

Mr Walford

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

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

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

From: Ian Walford
CG-Functions

Date: 10 November 1998

Mr Jamieson

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

SCOTLAND BILL: FUTURE WESTMINSTER LEGISLATION

1. Thank you for your minute of today's date. As I said in my minute yesterday, some of the questions about possible future legislation at Westminster are really for Mr Ewing (who is leading for our interests on the Procedure Committee inquiry and on the procedures of the Scottish Parliament) and others to answer. But I would like to respond immediately to some of your points.

Consent Mechanism

2. I agree with you that, in general, the aim should be to avoid legislation at Westminster on devolved matters. But I imagine that Scottish Ministers will want to adopt a pragmatic approach, particularly if they are on good terms with the UK Government of the day. The wording of the convention does, after all, allow for legislation on devolved matters at Westminster provided that the consent of the Scottish Parliament has been secured. There are bound to be circumstances in which it would make practical sense for Westminster to legislate for Scotland, perhaps in relation to the implementation of an EU obligation.

3. As you say, it is important in such circumstances that Scottish Ministers secure the consent of the Scottish Parliament both to the proposal to legislate and to the principle of the Bill in question. Thereafter, as I said in my minute yesterday, it would be for Scottish Ministers and their officials to liaise with their relevant opposite numbers in Whitehall as the Bill progresses through Westminster. In doing so they would be accountable to Holyrood and would doubtless take this into account in deciding when and in what terms to report to MSPs. I am not sure that this quite amounts to the Scottish Parliament "losing control over the detail of the legislation". Ultimately, as you say in paragraph 2.3 of your minute, Holyrood could trump the Westminster legislation if it wished, but this should not be necessary if the spirit as well as the letter of the convention has been observed in London.

4. Mr Burgess has pointed out to me that another issue which will need to be considered is how the convention and consent mechanisms should apply to any proposed private and

private members' legislation at Westminster. Again this will be a matter for the Procedure Committee and the House Authorities to consider

Ministerial and official responsibilities

5. I was not suggesting in my minute of yesterday that Ministerial responsibility for Westminster legislation on devolved matters should rest with Scottish Ministers and their officials. As I said in paragraph 7, for the remainder of the 1998-1999 session after D-Day I would expect the UK Minister who was responsible for the relevant legislation before D-Day (e.g. the Secretary of State for Health) to remain responsible for it after D-Day. In paragraph 8 I said that it will be for the Prime Minister to decide which of his Ministers (i.e. a Minister in the UK Government) should be responsible for legislation on devolved matters in 1999-2000 and beyond.

6. I would not expect the Secretary of State for Scotland to be the lead Minister on very much if any legislation after devolution since we are expecting his Office to be left with relatively few executive functions. In any event I imagine that any legislation on devolved matters at Westminster would be likely (although this is not inevitable) to take the form of a Bill of UK or GB-wide application. In such circumstances the relevant Whitehall Secretary of State would be in the lead although we would expect the Secretary of State for Scotland to play a part in the policy formulation and probably to be involved in some capacity during the passage of the Bill. This principle should apply in the remainder of the 1998-99 session after D-Day and in future sessions.

7. I agree with you that the Procedure Committee will need to think carefully about how relevant UK Ministers, including the Secretary of State for Scotland, should be held accountable by Westminster MPs for their handling of legislation on devolved matters. But provided that they are legislating with the consent of Holyrood I would not have thought that there would ^{be} an insuperable problem - and in any case the issue should arise relatively infrequently.

8. In paragraph 3.3 of your minute you questioned whether it would be appropriate for officials of the Scottish Administration to brief UK Ministers. As I said in my minute yesterday, we are planning generally on the basis that there will be a reasonably free flow of information and frequent consultation between Scottish Ministers and officials and their counterparts in the UK Government on the basis of principles laid out in concordats. I do not see why these arrangements should not extend to the provision of factual briefing and suggested lines to take for UK Ministers dealing with legislation on devolved matters at Westminster where the Scottish Parliament has already consented to the principle of the legislation. As you say yourself in paragraph 3.4, this would in effect amount to no more than consultation and should not blur lines of accountability. As discussed above, I would certainly not see this as a substitute for a UK Minister taking responsibility for the Bill.

IAN WALFORD
10 November 1998

CG-Functions
Room G-H94
VQ
Ext 45532

From: Ian Walford
CG-Functions

Date: 9 November 1998

Mr Ewing

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

SCOTLAND BILL: FUTURE WESTMINSTER LEGISLATION X

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.

LT:SW

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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.

Mr Rogers

Copy to: X Mr Gordon
Mr Ewing
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Mr Sinclair
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Mrs Nelson X

SCOTLAND BILL: FUTURE WESTMINSTER LEGISLATION X

1. It would appear that there is intended to be a number of GB Bills next session which will deal with devolved matters, such as the Water Charges Bill and the Road Traffic (NHS Charges) Bill.

2. As you are aware, from a purely constitutional point of view, we are in principle against such legislation because it undermines the devolution settlement and the proposed constitutional convention.

3. However, there are also practical concerns. You will have seen Margaret Beckett's letter to the Lord Chancellor of 29 October about the procedural consequences of devolution in the Westminster Parliament. Ministers of the Crown will cease to have Ministerial responsibility for devolved matters as from D-day. Which Minister is then to have Ministerial responsibility for devolved matters in GB Bills and does that responsibility extend to answering PQs about these matters. If not, why not, particularly when they are steering through legislation about these matters. Is this to become the responsibility of the Secretary of State for Scotland?

4. What is to happen if questions are raised in the Scottish Parliament about the legislation before the Westminster Parliament.

5. I simply raise these questions because they will have to be answered and they simply demonstrate just how unsatisfactory it is to allow Westminster legislation to continue to deal with devolved matters.

Iain Jamieson

J L JAMIESON
6 November 1998

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