

Mr Rogers (point j.)
Mrs Macdonald (points h, j, n)
Mr McLeod (point m)
Mr Dalgetty

Copy to: Mr Cameron
Mr Jamieson
Mr Walford
Mrs McAllan
Mr Rooke

5/2/13

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FOOD STANDARDS BILL: TREATMENT OF DEVOLUTION

1. With apologies for yet another minute on this subject, I now attach a draft letter in response to Jill Wordley's letter of 16 November, circulated under cover of my minute of 19 November.

2. I have tried to incorporate the main points made in the responses to my previous minute and would be grateful for confirmation that you are content **-by lunchtime Friday 27 November please**. I am hoping to issue the letter by close Friday. For convenience I have flagged the relevant points in the draft. (Mr McLeod may wish to note that the references to continuing discussion on FSA accounting to the Parliament refer to the expenditure apportionment paper circulated under cover of Mrs McAllan's E.mail of 20 November.)

J R WILDGOOSE
25 November 1998

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~~Mr Dando~~
Did anyone respond by his
deadline?

DM

2/12

Miss E J Wordley
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25 November 1998

Dear Jill

FOOD STANDARDS BILL: DEVOLUTION IMPLICATIONS

1. Your letter of 16 November attaching a draft letter to Parliamentary Counsel refers - apologies for the delay in response.

2. As I mentioned at our meeting in Edinburgh, there remains a question mark on the feasibility of taking legislation through Westminster in a devolved area, particularly with a Bill likely to be as high profile as the Food Standards Bill. As you know, we will have to seek the agreement of the Scottish Parliament, both to the essential content of the Bill and to it going to Westminster. It is of course possible that the Parliament will not agree - in which case we are back to the drawing board. That said, we agreed that we must proceed at present on the basis of devolution on the face of the Bill. I say this again simply to confirm that we may yet be in an all change situation - but of course this is nothing new in the history of this Bill!

3. Turning to the Clauses themselves, we have the following comments:-
 - a. Clause 1: Accepted.

b. Clause 3 - Appointment of Commissioners: We are content with paragraphs 5 and 6. I also agree with the thrust of paragraph 7 that a provision should be included in Clause 3 about Commissioners having responsibility for each of Scotland, Wales and Northern Ireland. I believe that the current draft leaves matters slightly unclear and one has to read Clause 5(5) along with Clause 3 to understand what is happening on Chairmanship of the Territorial Committees - and for the assurance that Territorial interests will be looked after within the Commission. As to the question of two "Scottish" Commissioners I have looked back at the White Paper (paragraph 7.8) and it clearly states that the Government "... envisages that there would be 2 Commissioners with specific responsibility for Scottish interests...". Upon reflection, I do believe this does need to go into the Bill. Hence, paragraph 8 of the draft letter needs to be changed to reflect this.

c. Clause 4: Agreed.

d. Clause 5 - Advisory Committees: We are content with paragraph 11. Paragraph 12 will need to be amended in the light of comments at point (b) above. On paragraph 13 I have two points. First, I am not clear that the general terms of reference for these committees as specified in Clause 5(2) fully reflects what is required as specified in the White Paper (paragraph 7.7). Second, I am not convinced that the uniformity implicit in the last three sentences of paragraph 13 of the draft letter to Parliamentary Counsel, is necessary, or even desirable.

On the first of these points, the White Paper at paragraph 7.7 envisages the committees carrying out the following essential functions:

- advising the UK Commission on Scottish, Welsh and Northern Irish interests in food standards. (Paragraph 7.7 second bullet point of the White Paper).

- Expressing a view on all proposals for legislative change - which would be reported to Ministers in Scotland, Wales and Northern Ireland, when the UK Agency put forward proposals for any such changes. (Paragraph 7.7 of the White Paper third bullet point).

- Providing advice, on request, to the devolved Ministers or Parliament/Assembly on any issues relevant to food standards and safety or on specific Scottish, Welsh or Northern Irish issues which arise in any of the other Advisory Committees.

