This Note gives some background since the elections to the Scottish Parliament of May 2007. It summarises details of the *National Conversation* launched by the new First Minister, Alex Salmond and the Constitutional Commission proposed by the Opposition parties in Holyrood.

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A. Background

Ahead of the Scottish Parliament election in May 2007, the Scottish National Party (SNP) published a document outlining what it would do in its first 100 days if it formed the new Scottish Executive.

The document entitled "It's time to look forward - The first 100 days of an SNP government" outlined a series of commitments which the SNP pledged to deliver on. In his foreword the SNP leader, Alex Salmond, said:

“As First Minister, I will introduce a series of sensible and simple measures to deliver improved public services, fairer taxation and greater wealth for our nation - clear benefits, financial and social, for the people of our country.

I want a government that works better for Scotland, with a team of ministers able to prioritise sustainable economic growth, health, education and the fight against crime.

I want to see progress for our public services, with a greater focus on the frontline and more say for local communities.

And I want Scotland’s voice to be heard more clearly in the world, with a real Scottish government an active partner for peace, and with a place at the top table of Europe.

It is my determination to deliver on the people’s priorities for Scotland. And I trust the people to take the decision on Scotland’s future in an independence referendum.”

For the full text, see the link below.  


At the Scottish Parliament Election on 3 May 2007, the SNP won a historic, if narrow, single seat victory over Labour. The election produced the following result in terms of MSP numbers:

- Scottish National Party 47
- Scottish Labour Party 46
- Scottish Conservatives 17
- Scottish Liberal Democrats 16
- Scottish Green Party 2
- Margo MacDonald (Independent) 1

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1 It’s time to look forward – the first 100 days of an SNP government http://www.snp.org/policies/government-communities/the-first-100-days-of-an-snp-government/2007-03-19.2499824143/download
Following the election the SNP, as the largest single parliamentary party, entered into discussion with the Scottish Liberal Democrats and the Scottish Green Party with a view to forming a coalition government with sufficient seats (65) to control the Parliament. Ultimately, the Liberal Democrats declined to take part in any coalition and the Scottish Green Party restricted its involvement to a “co-operation agreement” under which they would support Mr Salmond's bid to be First Minister and vote for the SNP’s budget, in return for SNP support for its policies. Other support would be provided on an issue by issue basis. Consequently, the SNP formed the Parliament’s first minority government.

For more detail on the formation of the new Scottish Executive and election of the First Minister, Scottish Cabinet and Presiding Officer, see Standard Note SN/PC/04372.

C. The Scottish Government

Section 44 of the Scotland Act 1998 makes provision for a Scottish Executive comprising the First Minister, Ministers appointed by the First Minister under Section 47 of the Act and the two Scottish Law Officers. Section 49 of the Act provides for the appointment of junior Scottish Ministers. The Act (S44(2)) also provides that the members of the Scottish Executive will be known collectively as “the Scottish Ministers”.

Section 51 of the 1998 Act provides for Scottish Ministers to appoint members of staff to the Scottish Administration and that these members of staff will be part of the Home Civil Service. Although no definition of the Scottish Administration is provided in the Act, it comprises the Scottish Ministers, including junior Scottish Ministers, the Scottish Law Officers, holders of non-ministerial offices and members of staff of the Scottish Administration.

In September 2007, the Scottish Executive announced that it would be known as the Scottish Government rather than the Scottish Executive. The First Minister, Alex Salmond, explained that this was because:

"The overwhelming majority of people had no idea what the term 'executive' meant.

"Obviously the Scottish administration is the government. It is regarded as the government across a range of issues, and it should act like a government." 5

However, for legal and procedural purposes the Scottish Executive will continue to be the official designation of the Scottish Ministers. For example, Government bills are still introduced in the name of the Scottish Executive and parliamentary questions tabled at Holyrood will continue to be addressed to the Scottish Executive.

