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From: John Ewing  
Constitutional Policy/ES  
22 June 1999

PS/Secretary of State

Copy to: PS/Lord Sewel  
PS/Lord MacDonald  
PS/Mr MacDonald  
PS/Perm Sec  
PS/ES  
Mr I Gordon  
Mr Kelly, ES  
Mr Ferguson, LD  
Mrs Brannan, HD  
Mr Rogers, ES  
Mr Olszewski

## LEGISLATION AT WESTMINSTER ABOUT DEVOLVED MATTERS

### Purpose

1. To let the Secretary of State see the motion which is to be debated tomorrow in the Scottish Parliament seeking its consent to 3 Bills with impacts in devolved areas, and the memorandum which has been supplied to MSPs describing the content of the Bills.

### Timing

2. **Urgent.** The Secretary of State will wish to see this material in advance of the debate timetabled for 4.30 pm tomorrow in the Scottish Parliament.

### Background

3. As Ministers are aware, both the UK Government and the Scottish Executive have stated their expectation that a convention will be established that the Westminster Parliament will not normally legislate about devolved matters without the consent of the Scottish Parliament. The First Minister's statement in the Scottish Parliament on 9 June alerted it to a number of Bills already under consideration in the UK Parliament, and to the intention that the Scottish Parliament would have the opportunity to debate the Food Standards Bill. That debate is scheduled for tomorrow afternoon. Immediately afterwards, there is to be a half-hour debate on 3 further Bills which have either recently been introduced in the UK Parliament or may be introduced before the Westminster recess. The Bills are the Electronic Communication Bill, the Limited Liability Partnerships Bill and the Financial Services and Markets Bill. A copy of the motion is attached at Annex A. Annex B is a memorandum describing the Bills

4. The impacts of each of these Bills in devolved areas are much smaller than that of the Food Standards Bill. The first 2 will, however, confer powers for subordinate legislation (to be made by the Scottish Ministers) to alter Scots law in devolved areas. The third will have an impact upon the legislative competence of the Scottish Parliament in that it creates a new

rule of Scots private law which is special to a reserved matter. Such rules are protected from modification by the Scottish Parliament in exercising its across-the-board competence to modify general rule of Scots private law.

5. While these are essentially technical measures which the Parliament should not need to trouble itself with, the political sensitivities within the Parliament means that there has been no choice on this occasion but to allow a short debate. However, we expect Mr Andrew Mackay to make it clear tomorrow that the Scottish Executive's view is that it will not in future be necessary to have a debate in the Scottish Parliament about Westminster Bills with relatively minor impacts upon devolved matters. What we envisage is a streamlined procedure whereby the Scottish Ministers will lodge motions seeking consent which will usually be passed without debate.

6. As for what the Scottish Parliament is asked to consent to, while it can be argued that the Parliament should always have in front of it the draft legislation containing the devolved provisions, in practice it is unrealistic to expect the UK Government always to publish Bills with minor impacts in devolved areas before they are introduced at Westminster. Instead, we envisage the Scottish Parliament being provided with short memoranda describing the devolved provisions along the lines of those which have been supplied for these 3 Bills.

#### Future Arrangements

7. In the light of this experience we will be liaising with Cabinet Office on arrangements for handling such Bills in the future both in the Scottish Parliament and at Westminster.

#### Recommendation

8. I invite the Secretary of State to note the terms of the motion which the Scottish Parliament will debate tomorrow about 3 UK Bills with minor impacts in devolved areas, and of the memorandum which has been supplied to notify the Parliament of those Bills.

**JOHN EWING**  
Executive Secretariat  
Rm 047  
SAH  
☎ 4 0357

22 June 1999

## **MEMORANDUM TO BE PLACED IN SCOTTISH PARLIAMENT DOCUMENT CENTRE**

### **LEGISLATION IN THE UK PARLIAMENT: FINANCIAL SERVICES & MARKETS BILL ELECTRONIC COMMUNICATIONS BILL LIMITED LIABILITY PARTNERSHIPS BILL**

#### **Introduction**

1. As indicated by the First Minister on 9 June, it is expected that a convention will be established whereby the UK Parliament will not normally legislate about devolved matters without the consent of the Scottish Parliament.
2. This memorandum describes the above 3 Bills, which have been or may be introduced before the Westminster summer recess 1999. The Financial Services and Markets Bill was introduced on 17 June. The Electronic Communications Bill and the Limited Liability Partnerships Bill may be introduced later in June.
3. These Bills are substantially concerned with reserved matters but either have some impact on devolved matters or to a limited extent deal with matters which would be within the devolved competence of the Scottish Parliament. A motion to the effect that the Scottish Parliament notes with approval the proposal that the UK Parliament should enact the above Bills has been put down by the First Minister and will be debated on Wednesday 23 June at 4.30pm for 30 minutes.

