation, or 'orders') to the settlement without the need for primary legislation (acts of parliament). There are many types of order and they work in a variety of ways. Some allow the transfer of powers between the UK and Scottish governments. Others enable UK ministers and Scottish ministers to act on behalf of one another.²¹ For example, it was through an order²² that the UK Government delivered its commitment in the Edinburgh Agreement to transfer the power to hold a legal, fair and decisive referendum on independence to the Scottish Parliament – enabling the Scottish Government to meet its democratic mandate.
- 1.17 The first part of this chapter considered how devolution works and how it has continued to evolve since the 1998 Act that brought it into being. The next part examines how the exercise of powers at the UK level and by the Scottish Parliament and Government has brought benefits for Scotland. The final section of this chapter examines the way in which Scotland's two governments and two parliaments have worked together to serve Scotland's interests and highlights the advantages and flexibility of the devolution settlement.

How devolution delivers for Scotland through reserved powers

- 1.18 There are many areas where it is sensible – and in the interests of Scotland – for the UK Government to deal with matters across the whole of the UK. Devolution means that people in Scotland – and people across the rest of the UK – can benefit from the legislation, policies and services delivered on their behalf in the areas reserved to the UK Parliament. The UK's full political, economic and social union means that Scotland, and all parts of the UK, benefit from attributes developed over the last 300 years.
- 1.19 **Security:** The UK is able to protect its citizens from global risks, both at home and abroad. Strong alliances and networks across the world, and the UK's sophisticated armed forces, police and intelligence agencies, mean that the UK is better able to manage threats from terrorism and organised crime.
- 1.20 The breadth and diversity of the UK economy and its stable tax-base support public spending and therefore public services – such as schools, hospitals, roads, pensions and benefits – for everyone in the UK. Independent economic analysis²³ suggests that Scotland faces significant economic challenges – such as maintaining spending on public services, and dealing with declining oil and gas production and a faster ageing population than the rest of the UK, while maintaining sustainable public finances – and would be required to make difficult policy choices with regard to taxes and levels of public expenditure.
- 1.21 **Scale:** Businesses in Scotland have access to a single domestic market across the whole UK with no borders to restrict the free movement of goods and people – a far more deeply integrated market than currently achieved in the European Union (EU). There are tens of

²¹ A full list of these powers can be found at: <https://www.gov.uk/government/policies/maintaining-and-strengthening-the-scottish-devolution-settlement/supporting-pages/legislating-for-scotland>

²² The draft Scotland Act 1998 (Modification of Schedule 5) Order 2013: www.legislation.gov.uk/ukdsi/2013/9780111529881/contents

²³ *Scottish Independence: The fiscal context*, Institute for Fiscal Studies, 2012: www.ifs.org.uk/bns/bn135.pdf

millions of journeys between Scotland and the rest of the UK every year,²⁴ and Scotland trades almost twice as many goods and services with England, Wales and Northern Ireland as with all the other countries of the world combined.²⁵

1.22 As future papers will show, being part of the larger UK generates jobs in Scotland, and reduces costs, encourages innovation and provides greater consumer choice. Scotland's economy has key specialisms in areas including the financial services, energy and defence industries. These sectors have created and sustained tens of thousands of jobs and help to contribute to Scotland's economic prosperity. Crucially, these sectors also benefit from being part of the balanced UK economy, which provides a larger market, protects employment and ensures their sustainability:

- Around 90 per cent of the customers of financial services firms based in Scotland live in the rest of the UK.²⁶
- The strength of the Scottish energy sector – with the oil and gas industry estimating that it supports around 200,000 jobs²⁷ – is sustained by its consumer base across the rest of the UK.
- The UK is one of the world's largest domestic defence markets and defence exporters. UK Government defence spending helps to sustain more than 12,600 jobs in the defence sector in Scotland and more than 15,000 Armed Forces and Ministry of Defence civilian personnel based in Scotland.

1.23 **Influence:** The UK is the only state which is a member of all of the EU, the North Atlantic Treaty Organization (NATO), the Commonwealth, the United Nations (UN) Security Council, and – as the seventh largest economy in the world²⁸ – the G8 and the G20. The UK has one of the world's most extensive diplomatic networks, employing over 14,000 people in nearly 270 missions in 170 countries across the world, with an annual budget of around £1.6 billion. This provides a formidable platform from which to support and lobby for Scottish companies and products and provide assistance to UK citizens who need help abroad.

1.24 **Integration:** The UK is united for the common good of all its citizens. All parts of the UK share a rich and closely intertwined history and identity that has developed over more than 300 years. More than 450,000 people living in Scotland today were born in England, Wales or Northern Ireland, and more than 830,000 people born in Scotland now live elsewhere in the UK.²⁹ The UK's economy is fully integrated, and Scotland's economic performance (excluding income from volatile North Sea oil and gas) closely follows the UK average.³⁰ And Scotland has been well supported throughout history and throughout recent global economic challenges by long-standing, UK-wide economic institutions, such as a stable, single currency, with its associated protection and insurance, and the strength and credibility of the Bank of England.

²⁴ In 2009 an estimated 24 million vehicles crossed the border between England and Scotland, with 11 million passenger journeys between other parts of the UK and Scotland's 17 airports. Road traffic flows are at: www.dft.gov.uk/traffic-counts. Passenger numbers are from Scottish Transport Statistics No. 29, 2010.

²⁵ Scottish Government – Scotland National Account Project, 2012, Q2: sum of imports and exports with the rest of the UK was £84 billion in 2011, compared with £46 billion with the rest of the world.

²⁶ Figures from Scottish Financial Enterprise: www.bbc.co.uk/news/uk-scotland-18515456

²⁷ www.oilandgasuk.co.uk/cmsfiles/modules/publications/pdfs/EC030.pdf

²⁸ World Bank GDP ranking: data.worldbank.org/data-catalog/GDP-ranking-table

²⁹ *Scotland's Census 2001*, General Register Office for Scotland

³⁰ www.ons.gov.uk/ons/taxonomy/index.html?nscl=Regional+GVA

- 1.25 Over three centuries the UK has built many significant institutions such as the NHS and the BBC, fought for freedom and democracy in two World Wars and many other important campaigns, celebrated Olympic and Paralympic success and created one of the world's most successful and enduring multi-nation states.
- 1.26 The case studies below provide some examples of how powers have been exercised in reserved areas and exemplify how Scotland benefits from the high level of integration, the greater scale of the UK and its ability to pool risks, whatever they may be.

Reserved powers in action

The UK Government and Parliament have powers in reserved policy areas that bring real benefits to people across the nations of the UK. These benefits – which come with being part of the United Kingdom – include:

- **A larger macro-economy:** Where risks are pooled and benefits are shared. For example, the UK Government was able to inject £45.5 billion into the Royal Bank of Scotland (RBS) in 2008 to support the bank and protect the financial system, including savers and their deposits across all of the UK. RBS also insured £281.6 billion of its assets in the UK Government's Asset Protection Scheme.* The UK collectively was able to withstand the global financial crisis and ensure the stability of the economy and the banking system. The monetary policy of the Bank of England and the UK Government's commitment to reducing the deficit is now helping to keep interest rates low for all in the UK.
- **First-class defence:** The UK Government's defence budget is the fourth largest in the world, and all parts of the UK benefit from the high standard of security and expertise that the UK provides. For example, under current plans the Ministry of Defence intends to move all of the UK's conventional submarines to the Clyde. This means that Scotland's largest single-site employer will expand from 6,700 to 8,200 military and civilian jobs by 2022. World-leading defence companies in Scotland, with their particular expertise in shipbuilding and other naval defence equipment, employ more than 12,600 people and generate annual sales of more than £1.8 billion a year.**
- **A strong voice in the world:** The influence exerted by the United Kingdom works to the benefit of all its citizens. For example, as a major Member State of the EU, the UK is able to exert real influence over decisions made on agriculture, fisheries and financial regulation that impact directly on everyone in the UK. As a member of the G7, G8 and G20, the UK is at the top table when economic decisions are made. With a key role in NATO, a seat on the UN Security Council and a foreign aid budget of almost £7 billion a year, the UK collectively plays a key role in safeguarding the nation, and promoting peace, security, human rights and development to those in need around the world.

* www.nao.org.uk/publications/1011/the_asset_protection_scheme.aspx

** www.scottish-enterprise.com/your-sector/aerospace-defence-and-marine/adm-strategy/adm-facts/defence-facts.aspx

- 1.27 Subsequent publications in the Scotland analysis programme will set out in greater detail how Scotland contributes to and benefits from being part of the UK, and how the rest of the UK benefits from its partnership with Scotland. In addition to this paper on Scotland's place within the UK constitution and the legal implications of independence, the programme will look in detail at the economic and other reserved policy issues that are critical to the question of Scotland's future, and which will be important in the referendum debate.

How devolution delivers for Scotland through devolved powers

“The last ten years have shown that not only is it possible to have a Scottish Parliament inside the UK, but that it works well in practice ... The Scottish Parliament has embedded itself in both the constitution of the United Kingdom and the consciousness of Scottish people. It is here to stay.”

Commission on Scottish Devolution, 2009

- 1.28 Within the wider framework of the UK – and with significant powers and responsibilities conferred through devolution – the Scottish Parliament and Scottish governments have made decisions about how to allocate resources and decisions on the design and delivery of a very wide range of public services. Devolution has resulted in more than a decade of laws being made and policy decisions being taken in Scotland, aimed at meeting the specific needs and circumstances of people in Scotland.
- 1.29 The first legislation passed by the newly established Scottish Parliament was the Mental Health (Public Safety and Appeals) (Scotland) Act 1999.³¹ Since then, the Parliament has passed more than 180 Acts to address some of the most important domestic issues facing Scotland. These include legislation establishing Scotland’s first National Parks, reforming land tenure, family law and the justice system, updating licensing law, prohibiting smoking in public places and banning the sale of cigarettes from vending machines, introducing a proportional voting system for local elections, establishing new railway links and protecting children.
- 1.30 In addition to legislative devolution, some further executive powers have been devolved to Scottish ministers. Some of these powers can be exercised jointly by UK and Scottish ministers. Specific powers can be transferred to Scottish ministers in areas where the UK Parliament retains legislative control.³² Scottish ministers have used these powers to promote renewable energy and energy conservation. They have also been used to promote the construction of railways in Scotland and to ensure that transport links are well integrated and serve the needs of people in Scotland. Under devolved powers, new services have been established, including lines from Stirling to Alloa and Bathgate to Airdrie.
- 1.31 The responsibilities of the Scottish Parliament and Government are therefore very broad. They have been used to determine a wide range of policies and deliver on Scottish priorities. That includes key economic drivers such as skills, promotion of enterprise, inward investment and capital spending across key sectors including transport, health, education and culture.
- 1.32 Devolution has allowed the Scottish Parliament and the Scottish Government to develop public services and to drive public policy in Scotland – across education, health, justice, enterprise, transport and well beyond – which respond to Scottish circumstance and need. This means in many cases taking decisions and ordering priorities differently to the rest of the UK. This is the practical and beneficial outcome of devolution.
- 1.33 The case studies below provide some examples of how legislation and public services in Scotland can and do develop differently from other parts of the UK, reflecting different priorities, policies and practices in Scotland.

³¹ *Mental Health and Scots Law in Practice*, Jim J. McManus and Lindsay D. G. Thomson, 2005, page 206.

³² An explanation can be found in the *Final Report of Commission on Scottish Devolution*, page 43.

Devolved powers in action

A Scottish Parliament and Scottish Government have ensured that where decisions can best be taken at the devolved level – closer to and in the interests of those they affect – there are the means to make that happen. Examples of where devolution has enabled specific Scottish solutions to specific Scottish issues include the following:

- **In healthcare:** The Scottish Parliament was the first in the UK to legislate to ban smoking in public places with the **Smoking, Health and Social Care (Scotland) Act 2005**. This was introduced to address high smoking rates in Scotland, which contributed to 13,000 deaths a year and were greater than those elsewhere in the UK.* Following a detailed assessment of the impact on communities, legislation was passed by the Scottish Parliament, representing the first step towards the introduction of a ban on smoking in public places across the whole of the UK. Independent studies have found a significant reduction in second-hand smoke exposure and a range of other improved health outcomes in Scotland as a result.**
- **In transport:** Successive Scottish governments have been able to take decisions about transport infrastructure and investment that reflect the challenges presented by Scotland's topography and the needs of Scotland's families, communities and economy. A recent example is the **Forth Crossing (Scotland) Act 2011**, which provided the powers necessary for Scottish ministers to oversee construction of a new crossing over the Firth of Forth to carry traffic. The Forth Replacement Crossing is a major infrastructure project for Scotland, designed to safeguard a vital connection in the country's transport network and ensure that it is able to meet future demands.
- **In land reform:** A right to responsible access was established by the **Land Reform (Scotland) Act 2003**, addressing historical grievances over land ownership that were specific to Scotland. The law introduced the right for the public to be on private land for recreational, educational and certain other purposes, as well as a right to cross private land. It also imposes certain duties on local authorities in relation to access on and over land in their areas and, in particular, requires them to plan public paths. Further provisions passed by the Scottish Parliament allowed bodies representing communities and crofting communities to buy land to which they have a connection, addressing an issue peculiar to Scotland in the context of the Highland Clearances.

* *The UK Smoking Epidemic: Deaths in 1995*, C. Callum, 1998, quoted on: www.clearingtheairscotland.com/facts/facts.html

** 'Changes in child exposure to environmental tobacco smoke (CHETS) study after implementation of smoke-free legislation in Scotland: national cross sectional survey', Patricia C Akhtar, Dorothy B Currie, Candace E Currie, Sally J Haw, *BMJ* (2007), volume 335, page 545: www.bmj.com/content/335/7619/545

A flexible and efficient system of government

“The ‘settlement’ created under the authority of the Scotland Acts is neither fixed nor static, but fluid and dynamic, its flexibility being operated by governments of all colours in the best interests of Scotland and the rest of the United Kingdom alike ... a spirit of mutual advantage and interdependence animates not only the design but the practical reality of devolution.”

