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From: K A L Thomson  
PS/Secretary of State  
8 July 1998

Mr R Gordon

Copy to: PS/Mr McLeish  
PS/Mr Wilson  
PS/Lord Sewel  
PS/Mr MacDonald  
PS/Mr Galbraith  
PS/Permanent Secretary  
PS/Departments  
Solicitor  
Mr E Ferguson  
Mr Grice  
Mr Ewing  
Mr Walford  
Mr I Jamieson  
Parliamentary Clerk  
Mr Elder  
Ms Alexander  
Mr Whitton

**SCOTLAND BILL: SCOTTISH LEGISLATION AT WESTMINSTER**

The Secretary of State has seen your minute of 11 June and PS/Mr MacDonald's minute of 16 June.

He discussed the approach proposed for the Foods Standards Agency with you. For the record, he was content to adopt the procedure described in paragraph 19 of your minute.

He was also content to agree that:

there should not be any provision in the Scotland Bill requiring Westminster to consult the Scottish Parliament on the terms of legislation but that such consultation should be achieved administratively (paragraphs 7 and 22.1 of your minute);

all future Westminster legislation touching on devolved matters should include a provision deeming it to be a pre-commencement enactment for the purposes of the Scotland Act (paragraphs 16 and 22.3 of your minute); and

to write to the Lord Chancellor in the terms circulated previously (paragraph 23 of your minute).

You also asked (paragraph 12) for a steer on what, if any, of the legislative proposals set out in the Annex to your minute Ministers would be content to defer in order to avoid pre-empting the Scottish Parliament. The Secretary of State sees the logic in the argument for having no, or only an irreducible minimum, of legislation in devolved areas in the 1998-99 session. He believes, however, that the Government must continue to take decisions on the promotion of legislation, as in other areas, on the merits of the case in question, and he does not relish the prospect of making the argument that devolution should mean that highly desirable legislation should be deferred. In particular, he thinks that Ministers will think it highly desirable, for political as well as policy reasons, to legislate on the NHS, water charges, and the modernisation of local government. He agrees with Mr MacDonald's comments on the latter. The Secretary of State would therefore wish to keep all his legislative options open, and to consider the case for deferring legislation on the merits of individual legislative proposals as those decisions fall to be considered.

**K A L THOMSON**  
PS/Secretary of State  
8 July 1998



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Richmond House  
79 Whitehall London SW1A 2NS Telephone 0171 210 3000

From the Secretary of State for Health

The Right Hon Donald Dewar Esq MP  
Secretary of State  
The Scottish Office  
Dover House  
Whitehall  
London  
SW1A 2AU

ps/SofS  
ps/Mins  
ps/PemSec  
ps/Depts  
SofS

Mr Gordon - by fax  
Mr Walford  
Mr Jamieson  
Party Clerk  
Special Advisers

6 July 1998

*[Handwritten signatures]*  
Mr E Ferguson  
Mr Grace  
Mr Ewing

**FUTURE LEGISLATION AT WESTMINSTER ON DEVOLVED MATTERS IN SCOTLAND**

You wrote to Derry Irving on 19 June, 1998 and copied to DSWR colleagues, seeking agreement to proposals for handling Westminster legislation on devolved matters.

On your proposal for a constitutional convention, I agree that a flexible framework is needed in dealing with the very different circumstances that may be associated with each Westminster legislative proposal that may affect devolved matters. A non-statutory consultation mechanism would provide this. I am therefore content to accept that concordats and administrative arrangements offer the best way forward. However, it will be necessary to assure consistency of approach, since concordats are to be developed bilaterally between the Scottish Administration and each between UK Government department. A common understanding of the principles that should guide development of the consultation arrangements, agreed by officials, may do the trick.

The general approach you have set out to ensure consistency between Westminster legislation and the Scotland Act seems acceptable so long as it is applied on a case-by-case basis according to the purpose of each particular Westminster legislation. Essentially therefore, if future Westminster legislation provides Ministerial functions which would impact on devolved matters, the legislation would be drafted to include a provision deeming it a pre-commencement enactment for purposes of the Scotland Bill. This should allow automatic transfer to Scottish Ministers, under clause 49, so far as the functions are exercisable within devolved competence.



My Department is leading on two of the Bills which will be immediately affected by this provision, i.e. the NHS (Amendment Bill) and the Foods Standards Agency Bill (with MAFF). My officials are in touch with yours on these Bills.

Their experience so far suggests that your proposals provide a practical way forward, including the restructuring of the FSA into a cross-border public authority, in so far as it has functions in Scotland which do not relate to reserved matters.

Copies of this letter are being sent to the Prime Minister, members of DSWR and to Sir Richard Wilson.

