House of Commons

Scottish Affairs Committee

The Sewel Convention: the Westminster perspective

Fourth Report of Session 2005–06

Report, together with formal minutes, oral and written evidence

Ordered by The House of Commons to be printed 6 June 2006

HC 983
Published on 19 June 2006
by authority of the House of Commons
London: The Stationery Office Limited
£13.50

The Scottish Affairs Committee

The Scottish Affairs Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Scotland Office (including (i) relations with the Scottish Parliament and (ii) administration and expenditure of the office of the Advocate General for Scotland (but excluding individual cases and advice given within government by the Advocate General)).

Current membership

Mr Mohammad Sarwar MP (*Labour, Glasgow Central*) (Chairman)
Danny Alexander MP, (*Liberal Democrat, Inverness, Nairn, Badenoch & Strathspey*)
Gordon Banks MP, (*Labour, Ochil & South Perthshire*)
Ms Katy Clark MP, (*Labour, North Ayrshire & Arran*)
Mr Ian Davidson MP, (*Labour, Glasgow South West*)
Mr John MacDougall MP, (*Labour, Glenrothes*)
Mr Jim McGovern MP, (*Labour, Dundee West*)
Mr Angus MacNeil MP, (*SNP, Na h-Eileanan An Iar*)
David Mundell MP, (*Conservative, Dumfriesshire, Clydesdale and Tweeddale*)
Mr Charles Walker MP, (*Conservative, Broxbourne*)
Mr Ben Wallace MP, (*Conservative, Lancaster & Wyre*)

Powers

The committee is one of the departmental select committees, the powers of which are set out in House of Commons Standing Orders, principally in SO No 152. These are available on the Internet via www.parliament.uk.

Publications

The Reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the Internet at
www.parliament.uk/parliamentary_committees/scottish_affairs_committee.cfm
A list of Reports of the Committee in the present Parliament is at the back of this volume.

Committee staff

The current staff of the Committee are Mike Clark (Clerk), Diane Nelson (Committee Assistant) and Camilla Brace (Secretary).

Contacts

All correspondence should be addressed to the Clerk of the Scottish Affairs Committee, House of Commons, 7 Millbank, London SW1P 3JA. The telephone number for general enquiries is 020 7219 6295; the Committee's email address is scotaffcom@parliament.uk.

Contents

Report

Page

1 Background to the inquiry 3

2 The Westminster perspective 5
Communicating the Scottish Parliament's view 6
"Tagging" of relevant Bills 7
Improved Explanatory Notes 7
Private Members' Bills 9

3 Closer ties with the Scottish Parliament 11

4 Addressing West Lothian? 13

Conclusions and recommendations 16

Annex 18
Extract from the Explanatory Notes to the Equality Bill [*Lords*] 18
Extract from the Explanatory Notes to the Police and Justice Bill 18

Formal Minutes 19

Witnesses 20

List of written evidence 20

Publications from the Scottish Affairs Committee since 2005 21

1 Background to the inquiry

1. In January 2005, the Procedures Committee of the Scottish Parliament announced a major inquiry into the operation of the Sewel Convention[1], ie, the process whereby the Scottish Parliament ("Holyrood") is asked to give its consent to a Westminster Bill that would change the law on a devolved matter or alter the powers devolved to Holyrood or to the Scottish Executive.

2. The Procedures Committee published its Report on 5 October 2005.[2] It made a number of recommendations for changes to how the Scottish Parliament dealt with Sewel motions,[3] which would replace the then current, and largely *ad hoc*, procedures "with a framework of new rules to improve transparency and to enhance the opportunity for parliamentary scrutiny".[4] The recommendations included:

a requirement on the Scottish Executive to provide information about any Scottish implications arising from Bills announced in the Queen's speech; and

a requirement on the Executive to provide a detailed memorandum at an earlier stage in the Westminster process thus giving the Scottish Parliament more time for scrutiny.[5]

3. The Committee also encouraged Scottish Ministers to make more time available for debates on Sewel motions which dealt with major issues, and proposed replacing the term "Sewel motions" with "Legislative Consent motions".[6]

4. The Procedures Committee also made a number of suggestions as to how Westminster could change its own procedures in what it described as "a spirit of constructive inter-parliamentary dialogue."[7] Those suggestions were:

the tagging of Bills in progress at Westminster to which the Sewel Convention would apply so that Westminster knew which Bills were involved;

the question of having explanatory notes in every Bill outlining whether the Bill triggered off the Sewel Convention and in what ways it engaged in the convention; and

a formal process for the Scottish Parliament to notify Westminster when a "legislative consent motion" had been passed, so that there would be contact from Parliament to Parliament, rather than simply going through Ministers.[8]

1 Procedures Committee News Release, CPROC 001/2005, 18 January 2005.

2 Procedures Committee 7th Report, 2005, *The Sewel Convention*, SP Paper 428.

3 The "Sewel Convention" and "Sewel motions" are named after Lord Sewel, the then Scottish Office Minister responsible for steering the Scotland Bill through the House of Lords in July 1998.

4 Procedures Committee News Release, CPROC 004/2005, 5 October 2005.

5 *Ibid*.

6 *Ibid*.

7 Procedures Committee 7th Report, 2005, *The Sewel Convention*, SP Paper 428, para 203.

8 *Ibid*, paras 204–207.

5. On 19 October 2005, we took evidence from Rt Hon Alistair Darling MP, the then Secretary of State for Scotland, on the Scotland Office's Departmental Annual Report. During questioning on whether Westminster had dealt effectively with Sewel motions, the Secretary of State responded:

> "…whilst it is probably fair to say that Members of the Scottish Parliament are very aware of there being a Sewel motion because they have debated it, my guess is Members of this Parliament are probably not aware either (a) that there is one, or (b) what happened to it. That is something which is obviously outside my responsibility. It is a matter for the House, but the House has a Procedure Committee and it, too, will probably want to study this to see whether or not it would be of assistance to Members generally if they knew, firstly that there was a Sewel motion, and secondly what was happening to it and what the considerations were. You may want to make recommendations on that, I do not know, but that is really for the House, it is not for the Government." [9]

6. The remit of the Scottish Affairs Committee, as set out in the Standing Orders of the House of Commons, includes having responsibility for relations with the Scottish Parliament.[10] Although we had already identified the Sewel Convention and relations between Westminster and Holyrood as a potential subject for a future inquiry, the Procedures Committee's report, and the Secretary of State's response to our questioning, acted as a catalyst.

7. On 27 October 2005, we announced that we would be holding our own inquiry into *The Sewel Convention: the Westminster perspective*. We stated that we would not be inquiring into Sewel motions *per se*, but rather how Members of Parliament could be better made aware that a particular Bill before the House of Commons had been subject to a Sewel motion in the Scottish Parliament – for example, perhaps by a more formal communication between Holyrood and Westminster, and the other possible changes to Westminster procedures promulgated by the Procedures Committee in its report.[11]

8. Subsequently, the Scottish Parliament debated, and approved, the proposed changes to its own procedures on 23 November 2005.[12] Although, therefore, Sewel motions are now officially entitled Legislative Consent motions, we have used "Sewel" throughout this Report as the term people will most immediately recognise.

9 Scottish Affairs Committee, Minutes of Evidence, 19 October 2005, *Scotland Office Annual Report 2005*, HC (2005–06) 580–i, Q18.

10 S.O. No. 152(2).

11 Scottish Affairs Committee Press Notice No. 3 of Session 2005–2006, 27 October 2005.

12 http://www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-05/sor1123-02.htm#Col20980.

2 The Westminster perspective

9. During our inquiry, we held four evidence sessions, all during March 2006; one in Edinburgh and three in Westminster. In Edinburgh, to start off the inquiry, we took evidence from Mr Donald Gorrie MSP, the Convener, Ms Karen Gillon MSP, the Deputy Convener, Mr Alex Johnstone MSP, and Mr Andrew Mylne, the Committee Clerk, of the Procedures Committee of the Scottish Parliament; at Westminster, we took evidence from Ms Margaret Curran MSP, Minister for Parliamentary Business, Mr Murray Sinclair, Head, Constitution and Parliamentary Secretariat, and Mr Paul Allen, Head, Constitutional Policy Unit, the Scottish Executive and from Mr David Cairns MP, the Parliamentary Under-Secretary of State for Scotland, Dr Jim Wildgoose, the Head of Scotland Office, and Mr Glenn Preston, Head of the Scotland Office's Constitutional Branch; from Mr Roger Sands, the Clerk of the House of Commons, and Mr Frank Cranmer, Clerk of Bills, House of Commons; and from Mr Barry K Winetrobe, Reader in Law, Napier University.[13] In addition to written submissions from the witnesses above, we also received a memorandum from the Clerk of the Parliaments.[14] We wish to place on record our thanks to all those who gave evidence during the inquiry.

10. We would also wish to record our gratitude to the staff at Edinburgh City Chambers, who facilitated our first set of formal evidence held outside Westminster since the 2005 General Election, and to the Members and the members of staff of the Scottish Parliament we met during our visit to Holyrood immediately following our evidence session; particular thanks go to Trish Godman MSP, the Convener, and her colleagues on the Conveners' Group for hosting a working lunch for us when we were able to discuss informally numerous matters of mutual concern.

11. As we stated in paragraph 4 above, in its report, the Scottish Parliament's Procedures Committee made some suggestions as to how we at Westminster could change our own procedures in order to improve communication between the two Parliaments. We were pleased to have confirmation from the Clerk of the House that there were no procedural reasons why the Procedures Committee's proposals could not be adopted at Westminster,[15] and that the view of Clerk of the Parliaments would not be radically different from his own.[16]

12. Mr Barry Winetrobe, in his written submission, expressed a view which summed up the situation, and with which we concur:

> "…under devolution, relations between the UK's parliaments and assemblies should be enhanced. The operation of the Convention is an instance of devolution business which formally was said to be a matter between the two parliaments, but which, in practice, has been dominated and driven by the two executives." [17]

13 See pp Ev 1-57.

14 For list of written submissions received, see p 20.

15 Q123.

16 Q136.

17 Ev 47, para 2.

13. This Report, therefore, should be taken as our attempt to redress this situation. We endorse all the suggestions to the changes in Westminster's procedures proposed by the Procedures Committee; in response to their specific proposals, **we recommend:**

> **the introduction of a formal process whereby the Scottish Parliament notifies Westminster when a Sewel motion had been passed;**
>
> **that any communication from the Scottish Parliament that it had passed a Sewel motion is, at the appropriate time, "tagged" on the Order Paper, and the text of the resolution made available in the Vote Office; and**
>
> **that all Explanatory Notes to Bills are explicit about which part or parts of the United Kingdom a Bill will affect, and could, therefore, trigger the Sewel Convention.**

14. All our recommendations, and other conclusions we have reached during the inquiry, are set out in detail in the paragraphs below, as are our views on how the House should implement those recommendations.

Communicating the Scottish Parliament's view

15. The first issue we had to address was, what would be the most appropriate way that Holyrood could advise Westminster that it had passed a Sewel motion? In his written submission the Clerk of the House stated:

> "it might be thought, for example, that a letter from the Clerk of the Scottish Parliament to the Clerk of the Parliaments and myself might suffice, rather than involving our respective presiding officers. However, whatever method of communication is adopted, it would be simple matter to note on the Order Paper against the bill in question the fact that the Scottish Parliament had agreed a Sewel Resolution in respect of it and to make the text of the resolution available to Members. Alternatively, as suggested in the Scotland Office memorandum, responsibility for making the text of the resolution available might rest with the Department in charge of the bill rather than with the House authorities." [18]

16. Mr Sands expanded on this during his oral evidence, saying:

> "The Presiding Officer route imparts a greater degree of formality, which might be seen to be attractive, but it does inevitably impose an extra link in the chain because the necessary information has got to be conveyed to the right office at Edinburgh, and then when it gets down to the Speaker's Office here conveyed to [the Public Bill] office for action to be taken. If time were tight, I suspect that in the end it would be found it would be better to do it official to official."[19]

18 Ev 40, para 8.

19 Q127.

17. We agree, and see no need for that extra link in the chain. **We recommend the introduction of a formal process whereby the Scottish Parliament notifies Westminster when a Sewel motion had been passed. Although we cannot, of course, insist on how the Scottish Parliament communicates its decisions to us, we trust that the Presiding Officer and the Clerk of the Scottish Parliament will note our view that the better way of letting the House of Commons and the House of Lords know that Holyrood had passed a Sewel motion would be for the Clerk of the Scottish Parliament to advise the Clerk of the House and the Clerk of the Parliaments that such a motion had been passed, rather than for the Presiding Officer to contact the Speaker and the Lord Chancellor.**

"Tagging" of relevant Bills

18. The next matter we considered was, once Holyrood had alerted Westminster that a Sewel motion had been passed, how was this best brought to the attention of Members?

19. When we asked the Clerk of the House whether it would be better if the House itself, rather than the Government, took on the duty of advising its Members that the Scottish Parliament had passed a Sewel motion, his response was:

> "I think it would be more appropriate because the passing of a Sewel resolution is a parliamentary action by the Scottish Parliament and therefore it is right that that should be communicated parliament to parliament and dealt with in that way."[20]

20. **We recommend that, following a communication from the Scottish Parliament that it had passed a Sewel motion, at the appropriate time a "tag" is placed on the Order Paper by the relevant House authority, alerting Members that the Scottish Parliament had agreed a Sewel motion in respect of a Bill, and that the text of the resolution is made available in the Vote Office.**

Improved Explanatory Notes

21. As well as the situation mentioned in paragraph 5 above, that MPs were sometimes unaware that a Sewel motion had been passed by Holyrood, a more fundamental problem is that it is not always immediately apparent whether or not a Bill introduced at Westminster would actually apply to Scotland, and therefore could initiate a Sewel motion. One way of removing this lack of clarity would be to ensure that a Bill's Explanatory Notes included unambiguous information about which parts of the UK the Bill applied to. As the Scotland Office stated in its written evidence:

> "The Government requires Bill teams to include in the Territorial Extent section of a Bill's Explanatory Notes a description of how a Bill applies to Scotland and whether or not it triggers the Sewel Convention. For example, the Explanatory Notes to the Equality Bill[21] currently before Parliament include this information. However, the Government recognises that sometimes this information is not as clear as it should be and will endeavour to make sure future Explanatory Notes are explicit about Sewel issues."[22]

20 Q125.

21 See Annex, p18.

22 Ev 28, para 29 (a).

22. David Cairns MP, the Parliamentary Under-Secretary of State for Scotland expanded on this when he gave oral evidence:

> "…I think it is important to get right the Explanatory Memorandum published at the time the Bill is published, which would indicate the area that would be covered by a Sewel motion. I would concede here we do not always get that right. There are some very good examples: the Equality Act, which has just gone through, is a very good example of where it was listed and how it would apply; in others there has just been either inadequate information or inconsistent information."[23]

23. During his evidence, the Clerk of the House agreed that notes to identify devolved provisions in Bills could be patchy, and suggested:

> "It could be standardised with advantage. When it is done well, it is fine. There is a section in the explanatory notes on the current Police and Justice Bill with some such heading as "Territorial Extent",[24] and it sets out provisions that may apply to Scotland very clearly. If that practice were followed in a consistent way, the House would have all the information it would reasonably want about the Bill as introduced."[25]

24. **We support fully the Government in its attempts to ensure that all Explanatory Notes are explicit about which part or parts of the United Kingdom a Bill will affect, and could, therefore, trigger the Sewel Convention, and we recommend that the Explanatory Notes to the Equality Bill [*Lords*] and to the Police and Justice Bill be taken by Bill teams in all Departments as exemplars.**

25. We believe, however, that more could be done to alert Members of the House to a Bill which could trigger Sewel even before that Bill was formally presented to the House and its Explanatory Notes available. After the Queen's Speech, the Secretary of State currently makes a brief Written Ministerial Statement stating that a list of Bills which would affect Scotland is available in the House of Commons Library.[26] Although helpful, we consider that it could be more so, as the Clerk of the House rightly stated it is "a matter of some constitutional significance".[27]

23 Q92.

24 See Annex, p18.

25 Q122.

26 Q129.

27 *Ibid*.

26. We were also concerned that members of the media and the public who had an interest in Scottish matters might not realise that a particular Bill affected Scotland and, even if they did, might not appreciate how they could access this information. During his evidence, Mr Barry Winetrobe stated:

> "I am certainly in favour of anything that makes information available to the wider public. As somebody who used to work in the Library, the placing in the Library system is not a method of publication, although most things that are like that would be published in some other way. It would be on somebody or other's website. Yes, I think there are ways that make it more transparent, more open to the public. In an ideal world, perhaps you would have an oral statement by the Scottish Secretary about which he could be questioned by yourselves immediately after the Queen's Speech in the same way as for other announcements made about details of bills by other Ministers or after the Budget."[28]

27. We were attracted by the idea of the Secretary of State making an oral statement, on which he could be questioned, in the House following the Queen's Speech, although, should our other recommendations be accepted, this may not be necessary. **We therefore recommend that, instead of a simple statement saying such a list is available in the Library, a list of those Bills which affect Scotland is included in the *Official Report* with the Secretary of State for Scotland's Written Ministerial Statement following the Queen's Speech, and that the list summarises each Bill's implications for Scotland.**

Private Members' Bills

28. Preceding paragraphs dealt with Government Bills, but we were also conscious of how the House dealt with a Private Members' Bill which affected Scotland, thereby triggering Sewel. In its written submission, the Scotland Office states:

> "As the devolution guidance note…. makes clear…the same procedures should be followed for private member's Bills supported by the Government as apply to Government Bills. The Government will not support a private members' Bill which includes provisions subject to the Convention without agreeing with the Scottish Executive that it will seek the consent of the Scottish Parliament to the inclusion of those provisions in the Bill."[29]

29. When David Cairns appeared before the Committee, he set out the Government's policy as being:

> "Essentially, the Government's position is quite clear on this: it is up to private Members to bring forward whatever they want to in a Private Member's Bill, it is not up to the Government to tell them what they should do."[30]

28 Q155.

29 Ev 27, para 28.

30 Q94.

30. And he confirmed that:

> "The Government is very clear that we will not support any Private Member's Bill which triggers Sewel unless all of the other stages have been gone through in relation to getting the consent of the Scottish Parliament. It is not up to the Government to tell private Members how they should go about introducing their own legislation."[31]

31. During oral evidence, Mr Frank Cranmer, Clerk of Bills in the House of Commons, explained the procedure the Public Bill Office employs when dealing with Private Members' Bills:

> "When I look at the bill drafted for the first time, one of the things that I try and bear in mind always is whether, if it applies to Scotland – though actually not many of them do – it engages devolved powers. If it appears to engage devolved powers we draw this to the attention of the Member concerned. The Bill quite often goes through a long drafting stage; and when it comes to fruition, and when it is presented and printed, we let the legislation team in the Scottish Parliament know so that they can pick it up. It is an entirely informal arrangement but it is an informal arrangement that is based on an exchange of letters between myself and …. the Clerk in charge at the time, saying that we would use our best endeavours to keep them informed. All I can say, Chairman, is that we have not had any complaints; the system seems to work well at an informal level."[32]

32. We commend the Public Bill Office for its Information Leaflet[33] dealing with the preparation of Private Members' Bills, as it specifically draws Members' attention to the situation that:

> "A decision will need to be reached about the territorial extent of a Bill….The Government has stated that it would be likely to oppose a Private Members' Bill seeking to alter the law on devolved subjects in Scotland without the consent of the Scottish Parliament."[34]

33. **We consider that the current informal procedures for how the House deals with those Private Members' Bills which might apply to matters devolved to the Scottish Parliament are appropriate and work well, and we do not, therefore, recommend any change to those arrangements.**

---

31 *Ibid*.

32 Q118.

33 *Preparing Private Members' Bills: A Short Guide for Members*, March 2006.

34 *Ibid*.

3 Closer ties with the Scottish Parliament

34. The Convener of the Scottish Parliament's Procedures Committee has indicated his willingness to "explore establishing better regular connections between Scottish MPs, MSPs and MEPs".[35] We welcome, and share, that willingness. Indeed, our Report *Work of the Committee in 2005* specifically stated that we would pursue our Sewel inquiry in the spirit of constructive inter-Parliamentary dialogue[36] we referred to in paragraph 4 above, and we re-iterate our hope that we:

> "….could persuade the Scottish Parliament's Conveners' Group to engage with us in a regular pattern of meetings, similar to those adopted in the last Parliament whereby the Welsh Affairs Committee held a meeting with the equivalent body, the Panel of Chairs of the National Assembly for Wales, every six months."[37]

35. Although we will continue to support and facilitate informal contacts between the Parliaments and their Members, we have also been considering ways of expanding such co-operation into a more formal setting, and have been impressed by the existing arrangements that exist between the Welsh Affairs Committee and the National Assembly for Wales. Standing Orders state that :

> "The Welsh Affairs Committee may invite members of any specified committee of the National Assembly for Wales to attend and participate in its proceedings (but not to vote)." [38]

36. This invitation is reciprocal, and members of the Welsh Affairs Committee can therefore participate in, but not vote in, meetings of National Assembly committees. We were advised by the Clerk of the House that this arrangement is referred to as "mutual reciprocated enlargement"[39], a somewhat clumsy term, but one which accurately sums up such a situation.