3 The two Scottish Law Officers are the Lord Advocate and the Solicitor General for Scotland
4 Non- ministerial offices include e.g. the Registrar General of births, Deaths and Marriages for Scotland; the Keeper of the Registers of Scotland and the Keeper of the Records of Scotland.
5 BBC News website - Scottish Executive renames itself, 3 September 2007 http://news.bbc.co.uk/1/hi/scotland/6974798.stm
Following the election, the posts of Minister and Deputy Minister (junior Minister) were restyled ‘Cabinet Secretary’ and ‘Minister’ respectively. The size of the Cabinet was also reduced from 10 Ministers and 8 Deputy Ministers to 6 Cabinet Secretaries (including the First Minister) and 10 Ministers. The two Law Officers are no longer members of the Cabinet but may attend on occasion.

D. The First 100 Days – An Overview

On 24 August 2007, the SNP marked the completion of their first 100 days in office with the publication of “Reporting on 100 days: Moving Scotland Forward”.

For the full text of the publication see the link below:
http://www.scotland.gov.uk/Publications/2007/08/23162100/0

The Scottish Government also published a press release in which Cabinet Secretary John Swinney said:

In our programme for the first 100 days of government we set out many of the important steps we would take to set our nation on a more ambitious path. As we reach the 100th day we are proud to be able to report back to the people of Scotland.

"The delivery of our 100 Days programme gives as a solid platform of success for four years of government.

"The list of what we have put in train to improve Scotland is already a long one. We have taken swift and early action in Government to deliver the SNP programme and make Scotland more successful.

Among the full range of measures, we have taken action to reduce class sizes, remove the iniquitous tolls on the Forth and Tay bridges, save vital accident and emergency units, abolish graduate fees and establish a Council of Economic Advisers to help boost Scotland’s economy.

We will continue to work as we have done in our first 100 days. Scotland has so much potential and by focussing on making our country even more successful the Government knows our nation can achieve much more.

Among the achievements claimed by the SNP for their first 100 days are that they:

- created a smaller, more effective Ministerial team with six Cabinet Secretaries (including the First Minister) and 10 Ministers
- established a Council of Economic Advisers to provide independent advice to increase Scotland’s sustainable economic growth rate
- drafted legislation to abolish tolls of the Forth and Tay bridges
- enabled the continuation of A&E services at Ayr and Monklands hospitals
- drafted legislation to end graduate endowment
- published a white paper on independence and launch of national conversation
- provided funding for 300 extra teachers and 250 more teacher training places from August, to drive down class sizes in P1 to 3; a commitment to providing additional funding for a phased 50 per cent increase in free nursery provision
• established negotiations with Westminster on the transfer of responsibilities for firearms legislation to the Scottish Parliament to allow action on air weapons
• set up a Saltire Award for innovation in industry to reward the best efforts to develop cutting edge renewable energy technology
• made a commitment to set a target of cutting emissions by 80 per cent by 2050. “We will be drafting a Climate Change Bill to take this forward”

The opposition parties at Holyrood were less enthusiastic about the SNP’s first one hundred days in Government. According to an article in the *Guardian*, the Liberal Democrat leader, Nicol Stephen said:

> The new first minister boasts that he has transformed Scotland. I disagree. It has been the biggest spin operation we have seen since Torvill and Dean won a gold medal for their triple salto at the Winter Olympics.

The article also reported on the Labour Party’s reaction:

> The Labour Party said the executive had produced only one of its promised five bills - the white paper and draft bill on an independence referendum. In all, said Andy Kerr, a former Labour health minister, the SNP had delivered in full only 20 of 68 promises.

One of the SNP’s key pledges has been the subject of considerable debate since the election - their commitment to deliver 1,000 new police officers.

On returning to the Scottish Parliament after the summer recess, Members debated the Scottish Government’s programme. During that debate, Cathy Jamieson, the Labour Party’s Deputy Leader said:

> Perhaps most significant is not what is in the statement, but what is not in it. Despite the blizzard of briefing, it is clear that the Scottish National Party does not intend to deliver on some of its manifesto promises.