**FRANK DOBSON**



THE SCOTTISH OFFICE  
DOVER HOUSE  
WHITEHALL  
LONDON SW1A 2AU

**RESTRICTED - POLICY**

The Rt Hon Lord Irvine of Lairg  
Lord Chancellor  
House of Lords  
LONDON  
SW1A 0PW

cc Legal Secretary  
Crown Agent  
Cand McDonald  
Eric Ferguson @ Dt

19 June 1998

*John Perry*

**FUTURE LEGISLATION AT WESTMINSTER ON DEVOLVED MATTERS IN SCOTLAND**

This letter is about the handling of Westminster legislation on devolved matters in the 1998/99 parliamentary session and beyond. I set out our thinking below and would be grateful for colleagues' agreement to what I propose.

**The constitutional convention**

Clause 27(7) of the Scotland Bill makes it clear that the devolution of legislative power to the Scottish Parliament does not affect Westminster's ability to legislate for Scotland, even in relation to devolved matters. Indeed the White Paper (paragraph 4.4) envisaged that there could be instances where it would be more convenient for legislation on devolved matters to be passed by the UK Parliament. As happened in Northern Ireland, earlier in the century, we expect a convention to be established that Westminster will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament. A similar mechanism may be needed where Ministers of the Crown exercise power by subordinate legislation to give effect to community law in relation to a devolved matter in Scotland.

It might be argued that this convention ought to be given effect in the Scotland Bill by providing for some form of statutory consultation mechanism between the Parliaments. However in practice it would be very difficult to lay down in advance any precise rule as to when and how consultation should take place because circumstances will vary so widely.

Thus I propose that it should be left to the UK Government and the Scottish Administration to keep in close touch through concordats and other administrative arrangements about legislative proposals, and for the Scottish Administration to decide how to consult the Scottish Parliament on plans for Westminster to legislate about devolved matters.

### **Consistency between Westminster Legislation and the Scotland Act**

The question of how the constitutional convention should be applied in practice will arise immediately after the Scottish Parliament comes into operation on 1 July 1999 as we have proposed and the other parties seem likely to agree. Subject to decisions about next session's legislative programme it is possible that on 1 July a number of Westminster Bills which relate in part to devolved matters in Scotland will be proceeding through Parliament. We need to ensure consistency between Westminster legislation on devolved matters and the provisions of the Scotland Bill, both in 1998/99 and in future sessions. Thus, for example, if it is proposed in future to confer functions upon Scottish Ministers under Westminster legislation, it would be important to ensure that those functions are conferred so as to be exercisable within devolved competence within the meaning of clause 50 of the Scotland Bill.

This is a matter which I understand is under active consideration by Parliamentary Counsel. Their present advice is that the best way of achieving consistency would be for Westminster legislation to be drafted in terms of conferring functions upon Ministers of the Crown and then for those functions, so far as they are exercisable within devolved competence, to be transferred to Scottish Ministers by virtue of the Scotland Bill. As clause 49 of that Bill is at present drafted in terms of those statutory functions being transferred to Scottish Ministers if they are conferred upon Ministers of the Crown in a pre-commencement enactment (ie an enactment passed before or in the same session as the Bill), Parliamentary Counsel have advised that this will mean that any Westminster legislation on devolved matters, in 1989-99 and beyond, will require to include provision for it to be treated as a pre-commencement enactment for the purposes of the Scotland Bill. Ministerial functions would then be transferred automatically to Scottish Ministers through clause 49 so far as exercisable within devolved competence.

If future Westminster legislation established a cross-border public authority, such as the proposed Food Standards Agency, which is discussed in more detail in the Annex to this letter, then a provision in the Westminster legislation providing that it should be treated as a pre-commencement enactment for the purposes of the Scotland Bill would mean that such an authority may be designated as such and may then be reconstructed through the provisions in clauses 84 and 85 of the Scotland Bill in the same way as an already existing cross-border public authority could.

I would be grateful to know if colleagues are content with this approach.

I am copying this letter to the Prime Minister, members of DSWR and to Sir Richard Wilson.

*yours sincerely,  
Donald.*

**DONALD DEWAR**



**RESTRICTED - POLICY**  
The Rt Hon Lord Irvine of Lairg  
Lord Chancellor  
House of Lords  
LONDON  
SW1A 0PW

Copy to: AS/Mr McLash  
AS/Mr Wilson  
AS/Lord Sewal  
AS/Mr Mac Donald  
AS/Mr Galbraith  
AS/Perm Sec  
AS/Departments  
Solicitor  
Mr E. Ferguson  
Mr Geice  
Mr Ewing  
Mr Walford  
Mr Jamieson  
Parly Clerk  
Mr Elder  
Ms Alexander  
Mr Whitten  
Mr Gordon

THE SCOTTISH OFFICE  
DOVER HOUSE  
WHITEHALL  
LONDON SW1A 2AU

19 June 1998

*Alan Gerry*

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Donald*

**DONALD DEWAR**