37. We have therefore been considering a similar situation whereby MSPs might be allowed to participate in appropriate meetings with Westminster committees in a situation which, presumably, might best be termed (admittedly, the even more unwieldy) "unilateral unreciprocated enlargement".

35 Letter to the Chairman of the Committee, 23 March 2006 (*not reported*).

36 Scottish Affairs Committee, First Report, Session 2005–06, *Work of the Committee in 2005*, HC (2005–06) 836, para 37.

37 *Ibid*, para 38.

38 S.O. No. 137A(3).

39 Q131.

38. Section 27 of the Scotland Act 1998[40] would seem to indicate that that Act would have to be amended before Westminster Members could participate in proceedings at Holyrood, as it expressly enables the Scottish Law Officers so to participate; the general rule of interpretation is that, in default of clear words to the contrary, the expression of one category excludes all others. However, this cannot debar the House from deciding to allow MSPs to participate in the proceedings of its own committees. This would be unusual, but not without precedent for UK Parliamentarians.

39. For example, as pointed out in the Procedure Committee's 2003–04 Report *Joint activities with the National Assembly for Wales:*

> "…there is a precedent for people who are not Members of either House of Parliament to take part in its proceedings other than as witnesses: in 1933 a Joint Committee on Indian Constitutional Reform was given power to "call into consultation representatives on the Indian States and of British India", and such representatives put questions directly to witnesses, subject to the direction of the Chairman".[41]

40. Much more recently, in October 2004, the British-Irish Inter-Parliamentary Body (BIIPB), which numbers both Scottish MPs and MSPs amongst its membership, agreed that representatives from the Nordic Council could, without a reciprocal agreement from the Council, attend and participate in the BIIPB's Plenary sessions and committees, although the Council's representatives could not vote;[42] and, as the Clerk of the House confirmed during his evidence, the Committee on Modernisation of the House of Commons is still considering whether Members of the European Parliament could participate, presumably on a non-reciprocal basis:

> "…in a kind of European grand committee…as long as they are just contributing to the discussion and not purporting to reach decisions on behalf of the House of Commons, or participating in any decision-making process."[43]

41. Such a forum could have been invaluable in discussing the recent report from the Commission on Boundary Differences and Voting Systems (the "Arbuthnott Commission") entitled *Putting Citizens First: Boundaries, Voting and Representation in Scotland*,[44] which has implications for Members elected to the Parliaments in Westminster, Holyrood and Brussels.

40 1998 Chapter 46.

41 Procedure Committee, Third Report, Session 2003–04, *Joint activities with the National Assembly for Wales*, HC (2003–04) 582, para 6.

42 http://www.biipb.org/biipb/summary/sum/doc/041018/2808.pdf, pp 20-25.

43 Q133.

44 Published by Edinburgh: The Stationery Office, ISBN 0108881792.

42. At the time of considering this Report, the Committee is awaiting a reaction to its request contained in its Third Report of this Session in that the report from the Arbuthnott Commission be debated in a Scottish Grand Committee, so that "all interested Scottish Members should have the opportunity to raise their own concerns with Ministers, and to seek to influence the Government's response" before the Government makes such a response.[45] It would, surely, have been even more valuable for HM Government to have had the views of MSPs and MEPs at its disposal before responding.

43. **We consider that there could be merit in the House of Commons establishing a "Super" Scottish Grand Committee, composed of Scottish MPs, MSPs and Scottish MEPs that could meet to discuss matters of mutual interest although, like the proposed Parliamentary European Committee, they could not come to decisions on behalf of the House of Commons, or participate in any decision-making process, although it could seek to inform and influence through debate decisions made by either Westminster or HM Government.**

44. **Although we do not make a formal recommendation that such a "Super" Scottish Grand Committee be introduced, we hope that the relevant Committees of the House of Commons, such as the Modernisation Committee or the Procedure Committee, might pick up and consider our suggestion for one of their future inquiries.**

4 Addressing West Lothian?

45. Although our inquiry focused on inter-Parliamentary arrangements, we were interested to hear also about inter-Government relations, and how the UK Government and the Scottish Executive communicated. We were told by the Scottish Executive's Minister for Parliamentary Business that:

> "At one level, obviously the Executive speaks to the British Government on a wide variety of fronts, usually on the policy front, for example the Minister for Justice is in close contact with the Home Office over developing policies, and there are communications at the official and political level. I have responsibility for the overall programme and if possible when the Queen's Speech is announced in the UK Parliament I try to make the Scottish Parliament aware publicly of the likely implications for ourselves in that."[46]

45 Scottish Affairs Committee, Third Report, Session 2005–06, *Putting Citizens First: the Report from the Commission on Boundary Differences and Voting Systems*, HC (2005–06) 924, para 10.

46 Q24.

46. The Parliamentary Under-Secretary of State said that:

> "….there are many channels of communication between the Government and the Executive. There are department to department communications, there are communications obviously involving the Scotland Office and Margaret Curran, whom you have just spoken to, and there are communications between the Leader of the House and Margaret Curran also. The primary channels of communication are obviously department to department because that is where the subject expertise is on any piece of legislation that is coming up."[47]

47. The fact that the two Governments do actually talk to each other was encouraging indeed, but we also asked whether the Convention would be robust enough to withstand a situation whereby HM Government and the Scottish Executive were of "a different political hue".[48] In response, the Parliamentary Under-Secretary of State stated:

> "…it is important to say that the Sewel Convention does not just exist on a nod and a wink. There is a memorandum of understanding which is a publicly available document. There are devolution guidance notes which are there and which are adhered to. There is custom and precedent about how we go about these things, and we respect that. It is not all done in some sort of informal way which is a suggestion that is sometimes made. Ultimately, I think that either Parliament would have to respect the will of the people in the result of a particular election. Unless the will of the people was to lurch violently in one direction or the other, and given that parties which were hitherto opposed to devolution now accept devolution and want to make it work, I think that a common understanding of how these things would work in the best interests of the people of Scotland would quickly become apparent."[49]

48. The Minister's reply was reassuring, as it showed devolution to be working. However, in this final section of our Report, we wish to record our concerns on an issue on which we are less reassured – the still unresolved "West Lothian Question", the name coined by the late Enoch Powell in response to questions posed by Tam Dalyell, the then MP for West Lothian, during a debate on Scottish devolution in the late 1970's. In essence, the West Lothian Question asked:

> is it acceptable that Scottish MPs cannot affect the issues of their constituents which have been devolved; and

> is it acceptable that Scottish MPs can vote on issues affecting England (including those which do not affect Scotland), whilst English MPs have no say on devolved Scottish issues?

47 Q81.

48 Q86.

49 *Ibid*.

49. It is a matter of concern to us that there are signs that English discontent with the current situation is becoming apparent. According to a report in *The Scotsman*, a recent poll, conducted by ICM for the BBC, indicated that 52 per cent of people in the UK believed it wrong that a Scottish MP should become Prime Minister, given that Scotland has its own Parliament. That figure rises to 55 per cent of people in England and 59 per cent of people in the South East of England, whereas only 20 per cent of people in Scotland thought it wrong.[50]

50. In order to address the West Lothian Question, there are usually four solutions proffered: the dissolution of the United Kingdom; English devolution; fewer Scottish MPs; or English votes on English laws. Although we make no recommendations on how to resolve this question, we considered it worth noting our concerns, with the hope that the matter will be comprehensively debated, and resolved, before the situation is reached whereby it could actually undermine the whole devolution settlement.

50 See *English blow to Brown's PM hopes, The Scotsman*, 15 May 2006.

Conclusions and recommendations

1. **We endorse the suggestions to the changes in Westminster's procedures proposed by the Procedures Committee of the Scottish Parliament; in response to their specific proposals, we recommend:**

   the introduction of a formal process whereby the Scottish Parliament notifies Westminster when a Sewel motion had been passed;

   that any communication from the Scottish Parliament that it had passed a Sewel motion is, at the appropriate time, "tagged" on the Order Paper, and the text of the resolution made available in the Vote Office; and

   that all Explanatory Notes to Bills are explicit about which part or parts of the United Kingdom a Bill will affect, and could, therefore, trigger the Sewel Convention. (Paragraph 13)

2. **We recommend the introduction of a formal process whereby the Scottish Parliament notifies Westminster when a Sewel motion had been passed. We trust that the Presiding Officer and the Clerk of the Scottish Parliament will note our view that the better way of letting the House of Commons and the House of Lords know that Holyrood had passed a Sewel motion would be for the Clerk of the Scottish Parliament to advise the Clerk of the House and the Clerk of the Parliaments that such a motion had been passed, rather than for the Presiding Officer to contact the Speaker and the Lord Chancellor.** (Paragraph 17)

3. **We recommend that, following a communication from the Scottish Parliament that it had passed a Sewel motion, at the appropriate time a "tag" is placed on the Order Paper by the relevant House authority, alerting Members that the Scottish Parliament had agreed a Sewel motion in respect of a Bill, and that the text of the resolution is made available in the Vote Office.** (Paragraph 20)

4. **We support fully the Government in its attempts to ensure that all Explanatory Notes are explicit about which part or parts of the United Kingdom a Bill will affect, and could, therefore, trigger the Sewel Convention, and we recommend that the Explanatory Notes to the Equality Bill [*Lords*] and to the Police and Justice Bill be taken by Bill teams in all Departments as exemplars.** (Paragraph 24)

5. **We recommend that, instead of a simple statement saying such a list is available in the Library, a list of those Bills which affect Scotland is included in the *Official Report* with the Secretary of State for Scotland's Written Ministerial Statement following the Queen's Speech, and that the list summarises each Bill's implications for Scotland.** (Paragraph 27)

6. **We consider that the current informal procedures for how the House deals with those Private Members' Bills which might apply to matters devolved to the Scottish Parliament are appropriate and work well, and we do not, therefore, recommend any change to those arrangements.** (Paragraph 33)

7. We consider that there could be merit in the House of Commons establishing a "Super" Scottish Grand Committee, composed of Scottish MPs, MSPs and Scottish MEPs that could meet to discuss matters of mutual interest although, like the proposed Parliamentary European Committee, they could not come to decisions on behalf of the House of Commons, or participate in any decision-making process, although it could seek to inform and influence through debate decisions made by either Westminster or HM Government. (Paragraph 43)

8. Although we do not make a formal recommendation that a "Super" Scottish Grand Committee be introduced, we hope that the relevant Committees of the House of Commons, such as the Modernisation Committee or the Procedure Committee, might pick up and consider our suggestion for one of their future inquiries. (Paragraph 44)

9. Although we make no recommendations on how to resolve the "West Lothian Question", we considered it worth noting our concerns, with the hope that the matter will be comprehensively debated, and resolved, before the situation is reached whereby it could actually undermine the whole devolution settlement. (Paragraph 50)

Annex

Extract from the Explanatory Notes to the Equality Bill [*Lords*]

TERRITORIAL EXTENT

357. The Bill extends to Great Britain.

358. Equal opportunities are in principle reserved to the Westminster Parliament, but the encouragement of equal opportunities is an exception to this rule and falls within the devolved competence of the Scottish Parliament. Some clauses of this Bill fall partly within the competence of the Scottish Parliament. These include clauses relating to promotion of equality and diversity in Part 1, the promotion of equal opportunities in the gender duty and duties imposing functions on Scottish Ministers in Part 4. The Scottish Parliament will be invited to agree that it is content for Parliament to legislate for Scotland in this devolved area. Human rights as a topic is neither reserved nor devolved – a human rights issue falls within the competence of the Scottish Parliament if the underlying subject matter is not reserved. The CEHR's human rights role in Scotland is intended to be limited in practice to human rights issues on reserved topics.

Extract from the Explanatory Notes to the Police and Justice Bill

TERRITORIAL EXTENT

14. The Police and Justice Bill's provisions extend to England and Wales, while certain provisions also extend to Scotland and Northern Ireland. The Bill addresses both reserved and devolved matters.

15. The legislation extends to Scotland for the following:

- National Policing Improvement Agency provisions;
- Her Majesty's Chief Inspector for Justice, Community Safety and Custody provisions;
- new police powers to collect data for domestic air and sea travel, insofar as it relates to reserved matters;
- the extension of stop and search powers at aerodromes;
- amendments to the Computer Misuse Act 1990;
- the extension of the IPCC's remit to immigration and asylum enforcement functions; and
- amendments to the Extradition Act 2003.

Formal Minutes

Tuesday 6 June 2006

Members present:

Mr Mohammad Sarwar, in the Chair

Danny Alexander
Ms Katy Clark
Mr Ian Davidson
Mr Jim McGovern
David Mundell
Mr Charles Walker
Mr Ben Wallace

The Committee deliberated.

Draft Report (The Sewel Convention: the Westminster perspective), proposed by the Chairman, brought up and read.

Ordered, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1–50 read and agreed to.

Annex agreed to.

Resolved, That the Report be the Fourth Report of the Committee to the House.

Ordered, That the Chairman do make the Report to the House.

Ordered, That the provisions of Standing Order No. 134 (Select Committee (reports)) be applied to the Report.

The Committee deliberated further.

[Adjourned till Tuesday 20 June at 9.45 am.

Witnesses

Tuesday 7 March 2006

Mr Donald Gorrie MSP, Convener, **Ms Karen Gillon MSP,** Deputy Convener, **Mr Alex Johnstone MSP, Mr Andrew Mylne,** Clerk, Procedures Committee, Scottish Parliament — Ev 1

Tuesday 14 March 2006

Ms Margaret Curran MSP, Minister for Parliamentary Business, **Mr Murray Sinclair,** Head, Constitution and Parliamentary Secretariat, **Mr Paul Allen,** Head, Constitutional Policy Unit, Scottish Executive — Ev 13

Mr David Cairns MP, Parliamentary Under-Secretary of State for Scotland, **Dr Jim Wildgoose,** Head of Scotland Office, **Mr Glenn Preston,** Head of Constitutional Branch, Scotland Office — Ev 30

Tuesday 21 March 2006

Mr Roger Sands, Clerk of the House of Commons, **Mr Frank Cranmer,** Clerk of Bills, House of Commons — Ev 42

Tuesday 28 March 2006

Mr Barry K Winetrobe, Reader in Law, Napier University — Ev 50

List of written evidence

Procedures Committee, Scottish Parliament	Ev 10
Scottish Executive	Ev 11
Scottish Executive (supplementary)	Ev 22
Procedures Committee, Scottish Parliament (supplementary)	Ev 23
Scotland Office	Ev 24
Clerk of the House of Commons	Ev 39
Clerk of the Parliaments	Ev 41
Clerk of Bills, House of Commons	Ev 46
Mr Barry K Winetrobe	Ev 47

Publications from the Scottish Affairs Committee since 2005

The following publications have been produced by the Scottish Affairs Committee since the beginning of the 2005 Parliament:

Session 2005-06

Reports

First Report	Work of the Committee in 2005	HC 836
Second Report	Meeting Scotland's Future Energy Needs: the Westfield Development Centre	HC 1010
Third Report	*Putting Citizens First:* the Report from the Commission on Boundary Differences and Voting Systems	HC 924
First Special Report	Meeting Scotland's Future Energy Needs: Government Response to the Committee's Second Report of Session 2004-05	HC 579
Minutes of Evidence	Scotland Office Annual Report 2005. Minutes of Evidence Wednesday 19 October 2005	HC 580-i
Memorandum	Spring Supplementary Estimate 2006: Explanatory Memorandum by the Scotland Office	HC 1106

Oral evidence

Taken before the Scottish Affairs Committee

on Tuesday 7 March 2006

Members present:

Mr Mohammad Sarwar, in the Chair

Ms Katy Clark
Mr John MacDougall
Mr Jim McGovern
David Mundell
Mr Charles Walker

Witnesses: **Mr Donald Gorrie** MSP, Convener **Ms Karen Gillon** MSP, Deputy Convener, **Mr Alex Johnstone,** MSP, and **Mr Andrew Mylne,** Committee Clerk, the Procedures Committee, the Scottish Parliament, gave evidence.

Q1 Chairman: Good morning. Donald, can I welcome you and your colleagues to the first meeting of the Scottish Affairs Committee to be held in Scotland since the general election of 2005. My colleagues and I are delighted to be here this morning in Edinburgh and it is very appropriate that the first witnesses in our inquiry into The Sewel Convention: the Westminster perspective are the Scottish Parliament's Procedures Committee as your report last year was the catalyst for our inquiry.[1] Can you first please, for the record, introduce your team?

Mr Gorrie: I am Donald Gorrie. I am the Convener of the Procedures Committee of the Scottish Parliament. Karen Gillon is the Deputy Convener, Alex Johnstone is a Conservative member and Andrew Mylne is our committee Clerk.

Q2 Chairman: Before we start the detailed questions would you like to make any opening remarks?

Mr Gorrie: Yes please. If I may I will give a little of the background and then ask Andrew Mylne to refresh all our minds about the factual position as it is at the moment. Could I say how much we welcome this interest by your committee in the Sewel Convention and the chance to discuss this issue. Speaking personally, my perception is that the relationship between Scottish MPs and Scottish MSPs in all parties leaves a good deal to be desired and things like this can only improve the interchange between the Scots in the two Parliaments. I am the fairly recent Convener of this committee following the change and so I am not an expert on all the evidence that the committee took. Karen Gillon was involved all that time and she and Andrew Mylne could answer any questions on that. The Procedures Committee in the Scottish Parliament has responsibility for bringing forward proposed changes to the standing orders and they can only be changed on a motion by our committee. It is a cross-party committee. At the moment it has seven members—three Labour members and one each from the Scottish Nationalists, the Conservatives, the Liberal Democrats and the Greens. It is worth noting that the report on the Sewel Convention was a unanimous report. The committee looked into the issue because there was a problem when the Scottish Parliament considered what we called then Sewel motions in that quite often the discussion was about the whole aspect of Sewel motions and independence and devolution and all that rather than the merits of the particular issue. This irritated people and so the committee had a look at it and I think the issue has now settled down and the committee has put into formal standing orders what were previously just use and wont procedures, so we think we have improved our end. Obviously, we are not in a position to make suggestions to yourselves but we did make some suggestions. I think it is fair to say that we feel the Scotland Office commented adversely on some things that were actually suggested to us by witnesses rather than being the conclusions of the committee, and I think there is perhaps more agreement than might appear from the Scotland Office memorandum. The particular point that has been made very strongly by various people is that we could improve the relationship between the two Parliaments as to how they deal with this legislation, that the two Governments talk to each other, but both of us are trying to keep a grip on legislation and on the activities of the Governments in our two Parliaments and we feel there is scope for improvement in that way and therefore, as I say, we greatly welcome your inquiry. I will ask Andrew Mylne to remind us about the status of the position in the Scottish Parliament at the moment.

Mr Mylne: What I would like to do very briefly is outline the procedures that we now have in the Scottish Parliament which have been introduced as a result of this report. As the Convener has already said, these procedures largely formalise a system that had existed and had been built up as a matter of practice over the previous six years, although it has introduced some new elements. The new procedure is basically aimed at increasing the transparency and clarity of the procedure while retaining flexibility where that is needed. In

---

[1] *The Sewel Convention* SP Paper 428 published 5 October 2005.

particular it aims to maximise the amount of time available for Scottish Parliament scrutiny. In outline, the procedure has two stages. The first involves the lodging of a memorandum by the Executive and the consideration of that memorandum by a lead committee of the Parliament. The second stage involves the lodging of a motion, also normally by the Executive, and a decision by the Parliament as a whole whether to pass that motion, and there is normally a week between these two stages. The rules go about this by defining at the outset what counts for our purposes as a "relevant Bill". This includes Bills the purpose of which is to alter the legislative competence of the Parliament or the executive competence of Scottish ministers as well as Bills making provision in devolved areas. The rules also define the point in the Westminster process at which our Scottish Parliament procedure is triggered. The aim here was to enable scrutiny to begin as early as possible while minimising the risk that the procedure would be triggered when something in Westminster was not going to proceed very far. With government Bills, which can be assumed to follow all the way through, the trigger is the introduction of the Bill. With a private Member's Bill the trigger is the Bill completing its first amending stage with the relevant provisions intact. With Bills that only become relevant Bills by virtue of amendments, the trigger is when those amendments are either lodged or tabled, depending on whether they are government amendments. In each case the new rule requires the Executive to provide a written memorandum within two weeks. It is worth mentioning that perhaps the main innovation in the new rules compared with the informal practice before is that the Executive is required to provide a memorandum regardless of whether it intends lodging a Sewel motion itself. It is also worth noting that at the second stage of the procedure the motion may be lodged by any MSP. In practice it has always been the Executive that has lodged motions but in principle it is open to any MSP to do so, and under the new rules, if a non-Executive member wishes to lodge a motion, then they must also lodge a memorandum in advance of doing so. The rules specify the information that the memorandum must contain. In particular this has to explain what sort of provision the Bill contains and give reasons why (or why not) the Executive thinks that the Parliament should give its consent. The memorandum will also usually contain a draft of the motion. That is basically what the rules provide. There are two other recommendations in the report that I would mention. One is a recommendation that the Executive should make an announcement after each Queen's Speech outlining which Bills in the Queen's Speech it proposes to be subject to this process, and that is to be done by letter, and also that there should be some changes in practice in the way motions are worded to make them more clear in terms of the extent of the consent that is being conferred. In terms of the procedure that we now operate those are the main points.

