

S/2/113

**Hibbert EW (Ewa)**

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**From:** Hibbert EW (Ewa)  
**Sent:** 19 January 1999 11:19  
**To:** Lewis E (Liz)  
**Subject:** Asylum and Immigration Bill

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Liz,

This minute contains general info about future (including this session) legislation at Westminster which deals with devolved matters, as discussed.

I shall also send some info shortly about the specific point raised by Mr St Clair in his minute of yesterday which explains that it is possible to stop functions transferring to the Scottish Ministers where those functions have been conferred on the Secretary of State in a GB Bill and where the function relates to a devolved matter. In this situation you would normally want the function to transfer, and you do this by specifying that the Bill is a pre-commencement enactment for the purposes of the Scotland Act and this triggers the automatic transfer provisions. If you don't specify, they don't transfer - but more on this shortly.

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welfarereformbill1801.d

cc

Recipients as per envelope,

Further to Mr St Clair's minute of yesterday, I attach a draft guidance note which deals with the question raised in para 12 of that minute. The function of designating reception zones in the Immigration and Asylum Bill will only be a concern if it is a function which relates to a devolved matter. If it is, then the draft note explains how it can be made to transfer to the Scottish Ministers or how it can be prevented from transferring to them.

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**[Draft as at 19/1/98 – Not yet cleared by CG Solicitors – please do not distribute outside TSO]**

### **15.3 Transfer of functions under future Westminster legislation about devolved matters**

The case of functions under future Westminster legislation which would be exercisable within devolved competence has to be seen within the context of the expectation that a convention will be established whereby Westminster will not normally legislate about devolved matters in Scotland without the consent of the Scottish Parliament (see Guidance Note 3). For example, it may be agreed that there should be a common code for the GB as a whole about a particular devolved matter, or that a new cross-border public authority should be established.

Ministerial functions under such an Act which are exercisable within devolved competence would not automatically transfer to the Scottish Ministers under section 53 because the Act would not be a "pre-commencement enactment". As a general rule, the proper way for the Act to provide for the transfer of the functions to the Scottish Ministers would be for it to deem itself to be a pre-commencement enactment<sup>i</sup> for the purposes of the Scotland Act, but otherwise to be silent about devolution. Section 53 and any other relevant provisions in the Scotland Act would then have effect. Again, explanatory material could be made available to make the intention clear.

As an alternative, it would of course be technically possible for the relevant enactment to confer the functions directly upon the Scottish Ministers. This approach might be considered in certain cases where the use of the powers in the Scotland Act would be particularly torturous. And it could be said to be more acceptable in principle than in the case of functions relating to reserved matters because the Scottish Parliament will have consented to the proposal for legislation at Westminster. However, if functions concerned with devolved Scotland are conferred directly on the Scottish Ministers by a Westminster Bill, their exercise would not be limited by the devolved competence test. Consequently, the functions might not be exercisable compatibly with other functions of the Scottish Ministers on the same topic. Such a Bill would also require to be drafted carefully to take into account the scheme of devolution in Scotland, for example so as to not to pre-judge the resolution in Scotland of issues such as how functions will be exercised by members of the Scottish Executive within devolved competence – for example, whether functions should be conferred on the Lord Advocate, the First Minister or one of the public offices that will form part of the Scottish Administration – or what the mechanisms will be for the payment of sums into or out of the Scottish Consolidated Fund. In general, therefore, a safer approach will be that outlined in the previous paragraph.

On occasion, of course, the intention may be that Ministerial functions conferred by a Westminster Bill which are exercisable within devolved competence should not transfer to the Scottish Ministers. Not deeming such a Bill to be a pre-commencement enactment would prevent the functions from transferring to the Scottish Ministers under section 53, but it would not protect the Act from being amended by the Scottish Parliament. Therefore in such a case, the relevant provision should be added to the provisions listed in Part I of Schedule 4 which are protected from modification by the Scottish Parliament. This would prevent the Scottish Parliament from amending the provision and will also prevent the transfer of the functions to the Scottish Ministers by section 53<sup>ii</sup>.