Professor Adam Tomkins, John Miller Chair of Public Law, University of Glasgow, August 2012³³

- 1.34 The processes underpinning devolution rarely attract much public attention and are often concerned with detailed policy or technical issues. Yet as a system of government, devolution provides the flexibility necessary to deliver the best of both worlds and support a modern, evolving UK. Through the use of orders (secondary legislation), powers can be devolved to meet unique or rapidly changing circumstances as they arise and, where both parliaments agree, without the need for primary legislation.
- 1.35 As noted earlier, it was using this process that the UK Government devolved to the Scottish Parliament the power to hold a referendum on independence by 2014. Both governments worked together successfully to agree a process to ensure that a legal, fair and decisive referendum can be held on Scottish independence. This will be one of the most important collective decisions that people living in Scotland will be asked to make. By using the powers in the Scotland Act 1998, the governments were able to reach a sensible and agreed process to transfer the power to the Scottish Parliament to hold the referendum, thereby allowing the Scottish Government to meet its manifesto pledge from the 2011 election.³⁴
- 1.36 The use of orders under the 1998 Act is also an important part of the smooth working of governance in Scotland. For example, they have often been used to ensure that Scottish Parliament legislation can be given full effect by making changes to legislation for other parts of the UK or in reserved areas.³⁵ The Scottish Parliament legislated to prevent the touting of Commonwealth Games tickets; but, as there is a risk that touting might also take place elsewhere in the UK, additional measures were brought in via an order under the 1998 Act³⁶ to prevent that occurring. This measure, and others like it, are critical to ensure that the objectives of Scottish Parliament legislation enacted, to ensure that a coherent body of legislation emerges from Scotland’s two parliaments and to ensure that devolution works in practice.

³³ Paper for the Advocate General’s legal forum, July 2012

³⁴ www.number10.gov.uk/news/scottish-independence-referendum/

³⁵ Orders taken forward under section 104 of the Scotland Act 1998 allow for consequential modifications to be made to reserved law in consequence of legislation passed by the Scottish Parliament. This order making power allows for amendments to be made to reserved law to reflect changes in legislation in Scotland. This is key to ensuring that reserved law is up to date and is key to making devolution work. For further details see: www.gov.uk/government/policies/maintaining-and-strengthening-the-scottish-devolution-settlement/supporting-pages/legislating-for-scotland. They have been used more than 50 times to date: www.gov.uk/government/uploads/system/uploads/attachment_data/file/69949/SCOTLAND-ACT-ORDER-LIST-December-2012__1_.pdf

³⁶ The Glasgow Commonwealth Games Act 2008 (Ticket Touting Offence) (England and Wales and Northern Ireland) Order 2012 (SI 2012/1852): www.legislation.gov.uk/uksi/2012/1852/contents/made

- 1.37 Other orders enable the Scottish Parliament to take advantage of the economies of scale and larger buying power of the UK, for example by enabling the UK Government to purchase on behalf of Scottish ministers a stockpile of flu vaccines ahead of the winter in 2011.³⁷ Another was used in 2006 to allow UK ministers to exercise Scottish ministers' functions for purchasing radio equipment for the fire services.³⁸ This meant that one single contract could be let for services, giving both administrations the potential to benefit from greater joint bargaining power in negotiating a price.
- 1.38 The parliament of an independent Scottish state could develop and implement legislation similar to that promulgated by the UK Government should it so choose. Consistency in the application of legislation across the current territory of the UK could also be attempted through formal agreement between two separate sovereign states in the event of independence. However, differences in the development and application of laws and regulations in two separate but neighbouring states would make this consistency harder to achieve over time.³⁹ No matter how close their relations, no sovereign parliament can legislate on behalf of another. Under devolution, however, the UK Parliament can and does legislate on behalf of the Scottish Parliament, a practice explored further below.

Working together to serve Scotland's interests

- 1.39 While many of the processes underpinning devolution are not set out in legislation, they all enable Scotland's two governments to work closely together to respond to changing circumstances and serve the needs of people in Scotland.
- 1.40 The Sewel Convention is one of the most important. It is widely used and acknowledged as being effective. It essentially means that, although the UK Parliament has the power, it will not normally legislate in relation to devolved matters except with the consent of the Scottish Parliament. It is more than a decade into the life of the Scottish Parliament and the Sewel Convention has consistently been adhered to.
- 1.41 The Convention has been put into practice through a process which allows the Scottish Parliament to consider a motion (called a Legislative Consent Motion or LCM).⁴⁰ If passed, it would give consent to the UK Parliament to pass legislation extending to Scotland on a devolved issue. Through LCMs, devolution also gives Scottish ministers (with the consent of the Scottish Parliament) the ability to ask the UK Parliament to legislate on its behalf by including provisions on devolved matters in UK Bills. The process allows Scotland to have the "best of both legislative worlds at Westminster and at Holyrood".⁴¹

³⁷ The Scotland Act 1998 (Agency Arrangements) (Specification) Order 2011 (SI 2011/2439): www.legislation.gov.uk/uksi/2011/2439/contents/made

³⁸ The Scotland Act 1998 (Agency Arrangements) (Specification) Order 2006 (SI 2006/1251): www.legislation.gov.uk/uksi/2006/1251/contents/made

³⁹ The effectiveness of the UK's existing regulatory framework – and its contribution to supporting inward investment and the UK economy – will be explored in further Scotland analysis papers.

⁴⁰ LCMs have been used on more than 120 occasions since 1999. The Scottish Parliament Procedures Committee and the House of Commons Scottish Affairs Committee have examined the application of the Convention and come to the conclusion that it is both necessary to the effective working of devolved governance and works well. *Final Report of Commission on Scottish Devolution*, page 49

⁴¹ Scottish Government website, *The Sewel Convention: Key Features*: www.scotland.gov.uk/About/Government/Sewel/KeyFacts

- 1.42 That can be because it would be more effective to legislate on a UK basis in order to put in place a single UK-wide regime. It may also be used because no time is available at the Scottish Parliament but the UK Parliament is considering legislation for England and Wales which the Scottish Government believes should also be brought into effect in Scotland, or for a range of other reasons.⁴²
- 1.43 Using LCMs can therefore help to free up Scottish parliamentary time, allowing Scottish Government ministers to focus on priority issues and enable legislation to be introduced that is of benefit to people in Scotland. Recent examples of where Scottish Government ministers have found this of use are in relation to:
- regulating financial services: “There is no added value in separate legislation as Scottish interests are reflected in the Bill and a separate process would be complex and require further time and resources to achieve the same policy aim.” John Swinney, then Cabinet Secretary for Finance and Sustainable Growth (November 2009); and
 - preventing bribery: “Uniformity across the UK would provide a more effective and workable legislative framework than would be possible if separate bills were introduced in the two Parliaments. It avoids difficulties of cross-border bribery, which might arise should the law on one side of the border be perceived as weaker than the law on the other.” Kenny MacAskill, Scottish Cabinet Secretary for Justice (January 2010).
- 1.44 The UK Government and Scottish Government are committed to the principles of working together on matters of mutual interest, and to good communication and mutual respect. They work together long before a bill enters parliament or in routine policy issues where none is required. These principles are set out in the Memorandum of Understanding between the UK Government and the devolved administrations first published in 1999, and regularly updated.⁴³
- 1.45 The way both governments have routinely worked together to serve Scotland’s interests over the past 13 years has been demonstrated across a number of areas. These range from co-ordinating public health responses to flu pandemics to joint working between agencies to support people back into work.
- 1.46 The bid for the Commonwealth Games in Glasgow in 2014 was a success for Glasgow, for Scotland and for the UK, and is a good example of the close collaboration between the two governments. According to independent evaluation⁴⁴ an important part of the bid’s success came down to the ability of Scotland’s two governments to co-operate, draw on shared resources and learn from one another. This included sharing the UK’s experience of running the London Olympic Games, the co-operation of UK Government agencies in processing high volumes of visa and work permit applications, and access to the UK’s only accredited facilities for dope-testing in London.⁴⁵ As the evaluation makes clear, it was the investment and in-house expertise of the Scottish Government and Glasgow City Council, coupled with the benefits of being part of the wider partnership of the UK that was critical to bringing the Games to Glasgow.

⁴² See guidance provided on the Scottish Government website: www.scotland.gov.uk/About/Government/Sewel/KeyFacts. It can also be used where provisions are minor or technical and uncontroversial, for example: the Child Poverty Bill 2009, Bribery Bill 2009, Financial Services Bill 2009–10.

⁴³ Memorandum of Understanding 2012: www.cabinetoffice.gov.uk/resource-library/devolution-memorandum-understanding-and-supplementary-agreement

⁴⁴ *The Report of the CGF Evaluation Commission for the 2014 Commonwealth Games*, www.thecgf.com/media/games/2014/2014_Evaluation_Report.pdf

⁴⁵ www.wada-ama.org/Documents/Science_Medicine/Anti-Doping_Laboratories/WADA_Accredited_Laboratories_EN.pdf

- 1.47 Co-operation on policing (which is almost entirely devolved) and intelligence or organised crime (which is largely reserved) will be critical to the Games and is a crucial part of keeping the citizens of Scotland and the rest of the UK secure. Some examples of how routine collaboration between services across reserved/devolved boundaries enables Scottish police to deliver on local operational priorities – while working closely with UK-wide agencies to deal with UK-wide threats – are examined below.

Co-operating to keep the UK secure

Police: Co-operation between the jurisdictions of Scotland, England and Wales, and Northern Ireland is facilitated by UK legislation that makes extensive provision for cross-border powers of arrest and detention. The current system of mutual recognition of arrest warrants by the courts enables co-operation between police forces across the UK without the need for lengthy administrative processes to arrest criminals in different jurisdictions.

Organised crime: The benefits of the current close working relationship between Scotland and the rest of the UK in tackling organised crime are clear. Long-standing judicial and policing co-operation, and mature collaborative arrangements across a number of agencies, enable a coherent picture of threats to be described and for a prioritised approach to tackling organised criminal groups to be taken.

Counter-terrorism operations: The Security Service is responsible for the covert investigation of intelligence leads, calling on police resources in Scotland or the rest of the UK as required. Where there is an overseas dimension, the Security Service (MI5) relies on the support of the Secret Intelligence Service (MI6) and Government Communications Headquarters (GCHQ). The police service leads on the development of the evidential case. It is this richness of distinctive yet complementary skills brought together by the close working relationship between the Security and Intelligence Agencies and the police which is key to the highly resilient and successful UK model for countering the terrorist threat across the UK.

- 1.48 As highlighted above, the existing policing and security system within the UK is based on long-established arrangements for inter-agency working between local police forces and UK-wide criminal or security agencies. It is also based on legislation that enables them to operate effectively across the jurisdictions of Scotland, England and Wales, and Northern Ireland. It is unlikely that an equally embedded system would be established between two separate states, and it would be virtually impossible to replicate the same degree of integration. The need to arrest a suspect over an international border between Scotland and England, for example, may need to be facilitated by the Serious Organised Crime Agency (SOCA) or its successor⁴⁶ in London and an equivalent in an independent Scottish state before it could be carried out by a local force on either side of the border. Additional processes that would be required to facilitate joint working across international frontiers could therefore have a detrimental effect on the delivery of justice and security across the current territory of the UK.

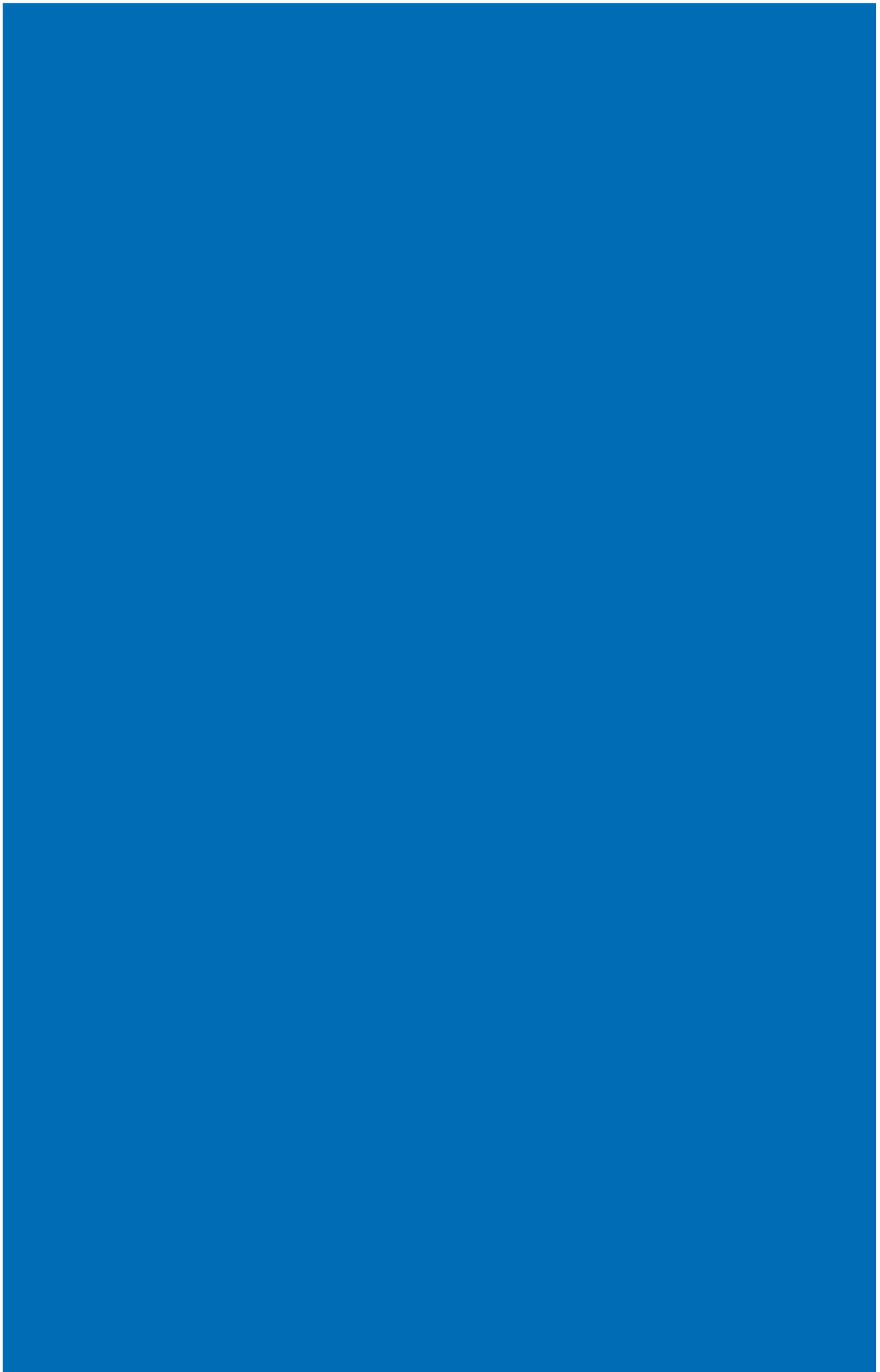
⁴⁶ SOCA is due to be replaced by the National Crime Agency (NCA) under Part 1 of the Crime and Courts Bill.

