

572/13
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From: J R Wildgoose
AEFD Division A
28 May 1998

By E.mail
Mr Gordon

Copy to: PS/Perm Sec
PS/AEFD
PS/DoH
Mr Cameron (with copy of Mr Jamieson's minute)
Mr Ferguson
Mrs Mellon
Mr Irvine
Mr Rennie
Mr Ewing
Mr Grice
Mr Walford
Solicitor
Divisional Solicitors
Mr Jamieson
Mr Sinclair
Mr Ferry
Mrs Nelson

SCOTLAND BILL: SCOTTISH LEGISLATION IN 1998/99

1. I have seen Mr Jamieson's minute of 21 May and write to offer my views specifically in relation to the Food Standards Agency Bill.
2. By way of background, the FSA Bill, as Mr Jamieson correctly reports, is intended to establish the FSA. However, it is also intended to provide a new approach in food safety and standards issues - designed to re-establish consumer confidence in the safety of food. Part of this involves setting a framework of decision making which is "at arms length" from Ministers - an infinitely elastic term which nonetheless has importance in the consumer confidence context. To achieve these aims, the FSA is proposed as a Non Ministerial Department headed by a Commission, although reporting through Health Ministers (plural ie including successors under Devolution) for Parliamentary business. A set of key guiding principles will be inscribed in the legislation as to the FSA's method of operation and decision making, and it will also have the power to make its advice to Ministers public.
3. The FSA is proposed as a UK body - for consistency of implementation of food safety policy and legislation (very largely EU driven) and to avoid unnecessary duplication in the provision of (extensive) scientific advice over a range of issues - some 15 special scientific advisory committees currently supply advice on food safety issues - amongst others. However, we have been careful to ensure that in the arrangements for Scotland, the interests of the Scottish Parliament and Executive are fully taken into account. For example, the FSA ie the full UK body, will be accountable to the Scottish Parliament, there will be joint appointment arrangements (Health Ministers) for all the key positions and also joint decision

making arrangements on all other issues where Ministerial decisions are required. There will also be specific arrangements to ensure Scottish interests in food safety are fully taken into account in the decision-making. These are fully laid out in the White Paper. (The consultation on the White Paper ended on 15 March - and there was very general (almost universal) acceptance (indeed welcoming) of the proposals at least as far as the structure of the new body is concerned).

4. Decisions on all these issues, particularly in relation to construction of the White Paper had to be made at a time when policy on the Scotland Bill, and in particular the key clauses on cross border bodies (83-85), was still being formulated. Indeed, I understand from numerous conversations (and minuting) with Mr Crawley at the time, some of the issues raised in the FSA debate influenced thinking on Clauses 83-85 ie possibility for joint appointments (as distinct from merely Scottish consultation) and also the possibility of having these Clauses apply to cross border bodies set up after the Scotland Bill became law. Nonetheless, at the time I agreed with Constitution Group that the best policy was for the FSA Bill to "wash its own face" with all the necessary accountability arrangements in respect of the Scottish Parliament and Executive to be inscribed in the Bill. This is the policy we have pursued.

5. Currently the position is that the White Paper Provisions have been turned into instructions to Parliamentary Counsel with the first few Clauses now beginning to filter back from Counsel. I expect the bulk of these to appear in the next 2-3 weeks. Copies are going direct to Solicitor's Office - Mrs Macdonald. The aim is to publish the Bill for consultation end June/early July with pre-legislative scrutiny by an ad hoc committee drawn from members of the Health and Agriculture Select Committees. The Bill will then be introduced early in the new session with MAFF and DH Ministers aiming for second reading before Christmas 1998.

6. Against this background, I would offer the following comments on the points at paragraph 2 of Mr Jamieson's minute:-

Point 2(a): I cannot see that there is any pre-emption of the Scottish Parliament's powers. The aim in proceeding with the FSA is to ensure that all the necessary powers and accountability arrangements are built into the Bill. But we have always worked on the assumption that the Scottish Parliament/Executive could walk away from whatever arrangements are finally set up and legislate to set up separate Scottish arrangements. Indeed, this has been a powerful argument to use with MAFF and DH to establish the kind of flexibility we require in light of Devolution. (I might add that I would not advise Ministers of the new Scottish Executive to set up separate arrangements for food safety - given the consistency and duplication arguments mentioned above - but this is a separate issue).

