

— letter on media }
— quote on media } we can say anything we like
— letter on travel papers } I'll have to do it
volunteers?

From: Ian Walford
CG-Functions
19 November 1998

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Sp. David Brown
sp letter?

Mr Ewing

- Copy to:
- Mr Gordon
 - Mr Ferguson
 - Mr Kelly
 - Mr Jamieson
 - Dr Wildgoose
 - Ms Hibbert
 - Mr Rogers
 - Parliamentary Clerk

1. cc Mr. Mullin, Soli ✓
Mr P. Law, HD ✓
Mr J. Mason, ED ✓ } ISSUED 20/11
8/11

This correspondence is relevant to the
Secure Electronic Commerce Bill. I shall
write today on that. DM
DAVID BOWLES
CG

2. Return to me please

SCOTLAND ACT: FUTURE WESTMINSTER LEGISLATION

1. You and I and some copy recipients attended a meeting yesterday chaired by Mr Gordon which discussed future Westminster legislation on devolved matters in the light of the exchange of minutes last week. This minute records my understanding of what was agreed.
2. It was agreed that for constitutional and practical reasons every effort should be made in future to keep to an absolute minimum the amount of legislation at Westminster on devolved matters, but that there was unlikely to be much political demand for such legislation in any event. UK Ministers are unlikely to favour bids for Scottish legislation given that slots in the Westminster legislative programme are normally in short supply, and there is unlikely to be much appetite among the new devolved Scottish politicians for Westminster legislation on devolved matters. It was agreed nevertheless that this message should be highlighted in relevant guidance over the next few months.
3. It was agreed that the specific issues which were raised in the minutes last week divide essentially into 2 categories: transitional, relating to legislation in the forthcoming 1998/99 programme, and longer-term issues, relating to Parliamentary sessions 1999/2000 and beyond.
4. On the transitional issues the following points were made:
 - 4.1 Mr Ferguson said that he hoped that most of the (largely uncontroversial) Bills which contain devolved Scottish provisions in 1998/99 (listed in the annex to his minute of 12 November) will have received Royal Assent before D-day, but that this could not by any means be guaranteed;
 - 4.2 if any of the Bills were still before Westminster on D-Day, incoming Scottish Ministers would probably need to make a statement to the Parliament explaining the position. There would be little point at that stage in formally seeking Parliament's consent for any legislation given that it should by then have virtually completed its

Part of contingency planning

Saying in guidance that expect SMs to make statements

if SP don't expect UKG to take it over.

What if SMs want to have contact?

Do we back off?

passage, but Ministers could stress that the Parliament would be free to amend or alter that legislation in the future if it wished to do so;

4.3 Mr Kelly agreed to trawl Departments as soon as possible asking them to identify any EU legislative requirements which are likely to need to be implemented over the next few months, and at the same time to encourage Divisions to make early decisions about which could or should be put through Westminster before the elections and which should be held back and put before the Scottish Parliament;

4.4 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 was that the Secretary of State for Scotland would need to take responsibility. This might strengthen the case for the Secretary of State to have one junior Minister for a short transitional period; and

4.5 Mr Ferguson agreed to consider whether there would be merit in the Secretary of State writing to colleagues reasonably soon after the Queen's speech making some of the above points.

(How can we do this before this?)

What if SP 4 years strongly Done we back off?

5. As to legislation in 1999/2000 and beyond, the following points were agreed:

5.1 the Scottish Ministers would need to formally seek the consent of the Parliament for any proposed legislation at Westminster. The consent would need to be obtained both for the proposal that a Bill should be dealt with at Westminster rather than at Holyrood and for the principle of the relevant piece of legislation itself;

5.2 in the rare situations where consent was sought and obtained it would be more appropriate for the UK functional Minister than for the Secretary of State for Scotland to be responsible for the Scottish provisions. But it would be for the UK Government collectively to decide on a case by case basis which Minister should lead, taking political and presentational factors into account as well as practical considerations;

