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From: John Ewing
Constitution Group - Policy
12 June 1998

Mr Walford

Copy to: Mr Gordon
Mr Jamieson
Mr Hampson, Env
Mr Baird, Env
Mr Calder, Env/WSU
Mrs Fraser, Env/APU
Mr Cameron, Env/TCU
Mr Ferguson, Liaison Division
Ms McDougall

*miss Salmon
Please open file - 0555/5 I
series covered:
Legislation: Scottish legislation
at Westminster
and put these papers on it.
Ent 13/5*

SCOTLAND BILL: SCOTTISH LEGISLATION AT WESTMINSTER IN 1998/99 AND BEYOND

1. I refer to your minute of 5 June which we discussed and to Mr Baird's minute of 10 June commenting on the mechanisms which might be used to allow the Scottish Parliament to be consulted on GB/UK Bills. I have also seen Mr Jamieson's comments on your draft.
2. As you know I do not think it is realistic to develop an elaborate consultation process that would involve inserting different stages into the consideration of GB legislation enacted at Westminster which will apply in Scotland. What we need to aim for is adequate consultation between the Scottish Executive and the UK Government prior to the bringing forward of a GB Bill and appropriate mechanisms thereafter to keep the Scottish Parliament informed and obtain its consent to the approach being taken as circumstances may require. I therefore agree with Mr Jamieson that it would be difficult to lay down any rules in advance as to how the arrangements should be made to keep the Scottish Parliament informed of what is proposed. Like him I do not believe we should make any changes in the Scotland Bill on this matter.
3. Scottish Ministers may want to take advantage of the establishment of committees in the Scottish Parliament to inform them or the Parliament itself of the plans for legislation to be enacted at Westminster. Provision could be made for a short debate on the Scottish Administration's proposal but that would not have direct impact on the legislation itself. Rather it would be an opportunity for the Parliament to express its views on the approach that the Scottish Administration had negotiated with the UK Government.

4. In some cases where it is appropriate to give the Parliament more involvement then provision could be included in the GB Bill requiring the commencement order applying the provisions in Scotland and any other subordinate legislation to be subject to approval by the Scottish Parliament. These precise arrangements could be looked at on a case by case basis.

JOHN EWING
Constitution Group
Room 1-F76
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Ext 0357

12 June 1998

10/6

(2)

Mr Walford

Copy to: Mr Hampson, Env
Mr Calder, Env/WSU
Mrs Fraser, Env/EPU
Mr Cameron, Env/DCU
Mr R Gordon
Mr Jamieson
Mr Ewing
Mr Ferguson
Ms McDougall

SCOTLAND BILL: SCOTTISH LEGISLATION AT WESTMINSTER IN 1998/99 AND BEYOND

1. Thank you for your minute of 5 June to Stephen Hampson. I am generally content with the way in which you propose to proceed, however it would be helpful if you could elaborate on how you propose the Scottish Parliament should be consulted on GB/UK Bills that impinge on devolved matters. I think at the very minimum there should be a two-stage process: seeking the Parliament's approval on the Bill (effectively a Second Reading) and on the eventual look of the Bill (a new stage before Royal Assent). While it would remain open to the Scottish Parliament to repeal/amend provisions in respect of devolved matters about which it was unhappy, the process I propose should ensure maximum co-operation between Westminster and Holyrood to minimise the risk of such an eventuality. That said, I am unsure how easy it would be to accommodate such an approach, particularly for next session's Bills.

2. Moreover, we should explain to Ministers that problems have arisen because the start date for the Scottish Parliament has been brought forward; and that the bids we made for next session were put forward at a time when it was reasonable to expect their legislative passage to have been completed before the Scottish Parliament assumed its powers.