1.49 Devolution as a system of government therefore facilitates close working between Scotland's two governments. While co-operation between separate states and the exchange of knowledge and expertise could continue across international borders in the event of independence, people in Scotland would lose the benefit of having two governments working closely together to serve their interests. Moreover, many of these processes simply could not take place without international agreements being in place. As such, it is unlikely that it would be as easy to replicate the same level of routine co-operation that is commonplace under devolution between the agencies and governments of the UK and Scotland across an international border.

Conclusion

- 1.50 The analysis in this chapter has demonstrated that devolution means that Scotland has two governments working in its interests, each in areas best suited to their role. This enables people in Scotland to have the best of both worlds. Devolution allows decisions to be made which reflect different priorities within Scotland in key areas, bringing government closer to people in Scotland. It also allows all citizens to benefit from the collective decision-making processes that are in place to guarantee their security, represent their interests in the world, and ensure that natural and financial resources are shared effectively, wherever they happen to live in the UK.
- 1.51 It has also shown that devolution is flexible and has been adapted to meet changing circumstances. Many adjustments have been made through the Scotland Act 1998 to achieve this. Significant new powers have also been devolved to the Scottish Parliament through the Scotland Act 2012.
- 1.52 As demonstrated above, devolution is also an efficient, effective and collaborative form of government. Effective co-operation between Scotland's two governments is built into the fabric of devolution, and exemplified in how they work together on a daily basis.
- 1.53 That is not to say that people in Scotland will always agree with the way that power is exercised on their behalf either by the UK Government or the Scottish Government. The same can be said for people living in all parts of the UK. Devolution cannot "solve the problems of resources or banish the dilemmas of government,"⁴⁷ and nor could any other form of governance in Scotland. But what is at stake in the referendum on independence is not the particular policies of a given government. The choice facing people in Scotland is between what devolution within the UK has to offer and the alternative of independence.
- 1.54 They are not the same thing, however. Independence is not an extension of devolution, nor does it represent the gradual accretion of powers to a devolved legislature until a new state is born.
- 1.55 Becoming a new, independent state is a completely different proposition to redefining arrangements within an existing state. The question of what constitutes a state, and how new states are created, is therefore crucial to an understanding of the choice people in Scotland are being asked to make in 2014 and is dealt with in the following chapter.

⁴⁷ Foreword to *Scotland's Parliament*, Donald Dewar, 1997



Chapter 2:

What independence would mean: law and practice

Summary

- Should a majority of people in Scotland vote for independence, Scotland would leave the United Kingdom (UK) following a process of negotiations.
- Two of the most important factors determining what independence would mean for the UK and for Scotland in practice are the legal issues associated with state formation and the process for negotiating the terms of independence.
- Independent legal opinion by two of the world's leading experts in international law and the law of state formation concludes that, in the event of independence, the UK would continue and Scotland would form a new, separate state.
- Their analysis cites the overwhelming body of international precedent in support of this conclusion. This includes, within the UK context, the creation of what is now the Republic of Ireland.
- Given this, representatives of the UK Government would enter any negotiations on the terms of independence as representatives of the continuing state of the UK.
- Until the outcome of the referendum is known, neither the UK Government nor the Scottish Government has a mandate to carry out these negotiations which, by their nature, would involve putting the interests of people in one part of the UK above the interests of another part of the UK. All UK Government ministers have a responsibility to the citizens of all parts of the UK, and cannot undertake any activity that would undermine those duties.
- For that reason, neither the UK Government nor the Scottish Government can enter into talks in advance of a referendum on the terms of independence. To do so would involve unpicking the fabric of the UK before people in Scotland have had a chance to have their say in the referendum.
- Clarity about the legal issues associated with statehood and the parameters of the negotiations is critical for an informed debate about the implications of independence for both the UK and Scotland, at home and abroad. The expert Opinion on which this paper is based provides the necessary and clear answer.

Scotland's choice

- 2.1 Successive UK governments have said that, should a majority of people in any part of the multi-national UK express a clear desire to leave it through a fair and democratic process, the UK Government would not seek to prevent that happening.⁴⁸ That is why the UK Government sought to reach an agreement on a legal, fair and decisive referendum on independence for Scotland in October 2012, through the Edinburgh Agreement.⁴⁹ Should a majority of voters in Scotland vote in favour of independence in that referendum, the UK Government would, in the same spirit, move to initiate negotiations for Scotland's departure from the UK.
- 2.2 The UK Government has also consistently stated that Scotland could be a viable independent state and Scotland has the right to choose that path. But the UK Government, standing alongside many others, will continue to argue the case that all parts of the UK are better served by staying together.
- 2.3 Much of the debate around whether Scotland would be better off staying in the UK or leaving it revolve, understandably, around what a new Scottish state might look like and how it would differ from current arrangements within the UK.
- 2.4 There are two important general factors determining what independence would mean for both the UK and Scotland in practice. These are: first, what the principles set out in international law and modern cases of individual state formation tell us about how new states are formed; and second, how the process for negotiating the terms of independence would work. Both are examined in this chapter.

Legal issues

- 2.5 In the event of independence, there would be a new state in the international community called Scotland. The question is then: what happens to the state known as the UK? The UK could carry on legally as before, but without Scotland. Alternatively, the UK could cease to exist and two new states could come into being – Scotland, and one comprising England, Wales and Northern Ireland that has not previously existed.
- 2.6 The answer matters hugely for Scotland because it determines the basis on which the new Scottish state would come into being. If the second proposition is true however, Scottish independence would have profound consequences for the rest of the UK as well, and far more dramatic than has commonly been thought. In this scenario the rest of the UK could not, for example, automatically retain its membership of key international organisations like the North Atlantic Treaty Organization (NATO) or the European Union (EU) because, like Scotland, it would be a new state.
- 2.7 Given the importance of this issue, in 2012 three departments of the UK Government – the Foreign and Commonwealth Office (FCO), the Cabinet Office and the Office of the Advocate General for Scotland – commissioned detailed independent expert advice. The authors of that advice are Professor James Crawford SC, Whewell Professor of International Law at the University of Cambridge and a world-renowned expert on the law and practice of state formation and issues of state succession and continuation, and Professor Alan Boyle, Professor of Public International Law at the University of Edinburgh specialising in the law of treaties, international law-making and the settlement of international disputes. Their paper – hereafter referred to as

⁴⁸ *Scottish Independence: A Practical Guide*, Jo Eric Murkens, Peter Jones and Michael Keating, 2002, pages 12–13 provide one source of reference for the position of key UK ministers from the 1980s onwards.

⁴⁹ www.number10.gov.uk/wp-content/uploads/2012/10/Agreement-final-for-signing.pdf

'the Opinion' – forms the basis for the analysis contained in this paper and is referred to in detail in this and Chapter 3.⁵⁰

- 2.8 This analysis has also been informed by the expertise of those sitting on the Advocate General's Forum,⁵¹ which was established to discuss some of the key legal and constitutional issues surrounding the referendum on Scottish independence.

State formation in international law

- 2.9 Some background about the key legal concepts of state formation is necessary in order to understand these important questions.
- 2.10 As Professors Crawford and Boyle explain, a state is a legal entity which comprises a people settled in a territory under its own sovereign government and which possesses legal personality under international law.⁵² States are the primary subjects of international law, meaning that they are able to enjoy and are bound by rights, duties and powers established in international law, and enter into relations with other states. When a new state comes into existence, by whatever means, it is of fundamental importance that it is recognised by other states. Recognition is a formal, political act, with important legal effects, by which a state accepts the existence of another sovereign state and thus its capacity to contract mutual rights and obligations on the international plane.
- 2.11 The UK recognises states in accordance with common international doctrine, which is that the entity claiming statehood should have, and seems likely to continue to have: a clearly defined territory with a population; a government which is able to exercise effective control over that territory; and independence in its external relations.⁵³
- 2.12 Despite their technical titles, the concepts of state continuity and state succession in international law – considered comprehensively in the Opinion⁵⁴ – are relatively straightforward. Continuity applies where the same state continues to exist despite changes in its territory and population. What Professors Crawford and Boyle refer to as a 'continuator state'⁵⁵ therefore continues automatically to exercise the same rights, obligations and powers under international law as the predecessor state. State succession occurs when there is a change of sovereignty over a territory. It is defined in the Vienna Convention on Succession of States as "the replacement of one State by another in the responsibility for the international relations of territory".⁵⁶ A successor state, in contrast with a continuing state, does not automatically assume the rights, obligations and powers of the predecessor.⁵⁷

⁵⁰ The Opinion can be found in full at Annex A.

⁵¹ Information on the Advocate General's Legal Forum can be found here: www.oag.gov.uk/oag/363.html

⁵² Crawford and Boyle, paragraph 52

⁵³ The UK practice on recognition was set out in a parliamentary answer given by an FCO minister in 1989. *HC Written Answers for 16 November 1989*, volume 160 c.494W. These criteria are consistent with Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States, which describes the qualifications for statehood as "(a) a permanent population; (b) a defined territory; (c) a government; and (d) a capacity to enter into relations with other States".

⁵⁴ Crawford and Boyle, paragraphs 16–24

⁵⁵ This is the technical legal terminology used in the Opinion. In the rest of this paper the simpler terms 'remainder state' or 'continuing state' will be used for the sake of clarity, unless the technical term is required. In the event of independence, the UK without Scotland is referred to as 'the remainder of the UK' or the 'Continuing UK'.

⁵⁶ Vienna Convention on Succession of States in respect of Treaties, Vienna, 23 August 1978: untreaty.un.org/cod/avl/ha/vcssrt/vcssrt.html

⁵⁷ Crawford and Boyle, paragraph 24

2.13 This means that issues arising from succession do not arise for continuing states. They remain in the same legal position as the predecessor state. Continuing states, for example, do not have to re-negotiate existing treaties or reapply for membership of international organisations. By contrast, where a successor state is established this gives rise to a host of legal questions about the conditions of succession.⁵⁸

The position of an independent Scottish state and the continuing UK in international law

2.14 Professors Crawford and Boyle set out three possible outcomes under international law for an independent Scotland:

- The remainder of the UK is the continuing state and would exercise the existing UK's international rights and obligations, and Scotland becomes a new successor state.⁵⁹
- Two successor states are created and neither would continue the international legal personality of the UK, which would cease to exist.⁶⁰
- The remainder of the UK is the continuing state and Scotland reverts to the status of the pre-1707 Scottish state.⁶¹

2.15 As the Opinion makes clear, the overwhelming weight of international precedent suggests that the first outcome is the most likely: **the remainder of the UK would be considered the continuing state and an independent Scotland would be a new state.**⁶²

2.16 Professors Crawford and Boyle point to four factors that underpin this conclusion:

- First is **specific precedent**. The majority of cases in the 20th century demonstrate that continuity of one state rather than dissolution is the norm. Significant examples include the UK/Ireland (1922), British India (1947), Malaysia/Singapore (1965), Pakistan/ Bangladesh (1971–72), Union of Soviet Socialist Republics (USSR) (1990–91), Ethiopia/Eritrea (1993), Serbia/Montenegro (2006) and Sudan/South Sudan (2011).⁶³ The case of Ireland is the only direct example of the formation of an independent state from a territory within the UK.
- Second is the role of **population and territory**. According to Professors Crawford and Boyle, this has been an important determinant in other cases.⁶⁴ In the event of Scottish independence, the continuing UK would retain the majority of both the population (92 per cent) and the territory (68 per cent) of the UK, as well as retaining the UK's institutions of government. These facts would clearly support a claim to continuity with the UK.⁶⁵

⁵⁸ Ibid.

⁵⁹ Crawford and Boyle, paragraphs 50–70

⁶⁰ Crawford and Boyle, paragraphs 71–94

⁶¹ Crawford and Boyle, paragraphs 95–115

⁶² There can be only one continuator state because, as a matter of law, the continuator is the same state as the predecessor. It is therefore not credible to suggest that Scotland could assert a right to be the continuator of the UK in preference to England, Wales and Northern Ireland, bearing in mind the fact that the remainder of the UK would retain the majority of the UK's territory, population and governmental institutions. Crawford and Boyle, paragraph 50. Nicola Sturgeon, Deputy First Minister, stated in her evidence to the House of Commons Foreign Affairs Committee on 28 January 2013 that Scotland "would ... inherit treaty obligations and so on" and that she is "arguing the position of co-equal states."