> The First Minister may recall that the last time that he and I shared a platform was at the Scottish Police Federation conference on 24 April, when he made a clear commitment to deliver 1,000 extra police officers. The document that was published today says:

> "We will work with police forces to increase policing capacity through the deployment of the equivalent of 1,000 additional police officers.

> I am not sure what the equivalent of a police officer is. Are we supposed to tell our constituents to dial 999 to ask for the equivalent officer to attend? When does the First Minister expect to deliver on the clear promise of 1,000 extra police officers?"
This SNP manifesto commitment to employ 1,000 extra police officers has been used on a number of occasions by the opposition parties at Holyrood to suggest that the Scottish Government has not met its election pledges. Other SNP commitments have also been questioned by opposition Members. During the same debate on the Scottish Government’s programme Nicol Stephen said:

The soundbite is a demand for more powers on air-guns; the reality is silence on knife crime. The soundbite is about more rights for patients; the reality is American-style litigation being brought to Scotland's NHS. Is the most important thing for our health service the injection of an unlimited number of lawyers? The soundbite is about abolishing tolls; the reality consists of cuts in public transport projects. The soundbite is about wiping away all the debts of graduates; the reality is that the Cabinet Secretary for Education and Lifelong Learning has already said that the cost of that is "prohibitive".

That is not the First Minister's only problem with money. Can he explain why 83 written questions on his policy priorities have been shuffled off to await the outcome of the spending review? Key decisions have been put off until November.

Today's grand statement tells us a lot by what is not there. The SNP has made commitments that it does not have the capability to deliver on. Where have they gone, the promises that were made to the many, not the few—to students, on class sizes, and many others? The SNP's sums simply do not add up—does the First Minister not now know that?10

E. Choosing Scotland's Future: A National Conversation

On August 14 2007, the Scottish Government published “Choosing Scotland’s Future: A National Conversation: Independence and Responsibility in the Modern World”. The paper was intended as the first step in promoting a "conversation" on Scotland's constitutional future.

For the full text of the National Conversation see the link below:
http://www.scotland.gov.uk/Publications/2007/08/13103747/0

In addition to the consultation document, the Scottish Government launched a webpage containing a ‘Ministers’ blog’ which provides an opportunity for members of the public to comment on articles submitted by Cabinet Secretaries and Ministers.

The National Conversation Document contains options for constitutional change in Scotland ranging from further powers for the Scottish Parliament to Scottish independence and considers the legislative position in relation to the various changes proposed:

Enhanced devolution or independence would require legislation, probably at both Westminster and Holyrood. Substantially enhanced devolution would arguably, and independence would certainly, require the consent of the Scottish people through a referendum. Such a vote, whilst not constitutionally binding, has been accepted as the correct way of determining Scotland’s constitutional future. There must,
therefore, be due consideration of appropriate forms of legislation for such a vote, and of the question of how a referendum could be initiated by the Scottish Parliament.  

In addition, for the Scottish Government’s favoured independence option, it sets out the draft bill for a national referendum which would be “held to establish whether the Scottish people agree to authorise the Scottish Government to negotiate terms for Scottish independence with the Government of the United Kingdom”.

The publication of the draft bill as part of the National Conversation document engendered debate between the political parties over whether Holyrood was competent to legislate for the proposed referendum. At a debate on 6 December 2007 on devolution, the Labour Leader, Wendy Alexander, asked the following question:

**Ms Alexander:** Many of us are interested in knowing whether the Government believes that its bill on the referendum is competent or incompetent, legal or illegal. We have spent three months asking the question, and still we have not got an answer. Let us ask again: is the SNP’s flagship bill on the referendum competent for this Parliament?

