

(49)

From: David Rogers  
Constitution Group - Functions  
20 November, 1998

Mr Parr, HD

Copy to: Mr Walford, CG  
Mr Ewing, CG  
Mr Ferguson, Liaison Division  
Mr Mason, EID  
Mr Jamieson, CG  
Mr Mullin, Sols  
Ms Hibbert, CG

1. Mr [unclear]  
2. 5/2/13 (all papers)  
[unclear]

### SECURE ELECTRONIC COMMERCE BILL

1. I refer to your minute of 19 November to Ms Hibbert which pointed out that the Queen's Speech will include the Secure Electronic Commerce Bill which includes certain provisions about devolved matters in Scotland. I have also seen Mr Mullin's minute of 19 November. Copies of this correspondence are attached for those who have not seen it before.
2. I have nothing to add to Mr Mullin's comments about the question of whether this Bill will be, or should be deemed to be, a pre-commencement enactment.
3. The question about whether this Bill should make provision about devolved matters in Scotland is really quite separate. As you say, the Government has announced that it expects a convention to develop whereby the Westminster Parliament will not normally legislate about devolved matters in Scotland without the consent of the Scottish Parliament. There has been quite a bit of thinking over the last couple of weeks about this very point, and in particular about the arrangements which need to be made for those Bills which may be going through Parliament at the time when the Scottish Parliament assumes its powers. Rather than going on at length about the conclusions which have been reached, I am copying the relevant correspondence to you, Mr Mullin and Mr Mason.
4. You will see from the annex to Mr Ferguson's minute of 11 November that there are a number of Westminster Bills making provision about devolved matters in Scotland which may still be before Parliament when the Scottish Parliament takes up its powers. Mr Walford's minute of 19 November explains the CG and Liaison Division thinking about how to deal with these Bills. The Secure Electronic Commerce Bill is in a slightly different position in that it is not to be introduced until Easter next year, and its Parliamentary passage may drag on into the following session. It will look rather odd for the Government to be introducing such legislation during the purdah period before the Scottish Parliamentary election, and might be difficult to defend that as consistent with the impending devolution of primary legislative competence to the Scottish Parliament. Are there strong reasons for the

Bill to make provision about devolved matters in Scotland? If not, it might be better for such provision to be left to the Scottish Parliament, with the Westminster Bill confining itself to other matters.

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20 November 1998

TeamMail - Received Mail

(49)

Sender.....: Walford I (Ian) #  
Recipient.....: Hibbert EW (Ewa)  
Rogers D (David)  
Subject.....: RE:FWD:DEVOLUTION: SECURE ELECTRONIC COMMERCE BILL  
Sent.....: 19/11/1998 15:05  
Attachments.....:  
Reply Requested.....: No  
Folder.....:  
In Reply To.....: FWD:DEVOLUTION: SECURE ELECTRONIC COMMERCE BILL  
Read.....: 19/11/1998 15:34  
Reply Sent.....:  
Reply Requested by...:  
Delivered.....: 19/11/1998 15:05  
Priority.....: Normal  
Sensitivity.....: None  
Status.....: Read  
Importance.....: Normal  
Conversion Prohibited: No

Ewa, David

I have looked at the papers on secure electronic commerce. I agree with David that it might be more sensible for him to reply. He might want to attach a copy of my note of yesterday's meeting which Tracy is about to issue.

I do wonder given that the Bill will not be introduced until Easter next year (i.e. probably during the pre-election purdah period) whether DTI should not be encouraged to make it an England-only Bill. It will look very odd to publish a Bill at Westminster just as MSPs are going out on the stump proclaiming the virtues of a Scottish Parliament with primary legislative powers. It would appear to make a mockery of the convention.

Happy to discuss.

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1. Mr McDougall FE 5/2/13

Ms Hibbert *Track - grateful*  
cc Mr Walford. *if you would nominate Mr Wallace 20/11*

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Ms Hibbert, CG

Copy to: Mr Mason, EID  
Mr Mullin, Sols

A timely query. I don't recall this one from the Eric Ferguson list. I think the law needs to be copied recent correspondence on X, and to get a short reply on the other points. I'd be happy to do that if you want, as the points seem more on my side than yours.