#### **The Bills**

4. The Financial Services and Markets Bill does not make any provision which would have been within the competence of the Scottish Parliament but it does have an impact on Scots bankruptcy law. The basic purpose of the Bill is to set up a single regulator for Financial Services and Markets, the Financial Services Authority (FSA). The FSA would be given power to petition for the bankruptcy of a sole trader where he appears to be unable to pay a regulated activity debt (ie relating to the provision of financial services), or appears to have no reasonable prospect of being able to pay such a debt. This would enable the FSA to bring a trader's activities to an early end, so as to minimise the loss, which might otherwise be sustained by consumers doing business with him. In Scots law normally only a creditor or a creditor under a trust deed or the debtor himself can petition for sequestration of an individual. The Bill would therefore create a precedent in Scots bankruptcy law, since the FSA would not itself be a creditor, but would, as it were, be acting on behalf of consumers who might have sustained a loss through the activities of an individual trader.
5. A Bill on Electronic Communications is planned for introduction shortly. This does not in itself contain any devolved provisions. However it provides that existing legislation may be modified by order, so as to make provision for electronic signatures and the conclusion of contracts by electronic means. The Bill provides that in Scotland, an order introducing a complete package of measures in respect of reserved matters can be put in place by a Scottish Minister with the consent of a UK Minister. This would not be possible without UK legislation to make the necessary provision.

6. Thirdly, UK Ministers are hopeful of introducing before the end of the Westminster session a Bill on Limited Liability Partnerships but this has to find time against competing priorities. This Bill would create a new form of business association, a "limited liability partnership" which would be a body corporate in which the liability of the partners would be limited to the extent of their stake in the business. It does not directly contain provision on devolved matters. However it contains a power for a Scottish Minister to make regulations for the process of winding up of limited liability partnerships in Scotland. This is because the law on the process of the winding up of business associations is devolved.

7. These Bills represent desirable measures to secure a level playing field for business and adequate consumer protection throughout Great Britain. The impact they have on devolved matters is consequential on these primary purposes which are reserved matters. For 2 of the Bills, implementation will require statutory instruments to be made by Scottish Ministers, in one case with the consent of the appropriate UK Minister. The consent is necessary because the exercise of the power would relate to reserved matters. It is clearly sensible for the UK Parliament to establish a single regime from which Scottish business interests and consumers can also benefit.

8. More detail on the purposes of the Bills is given in the Appendices.

## FINANCIAL SERVICES & MARKETS BILL

### Description of Bill

1. This Bill will set up a single regulatory framework for the UK financial services industry and a single statutory regulator, the Financial Services Authority (FSA). The FSA already exists but it only regulates investment business and banking. The reconstituted FSA will regulate all kinds of financial services including insurance and will have enhanced powers. The Bill was the subject of consultation in July 1998 and a progress report was published in March 1999 by HM Treasury. The proposals were generally well received.

### Impact on devolved matters

2. At present the FSA is able to petition for the winding up of companies (including partnerships) which are authorised to carry out financial services business. However, it does not have an equivalent power to petition for the bankruptcy of a sole trader carrying out a financial services business. These sole traders usually trade as Independent Financial Advisers. Many such sole traders are not incorporated under the Companies Act and are effectively doing business as private individuals. A recent case in Northern Ireland highlighted this gap in the law. Consequently, it is proposed that the FSA should be given a power to petition for bankruptcy of an individual.

3. This would create a precedent in Scotland. Under Scots bankruptcy law only a creditor, a trustee under a trust deed, or an insolvent individual himself, may petition for sequestration. The reason for sequestration is to ensure that all creditors are treated fairly and receive a share of the debts owed to them. The FSA would be given a power to petition for sequestration even although it is not a creditor of the individual in question. The underlying reasoning is that in the case of an investment adviser who appears unlikely to be able to satisfy his obligations to his clients, there may be many creditors who have invested money with the individual in good faith, but they may not have the means or knowledge to petition for that person's sequestration. Therefore the FSA as it were stands proxy for all the individual creditors and safeguards their position by petitioning for sequestration on their behalf. The Scottish Parliament could not itself pass legislation to give the FSA this power to petition for sequestration, as regulation of financial services is a reserved matter.

4. The Bill would also remove the need for the self-regulating legal professions in Scotland to make provision for regulating the provision of financial services by their members. Self-regulation of the legal professions is a devolved matter, but regulation of the provision of financial services is a reserved matter. Consideration is currently taking place on whether the Bill requires any consequential changes to the Solicitors (Scotland) Act 1980 and if so, what the appropriate procedures would be.

## **ELECTRONIC COMMUNICATIONS BILL**

### **Description of Bill**

1. Electronic Commerce is a new way of marketing goods and services, using electronic means. This involves buying and selling goods and services, money transfers, and advertising, and also includes transactions with Government. The Electronic Communications Bill would include powers to create a statutory voluntary approvals regime for bodies offering electronic signature and confidentiality services. These services enable people to check who has signed an electronic message, that it has not been tampered with, and that it has been kept confidential.