I am aware that there was some discussion with Parliamentary Counsel on this issue previously - although the precise papers are not to hand here. Having looked in detail again at Clause 5(2), I do not feel that it reflects the full flavour of the functions of the Territorial committees. I think these essentially need to reflect - advice to the Commission, advice on proposals for legislative change and, responses to questions asked by devolved Ministers or Parliament/Assembly on food safety and standards. I recollect that there were some issues raised previously about which matters these Committees would serve. But I do not see this as a specific problem; I expect the advice emanating from them to be the same whoever is asking the question - be it the Commission or a Scottish Ministers. After all, we are anticipating that this advice could be published and hence presumably this itself ensures consistency irrespective of who is asking.

Turning to the second point regarding variation of the terms of reference, I believe that rather than having uniformity as implied in paragraph 13 we could provide for each devolved administration to supplement the terms of reference of its own committee after consultation with the others, including the Secretary of State. I further believe that providing suitably comprehensive, although still general, terms of reference can be specified in Clause 5(2) along the lines indicated above there will in fact be little need for variation in the terms of reference. The power to vary by each of

the devolved administrations therefore becomes an important optical and political point in terms of perceived control of food safety and standards.

e. Clause 6 - Other Advisory Committees: Agreed.

f. Clauses 8 and 9 - Development of Policy and Provision of Advice etc: We agree paragraphs 15 and 16. On paragraph 17 relating to directions associated with national security I have dealt with this below along with other powers of direction.

g. Clause 15 - Power to Exercise FEPA and FSA 1990 Powers by Agreement: Agreed - but we will need to make sure that the Bill confers powers on Scottish Ministers to delegate these FEPA and FSA 1990 functions to the Agency to take them on.

h. Clauses 16-20 - Amendment to other Acts: I had automatically assumed that we would invoke the deeming provisions; the device that I thought had been agreed was to include a Clause specifying that for the purposes of the Scotland Act, the FS Bill and subsequent Act would be deemed a pre-commencement enactment (last sentence of paragraph 21).

(Mrs Macdonald - have I got this right? I am not clear about the argumentation used in the paragraphs in the draft letter to Parliamentary Counsel - in particular paragraph 22. As I understand it MAFF favour face of the Bill changes for explicit changes to the Food Safety Act 1990, FEPA 1985, RSA 1993 and EPA 1990 - but the deeming provisions for anything else. Is this "mixed" approach acceptable?)

i. Clause 22 - Statement of General Objectives: Agreed.

j. Clause 23 - Directions re EU and International Obligations, Clause 24 - Directions re Breach of Duty and Clause 9(4) - Directions re National Security: I am

seriously concerned about the political consequences of the procedures you are now suggesting on all three of these areas of direction. As you are aware there is a perceived political downside to introducing in Scotland a UK Agency in an area which is devolved to the Scottish Parliament. The way that we will be able to sell this to the Parliament, and to wider interests, is to demonstrate that the Parliament will not be constrained in the actions it takes on food safety (within the provisions of EU legislation) and that the UK Agency will be accountable to the Parliament including on powers of direction - even if it is highly unlikely that they will be used. At the same time, if there was ever any thought that these powers of direction would be used, then of course there is a much bigger problem with what you are proposing. I am here working on the basis that they represent the exocet in the cupboard that in fact never needs to be used; its existence is sufficient to achieve its objectives.

Set against this thinking, I would comment on each of the direction powers as follows:

- Clause 9(4) - National Security: While I recognise that national security is not devolved, Scotland is exercising executive devolution on some national security functions. That is to say that the decision to exercise the power remains with the UK Minister but its implementation is devolved to Scotland. For example, this is proposed for the water industry and for environmental protection (Mr Rogers, Mrs Macdonald can you give me some firmer arguments here? Is it correct simply to accept that because national security is not devolved, we have no policy responsibility. National security strikes me as being a very wide term. Jill Wordley envisages this as being in a nuclear context - but of course the wording in the Bill does not specify this and one could envisage all sorts of things being caught by the term. Is this acceptable?).