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<sup>i</sup> This will not make subordinate legislation under the Bill a pre-commencement enactment. But the effect will be that any power conferred by the Bill to make subordinate legislation, so far as exercisable within devolved competence, will if it is a Minister power pass to the Scottish Ministers. If it is a power of Her Majesty in Council, administrative arrangements will ensure that it will be exercisable on the advice of the First Minister rather than a Minister of the Crown (see chapter 6).

<sup>ii</sup> Schedule 4 can be amended by an Order in Council under section 30, subject to the approval of both Parliaments. As explained in guidance note 3, this is the route which should in general be taken, rather than an amendment directly by a Westminster Act.

Mr MacLeod, EID

file : ~~5/2/13~~  
+ EID file

Copy to: Mr Foulis, EID  
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**SCOTLAND ACT: FUTURE WESTMINSTER LEGISLATION ON DEVOLVED MATTERS: WELFARE REFORM BILL: AMENDMENTS TO THE EMPLOYMENT AND TRAINING ACT 1973**

1. I refer to your minute of today to Mr Walford. I am replying in his absence this afternoon.

**General points about future Westminster legislation on devolved matters**

2. First, a couple of general points about future Westminster legislation on devolved matters. Mr Ferguson in Liaison Division is keeping a note of all Bills in the current session which deal with devolved matters and I suggest that you alert him to this one in case he is not yet aware that this Bill does deal with a devolved matter.

3. Constitution Group's general advice is that for constitutional and practical reasons every effort should be made from December 1998 to keep to an absolute minimum the amount of legislation at Westminster on devolved matters. The Welfare Reform Bill deals with the devolved matter of training for employment, or perhaps to put it more accurately, it deals with matters other than those which are reserved by Schedule 5. The Scottish Parliament could therefore legislate in relation to these non-reserved matters itself.

4. Therefore our initial view is usually to resist new Westminster Bills from dealing with devolved matters and to argue that the matter should be left for the Scottish Parliament. However, there are already a number of Bills in the current parliamentary session (some of which have not yet been introduced or reached second reading) which contain provisions dealing with devolved matters. We have decided to agree to them being dealt with at Westminster because they are largely uncontroversial and/or minor, they are desirable, it is convenient to get them dealt with in this session, and they will mostly have received Royal Assent before D-Day (although this is not guaranteed). The Welfare Reform Bill appears to meet some of these criteria, and I suppose the bottom line is that Ministers will want the whole package in the Bill to apply in Scotland as well – but to the extent that it relate to devolved matters the Scottish Parliament will of course be able to legislate about those matters after 1 July.

5. If, as you expect, the Bill is still before Westminster on D-Day, then our advice is that incoming Scottish Ministers would probably need to make a statement to the Scottish Parliament explaining the position. There would be little point at that stage in formally seeking the Scottish Parliament's consent for the Bill given that it should by then be a good way through its passage, but the Scottish Ministers could stress that the Scottish Parliament would be free to amend or alter that legislation in the future if it wished to do so within its legislative competence.

6. It will be for the UK Government to decide which Minister should lead on Scottish provisions which are still before the Westminster Parliament on D-day, but the expectation is that the Secretary of State for Scotland would need to take responsibility.

7. The Bill should make as limited a degree of provision relating to devolved matters as is possible to meet the agreed policy requirement so that we keep to a minimum the amount of legislation at Westminster on devolved matters. It should not be used as a vehicle for making other changes.

8. If the Bill creates any Ministerial functions which are within devolved competence and which should post-devolution be exercised by the Scottish Ministers in or as regards Scotland, or if it modifies any existing Ministerial functions, then the Bill should deem itself to be a pre-commencement enactment for the purposes of the Scotland Act 1998. This would then allow those Ministerial functions within devolved competence to transfer automatically to the Scottish Ministers under section 53 of the Scotland Act. The Bill would otherwise be silent about devolution, although explanatory material should describe the overall outcome.

9. This is a point which you will need to consider when you see the first draft of the Adoption Bill. You should consult your Divisional Solicitor to ensure that the appropriate provision is made. We hope to issue guidance about this in the next few weeks, but if you have any urgent questions then please let me know.

