

Mr Walford

Copy to: Mr Gordon
Mr Ewing
Mr Ferguson
Mr O Kelly
Mr Rogers
Ms Hibbert
Mr Burgess
Parliamentary Clerk

Mr Sinclair
Mr Ferrie
Mrs Nelson

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SCOTLAND BILL: FUTURE WESTMINSTER LEGISLATION

1. I refer to your minute of yesterday and have the following comments.

Consent mechanism

2.1 It seems to me that the Scottish Parliament will have to consent both –

(a) to the proposal that a Bill dealing with devolved matters should be dealt with at Westminster rather than by itself;

(b) to the principle of the Bill itself.

2.2 However, I find it difficult to conceive of ways in which the Scottish Parliament could continue to have a say over the detail of what is in the Bill when it is going through Westminster. Is the Scottish Parliament to be able to suggest amendments to the Bill? Is the Scottish Parliament to approve the Bill in its final form before it is submitted for Royal Assent? Consideration should be given to practical questions such as these but my own feeling at present is that they may prove more troublesome than they are worth because they may also involve changes in Westminster procedure which may be difficult to achieve.

2.3 It may be that the general principle to be adopted is that, if the Scottish Parliament has seen fit to allow Westminster to legislate with regard to devolved matters, then they simply lose control over the detail of that legislation. If they do not like it, then the Scottish Parliament could introduce a Bill of their own to reverse the effects of the Westminster legislation so far as it applies to devolved matters.

Ministerial and official responsibilities

3.1 If I have understood you correctly, you appear to be suggesting in paragraphs 7-9 of your minute that Ministerial responsibility for Westminster legislation dealing with devolved matters should rest with Scottish Ministers and their officials.

3.2 If this is what you are suggesting, I do not think that this can be right. There can be no circumstances in which Scottish Ministers will be responsible or answerable in the Westminster Parliament. The responsibility for such Scottish Westminster legislation (or the

only technical consent

SPs accountable to SP

No

Scottish part of GB legislation) must rest with a Minister of the Crown in the UK Government. The question which I asked in my minute of 6 November is which UK Minister? Is it to be the Secretary of State for Scotland?

3.3 It seems to me that the same position would also apply to officials. It does not seem to me to be constitutionally appropriate for officials in the Scottish Administration to brief UK Ministers. In terms of the amended Civil Service Order in Council, they will owe their loyalties to Scottish Ministers and not to UK Ministers. UK Ministers will expect to be serviced by their own officials. Accordingly, if it is the Secretary of State for Scotland who is to answer in the Westminster Parliament for Scottish legislation dealing with devolved matters then he will have to have staff to deal with that legislation. Such staff may, of course, be seconded to him from the Scottish Administration. It may be that the Bill teams working on Scottish Westminster legislation on D-day will not transfer to the Scottish Administration on that date but remain with the UK Government until the Bill is enacted.

3.4 There would of course be no objection to the relevant UK Minister and his officials consulting Scottish Ministers and their officials and indeed I would expect this to be the case. However, this cannot, in itself, be regarded as a substitute for finding an appropriate UK Minister with officials who is responsible for the Scottish legislation.

3.5 If the Secretary of State for Scotland is to be the responsible UK Minister, then the nature of his responsibilities will require to be quite carefully described so as to avoid him becoming generally accountable to Scottish MPs at Westminster about devolved matters. To some extent, however, this will be unavoidable. For example, if the Secretary of State for Scotland is dealing with the Scottish part of the Water Charges Bill, Scottish MPs are likely to continue to hold him accountable and answerable for anything about the water industry in Scotland even after D-day, particularly if it falls within the scope of that Bill. It seems to me that all this requires to be raised and worked out with the President of the Council and the House of Commons Procedural Committee.

3.6 As I mentioned in my minute to Mr Rogers of 6 November, these problems simply demonstrate just how unsatisfactory it is to allow Westminster to continue to legislate on devolved matters, other than quite exceptionally. Some Departments simply do not appear to have woken up to the fact of devolution.

Iain Jamieson

J L JAMIESON
10 November 1998

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TeamMail - Received Mail

Sender.....: Burgess WG (George)
Recipient.....: Walford I (Ian) #
Subject.....: RE:FUTURE LEGISLATION AT WESTMINSTER
Sent.....: 10/11/1998 09:16

(LO)

Walford I (Ian) f:

>Please see attached 3 page minute.

Your minute sets out a possible mechanism for the Scottish Parliament to signify consent to legislation at Westminster in devolved areas. Would you envisage this mechanism also extending to private legislation, where there might well be even more need for something like it?

George

From: Ian Walford
CG-Functions

Date: 9 November 1998

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Mr Ewing

Copy to:	Mr Gordon	Mr Jamieson
	Mr Ewing	Mr Sinclair
	Mr Ferguson, LD	Mr Ferrie
	Mr O Kelly	Mrs Nelson
	Mr Rogers	
	Ms Hibbert	
	Mr Burgess	
	Parly Clerk	

SCOTLAND BILL: FUTURE WESTMINSTER LEGISLATION

1. I refer to Mr Jamieson's minute of 6 November addressed to Mr Rogers. You, I and Mr Ferguson (to whom I am sending a copy of Mr Jamieson's minute) all have an interest in this issue. I am also copying this minute and Mr Jamieson's to Owen Kelly, because the possibility may arise from time to time of UK or GB legislation being introduced at Westminster to implement an EU obligation which relates to devolved matters, as foreshadowed in 5.8 of the White Paper, and to Parly Clerk.