Point 2(b): I am not clear exactly how the constitutional convention applies, particularly in the transition year 1998/99. Inevitably there will be a delay before the Scottish legislative programme can proceed - whereas there is no delay in the Westminster programme. But given the circumstances, there must be some transitional arrangements which do not contravene the spirit of the constitutional convention. What we cannot have, for the FSA, is a limbo period when the rest of the

UK marches ahead and we are left behind in an uncertain position. Given the political significance of food safety, Ministers of the Scottish Executive - of whatever political hue - could not defend this against criticism, and would not thank us for such uncertainty.

Point 2(c): I agree absolutely with Mr Jamieson's comments - and, as the above indicates, reflect what we are striving to achieve. As also indicated above, the draft Clauses are beginning to issue from Parliamentary Counsel and are being copied to Solicitor's office - relevant Clauses will of course be copied to Mr Jamieson. No doubt inconsistencies with concepts currently used in the Scotland Bill can be picked up now.

7. I hope these comments in respect of the FSA Bill, and how I see the position, are helpful.

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Room 352
Pentland House
Ext 6159

5/2/13

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	PS/EID	Mr Grice
	PS/AEFD	Mr Walford
	PS/HD	Solicitor
	PSDoH	Divisional Solicitors
	Mr Ferguson	Mr Sinclair
	Mrs Mellon	Mr Ferrie
	Mr Irvine	Mrs Nelson
	Mr Rennie	

① copy to: MS Herbert ✓
Mr Rogers (or)

② RTN

32

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1. I understand that it is proposed that there should be certain Bills next session in the Westminster Parliament which will deal with devolved matters in Scotland. The examples of which I am aware are the Food Standards Agency Bill, a Pollution Bill and a Water Bill but there may be others.

2. I am concerned about the implications of these Bills for devolution and the Scotland Bill for the following main reasons

(a) these Bills will pre-empt what the Scottish Parliament will be able to do about those devolved matters when it assumes its full powers in June or July next year and will be making provision about devolved matters at a time when the Scottish Parliament has such competence;

(b) it is inconsistent with the constitutional convention which it is thought would otherwise have developed that, although the Westminster Parliament would, of course, retain ultimate sovereignty, it would not legislate with regard to devolved matters as long as the Scotland Act remains unrepealed because it would have devolved legislative responsibility to deal with these matters to the Scottish Parliament. Early breaches of this convention might prevent it developing at all; and

(c) while it will be essential for these Bills to take full and proper account of devolution, Parliamentary Counsel are concerned that they could be inconsistent with certain of the concepts currently used in the Scotland Bill which may therefore require to be amended as a result eg the concept of devolved competence.

3. I really know nothing about the content of these Bills but I understand in very general terms

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3. I really know nothing about the content of these Bills but I understand in very general terms

(a) that the Food Standards Agency Bill is intended to establish the Food Standards Agency which, if it had been established this session, would have been dealt with as a cross-border public authority. Indeed the kind of provision which will be required to be made in this Bill to achieve the separate exercise of functions in Scotland will be very similar to the kind of provision which it is envisaged will have to be made in the case of the Forestry Commission by an order under clause 84 of the Scotland Bill;

(b) that the Pollution Bill is intended to give effect to an EC Directive which is due to be implemented by end October 1999. It might therefore have been the first EC Directive implemented by the Scottish Parliament. I am not certain whether this Directive gives rise to questions regarding the split of UK/GB quotas on pollution output; and

(c) that the Water Bill will contain purely Scottish provisions which are unrelated to any English provisions about the establishment of a Commissioner.

4. It seems to me that, in these circumstances, there should be some clarification as to what are the implications of these Bills for devolution in general and the Scotland Bill in particular, having regard to the considerations mentioned in paragraph 2 above. We also need details of what provision will be made in each of these Bills about devolution ie, amongst other things, the functions they will confer on the Scottish Ministers and how their terms will inter-relate with the provisions of the Scotland Bill.

Iain Jamieson

J L JAMIESON
21 May 1998

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