

18

**Rogers DA (David)**

**From:** Thomson KAL (Ken)  
**Sent:** 17 June 1999 08:19  
**To:** Brannan MH (Micheline); First Minister  
**Cc:** PS/Executive Secretariat; PS/HD; Minister for Children and Education; Minister for Enterprise and Lifelong Learning; Minister for Finance; Minister for Parliament; Minister for Health and Community Care; Minister for Rural Affairs; Minister for Social Inclusion Local Govt. & Housing; Minister for Transport and Environment; PS/AEFD; PS/DD; PS/DoH; PS/EID; PS/Perm Sec; Deputy First Minister (Minister for Justice); Scottish Courts; Kernohan G (Gerry); Ewing JA (John); Walford IN (Ian); Campbell I (Ian)(Exec Sec); Rogers DA (David); Jamieson JL (Iain); Stage ID (Ian); Rafferty JA (John); Whitton D (David); Fitzpatrick B (Brian); InD Enterprise&LL; InD Justice; Gordon RSB (Robert); Campbell N (Niall)  
**Subject:** RE: WESTMINSTER LEGISLATION ON DEVOLVED MATTERS

Mrs Brannan

Copy as above

**WESTMINSTER LEGISLATION ON DEVOLVED MATTERS**

My minute of yesterday to you was not copied to all recipients of yours of 15 June, so I now enclose a copy. Since I minuted, the SNP has indicated that it wishes to debate these Bills (probably for 30 minutes taken out of the time previously allotted to the Food Standards Agency Bill) and would welcome a proposal from the Executive on how the Scottish Parliament may be kept informed of such legislation. Mr Ewing is considering that point and will provide further advice.

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



LEGISLATION AT  
WESTMINSTER ABO...

## **Rogers DA (David)**

---

**From:** Thomson KAL (Ken)  
**Sent:** 16 June 1999 16:16  
**To:** Gordon RSB (Robert); Rogers DA (David); Brannan MH (Micheline)  
**Cc:** Minister for Parliament; PS/HD; Hislop E (Elizabeth); Campbell I (Ian)(Exec Sec)  
**Subject:** LEGISLATION AT WESTMINSTER ABOUT MATTERS WITHIN THE COMPETENCE OF THE SCOTTISH PARLIAMENT

Robert Gordon  
Micheline Brannan  
David Rogers

Copy as above

### **LEGISLATION AT WESTMINSTER ABOUT MATTERS WITHIN THE COMPETENCE OF THE SCOTTISH PARLIAMENT**

I've spoken to FM in the light of conversations with Robert and David and with Micheline's memorandum in hand.

He repeats his concern at the potential for mischief or outrage arising from the meeting later today with the SNP. He remains of the view that the meeting is the best way forward, but adjoins us all to appreciate the sensitivity of reserved/devolved distinctions where the SNP is concerned.

He is generally content with the memorandum, subject to a slight expansion of the first paragraph, to read:

As the First Minister indicated in his statement to the Parliament on 9 June, both the Scottish Executive and the UK Government expect that, by convention, the Westminster Parliament will not normally legislate about devolved matters without the consent of the Scottish Parliament. Discussion of Bills which will or may come before the Westminster Parliament before the Scottish Parliament assumes its full powers is in that context.

In respect of the Financial Services and Markets Bill, however, he still finds it hard to accept that it is necessary for the UK Government to introduce a new reserved 'island' in order to achieve its policy objectives. He wants to be able to take stock of the SNP's reaction and other considerations, and he does not rule out having to seek the Parliament's consent. He regards any diminution of the Parliament's ability to legislate in respect of Scots private law as a serious matter.

As regards the proposal to amend the Access to Justice Bill to allow Scottish judges to take part more easily in international courts, he takes the view that he has informed the Parliament of the fact that the Access to Justice Bill is before the Westminster Parliament and that it deals with some devolved matters. He is inclined to rest on that, to see if the prospective amendment is raised in the Parliament and to respond, if necessary, by pointing out that it will be open to the Parliament to amend any provision so introduced.