3. Turning to the two Bills for which Environment Group have the lead interest, I offer the following comments.

Water Charges Bill

4. We are happy that the Scottish interest in the DETR Water Charges Bill should be included among the "irreducible minimum" of measures at paragraph 7 because of Ministers' public commitment to it, but we think it should be made clear that the Bill is a DETR measure, which will include small additional provisions to reform water regulation in Scotland and to wind up the Consumers Council. The rest of the Bill's provisions on water charging relating will not apply to Scotland. This should be made clearer in the main text of the submission by amending the reference to the Bill at paragraph 7 on the lines:

"Reform of Water Regulation in Scotland (within DETR Water Charges Bill)"

5. The contribution to the annex should read:

“The Deputy Prime Minister has agreed that DETR’s Water Charges Bill should include brief Scottish provisions to wind up the Water and Sewerage Customers Council, and establish a unified and professional regulatory system for water in Scotland. The functions of the new regulator will be devolved. This will fulfil a commitment made by Ministers to Parliament in December 1997 following the review of the water industry in Scotland. The Bill, which is classified by DETR as “essential”, may be introduced in October; there is no target date for Royal Assent. Its water charging provisions will not apply to Scotland.”

EC Pollution Directive

6. The Bill should be referred to in paragraph 7 as “The Integrated Pollution Prevention and Control (IPPC) Bill”, and the following descriptive section can then go into the Annex-

“The IPPC Bill will incorporate into GB legislation the requirements of the IPPC Directive (96/61) which will apply to some 5000 installations in Great Britain. The Directive has to be implemented by 3 November 1999. In addition to implementing the Directive, the Bill will allow us to include within the IPPC regime the rump of the existing Integrated Pollution Control processes which do not fall within IPPC, thus producing a more rational system of regulation.

The IPPC Bill will be a GB Bill, but its implementation in Scotland will be through Scottish Regulations. The Bill is likely to be introduced early in 1999, and receive Royal Assent by July 1999.”

COLIN J BAIRD
AEFD: Env-Devolution Co-ordination Unit
1H, Victoria Quay
Ext 0241

10 June 1998

TeamMail - Unfinished Mail

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Sender.....: Ferguson EW (Eric)#
Recipient.....: Hampson SF (Stephen) (PS)#
 Baxter CM (Colin) (PS)#
 Brannan MH (Micheline) (PS)#
 Aldridge JS (John) (PS)#
 Davison EC (Ted) (PS)#
 Fraser AW (Alan) (PS)#
 McNaughton AW (Andrew)
 Wildgoose JR (Jim) (PS)#
 Gordon RSB (Robert) #
 Jamieson JL (Iain) (PS) #
 Ewing J (John) (PS)#
 McDougall JE (Joanne)
 Walford I (Ian) #
Subject.....: Scotland Bill: Westminster legislation
Sent.....: -
Attachments.....: REV1.DOC
Requested.....: No
Folder.....:
In Reply To.....: R
Reply Requested by...:
Priority.....: Normal
Sensitivity.....: None
Status.....:
Importance.....: Normal
Conversion Prohibited: No

Ian,

Your e-mail of today refers. It seeks comments on your draft submission.

My main comment is that Ministers should be asked to decide what is the irreducible minimum of Scottish legislation for Westminster in 1998/99 on the basis of the details of the Bills which have a provisional place in the legislative programme (included in the Annexes to your draft) or, if necessary, on the basis of further departmental advice. They have longer to decide on the final selection of Bills than they have to decide on the mechanism for handling such Bills in 1998/99 and beyond, since final decisions on the legislative programme are unlikely to be taken until July. I am attaching a revised version of your draft to illustrate the sort of changes in your draft which would flow from my proposed approach.

Eric Ferguson
Liaison Division
5 June 1998
Ext 6800

From: Robert Gordon
Constitution Group
2 June 1998

Mr Jamieson

Copy to:	PS/Permanent Secretary	Mr Rennie
	PS/DD	Dr Wildgoose
	PS/EID	Mr Ewing
	PS/AEFD	Mr Grice
	PS/HD	Mr Walford
	PS/DoH	Solicitor
	Mr T Cameron	Divisional Solicitors
	Mr Ferguson	Mr Sinclair
	Mr Hampson	Mr Ferrie
	Mr Calder	Mrs Nelson
	Mrs Mellon	
	Mr Irvine	