⁶³ Crawford and Boyle, paragraphs 53–64

⁶⁴ Crawford and Boyle, paragraph 68.1

⁶⁵ Crawford and Boyle, paragraph 69

- Third is likely **recognition by other states**. As outlined in 2.10 above, this would be a critical factor. The Opinion references and concurs with previous statements made by the UK Government that the UK would be recognised as the continuing state by the rest of the international community in the event of Scottish independence.⁶⁶ Other expert authorities on legal and constitutional matters support this conclusion.⁶⁷ The UK's role in the international order would clearly be an important factor in this regard. The UK: is one of only five permanent members of the United Nations (UN) Security Council; is a nuclear weapons state under the Treaty on the Non-Proliferation of Nuclear Weapons (NPT); is a key member of NATO; is a member of the EU; and has been involved in up to 14,000 treaties, multilateral and bilateral.⁶⁸ In the unlikely event that the UK should be regarded as a successor state, its extinction as a legal entity (which is what this would entail) would cause huge disruption within the international institutional framework, particularly in respect of the UN Security Council and the NPT.
- A final factor, closely related to the point about recognition, is a general requirement for **mutual consent** in the rare cases of dissolution to come about through negotiated separations. Professors Crawford and Boyle point out that dissolution into two new states is unlikely to be accepted by the international community in the case of Scotland and the UK unless the remainder of the UK agreed.⁶⁹ As outlined above, the Opinion notes that the UK Government has already stated its view that the international community would recognise the UK as the continuing state, and concurs with it.

2.17 On the final point, in practice, it is hard to envisage any scenario whereby the UK Parliament would ever have a mandate from the people of the rest of the UK to dissolve the UK by voting the state out of existence. Therefore UK consent to the creation of two new states is unlikely.

2.18 The second of the three possible scenarios – that the UK's existence in international law would come to an end and two entirely new states would be created – has been advanced by the First Minister of Scotland, who has suggested that both new states

⁶⁶ Crawford and Boyle, paragraph 70

⁶⁷ Written evidence from Dr Jo Eric Khushal Murkens, London School of Economics and Political Science Department of Law and Professor Robert Hazell, Director Constitution Unit School of Public Policy to the House of Lords Economic Affairs Committee, 24 September 2012:

www.publications.parliament.uk/pa/cm201213/cmselect/cmcaff/writev/643/m13.htm

Written evidence to the House of Commons Foreign Affairs Committee from Professor Nigel White, School of Law, University of Nottingham:

www.publications.parliament.uk/pa/cm201213/cmselect/cmcaff/writev/643/m14.htm

Oral evidence to the House of Commons Foreign Affairs Committee including Professor Matthew Craven, Professor of International Law and Dean of the Faculty of Law and Social Science, School of Oriental and African Studies: www.publications.parliament.uk/pa/cm201213/cmselect/cmcaff/uc643-i/uc64301.htm

⁶⁸ The FCO online treaty database: www.fco.gov.uk/en/publications-and-documents/treaties/uk-treaties-online/. There were 13,988 treaty (as opposed to Memorandum of Understanding) records as at 25 January 2013; 10,813 of these are bilateral. Of that total, some 2,200 are EU treaties.

⁶⁹ Crawford and Boyle, paragraph 93

would inherit “exactly the same international treaty rights and obligations”.⁷⁰ It is not clear whether the Scottish Government is trying to suggest that both states would be ‘continuator’ of the UK. However, as already noted above in paragraph 2.14 (footnote 62), the analysis in the Opinion makes clear that this could not happen under any scenario – it is not legally possible.

- 2.19 Some academics and legal practitioners have also indicated that the creation of two successor states would be the most likely scenario.⁷¹ However, in international practice there are only two recent cases of states that have dissolved without leaving a continuing state and neither of these cases is a direct precedent for the position of an independent Scotland. These are Czechoslovakia and the Federal Republic of Yugoslavia (FRY), and are considered below.

The two exceptional cases of dissolution in recent history

Czechoslovakia: In 1992–93, both of the constituent republics of Czechoslovakia agreed in advance that it would be dissolved and that the Czech Republic and Slovakia would be successor states. Neither claimed to continue its identity. However, as outlined in the Opinion, the UK Government has already stated its view that the international community would recognise the UK as the continuing state in the event of Scottish independence – a view with which Professors Crawford and Boyle agree. The parallels are also limited by the fact that there was no referendum – the separation was based on legislation which was a product of agreement between representatives of the two former constituent republics.

The Federal Republic of Yugoslavia: The second recent example is the dissolution of the former Yugoslavia into five states. The FRY claimed initially to be the ‘continuator’ of the Socialist Federal Republic of Yugoslavia (SFRY). However, this claim was not accepted by the other successor states of the former Yugoslavia or by the international community and would not apply in the case of Scotland and the UK, as made clear in the Opinion. There were several reasons for this. The circumstances of ethnic conflict in which the dissolution took place are evidently very different to those in the UK today, and there was a lack of separation agreements with the other former Yugoslav republics. The “federal government organs that represented the SFRY had also ceased to function”.^{*} Importantly, the UN Security Council considered that the state formerly known as the SFRY had ceased to exist and claims to the contrary had “not been generally accepted”.

* Crawford and Boyle, paragraphs 79–92

- 2.20 Professors Crawford and Boyle conclude that these relatively rare examples of dissolution, dependent as they are on the specifics of each case, do not cast any doubt on the

⁷⁰ First Minister of Scotland, Alex Salmond speaking in an interview with Jon Snow, 26 November 2012: “Because the UK was formed by the international treaty that allied Scotland and England, if that Treaty is dissolved, as it would have to be, by agreement, post the ‘Edinburgh Agreement’ – it’s not a secession we’re talking about, it’s an agreement that’s been enshrined in the ‘Edinburgh Agreement’ that both sides will accept the result of the people – if that partnership is dissolved, as I think it should be ... then both parties to that stand equal to each other, and equal to any other relationships that they have.” Scottish Government spokesperson quoted in *The Guardian*, 24 October 2012: “Scotland will inherit exactly the same international treaty rights and obligations as the rest of the UK, as equal successor states.” Alex Salmond in an interview with Andrew Neil, in March 2012: “We’d be a successor state, one of two successor states.” Nicola Sturgeon, Deputy First Minister, stated in her evidence to the House of Commons Foreign Affairs Committee on 28 January 2013 that Scotland “would ... inherit treaty obligations and so on” and that she is “arguing the position of co-equal states”.

⁷¹ Dr Andrew Blick, University of Kent and Senior Research Fellow at the Centre for Political and Constitutional Studies, King’s College London:
www.publications.parliament.uk/pa/cm201213/cmselect/cmffaff/uc643-i/uc64301.htm

conclusion that the most likely outcome is that the remainder of the UK would be recognised as continuing the international legal personality of the UK.⁷²

- 2.21 The third possibility that has been suggested is that the status of Scotland before 1707 and the Acts of Union which formed the Kingdom of Great Britain would have relevance to the status of Scotland in the event of independence in the 21st century.⁷³ In the interview in November 2012 already cited (footnote 70), for example, the First Minister of Scotland stated that “because the UK was formed by the international Treaty that allied Scotland and England, if that treaty is dissolved, as it would have to be, by agreement ... then both parties to that stand equal to each other, and equal to any other relationships that they have”.
- 2.22 However, the Opinion makes clear that the status of Scotland and England in 1707 has no bearing on the determination of issues relating to continuity and succession under international law in the 21st century and in the event that Scotland were to separate from the UK.⁷⁴ The status of the continuing UK and Scotland in the event of Scottish independence would be determined according to the modern principles of international law described above. While there may be some debate about whether the Treaty and Acts of Union constituted a treaty as a matter of international law at the time that they were drafted, they ceased to have any effect in international law as Scotland ceased to be a separate state following the creation of the Kingdom of Great Britain.⁷⁵
- 2.23 The Scottish Government may also be seeking to argue that an independent Scottish state could ‘revert’ to the pre-1707 Scottish state following independence. There are modern cases of ‘reversion’ but normally in very different circumstances, often involving illegal annexation of territory. Kuwait, following the ending of the Iraqi invasion in 1990–91, is one such example. There is little evidence to suggest that, even if such a claim were made in Scotland’s case, it would have any specific legal consequences in international law after a gap of more than three centuries.⁷⁶ Pre-1707 Scotland was evidently not a member of the UN or the EU, nor was it a party to modern treaties. Moreover, and perhaps most importantly, regardless of the merits of the argument that Scotland could assert identity with the pre-1707 Scottish state, it would not affect the status of the remainder of the UK’s claim to continuity in international law (as outlined in paragraph 2.15–2.16 above).⁷⁷ This means that, even in the unlikely event that the ‘reversion’ argument was accepted internationally in relation to Scotland, it would make little if any practical difference to the position of the continuing UK.

Conclusions from international law

- 2.24 Professors Crawford and Boyle conclude that the third model described above, while historically interesting, is unlikely to be correct. Even if it were, it would be of no practical consequence because it leaves the remainder of the UK as the continuing state. Equally the second model of dissolution is not, as their analysis has shown, a realistic scenario where any relevant precedent or legal argument can be advanced in its support.
- 2.25 The Opinion is therefore clear in its assessment that, in the event of Scottish independence the remainder of the UK would be considered the continuing state and Scotland would be

⁷² Crawford and Boyle, paragraphs 65–70

⁷³ Op. cit., Alex Salmond speaking in an interview with Jon Snow, 26 November 2012

⁷⁴ Crawford and Boyle, paragraphs 109–115

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid.

a new state.⁷⁸ It concurs with the UK Government's previously stated judgement that this situation would be recognised by the international community. That view is also consistent with the findings of in-depth work carried out by other leading constitutional experts.⁷⁹

2.26 This is not an assessment that precludes Scottish independence. On the contrary, if people in Scotland vote for independence, Professors Crawford and Boyle have mapped out a clear legal route for Scotland to take its place in the global community of independent states. The objective and comprehensive analysis demonstrates what would happen in law if Scotland were to become independent. This is a good foundation for assessing the potential implications of independence. The UK's position as the continuing state gives rise to a number of practical consequences which are examined more fully in the following chapter.

The negotiations process and its parameters

2.27 Before examining those consequences, it is necessary first to explore the other major factor that would affect how an independent Scotland would come into being. As Professors Crawford and Boyle and other scholars have stated, a process of negotiations would be needed to establish a new Scottish state.⁸⁰ It is therefore worth exploring how the negotiations themselves might work, for the purposes of an informed debate.

2.28 It is not possible to predict with any confidence the precise way in which any such negotiations would play out now, because the circumstances in the event of a vote for independence in the referendum would be very different. However, drawing on constitutional practice within the UK, key principles in international law and relevant lessons from what has happened in other countries (albeit often under very different circumstances), six general conclusions can be established.

2.29 **First, while the negotiations took place Scotland would remain part of the UK with its own devolved Parliament and Government.** As the Scottish Government has said,⁸¹ independence would not take effect immediately after the referendum. So for a time Scotland would continue, as before, under the same laws and legal framework.

2.30 **Second, the negotiations would be entered into in good faith.** Throughout history new states have come into being, often in a context of conflict or unrest. The situation in Scotland is different – both sides are committed to respecting the democratic wishes of people in Scotland, and the referendum result. In the event of a majority vote for independence, this would mean engaging in negotiations to give effect to the desire of people in Scotland to establish their own separate state.

2.31 **Third, the negotiations would be of a completely different nature to previous discussions within the UK about establishing or modifying the devolution settlement.** The Scottish Government has, in the past, drawn a comparison between the forthcoming independence referendum and the 1997 devolution referendum.⁸² More recently, the Scottish Government has suggested that the discussions leading to the Edinburgh Agreement and transfer of powers for holding a referendum in 2014 would be

⁷⁸ Crawford and Boyle, paragraph 70

⁷⁹ Op. cit., Murkens, Hazell, White, Craven

⁸⁰ Crawford and Boyle, paragraph 47

⁸¹ www.scotland.gov.uk/Resource/0038/00386122.pdf, page 28; Op. cit., *Scotland's Future*

⁸² BBC News, 6 June 2011: A spokesman for Alex Salmond said: "Acknowledged experts have made the democratic position clear, and the people of Scotland have the right to choose independence on the basis of one referendum agreed by the Scottish Parliament, on a published proposal, which is then implemented – exactly as was done for devolution in 1997." See: www.bbc.co.uk/news/uk-scotland-13671907

a “template for a post-referendum transfer of powers from Westminster to Scotland”.⁸³ However, there is a fundamental difference between the processes to establish and maintain devolution within the UK – which have altered the structure of government within a single state – and those that would be necessary to establish a new, independent Scottish state.