Q3 Mr MacDougall: In what you describe in paragraph 203 of your report as "a spirit of constructive inter-parliamentary dialogue", a spirit with which we on this committee would fully concur, you make some suggestion as to how we at Westminster might change our associated procedures. Could you briefly recap on how you would like us to change our procedures?

Mr Gorrie: Three of the main things that we suggested were, first of all, tagging of Bills in progress at Westminster to which the Sewel Convention would apply so that people at Westminster knew which Bills were involved. In our case we have a motion but the tagging would make it clearer to the people who are interested in that issue at Westminster. The second is the question of having explanatory notes for every Bill outlining whether the Bill triggers the Sewel Convention and in what ways it engages the convention; and, thirdly, a formal process for the Scottish Parliament, possibly through our Presiding Officer to the Speaker at Westminster, to notify Westminster when a "legislative consent motion", which is our new name for Sewel, has been passed—I can never remember it so I do not suppose other people will either—so that there will be contact from Parliament to Parliament rather than merely going through ministers. Obviously, the Governments have to co-operate but we think the Parliaments could co-operate better as well.

Q4 David Mundell: Thank you, Convener. I particularly want to ask you this, Donald, and Karen. At the moment the reality is that we have a Labour-led Scottish Executive and a Labour majority in Westminster. I am sure the test of the procedures has to be whether they would work if we had different political arrangements either in Scotland or in Westminster. I would be particularly interested in your views in relation to the process in that context because I have serious reservations as to whether it would work. One of the examples I take is the last Sewel motion I voted on as a Member of the Scottish Parliament which was in relation to the Gambling Bill, which was then very significantly changed to the Bill that ultimately appeared at the end of the Westminster process. I just do not see how that would have been possible had you had a government of a different persuasion from the lead role in Holyrood and therefore I would be very interested to see how you think these processes would work in that sort of environment.

Ms Gillon: That is one of the primary reasons, David, why we engaged in this process, that we all acknowledge that at some point in the future, although I probably take a different perspective from you as to how far in the future that might be, the two Governments in Scotland and in the UK will be of a different political colour, and we felt it was important that, rather than just have an ad hoc arrangement, we had a more formal arrangement between the two Parliaments and the two Governments as to how that would be taken forward. From our perspective things are now within our standing orders as a clear process by which the consent of the Scottish Parliament would be sought. I hope from our dialogue that a similar commitment will be made from the UK Government

through yourselves recognising the importance of a constructive dialogue. It is in nobody's interests, whatever government we are of, for the two Parliaments to be in conflict with each other at whatever point in the future. That is why from my own perspective it is important that Scottish Members of Parliament are aware of decisions taken by the Scottish Parliament and of any concerns raised through the committee report from the evidence that has been taken, so that they are informed as to what their colleagues here in Scotland feel. Obviously, that happens in an informal manner between MPs and MSPs if they are of the same party and within the same constituency, and it happens in other ways but I think there is a need for us to have a better dialogue between the two Parliaments as well as to how we communicate issues around legislative consent motions to our colleagues at Westminster.

Mr Gorrie: The point you raised about a Bill which changes quite materially as it goes through is a very important point, and I know Alex Johnstone has views on this which he might wish to contribute.

Mr Johnstone: One of the reasons why people like me spent a lot of time prior to 1997 campaigning against the Scottish Parliament was that we realised that there would be significant points of friction between a Scottish Government and one in Westminster. The Sewel Convention is one of these key areas which have worked to try and prevent that friction from taking place and consequently will always have a political dimension. I do not think it is our job or yours to try and block that political dimension but we can do a great deal to continue to smooth the path. The problem we have at the moment is that I believe much of the understanding which has gone on between Westminster and Edinburgh has happened at governmental level, and that works very well, of course, when we have the same party in government in the south as the main party in government here in Edinburgh. The fear we have is that that need not necessarily be the case for ever more, and for that reason I think there is a sound justification for trying to develop this procedure, to get it more rooted in the parliamentary relationship rather than in the governmental relationship so that we have some formal structure which will stand us in good stead should that future eventuality ever come about. One of the most difficult political aspects of this, and it is exploited politically by those who see advantage in it, is the point that was highlighted by David Mundell just a moment ago, and that is where legislation changes radically after consent has been given. The committee, in drafting its report, did not seek to impose a structure which would require re-assessment of legislation at a later stage. In fact, it is part of the relationship between the two Parliaments and must be based on trust, and consequently it is inappropriate that the Scottish Parliament or any committee of it should have any kind of say over legislation once it has been passed in Westminster, but at the same time it is very important that Westminster Members and Westminster Governments realise that that relationship of understanding is something that must be protected for our mutual political benefit. For that reason I think it is important that you look at ways in which we can broaden that consultative process to take in situations where radical changes are made to legislation during its passage through the House of Commons and the House of Lords. That appears not to be covered by the consent that was granted in the first instance, so I do not think I seek a formal arrangement; I seek a procedure by which the understanding can be extended and made more mutually beneficial as time goes on.

Q5 David Mundell: I do not want to put words in my former colleagues' mouths, but I think, Karen and Alex, and to an extent you, Donald, you are saying that the current arrangements ultimately are not sustainable; the current arrangements have been able to get things through the initial period of the Parliament but the current informality could not continue in a situation of Parliaments of different persuasion.

Mr Johnstone: It would certainly be my view that the current arrangements could not be sustained in a relationship between two executives which were mutually aggravated towards each other.

Mr Gorrie: With respect, the word should have been "previous" rather than "current" because we have got through the new standing orders and formalised the thing and probably we would accept that the reason the committee looked into the issue was they were dissatisfied with the informal arrangements. It is early days yet but the formal arrangements seem to be bedding down quite well, so I do not personally see why they should not work in the circumstances you have outlined.

Q6 Chairman: I appreciate that there should be a better arrangement between the two Governments and the two Parliaments. If there are any disagreements between the two Governments and the two Parliaments, what will be the mechanism to resolve those disputes or disagreements?

Mr Gorrie: I suppose the reading of the Scotland Act as to who does what. There has to be some discussion, presumably at government level. If they are trying to run the railways in a sensible way they try and negotiate as to whether the thing changes at Carlisle or Berwick or whatever, and that presumably should be mirrored in the Parliament, looking at the practicalities of the issue. If there is an issue that the Westminster Government is very keen to have hundreds of casinos or hundreds of nuclear power stations or whatever and the Scots do not, there is going to be a good political row about that but in the end it is a question of the interpretation of the Scotland Act, I think, but Karen may have a view.

Ms Gillon: I suppose ultimately it depends whether or not a future government of another political persuasion would carry on the convention from a Westminster perspective. From our context our standing orders are clear, that this is the process that we would have to follow. At Westminster, as I understand it, it is still a convention, that the

Government will seek the consent of the Scottish Parliament if it wishes to legislate in a devolved in area and the Parliament will then decide whether or not it will give its consent. I suppose the real friction comes if a future Conservative Government, for example, or even a Liberal Democrat Government, decides to do away with that convention and legislate at a whim, because of the majority, against the will of the Scottish Parliament. Ultimately we could then legislate in Scotland to change the law in Scotland and we would get into a game of parliamentary ping-pong, such as you sometimes have with the House of Lords, between the House of Commons and the Scottish Parliament. You would legislate, we would legislate, you would legislate, we would legislate, and ultimately we would get ourselves into a bit of a mess, I imagine. If the government of the day maintains the convention that it will consult with the Scottish Parliament and it will seek the consent of the Scottish Parliament to legislate in a devolved area, I think the other issues can be resolved meaningfully in dialogue between the Parliament and Scottish MPs. However, if the Government withdraws that provision then I think we are in for a serious difficulty but you are then undermining the will of the Scottish people and I think that is a serious decision for any government at Westminster to take.

Q7 Mr Walker: I suppose you could argue that the Scottish Parliament will truly come of age when it has a good old-fashioned ding-dong with the UK Parliament. It would be quite interesting to see what happens and the excitement and the passion and depth of feeling that that generates but, just taking Donald and Karen back, you said the relationship between MPs and MSPs leaves a great deal to be desired. Can you expand on that slightly? Where do the frictions occur between, say, these wonderful people round this table from Scotland—obviously not me because I am from Hertfordshire—and perhaps their MSP colleagues in similar seats or where they share boundaries?

Ms Gillon: Can I flag up that I never said that the relationship left a lot to be desired. I have a very productive relationship even with your colleague sitting next to you[2], who is one of my three MPs who cover the constituency that I represent. I think where communication breaks down is when we pass the legislative consent motion and you are not aware of the concerns that have been raised in the Scottish Parliament. I think that is a two-way process but we need to get better at passing on to our colleagues, either informally or formally, the concerns that have been raised and you guys need to get better at asking or searching out the information. I do not have any hesitation in saying to David X, Y or Z and I am sure he would not have any hesitation in saying it to me, and similarly with MPs of my own party, so I do not have a problem with that. It is not in the informal relationships; I think it is maybe in the formal relationships. We do not have a clear structure whereby the committee report of the Parliament, for example, can be passed to the House of Commons for information, not to bind you in any way, shape or form but as another document to give more information because they usually take evidence and they usually present that, weighing up all the different angles that are presented.

Mr Gorrie: I did say that I thought the relationship could be improved. Perhaps I should have clarified that. Certainly I would agree with a lot of what Karen has said, that it is not friction or animosity. I think there is a failure to communicate to a large extent and it is a two-way process. You can find that perfectly competent Scottish MPs are not really aware of how big an issue something is here and vice versa, and I think having better dialogue, either formally or informally, between the Scottish Parliament and Westminster would benefit both of us. I think the Sewel Convention is an example of that. The presence of Sewel on the Westminster radar would be invisible to most people It is not antagonism; it is just that perhaps we fail to get our message over in some respects and I think this is an opportunity, which is very welcome, to try and improve that.

Q8 Mr McGovern: In your opening remarks you touched briefly upon the Scotland Office responses. If you look at the submissions from both the Executive and the Scotland Office it would appear that the Scottish Executive are pretty supportive of the proposals, whereas the Scotland Office were much less so. In fact, it looks as though the Scotland Office did not really like them at all. Would you or your colleagues care to comment on that?

Mr Gorrie: I formed exactly the same impression, but our excellent committee Clerk said I had to read the Scotland Office paper more carefully. As I think I said, the Scotland Office paper comments on various issues but I think it does not focus on what our committee was actually proposing but rather on some of the evidence we had. Of the three points we made, one of them they are reasonably accepting of, are they not, the explanatory notes issue? There is the tagging, the explanatory notes and the formal process between the Parliament and Westminster, which I think it says it did not see much point in.[3] That is an issue for the two Parliaments. I think there is a slight implication in the government paper that if the two Governments are co-operating that is all that is really needed. Our argument is that there should be better co-operation between the two Parliaments and that does not in any way reduce the need for good co-operation between the Governments. I think the Scotland Office paper is less hostile than I thought it was at first reading and I think we can go ahead. The tagging is a specific issue which you may or may not support but it was just a

[2] David Mundell MP.

[3] *Note by Witness:* Of the three Procedures Committee recommendations, the one that the Scotland Office specifically resisted was in relation to the issue of tagging of Bills, rather than the issue of a formal mechanism for the Scottish Parliament to communicate its consent to Westminster: "The Government does not see any value in the Speaker certifying Bills . . . " (Scotland Office written evidence, para 29(a)).

suggestion of some way to bring to the attention of Scottish Members of Westminster especially that this Sewel issue is coming up.

Q9 Mr McGovern: On the same subject, as you know, at Westminster for several years now we have been changing and updating our practices and procedures. Do you think the Scotland Office response has suggested that Parliament is much more willing to change than Government is?
Mr Gorrie: Yes. I spend my life criticising governments. I think that all governments are capable of very great improvement and it is our job to try to improve them. The response from the Scotland Office, as I said, is not as hostile as it at first sight seems, and the Westminster Parliament has, since I departed from it, shown great enthusiasm for improving its ways and so I hope that as part of that you will work to improve the way that we deal with these legislative consent motions.
Ms Gillon: I think sometimes there is a view within Government that they will always be Government and therefore the current mechanisms suit them because they are the Government. Obviously, the Civil Service who advise the Government will always be the Civil Service regardless of who the Government of the day is and the mechanisms that they have, if they work for them at the moment, suit them and therefore they are less willing to change, and that is as true in our Parliament as it is, I am sure, in yours. My main desire for this, because I believe in the devolution settlement, was to ensure that we had a robust mechanism that could work whatever the hue of the Government of the day was and that is a Parliament to Parliament relationship, and the Executives have a part to play in that and the Civil Service have a part to play in that but I want a mechanism between our two Parliaments that allows the two Parliaments to work regardless of who the Government of the day is.
Mr Johnstone: That is a very important point and, although I come from a rather different position from where I am today, I also see it as extremely important for the political future of the United Kingdom that we find reasonable accommodations in this area, and that is why I agree with all the conclusions that Karen has just summed up.

Q10 Chairman: Convener, your committee proposed that the Scottish Parliament amendments should be considered at an extra stage at Westminster and the Scotland Office response was, "It would be extremely difficult in the management of business at Westminster to have a two stage system of consent, which would mean that the Government would not be in a position to amend the Bill if the second consent was withheld". What is your response to that?
Mr Gorrie: As I was not involved in the detailed consideration I will ask Andrew Mylne to give the factual position from the committee.
Mr Mylne: Chairman, I think you are referring to paragraph 29(e) in the Scotland Office paper. This is one of the points where the Scotland Office is responding, as I understand it, to points that were made in evidence to the Procedures Committee by some of our witnesses. This is not actually a response to a conclusion given by the committee itself, so I do not think that the committee would necessarily disagree with the point being made.
Ms Gillon: Our view when we considered this was that ultimately, if we give our consent to legislate and it is within a framework within that motion, we have to trust you as the MPs with an interest in Scotland to legislate in the best interests of Scotland. We do not have a monopoly on acting in the interests of Scotland. We send MPs to Westminster to do exactly that and we have to trust you to get on with the job and represent your constituents in the same way as we do. A positive relationship and dialogue is important to us but ultimately you are the guys with the job to legislate in the Westminster context and once we have passed over that consent it is up to you to make the amendments that you think are appropriate to Scotland.
Mr Gorrie: The Clerk has pointed out to me that in paragraph 201 of the report by the committee it says, "We do not therefore support the suggestion made by some witnesses of a second opportunity to consider the Westminster Bill . . .", so I think that clarifies the position and the Scotland Office paper is not relevant to what we were suggesting.

Q11 Mr Walker: When Alistair Darling appeared before us last year[4] he made the comment that most Scottish MPs did not know when a Bill had been the subject of a Sewel motion. How do you think that such a situation could be rectified? Would it be by Westminster introducing some of your suggestions?
Ms Gillon: We have made a number of suggestions that I think help in that process. I can phone up my MP and say, "By the way, we have passed a legislative consent motion on this issue and you should be aware of it and the issues within it", but ultimately MPs should be aware that there is a legislative consent provision within the Bill. With regard to how that is done, there are some helpful suggestions in the Scotland Office paper about putting it in territorial notes within the explanatory notes. I am not as familiar with the Westminster process as you are. I think there needs to be some way of communicating that consent better to MPs. It is ultimately for you to decide how best that is done but I think it would help us all if that were done more effectively than it is at the moment.

Q12 David Mundell: In the current arrangements for Wales, which are somewhat different, members of the National Assembly for Wales are able to take part in the proceedings of the Welsh Affairs Committee of the House of Commons, which is an example to some extent of joint working, although the framework of the Welsh Assembly is quite different. Could you anticipate that there would be a role for Scottish Parliamentarians at some aspect of Westminster, either the Scottish Affairs Committee or the Grand Committee or, as was

[4] Minutes of Evidence, Scotland Office Annual Report HC (2005–06) 580-I Q18.

being alluded to, some other separate procedure whereby perhaps MSPs or the Executive gave evidence at some part of the Bills select committee process?

Mr Gorrie: I think some arrangement would be possible. The Scotland Act, in my view wrongly, says that any Scottish Parliament committee can only consist of MSPs. We are not allowed to co-opt people or have joint committees and things like that but coming to give evidence or have informal gatherings I think would be helpful because it is a question of improving the conduct of these matters between the two Parliaments as opposed to between the two Governments. I am sure we might have matters in common to discuss, so I think any mechanism that there was would be helpful. As I say, there is a slight problem of the wording of the Scotland Act.

Q13 David Mundell: In the context of the Sewel motion or the legislative consent motion, what scope is there for that to be very specific, such as if you wanted a clause X to be inserted or a clause Y to be deleted? What scope are you giving for that to be a very specific consent, that you are consenting for Westminster to legislate but there are certain specifics that you would like to see incorporated? I am not convinced, Karen, that everybody would feel the same if we did have a different government, for natural political reasons, that they were just as willing to hand it over on a sort of *carte blanche* basis.

Ms Gillon: The motion can be as specific as you want it to be within the Scottish Parliament. The motions have become far more specific over the last two years. Rather than just a very bland statement about, "We give our consent to legislate in this Bill", motions have been far more specific. I do not think at the moment they would hand over consent willy-nilly to a Westminster Government to legislate on their behalf. We have to do that in the best interests of Scotland and where it is appropriate and I think that is what we do. I think that our procedures now are robust. It may be, however, that a future Parliament in Scotland which is not of a Unionist perspective but of a Nationalist perspective will not give consent to legislate in any way, shape or form to the UK Government because it is fundamentally opposed to that, whatever reason there may be for doing that, and that is something that ultimately we will have to deal with at the time. It will mean there is far more legislation, maybe of a much smaller nature, having to be done here in Scotland than can usefully and appropriately be done through a UK Bill. That is a decision that the Parliament will ultimately have to take and will have to pay the political price to the public for those decisions as well. I cannot talk about this now when I am not fully aware of what might happen. All I can do from the procedures point of view within the Scottish Parliament is put in robust procedures that are clear and transparent so that everybody knows the rules under which they are operating, everyone knows what they are consenting to or not consenting to, that then is either passed or not passed by the Scottish Parliament and then I trust my colleagues at Westminster, whatever party they are of, to act in the best interests of Scotland. Ultimately, if you do not do that and they amend a Bill outwith all recognition, the Scottish Parliament can legislate anyway in a devolved area. If you were to pass a Sewel motion or a legislative consent motion and the Bill that turned up at the end of it was transformed out of all recognition, not minor, not small but completely changing the context in which the consent was given, there is nothing that prevents us from legislating as a Parliament on those particular devolved provisions. I just do not think it is in anybody's interests for us to get into that game and so I want us to get the procedures in Scotland right for us and I hope that through these dialogues and discussions you can put in a more robust framework at Westminster to ensure that at your end there are similar robust mechanisms by which consent can be given and sought in the future.[5]

Q14 David Mundell: What about the point of MSPs having some role in that process? Do you think that is a viable option?

Ms Gillon: Forgive me for not knowing how you take evidence at a committee, but if I am sitting on a committee in the Scottish Parliament and I think there is something to be gained from inviting the Scottish Affairs Select Committee or another committee at Westminster to give evidence as part of our consideration of a Bill, then I will not hesitate to recommend that. We have had ministers come to give evidence and we had in our inquiry MPs from the UK Parliament come to give evidence. If within the passage of a UK Bill the relevant committee thinks it is appropriate to invite somebody from the Scottish Parliament, say, the Convener of the Railway Committee, to come and give evidence, I am sure that the conveners of our parliamentary committees would be only too willing to do that. If we could have constructive dialogue between our two Parliaments and between ourselves and yourselves then whatever people want to do a mechanism will be found to do it. I do not think we need a formal arrangement where we sit on the Scottish Affairs Select Committee or we set up another committee where we are jointly on it. I do not think our relationship is at the stage where we need that. We are both Parliaments and we are both able to deal with each other effectively, and as long as we have effective dialogue and communication we can move forward.

Mr Johnstone: It must be based on trust rather than structure.

Q15 Mr Walker: Can you give any examples of where a Bill has caused you concern, where there has been some friction between your agenda and perhaps the UK Parliament's agenda, but which may not have bubbled forward?

Ms Gillon: I will let my colleagues from the UK Opposition answer.

[5] See Ev 10.

Mr Gorrie: There was a political issue here about civil partnerships, some issue like that, was there not? There was a UK Bill and it was put through on a Sewel motion. Quite a lot of people, regardless of party, felt that this was such an important issue that the Scots should separately legislate on it rather than having a Sewel motion, so there are occasions like that, but very often, when you examine a Sewel motion, Westminster is giving greater powers to Scottish ministers (I mean ministers up here) and to the Parliament. A lot of Sewel Bills are not the wicked English invading Scotland. It is a generous Westminster giving greater powers to the Scottish Parliament. There are quite a lot of Sewel motions of that order.