#### **Specific comments about amending the 1973 Act**

10. Your assessment of the effect of paragraph 6 of Schedule 2 on the Scottish Parliament's ability to amend section 2 of the 1973 Act is not quite right. All that paragraph 6 does is protect the shared powers of the Minister of the Crown, which relate to devolved matters but are shared by virtue of section 56, from being changed by the Scottish Parliament. The rest of section 2 to the extent that it relates to devolved matters, including the functions that the Scottish Ministers exercise under section 2 can be changed by an Act of the Scottish Parliament as it applies in or as regards Scotland. However the reasons already given above may make you want to do all the desired changes to section 2 in the Welfare Reform Bill rather than waiting for the Scottish Parliament to do it in an Act of the Scottish Parliament.

11. Ms McLeod's interpretation of Part III of Schedule 5 is correct: the extent of the reservation of job search and support is fixed by reference to the subject matter of the 1973 Act as it stands on 1 July. Later changes to the Act do not affect what is reserved. There is no need to change the Schedule 5 entry.

12. I have made some manuscript changes to the submission and these will follow shortly by hand.

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5/2/13

Ewa W Hibbert  
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7 January 1999

Mr Stevens, SWSG

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Ms Brown, Sols Office

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**SCOTLAND ACT: FUTURE WESTMINSTER LEGISLATION ON DEVOLVED MATTERS: PROPOSED ADOPTION BILL**

1. We discussed the proposed private member's Adoption Bill, which may be announced next week, and what line to take about future legislation at Westminster which deals with devolved matters. The Bill is supported by the Department of Health but has not yet been drafted or timetabled. It is intended to be a GB Bill. I am copying this minute to Mr Ferguson in case he is not aware of this proposed Bill.
2. Constitution Group's advice is that for constitutional and practical reasons every effort should be made from December 1998 to keep to an absolute minimum the amount of legislation at Westminster on devolved matters. The proposed Adoption Bill deals with the implementation of an international convention on recognising inter-country adoptions. Adoption is a devolved matter and the Scottish Parliament is able and required to legislate for the purpose of observing and giving effect to international obligations so far as they relate to devolved matters. The Scottish Parliament could therefore implement the convention in Scotland after D-Day. You did not think that there was a pressing deadline for implementing the convention which would compel us to agree to it being implemented in a GB Westminster Bill prior to 1 July.
3. Therefore my initial view would be to resist and to argue that the matter should be left for the Scottish Parliament. However, there are already a number of Bills in the current parliamentary session (some of which have not yet made much progress such as the Asylum and Immigration Bill) which contain provisions dealing with devolved matters. We have decided to agree to them being dealt with at Westminster because they are largely uncontroversial and/or minor, they are desirable, it is convenient to get them dealt with in this session, and they will mostly have received Royal Assent before D-Day (although this is not guaranteed). The Adoption Bill appears to fall within this category and I would therefore tentatively say that we could agree to it being dealt with in this session as a GB Bill.
4. If the Adoption Bill gets Royal Assent before D-Day, then all well and good. If it were still before Westminster on D-Day, then our advice is that incoming Scottish Ministers would probably need to make a statement to the Scottish Parliament explaining the position. There would be little point at that stage in formally seeking <sup>the Scottish</sup> Parliament's consent for the Bill given that it should by then have mostly completed its passage, but <sup>Scottish</sup> Ministers could stress that the Scottish Parliament would be free to amend or alter that legislation in the future if it wished to do so, as long as it was still in compliance with the international obligation.
5. It will be for the UK Government to decide which Minister should lead on Scottish provisions which are still before the Westminster Parliament on D-day, but the expectation is that the Secretary of State for Scotland would need to take responsibility.

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7 January 1999

6. The Adoption Bill should make as limited a degree of provision relating to devolved matters as is possible to meet the international obligation so that we keep to a minimum the amount of legislation at Westminster on devolved matters. It should not be used as a vehicle for making other changes.

7. I hope this is helpful. I would be happy to comment on your draft submission.

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