- 2.32 In 1997, the then UK Government was able to put a devolution proposal to establish a Scottish Parliament before voters in the knowledge that the UK Parliament could then enact the details based on discussion and a democratic vote involving representatives of the whole UK. As a result, the proposals published in a UK Government White Paper were endorsed in a referendum by people in Scotland, and these were swiftly enacted.
- 2.33 That process, and subsequent changes to the devolution settlement (including through the Scotland Act 2012 and under the Edinburgh Agreement), has involved the transfer of powers and responsibilities within a unitary UK state, which has a single international border and a single voice to represent its interests in the international community. No international organisations or other states have needed to be involved, then or since. The UK Government also acts on behalf of everyone in the UK in those matters.
- 2.34 The process for independence negotiations would be entirely different. It would involve discussion over the division of many of the responsibilities, institutions, processes, assets and liabilities that are currently shared throughout the whole of the UK across what would become an international frontier. It would involve two parties negotiating on behalf of what would become two separate states with their own citizens. Unlike in devolution discussions, it may require UK Government negotiators to prioritise the interests of those who would remain in the UK over people living in a part of what would become a separate state.
- 2.35 **Fourth, there would be legal and international complexities.** Some of the issues negotiated would be the subject of international law rules and principles, and/or to scrutiny by international actors (either institutions or other states). This would include, for example, determination of the maritime boundary and the allocation of national debts and assets (including the UK’s fixed strategic defence assets). Many of the issues under negotiation would also be subject to EU law.⁸⁴
- 2.36 The UK’s status as the continuing state and Scotland’s status as a successor state would have significant consequences for Scotland’s role in international organisations. In the event of independence, the Scottish Government have suggested that the Scottish Parliament would have a leading role in passing legislation to give effect to independence. The Scottish Government has also implied that it would be within the UK Parliament’s power to provide for “the transition of Scotland’s status in the EU from membership as part of the UK to independent membership” and “for the continuing application to Scotland of international arrangements with other countries and international organisations”.⁸⁵ But it would not be in the gift of the UK Parliament – or indeed the Scottish Parliament – to decide these matters. They would be determined by an independent Scottish state’s position in international law as a successor state and by negotiations with international organisations.
- 2.37 These issues are explored fully in the following chapter but it is important to note that, in negotiating membership of the EU, an independent Scottish state would not automatically

⁸³ Op. cit., *Scotland’s Future*, page 3

⁸⁴ *Scottish Independence: A Practical Guide*, Jo Eric Murkens, Peter Jones and Michael Keating, 2002, page 79

⁸⁵ Op. cit., *Scotland’s Future*, pages 15–16. “The constitutional platform will enable the transfer of sovereignty to Scotland” [in the matters outlined above].

'inherit' the UK's opt-outs, and this would have important domestic implications (for example in relation to currency and border controls).⁸⁶

- 2.38 Negotiations would therefore be required between representatives of the continuing UK and an independent Scottish state on a host of complex and often interdependent issues, which may also require the involvement of other states and international organisations, such as the EU, in a number of important areas.
- 2.39 **Fifth – and partly for some of the reasons already discussed – the scale and complexity of the negotiations task would be considerable. The talks could take a long time.** As the UK is a highly integrated political, economic and social union, founded on a long shared history, many of the arrangements in place for governing the UK would need to be reviewed and decisions reached on if and how these may need to be divided.⁸⁷
- 2.40 There are a number of high-level issues that would need to be discussed early in any separation negotiations. Some have already been mentioned, including the apportionment of debts and assets, and defence arrangements. Others are likely to include fiscal, economic and monetary policy, arrangements for national security, citizenship and border controls.⁸⁸ There would also be a huge range of other areas which would have to be covered in the talks, in both the international and domestic spheres.
- 2.41 This means that the negotiations could take time. The Scottish Government has stated that independence would not immediately follow a referendum and envisages that negotiations would be complete in time to establish an independent Scottish state by March 2016.⁸⁹ The importance of Scotland's position in relation to the EU and the implications for a whole range of key issues, from currency to fish quotas, would mean that the length of time that EU negotiations took would be a determining factor for the length of negotiations overall. The duration of the negotiations is therefore impossible to predict now.⁹⁰
- 2.42 The dissolution of Czechoslovakia took place in very different circumstances, but some relevant parallels may be drawn and these are examined in the following box.

⁸⁶ This is explored fully in Chapter 3, paragraph 3.39.

⁸⁷ Op. cit., Murkens, Jones and Keating, page 79

⁸⁸ See for further details, 'Czechs and Slovaks Define Post-Divorce Relations', Pehe, *RFE Research Report* Volume 1., 13 November 1992

⁸⁹ Op. cit., *Scotland's Future*, page 16

⁹⁰ This point is evident from a paper published by Sir David Edward, former European Court of Justice judge. While his views on the question of Scotland's EU membership differ from those presented in this paper, he points out that: "The length and complexity of the negotiation and ratification process cannot be predicted in advance. In part, it would depend on the goodwill of those involved."

See: www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/852/David-Edward-Scotland-and-the-European-Union.aspx

The process of dissolution in Czechoslovakia

The circumstances of Czechoslovakia in the early 1990s were clearly very different to those in the UK today. Czechoslovakia had a shorter, less integrated federal partnership, and had been under Soviet domination for four decades. In practice, this meant dissolution took place while many of the things that we take for granted in the UK (for example a free market, democratic government) were only then being established.* There were other crucial differences. First, two entirely new states were created through dissolution. This meant that neither state continued, in contrast to what would be the case for the UK in the event of Scottish independence. Second, there was a strong desire on the part of the international community to accept a solution that avoided a risk of conflict. Finally, Czechoslovakia was not a member of the EU.

However, while the negotiations process that took place cannot provide a template for what would happen in the event of Scottish independence, there are some interesting points to note. The dissolution required 31 overarching treaties and around 2,000 sub-agreements between the two parties.** Priority matters requiring negotiation included monetary arrangements, border regulations and residency requirements, mutual recognition of documents issued by either republic, the use of archives, social security arrangements, the employment of citizens from either country in the other, healthcare services and environmental protection.†

Although the dissolution took legal effect within just six months of agreement upon separation, many important outstanding issues were not resolved until 2000, some seven years after the split.‡ Given the differences in historical context, size, level of integration and international position of Czechoslovakia compared with the UK, it is likely that both the number of issues to be addressed and the time required to negotiate them would be considerably greater in the event of Scottish independence.

* For further details, see: 'Slovak Nationalism and the Break-Up of Czechoslovakia', Paal Sigurd Hilde, *Europe-Asia Studies* Volume 51, Number 4, 1999, pages 647–656
moduly.outly.cz/posycze1/Hilde_Paul_1999.PDF

** *Issues Around Scottish Independence*, David Sinclair, Constitution Unit, University College London, 1999: www.ucl.ac.uk/spp/publications/unit-publications/51.pdf; Professor Robert Hazell, Constitution Unit, University College London, writing in *The Guardian*, 29 July 2008: www.guardian.co.uk/commentisfree/2008/jul/29/snp.scotland; 'The Dissolution of the Czech and Slovak Federal Republic', 1993, cited in *The Breakup of Czechoslovakia, Research Paper*, R. Young, Institute of Intergovernmental Relations, Queen's University, Kingston, Ontario, 1994, page 42

† See, for further details, 'Czechs and Slovaks Define Post-Divorce Relations', Petie, *RFE Research Report* Volume 1, Number 45, 13 November 1992

‡ *Scottish Independence: A Practical Guide*, Jo Eric Murkens, Peter Jones and Michael Keating, 2002, pages 99 and 211

2.43 Finally, the negotiations cannot be conducted in advance of the referendum.

The analysis here assessing the nature, complexity and duration of independence negotiations might appear to make a case for setting out some agreements in advance of the referendum superficially attractive. On a closer examination, however, this is not a realistic option.

2.44 Under paragraph 30 of the Edinburgh Agreement, both the UK Government and Scottish Government are committed to continuing to work together in good faith in light of the outcome of the referendum, whatever it is. As the UK Government has already stated, this means that in the event of a majority vote for independence, the UK Government would

engage in a process to bring it about.⁹¹ But that does not mean that representatives of the continuing UK would or could facilitate everything that the Scottish Government has said it hopes to achieve through independence or that the details of that process can be spelled out now.

- 2.45 Both governments agree that there can be no ‘pre-negotiations’ on what the terms of independence might be before the referendum takes place.⁹² For the UK Government’s part, this is because of a profoundly important principle arising from the fact that the UK Government is one of Scotland’s two governments. UK Government ministers represent the whole of the UK, including Scotland, and serve the interests of all its citizens. As such, the UK Government has direct responsibility for many of the key areas likely to feature heavily in post-referendum negotiations, and must continue to represent the interests of people in Scotland now.
- 2.46 In any negotiations following a vote for independence in the referendum, it would be the role of representatives of an independent Scottish state to seek the optimum arrangements for those who would live in it. Similarly, the role of the representatives of the UK would be to represent the interests of those who would remain in England, Wales and Northern Ireland. Until the outcome of the referendum is known, neither the UK Government nor the Scottish Government has a mandate to carry out these negotiations. For the UK Government it would mean abrogating its responsibilities as part of the Government of Scotland. For the Scottish Government, it would mean assuming positions on reserved matters that are the responsibility of the UK Government without any mandate to do so.
- 2.47 As the Secretary of State for Scotland has said, it is for that reason the UK Government cannot, in good faith, plan for or hold negotiations before the referendum, where it would potentially be required to put the interests of the people of the rest of the UK above those of the interests of people in Scotland.⁹³ To do so now would be to start unpicking the fabric of the UK before people in Scotland had exercised their democratic right to choose whether to remain part of it or not.
- 2.48 As the Scottish Government has said, the process itself and the timetable for establishing a new independent Scottish state would also need to be agreed between the UK and Scottish Governments after the referendum.⁹⁴
- 2.49 That is not to say that there cannot be some clarity about the process that would be followed in the aftermath of a referendum. The account given in this chapter of the parameters in which any negotiations would take place is an important factor in providing for an informed debate.

⁹¹ Secretary of State for Scotland, Rt Hon. Michael Moore MP, 18 December 2012, Lords Select Committee on Economic Affairs: *The Economic Implications for the United Kingdom of Scottish Independence*, page 4: www.parliament.uk/documents/lords-committees/economic-affairs/ScottishIndependence/ucEAC20121218Ev20.pdf

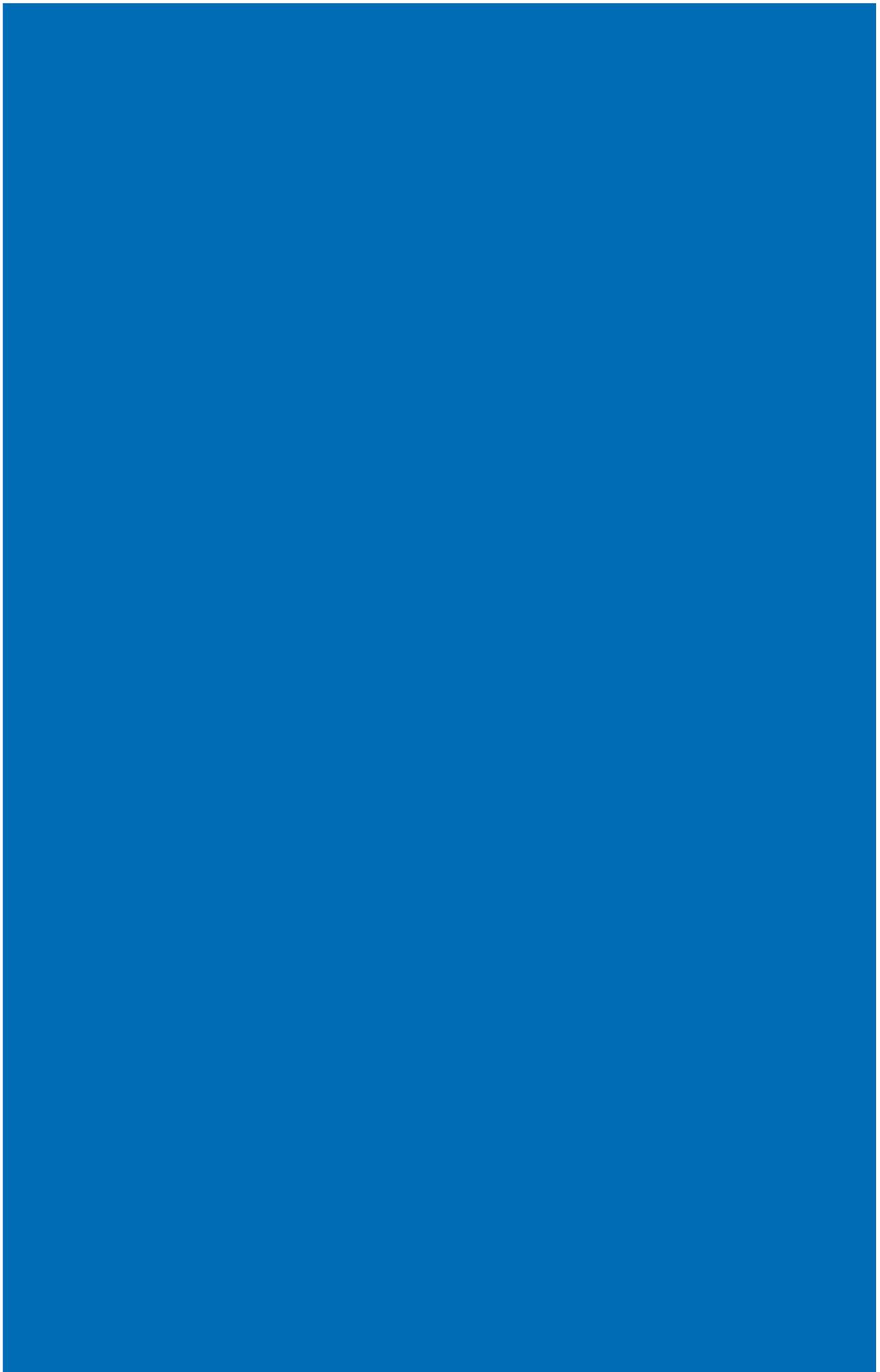
⁹² Letter from Deputy First Minister, Nicola Sturgeon MSP, to Deputy Prime Minister, Rt Hon. Nick Clegg MP, December 2012

⁹³ “The UK Government works for the whole of the UK, including Scotland, and we are deeply committed to the United Kingdom. I and my ministerial colleagues represent the whole of the UK; we cannot – and should not – negotiate or plan in the interests of only one part of it.” Michael Moore MP, Secretary of State for Scotland, January 2012

⁹⁴ Op. cit., *Scotland’s Future*, page 5

Conclusion

- 2.50 The analysis in this chapter points to a highly significant conclusion. Professors Crawford and Boyle are clear that the legal position on state formation means that the remainder of the UK would continue as the same state and Scotland would form a new state. This has some important implications for the continuing UK, which would retain the same rights, obligations and powers on the international stage. Domestically, the implications of independence for the continuing UK would also be limited. By contrast, independence would require Scotland to seek new international and domestic arrangements to replace or replicate those that currently exist in Scotland as of right. These are explored in the next chapter.
- 2.51 The post-referendum negotiations would also be critical in determining what those new arrangements would be. Those negotiations cannot begin until after the referendum, and this means that inevitably there will be some uncertainty on the details of independence before the referendum.
- 2.52 The uncertainty around those negotiations does not preclude an informed debate – rather it calls for recognition of what it is possible to say conclusively now.