If you need to contact me before the meeting, try 0385 95 10 10.

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

Mr Jamieson, ESLA

25

Comm 64  
0555

Copy to: PS/Executive Secretariat  
Mr Rogers  
Mr I Campbell  
Mr Burgess  
Mr J A Gibbons  
Solicitor  
Mr McCluskie  
Mr J Shaw

Mr P Layden  
Ms S Cooper  
Mr S Foubister  
Mr W Ferrie  
Ms E MacDonald  
Ms A Coull  
Ms G Russell  
Mr N Taylor

??

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

1. Thank you for your minute of today which very lucidly sets out the issues concerning the granting of consent to Westminster legislation.
2. Following the meeting with the SNP last night and subsequent discussion with the First Minister I have prepared the attached submission which attempts to set out some procedures which would be adopted by the Executive in respect of such legislation in the future. My aim is to come up with something that can operate practically and which might encourage the Parliament to consider some of this legislation to be of a technical nature not requiring debate. Others, like the FSA Bill, are likely to be of such substance that the Parliament will always want to debate the provisions. Your comments on the proposals would be welcome.
3. We also discussed the possibility of a better long term solution to this type of problem namely the enactment in an ASP of a power analogous to that contained in section 104 of the Scotland Act. Such a power would enable Scottish Ministers to make subordinate legislation subject to approval in the Scottish Parliament which would contain provisions which were deemed to be necessary as a consequence of the enactment of legislation at Westminster. Such a power is likely to be seen as giving more control to the Scottish Parliament over matters which at present would have to be dealt with either in Westminster legislation or in a ragbag of various Miscellaneous Provisions Bills enacted every year to catch up on changes at Westminster. Again I would welcome comments on this proposal.
4. I need to put the minute up to the First Minister on Monday at the latest. **Can I, therefore, ask for comments by 12 noon on Monday 21 June.**

---

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

17 June 1999

From: John Ewing  
Executive Secretariat  
June 1999

PS/First Minister

- Copy to: PS/Minister for Parliament
- PS/Lord Advocate
- PS/Mr McConnell
- PS/Perm Sec
- PS/Exec Sec
- Solicitor
- Mr Jamieson
- Mr Walford
- Mr Kelly

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

1. This minute seeks the First Minister's agreement to the mechanisms we should put in place to obtain the Scottish Parliament's consent for legislation at Westminster which affects devolved matters and suggests how we might meet the SNP concerns on keeping the Parliament informed of such legislation. It also invites the First Minister to consider whether we should bring forward an Act of the Scottish Parliament to allow any changes to devolved legislation made necessary as a consequence of the enactment of the legislation at Westminster to proceed by subordinate legislation laid before the Scottish Parliament.

Timing

2. **Urgent.** There will need to be a statement made on these matters during the debate on the Food Standards Agency Bill next week.

Background

3. The First Minister is aware of the discussions which have been held with the SNP on ~~the handling of 3 Bills which may come forward at Westminster which, while primarily~~ concerned with reserved matters, makes changes in Scots private law in devolved areas. The SNP are concerned at the frequency with which such Bills are emerging as well as the fact that they intrude on the general presumption that the Scottish Parliament should alone be



responsible for making changes to devolved law. Their worry is that this will become too frequent an occurrence and that the convention which Ministers have placed such store on would not in practice operate effectively to protect the position of the Scottish Parliament.

4. During next weeks debate the SNP will want to secure assurances from the Executive on the operation of the convention and details of how the Scottish Parliament might be kept informed of Westminster legislation which impacts on devolved matters. This paper discusses how that might be achieved.

#### Westminster Convention

5. The UK Government has made it clear that it expects a convention to be established ~~and~~ that the UK Parliament would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament. However, neither the UK Government nor the UK Parliament have indicated how they expect the Convention to operate in practice. It is not envisaged that a Westminster Bill would require the consent of the Scottish Parliament to be signified in the same way as <sup>they</sup> require the consent of ~~The~~ Queen to interfering with Her property, ie before a particular stage of the Bill is reached otherwise the relevant provisions in the Bill fall. Ultimately, whether or not the Scottish Parliament consented, the UK Parliament could legislate on any matter.