2. You will recall that the whole matter of future legislation at Westminster was addressed in the PS/minute which Mr Gordon put to the Secretary of State in June. In it he recommended that the Secretary of State seek colleagues' agreement to a convention governing future legislation on devolved matters at Westminster. As you know, DSWR colleagues did subsequently agree that a convention should be established under which Westminster would normally only legislate on devolved matters with the consent of the Scottish Parliament. This convention was announced in the House of Lords in July during the passage of the Scotland Bill.

3. As part of the same submission Mr Gordon gave Ministers details of the then proposed legislation for the 1998-99 session which would relate to devolved matters. This information had been assembled by Liaison Division. Ministers were invited to consider whether any legislation relating to devolved matters should be introduced in the 1998-99 session bearing in mind the risks that (a) it could be criticised for pre-empting the Scottish Parliament and (b) that it could still be before Parliament on D-Day. Ministers took some time to consider the list. They eventually decided that for various operational reasons it was essential that the Water Charges Bill and Road Traffic (NHS Charges) Bill should be introduced in 1998-99 in spite of the possible risks. (In fact it is intended that the latter should be enacted and commenced before 1 April 1999). I understand that Ministers also decided that some quite technical Scottish provisions should be included in a Modernisation of Justice Bill. I am not aware of any other candidates for the 1998-99 session, but I would be grateful if Mr Ferguson could let us know whether there are any and, if so, whether there is any intelligence on when they are likely to receive Royal Assent.

4. Mr Jamieson has raised some questions which we need to consider about how any (presumably very infrequent) legislation on devolved matters at Westminster should be handled at Westminster and in the Scottish Parliament, both in the 1998-99 'transitional' session and beyond. (The Food Standards Agency Bill may be a significant early test case, probably in the year 1999-2000).

5. The first (obvious) point to make is that, if the convention is observed, legislation on devolved matters will only be introduced if the Scottish Parliament has consented to it. We have spoken before about the mechanism by which Scottish Ministers would obtain the Parliament's consent, on the assumption that they would themselves have had prior discussions with the UK Government about the possibility of legislation at Westminster on a particular matter and agreed that it would be desirable. I think your view is that a Scottish Minister would put a motion to the Scottish Parliament explaining and justifying the intention to legislate at Westminster. The motion would presumably need to secure a majority in a vote in order to signify consent. You also take the view, I think, that only consent to the principle of the legislation would need to be obtained, rather than consent for the legislation in its final form. It would be for Scottish Ministers to negotiate with UK Ministers on the precise terms of the proposed legislation. There is, however, an argument for Scottish Ministers being required under Standing Orders to report to the Parliament at periodic intervals during the passage of the relevant legislation through Westminster - for example after the completion of the Commons stages - if only to demonstrate that they are keeping in close touch with progress.

6. I assume that this 'consent procedure' will need to be activated for the first time immediately after D-day in respect of any legislation on devolved matters which is still before Westminster.

7. Mr Jamieson also asked about the implications of the likely outcome of the Procedure Committee's inquiry into the consequences of devolution. My view is that any legislation relating to devolved matters which is before Westminster on D-Day and any questions about it should continue to be handled by the Minister who was handling it before D-day. Scottish Ministers would need to make this clear when they made their statement seeking consent (see paragraph 6). Scottish Ministers might also make it clear then that they expect to be consulted by UK Ministers about any possible Government amendments to the legislation and that they expect their officials to be involved in briefing the relevant UK Minister in charge of the Bill(s). Such arrangements, which would apply in respect of future legislation introduced at Westminster under the convention as well as unfinished legislation in the 1998-99 session, would be perfectly consistent with the arrangements for consultation and information exchange which we are intending should be put in concordats, and indeed with the convention itself.

8. In 1999-2000 and beyond it will be for the Prime Minister to decide which of his Ministers should handle legislation at Westminster relating to devolved matters, although this would presumably be a matter for discussion with Scottish Ministers in the period before the latter seek the consent of Holyrood to the legislation in question.

9. Mr Jamieson asked what is to happen if questions are raised in the Scottish Parliament about the legislation before Westminster. I assume that Standing Orders would make it clear that the Scottish Minister who sought the consent of the Scottish Parliament would be answerable in connection with any aspect of the relevant piece of legislation. On occasions he/she would no doubt need to seek briefing from the relevant UK Department.

10. I would be grateful for your views and those of copy recipients on what is proposed. Guidance on these matters will need to be disseminated throughout The Scottish Office and associated Departments quite quickly and included in comprehensive guidance on the devolution settlement in due course.

IAN WALFORD

9 November 1998

CG-Functions

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VQ

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