Q16 Mr Walker: But how did you convey your concerns and resolve that issue over that specific piece of legislation?
Mr Gorrie: I do not think we did convey the concern in that it was by a majority in the end in our Parliament to treat it through a Sewel motion, and there were one or two others. I do not have a great memory for these things. There have been two or three issues that might have been so important that we should not go down the Sewel route but there have not been many occasions I can think of when there was concern about the substance of the thing, that the policy behind the Sewel motion was misguided.
Ms Gillon: You would probably get a good old ding-dong between members of the Procedures Committee on civil partnerships and whether or not it is appropriate to have a Sewel motion. I took a different perspective about that. I think there were significant reserved responsibilities within the Civil Partnerships Bill that made it entirely the right mechanism to move forward on a UK basis. We are not good at conveying our concerns as a Parliament. I think if the Executive have concerns or the Executive parties have concerns then they will be conveyed to the relevant government minister and action taken. One of the issues was around, if I remember rightly, the Terrorism Bill where we amended the Sewel motion before it was passed in the Parliament to take out a particular clause, a particular area of consent around terrorism, which ran contrary to our Land Reform Bill. I may be giving you absolutely duff information but we did amend it. It was the Serious and Organised Crime Bill. We had to amend our motion to take out a line where there was not a majority of the Parliament.. If there were serious concerns or significant enough concerns within the Scottish Parliament about the provision, there would not be a majority in favour of voting for it. We still live in a government of majority so ultimately those concerns would be passed on, and I am sure, David, your colleagues would pass on their concerns to you as Shadow Scottish Secretary about issues from their particular political perspective, but ultimately the Governments are very good at sharing concerns. The Parliaments are perhaps not as good at sharing concerns and any kind of dialogue that we can develop will help to pass on those concerns to Scottish MPs. I know ultimately Scottish MPs do not always sit on the relevant subject committee. That is sometimes an issue: how do you then pass on the concerns of Scotland to the MPs from your party who are sitting on the relevant subject committees? You have to have the information in time for you to have the influence on your colleagues within the relevant subject committees as well.

Q17 Mr McGovern: To digress slightly, my colleague, who represents an English constituency, referred to a Scottish newspaper yesterday as "*The Scotsman*, or whatever you call it". On the front of that newspaper today the main article refers to what I think is called the Steel Report, which would suggest that if it was followed through the only thing that was done from Westminster would be the Child Support Agency. Could I ask your Convener in particular if he has a view on that?
Mr Gorrie: I have not yet read the report, which was a report within the Liberal Democrat Party arrangements. It would be correct to say that a lot of people in the Scottish Parliament sometimes get frustrated and feel that there could be some increase in or clarification of the powers of the Scottish Parliament, setting aside entirely the Nationalists who wish independence and some of the other parties do as well. The people who are in favour of the devolution settlement think that, while the Scotland Act was a very good first shot at the subject, it has thrown up some anomalies that need to be corrected. The organisation of taxation, for example, is a frequent subject of consideration, so, without knowledge of what is in this particular report, I think there would be quite strong cross-party support for re-examining the exact way the devolution settlement is working out, but obviously each party has its own view. The Liberal Party has for many years had a view of a more federal structure for Britain and it may be that this report is mirroring that. I do not know what my colleagues think. I think you could get very strong, almost unanimous, support for specific measures, relatively minor perhaps in some cases, to improve the operation of the devolution settlement.

Q18 Mr MacDougall: There appears to be an inconsistency in terms of the principles of devolution when we consider the appropriate level. You could argue on the one hand about the comment that my colleague has made in relation to *The Scotsman* report and the underlying thoughts behind that, concentration of more power for the Scottish Parliament, but when you talk to councillors there is a strong belief that the Scottish Parliament is taking more power from the local authorities. Is there not almost an argument developing there that all power comes through the Scottish Parliament? They are all for the best interests but their actions at the end of the day will produce that outcome if we do not have very careful consideration of what appears to be a better practice of consultation but does not really consider the eventual outcome of where that takes

us, and therefore the whole principles of democracy and devolution and so on could be more damaged than improved?

Mr Gorrie: Like you, if I remember correctly, I come from a local government background and I do think there is a tendency, both at Westminster and at Edinburgh, for the Government to suck up powers from local government and I would certainly support giving more authority to local government and even within a council area having more democracy. One of the things in my view that the English do better than we do is that in many areas they have historically very strong parish councils that can raise taxation and do things whereas our community councils are much weaker. It depends what view you take. It may be that in 20 years' time everything will be decided by the European Parliament and both Westminster and ourselves can go home. There is a tendency to move the powers to the centre, so you have a good point: it would be quite wrong for the Scottish Parliament to try to become the power base of everything in Scotland and those of us who are not for independence feel there should be a fair division of powers between Westminster and Edinburgh, but I think there could be some improvement in the details of the way it is done. If you take Europe, it may be that the Scottish Parliament could improve its relationship with the European Parliament and the European Commission and so on, which we are trying to do, but without subverting the United Kingdom position we could sometimes have more influence. It is a very multi-level system of government that we have and we have to co-operate as well as we can and try and work out the best level of decision being made. I remember many years ago speaking at a meeting in Linlithgow and saying that Linlithgow could not have its own foreign policy, and a chap said, "Why not?". I did not really have an answer.

Ms Gillon: Mine is a personal view. I am not speaking on behalf of my party. Coming as I do from the Borders and representing a Labour constituency, I doubt that there is much in the Steel report that I will fundamentally agree with. I think there may be some tinkering at the edges but the devolution settlement is a new one and I think it still needs time to bed in. I am not in favour of fundamentally ripping up the Scotland Act at this point in time. I think we need to get on with the relationships that we have, the powers that we have and use them in the best interests of the people that we equally represent. It does nobody any good if, six years down the line, we have a fundamental review of the Scotland Act. I do not think we are there yet. I think there are some changes at the edges but I do not think we are there on a fundamental review.

Q19 Ms Clark: Picking up on Karen's point about trying to make these relationships work as well as they possibly can, has the committee considered what further formal steps can be taken? We have obviously looked at your report with interest and the Scottish Members of Parliament and the Scottish Affairs Select Committee want to do what we can to make sure that Westminster reacts to ensure that the relationship is improved as much as it possibly can be. Maybe you could outline what formal steps you have already taken and what further steps you think might be taken, perhaps by writing to Mr Speaker or the Lord Chancellor at Westminster, to try and ensure that something comes from all of this and that we see real improvements.

Ms Gillon: There are a couple of things. One of our recommendations is that as a Parliament the Presiding Officer would send routinely the legislative consent motion to Mr Speaker and to the Lord Chancellor, and it is for them to determine what they do with it and I suppose ultimately it is for you to offer advice to them as to what you think they should do with it, how it can best be disseminated to Members. We recommend that it is sent to them formally so that it is communicated from Parliament to Parliament rather than just from Executive to Executive. That is something that we will be taking forward and I hope that you will be able to look at how you can influence Mr Speaker as to how he then disseminates that to Members more effectively. The Scotland Office have picked up on the issue of territorial notes within the explanatory notes, and I think that is important. The issue of dialogue between the two Parliaments is one that we need to continue to improve. I would be interested to know from you at a later date if you would find it useful for our committee reports to be disseminated to the Scottish Affairs Select Committee routinely rather than to a relevant subject committee so that you are aware of the issues. Whatever comes out of this I think will be positive and I think this kind of dialogue is positive, the opportunity for us to converse with each other formally, and I hope that we can continue to have a positive dialogue between the two Parliaments, between your committee and the relevant committees within the Parliament. Certainly from our perspective I know that if there are issues we want to raise we will not be shy in doing it. People are the most important part in all of this. We can have all the processes in the world that we like, all the standing orders that we like, but the dialogue between individuals will be what makes the processes work, so this is a very helpful move forward.

Q20 David Mundell: I want to ask about the issue of timetabling, because again my own experience in Parliament, having taken part in the longest ever committee meeting of the Transport Committee when the railway powers were transferred, there was an element of the Parliament at very short notice having to fit in with the Westminster Parliament, which again on this occasion people were willing to do. What are the arrangements in relation to timetabling Scottish Parliament activity relative to Westminster activity, and where does that sit between the Executive and the Parliament, because again that is relying very heavily on individual co-operation and I wonder what dialogue and processes exist to make that happen?

Ms Gillon: Andrew will be able to outline the time frames that we would normally expect, but we all understand that towards the end of a government's

term of office there is legislation that they are seeking to get through before their term of office comes to an end. There are things that we are trying to get through in the next 18 months because we have elections in May. There were particular issues at the end of the last Government's session where there was not a flood but a fairly regular stream of Sewel motions because there was a lot of legislation backed up and trying to get through the process. We all understand that that has happened. What we have done is put in time frames that we would normally expect, so although we understand that there will be occasions where that is not going to happen we now have time frames that allow us to do our work effectively.

Mr Mylne: When the committee was engaged in this work we were very conscious that the context in which the Scottish Parliament has to conduct this sort of work has a time frame which is largely set by external factors, namely, what is happening at Westminster, and this adds a significant set of additional challenges in devising procedures that would work effectively within the Parliament. The new rules that we have put in place, which I outlined at the beginning, say very little about timescale as such, simply because the context is so variable, but what they are aiming to do is maximise whatever time is available in any particular instance, in particular by ensuring that Parliament is formally notified of a relevant development at Westminster at the earliest possible stage. The aim, in other words, is to ensure that Parliament's scrutiny process can begin very early in the Westminster process. When it needs to be concluded by is set as part of the terms of the Sewel Convention itself, as currently agreed between the Executive and the UK Government, and that is at the last amending stage in the first House of Westminster, so for a Bill introduced in the Commons that will be the report stage in the Commons. My understanding is that with Bills going through the normal process in Westminster there is around four months between introduction and that last amending stage in the first House, so if the Scottish Parliament gets the memorandum introduced to trigger the process within the two weeks of introduction that should allow plenty of time for reasonable process of committee scrutiny, including, perhaps, some evidence taking from witnesses and so on, the production of a report and the scheduling of a debate in the chamber with reasonable notice if you want to read the report. All that should be possible but it is early days with this new procedure and we are not yet in a position to say how much time is actually available. Ultimately the timetabling of a debate in the chamber, for example, is up to the Parliamentary Bureau through the political channels and in the normal way for Scottish Parliament business.

Mr Gorrie: One issue is the way that Westminster deals with the Bills, that there is not committee consultation about the Bill, but it would be helpful if we could devise perhaps some informal system whereby those MPs interested in the issue and MSPs could discuss it together early enough to have some influence on the outcome of the legislation through some sort of informal joint meetings because once a thing is into a committee at Westminster there is not an opportunity for consultation.

Q21 Chairman: Convener, do you think that since the establishment of the Scottish Parliament the role of the UK Government has been fair, responsible and supportive of the Scottish Parliament?

Mr Gorrie: Yes, I think so. We have our party political disagreements. We have to accept the fact that Scotland is quite small in population, though not in area, and quite a small part of the United Kingdom and therefore a lot of people working hard at Westminster do not give very much thought to Scotland. I think we live with that but I would have thought that the government machine works reasonably well with regard to Scotland at Westminster and I do not think we have any complaints on that score as opposed to particular political battles on political issues.

Ms Gillon: There are also those who would say that, while civil partnerships is probably one of the most political decisions that was taken, the actual mechanism and communication between the Minister at the time, who was a Scotland Office Minister, Anne McGuire, and the relevant parliamentary committee, was a very positive relationship. Where there is a relevant Scotland Office minister it does enhance the dialogue and debate and communication between the two Parliaments. With civil partnerships I think it was a very productive relationship. There was good dialogue, regular dialogue between the committee and the minister, making changes where they were required, keeping the committee up to date and I think when that happens it is very productive.

Q22 Chairman: Convener, I believe that you have a Procedures Committee meeting very shortly and so could I thank you and your colleagues for your attendance. Before I declare the meeting closed would you like to say anything in conclusion, perhaps on areas which we have not covered during our questioning?

Mr Gorrie: We very much welcome the meeting and hope that there may be other, perhaps not identical, types of meetings and that we can work together to improve the system under which Scotland is governed at Westminster and here. I think there is good opportunity for improving the way we do things.

Chairman: I want to put on the record that we were going to take evidence from Margaret Curran after the break but unfortunately, as she has to represent the First Minister at a funeral service in Glasgow, she is unable to be here, so we will be taking evidence from her next week.[6]

[6] See Ev 13.

Memorandum submitted by the Clerk of the Procedures Committee, Scottish Parliament

THE SEWEL CONVENTION: THE WESTMINSTER PERSPECTIVE

Following your Committee's meeting in Edinburgh on 7 March at which three members of the Procedures Committee and I gave evidence, I am writing to offer additional written evidence on one of the issues your Committee members raised—namely the question of what happens if, after the Scottish Parliament has given its consent by means of a resolution, the Westminster Bill is then substantially amended during its passage.

Part of the answer (as Karen Gillon said in her reply to Question 13) is that the Parliament always has the option of passing its own legislation to repeal or amend the legislation passed by Westminster (although admittedly this only applies where the provisions in the Westminster Bill for which consent is given are provisions dealing with a devolved matter, and not in relation to provisions altering the legislative competence of the Parliament or the executive competence of Scottish Ministers).

However, there is another factor that wasn't, perhaps, brought out as clearly in our evidence as it might have been. Under the new standing orders that now govern how the Parliament deals with these matters, there are three separate circumstances in which the Executive is required to lodge a "legislative consent memorandum". In my answer to Question 2, I briefly outlined what these three circumstances are:

> "With government Bills, which can be assumed to follow all the way through, the trigger is the introduction of the Bill. With a private Member's Bill the trigger is the Bill completing its first amending stage with the relevant provisions intact. With Bills that only become relevant Bills by virtue of amendments, the trigger is when those amendments are either lodged or tabled, depending on whether they are government amendments".

This brief description of the last of these circumstances, however, was incomplete in one respect. To quote the relevant part of the Rule, a memorandum is required ". . . in relation to any Bill that, by virtue of amendments:

(i) agreed to; or

(ii) tabled by a Minister of the Crown or published with the name of a Minister of the Crown in support,

in either House, makes (or would make) relevant provision for the first time or beyond the limits of any consent previously given by the Parliament . . ." (Rule 9B.3.1(c)—emphasis added).

By virtue of this wording, the Parliament's own scrutiny procedure may be triggered more than once during the passage of a particular Westminster Bill. Whether this happens will depend on two separate factors—the terms in which the original "legislative consent resolution" is expressed, and the extent to which the relevant provisions of the Bill are then amended. So if the resolution is in very broad terms, it effectively gives Westminster authority to amend the relevant provision to whatever extent it chooses without the Parliament's consent coming into question. But if the resolution is more narrowly framed, and if amendments to the relevant provisions that would alter them substantially are tabled or agreed to, the Executive could be required to lodge a fresh memorandum bringing this to the Parliament's attention. It would then be for the Parliament to decide whether to pass a second resolution extending its consent to cover the amendments—or to withhold that further consent, forcing the Government (under the terms of the Convention), to withdraw or seek to overturn the amendments in question.

I trust that this clarification is of assistance to your Committee in its deliberations.

Andrew Mylne
Clerk to the Committee

21 March 2006

Tuesday 14 March 2006

Members present:

Mr Mohammed Sarwar, in the Chair

Danny Alexander
Gordon Banks
David Mundell
Mr Jim McGovern
Mr Charles Walker

Memorandum submitted by the Scottish Executive

BACKGROUND

1. The "Sewel Convention"—*that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament*—is an essential feature of the devolution settlement, being reflected in the Memorandum of Understanding between the UK Government and the Devolved Administrations, as well as in the UK Government's Devolution Guidance Note (DGN) 10. Without some understanding or commitment along these lines, it is difficult to see how any system of devolution could successfully operate within a constitutional framework incorporating a state Parliament which remains sovereign. The Convention makes it possible for that to happen.

2. With the experience of over six years of devolved government on which to draw, this seems an appropriate point for reviewing the practical operation of the Convention. In that light the Scottish Parliament's Procedures Committee recently undertook an inquiry into the operation of the Convention; its report led to a number of changes to the way in which the Scottish Parliament considers giving consent. The report also made a number of observations about matters of more direct relevance to Westminster. Against this background, the Scottish Executive welcomes the decision of the Scottish Affairs Committee to hold this inquiry and specifically to consider the outcome of the Scottish Parliament's own inquiry and innovations.

3. Fundamentally, the Executive's view—which we were pleased to see was shared by many of the parties, academics and commentators who submitted evidence to the Procedures Committee's inquiry—is that as a matter of principle the Sewel Convention has provided an important constitutional safeguard which reflects and respects the devolution settlement and operates to the benefit of the people of Scotland. The Executive also recognises the need to ensure that the Convention operates effectively in practice and has endeavoured to co-operate with the Scottish Parliament to this end.

4. The way in which the Scottish Parliament deals with proposals for consent under the Convention has evolved over time, most recently and significantly since the Procedures Committee inquiry last year. While a key point has always been a decision by the Parliament on a motion—generally known colloquially as a "Sewel Motion" but now, in the wake of recent reforms, formally referred to in the Standing Orders of the Parliament as a "Legislative Consent Motion"—the associated process has developed. We hope it will be helpful to explain the new procedures in a little detail and to outline the processes within the Scottish Executive that take place before Legislative Consent Motions reach the Parliament.

POLICY AGREEMENT

5. There has been a variety of circumstances in which the Scottish Ministers have invited the Scottish Parliament to approve a motion consenting to legislation at Westminster, including:

— where it would be more effective to legislate in a single piece of legislation in order to put in place a single UK-wide or GB-wide statutory regime;

— where a complex inter-relationship between reserved and devolved matters can most effectively and efficiently be dealt with in a single piece of legislation;

— where the UK Parliament is considering legislation for England and Wales which could beneficially also be brought into effect in Scotland, but sufficient Parliamentary time is not readily available at Holyrood without setting aside our own legislative plans and priorities;

— where the provisions in question, although they relate to devolved matters, are minor or technical and entirely uncontroversial; and

— where the powers of the Scottish Parliament and/or Scottish Ministers would be enhanced in a manner that would be outwith the competence of the Scottish Parliament—for example, conferring powers on the Scottish Ministers in relation to reserved matters.

6. It is important to underscore that the Convention has not been used to consent to the transfer of any part of the Scottish Parliament's legislative competence back to Westminster. As regards devolved matters, the Scottish Parliament has retained the right to legislate on the same issue itself on another occasion if it wishes to do so, and to amend or repeal provisions on devolved matters which have been enacted at Westminster. There is, therefore, no question of the Convention operating in a way which somehow undermines the devolution settlement. On the contrary, it allows Scotland to have the best of both legislative worlds by enabling useful provisions to be enacted at Westminster, subject to the consent of the Scottish Parliament, when a Scottish legislative vehicle is feasible.

7. When there is a suggestion—from the UK Government or the Scottish Executive—that there may be a case for including relevant provisions in a UK Bill (ie provisions which, under the Convention, would require the consent of the Scottish Parliament), generally the merits and alternative options are initially discussed between officials. As well as the relevant policy officials, discussions will usually also involve those in the Constitutional Policy Unit of the Scottish Executive, the Constitutional Branch of the Scotland Office and the Office of the Solicitor to the Advocate General ("OSAG").

8. From the Executive's side, once officials have explored the options, advice will be put to the relevant portfolio Ministers. If the portfolio Ministers conclude that the appropriate option is to seek the consent of the Scottish Parliament for legislation at Westminster, they will seek collective Ministerial agreement—generally from the Cabinet Sub-Committee on Legislation ("CSCL")—to the policy and to legislating in a UK Bill subject to the Sewel Convention. Authorisation from CSCL is the Executive's commitment to proposing a Legislative Consent Motion in the Scottish Parliament in due course, and is communicated to the UK Government.

New Scottish Parliament Procedures

9. The Scottish Parliament's procedures for dealing with proposals under the Sewel Convention are now largely enshrined in its Standing Orders. This formalises the previously informal system of dealing with Sewel Motions. The Standing Orders now refer to these Motions as "Legislative Consent Motions" and the explanatory memorandums which are now required (these were previously provided by the Executive on a voluntary basis) are to be called "Legislative Consent Memorandums".

10. Under the new Standing Orders, the Scottish Executive must provide the Scottish Parliament with a Memorandum on every Bill introduced at Westminster which contains relevant provisions. This Memorandum must be provided within two weeks of the Bill's introduction. This rule applies whether or not the Executive intends to lodge a Legislative Consent Motion on the Bill in question. Discussions between the UK Government and the Scottish Executive should take place well in advance of a Bill's introduction which means that it should be possible, in most cases, to achieve this target.