5.3 the lead UK Minister on a Bill which contained devolved Scottish provisions would need to make it clear in a statement to Parliament when the Bill was introduced (or at Second Reading) that the provisions were being introduced with the consent of the Scottish Parliament, that he would be keeping in close touch with and consulting Scottish Ministers during the passage of the legislation, and that while he would be answerable to Parliament for the passage of the devolved legislation he would not be generally accountable for the relevant devolved matter. It was agreed that the Westminster Procedure Committee should ideally reflect in its report into the effects of devolution this caveat to the general rule that UK Ministers would not in future answer questions on devolved matters; and

5.4 officials of the Scottish Administration would be able to brief UK Ministers leading on Bills containing Scottish provisions, but on the clear understanding that they were part of a Bill Team which would be led by an official from the UK Department and that the UK Department would have the final say on what briefing went to the Minister. Nevertheless it was felt that this approach was preferable to

SP has signed letters with it
Message to go for it to work quickly.

Just for a Bill or for principle?

statements
all will be a dev't Bill.

Slight to agreement

SPJ

seconding Scottish officials to UK Departments for the duration of a Bill because they would no longer then be accountable to Scottish Ministers.

6. As to taking forward what has been agreed for 1999-2000 and beyond, I assume that you will continue to lead on input to the Procedure Committee and in developing the procedure for obtaining consent from the Scottish Parliament for legislation at Westminster. For my part I shall ensure that what has been agreed is reflected in the DevCom guidance (both oral, through the seminars, and in written guidance) and that it is reflected in appropriate terms in the Memorandum of Understanding between the UK Government and the devolved administrations.

7. Mr Jamieson, Dr Wildgoose and I discussed briefly afterwards the implications of what had been agreed for the FSA Bill. We agreed that for the time being, and subject to Ministers' views, it would be sensible to press ahead with the plans to put provisions about the (devolved) Scottish involvement in the FSA on the face of the Bill for consultative purposes, but that Whitehall colleagues and indeed the general public would need to be reminded continually that the proposal that the legislation in 1999-2000 should cover Scotland would be subject to the consent of the Scottish Parliament.

IAN WALFORD

Constitution Group - Functions

Room G-H94

VQ

Ext 45532

19 November 1998

Mr Walford

Copy to

Mr Gordon
Mr Jamieson
Mr Ewing
Mr Burgess

Mr Sinclair
Mr Ferrie
Mrs Nelson
Ms Hibbert

1. Mr Darling
I fed # make Iain's
notes available prop
2. 5/2/13
quite quickly 13/11
please.

SCOTLAND BILL: FUTURE WESTMINSTER LEGISLATION

I have commented separately on the question of the Westminster legislative programme for 1998/99. Mr Jamieson's minutes of 6, 10 and 11 November raise a number of other points which need to be resolved quite quickly if we are going to be able to take sensible decisions on the role and size of Secretary of State's Office. 56

2. In relation to the **Consent Mechanism** I agree wholeheartedly with the general principle in paragraph 2.3 of Iain Jamieson's minute of 10 November (viz. after consent the Scottish Parliament lose control over the detail). Any other proposition would impose a considerable additional burden on the Westminster Parliament and on the Secretary of State and his/her Office.

3. If I understand the position correctly, Iain Jamieson appears to be saying that, in relation to any "devolved" legislation handled by Westminster:-

- the Secretary of State will either be solely or jointly responsible with the relevant UK Minister(s) for all such devolved legislation; and
- that it will be constitutionally inappropriate for Scottish Executive officials to **brief** UK Ministers – though UK Ministers may **consult** Scottish Executive officials. ✓

If this is right, and we cannot find some pragmatic way round the consequential difficulties, then it has fairly weighty implications for the role of the Secretary of State and his Office.

4. For a start it would appear to drive a coach and horses through what I regard as a crucial Westminster principle – that the Secretary of State should **not** have to be routinely answerable to Westminster MPs on devolved matters. If Secretary of State deals with devolved matters in the context of GB/UK legislation then it will be difficult to persuade the House authorities that he should not do so in relation to PQs, adjournment debates, Scottish Grand Committee etc. Such a position would have substantial implications for the envisaged role of Secretary of State and for this office. - what?