SCOTLAND BILL: SCOTTISH LEGISLATION IN 1998/99

1. Thank you for your minute of 21 May. We discussed it and subsequent minuting briefly at the Constitution Group meeting yesterday morning.
2. We agreed that it would be impracticable to have no Westminster legislation next session covering matters which would come within the competence of the Scottish Parliament once it was established. We needed, however, a much better understanding of what colleagues proposed and as a first step Mr Walford, in consultation with Mr Eric Ferguson, will identify the relevant legislative proposals and set up, as necessary, bilateral meetings with the Bill Managers/lead policy officials in the Scottish Office (a meeting among you, Dr Wildgoose and Mr Walford has already been arranged).
3. These discussions will need to address the political, operational and other considerations for and against legislating at Westminster in 1998/99. For instance, while there is a policy objective to leave matters to the Scottish Parliament wherever possible, failure to take action in high priority areas in parallel with action south of the border (particularly where the Government is already committed to act) could expose Ministers to criticism - especially when there is no guarantee that the Scottish Parliament would find an early opportunity to legislate for Scotland in these areas. The aim is that we should identify the irreducible minimum of legislation relating to devolved matters which will need to be passed at Westminster next session. The process will also provide an opportunity to test whether including provisions in the Bills deeming them for the purposes of the Scotland Bill to be pre-commencement enactments would be sufficient to overcome the risk of undermining the constitutional convention our Bill seeks to establish.

4. In parallel with this we will consider further within Constitution Group what procedure would be appropriate in 1999/2000 and subsequent sessions where - as the White Paper envisaged - the Parliaments agree that Westminster should legislate on a GB/UK basis in respect of a devolved matter.

5. We will circulate further guidance to colleagues in the light of the discussions; and will clear with all interested colleagues a note to Ministers in due course.

Robert Gordon
02 June 1998

Constitution Group
Room 1-F99
Victoria Quay
Ext 7937

From: **Stephen Hampson**
AEFD.Env
1 June 1998

Robert Gordon

Copy to:	PS/Perm Sec	PS/DD	PS/EID
	PS/AEFD	PS/HD	PS/DoH
	Mr Rennie	Mr Calder	Mr S Cameron
	Mr Ferguson	Mrs Mellon	Mr J Irvine
	Dr Wildgoose	Mr Ewing	Mr Grice
	Mr Walford	Mr Ferrie	Mr M Sinclair
	Solicitor	Mr I. Jamieson	Divisional Solicitors,
	Mrs Nelson		

SCOTLAND BILL: SCOTTISH LEGISLATION IN 1998/99

1. I have seen Mr Jamieson's minute to you of 21 May on the above.
2. Two of the three Bills to which Mr Jamieson refers are in my area of responsibility (water industry and IPPC). Mr Simons' minute of 21 May sets out the background to the IPPC Bill. I have also seen Dr Wildgoose's minute of 28 May.
3. I am grateful to Mr Jamieson for pointing out what could be a significant presentational difficulty. However, I was surprised at the issue surfacing only now. This issue was not considered at the time of bidding for a place in the legislation as we were then expecting a date in 2000 for the Parliament to begin legislating. You may recall that, at the Top Management Seminar which discussed the plans for the Parliament, I pointed out that problems could arise if we went for a 1 July 1999 starting date. I therefore suggested that the best time for the transfer of legislative powers to the Scottish Parliament might be between Westminster Parliamentary sessions.
4. I do recognise the possible presentational difficulties if the Westminster Bills have not received Royal Assent by 1 July. However, (2a of Mr Jamieson's minute), if the Scottish Executive comes into being with the legislation not having completed all its stages, then, providing new Ministers are not opposed to the legislation, it can be carried to conclusion as a transitional measure. If they are opposed to it, then no doubt the relevant clauses can be dropped (or new legislation later introduced) - the Parliament's powers are not pre-empted. The opposite approach, that no legislative action could be taken on any issue until a new administration had formulated its programme for the new Parliament, implies a prolonged hiatus in the business of government. On 2b, like Dr Wildgoose I doubt if the development of the constitutional convention favoured by Mr Jamieson will be much influenced by what would clearly be a one-off transitional arrangement. On 2c, I am sure that our legal colleagues can resolve any technical legal difficulties that might arise. As I understand it, the start date of 1 May remains a proposal rather than a firm decision. Is it possible for the McLeish Group to come to an understanding about these specific transitional points?