6. Given that the convention is based on the presumption that the active consent of the Parliament will be sought rather than that the Parliament will simply be informed of the passage of legislation at Westminster, we think it is inevitable that some form of motion will have to be tabled before the Parliament. Whether that motion has to be debated will depend on the circumstances in any individual case. Broadly speaking the kind of legislation we are likely to be dealing with fall into 3 categories:

6.1 substantive legislation in a devolved area ~~which the Scottish Parliament could enact on its own but where for policy reasons it is felt appropriate to proceed on a GB~~  
basis, eg the Food Standards Agency Bill;

*No - change in the order of bills*

6.2 legislation in a reserved area which requires amendment to Scots private law in order for the legislation to operate effectively, eg the Electronic Commerce Bill; and

X

6.3 legislation in a reserved area which makes incidental amendments to Scots private law, eg the Financial Services and Markets Bill.

*No new procedure*

*It should*

*But SPL point*

7. It is arguable that the convention should not apply at all to the third category of Bills since these will be dealing with matters which the Scottish Parliament could not legislate upon in its own right. <sup>NB</sup> Nevertheless, while such Bills might not normally be drawn to the attention of the Parliament they could, during their passage, attract amendments which would bring them within the scope of devolved matters. Any procedure we develop will need to be robust enough to be able to pick up these should that happen.

X

8. Of the remaining 2 categories, both would need the consent of the Parliament but we suggest that for the most part only in the first case where the Parliament is effectively being asked to forego the opportunity to legislate in an area, should there be the need for a substantive debate. In the second category it is to be hoped that the Parliament could be persuaded that any motion could be regarded as a technical matter and generally approved without debate. However, the Parliament's willingness to embrace that approach will undoubtedly depend how frequently the situation arises.

9. Colleagues in HD advise that they would normally expect to deal with between 6-8 pieces of legislation a year promoted by other Departments in the UK Government but which have an impact on Scots civil law and require appropriate provisions to be included. Although these changes might be fairly technical the frequency with which such Bills arise provides an opportunity for complaint.

✓

Procedure in the Scottish Parliament

10. MSPs will want the reassurance that they are kept informed of any proposals to legislate on devolved matters and that they are kept abreast of changes which might emerge during the passage of a Bill at Westminster. The SNP will be keen to ensure that where

substantive changes do arise there could be the opportunity for debate in the Parliament, effectively allowing it to reconsider the matter of its consent. However, in practical terms we need to avoid a situation where the Parliament is frequently debating such matters since not only is it potentially embarrassing but it also detracts from the time available to deal with other issues. We would, therefore, propose the following approach.

11. Where a policy decision is taken to legislate about a devolved matter at Westminster rather than introduce legislation in the Scottish Parliament, then the consent of the Scottish Parliament to that proposal should be obtained at the earliest opportunity. This should be on the basis of firm policy recommendations such as those which might be included in a White Paper. It will be necessary to give sufficient information to the Parliament to enable it to take an informed decision on the matter. Such information could be provided by means of a policy memorandum and the Parliament's consent obtained by a motion which could be debated.

12. Thereafter it would be necessary to keep the Parliament informed on the development of that legislation. This could be done by submitting a supplementary memorandum covering a copy of the Bill as it is introduced into the Westminster Parliament. Depending on the substance of the matter and the extent to which the Bill strays into devolved areas, it may be necessary to allow the Parliament to debate the precise terms of the Bill if this differs in any significant way from the initial proposals. In the most substantive cases we may need to ensure that the Parliament has an opportunity to debate the Bill as introduced at Westminster.

13. In the case of the second category of legislation referred to above, the proposal would be that the Parliament would be again informed by means of a memorandum of the fact that a Bill was to be introduced at Westminster which makes provision about devolved matters. The Parliament's consent to this legislation would still be sought by means of a motion but the aim would be to secure through discussion in the Parliamentary Bureau that the motion did not require any debate. It would probably still be necessary to give a commitment that the ~~Parliament would be advised by means of a further supplementary memorandum submitted~~ by the Executive should the legislation be amended so as to increase the extent of the changes in devolved matters.