11. Once the Memorandum has been lodged in the Scottish Parliament, it will be referred to the Business Bureau who will allocate it to a lead Committee for consideration and to any secondary Committees deemed appropriate. Where the relevant provisions will confer on the Scottish Ministers powers to make subordinate legislation, the Memorandum will also be referred to the Subordinate Legislation Committee ("SLC"). The SLC and any secondary Committee(s) may choose to make a report to the lead Committee. The lead Committee will then consider the issue and make a report to the Parliament.

12. Once the lead Committee has reported, five working days must elapse before the Legislative Consent Motion may be lodged in the Parliament, to give Members time to consider the report. The Parliament will then vote on the Motion in the Chamber. The vote will, on occasion, be preceded by a debate.

13. The Procedures Committee also made recommendations, that were not subsequently included in the Standing Orders, but which the Executive was happy to accept. For example, the Committee recommended that, wherever possible, the Executive should write to the Presiding Officer and all MSPs following the Queen's Speech to outline which of the Bills in the UK Government's legislative programme are likely to result in a Legislative Consent Motion coming forward from the Executive. However, it was acknowledged that it would not always be clear at the time of the Queen's Speech which Bills will give rise to a Legislative Consent Motion as much of the detailed policy is often worked out at a later stage. On such Bills, the Executive agreed that, once the position had become clear, the relevant Executive Minister would write to the relevant Committee convener informing him/her of the intention to bring forward a Legislative Consent Motion.

14. It is clear from these new procedures that quite some lead in time is required to ensure that all the procedures can be followed correctly and to ensure that the Scottish Parliament has sufficient time and information to come to an informed decision on the issues before it.

Westminster Procedures

15. The Scottish Executive and the UK Government already work closely together to ensure the smooth running of the Sewel Convention. This includes day-to-day discussions on particular Bills and particular policies but also includes educational events, such as the successful seminars held following the last two Queen's Speeches. These events were hosted by the Scotland Office and included input from Scottish

Executive and Scotland Office Ministers and officials. They were extremely well attended and were well received by the Whitehall Bill Teams and Scottish Executive officials represented. Scottish Executive and Scotland Office officials regularly give talks at Bill Team and other training events to stress the importance of considering devolution issues early in policy development and Ministers talk regularly to each other about these issues.

16. The Scottish Executive was pleased to note that one of the terms of reference of the Scottish Affairs Committee's inquiry would be to consider the possible changes to Westminster procedures promulgated by the Procedures Committee of the Scottish Parliament in its recent report on the operation of the Sewel Convention.

17. The Procedures Committee made a number of suggestions for the approach that might be taken at Westminster:

- It suggested that Bills at Westminster that were subject to the Sewel Convention might be tagged in some way so that MPs (particularly Scottish MPs) would be aware that the Bill contained provisions subject to the Sewel Convention.
- It proposed that Explanatory Notes to a Bill might contain a standard section on the Sewel Convention which outlined which particular clauses of the Bill would be subject to the consent of the Scottish Parliament. It was also suggested that the Explanatory Notes that were reprinted for the Bill beginning its progress in the Second House could include details of the Scottish Parliament's resolution agreeing or otherwise to the provisions subject to the Sewel Convention.
- It proposed a formal mechanism, perhaps between the Presiding Officer and the Speaker of the House of Commons and the Lord Chancellor, to notify the UK Parliament of the decision of the Scottish Parliament when it voted on a Legislative Consent Motion.

The Scottish Executive supports the aims of these suggestions, while at the same time fully appreciating that the feasibility and practical value of introducing these (or other) procedural innovations at Westminster is a matter for the UK Parliament and UK Government. Indeed, it is with that in mind that the Executive particularly welcomes the fact and the timing of the Scottish Affairs Committee's current inquiry.

Conclusion

18. The effect of the Sewel Convention is twofold. It enshrines what amounts to a "self-denying ordinance" that the sovereign Westminster Parliament will not normally legislate with regard to devolved matters in Scotland which are the province of the Scottish Parliament. However, at the same time it has the flexibility to provide a mechanism which enables provisions on relevant matters to be included in Westminster Bills with the agreement of both administrations and both Parliaments.

19. In the Executive's view the Convention is a useful and important aspect of the devolution settlement which operates to the benefit of the people of Scotland. In effect, it allows Scotland to have the best of both legislative worlds at Westminster and at Holyrood: without it, the stark choice would be to do without worthwhile legislation or to put aside our own legislative priorities to make room for a separate Scottish Bill. But it is important to keep the scope and the scale of the Convention in perspective. Legislative Consent Motions almost invariably relate only to limited provisions in a Westminster Bill, and are subject to the express agreement of the Scottish Parliament in plenary, after proper scrutiny by the relevant Committee of the Parliament. The operation of the Convention is therefore open and transparent. It fully reflects the Executive's accountability to Parliament and the Parliament's legislative competence in respect of devolved matters.

13 January 2006

Witnesses: **Ms Margaret Curran** MSP, Minister for Parliamentary Business, **Mr Murray Sinclair,** Head, Constitution and Parliamentary Secretariat, and **Mr Paul Allen,** Head, Constitutional Policy Unit, the Scottish Executive, gave evidence.

Q23 Chairman: Good afternoon, Minister. Welcome to you and your officials to our meeting today. We are very pleased that you have been able to attend to give evidence to our inquiry on *The Sewel Convention, the Westminster perspective*. Would you like to make an opening statement before we ask questions?

Ms Curran: Thank you very much, Chair. This is my first attendance at a House of Commons select committee, and hopefully not my last. I am very grateful to be here. Thank you for agreeing to postponement of my presentation visit last week in Edinburgh; I very much appreciate you assisting me with that. I am Margaret Curran, Minister for Parliamentary Business, and on my left is Murray Sinclair from the Scottish Executive, and on my right Paul Allen from the Scottish Executive. Can I repeat how pleased we are to be here, particularly as you have chosen to hold an inquiry into the Sewel Convention. I am not completely unique, but I am one of the few who are very interested in the Sewel Convention, and it has given me great cause for interest in my time as a minister. Since the beginning of devolution the Convention has been a very important feature of the settlement, and a fairly important part of what has been a fairly smooth

operation of devolution in practice. We recognise that while the UK Parliament remains sovereign, the Government recognises the right of the Scottish Parliament to make decisions on matters within its own competence so the Government has agreed not to legislate on devolved matters without the consent of the Scottish Parliament. This agreement has helped to underpin the devolution settlement and support the role of the Scottish Parliament and make devolution live and breathe effectively. As you know, I think well, our own Procedures Committee in the Scottish Parliament completed its own inquiry into the Convention, and I know that you were speaking to representatives of that committee last week. I genuinely appreciate the interest you have taken in the matters in the Scottish Parliament, because that shared understanding helps us all. It is my own experience that the Executive and the UK Government have worked well together both at official level and ministerial level to make the Convention work. Through that joint effort we have ensured that the Convention has been respected. We had one breakage of it, and it was inadvertent and very swiftly dealt with, so that is not bad in all this period of time, and that is evidence that we are making this commitment work. It has ensured the devolution settlement and its practices are respected both sides of the border. It gives the Scottish Parliament the right to consider and decide before legislation is passed in devolved areas in the sure knowledge that that will be abided by, and it will ensure that our parliament takes responsibility for its own decisions. At some point, I would like to lay out this afternoon the benefits of the Sewel Convention, and clarify some misunderstanding there has been broadly about its usage because I think it has been a benefit to Scotland and is evidence of the strong partnership we have now. I will do that more in questioning. We are developing the Sewel Convention and our procedures and they have grown and will become more effective, and we would happily answer any questions you have got. We welcome the fact that this Parliament is taking such an interest in the Sewel Convention because it is very important that the parliament appreciates the kinds of issues we are dealing with.

Q24 Chairman: What channels of communication between the two parliaments and the two governments that exist now, and perhaps you can indicate who is your point of contact in the British Government?

Ms Curran: There are various levels at which you have to deal with that. At one level, obviously the Executive speaks to the British Government on a wide variety of fronts, usually on the policy front, for example the Minister for Justice is in close contact with the Home Office over developing policies, and there are communications at the official and political level. I have responsibility for the overall programme and if possible when the Queen's Speech is announced in the UK Parliament I try to make the Scottish Parliament aware publicly of the likely implications for ourselves in that. That would be a means of doing that as well. It is ongoing communication, as issues emerge that we might wish to take action on, or not, as the case might be.

Q25 Chairman: Please can you clarify where the initiative for the Sewel motions has come from: is it from the Government or the Executive?

Ms Curran: It could be both perhaps in some ways. Again, the kind of line I have taken is as early intervention as possible. The earlier we know things the better. It could be that legislation has been proposed at Westminster level and officials have been in discussions about that. Sometimes, as I say, it could be more at the political level. Most of the Sewels that have been passed, the vast majority of them, are over technical matters and minor matters, as we would see it, so sometimes it can be later on in the process.

Q26 Chairman: As the Executive's Minister for Parliamentary Business, would you automatically be the First Scottish Minister HM Government contacted, if proposed legislation would affect Scotland, or would it depend entirely on which of the Executive's departments had responsibility for the matter?

Ms Curran: Normally it would be by portfolio, so it would be the subjects minister, the portfolio minister, and their department. They would probably be the first to contact, but I would have an over-arching interest in it. You may be aware that we have a cabinet sub-committee on legislation, and I take the lead role in that; so before it could be finally signed off it would need to come through my department.

Q27 Chairman: If the UK Government wanted to contact any ministry, would they come through you or write . . .

Ms Curran: Not necessarily. They can do it department to department.

Q28 Danny Alexander: I am interested in how you keep the Westminster Parliament and most of the Scottish Parliament up to date with legislation, particularly legislation where a Sewel Convention might apply.

Ms Curran: I suppose my interest lies—primarily my responsibilities are to my own parliament, so I am perhaps a bit more knowledgeable about that. I think we have made quite a lot of progress on that because I have been very keen in the time I have been in this job to make sure that the Scottish Parliament is well informed about it, largely because I think we have been misinformed, and always think somehow Sewel Convention is about passing power back to Westminster, and if you look at the details in fact that is not the case. You have to clarify that. It is also about the democratic role of the parliament and the accountability of the parliament in passing good legislation. The key of a Sewel motion is that it needs the consent of the Scottish Parliament, which is what part of the name change is about, so that we emphasise consent, and it needs the consent of the parliament. First of all, we have to have a

memorandum that goes to the committee, which is fuller than it has ever been before. We have to give adequate time for the committee to decide whether to take evidence and to make a recommendation about it, and then we have to make sure the parliament has adequate time itself to think through the implications of it; and then it has to go to a vote in the parliament. So we put quite a lot of effort into ensuring that parliament is well briefed, or in Sewel Conventions that the Executive would recommend.

Q29 Danny Alexander: Do you then keep the parliament up to date with the progress of any legislation here, once a Sewel motion has been passed and a certain bill therefore is going to apply to Scotland?
Ms Curran: Not necessarily.
Mr Sinclair: As long as it proceeds to time, but if there is a new issue raised during the parliamentary passage to the Westminster legislation, then we will bring that back to—a new issue that leads to devolved matters and bring it back to the Scottish Parliament.
Ms Curran: We would be obliged to bring it back.

Q30 Danny Alexander: So once the parliament has given its consent, as far as you are concerned that is the Scottish Parliament's involvement and that is the issue done with unless there is a substantial change.
Ms Curran: Yes, because it is only giving consent to that particular aspect of legislation. We are only interested in the devolved aspect. What Westminster does for the rest of its powers is its business. We would be very particular about legislating within our own areas of competence.

Q31 Danny Alexander: Presumably, it is at least possible perhaps—and this might be more the case potentially if you had governments of different political hues in Scotland and in Westminster—that the Scottish Parliament might pass a motion to have a certain piece of legislation, and it might apply to Scotland in certain technical respects, or broader respects than they intend to do, but then the Westminster Parliament decides not to pass that legislation for whatever reason.[1]
Ms Curran: Yes.

Q32 Danny Alexander: I guess that situation has not arisen as yet.[2]
Ms Curran: No.

Q33 Danny Alexander: It is a situation that could arise. How would that be dealt with?
Ms Curran: I suppose theoretically there could be bills that fall at Westminster. They maybe passed a consent motion where we would want part of it, and we would have our own choice then, either to legislate ourselves on the matter, if it was a priority for us; or we would be able to inform the parliament that that was not passed. We would have that choice. I should say that the political colours of the Executive and the Westminster Government are not entirely absolute, as you know; and it is a strength. Some people say it is only working just now because we have got politicians of the same party in power, but it is a bit more complicated than that, as you know. I think that is a strength, that we can work beyond one party to make the Sewel Convention work; and broadly speaking MSPs would see it working—broadly speaking.

Q34 David Mundell: Margaret, you would have to accept that if you had significantly different governments then things would be different in terms of the operation; and what I am concerned about is to ensure that the process is robust enough to be able to deal with that. One of those issues around that is timing, because my personal experience for example with the powers that were in the Railways Bill was that the Scottish Parliament very much fitted in with the Westminster timing in order to meet their requirements, and we had one very lengthy committee meeting of seven hours because we went along with that process. How confident are you that these timing issues are independent from political interference so to speak?p[3]
Ms Curran: Let me try and—and if I am not answering directly I am sure you will come back to me, because I do not think the issue is around timing. I, like you, would absolutely share the proposal that our processes must be robust to withstand any kind of political disagreement. You say "significant" difference between political parties: I take it you mean your own party would have significant differences, which is probably true; but I genuinely believe we should have robust mechanisms that withstand personalities and people of different political persuasions. We have seen some evidence of that; but there have been differences between certain colleagues in the Scottish Parliament and certain proposals that come from Westminster. That is part of the urge to make sure that we always improve the processes. I think the Scottish Parliament and its committee system that really looks at this in depth before bringing it to parliament does need to have adequate time to properly give consideration to the matters before it. I have pushed our system to make sure that that happens and we have come forward with a package of proposals that will be implemented. I would be very sympathetic to any members of any political persuasion who said to me they did not have enough time to give any matter proper scrutiny, and that would include Sewels. The fact that we have very little debate about it now—a lot of the controversy has gone—I have had no representations about more time since we have changed that—it does indicate that people are satisfied broadly. The particular issue with the Railways Bill was not so much us fitting in with the timing to make it easier for people down here—I do not think anyone has alleged that—I think it was the nature of the Sewel itself and the powers we were getting; and the committee were determined that they were going to do what was in the best interests

[1] See Ev 22.
[2] See Ev 22.
[3] See Ev 22.

of the Scottish Parliament, and I think we did a thorough and robust job on that, and I think we were right to do that. I cannot remember all the details of the Railways Bill, and maybe we could have done it over two weeks rather than one, and we should have done that if we could. There is an issue of timing about the legislation, but there always is. To get legislation through you have to say to people sometimes, "you need to decide today; you cannot take for ever to decide about this", but that does not just apply to Sewels, it applies to everyone and it applies in our parliament and yours, just to get through the work. We have made quite a lot of effort to try and make sure that people get the time they need to make the proper decision happen.

Q35 David Mundell: You are confident the processes you have developed at the Scottish Parliament—that there is not scope for delay to be deliberately brought about so as to bring conflict with the Westminster timescale?
Ms Curran: Yes, I think I am confident, and I have certainly had co-operation from all the political parties about that. Some political parties would disagree with the content of the Sewel and some disagree with the principle of the Sewel; but, as I say, that is becoming less and less of an issue on the floor of the chamber and indeed the committees. It is much more now about what we are doing that focuses minds. I do not know of any other examples.
Mr Sinclair: The process is quite clear: if the parliament does not consent, then the provisions will not be included in the bill, and timing has been largely resolved, so I do not see a difficulty.
Ms Curran: The earlier the warning you get about what the proposals are, the easier it is.

Q36 David Mundell: In terms of the actual content of the motions, there has also been a move to make them more specific partly in relation to the issues that Danny was raising, where the parliament would be happy for the Westminster government to legislate but only within certain parameters. Do you think that will be increasingly the case, not just to legislate on the devolved area but for the legislation to be in a specific form?
Ms Curran: Yes. I think we are attracted by Sewels, and again I think this is more than just the governing parties in Scotland; I think people can see it more broadly. We are attracted by Sewels because it feels to us as if we get the best of both worlds. We can for example improve Scots law quickly over what is sometimes a small issue. For example, allowing guide dogs into taxis in Scotland. When they proposed that at Westminster and suggested we should do it in a Sewel in Scotland, it seemed to us a perfectly rational thing to do rather than a separate bill about getting guide dogs into taxis in Scotland. That is very specific and that is tight, and we need to be very focused on what it is we are actually legislating on. Broadly speaking, the Sewels are of that nature. We are very clear about what we are legislating on. The committee is very clear about what it is legislating on and what information they need. Most of the detailed work goes on at committee stage. The committee looks at it and makes a representation to the parliament. We have had some debates on Sewel motions on the floor, but not many actually recently.

Q37 David Mundell: You set out at the start some detail about how the inter-governmental relationship works. I was interested that you did not mention whether you had any relationship with the Leader of the House here, for example.
Ms Curran: He is a very nice man! He has never taken it any further than that, I have to say!

Q38 David Mundell: Is there a linkage between your department and his?
Ms Curran: Yes, there is a formal link where we are in fairly regular contact with the Leader of the House, both at official and political level. When the Queen's Speech has been prepared for example we would have a formal role—informal role—
Mr Sinclair: Informal— and a very close working relationship.
Ms Curran: I think it becomes formal when we would want to inform parliament of any relevant issues for Scotland. That is something we did last year for the first time[4], just through PQ; we indicated the relevance to Scotland. To that extent, that would be how we would relate to each other.

Q39 David Mundell: Does that relationship transcend political persuasion?
Ms Curran: I suppose it is difficult for me to honestly answer that because just now we are members of the same party. He is a very fine upstanding Leader of the House. My job requires me to work with other political opponents in the parliament because of the nature of the parliament, and my experience is that we are managing that very effectively. When people see it is commonsense legislation we are about, then people will respect that. Obviously, we have political differences and will promote policies that people will not necessarily agree with, but my interest is to make sure that procedures are proper around that, that people have confidence around procedures and that they get opposition properly to have their place within those procedures to test and oppose appropriately. It is part of my job. I think it is in our interests to do that because you get robust legislation if you have a robust opposition as well. I think you can say they are fairly robust. I suppose the opposition people might take a different view.

Q40 David Mundell: Even if you take the political dynamic out of it, is there scope for improvement at the moment?
Ms Curran: I am sure there must always be scope for improvement. Again, it is maybe our familiarity with parliamentary procedures. Our parliament is growing in confidence as it grows with legislation and experience. We can refer back to other pieces of legislation, and that is bound to improve. I think it is mostly about time and perspective. Sometimes I think people got Sewels out of perspective a wee bit

[4] See Ev 23.

and thought it was more major pieces of legislation and that we were not properly respecting the Scottish Parliament. I think we have got that back in perspective now.

Q41 David Mundell: Specifically, again going back to the concept of robustness in a climate of political differences that would—
Ms Curran: I do not want to raise your hopes, David, but there does not seem to be much prospect of that at the moment.

Q42 David Mundell: I do not want it to be partisan in that way, Margaret, because I would not expect you to concede that there would be a Conservative Government around the corner, but it is in our interests to ensure that the process transcends whatever.
Ms Curran: Absolutely.

Q43 David Mundell: Do you see anything specifically at the moment that would require to change, or just that the natural evolution would take it that way?
Ms Curran: I suppose it is bedding down the parliamentary process at our end, as people are familiar with their responsibilities to the parliament in terms of scrutinising legislation. Again, Sewel is obviously not comparable to the acts of parliament we pass; there is no comparison between them. Properly, members' minds are focused on the acts that the Executive brings to the Chamber. Nevertheless, the Sewels are important and deserve that support. We have put a lot of effort into making sure the civil servants and parliamentary officials are properly briefed about. We have had a lot of exchanges with Whitehall, and I have spoken to a few groups of civil servants down here about life in Scotland—"remember devolution is there"—and I think it is about that; that is where we are. With due respect, I would think Whitehall should never forget there is a devolved Scotland now, if I could politely suggest that.

Q44 Danny Alexander: Minister, can I come back to the issue of timing of a Sewel motion in relation to procedures at Westminster. You have described the procedures in so far as ensuring there is proper scrutiny and consent of a Sewel motion in the Scottish Parliament before it is passed and then, as it were we are informed down here. To what extent do you take account of the timing of the Westminster legislation in planning the timing of the debate and passing of the Sewel motion? I would be concerned to ensure that through our own procedures here proper scrutiny can be afforded to a Sewel motion at this end as well. For example, if this place is not aware that a Sewel motion has been passed until, for example, the committee stage has been reached—for example, a committee may be appointed that has no Scottish MPs on it—and there is a great debate going on at the moment about whether Scottish MPs should be able to vote on matters at Westminster, and a Sewel motion is something that can change the terms of that debate from one moment to the other. Do you make every effort to ensure that if there is going to be a Sewel motion, that is passed for example in time for the second reading debate so that the Scots MPs here know the terms in which they are taking part in that debate?
Ms Curran: I think the timing is proscribed for us; we have to have it in before the second reading.
Mr Sinclair: The aim is always to have the motion dealt with before the last amending stage in the first House so that the Westminster Parliament can react to what the Scottish Parliament has decided. One of the changes that the Minister mentioned earlier was the fact that we now have an obligation in a memorandum, which sets out some detail of what the devolved provisions in the Westminster bill are, and we are under an obligation under standing orders to introduce that to the Scottish Parliament two weeks after introduction of the Westminster bill. We are in a much better position, generally speaking, to enable proper consideration by both the Scottish Parliament and by here, and we certainly do everything we can to ensure that that all works together.