**SECURE ELECTRONIC COMMERCE BILL**

- This minute seeks advice on the potential impact of the above DTI Bill.
- We have just been informed by the DTI that the Secure Electronic Commerce Bill is to be included in the Queen's Speech next week and is to be subject to the new carry-over procedure. That means the Bill is to be considered in the Commons in the coming session, but that consideration in the Lords will be held over until the 1999/00 session. DTI expect that the Bill will be introduced no earlier than Easter next year.
- As well as legislating on reserved matters, the Bill will seek to amend substantive Scots law. For instance, it will amend the Requirements of Writing (Scotland) Act 1995 so that an electronic signature would be recognised in Scots law. In addition, the Bill will provide Ministers with order-making powers under which the relevant Minister would be able to amend the law to ensure that (where appropriate) requirements for material to be provided in writing may be satisfied by means of electronic communication. Since such powers would relate in Scotland to substantive, devolved civil law, it is our intention to ensure that the order-making powers would be available to Scottish Ministers after devolution.

*points seem more on my side than yours.*

*AM 19/11*

4. The questions which arise from the above are as follows:-

*No. (But it might want to deem itself to be one for the purposes of the Scotland Act in order to make use of the transf. provision in the Scotland Act)*

- Will the DTI Bill be considered a pre-commencement enactment?
- If the answer to 4.1 is "no", what arrangements will apply to the Westminster Parliament amending devolved Scots law?
- Once the primary legislation is made, what consultation arrangements might be necessary between Westminster and Scottish Ministers in the making of the orders mentioned above?

*X there has been extensive correspondence with Sols about this over the last fortnight, and I think Mr Walford is going to write something up. We'll need to ask SP for permission to combine in May.*

5. To answer 4.1, my view is that the DTI Bill would not be considered a pre-commencement enactment, but I would welcome your thoughts. I reached my view by considering Clause 53 of the Scotland Bill. Clause 53 (copy attached) defines "pre-commencement enactment". The DTI Bill will be primary legislation, so 53(3)(c) would not apply. Neither would the DTI Bill be passed before or in the same session as the Scotland Bill, so 53(3)(a) would not apply. I assume that Clause 53 of the Scotland Bill will be commenced before the DTI Bill would be enacted, so 53(3)(b) would not apply.

*Not quite right 53(3)(b) wouldn't apply because it only applies to secondary legislation.*

6. The *Quick Guide to Devolution* issued to staff last month confirmed (in paragraph 4) that the Westminster Parliament will retain the power to legislate on devolved matters. So, clearly Westminster would be able to make the amendments mentioned above at paragraph 3. However, the *Quick Guide to Devolution* also referred to the expectation of a convention that the Westminster Parliament would not normally legislate on devolved matters without the

*requirement to consult the UK Government, but merely five words in a concordat.*

consent of the Scottish Parliament. That would seem to be the way forward for 4.2. I should be grateful if you would explain further how this convention might work. For instance, how would the Scottish Parliament be consulted and how would the consent be obtained, directly from Westminster or via Scottish officials? In addition, what would happen if the Scottish Parliament refused consent and decided itself to legislate to amend Scots law (either to match what Westminster proposed, or even to take a different approach)? It would help in instructing the DTI Bill if we could alert the DTI now to any particular requirements of the convention. I would appreciate any information you might be able to give me, though I realise it might still be too early for you to say much.

7. I assume the answer to 4.3 lies in the interdepartmental concordat with the DTI. I would appreciate if Mr Mason could consider this and whether any special provision is required.

8. I would be happy to discuss.

*Yes.*

*Paul M Parr*

**PAUL M PARR**

SOHD

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19 November 1998

General transfer of functions.

53. - (1) The functions mentioned in subsection (2) shall, so far as they are exercisable within devolved competence, be exercisable by the Scottish Ministers instead of by a Minister of the Crown.

(2) Those functions are-

- (a) those of Her Majesty's prerogative and other executive functions which are exercisable on behalf of Her Majesty by a Minister of the Crown,
- (b) other functions conferred on a Minister of the Crown by a prerogative instrument, and
- (c) functions conferred on a Minister of the Crown by any pre-commencement enactment,

but do not include any retained functions of the Lord Advocate.

(3) In this Act, "pre-commencement enactment" means-

- (a) an Act passed before or in the same session as this Act and any other enactment made before the passing of this Act,
- (b) an enactment made, before the commencement of this section, under such an Act or such other enactment,
- (c) subordinate legislation under section 106, to the extent that the legislation states that it is to be treated as a pre-commencement enactment.