- Clause 23 - Directions re EU and International Obligations: I am not at all convinced by the arguments at paragraph 26. You correctly point out that devolved administrations are under a duty to give effect to EU obligations - and indeed international ones - but the fact that the UK as a whole would be equally keen to ensure compliance does not remove the obligation that Scotland will wish to ensure compliance. (I will lightly pass over the implication that the UK in some sense does not include Scotland.) But I think you identify a more important issue when you refer to different interpretations of EU or indeed international obligations. As we all know, there are from time to time different interpretations of EU legislation. It is this very problem that could surface in the Scottish Parliament eg the current case of Russian Fish, where we have a different legal interpretation. If there was any threat that the power of direction would be used to over-ride an interpretation in Scotland, then this would be very bad news indeed for the whole UK approach - for the political reasons noted above. I believe this power of direction needs to be exercised only with the consent of Scottish Ministers.

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- Clause 24 - Directions re Breach of Duty: I do not agree with the argumentation of paragraph 27. The basis of the breach of duty has little to do with interests in terms of resources - rather it concerns achievement of policy objectives and compliance with legislative requirements. All parts of the UK have an equal interest in this. While I recognise that paragraph 28 attempts to nod in the direction of the devolved administrations, fundamentally there is an asymmetry. The UK Minister essentially holds the ring and would have to agree to any action outwith the area of the devolved administration. The asymmetry is that while the area of the devolved administration is the responsibility of the devolved administration, the UK Minister could

actually direct across the UK without the agreement of the devolved administration. This would be a red rag to a bull from a political perspective in Scotland. We must have these powers to be exercised by joint decision. Note I would even prefer this than to exercising the power separately for each devolved area - because I think this would inevitably lead to problems. Such an arrangement does not sit well with setting up a UK body. Also, I believe that the power should be used only as a last resort in extreme conditions; surely joint agreement would be appropriate in such conditions?

I also disagree on paragraph 30 that the Secretary of State should have ultimate decision over removal of the Commission. The Commission is appointed jointly and therefore, the decision to remove it should also be joint. I note the point you make about the Agency continuing in existence without a Commission and that the devolved administrations could not take ownership of their parts. But it must be possible to devise some form of interim arrangements in the highly unlikely circumstances that would ensue to permit joint decision making.

k. Clause 25 - Laying of Annual Reports: Agreed.

l. Clause 26 - Levy Provisions: As you will be aware, I have now written round at official level to request policy clearance for Scotland, Wales and Northern Ireland to set different rates and provisions for the FSA levy. Much of the latter part of paragraph 34 has therefore been overtaken - and as we discussed at the Edinburgh meeting is not quite correct anyway in the more general context of the competence of the Scottish Parliament.

m. Clause 28 - Financial Provisions: Again we will need to review matters in the light of decisions on expenditure apportionment - but we are broadly content with

paragraphs 35-37. As far as paragraph 39 is concerned, the FSA will not be a formal cross border public authority and therefore this whole paragraph should be deleted - no part of the funding of the Agency will be a charge on the SCF, which is outwith the control of the Parliament. (Mr McLeod are you happy with this?)

n. Clause 30 - Order Applying the 1990 Act to Feedingstuffs: We would prefer this power to come via the FS Bill - essentially for clarity. (Mrs Macdonald is this acceptable?)

o. Other Provisions: We agree that FSA Commissioners should be disqualified from the Scottish Parliament but the advice from our constitution people is that this should not be done on the face of the Bill but rather left for the Parliament to do itself. As regards Parliamentary Commissioners, a blanket provision will be made excluding the Scottish PCA from exercising any jurisdiction in areas following outside its remit. There will therefore be no need for the Bill to make any particular provision for this instance.

4. Apologies for this extensive list of comments - but as indicated to you, having looked again at the detail, there are a number of points that need to be ironed out now. I would of course be happy to discuss these issues in detail.

5. Copies of this letter go to Joy Whinney and Doreen Roy.

Yours sincerely

J R WILDGOOSE