5. The Scottish bids for the 1998-99 legislation programme were made many months ago, with, of course, the full backing of Ministers. In the case of the water provisions, which follow through a manifesto commitment, both Lord Sewel and the Secretary of State were particularly anxious that the provisions should be in place early. The investment needs of the industry are a priority that cannot be delayed, and the current arrangements are not providing a stable structure for this action. Moreover, Ministers wanted to avoid giving the Customers Council more scope to make political mischief by having an additional year's charges round under their control, which would be the case if the legislation were delayed to the Scottish Parliament. The Secretary of State went to significant efforts to persuade his colleagues of the case for 1998/99 legislation on water. Similarly, delaying IPPC implementation could bring infraction proceedings against Scotland, which no Ministers would welcome. Indeed as Mr Simons pointed out in his minute of 21 May the Secretary of State already agreed in his letter of 7 May to Mr Meacher that there should be UK legislation to implement the EC Directive.

6. I therefore trust no-one at this late stage will suggest postponing my two pieces of legislation.

7. Finally, I should be grateful if other minuting on this subject could be copied to me and to Mr Calder (for the water industry interest).

Stephen Hampson.

STEPHEN HAMPSON

1 June 1998

AEFD.Env

1-H06

Victoria Quay



0779



7705

Mr Gordon

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Copy to:	PS/Perm Sec	Solicitor
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	PS/DoH	Mr Sinclair
	Mr Cameron	Mr Ferrie
	Dr Wildgoose	Mrs Nelson
	Mr Ferguson	
	Mrs Mellon	
	Mr Irvine	
	Mr Rennie	
	Mr Ewing	
	Mr Grice	
	Mr Walford	

SCOTLAND BILL: SCOTTISH LEGISLATION IN 1998/99

1. I am very grateful to Dr Wildgoose for his minute of 28 May explaining the position with regard to the Food Standards Agency Bill.
2. I understand that Parliamentary Counsel on our Bill and on the Food Standards Agency Bill share my concerns. They are still giving further consideration to this matter but I understand that they may be suggesting that the only way in which the Food Standards Agency Bill could be enacted next session without causing irreparable damage to either the provisions of our Bill or to the proposed constitutional convention would be for the Food Standards Agency Bill to contain a provision which would deem it, for the purposes of our Bill, to be a pre-commencement enactment ie to be enacted this session. On this basis, the Food Standards Agency Bill may not have any other express provisions in it reflecting devolution.
3. Parliamentary Counsel will require to devise a solution which can be applied consistently for all GB/UK Bills containing Scottish provisions next session and in future sessions.
4. Furthermore, in future such sessions, where it may be desired, for similar policy reasons as are advanced by Dr Wildgoose, to permit the Westminster Parliament to set up a GB/UK body to deal with a matter which is a devolved matter in Scotland, it may be necessary to devise some additional procedure for having such a Bill subject to some joint procedure in both the Westminster and the Edinburgh Parliaments so as to avoid the Westminster Parliament pre-empting the Scottish Parliament's powers and to ensure consistency with the proposed constitutional convention. We will be considering with Parliamentary Counsel what that procedure should be. Clearly we must do so as a matter of urgency if we are to have amendments ready and cleared in time to be tabled for Lords Committee.

Iain Jamieson

J L JAMIESON
29 May 1998

Constitution Group
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Fax 7804

(17)

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.

J R Wildgoose

J R WILDGOOSE
28 May 1998

AEFD Division A1
Room 352
Pentland House
Ext 6159

Mr Gordon

Copy to:	PS/Perm Sec	Mr Wildgoose
	PS/DD	Mr Ewing
	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	

SCOTLAND BILL: SCOTTISH LEGISLATION IN 1998/99

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

(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 implication 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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