Chapter 3:

Implications of independence: legal and practical issues at home and abroad

Summary

International organisations and treaties

- The findings of the legal Opinion show that as the continuing state, the United Kingdom's (UK) membership of international organisations (including the European Union (EU), the North Atlantic Treaty Organization (NATO), the International Monetary Fund (IMF), the G8 and G20) and treaties would be largely unaffected by Scottish independence.
- By contrast, an independent Scottish state would be required to apply and/or negotiate to become a member of whichever international organisations it wished to join as a new state. In some cases this would be straightforward; in others, notably the EU, it would not. It would not, as the Scottish Government has suggested, be within the gift of the Scottish Parliament or the UK Parliament to decide these matters.⁹⁵
- The outcome of negotiations between international bodies and other states would have a significant impact on the governance of an independent Scottish state, for example in relation to its arrangements for defence, trade and border controls. The question of an independent Scotland's membership of the EU would be very complex and of fundamental importance given the range of legal, economic and social policy issues flowing from it.

EU membership

- Conclusions from the legal Opinion indicate that as the remainder of the UK would be the same state as the existing UK with the same international rights and obligations, its EU membership would continue. Crucially, it would continue on existing terms, including all the UK's current opt-outs (for example, on currency or the rebate).
- There is no prospect that an independent Scottish state would automatically become a new member of the EU upon independence because there is no explicit provision for this process in the EU's own membership rules. Neither would an independent Scotland automatically 'inherit' the UK's opt-outs.

⁹⁵ Op. cit., *Scotland's Future*, pages 10 and 15–16

- In practice, rather than being purely a matter of law, the mechanism for an independent Scotland becoming a Member State of the EU would depend on the outcome of negotiations and on the attitude of other EU institutions and Member States.
- The key point is that the process would be very complex and involve detailed discussions. The timing and – more importantly – outcome of these negotiations simply cannot be predicted now.

Domestic implications

- It would be primarily up to representatives of the new independent Scottish state to decide what domestic arrangements they would seek to establish for governing Scotland.
- But one important factor in determining those arrangements arises from the position regarding the EU. Whatever the process that would have to be agreed for negotiating Scotland's EU membership, the potential loss of the current UK opt-outs would have significant consequences.
- A second crucial factor relates to the institutions supporting a new Scottish state. The legal position is clear that the bodies that support the UK now – for example the Bank of England – would continue to operate on behalf of the remainder of the UK on the same basis as before Scottish independence. Any requests by an independent Scottish state to make use of them would require the agreement of the continuing UK and would need to form part of the negotiations process.
- Finally, unpicking the UK's institutional and governmental framework would be an enormous task. As an indication of the scale and complexity involved, in order to perform the same functions that are currently provided by the UK, the government of an independent Scottish state may need to create up to four times as many Scottish public organisations as currently exist.

Independence for Scotland – the international dimension

- 3.1 The previous chapter examined the underlying law and practice of how a new Scottish state would come into being – based on the expert Opinion provided by Professors Crawford and Boyle – and the parameters of the negotiations process required to bring this about. This chapter examines the international and domestic implications that arise from this analysis.
- 3.2 It is worth starting with a consideration of some of the key international implications that flow from the legal position of an independent Scottish state and the continuing UK in the event of independence. This is because the outcome of negotiations with international bodies and other states would have a significant impact on the governance of an independent Scottish state. That would include, for example, its arrangements for defence, trade and border controls. The question of an independent Scotland's membership of the EU would be very complex and of fundamental importance given the range of legal, economic and social policy issues flowing from it and therefore merits detailed consideration.

Membership of international organisations

- 3.3 The UK occupies a unique position in international affairs: the product of its history, culture, economic weight, military strength and position at the centre of a series of overlapping networks.⁹⁶ As evidenced in Chapter 2, since the remainder of the UK would be the continuing state it would automatically retain the rights, obligations and powers of the UK under international law. The detailed Opinion published alongside this paper also makes clear that the remainder of the UK would therefore be regarded as continuing the UK's membership of all international organisations of which it is currently a member.⁹⁷
- 3.4 This includes the UK's permanent membership of the United Nations (UN) Security Council and its status as a 'nuclear weapons State' under the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). The recognition of Russia as the continuing state of the USSR sets a clear precedent in this regard. The remainder of the UK would also continue the UK's membership of other organisations such as NATO, the IMF and the EU (albeit with some necessary adjustments within the EU consequent upon its reduced population and territory).⁹⁸ The central role the UK plays in some of these organisations is explored in the box below.

⁹⁶ The UK's international links can be seen in the DHL *Global Interconnectedness Index 2011*: www.dhl.com/content/dam/flash/g0/gci/download/DHL_GlobalConnectednessIndex.pdf

⁹⁷ Crawford and Boyle, paragraph 70

⁹⁸ An example of matters falling within such potential 'adjustments' are contained within EU Protocol (No 36) on Transitional Provisions. This Protocol covers such matters as transitional Council voting weights, allocation of members of the Economic and Social Committee and allocation of members of the Committee of the Regions. Alterations may also need to be made in secondary legislation to change the number of Members of the European Parliament in line with a change in the remainder of the UK's population.

The UK's membership of international organisations

United Nations (UN): The UK is one of five permanent members of the UN Security Council. Permanent membership of the Security Council gives the UK a strong voice in world affairs and a veto over Security Council resolutions. The UK is therefore central to one of the most important collective decision-making bodies in international affairs and a member of all the UN's Specialised Agencies. Its influence, and the size of the UK's contributions to the UN budget, ensure that the UK can make a significant contribution to institutional reform, helping the UN work effectively for its members.

European Union (EU): The UK is one of the EU's largest Member States, a fact reflected in the composition of the EU's two legislative bodies: the Council of the European Union and the European Parliament (EP). The UK also has a set of opt-outs in important areas that are not available to most Member States or new applicants (see box on page 50 for details).

North Atlantic Treaty Organization (NATO): The NATO alliance has been the cornerstone of the UK's defence for decades. Being one of NATO's largest members means that the UK has significant influence within the alliance, as well as recourse to the collective resources and security the alliance provides to members. It forms the bedrock of the UK's defence through members' assurance of collective defence against attack, as well as delivering crisis management capability and operations to address threats worldwide that might affect NATO members (e.g. Afghanistan, the Balkans and anti-piracy off the Horn of Africa).

G7/G8/G20: As one of the world's largest economies, the UK is a member of the G7, G8 and G20. Within these bodies the UK has the power to shape responses to global issues, and played a leading role in the response to the financial crisis. Its membership contributes to the UK's strong voice in world affairs, from economic, finance and trade policy, to social, security and environmental issues.

International Monetary Fund (IMF): The UK is a founding member of the IMF, one of the most important financial institutions in the world. It is one of eight members with a single seat on the Executive Board, enabling the UK Government to influence its priorities. Through its role in the IMF, the UK helps to foster global monetary co-operation, secure financial stability, facilitate international trade, promote high employment and sustainable economic growth, and reduce poverty around the world.

- 3.5 For successor states, like a potential independent Scotland, the rules and practices of individual bodies govern the terms on which they may join international organisations. As Professors Crawford and Boyle make clear, in principle, an independent Scottish state would therefore be required to apply to become a member of whichever international organisations it wished to join as a new state.⁹⁹ In some cases the question of an independent Scotland's membership would be likely to be straightforward; in others, notably the EU, it would not.
- 3.6 As the Opinion points out, the UN Charter, for example, makes no provision for succession to membership and a new state such as an independent Scotland would need to be formally admitted in its own name. This is consistent with international practice regarding successor states, from Pakistan and Burma in 1947 to the case of South Sudan in 2011.¹⁰⁰ In practice, accession to the UN would almost certainly be straightforward in the circumstances of Scottish independence, particularly if the continuing state – the remainder of the UK – supported the application, which it would. As the five permanent

⁹⁹ Crawford and Boyle, paragraph 133

¹⁰⁰ Ibid., paragraphs 126–33

members of the UN Security Council are fixed by Article 23 of the UN Charter, an independent Scottish state would not be a permanent member of the Security Council.

- 3.7 Membership of some other international organisations depends on meeting the relevant criteria. For example, if an independent Scottish state decided that it wanted to be a member of NATO, the North Atlantic Council (NAC), on which all 28 member states are represented, would need to decide whether or not it would meet the criteria for membership.¹⁰¹ Decisions of the NAC are agreed upon on the basis of unanimity. There is therefore no guarantee that an independent Scottish state could automatically join NATO should it so wish.
- 3.8 It is therefore evident from the Opinion that an independent Scottish state would not be able to ‘inherit’¹⁰² membership of key international organisations and – through them – the UK’s pre-eminent position in international affairs, its global impact and reach. Future Scotland analysis papers in the series will examine the UK’s membership of key international organisations in further depth, and how Scotland contributes to and gains from them through the UK.
- 3.9 The question of an independent Scotland’s membership of the EU would be very complex and of fundamental importance, given the range of legal, economic and social policy issues flowing from it. It is therefore considered separately below.

EU membership

- 3.10 The Opinion states that, in principle, the rules of international law apply to the EU as to any other international organisation.¹⁰³ Since it is clear that under international law the remainder of the UK would be the same state as the UK with the same international rights and obligations, its EU membership would continue.
- 3.11 The EU is founded on the EU Treaties which apply to Member States who have agreed and ratified them. Under the provisions of those Treaties, the UK is one of those Member States and would continue to be so even in the event of the loss of some of its territory.¹⁰⁴ No treaty amendments would therefore be required simply as a result of a change to the territory of the UK.
- 3.12 Crucially, the UK’s membership of the EU would continue on existing terms. That would include retaining the UK’s opt-outs on, for example, currency, or the UK rebate (explained in the box below), although there would need to be technical adjustments consequent upon the reduction in the UK’s population.¹⁰⁵

¹⁰¹ Further details on the requirements for NATO membership and the accession process can be found here: www.nato.int/cps/en/natolive/topics_49212.htm

¹⁰² Recently the Scottish Government’s Cabinet Secretary for Culture and External Affairs referred to an independent Scotland coming “into the EU as our own independent member inheriting the responsibilities that the UK has”, interview on BBC *Good Morning Scotland*, 28 January 2013. The Deputy First Minister made similar points in a 13 December 2012 statement to the Scottish Parliament: www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=7603&mode=pdf, and in her evidence to the House of Commons Foreign Affairs Committee on 28 January 2013: Scotland “would ... inherit treaty obligations and so on”.

¹⁰³ Crawford and Boyle, paragraphs 145–51

¹⁰⁴ *Ibid.*

¹⁰⁵ As explained in footnote 98 above.

The UK's membership of the EU

The UK is one of the EU's largest Member States, a fact reflected in the composition of the EU's two legislative bodies: the Council of the European Union and the European Parliament (EP). The UK has the equal highest number of votes in the Council (29) and the third largest EP delegation (73 Members of the European Parliament).

The UK has a set of opt-outs in important areas that are not available to most Member States and there is no provision for them to apply to new members. These include opt-outs from the European single currency, the euro, which allows it to keep sterling as its currency, and from the Schengen travel area, which allows it to maintain control of its own borders and immigration policy.

The UK has also negotiated a rebate from the EU budget, worth some £3 billion to the British taxpayer in 2011.