2. The Bill would also ensure, as far as possible, that the law is technology neutral in its application. It will clarify the position regarding legal recognition of electronic signatures and begin the process of updating the statute book so that electronic means can be used as well as the traditional pen and paper.

### **Impact on devolved matters**

3. The Bill is largely concerned with reserved matters, such as electronic cryptography and telecommunications. To give it effect generally may require amendments to the law on what constitutes a legally valid document and legally valid evidence of, say, a contract. It is not intended that all such amendments should be made in primary legislation. Rather there will be a provision giving Ministers powers (by statutory instrument) to modify existing legislation for the purpose of authorising, facilitating or encouraging the use of electronic commerce or electronic storage. The Bill will provide that for Scotland, a Scottish Minister may make any order putting in place a complete package of rules including rules in respect of reserved matters. Because the rules will cover reserved matters this will require the consent of the appropriate UK Minister. The Scottish Parliament could have made some changes to devolved matters, for example, to the Requirements of Writing (Scotland) Act 1995, which provides for the execution of documents with signatures, but not for the purposes of authorising or facilitating electronic commerce as such. Nor could the Scottish Parliament legislate on matters relating to communication systems. The proposal that a Scottish Minister should be able to introduce a complete package of such changes covering reserved matters, albeit with consent, will give the Scottish Parliament much more control over the implementation of the Bill in Scotland than it would otherwise have had.

4. To omit Scotland from the Bill would be to disadvantage Scottish businesses and consumers and delay the development of electronic commerce in Scotland. It makes sense for there to be a single GB regime on these matters.

**LIMITED LIABILITY PARTNERSHIPS BILL****Description of Bill**

1. The DTI proposes to create a new form of corporate business association to be known as a "limited liability partnership" (LLP) and provides a regulation-making power to make other provision relating to the winding up of LLP's. The Bill to give effect to this will apply to England, Wales and Scotland. A separate Northern Ireland Code would be needed to create LLPs in Northern Ireland. This would fall within the legislative competence of the Northern Ireland Assembly.
2. The main purpose of the Bill is the creation of a new form of business association. That would be a reserved matter under the terms of Head C, Section C1 of schedule 5 to the Scotland Act 1998. However, Section C2 (Insolvency) provides an exception from the reservation in relation to the process of winding up business associations.
3. An LLP will be a legal entity distinct from its members with the capacity of a legal person, including the capacity to enter into contracts. It is anticipated that business will normally be transacted with the firm as principal, not the members. The proposals would limit the members' exposure to the extent of their stake in the business. Members would remain personally liable for their own acts.
4. As well as providing for the formation of LLPs, the Bill sets out registration requirements. It also amends the relevant taxation legislation. In addition the Bill contains power to make regulations in the area of LLPs – there is a power to apply certain parts of the Companies Act 1985 and a duty to apply certain parts of the Insolvency Act 1986.

**Impact on devolved matters**

5. The Bill contains power to apply the Insolvency Act 1986 to LLPs. This means that a Minister can by statutory instrument apply the relevant provisions of the Insolvency Act to the procedures for winding up a LLP. For LLPs in England and Wales, this will be done by the Secretary of State for Trade and Industry.
6. Because the law on the process of winding up business associations is devolved, it will be for the Scottish Ministers to make regulations on that in respect of Scottish LLP's.

**Rogers DA (David)**

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**From:** Thomson KAL (Ken)  
**Sent:** 27 June 1999 22:06  
**To:** Ewing JA (John)  
**Cc:** Deputy First Minister (Minister for Justice); Minister for Parliament; PS/Lord Advocate; Minister for Finance; PS/Perm Sec; PS/Executive Secretariat; Henderson RM (Richard); Jamieson JL (Iain); Wildgoose JR (James); Brannan MH (Micheline); Walford IN (Ian); Kelly OD (Owen); Rogers DA (David); Rafferty JA (John); Whitton D (David); Fitzpatrick B (Brian)  
**Subject:** Westminster bills about devolved matters: operation of convention

Mr Ewing

Copy as above

**WESTMINSTER BILLS ABOUT DEVOLVED MATTERS: OPERATION OF CONVENTION**

Further to my minute of 23 June, this is to confirm that the First Minister is content for you to develop the proposals in your minute of 21 June.

He commented on one point, namely the proposal at paragraph 19.3 of your minute that the executive should supply a supplementary memorandum, and lodge a further motion, should there be a change to the legislation during its passage which materially affects the extent to which it impacts on devolved matters. While he is content in principle with the offer of a mechanism to inform the Parliament in the event of changes to legislation already introduced and consented to, he thinks there should be further discussion of the detail, and in particular he is concerned that the agreed definition of material change should not be such as to produce a very large number of such memoranda and motions.

**K A L THOMSON**  
PS/First Minister  
26 June 1999