5. If, as Mr Jamieson claims, the Secretary of State cannot reasonably opt out of devolved legislation without either an (inappropriate) Transfer of Functions to UK Ministers, or (unlikely) Prime Ministerial diktat then it would seem preferable to restrict "devolved" legislation going through Westminster to the absolute minimum. This line would result in some unnecessary double-handling, for example, legislation implementing EU directives on eg habitats etc having to be put through separately by Westminster and the Scottish Parliament which, on the face of things, ought to be perfectly capable of being dealt with satisfactorily by Westminster on a GB/UK basis by the relevant UK Minister.

6. In view of the potential implications of decisions taken in relation to these matters I would be grateful if I could be included in any discussions between John Ewing and Iain Jamieson.

E W FERGUSON

12 November 1998

Room 6/2

Dover House

Mr Walford

Copy to Mr Gordon Mr Sinclair
 Mr Ewing Mr Ferrie
 Ms Hibbert Mrs Nelson
 Mr Burgess

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SCOTLAND BILL: FUTURE WESTMINSTER LEGISLATION

Thank you for sending me a copy of Ian Jamieson's minute of 6 November and of your minute to John Ewing of 9 November. I have since seen the further exchanges between you on 10 and 11 November.

2. Cabinet agreed the legislative programme for 1998/99 last Thursday. The Scottish involvement is set out in the attached Annex. I have tried to categorise the Bills into devolved and reserved as best I can, but I cannot guarantee that I have got it right in every case.

3. You asked when these Bills are likely to receive Royal Assent. I know that every effort is to be made to enact the NHS (Amendment) Bill before 1 April 1999, but that will be a tall order given that the next Session of Parliament is not due to start until 24 November. I think that the reality is that most of the Bills listed in the Annex will still be on the go after 6 May and some will still be on the go after 1 July.

4. I can see no way round the likelihood that at least some Bills with devolved Scottish provisions will still be on the go when the Scottish Parliament becomes operational. However, these Bills are likely to be close to completing their passage through Westminster and I am not sure that activating the "consent procedure" is likely to be meaningful at such an advanced stage of the game. Will there be sufficient time between D-day and Recess to hold the Debate(s) in the Scottish Parliament? What happens to the legislation if the Scottish Parliament withholds consent in relation to the principle? Will all of the Scottish devolved provisions in the Bill(s) simply fall or will Westminster simply take note of the Scottish Parliament vote and enact the Bill - leaving it to the Scottish Parliament to take corrective legislative action, as they deem necessary?

5. I recognise that, in political terms, it may not be possible to avoid activating the "consent procedure" but it seems to me to be potentially fraught with difficulties. On the other hand, if you consider the actual policies underlying the Bills listed in the Annex it is difficult to envisage any complexion of Scottish Parliament failing to consent to all of the Bills listed in the programme, devolved and Private Members categories. The possible exception is the NHS (Amendment) Bill, but it is almost certain to be on the statute book before the Scottish Parliament becomes operational. In my view the difficulties here are likely to be more hypothetical than real.

6. To enable you to consider this information I will comment separately on the other matters raised by Iain Jamieson.

E W FERGUSON
11 November 1998
Room 6/2

Dover House

☎ 56800

Annex

Scottish Involvement in the Westminster Legislative Programme 1998/99

Scottish Programme Bill

Scottish Enterprise (Financial Limits Bill)

GB Bills with devolved Scottish provisions

Water Charges Bill

NHS (Amendment) Bill

Modernisation of Justice Bill

Road Traffic Act (NHS Charges) – uncontroversial Bill which may not run

GB Bills with reserved Scottish provisions

Welfare Reform and Pension Sharing

Age of Consent and Abuse of Trust Bill

Disability Rights Commission

Working Families Tax Credit

Asylum and Immigration

Fairness at Work

Scottish Private Members' Bills

Consent to Medical Treatment

Leasehold Casualties

Incapax Patients' Fund