Q45 Danny Alexander: So when you say your obligation is to ensure the motion is passed and introduced before the last amending stage in the first House, that would mean then if a bill began its life in the House of Commons that the motion would have to be passed before the report stage because that is when amendments can be debated—
Ms Curran: That is our aim.
Mr Sinclair: That is the aim, for obvious reasons; so that, as I say, this parliament has the opportunity to react to what—

Q46 Danny Alexander: So the second reading in the committee stage could have taken place in the first part of this place that is debating it before we necessarily know there is a Sewel motion, so it could be a bill starts its journey in the House of Commons; you have second reading in the committee stage; and we know it in time for the report stage, and then it goes to the Lords, and the Lords are fully aware throughout their scrutiny of the Sewel motion.
Mr Sinclair: It would be known prior to that that there is to be a Sewel motion because the memorandum will have been introduced within a fortnight after introduction of the bill.

Q47 Danny Alexander: Not necessarily whether it has been passed.
Mr Sinclair: The decision on that will not be known until it has been through committees and there has been a vote in plenary. The Minister takes a lot of care to ensure that that process is managed efficiently, but also giving sufficient time to the parliament to enable it to consider matters properly.

Q48 Mr McGovern: The Scottish Executive, it is fair to say, were fairly positive in their reaction to the Procedures Committee's suggested changes to our procedures here at Westminster. How do you think that inter-parliamentary co-operation could be

improved if we at Westminster were to accept and indeed adopted the Procedures Committee's suggested changes?
Ms Curran: I suppose I would have to say respectfully that it is not for me to say what the UK Parliament should do. I appreciate that is not what you are asking me, but, assuming that, I make that point. How they would manage the legislation and at what stage they would tell you, I would not be terribly well versed on because I would not be as familiar as you are with all the different procedures. It seemed to me that if you gave early warning about the possibility of a Sewel motion and if it was explained to members, that would help matters. It is essentially a matter for the Scotland Office.

Q49 Mr McGovern: Obviously it is up to the UK Parliament to implement or initiate any changes here, but the Scottish Parliament Procedures Committee have made certain suggestions that they feel would constitute an improvement. Are you aware of them?
Ms Curran: I am certainly aware of what they are. Some of them at first call might strike me as—I do not know how possible they would be within the procedures of the Westminster Parliament because I am not as *au fait* with the procedures as you would be. Support would be, again, as much sharing of information as possible and as much early warning as possible. That helps us all in terms of some of the issues we are trying to address. How that is done I would be open-minded about.

Q50 Danny Alexander: Alistair Darling last year in November or December said he thought that in general most Scottish MPs were not aware of when a Sewel motion had been agreed, or not.[5]
Ms Curran: Yes.

Q51 Danny Alexander: Would you agree with that assessment?
Ms Curran: I do not know what Scottish MPs would be aware of in terms of the legislation in the Scottish Parliament, but we are always looking for ways to try and make sure that information is exchanged more effectively throughout various mechanisms, and I would always think it would be useful for people to be informed about it, and again open-minded about how that is done. If we could co-operate in facilitating more awareness of it, I would happily do that.

Q52 Danny Alexander: Do you think the Procedures Committee recommendations, if they were adopted, would help to rectify the problem that Alistair Darling identified?
Ms Curran: It would depend. Again, you have to keep Sewels in perspective. They are usually small technical matters. You can get into an argument about that, I appreciate, but most of us now think they are not a substitute for the major pieces of legislation that we are primarily focused on and you cannot complicate them. You have to have an awareness and share information, but keep it in perspective, I would say.

Q53 Danny Alexander: You will probably also be aware that Parliament here is considering something called the Legislative and Regulatory Reform Bill.
Ms Curran: Yes, I have heard about this.

Q54 Danny Alexander: Which has otherwise been referred to as the "Abolition of Parliament Bill"! I am not asking you to comment on that!
Ms Curran: I am sure it is not true.

Q55 Danny Alexander: One of the things that that bill states is this: "A Minister of the Crown may reform (a) any public general Act or local Act or (b) any Order in Council, order, rules . . . or other subordinate instrument." In other words, it gives ministers pretty sweeping powers, should they choose to exercise them, to change legislation at their discretion, putting it at its politest. Do you have a view on this Bill and in particular what its possible impact on Scotland might be?
Ms Curran: I would not pretend to be an expert on this Bill. My understanding is that it really is the result of a desire to reduce regulation overall, which a number of people on this Committee certainly advocated at some point in another life in another place. That was the main drive behind it, to reduce regulation, which some people, and businesses in particular, say is burdensome. I would have a great deal of sympathy with that, if that is possible. I am aware obviously of some press comment about unintended consequences. I suppose my issue is that if Westminster wants to reform the Scotland Act and abolish the Scotland Act, it can already, from my world. I do not think they are planning to do it by—in Westminster. I think I would be reassured that they have no intention to do that. We have certainly no anticipation of that coming down the track.

Q56 Danny Alexander: Within this Legislative and Regulatory Reform Bill—I have quoted clause 1(3) but then clause 4 also states: "An order under section 1 may not, except by virtue of section 2(4), make provision which would be within the legislative competence of the Scottish Parliament if it were contained in an Act of that Parliament." In other words, it seems to be saying that while ministers here can do what they like, that is not intended to allow them to do what they like in relation to bills that have been passed by the Scottish Parliament. Do you think—
Ms Curran: So I should be reassured by that—is that what you are telling me?

Q57 Danny Alexander: I am asking you if you are reassured or whether you are concerned that while on the one hand provision is made in the Bill to respect the Scottish Parliament, which I am sure you would be reassured by; on the other hand other provisions in the Bill seem to give ministers power to make changes without any consideration.

[5] Oral evidence session: Wednesday 19 October 2005 *Scotland Office Annual Report 2005,* HC 580-i.

14 March 2006 Ms Margaret Curran, Mr Murray Sinclair and Mr Paul Allen

Ms Curran: Obviously, I would be reassured in the first instance that our arrangements would be respected, and it would certainly have been a very strange development if that was the case, and one that I do not think anyone would have anticipated. Secondly, as I understand it—and I would put in a caveat that I am no expert on it—it is primarily to reduce regulation and not to undermine the primary legislative powers of parliament and to reduce the democratic scrutiny of parliamentary powers. That is my understanding of the legislation. I am sure you will test all that!

Q58 Danny Alexander: I was going to follow that point up in relation to something David said earlier, that one always has to look at legislation not just with a view to what the intention is at the moment but what other future governments might do with it. In the same way that the question arose earlier about how the Sewel Convention would be managed effectively if there was a change of government either in Scotland or in Westminster, I think the same consideration applies to this legislation as well; so I urge you to look at it and think about it with that in mind as well.

Ms Curran: Yes. I suppose there are two principled answers to that. Firstly—and if I was being honest I would think this was around in the early days of devolution—that one government introduced devolution. There was another party very much opposed to it, and we were worried that if another party came into government they could just as easily abolish it. I think we have got a convention or understanding that that would not happen particularly, and we have to respect the fact that devolution, I think will live beyond any possible change in government, because you have to look within that to the kind of commitment that I think people give. Secondly, that could well apply to this legislation where, if people are saying, "this is the intention of this legislation", parliamentary processes will test that out; and I am sure that as this Bill goes through its parliamentary process either through what ministers say in parliament, which is of long standing, or through any amendments to the Bill, it will be clear that it is not meant to be taking a democratic swipe at the powers of the Westminster Parliament.

Q59 David Mundell: I think it is inconceivable, Margaret, that any government would legislate on matters devolved to Scotland if it did not have the consent of the Scottish Parliament to do so. I think that is a given. One thing which I do think is of concern in this order process promoted by the Legislative and Regulatory Reform Bill is that it does allow for other things to be done, not through what would be these normal processes; and whilst in our briefing it speculates that it could be used to require nuclear facilities to be built in Scotland, for example—which I think would be unlikely—you would have a procedure for that. There are various areas in which you could see orders being used which are then—just as you were indicating before –Whitehall departments do not pick up the devolved aspect of it, and therefore this order process surely is not very helpful in the devolved context?

Ms Curran: I do not know if I could conclude that from what you have just said. We would always be alert to Whitehall being aware of and properly engaged with the devolved arrangements, however that would take shape—Sewel or whatever or legislation or practice that that had relevance for. As I understand it, it is still about general—and I know you support this because I am sure I have heard you talk about it—a reduction of regulation where appropriate. Any Sewel we would have would be about the reduction in regulation. I am sure that in relation to any unintended consequence of that, the robust Westminster procedures here would make sure that they were thoroughly tested.

Q60 Chairman: Margaret, there is a serious possibility here that the British Government makes a decision to have nuclear energy in Scotland. That is a matter for the British Parliament to decide, but as far as planning issues are concerned, that is a matter for the local government and the Scottish Executive. If there is a conflict, how do you see it?

Ms Curran: Planning powers in Scotland would have to be properly exercised, and I think would be properly exercised. We are passing new planning legislation, which is modernising planning in Scotland, but the Scottish Executive and First Minister are on record as saying that certainly there are issues that need to be addressed before we could move forward and that we would still want to be addressed, in terms of waste. I think that remains the policy of the Scottish Executive.

Q61 David Mundell: In that sense there is not a clarity at the moment of what might be called dispute resolution if there were conflicting policy agendas. Earlier on you said there can be different policy agendas in respect of the respective parliaments, but one of the things at the moment is that there is not clarity in what would happen if there is a conflict in those policy areas, even legitimate conflict.

Ms Curran: I think my view would be that if we have powers—we have devolved power within Scotland, and we would exercise it as we saw right. If that led to conflict with somebody else, then we would still exercise our powers. If we had the consent of parliament we would stick with it.

Q62 Chairman: The question arises that you could exercise your powers of local government in the Scottish Executive, and the British Parliament wants to exercise its powers because it wants to install nuclear energy, because this is a very important issue in supplying the energy needs for Scotland; so how then do you see this dispute being resolved? It is a very important issue.

Ms Curran: Not unless the Westminster Government are suggesting we suspend all planning processes in Scotland in order to pursue a policy. I think we would still have to get proper planning—

Q63 Chairman: Sewel motions?
Ms Curran: I do not think you would use a Sewel motion for planning—

Q64 Chairman: I do not know—I am asking you this question.
Ms Curran: First of all, it makes my point: a Sewel motion would need the consent of the Scottish Parliament and if it did not have the consent of the Scottish Parliament it would not happen, so in the context you have described Sewel would be entirely irrelevant. There is no doubt that the Scottish Parliament, the Scottish Executive, may take one view of a policy, and the Westminster Government might take another view. There are two ways to deal with that: one is to have constructive dialogue where you do what is best and in the best interests of the people you represent, and I think that would cover most eventualities. There is a very good argument why you should have parties of equal persuasion—invariably mine—in government—because that is where you get the best decision-making! More seriously, if it came to a real—and it has not done—we have different parties in co-operation with this—it has not come to a great conflict because I think people want devolution to work—then you would have to respect the difference and manage it as best you could. That is life.

Q65 Mr McGovern: Members of the Welsh Assembly are able to take part in meetings of the Welsh Affairs Committee, and I believe that arrangement is reciprocal so that members of the Welsh Affairs Committee can take part in committees of the Welsh Assembly. Does the Scottish Executive feel that there might be merit in members of the Scottish Parliament taking part in the Scottish Affairs Committee?
Ms Curran: I am not terribly well versed with the Welsh situation. Wales is so different from Scotland that I am not sure it is directly comparable, and I would not see any appetite; I have not heard any suggestion that that is a way forward for us. We have primary legislative powers and are entirely focused on that, and actually are stretched with that to a certain degree, one could argue. Notwithstanding that, I would still think there is an approach of co-operation in Scotland. We are in a devolved setting but we are not an independent country. We want to work with the UK Government and see it working in the interests of the Scots as well; and we want to get the best of both worlds, as I see it, as we possibly can.

Q66 Mr McGovern: Given the previous question, which was obviously hypothetical, do you think there would be some benefit in close-up contact?
Ms Curran: There is bound to be better benefit out of closer contact and closer engagement. There always is, if people work closely together. Whether that would resolve some of the big issues that may be looming, I do not know. I think that usually, often with the right approach you can solve a lot of problems, but I do not know if that would be the best way of doing it.

Q67 Danny Alexander: Following up David's theoretical example on nuclear energy, I asked earlier what happens if Westminster then rejects the legislation that the Sewel Convention has been attached to it—what happens in a situation where, for example, a Sewel motion has been passed referring to a specific clause in a bill and then the Westminster Parliament decides to amend the clause—in other words, the Sewel motion has been passed to get that clause to apply to Scotland, and then, because of what is happening in the committee here, the effect of that clause is somewhat different to what was initially expected: how then would the Scottish Executive and the Scottish Parliament react to that? Once the motion is passed, does that mean it is done, that whatever happens here applies to Scotland, even if you do not like it?[6]
Ms Curran: In the first instance it is unlikely, as I recall Sewel motions, that we refer to a specific clause as such. It tends to be more subject matter, more general than that. We would be very clear that we were only passing what we had said was the subject matter of the Scottish Parliament. If it had changed as a result of its process, its legislative journey down here, we would have to take it back to parliament, and parliament would then decide whether the change was unacceptable or consider whether it was appropriate. I do not think it has ever happened.
Mr Allen: Not this session. There were a couple of times in the first session where we had a supplementary motion; on a couple of bills we had a second motion, and one bill we had a third motion, because the bill had changed and there was devolved stuff in, and we had to ask the parliament whether they consented or not, so there have been additional memoranda and additional motions where things have changed.

Q68 Danny Alexander: Those additional memoranda can either continue with consent to the new form, or you can withdraw consent or amend or whatever—and in theory there is no end to that process. You could have quite a number of supplementary memoranda as the process goes on down here.
Mr Allen: If the Executive and the UK Government had agreed that there were new things they wanted to put into the bill, then obviously it would be right to ask the parliament about that. That is what we have done in the past.
Ms Curran: We would need to manage that, and I would insist that parliament had enough time to do that in terms of scrutiny.
Mr Sinclair: The key fact in looking at any proposal for a new amendment after the Sewel process has been gone through is the time for the Scottish Parliament to agree to it, and, if not, that would be a very obvious thing; if there is not, then we would not be able to agree to it.

[6] See Ev 23.

Q69 Danny Alexander: The point you were making earlier about the initial timing of a motion having to come in before the last amending stage here in the first chamber when we consider the bill, that would then mean supplementary amendments, as it were, could keep coming down here at further stages, probably quite a long way down through the process of the legislative journey through Westminster.
Ms Curran: As I said, that is our aim. There is always a possibility that the bill will only go through the two houses; but in practice the passage of the bill can operate quite differently and you have to take the decision on whether or not you are going to come forward with a further memorandum and go back to the parliament by reference to what is happening at that time and what you know about the parliamentary passage of the bill then. Sometimes there will be, as Paul indicates, time to go back to the parliament with a subsequent memorandum, but it is quite rare, as the Minister says, because we do an awful lot to make sure that the scope for surprises is limited, and we have matters agreed well in advance.
Ms Curran: Usually Sewels are very tight. The comparison between a Sewel and a piece of legislation is very difficult; it is usually very focused.

Q70 Danny Alexander: I am concerned about the degree to which Westminster MPs are able to scrutinise. Quite rightly from your point of view, you are concerned to ensure that the Scottish Parliament gives its consent to whatever is done. That is quite right and is very much in keeping with the devolution settlement. From our point of view we have to work out whether the processes for scrutinising these motions in the Sewel process at this end is adequate. That was not a question! I had better ask one—stunned silence! Do you think there would be any merit, bearing in mind the question about members attending this Committee or vice versa—you did not like that idea—in any other form of joint Westminster/Holyrood scrutiny of draft legislation down here that might affect Scotland, or that might be asked to affect Scotland—on an *ad hoc* basis, getting committees of MPs and MSPs together to look in those situations—not the very technical matters that you are referring to but broader? Is that possible?
Ms Curran: Awareness of what is going on in Scottish legislative matters, whichever parliament is doing it, is obviously in all our interests because we are all interested in a better legislative process. I think you need to be clear about the decision-making structures and the accountability for those decision-making structures, and ultimately to parliament. So I do not think we could do anything that would cut cross that particularly. If the Executive, which tends to bring forward the Sewel motions—we are very clear that we are responsible to the Scottish Parliament. MSPs would be as well. You could not have a committee of the two parliaments that cut across that, I do not think. I would need to think about it in more depth; that is off the top of my head.
Mr Sinclair: As you have indicated, as the Minister said, given the nature of most Sewels, you have to wonder what the—whether it would be worth it.
Ms Curran: We need to be proportionate in the kind of work we are doing. Again, that would need more consideration.

Q71 David Mundell: What is the role of the Scottish parliamentary officialdom in this whole process? You are not responsible for them.
Ms Curran: You are absolutely right, David.

Q72 David Mundell: What is their role in it? We spoke to the Procedures Committee and the Scotland Office and yourself, and next week we will speak to Westminster parliamentary officials, but one group of people are the Scottish Parliament officials; how are they involved in the process?
Ms Curran: Let me chart this, and then if I get this wrong my esteemed colleagues will help me out. First of all, it is the Parliamentary Bureau where we have to take forward any proposal for processing a Sewel or a consent motion, as we now call it. We would take that to the Bureau, which is the supportive secretariat to parliamentary officials who assist us in terms of committee recommendations, which committees things go to and how that committee works. That is the first important in terms of this work, and that is the first stage of it. The second stage would be the committee itself, where the clerk of the committee plays a very significant role in terms of advising the committee about how to deal with the Sewel, and they are quite independent of the Executive. They need to decide first how much time they will give in evidence-gathering. Some of our experience was that some of the committees were saying they did not get enough time to check out what the Executive was saying and wanted independent analysis of that. It is proportionate; sometimes it is worth that and sometimes it is not worth it and most people accept that. So you would look to the clerk for that kind of advice. Then it would be what kind of information, evidence, the Committee needs, and then whether to recommend a debate around the Sewel and managing the timing and voting of the Sewel. As Parliament Business Manager, I am the one that comes forward with the business response to that about how we would do it in parliament, and I would take that very seriously. At committee stage—notwithstanding some people play a few tricks from time to time—but putting that to one side, if at committee stage they wanted time to debate it, I would do my best to ensure that that happens. That is important, and the whole parliamentary officialdom and the processes around that are important. Then it is the vote itself in parliament.

Q73 David Mundell: Would that officialdom be in direct contact with the officialdom in Westminster, other than through government channels?
Ms Curran: No, we would have our own government communications, but, no, I do not think the clerks would go through government.

Mr Sinclair: Not as far as I am aware.

Q74 David Mundell: There would not be direct contact between the Scottish Parliament officials and Westminster officials.
Ms Curran: Can I check that out and come back to the Committee, or write? I need to make a check with the parliamentary officials and ask them.
Mr Sinclair: Obviously there has to be close communications between the two governments, and that happens. I am not aware of any formal communications between departments. We can ask.
Mr Allen: There is no protocol as far as I am aware. There is nothing to stop them phoning up the clerk of the relevant committee in Westminster and asking, but as far as I am aware there is no regular process or protocol governing that.
Ms Curran: I do not know about the Procedures Committee either.
Mr Sinclair: The inference I drew from some of the recommendations in some of the evidence that has been given by the members of the Procedures Committee is that there is not an awful lot of that happening. We can ask. We can write.
Ms Curran: We will come back on that, if that is okay.[7]

Q75 Chairman: Margaret, you will know that the Scottish Parliament has now agreed that the official name of Sewel motions should be changed to "Legislative Consent Motions". Why is there a need for a change of name?
Ms Curran: I actually think that was a quite sensible recommendation from the committee. We certainly agreed to it and support it, and we have now changed all our jargon, as you can see. I think it was influenced by two things: Sewel in the popular media certainly is misnamed because people just associate Sewel with giving powers back to Westminster. Every time it comes up in the media—Newsnight or Glen Campbell does it all the time—"oh, they have passed a Sewel motion; that means they are giving powers back to Westminster"—even when 75% of the time it does not in fact. A good number of Sewels have given us more powers—railways and gambling being the best examples of that; so there is that argument. I think that when Lord Sewel himself gave evidence to the Procedures Committee he said that giving powers back to us is not a Sewel motion and it is inappropriate to be named a Sewel motion; it has gone beyond the original Convention, so I think it was appropriate to broaden the term. I particularly like it because it emphasises consent and makes it clear to people who hadn't a clue who Lord Sewel was that it is about consent. That is why I like it.