14. This procedure is obviously dependent on the Executive co-operating with the Parliament. It is possible that the SNP would prefer to see a formal arrangement between the Westminster Parliament and the Scottish Parliament so as to avoid relying upon the Executive to carry out this task. However, we have serious reservations about whether such an arrangement could work. In reality, the Parliamentary authorities at Westminster are not well placed to make the judgement that the provisions of a Bill relate to devolved matters. That information is more likely to be forthcoming through the Executive's contacts with Whitehall Departments. In particular the contacts between the Office of the Solicitor to the Scottish Executive and the Offices of the Solicitor to the Secretary of State and the respective draftsmen could be crucial in obtaining notice of legislation in these areas. In reality there is little practical alternative to the Executive taking on the responsibility and to the Parliament trusting it to carry this out properly.

15. The First Minister is invited to agree that the Scottish Executive should give a commitment to:

15.1 produce a memorandum for submission to the Scottish Parliament on any case where it is proposed that the Westminster Parliament be invited to legislate on a matter which falls within the devolved responsibilities;

15.2 a ~~commitment~~ to augment that memorandum with further supplementary memorandums should there be changes to the legislation during its passage which materially affects the extent to which it impacts on devolved matters;

15.3 to consider sympathetically any requests for a debate on such a memorandum where the legislation involves substantive inroads into devolved matters, and in each case to table a motion before the Parliament seeking its consent to the legislation.

Longer Term

16. The First Minister was particularly concerned about the potential for a number of such proposals emerging each year and for the mischief that could be caused as a result. We have been giving some further consideration as to whether we can identify a better way forward

*Can we deliver? what does Whitehall*

*Thinking*

*for 15.2 too?*

*Let's problem*

*X*

which would minimise the need to enact provisions in Westminster legislation in devolved areas.

17. We think one possibility might be to take a power in an Act of the Scottish Parliament to allow such changes to be made by subordinate legislation.

18. The First Minister will be aware that section 104 of the Scotland Act 1998 contains a provision which would allow the UK Government to bring forward subordinate legislation which may make such provision as is considered necessary or expedient as a consequence of any provision made by or under an Act of the Scottish Parliament. This provision is intended to allow Westminster to agree any changes to the law as it applies in England and Wales and in reserved areas which arises out of an Act passed by the Scottish Parliament in a devolved area. The mirror image of such power might be very useful in the Scottish Parliament.

19. It would allow Scottish Ministers to bring forward subordinate legislation subject to the approval of the Parliament which would make the necessary changes in devolved law arising as a consequence of legislation enacted at Westminster. For example, in the context of the Electronic Commerce Bill it would be unnecessary to include provision allowing for the adoption of electronic signatures as probate in Scots law. Instead the DTI Bill could be concerned totally with reserved matters and an appropriate Order would be brought forward once that Bill was enacted making the necessary consequential amendments to Scots private law to enable it to operate in Scotland.

20. Such an arrangement is not, in practice, wildly different from what is proposed in the Electronic Commerce Bill which itself is recommending the granting of a subordinate-legislation making power to Scottish Ministers to make the changes. However, it would be seen as more within the control of the Scottish Parliament and is likely, therefore, to prove more acceptable to non-Executive parties.

21. We will need to undertake further analysis of this possibility, but our first consideration suggests that it would be within the legislative competence of the Scottish Parliament to enact such a provision. Nevertheless, it would be necessary to consult with the

Why? It not. Or how and what veto?

UK Government since it would clearly be seen by some as an extension of the existing constitutional settlement, which it is not.

22. Is the First Minister content that we explore the possibility of introducing an Act of the Scottish Parliament to allow cross subordinate legislation to be made making such a provision as they consider necessary or expedient in the consequence of any provision made by or under an Act of the Westminster Parliament.

JOHN EWING  
Executive Secretariat  
Rm 047  
SAH  
☎ 4 0357

Recm

17 June 1999