In response, Nicola Sturgeon, Deputy First Minister and Cabinet Secretary for Health and Wellbeing, said:

**Nicola Sturgeon:** The answers to Wendy Alexander’s questions are: competent and legal.

At a meeting of the European and External Relations Committee on 11 December 2007, the Deputy First Minister gave evidence on the Scottish Government’s National Conversation document. She was asked:

**Alex Neil:** I might wish to come back in later, but I have one further question for the moment. In the debate last Thursday morning, Wendy Alexander questioned the legality of the bill as outlined in the white paper. No doubt she is an expert on what is legal and what is not. I presume that the Scottish Government’s legal opinion is that a bill with the wording that is outlined in the white paper is entirely legal and constitutional.

While Ms Sturgeon refused to reveal the nature of the legal advice the Scottish Government had received on this issue, she confirmed her view that such a referendum, depending on its wording, would be within the Parliament’s legislative competence:

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http://www.scotland.gov.uk/Publications/2007/08/13103747/0

12 Ibid

http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-07/sor1206-02.htm
Col4133
Nicola Sturgeon: As Alex Neil is aware, it is the practice of Government—as it was of our predecessor Governments—not to confirm either the fact or the content of legal advice, and that is a rule that I will not breach today. In my view, a referendum is within the competence of the Scottish Parliament. The wording of that referendum would have to be drawn in such a way that ensured that it was within the competence of the Scottish Parliament.\(^\text{14}\)

The *Scotland Act 1998* is not definitive on the matter of whether the SNP’s proposed Referendum Bill would be competent for the Scottish Parliament. However, Section 29 of the Act provides that:

(1) An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament.

(2) A provision is outside that competence so far as any of the following paragraphs apply –

(b) it relates to reserved matters.

Schedule 5 of the 1998 Act provides a list of subjects which are reserved to Westminster. This includes “the Union of the Kingdoms of Scotland and England”. Schedule 5 does not, however, identify the holding of a referendum as a reserved issue\(^\text{15}\).

The Scottish Parliament’s ability to legislate for a referendum was discussed in the course of the debates which took place in the House of Commons during consideration of the *Political Parties, Elections and Referendums Bill*.

During these debates the UK Government’s position on the subjects on which the Scottish Government has the authority to conduct referendums was reiterated. The junior minister, Paddy Tipping, said in the debate on amendments to the Bill on 14 February 2000:

“The key issue underlying the amendments is the devolution settlement. This Parliament has devolved certain matters to Scotland and Wales, including local government elections in Scotland, the funding of political parties represented in the Scottish Parliament and the conduct of referendums in Scotland and Wales on devolved matters.”\(^\text{16}\)

Another perspective on the Scottish Parliament’s ability to legislate for a referendum is contained in the Scottish Government’s White Paper “Choosing Scotland’s Future – A National Conversation”.

Paragraph 5.9 states:

As far as legislative competence is concerned, a referendum could be held under the authority of an Act of the Scottish Parliament, depending on the precise proposition in


\(^{16}\) HC Deb 14 February 2000, columns 650-651
the referendum Bill, or any adjustments made to the Parliament before the Bill is introduced.\textsuperscript{17}

The implication, therefore, appears to be that while it is within the legislative competence of the Scottish Parliament to hold a national referendum, the subject matter of such a referendum may place it outside the scope of the Parliament’s powers. In other words, a referendum may only be competent if it is on an issue devolved to the Scottish Parliament.

It would appear, therefore, that the referendum questions posed in the Scottish Government’s draft \textit{Referendum (Scotland) Bill} will be crucial in any assessment of whether such a referendum is competent. The proposition is that:

- I AGREE that the Scottish Government should negotiate a settlement with the Government of the United Kingdom so that Scotland becomes an independent state.

- Or

- I DO NOT AGREE that the Government should negotiate a settlement with the Government of the United Kingdom so that Scotland becomes an independent state.”\textsuperscript{18}

It is not immediately clear whether a referendum containing these questions could be classed as covering a devolved issue or not. This is because negotiations and discussions between the Scottish Government and the United Kingdom Government are within parliamentary competence but, as noted earlier, under Schedule 5 of the \textit{Scotland Act} “the Union of the Kingdoms of Scotland and England” is a reserved matter.