Q76 Chairman: Have you contacted HM Government, and what is their response?
Ms Curran: That is a good question!
Mr Sinclair: The Scotland Office are following us—
Ms Curran: You can ask them.
Mr Sinclair: They were fully aware of the Procedures Committee's proposals to change the name. The question was whether we have suggested any change in the name in the Convention itself; we have not.

Q77 Chairman: You are saying that they were not really desperate to jump on this conclusion and agree with you in being willing to change the name.
Ms Curran: They are more familiar with the House of Lords than we are, I suppose.
Mr Sinclair: It is ultimately a convention of the Westminster Parliament.

Q78 Chairman: Would you be lobbying the Westminster Government about this change of name?
Ms Curran: Possibly. We will persuade them!

Q79 Chairman: Minister, thank you for your evidence, and your team. Do you wish to say anything in conclusion, perhaps on areas we have not covered during our questions, particularly Mr Sinclair and Mr Allen?
Ms Curran: I think you have covered all the areas quite thoroughly. It was remiss of me not to have said earlier that I hope you enjoyed your visit to the Scottish Parliament. I hope you all managed to see round it and that it was intact.
Chairman: Yes, we have just sent a letter to Tricia and others, thanking them for their kind hospitality. Please give them our best wishes and thanks. Thank you very much.

Supplementary memorandum submitted by the Scottish Executive

Thank you for the opportunity to make corrections to the transcript of the oral evidence given to the Committee on 14 March. While we have no corrections for the transcript, it may be of assistance to the Committee if we offer some clarification and additional information on a few points.

At Q31 and Q32, Mr Alexander asked about Bills which, subsequent to the approval of a "Sewel motion", had not progressed to enactment. There have been no examples of that under our new procedures. However, there were examples prior to the coming into effect of the new procedures. Most recently, the National Lottery Bill fell at the 2005 General Election, subsequent to the approval of a Sewel motion on 27 January 2005: the Bill has since been reintroduced. There was a similar experience with the Tobacco Advertising and Promotion Bill, which fell at the 2001 General Election, subsequent to the approval of a Sewel motion on 17 January 2001: the Bill was later reintroduced and enacted. (In both those cases the Scottish Parliament's consent was deemed to have carried over, but our new procedures mean that it is likely that, should such situations occur again in future, consent would need to be sought afresh). Other examples from the first

session of the Scottish Parliament are the Outworking Bill and the Culture and Recreation Bill, which did not reach the statute book though motions had been approved 31 January 2001 and 8 March 2001 respectively.

At Q34, Mr Mundell asked about timing of consideration for motions in the Scottish Parliament. The motion on the Railways Bill, to which he referred specifically, is acknowledged to have been exceptionally demanding in that regard. Other motions, most recently in relation to the Health Bill, have also presented challenges of timing, though the provisions requiring scrutiny in such cases have generally been relatively narrow in scope. Where provisions have been substantive, it has generally been possible to be more accommodating on timescales. For example, in the case of the Civil Partnership Bill, there was formal and informal consideration in the Equal Opportunities Committee (9 September, 23 September, 28 October, 4 November and 11 November 2003) and the Justice 1 Committee (17 December 2003 and 31 March, 12 May, 26 May and 30 June 2004). It is anticipated that the timing dimension will be addressed in some degree by the new procedures that have been adopted by the Parliament, which require the Executive in normal circumstances to provide information to the Parliament within specified timescales. Since those procedures have begun to bed down, there seem to have been less acute challenges though, of course, we will be keeping matters under review.

At Q38, Mr Mundell asked about relations with the Leader of the House and, in the course of our response, we mentioned that at the time of the Queen's Speech we now use an inspired Parliamentary Question to bring relevant aspects to the attention of the Scottish Parliament. We said we had done this for the first time last year, whereas in fact we did this for the first time in the year before last (23 November 2004 to be precise).

At Q67, Mr Alexander asked about developments after the approval of a motion and was advised that there had been instances of proposals for significant amendments to Bills necessitating supplementary consent being sought from the Scottish Parliament. They were the Adoption and Children Bill (with motions being approved on 4 April 2001, 24 October 2001 and 30 January 2002) and the Police Reform Bill (with motions being approved on 30 January 2002 and 27 June 2002).

I hope that this information is helpful. Should there be any further points that the Committee would like to cover, we would be very happy to assist where possible.

Paul Allen
Head of Unit

Supplementary memorandum submitted by the Clerk of the Procedures Committee, Scottish Parliament

The Sewel Convention: The Westminster Perspective

I have been approached by Paul Allen from the Scottish Executive, who has suggested that I might provide additional information on questions asked by David Mundell MP on 14 March, when Mr Allen was giving evidence as part of a Scottish Executive team led by the Minister for Parliamentary Business.

The questions (QQ71-74 in the uncorrected transcript) were about the role of "Scottish parliamentary officialdom", particularly in relation to their channels of communication with Westminster.

I should begin by explaining that each Scottish Parliament committee, like those at Westminster, is supported by a small team of clerking staff. Other clerks support the Parliamentary Bureau, which has responsibility (amongst other things) for referring legislative consent memorandums to committees and for recommending to the Parliament (in a business programme motion) when legislative consent motions are to be taken.

Under the Parliament's new procedures, each legislative consent memorandum is referred to a committee to "consider and report", and it would therefore fall to the clerks to that committee to provide relevant advice to the committee members (and to draft the committee's report). Under current administrative arrangements, it is also for those clerks to prepare any memorandum lodged for publication as a Parliamentary document.

Committee clerks are routinely in contact with Executive officials on matters of committee business in which the Executive has an interest. In this context, this might include liaison with Departmental officials about the terms of the memorandum or about arranging oral evidence from the Minister. They might also discuss timing issues with officials in the Minister for Parliamentary Business's office, who would be responsible later in the process for preparing any Executive motion.

In addition, committee clerks might on occasion contact their Westminster counterparts to discuss the likely timing of Bill stages that have not yet been publicly announced. Such communication would be direct with the relevant Bill Office, and not through Government/Executive channels.

There is one final point that may be worth making in this connection. The memorandums submitted by the Clerks of the two Houses refers to a long-standing administrative arrangement between the Commons and Lords Bill Offices and Chamber Office clerks here. The purpose of that arrangement was to alert us to developments in Westminster, particularly in relation to private Members" Bills, likely to give rise to Sewel motions. This was a useful early warning mechanism at a time when Sewel procedure was largely informal

and in the hands of the Executive. However, it has now been largely superseded by the Parliament's new Rules requiring the Executive to give formal notice of relevant developments in Westminster through published memorandums. Although informal notification from Westminster clerks might still give additional advance notice in some cases, the new Rules should greatly reduce our reliance on such an arrangement in future.

I hope the above clarifies the points raised. Please let me know if I can be of any further assistance in relation to your inquiry.

Andrew Mylne
Clerk to the Committee

30 March 2006

Memorandum submitted by the Scotland Office

INTRODUCTION

1. The Government welcomes the opportunity to contribute to the Scottish Affairs Committee's inquiry into Westminster's perspective of the Sewel Convention.

2. This Memorandum addresses those issues identified in the Committee's call for evidence; in particular how Members of Parliament can be better made aware that a particular Bill before the House of Commons has been subject to a Sewel motion and how such motions are scrutinised at Westminster. The Government notes the Committee will also consider the possible changes to Westminster procedure promulgated by the Procedures Committee of the Scottish Parliament in its recent report on the operation of the Sewel Convention.[1] The Memorandum also includes information on the procedures whereby legislation is agreed within government prior to its introduction in the Parliament. The Government hopes this additional information will be helpful to the Committee's considerations.

3. The Convention stems from a commitment made by Lord Sewel, formerly a Scottish Office Minister, during the passage of the Scotland Bill through the House of Lords, that "we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament". This was subsequently incorporated into the *Memorandum of Understanding* (MOU) (Cm 5420) and the House of Commons Procedure Committee has indicated its support for the Convention. Policy on the Convention is set out in *Post-Devolution Primary Legislation Affecting Scotland,* (DGN 10)[2] one of a series of devolution guidance notes, published on the website of the Department for Constitutional Affairs.

THE APPLICATION OF THE CONVENTION

4. The Scotland Act defines the statutory basis of the Scottish devolution settlement. In particular, Schedule 5 to the Act sets out matters reserved to Parliament. The Act is underpinned by a network of administrative agreements, notably bilateral concordats between individual Government departments and the Scottish Executive, and the overarching Memorandum of Understanding. These establish principles of consultation and communication, especially when one administration's work may bear upon the responsibilities of another.

5. The Sewel Convention applies to provisions in Bills which:

— *Make provision for a devolved purpose* ie on a matter which, if contained in a Bill before the Scottish Parliament in the same context and for the same purpose, would be within the legislative competence of the Scottish Parliament. It does not apply to alterations to devolved law which are incidental or consequential on provisions made for reserved purposes, although as a matter of good practice Government departments consult the Scottish Executive on any such changes.

— *Provisions which vary the legislative competence of the Scottish Parliament* ie which amend Schedule 4 or 5 to the Scotland Act. The Act provides an alternative method of making such variations through an order making power under section 30(2). This provides for modifications to Schedule 4 or 5 through an Order in Council, subject to the agreement of the UK and Scottish Parliaments. There is a presumption that any such modifications will be made using the powers available under section 30(2). However, there may be times when the UK and Scottish Parliaments agree that it is appropriate to include such provisions in a Bill. Policy on the use of section 30(2) orders is set out in a devolution guidance note, *Use of Scotland Act Section 30(2) Orders* (DGN 14),[3] published on the website of the Department for Constitutional Affairs.

---

[1] http://www.scottish.parliament.uk/business/committees/procedures/reports-05/prr05-07-vol01.htm
[2] http://www.dca.gov.uk/constitution/devolution/guidance/dgn10.pdf
[3] http://www.dca.gov.uk/constitution/devolution/guidance/dgn14.pdf

- *Provisions which vary the executive competence of the Scottish Ministers, usually in reserved areas.* This is frequently referred to as executive devolution. Section 63 of the Scotland Act provides an alternative method for such variations of executive competence through an order making power whereby, *inter alia*, functions in reserved areas may be executively devolved to the Scottish Ministers subject to the agreement of the UK and Scottish Parliaments. Variations of the executive competence of the Scottish Ministers in Bills can also relate to provisions in devolved areas. Executive devolution of functions in reserved areas relates to matters on which the Scottish Parliament is not competent to legislate. It is often a way of giving powers or functions to Scottish Ministers which they could not otherwise have carried out under the Scotland Act. After the executive devolution of functions in reserved areas to the Scottish Ministers the Parliament remains the sole body able to legislate in relation to those matters. If the Scottish Parliament withheld its consent in such cases the Bill would be amended so that the functions in Scotland would be carried out by the Secretary of State. Provisions conferring executive functions on Scottish Ministers in Bills often form part of variations to a UK wide regime. In such circumstances, the use of orders under section 63 of the Scotland Act would not be appropriate if a new regime is to be rolled out across the UK at the same time.

6. Except as described in the third point of paragraph 5 above, the Convention does not apply to provisions in Bills in which the Parliament legislates for reserved matters in Scotland.

The Government's View of the Convention

The Convention's role in good government

7. The Government considers the Convention an important part of the devolution settlement. As a sovereign body, Parliament still has the right to legislate on all matters in Scotland. This is explicitly stated in section 28(7) of the Scotland Act. However, Parliament has exercised its sovereignty by devolving legislative competence in certain areas to the Scottish Parliament. The Convention is therefore a means of recognising the sovereignty of Parliament after devolution while respecting the competence of the Scottish Parliament to legislate in matters devolved to it by the Scotland Act. Adherence to the Convention is a way of avoiding the risk of the UK and Scottish Parliaments legislating on the same matter in different ways or against the other. It is thus a means of maintaining the stability of the devolution settlement. The Parliament has not knowingly legislated in relation to a matter subject to the Convention since the establishment of the Scottish Parliament without the consent of the Parliament.

8. The Government therefore considers that the continuation of the Convention is vital to the success of devolution. It enables pragmatic solutions to be reached in a timely fashion while simultaneously respecting the competence of the Scottish Parliament. Above all the Convention is concerned with ensuring good government. It enables the law to maintain its coherence and reliability. It also enables the benefits of Westminster legislation to apply to Scotland in devolved areas, if it is the wish of the Scottish Parliament that it should do so. This is good for Scotland and good for the United Kingdom as a whole.

The advantages of including provisions subject to the Convention in Bills

9. While it is a matter for the Scottish Executive and Scottish Parliament whether they agree to the inclusion of provisions subject to the Convention in Bills, the Government, for its part, sees a number of policy and handling advantages in doing so on appropriate occasions. These include:

- Legislating for UK or GB wide extent in order to create a coherent UK or GB wide system.
- Legislating for UK or GB wide extent in order to address cross border issues, for which an Act of the Scottish Parliament would be unable to provide.
- Legislating for a coherent UK wide system in order either to implement EU obligations in a timely fashion or vary the powers of the Scottish Ministers in relation to the implementation of EU obligations.
- Legislating to confer executive functions on the Scottish Ministers in reserved areas.
- Legislating with regard to cross border public authorities.
- Legislating to give legal certainty so there cannot be a challenge to a law on the grounds of vires.

10. It is a matter of choice whether or not the Scottish Executive and the Scottish Parliament wish provisions subject to the Convention to extend to Scotland.

The difference in types of provision requiring Sewel consent

11. Provisions in Bills which touch upon devolved matters but are incidental or consequential upon the main reserved purpose of a Bill do not attract the need for Sewel consent. However, many Sewel motions relate to provisions in Bills which relate to very limited policy areas or provisions that are technical in nature. While it might be within the competence of the Scottish Parliament to legislate in relation to those matters, it can be a matter of practical good government for such provisions to be included in a Bill.

12. As noted above, many Sewel motions relate to the executive devolution of functions and powers to the Scottish Ministers in reserved areas. Such matters remain reserved to Parliament which retains the sole right to legislate in relation to them. During the last session, the Gambling and Railways Bills executively devolved functions in reserved areas to the Scottish Ministers in this way. The Bills themselves covered reserved matters and the policy contained in them was therefore a matter for Parliament. The subject of the Sewel motion was therefore whether or not the Scottish Parliament wished the Scottish Ministers to exercise functions in reserved areas within a UK or GB wide regime.

13. There is clearly a qualitative difference in Sewel motions executively devolving functions in reserved areas and motions on provisions in Bills legislating for a devolved purpose. If the Scottish Parliament does not consent to the former the functions in Scotland will be conferred on the relevant Secretary of State. The Government would table amendments in the case of the latter to withdraw the provisions altogether so that they would not apply in Scotland.

14. The Committee will be aware that a Bill may include provisions of both types. Regardless of the circumstances, the Government agrees with the Scottish Parliament Procedures Committee recommendation that there should be clarity about exactly what the provisions triggering Sewel do. To meet this need Bill teams are asked to ensure Explanatory Notes to Bills are explicit in their description of the relevant provisions. Other means of notifying Parliament—such as written ministerial statements or a statement during the Second Reading debate—have been used by Ministers on an ad hoc basis.

15. The use of the Sewel Convention to legislate for a devolved purpose in no way alters or diminishes the legislative competence of the Scottish Parliament. The Scottish Parliament remains fully competent to legislate in relation to devolved matters as it sees fit. If the Scottish Parliament took the view that it did not wish an Act to include provisions for a devolved purpose it retains the right to legislate in an Act of the Scottish Parliament in relation to that matter. To that end, the Government fully endorses the Scottish Parliament Procedures Committee statement that it is "incorrect to say that when the [Scottish] Parliament agrees to a Sewel motion to enable Westminster to legislate on a devolved matter, this somehow involves the Parliament handing back powers to Westminster. Such an assertion betrays a basic misunderstanding of devolution" (paragraph 132, page 27).

The Government's Role in Managing the Convention

16. The Government considers that discussions on whether or not to include provisions subject to the Convention in a Bill should continue to take place between the Government and the Scottish Executive. The vast majority of the Bills including such provisions are Government Bills. Therefore it follows that the management of the policy contained within them is a matter for agreement between the Government and the Scottish Executive. Ultimately, all primary legislation is subject to the will of Parliament through its normal scrutiny arrangements. The Scottish Parliament gives its consent to the inclusion in Bills of provisions subject to the Convention through the process of giving or withholding Sewel consent.

17. The Government takes its responsibilities in managing devolution issues in Bills seriously and keeps them under constant review. Official guidance, such as the Cabinet Office's *Guide to Legislative Procedures* (at http://www.cabinetoffice.gov.uk/secretariats/economic_and_domestic/legislative_programme/guide.asp), sets out departments' obligations in relation to devolution and the Sewel Convention. In developing proposals for Bills and in drafting instructions to Parliamentary Counsel, Bill teams and their departmental legal advisers take advice from the Office of the Solicitor to the Advocate General for Scotland (OSAG), which provides departments with legal advice on devolution and Scots law, on whether or not provisions would be subject to the Convention.

18. Bill teams will also liaise closely with the Scottish Executive. The Executive takes advice from its own legal advisers. Proposals for the inclusion of provisions subject to the Convention come from both the Government and the Scottish Executive. Agreement between the Government and the Executive to the inclusion of provisions subject to the Convention in a Bill is usually made through ministerial correspondence between UK and Scottish Ministers.

19. The Government collectively agrees to legislative proposals at the Legislative Programme Committee (LP), either through Ministerial correspondence or through meetings of the Committee. LP is chaired by the Leader of the House of Commons, who has overall responsibility for the legislative programme. The Secretary of State for Scotland and the Advocate General for Scotland are members of the Committee. Furthermore, policy must be cleared through the relevant policy committee—often Domestic Affairs Committee (DA).

20. The actual content of the Government's legislative programme in future sessions is decided by Cabinet, on the basis of proposals from LP. A provisional list of Bills to be prepared for inclusion in the programme is agreed some time before the Queen's Speech. A final list is agreed shortly before State Opening. Prior to this departments will bid for measures to be included in the programme. In doing so departments must indicate the devolution issues they consider will arise and the extent of their discussions with the Scottish Executive.

21. Following the Queen's Speech individual Bills are cleared for introduction into Parliament following consideration at LP. The text of the Bill is supported at LP by a memorandum for the use of Ministers setting out its contents. This includes a description of the impact of devolution on a Bill. The Leader of the House expects substantive devolution issues to be resolved before a Bill is discussed at LP. LP will not agree to the inclusion of provisions subject to the Convention unless Scotland Office Ministers and the Advocate General are satisfied that devolution issues, including the need for Sewel consent if particular provisions are to be included, have been resolved.

22. It is important to record that the confidentiality surrounding the Queen's Speech means there is a limit to the amount of information that can be made available to the public and to the Parliament prior to the Speech. However, the close liaison between the Government and the Scottish Executive means that the Executive is able to inform the Scottish Parliament on the same day of Bills that are considered likely to need the consent of the Parliament. The Executive will then normally be able to lay Sewel memoranda shortly after Bills are introduced in the days after the Speech.

23. The Scottish Executive has committed to seeking the Scottish Parliament's consent before the final amending stage in the first House at Westminster. This means that, should the Scottish Parliament withhold its consent, the Government should normally table amendments to excise the provisions subject to the Convention for the final amending stage in the first House if at all possible. In order to table such amendments, the relevant department would need to gain agreement across Government. Departments would also have to draft instructions for Parliamentary Counsel. In the case of complex provisions, drafting by Counsel may take some time. Therefore it is important that sufficient time is allowed for seeking such agreement and for the drafting, tabling and scrutiny of amendments in Parliament in order to be able to take account of the will of the Scottish Parliament without creating difficulties in handling legislation at Westminster.

Parliamentary Handling of Bills

24. If it is proposed to amend a Bill to include provisions subject to the Convention once it has been introduced at Westminster agreement must be reached between the Government and the Scottish Executive. To that end Bill teams and Scottish Executive officials actively engage during the passage of Bills so that early consideration is given to whether any amendments triggering the Convention should be included. In such cases, the Scottish Executive will, if an amendment attracts the Convention, consider if it needs to submit a supplementary memorandum to the Scottish Parliament or seek additional consent. The Executive will also liaise with the Bill team on any timing issue that might arise.

25. Government amendments to Bills usually require clearance within Government. Scotland Office ministers will contribute to this process as necessary.

26. Provisions attracting the Sewel Convention in Bills are subject to the same degree of scrutiny as other provisions in legislation. The additional scrutiny provided by the Scottish Parliament of these provisions gives a further dimension to the consideration of the relevant parts of the Bill and so adds to the quality of the legislation eventually enacted.

Draft Bills

27. Bills to be published in draft either for consultation or for pre-legislative scrutiny are not normally discussed at meetings of LP, but are cleared for publication through ministerial correspondence. The expectation is that provisions in Bills to be published in draft which include proposals within the scope of the Convention will have been previously agreed with the Scottish Executive through an exchange of correspondence, copied to the Secretary of State for Scotland.