- 3.13 The key issue therefore relates to an independent Scotland's membership of the EU. As outlined in the Opinion, an independent Scottish state could not automatically¹⁰⁶ become a new member of the EU upon independence because there is no explicit provision for this process in the EU's own membership rules.¹⁰⁷ Neither would an independent Scottish state automatically 'inherit' the UK's opt-outs.¹⁰⁸
- 3.14 However, as there is no precedent for one part of a Member State becoming independent and then seeking to become a Member State of the EU in its own right, it is not possible to say with any certainty now what such a process would entail in the event of Scottish independence or how long this might take.¹⁰⁹ In practice, rather than being purely a matter of law, the mechanism for an independent Scotland becoming a Member State of the EU would depend on the outcome of negotiations¹¹⁰ and on the attitude of other Member States and the EU institutions. Nobody can say with certainty now what the outcome of those negotiations would be.
- 3.15 Since an independent Scotland would be a new state, as Professors Crawford and Boyle make clear in their Opinion, "it is difficult to see how Scotland could evade the accession process for new states in the EU Treaties".¹¹¹ According to Article 49 of the Treaty of the European Union, new states need to apply for membership, obtain unanimous support of the European Council for this request and have membership approved through an accession treaty, ratified by the parliaments of all the Member States.¹¹²
- 3.16 The President of the European Commission, the executive arm of the EU, has made an important intervention which has implications for this debate. He said:

The EU is founded on the Treaties which apply only to the Member States who have agreed and ratified them. If part of the territory of a Member State would cease to be

¹⁰⁶ The Scottish Government has indicated that this would be the case in relation to EU membership. Deputy First Minister Nicola Sturgeon at the Scottish Parliament European and External Relations Committee 11 December 2007: www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=1295&i=5786&c=227428&s=automatic

¹⁰⁷ Crawford and Boyle, paragraph 152. Sir David Edward in 'Scotland and the European Union', paragraph 16 also states: "there would be no automaticity of result": www.scottishconstitutionalfuture.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/852/David-Edward-Scotland-and-the-European-Union.aspx

¹⁰⁸ Crawford and Boyle, paragraph 166

¹⁰⁹ Ibid., paragraph 152

¹¹⁰ Ibid., paragraphs 152 and 156

¹¹¹ Ibid., paragraph 154

¹¹² Ibid., paragraphs 152–84

part of that state because it were to become a new independent state, the Treaties would no longer apply to that territory. In other words, a new independent state would, by the fact of its independence, become a third country with respect to the EU and the Treaties would no longer apply on its territory.¹¹³

- 3.17 There is an alternative view put forward by some, including the Scottish Government, as well as experts such as the eminent Scottish jurist and former European Court of Justice judge Sir David Edward. This view regards the EU as different from other international organisations because it has its own autonomous body of law.¹¹⁴ According to this view, the fact that EU law is currently applicable to Scotland (for example, the people of Scotland are currently EU citizens) could have a bearing on the process by which an independent Scottish state could become a member of the EU. In particular, it is argued that there would be an obligation on the continuing UK and other Member States to negotiate the necessary amendments to the treaties prior to independence to enable Scotland to take its place as a Member State and ensure that the existing individual rights of EU citizens were protected.¹¹⁵
- 3.18 It is conceivable that the Court of Justice of the European Union, which is responsible for interpreting EU law, might attach weight to this argument if a case relating to the establishment of a new Scottish state ever came before it. However, as Professors Crawford and Boyle set out, it is unlikely that the Court would ever have an opportunity to consider this matter.¹¹⁶
- 3.19 What is clear on either analysis is that negotiations would have to take place for an independent Scotland to become an EU Member State. The resulting agreement would require the unanimous consent of all existing Member States. There is no way of knowing how long this process would take, but the complexities of the situation suggest that it is likely to take a considerable period of time.
- 3.20 The outcome of negotiations concerning an independent Scottish state's position in the EU is as uncertain as the process. While it is not possible to say now what would happen in the event of independence, there are two possible scenarios:
- terms are negotiated that representatives of the new Scottish state deem acceptable for EU membership, even if they are less favourable than those Scotland has within the UK; or
 - the negotiations do not reach an acceptable arrangement.
- 3.21 In summary, the UK Government has already said that the most likely consequence for Scotland of leaving the UK is that, as a new state, it would have to apply for EU membership.¹¹⁷ Overall, having given proper consideration to the evidence and apparently

¹¹³ Letter to the Lords Economic Affairs Committee, 10 December 2012

¹¹⁴ Deputy First Minister, Nicola Sturgeon:

www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=7603&i=69449&c=1400991&s=europe; Sir David Edward, a member of the Advocate General's expert Legal Forum, presented a paper setting out these arguments to the group in its meeting in October 2012. A version of this paper can be found on the Scottish Constitutional Futures website: www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/852/David-Edward-Scotland-and-the-European-Union.aspx; Andrew Scott, Professor of European Union Studies and Co-Director of the Europa Institute in the School of Law at the University of Edinburgh: www.publications.parliament.uk/pa/cm201213/cmselect/cmsscotaf/139/120516.htm

¹¹⁵ Sir David Edward: www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/852/David-Edward-Scotland-and-the-European-Union.aspx, paragraph 19

¹¹⁶ Crawford and Boyle, paragraphs 167–83

¹¹⁷ Speech given by the Advocate General for Scotland, 2 October 2012

competing viewpoints, it is clear that there would not be an automatic or seamless transition from Scotland being an integral part of the UK to becoming an independent Member State of the EU.¹¹⁸ Some form of application would be required and negotiations on terms of membership would have to ensue. While these negotiations could take place alongside other negotiations leading up to independence, they would inevitably be complex, could well be lengthy and any ensuing treaty of accession would require ratification by all Member States and an independent Scottish state.

International treaties

- 3.22 International treaties constitute a major source of international law and are critical to establishing the respective rights and obligations of states in relation to many political, economic, military, environmental and other matters. They lie behind virtually every aspect of human activity with an international dimension, from television programme exchange to war and peace; from regional fishing arrangements to contractual obligations and copyright. The UK has been involved in up to 14,000 treaties, bilateral and multilateral, and as the continuing state in the event of Scottish independence all existing UK treaties would continue to apply to the remainder of the UK.
- 3.23 These treaties are important. They matter to citizens – for example, consular treaties enable UK nationals to get help when they have problems abroad. They matter to business – treaties such as air services agreements allow airlines to operate routes between the UK and partner states, enabling companies to develop across continents and provide new services. Other agreements also help the police and security services keep the UK and its citizens safe by facilitating co-operation across international borders, for example.
- 3.24 To the extent that a new independent Scottish state wished to succeed to the international obligations of the UK, this would mean that it would have to go through a process of becoming a party to (or confirming its participation in) however many of those treaties, currently applicable to the UK, it wished to join.
- 3.25 While there are overlaps between them, it may be helpful to think of treaties as falling into three broad categories:
- treaties to which any state can take formal action to become a party as of right, simply by virtue of being an independent state. This includes many multilateral treaties, for example dealing with human rights or humanitarian issues (such as the Geneva Conventions for the Protection of War Victims) or conventions relating to terrorism;
 - treaties establishing international or inter-governmental organisations for which there are particular entry or membership criteria or procedures. Agreements establishing the World Trade Organization (WTO), the Organisation for Economic Co-operation and Development (OECD) and NATO are examples. These treaties may require negotiations with any new state to determine particular terms of membership relating to that state. The EU is another example of a treaty-based organisation, as explained above; and
 - treaties to which a new state might wish to succeed or to conclude with other states, but which may require renegotiation of terms, in particular in this context UK bilateral treaties. Succession to such agreements by a new state would require the agreement of the other state that is party to the treaty. Examples include extradition treaties, mutual legal assistance treaties, double taxation treaties, tax information exchange agreements and aviation agreements.

¹¹⁸ Sir David Edward, *op. cit.*, paragraphs 16 and 22; Crawford and Boyle, paragraphs 154–6

- 3.26 As is the case with membership of international organisations, in some areas the process for an independent Scottish state becoming party to existing treaties would be straightforward, but in other cases an independent Scottish state may face some complex issues that would take time to resolve.
- 3.27 For example, once it became a member of the UN an independent Scottish state could, should it wish to do so, seek to become a party to whichever of the 500 plus treaties deposited with the Secretary General to the UN in which it was eligible to participate. This process should be relatively straightforward for an independent Scottish state.
- 3.28 Equally, there may be some treaties that an independent Scottish state wished to accede to (or confirm its participation in) where re-negotiations of terms could take some time to reach. For example, the UK currently has agreements on extradition in place with more than 100 countries, either by way of multilateral extradition conventions or agreements, or under bilateral extradition treaties. Negotiating an extradition treaty is a resource-intensive task. The time frame for negotiations can vary greatly and may take a number of years depending on the states involved and the context of the negotiations.¹¹⁹ But the benefit of having these treaties is that requests do not have to be considered on a case-by-case basis, which can take a significant amount of time. Some examples of each category of treaty to which the UK is party and what they involve are examined more fully in the box opposite.

Examples of different types of treaty

UN treaties: Examples of UN treaties to which a new Scottish state would be entitled to succeed as of right would include the International Covenant on Civil and Political Rights, which guarantees basic human rights for all, the UN Convention Against Torture, or the International Convention for the Suppression of the Financing of Terrorism. Succession to these treaties ensures the protection of citizens under international law as soon as a new state comes into being.

North Atlantic Treaty (multilateral): Before a state can become a party to the North Atlantic Treaty and join NATO, it must meet the criteria for membership. These are set by the North Atlantic Council (NAC), on which all member states are represented. Decisions of the NAC are agreed upon on the basis of unanimity. Should it wish to apply to join, the decision on whether an independent Scottish state could become a member of NATO would need to take careful account of its defence policy, including its intended budget, capabilities, missions and objectives. As NATO is a nuclear alliance, an independent Scottish state's position on nuclear weapons would be a significant factor in determining its membership.

Extradition treaties (bilateral): An extradition treaty governs the process where one territory or state surrenders a suspected or convicted criminal to another territory or state. The UK has extradition relations with more than 100 territories (extradition policy is reserved*). An independent Scottish state would need to define its own extradition policy and create legislation to replace current UK extradition acts before deciding whether it wants to negotiate bilateral treaties with other states. Extradition with European countries would be an issue for negotiation in relation to EU membership.

* Extradition procedures for Scotland differ from the rest of the UK because of its separate legal system. Cases are prosecuted by the Crown Office rather than the Crown Prosecution Service and Scottish ministers make the final decision on whether to extradite an individual.

¹¹⁹ While treaties with some countries (e.g. Algeria) have taken less than a year to conclude, the UK's extradition treaty with the United States, once agreed, took over four years to ratify.

- 3.29 The principles governing treaty succession are considered above in relation to existing treaties to which the UK is party and new agreements that an independent Scottish state may wish to conclude with other states or international organisations. A complex set of other cross-border agreements would also need to be reached to replace the existing internal processes governing the UK.
- 3.30 Arrangements would be needed to cover crucial matters such as intelligence sharing, as well as a wide range of other important practical issues, from securing energy supply to ensuring that transport links operate effectively or providing access to broadcasting content. These would be necessary to ensure that where co-operation was sensible and in the interests of both states it could continue across borders.

Domestic implications

- 3.31 The UK is a highly integrated and well-established multi-nation state. Under devolution, responsibility for governing Scotland is shared between the UK Government and the Scottish Government. All of the powers and responsibilities of the UK in Scotland would therefore become the responsibility of a new independent Scottish state in the event of independence.
- 3.32 That would include: security, defence and intelligence; tax administration and welfare expenditure; foreign policy; key parts of energy and transport policy; and a range of other areas including, crucially, macroeconomic policy and monetary policy.
- 3.33 It would be primarily up to representatives of a new Scottish state to decide what arrangements they would look to establish for governing Scotland. But one important factor in determining those arrangements arises from the position in relation to the EU. Whatever the process that would have to be agreed for negotiating Scotland's EU membership, the potential loss of the current UK opt-outs would have significant consequences.
- 3.34 A second factor relates to the institutions supporting a new Scottish state and how this would be affected by separation from the UK. Some constitutional background is necessary for an understanding of this important issue. In the UK, the Westminster Parliament is sovereign and the body of law enacted by it forms the basis of the UK's law and practices. At the time Scottish independence became operative, UK parliamentary sovereignty would continue to apply unchanged in the remainder of the UK. The UK Parliament's jurisdiction would no longer extend to an independent Scottish state.
- 3.35 The laws passed by the UK Parliament would therefore continue to apply in the remainder of the UK as before, unless they were altered by Parliament itself in the course of enacting Scottish independence. This is what happened when the Irish Free State was formed from within the UK in 1922 (an arrangement that allows Ireland to continue to use some UK legislation to the present day). It would be open to an independent Scottish state to continue to apply some or all of the body of reserved laws passed by the UK Parliament, unless and until the Scottish Parliament decided to repeal them. However, an independent Scottish state could not unilaterally retain functions of UK institutions in relation to Scotland, as discussed below.

3.36 The bodies that support the UK in its present form would therefore continue, after Scottish independence, to undertake their functions on behalf of the remainder of the UK. To take two examples:

- **The three security and intelligence agencies:** The Security Service (MI5), the Secret Intelligence Service (MI6) and the Government Communications Headquarters (GCHQ) operate lawfully within the UK, and abroad on its behalf, under UK Acts of Parliament passed in 1989 and 1994. Should Scotland become independent the automatic position in law would be that they would continue to operate on the same basis, except that they would have no authority or obligation to act on behalf of an independent Scottish state.
- **The Bank of England:** The Bank's powers are governed by a number of statutes including the Bank of England Acts passed in 1694, 1946 and 1998, the Banking Act 2009 and the Financial Services Act 2012 (from April 2013). As with the security and intelligence agencies, it would continue as before. Under its current constitutional arrangements, the Bank's functions and objectives in relation to monetary policy and financial stability relate to the UK as a whole – including Scotland. Under independence, the Bank's functions and objectives would relate to the continuing UK only. So the Bank would no longer have to consider, for example, the stability of the Scottish financial system – unless and until the Scottish financial position impacted on the continuing UK's financial position, in which case it would be relevant in the same way as any other international trading partner.

3.37 It would be open to representatives of an independent Scottish state to seek to make use of arrangements now operative within the UK should they so wish, although any proposals would need to be considered carefully and may not be straightforward or necessarily in the interests of the continuing UK. The Scottish Government has said that it would be minded to do so, and has made specific reference to the Bank of England and the UK's currency.¹²⁰ Proposals for a formal currency union or for an independent Scottish state to have recourse to the Bank of England's functions could form part of independence negotiations should representatives of an independent Scottish state want to table them, but they would require the agreement of the continuing UK and would be on the condition that they satisfied the economic interests of both parties.

3.38 Some further examination of possible arrangements in an independent Scottish state for currency and border controls illustrates why this analysis is important for understanding how an independent Scotland might work.

The example of currency

3.39 Under EU rules, all new Member States are required to agree to adopting the euro in future unless they negotiate a specific opt-out, as the UK has done. The question of an independent Scotland's EU membership is considered in detail in the analysis of the legal Opinion above, which makes clear that it is far from certain that an independent Scottish state would be able to secure such an opt-out.