\textbf{F. The Reaction to the National Conversation}

The publication of the Scottish Government’s National Conversation united the three main opposition parties at Holyrood. The leaders of the Labour Party, the Conservative Party and the Liberal Democrats issued a joint statement opposing the Government’s plans. The statement read:

In May, the people of Scotland voted for a range of political parties, none of which command majority support. The parties we represent - together representing 65\% of voters in Scotland - believe that Scotland as a whole, and individual Scots, have the best chance of success and progress inside the United Kingdom.

We therefore regret the fact that the minority SNP administration, representing less than a third of Scottish voters, will tomorrow publish a white paper which is designed to further their party's central objective to take Scotland outside the United Kingdom. The SNP is squandering taxpayers’ money in pursuit of their own narrow and failed agenda. They have promised to build a consensus around the policies they will bring forward for debate in the Scottish Parliament. But this white paper can only create division and uncertainty which will damage Scotland.

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The SNP have spoken about a national conversation but tomorrow’s publication is about their nationalist crusade. We will listen, but we fear this will be less of a conversation than a one-way megaphone.
We are deeply concerned that the proposals to be made by the SNP are only designed to drag the people of Scotland into a constitutional cul-de-sac. We will not give succour to those who want to end the Union.
Their objective is to end the United Kingdom while our parties want to see devolution succeed inside the United Kingdom. Our parties have differing views on how to reform, maintain, and strengthen the Union, but none of us want to see it ended.
Reforming the Union is in conflict with ending the Union, so there can be no consensus around a minority obsession that will do great damage to Scotland.
In the months to come we will consider how best the interests of the people of Scotland can be served. Though we disagree about the means to achieve it, good governance and basic priorities should come first for Scottish ministers.
Sadly, tomorrow's white paper signals that the constitutional debate, and staging squabbles with Westminster, are the priority of the current minority administration.
We regret the fact that these divisive proposals were brought forward during the recess rather than when parliament was sitting.
We are willing to enter into debate jointly about the way in which devolution within the UK can best develop in the years to come and we believe that colleagues in Westminster have a role to play in that debate.
Before the Scottish Parliament reconvenes we will discuss together the best way to take forward this debate.\textsuperscript{19}

This response to the National Conversation was taken forward by the three parties and on 6 December 2007 they instigated a debate reviewing the devolution settlement.

G. A Constitutional Commission

During this debate on 6 December, the Parliament considered a motion in the name of the Labour leader, Wendy Alexander; which said:

That the Parliament, recognising mainstream public opinion in Scotland, supports the establishment of an independently chaired commission to review devolution in Scotland; encourages UK Parliamentarians and parties to support this commission also and proposes that the remit of this commission should be:
To review the provisions of the Scotland Act 1998 in the light of experience and to recommend any changes to the present constitutional arrangements that would enable the Scottish Parliament to better serve the people of Scotland, that would improve the financial accountability of the Scottish Parliament and that would continue to secure the position of Scotland within the United Kingdom”, and further instructs the Scottish Parliamentary Corporate Body to allocate appropriate resources and funding for this review.\textsuperscript{20}

The aim of the debate in Parliament appeared to be to engender support for a review of the devolution settlement, a decade after the Scotland Act came into force. During the debate Wendy Alexander said:

\textsuperscript{19} BBC News website - Independence statement in full, 13 August 2007
http://news.bbc.co.uk/1/hi/scotland/6944185.stm
\textsuperscript{20} Scottish Parliament Motion S3M-976 4 December 2007 http://www.scottish.parliament.uk/sch/motion.result
It is clear that Scotland wants to walk taller within the United Kingdom, not to walk out. How do we move forward? How do we align power and responsibility more closely within this place? Let us address the case for greater financial accountability. The review of Scotland’s future should be about more than party politics, which is why the leaders of the three main Opposition parties in Scotland—I pay generous tribute to Annabel Goldie and Nicol Stephen—have worked together not only in this place but with our UK counterparts to agree this approach.