¹²⁰ Scottish Government Finance Secretary John Swinney, 11 June 2012: "Our framework is one of monetary union with the rest of the UK. Retaining the pound under independence is something that I believe is in the interests of Scotland, the rest of the UK and the stability of Sterling itself." He has also argued that the Bank is "as much Scotland's as anybody else's", BBC News, 11 December 2012: www.bbc.co.uk/news/uk-scotland-scotland-politics-20675705

- 3.40 The Scottish Government has suggested that an independent Scotland would retain use of sterling.¹²¹ As leading economists have pointed out,¹²² if representatives of an independent Scottish state wanted to do this without launching a new currency that would be pegged to the pound, they could either unilaterally adopt the pound, or seek an agreement with the continuing UK for a formal currency union. Under the first option, an independent Scottish state would not be able to have a say in its monetary policy.
- 3.41 For the Bank of England to include an independent Scottish state in its area of responsibility there would need to be a formal sterling currency union between the continuing UK and an independent Scotland. Forming a formal sterling currency union with the UK would be subject to negotiations between representatives of an independent Scottish state and the continuing UK, and would only be possible if both parties managed to reach an agreement on conditions for the currency union, which satisfied their economic interests. At this stage it is not possible to know what the outcome of such negotiations would be.
- 3.42 As recent experience of the euro area has shown, it is extremely challenging to combine a formal currency union with full fiscal independence. In practice, negotiations would have to cover arrangements on fiscal policy and financial stability and would be likely to limit any Scottish Government's control over spending and borrowing in a future independent Scottish state.
- 3.43 A new Scottish currency, either floating or pegged, is not an option currently supported by the Scottish Government and for that reason is not considered here. What this brief analysis demonstrates is that there is no straightforward option or guarantee that Scotland would enjoy similar benefits under independence to those it gains from being part of the UK, with a full monetary, fiscal and political union. The forthcoming Scotland analysis paper on currency will explore this issue in detail.

The example of borders

- 3.44 An independent Scottish state would be responsible for deciding on the best arrangements to put in place for the control and protection of its borders. It would need to take decisions on how to manage the flow of both people and goods across those borders, and then implement those decisions.
- 3.45 As mentioned above, the Scottish Government has stated that representatives of an independent Scottish state would seek to maintain the terms of the UK's current EU membership.¹²³ A critical opt-out that the UK has secured relates to the Schengen free movement area, which abolishes all internal borders within the EU and imposes a common visa and border policy on its members.¹²⁴ Membership of the Schengen area has

¹²¹ 'Opportunities for Scotland's Economy', John Swinney, Glasgow Caledonian University, 11 June 2012: www.scotland.gov.uk/News/Releases/2012/06/Scotland-Economy11062012; Alex Salmond, *Today*, BBC Radio 4, 16 January 2013; Nicola Sturgeon, speaking at a *Times* and BBC debate in late May 2012

¹²² Professor John Kay's evidence to the House of Lords Committee on Economic Affairs, 22 May 2012: www.parliament.uk/documents/lords-committees/economic-affairs/ScottishIndependence/ucEAC20120522Ev2.pdf

¹²³ The Scottish National Party publication *Your Scotland, Your Future* (January 2012) has made clear that this is its policy in relation to borders: "Like many countries, Scotland has a land border. When we cross to and from England, there are no checks or delays – no customs posts or immigration officers demanding passports. That's the way it has always been, because of the arrangements that exist here in the British Isles between the nations of the UK and Ireland. And that's the way it will stay after independence."

¹²⁴ Iceland, Norway, Switzerland and Liechtenstein have also joined the Schengen area, although they are not EU Member States.

been part of the EU legal framework since 1997 and all new members of the EU since this time have been required to join the Schengen area.

- 3.46 Following the analysis of Scotland's EU membership in paragraphs 3.10 – 3.21, it is by no means certain that an independent Scottish state would be able to negotiate similar opt-outs from Schengen membership to those enjoyed by the UK and the Republic of Ireland. If an independent Scottish state were required to join the Schengen area as part of its EU membership, it would therefore have to implement the border and immigration policies required by the EU. As the UK has no intention of joining the Schengen area, this would involve border controls between Scotland and the continuing UK in order to meet EU rules protecting the security of the Schengen area¹²⁵ and for the UK to maintain controls at its frontiers, as allowed for by the Treaty of Amsterdam.¹²⁶
- 3.47 The UK is a member of the Common Travel Area (CTA). The CTA is the free movement zone that allows people to travel between the UK, the Republic of Ireland, the Isle of Man and the Channel Islands without internal borders for immigration purposes. The CTA arrangement works because its members continue to collaborate on border policies and practices.
- 3.48 The current Scottish Government has indicated that it would want an independent Scottish state to be in the CTA.¹²⁷ However, membership of the CTA would need to be negotiated with the continuing UK and all existing CTA members.
- 3.49 Membership of the Schengen area is not compatible with membership of the CTA. Therefore, if an independent Scottish state was required to join the Schengen area under the terms of EU membership it would not be able to be a member of the CTA. Even if an independent Scottish state was able to negotiate an opt-out from Schengen and successfully negotiated to become part of the CTA, which cannot be predicted with any certainty, it would be required to collaborate with other CTA members, including the continuing UK, on border and immigration policies to maintain the integrity and security of the CTA area.

Other practical issues

- 3.50 The division of liabilities and assets is a significant part of any negotiations to create a new state, and would also have to be settled by negotiation. Although there are some general principles of international law that could impact upon this matter there is no clear consensus in international practice as to the precise allocation of national debt in circumstances of state separation or dissolution. However, there would be an expectation that an independent Scottish state would take on an equitable share of the UK's national debt. How an 'equitable share' would be calculated is open to question and would have to be negotiated. The continuing UK would approach negotiations in good faith and, in the interests of its citizens, would need to seek to ensure that a fair settlement applied to assets and liabilities (such as national debt).
- 3.51 For particular fixed assets, such as government buildings, the territory in which they are situated would be a significant factor to be taken into consideration in the discussions. The future of the UK's nuclear weapons and facilities would be an important issue to be

¹²⁵ ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/index_en.htm

¹²⁶ eur-lex.europa.eu/en/treaties/dat/11997D/htm/11997D.html

¹²⁷ Deputy First Minister Nicola Sturgeon's statement to Scottish Parliament on an independent Scotland's continuing membership of the EU, 13 December 2012, in which she indicated that: "Just like Ireland, we would not enter Schengen but would instead look to co-operate with Ireland and the rest of the UK in the common travel area". See: www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=7603&i=69449&c=1400991&s=common%20travel%20area

resolved. Under international law (the NPT), an independent Scottish state would not be recognised as a state entitled to possess a nuclear deterrent. A forthcoming paper in the Scotland analysis programme will examine the specific issues relating to the UK's current provision of defence and security for all its citizens, and the potential implications of Scottish independence.

- 3.52 In the majority of areas it is therefore not possible to say with confidence what the outcome would be following the process of negotiations. Notwithstanding some unfortunate but unavoidable uncertainty, two things are clear. First, the UK would enter those negotiations as the continuing state, and the laws and institutions of the UK would continue to be those of the remainder of the UK in the event of independence. Whether and how they would operate in an independent Scottish state would be for negotiation. Second, unpicking the UK's institutional and governmental framework would be a huge task. Some extent of the scale and complexity of the challenge can be given.

Machinery of government, laws and regulations

- 3.53 The UK has a well- and long-established system of government. It has areas of law in reserved areas, which are well integrated with Scots law in devolved areas. Were Scotland to become independent, the UK's constitution, laws and institutions would remain in place. Inevitably some changes would be required as a consequence of Scotland leaving the UK (for example the UK would need to change the number of MPs in the House of Commons, as in the event of independence there would be no MPs representing constituencies in Scotland).
- 3.54 As well as deciding what laws and regulations, if any, it wished to retain, an independent Scottish state would also need to establish new institutions or significantly expand capacity in existing ones in order to assume functions that are currently reserved to the UK Government. There would inevitably be transitional costs in doing so.
- 3.55 To give an indication of the scale of the task, around 490,000 staff¹²⁸ are employed in over 230 UK central government organisations.¹²⁹ Over 140 of these organisations perform functions for Scotland which are reserved to the UK Government. That figure includes key UK Government departments, such as the Foreign and Commonwealth Office and the Ministry of Defence. It also includes bodies that oversee important activities for the whole of the UK, from regulating communications, energy companies and railways to promoting the UK abroad.¹³⁰ These statistics do not include public corporations and corporate bodies, which may need to be replicated at some cost. The figures also exclude nearly 60 advisory and other bodies that are also responsible for matters throughout the UK.¹³¹

¹²⁸ Civil Service figures from the Office for National Statistics (ONS), Table 10:

www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcm%3A77-279128; executive non-departmental public body (NDPB) figures from Cabinet Office analysis and Insight monthly workforce Management Information survey. On a full-time equivalent (FTE) basis.

¹²⁹ These comprise ministerial and non-ministerial departments, executive agencies, and crown and executive non-departmental public bodies. These bodies cover a wide range of functions, many employing hundreds or thousands of people. Some employ small numbers and have a narrower remit.

¹³⁰ It excludes those bodies that would not have any direct relevance to an independent Scottish state, like the Arts Council England, English Heritage or the Environment Agency.

¹³¹ These bodies tend to employ small numbers or are staffed by unpaid experts, but they cover a wide range of functions that would need to be considered and potentially replicated in some form by the government of an independent Scottish state.

3.56 Overall, in order to perform the same functions that are currently provided by the UK, the government of an independent Scottish state may therefore need to create up to four times as many Scottish public organisations as currently exist.¹³²

Conclusion

3.57 This analysis has illustrated the profound practical significance of the conclusion of the legal Opinion outlined in Chapter 2 that Scotland would become a new state while the remainder of the UK would carry on as before.

3.58 In the international arena, it means that an independent Scottish state would not automatically 'inherit' the UK's position in global affairs, and there would be considerable uncertainty about the nature of its relationship with the EU.

3.59 In the domestic sphere, proposals to continue with arrangements that Scotland currently has within the UK would be the subject of negotiations with the remainder of the UK and the EU in the event of Scottish independence.

¹³² Some 27,000 FTE staff (Civil Service figures from ONS, Table 10: www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcm%3A77-279128) work in around 50 Scottish Government organisations (Scottish Government: www.scotland.gov.uk/Topics/Government/public-bodies/about/Bodies).

The first part of the document discusses the importance of maintaining accurate records in a business setting. It highlights how proper record-keeping can help in decision-making, legal compliance, and financial management. The text emphasizes that records should be organized, up-to-date, and easily accessible to relevant personnel.

Next, the document addresses the challenges of data management in the digital age. It notes that while digital storage offers convenience and scalability, it also introduces risks such as data loss, security breaches, and information overload. The author suggests implementing robust backup strategies, access controls, and regular data audits to mitigate these risks.

The third section focuses on the role of technology in streamlining record-keeping processes. It mentions various software solutions and automation tools that can reduce manual errors and save time. However, it also cautions against over-reliance on technology, stressing the need for human oversight and training to ensure that the systems are used effectively.

Finally, the document concludes by reinforcing the long-term benefits of a well-maintained record-keeping system. It states that consistent record-keeping not only supports operational efficiency but also provides a historical perspective that is invaluable for strategic planning and organizational growth.

Conclusion

- 4.1 The Acts of Union of 1707 united the parliaments of Scotland and England and resulted in the formation of a single parliament of Great Britain at Westminster and a single, unified United Kingdom (UK) state. Although smaller in population and geography than England, Scotland has played an indispensable role in the development of the multi-nation UK, from the contributions its citizens have made to establishing democracy and the rule of law, to the development of modern industrial and financial systems, to philosophy, culture, sport and the arts.
- 4.2 Scotland and the rest of the UK are highly integrated and interdependent. Over the centuries, the UK has developed and flourished, its constitution, laws and institutions underpinning one of the most successful partnerships of nations in history.
- 4.3 Devolution gives Scotland the best of both worlds. It means that the Scottish Parliament and Scottish Government are empowered to take decisions so that specific Scottish needs are addressed. This has enabled successive governments to make choices on behalf of people in Scotland over a range of important domestic policy issues, including health, education and policing. In some cases, decisions taken or issues prioritised in Scotland have varied from the rest of the UK – this is the practical and beneficial outcome of devolution.
- 4.4 However, devolution also means that, in areas where the greater scale, security, level of integration and influence of the whole UK can help Scotland to punch above its weight, take advantage of opportunities and pool resources and risks, decisions can be made on a UK-wide basis with Scottish involvement.
- 4.5 People in Scotland need accurate information in order to make an informed decision about the critical question of the future of the UK and Scotland's place within it when they come to vote in the referendum in 2014.
- 4.6 This paper provides analysis of how devolution operates today and what it offers to people in Scotland and the whole of the UK. It also provides a robust legal basis for one of the most important issues that is central to the debate ahead of the referendum – namely that in the event of independence the UK would be the continuing state and Scotland would have to form a new state.
- 4.7 It is the current Scottish Government that is proposing independence. It is therefore incumbent on the Scottish Government to take account of the legal issues and some unavoidable uncertainties about what can be said now concerning the details of independence as part of making a well-evidenced case to the people of Scotland.

- 4.8 For its part, the UK Government will comprehensively examine how Scotland contributes to and benefits from being part of the UK. Throughout the course of 2013 and 2014, the Scotland analysis programme will look in more depth at the key issues at stake, building on the underlying legal issues outlined here.
- 4.9 This programme will also examine some of the potential implications of Scottish independence – where these can be identified. In doing so, it aims to ensure that, when people in Scotland come to make their choice in 2014, it is in full knowledge of how the UK works and what the implications of leaving it may be.



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