Today, the Parliament has the chance to offer its support for an independently chaired commission "to review the provisions of the Scotland Act 1998.

We are actively encouraging Westminster colleagues to support the commission. However, it begins today with this Parliament backing the initiative.

One aspect of the original Scottish Constitutional Convention was the way in which it harnessed the expertise of civic Scotland to the cause of home rule. To succeed, the new commission must take the debate beyond the Parliament. It must build on what we have learned over the past decade. It should draw upon business leaders, the public sector, trade unions, voluntary groups and academia. Moreover, Scots of all walks of life should have the chance to contribute to the debate. If the new commission is set up early in the new year, it can deliberate for a period of months, and consider the detail of how Scotland should move forward.21

In her speech during the debate the leader of the Conservative Party, Annabel Goldie, said:

This tripartite agreement is significant. Strengthening devolution while continuing to secure the position of Scotland within the United Kingdom is not just an honourable but a highly important commitment. It is bigger than any one political party, because it dwarfs party politics. We are talking about shaping the constitutional direction of travel of our nation for the future, not just because it is sensible and pragmatic to do that eight years on, but because it overwhelmingly reflects what Scotland wants to happen.

Today’s debate gives Scottish parliamentary breath to that overwhelming public aspiration. I thank Jack McConnell for his initial support of the process and I thank my counterparts, Wendy Alexander and Nicol Stephen, for the constructive discussions that have brought us to the stage of agreeing the need for an independently chaired commission to review devolution in Scotland. I also thank them for agreeing that the remit of the commission should be to review the provisions of the Scotland Act 1998 in the light of experience and to recommend any changes to the present constitutional arrangements that would enable the Scottish Parliament to serve the people of Scotland better, that would improve the financial accountability of the Scottish Parliament or that would continue to secure the position of Scotland within the United Kingdom. This debate and tonight's vote represent significant political progress for Scotland.22

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http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-07/sor1206-02.htm Col4133

http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-07/sor1206-02.htm Col4133
For the Liberal Democrats, Nicol Stephen, welcomed the review that would be instigated by the Commission:

It is right to call this an historic day. Liberal Democrats favour the conferral of more powers and a better, more effective Parliament. We think that that would lead to a stronger Scotland in a stronger United Kingdom.

Over the past few years, we have been the only party campaigning for more powers for the Parliament but rejecting independence. It is 10 years since the passage of the Scotland Act 1998, and now is the right time to consider gaining those new powers.23

The motion before the Parliament was carried by 76 votes to 46 votes with 3 abstentions.

The Deputy First Minister, Nicola Sturgeon, speaking at the European and External Relations Committee meeting the following week, raised the subject of the constitutional commission:

Before I conclude, it is worth my contrasting the inclusive, open and wide-ranging nature of the national conversation with the constitutional commission that is proposed by the main Opposition parties. Although we welcome any contribution to the national conversation, we regret that the Parliament has agreed to establish a commission that deliberately excludes independence—not just the favoured option of the largest party in the Parliament, but the favoured option of a substantial proportion of the Scottish people. The national conversation lets all people across Scotland have their say, whereas the commission would restrict debate to an elite few and seek to dictate what could and could not be discussed. The national conversation purposely invites views on all the options for change, not just on the Government's preferred option, and does not limit those options, as the commission tries to do.

Although I welcome the commission, to an extent, and agree that its report will make a contribution to the conversation, its limited nature means that its work cannot replace the national conversation, which will continue to engage directly with the Scottish people over the months ahead, with the overall purpose of letting the people of Scotland decide their own future in a referendum.24

The Scottish Parliamentary Corporate Body is currently considering how to take forward the review of the Scotland Act 1998 as agreed by the Parliament.

23 Ibid