Private Members' Bills

28. As the devolution guidance note, *Post Devolution Legislation Affecting Scotland* makes clear at paragraphs 14 and 15, the same procedures should be followed for private member's Bills supported by the Government as apply to Government Bills. The Government will not support a private members' Bill which includes provisions subject to the Convention without agreeing with the Scottish Executive that it will seek the consent of the Scottish Parliament to the inclusion of those provisions in the Bill.

Possible Changes to Westminster Procedures

29. The Government welcomes the opportunity to comment on the possible changes to Westminster procedures highlighted in paragraphs 115–123 of the Scottish Parliament Procedures Committee report.

(a) *Certification [of Bills] by the Speaker/"Tagging" of relevant Scottish Parliament papers/Routine inclusion of existence and details of Sewel context in Bill's Explanatory Notes/Formal recognition of process in Scottish Parliament (paragraphs 115–119)*

The Government does not see any value in the Speaker certifying Bills as containing provisions that are subject to the consent of the Scottish Parliament. However, the Government is mindful of the need fully to appraise Parliament of information relating to legislation before it. The Government has therefore asked Bill teams to make available in each House Library a copy of the Sewel motion (now referred to in the Scottish Parliament as Legislative Consent Motions) and accompanying Scottish Executive Memorandum once the Scottish Parliament has given its consent to provisions to be included in a Bill. The Government believes this will give Parliament a clear indication of the matters considered by the Scottish Parliament. A similar process does not currently exist for relevant Scottish Parliamentary committee reports, but the Government would be happy to consider this if the Scottish Affairs Committee feels it would be useful.

The Government requires Bill teams to include in the Territorial Extent section of a Bill's Explanatory Notes a description of how a Bill applies to Scotland and whether or not it triggers the Sewel Convention. For example, the Explanatory Notes to the Equality Bill[4] currently before Parliament include this information. However, the Government recognises that sometimes this information is not as clear as it should be and will endeavour to make sure future Explanatory Notes are explicit about Sewel issues.

(b) *Statement at Second Reading about application to Scotland (paragraphs 116 and 118)*

The Government does not believe a statement at Second Reading is necessary, particularly given the commitments at 28(a) above to ensure Parliament is given a clear indication of a Bill's Territorial Extent and any matters considered by the Scottish Parliament.

The Government believes it is worth recording that at the time of the Queen's Speech the Scotland Office does explain in general how the legislative programme will apply in Scotland.[5] A copy of this briefing note is now placed in the Libraries of both Houses. The Scottish Executive also explains the extent to which Bills at that stage are considered likely to require the consent of the Parliament, as Scottish Ministers will invite the Parliament to agree the measures should be enacted at Westminster for the benefit of Scotland.[6]

The Government remains committed to seeking to publish as many bills as possible in draft form to allow them to receive pre-legislative scrutiny. Publishing the Bills for pre-legislative scrutiny means that the Scottish Parliament will also know the details of some Bills which will, if introduced with a view to being enacted, attract the Convention.

(c) *Direct engagement between two Parliaments (paragraph 120)*

The Government believes that how and the extent to which Parliaments communicate with each other is rightly a matter for those bodies. As the Committee will be aware, however, the organisation of business in Parliament is a matter for the Government which draws its authority from being able to command a majority in the House of Commons. The vast majority of Bills that reach the statute book are Government Bills. It follows that to be in the best state of readiness to handle Sewel mechanisms, there must be close liaison between the Government and the Scottish Executive. As indicated in paragraphs 16 to 23 above, there is such liaison at several stages as Bills are being considered, much of which occurs before the parliamentary stages are initiated.

The Government does not support the suggestion that the Scottish Affairs or Grand Committees consider provisions in parallel with the Standing Committee responsible for a Bill. The Government believes it would be difficult to factor into business management a Committee to look at Sewel provisions separate from the rest of the Bill. Furthermore, such provisions are often very minor within the overall aims of the Bill. It is therefore difficult to see why they would merit distinct scrutiny measures. Moreover, devolution is predicated on the sovereign Westminster Parliament not involving itself in devolved matters without the agreement of the Scottish Parliament. Joint committees with regard to legislation would put that distinction at risk.

The Government can see no benefit in the suggestion that joint committees could be established, involving MPs and MSPs. While this would ultimately be a matter for Parliament itself, it would be unclear who exactly would have responsibility for what. For example, it could mean that MSPs might consider reserved provisions and equally that MPs would have a locus as a matter of right in devolved matters. Of course, if

[4] http://www.publications.parliament.uk/pa/cm200506/cmbills/085/en/06085x-e.htm (para 358)
[5] http://www.scotlandoffice.gov.uk/our-communications/release.php?id = 3467
[6] http://www.scotland.gov.uk/News/Releases/2004/11/23134044

a Scottish Parliament Committee has views on particular provisions in a Bill it can make them known either to the Scottish Ministers or directly in correspondence with Ministers. Indeed these views could be transmitted directly to the Standing Committee scrutinising a Bill.

(d) *Parallel scrutiny of draft Bills (paragraph 121)*

As noted above, the Government remains committed to seeking to publish Bills in draft for pre-legislative scrutiny or as part of a consultation. Ministers seek colleagues' clearance as they would do with an ordinary Bill before publication. Officials—of both the Government and Scottish Executive—liaise closely on such bills to ensure that devolution issues are resolved; as is the case with any Bill introduced into Parliament. If they are not resolved then the relevant provisions in a Bill will not be agreed to in correspondence. The Government understands that the Scottish Executive notifies the relevant subject Committee of the Scottish Parliament of draft Bills—including draft provisions attracting the Sewel Convention.

The Government does not therefore believe there is a need for joint scrutiny of draft Bills. One of the purposes of pre-legislative scrutiny is to test out a bill so that amendments can be made if necessary when it is formally introduced with a view to enactment. For that to work it is sensible to have a single focus of scrutiny. Otherwise there is a risk of having two versions of the same Bill.

(e) *Proposed Scottish Parliament amendments considered at Westminster/extra stage at Westminster*

The Government believes that by definition by agreeing to let the Parliament legislate in a devolved area it is for Parliament to do so. This proposition appears to derive from a suspicion that what the Scottish Parliament agrees to in giving Sewel consent and what comes out of the legislative process is not the same thing. This is not the case. As already noted, the Scottish Executive prepare a detailed memorandum of provisions in the Bill subject to the Convention which is considered by the relevant subject Committee in the Scottish Parliament. If additional provisions are added that are subject to the Convention (with the agreement of the Executive), the Committee is notified in the form of a supplementary memorandum. It is of course open to the Scottish Parliament to state that it does not want any additional provision to be included in the Bill.

The Government must manage its business at Westminster in an efficient and expeditious manner. Therefore Sewel consent is obtained before the final amending stage in the first House at Westminster so that amendments can, if necessary, be tabled at that stage. That is because there is a presumption against Government amendments in the second House—which would, if amendments were so agreed, lead to a further stage of Parliamentary consideration. It would be extremely difficult in the management of business at Westminster to have a two stage system of consent, which would mean that the Government would not be in a position to amend the Bill if the second consent was withheld.

(f) *Involvement of Scottish MPs*

The Government has always been of the view that it is an important underpinning principle of the House of Commons that all members are members for the whole of the UK and should be able to speak to any business before the House. However, Scottish MPs often take a particular interest in distinctly Scottish provisions—including those that trigger the Sewel Convention. It is also not uncommon for a Scotland Office Minister to take responsibility for leading through Parliament those sections of a Bill that apply in Scotland, whether these trigger Sewel or are in a reserved area.

January 2006

Witnesses: **David Cairns** MP, Parliamentary Under-Secretary of State for Scotland, **Dr Jim Wildgoose,** Head of Scotland Office, and **Mr Glenn Preston,** Head of Constitutional Branch, gave evidence.

Q80 Chairman: Good afternoon. Minister, can I welcome you and your officials to the Scottish Affairs Select Committee meeting. We are very pleased that you have been able to attend today to give evidence on our inquiry into *The Sewel Convention: the Westminster perspective*. For the record, would you like to introduce your team?

David Cairns: Thank you very much, Chairman. I am very pleased to be here this afternoon to have the opportunity to contribute to what I am sure will be an important and significant report. I am accompanied by two officials. On my left is Dr Jim Wildgoose who is the Head of Office at the Scotland Office. You may remember him from previous appearances before the Select Committee, such as your investigation into our Annual Report.[8] On my right is Glenn Preston, the Head of our Constitutional Policy Branch at the Scotland Office and who knows more about Sewel motions than is altogether healthy for a young man! I will make a very brief opening statement, with your permission, Chairman. I have said I am very pleased to be here, and I genuinely am, to have an opportunity to discuss some of these important issues. I know that you have already received our memorandum on those. As you have seen in the memorandum, we have gone deliberately into some detail about the machinery of government issues, since I know the Committee is especially interested not in the Sewel Convention *per se* but obviously on how the mechanisms work here from a Westminster perspective. Some of the possible changes are rightly a matter for Parliament itself but others, such as the improved explanatory notes to bills, are for the Government to consider. You will already know, Chairman, that we do believe there is room for improvement in our drafting of explanatory notes. Devolution is one of this Government's proudest achievements. The Sewel Convention is an integral part of the devolution settlement. It recognises and caters for the fundamental principle of the British constitution, that the UK Parliament is sovereign, and adapts it to allow for the reality of devolution. Finally, as my predecessor said to the Scottish Parliament Procedures Committee, "The Convention is not in any way a derogation of the competence of the Scottish Parliament. The Government that created devolution is not about to undermine it".

Q81 Chairman: Minister, can you tell us what kind of channels of communication are there between the two Governments and the two Parliaments? Is it department to department or does the Leader of the House contact our minister for parliamentary business?

David Cairns: I think there are many channels of communication between the Government and the Executive. There are department to department communications, there are communications obviously involving the Scotland Office and Margaret Curran, whom you have just spoken to, and there are communications between the Leader of the House and Margaret Curran also. The primary channels of communication are obviously department to department because that is where the subject expertise is on any piece of legislation that is coming up. Our focus, as a Government, is on policy outcome and on what we are trying to achieve for real people, communities and families and, therefore, it is where the policy expertise resides that we must have that discussion. The publishing of a Sewel motion or a memorandum is the beginning of one process, but in some ways it is the end of another process of a lot of discussion that takes place on the formation of policy at official levels. I came into this job less than a year ago and, speaking as somebody who had been a backbencher paying reasonably close attention to this, I have been very impressed by the degree of co-operation and interaction that takes place at official level. At ministerial level, clearly there are also discussions on a very regular basis and a very close working together as well.

Q82 Gordon Banks: Minister, you have already mentioned some of the inter-governmental relationships that go on. Are you of the opinion that they are working well? Do you think there is some more scope for improvement? Have we got Utopia?

David Cairns: We certainly do not have Utopia, but I think we have got a mechanism that if it did not exist, you would have to invent it. What was interesting in reading the Scottish Parliament Procedure's Committee report was at the beginning of that process there was some misunderstanding and apprehension about what the Sewel Convention was, how it worked and what it was used for. As they went through their inquiry they understood that fundamentally we got it right, but that there was room for improvement in terms of transparency, timing and nomenclature. I think there was a sense the phrase, from their point of view, "the Sewel motion" was perhaps imprecise and so now they are referring to a "legislative consent motion". From our point of view—we may come on to speak about this—I certainly think there is room for greater awareness and understanding among MPs, members of this House, as to what has triggered Sewel and the extent to which Sewel applies. Obviously we will look with interest on the recommendations of this Committee and this report. Certainly we are not in Utopia but if it did not exist we would have to invent something quite like this.

Q83 Gordon Banks: We touched on inter-governmental relationships but what about inter-parliamentary relationships? Would you be happier with a greater deal of co-operation between the Westminster and Holyrood Parliaments?

David Cairns: Ultimately how the Parliaments relate to one another is an issue for the Parliaments. It is not really for the Government to tell the Parliaments as such how they should relate to one another, but in the process of greater awareness and transparency there are some recommendations in the Clerk to the

[8] *Scotland Office Annual Report 2005,* HC 580-i.

House of Commons' memorandum[9] to your investigation which talks about the way in which this might happen between Presiding Officer, Speaker and Lord Chancellor, not that that is an issue for them but anything that would, from that point of view, increase transparency and awareness would obviously be welcome.

Q84 Mr Walker: Minister, can you spice this session up for us? There has been a bit of a love-in for the last couple of weeks looking into Sewel motions. What we are looking for is friction and stories of blood on the carpet between this Parliament and the Scottish Parliament, perhaps when Scotland has felt that England has, once again, been over-reaching itself and sticking its nose into parts of their business it should not. Are there any examples of that where you have had fevered telephone conversations with your MSP compatriots?
David Cairns: I will tell you if you promise not to tell anyone! Within Government—and by that, I mean within the UK Government—and within Whitehall and the formulation of any policy, there is clearly going to be interaction between government departments. They have set different priorities and want to achieve different aims and objectives. There is always a creative discussion and dialogue, and the fact is that the Scottish Executive ministers, in so far as issues relate to Scotland, take part in that. In all seriousness, you would not expect me to sit here and disclose that, but Scottish Executive ministers play a full part in discussions on these issues, whilst respecting the devolution divide which is a very important point. As I said in my opening statement, we created devolution. We believe it is for the Scottish Executive and Scottish Parliament to legislate, as it sees fit, on the issues that have been devolved to it and they are accountable to the people of Scotland in their own elections for that; it is for us to legislate elsewhere. Where there is clearly a commonality of interest and looking at the issues where Sewel is appropriate, if you are looking to get a common approach to something throughout the UK or—I do not know whether this is something that Ms Curran went into—where it is a question of an understanding and the policy objective is the same, the bill we happen to have here prepared and ready to go at Westminster is a good vehicle for that, but Scottish Executive ministers obviously play a role in those types of discussions.

Q85 David Mundell: Yes, can I ask—
David Cairns: Is this about Moffat Pond, because I have no views on Moffatt Pond, David.

Q86 David Mundell: You should be for it, I am! What I want to ask you about, Minister, is the suggestion that the procedures currently work because you have governments of substantially the same political persuasion at both Holyrood and Westminster. How robust do you feel current procedures are if, without requiring to draw you into speculation, you do have governments of a different political hue in each Parliament, and how procedures would stand up to that?
David Cairns: I am aware that this is a question that is often aired. I think it is important to say that the Sewel Convention does not just exist on a nod and a wink. There is a memorandum of understanding[10] which is a publicly available document. There are devolution guidance notes which are there and which are adhered to. There is custom and precedent about how we go about these things, and we respect that. It is not all done in some sort of informal way which is a suggestion that is sometimes made. Ultimately, I think that either Parliament would have to respect the will of the people in the result of a particular election. Unless the will of the people was to lurch violently in one direction or the other, and given that parties which were hitherto opposed to devolution now accept devolution and want to make it work, I think that a common understanding of how these things would work in the best interests of the people of Scotland would quickly become apparent. I do not think the Scottish people would forgive people playing politics on important policy issues because, as I say, we are talking about the Sewel motions and mechanisms here but I am interested, as I am sure you are too, more in the policy outcomes of these things and what we are trying to achieve for people. As you say, it is difficult to speculate entirely on what is going to happen in the future but there is a memorandum of understanding and there are devolution guidance notes, I think they are robust but I cannot predict what the future will hold any more than you can.

Q87 David Mundell: No. You are satisfied that the process is more than what might be called internal party channels?
David Cairns: It is clearly not internal party channels because many of the ministers who are involved in these discussions are not in the same party. We have regular discussions with ministers who are involved in these discussions from other parties in the coalition in Scotland and the fact that the devolution settlement and the Sewel motion are working, and I believe working well in the context of a coalition in the Scottish Executive, demonstrates that it is not all done through backdoor channels within the parties.

Q88 Danny Alexander: You said then what you are primarily concerned about is the outcome of policy, of course that is right. What we are looking into here is not the end but the means of the process and how we ensure proper democratic scrutiny throughout the process. I am interested to know your views about whether or not you think that the scrutiny of Sewel motions at this end, at Westminster, is effective. We heard a lot from Margaret Curran earlier about the way that Sewel motions are dealt with and the Scottish Parliament was very full of it, but in their report the Procedures Committee made

[9] See Ev 39.

[10] *Memorandum of Understanding and supplementary agreements between the United Kingdom Government, Scottish Ministers and the Cabinet of the National Assembly for Wales*, CM 4444.

a number of recommendations about how our procedure might be changed at Westminster to improve scrutiny. For example they suggested tagging relevant bills in parliamentary documents, mentioning any Sewel implications in explanatory notes and the need for the Scottish Parliament's Presiding Officer to send copies of any legislative consent resolution—as they call it now—to the Speaker and to the Lord Chancellor. I suppose there are two questions: are you satisfied the scrutiny process at this end is working well at the moment, and what is your reaction to the various suggestions made by the Procedure Committee?

David Cairns: If I can take them in reverse order. I am very content with the second question. I think that having an Explanatory Memorandum published at the same time as a Bill is published, which clearly indicates the areas where Sewel will apply, is a good thing. It helps transparency and it helps to focus people's attention on that. The difficulty with publishing the legislative consent memorandum at that time is it might not have been passed yet, because obviously there is a process and we would want the Sewel motion in the Scottish Parliament passed at some stage during the first House passage of the Bill here. There is some thinking, maybe, to be done about what appears on the Order Paper, for example at the Second Reading of a Bill which we know are triggers. I think that is something we can very constructively continue to have a think about and I would be genuinely interested to see what the Committee's views on that are. On the first question, it is not really for this House to scrutinise Sewel motions as such, because what this House does is scrutinise the legislation. The Sewel motion is whether or not the Scottish Parliament is consenting for legislation here which covers devolved issues which should apply across the UK. It is up to us to get the legislation right. I would not favour a parallel process where we are scrutinising the Sewel bit of it, if for no other reason than very often the bit that has been Sewel-ed is often very small and very technical, sometimes it is not but very often very small and technical. I think our job at Westminster, as a government, is to get the legislation right. The job of backbenchers is to hold the Government to account and make sure the legislation is right. The job of the Scottish Executive is to decide whether or not it is going to allow Westminster to legislate on a devolved area on this particular occasion. It is the job of MSPs, as part of their procedures, to scrutinise whether or not that is the right thing to do. I think we have got different roles here. I do not favour blurring the lines of accountability in all of this.

Q89 Danny Alexander: Except that there are clearly different responsibilities, of course there are. May I ask the question this way round then: you say it is not for us to scrutinise the Sewel motion, it should be scrutinising the legislation. Surely the application of a Sewel motion changes, no matter in how small a way, the application of legislation. Is there not an issue about when the Sewel motion applies? Margaret Curran was saying to us earlier that they try to work towards a basis of ensuring that the Sewel motion is passed by the Scottish Parliament before the last amending stage in the first House in which the Bill is proceeding.

David Cairns: Yes.

Q90 Danny Alexander: That would imply that if a Bill starts in the Commons, the Sewel motion might not come through until the report stage.

David Cairns: Yes.

Q91 Danny Alexander: Then it could be scrutinised at report stage and then it would be left to the Lords to give it full scrutiny. Do you think that is adequate in terms of the role of backbenchers to scrutinise the legislation and hold the Executive to account?

David Cairns: I come back to the point I made earlier, it is the role of this Parliament to scrutinise the legislation that the Government puts before this Parliament. In a sense that applies irrespective of whether or not there is a Sewel motion. The reason why it has to be given specific scrutiny in the Scottish Parliament is because they are not scrutinising the legislation in the round, they are only trying to work out whether or not this particular bit of the legislation should apply in Scotland and, if so, are there no other ways of doing it. They will specifically look at the Sewel motion which covers the extent to which any particular measure is going to apply in Scotland. I do not think it changes my fundamental point that it is our job as government to get the legislation right and the job of the backbenchers here to make sure that we are held accountable and we have the legislation right as well. The knowledge that a part of this will be applicable in Scotland is something which certainly does affect how, as an MP, you feel about this legislation. I do not think there is any additional procedural mechanism for reflecting that.

Danny Alexander: As a Scottish MP, it might well influence the extent to which a Scottish MP—I am thinking for example of MPs in the Scottish National Party who, as a rule, do not take part in debates on matters which only apply to England and Wales, that is a matter for their party policy.

Mr McGovern: It is not true.

Q92 Danny Alexander: Sometimes they do. In terms of the role of Scottish MPs, scrutinising this legislation, possibly perhaps being involved in a committee appointed through various channels and the knowledge that a Sewel motion applies to a piece of legislation and therefore applies to Scotland—when it initially started this process it was not clear it was going to apply to Scotland—does that not have implications about when it is in the best interest of backbenchers to know about the Sewel motion so that they can give appropriate scrutiny throughout the process in this House?

David Cairns: Yes, and that is why I think it is important to get right the Explanatory Notes published at the time the Bill is published, which would indicate the area that would be covered by a Sewel motion. I would concede here we do not always get that right. There are some very good

examples: the Equality Act, which has just gone through, is a very good example of where it was listed and how it would apply; in others there has just been either inadequate information or inconsistent information. I think one of the things we have given an undertaking to in our memorandum is to do that at an early stage, so that when any MP (Scottish or otherwise) says, "Here is a piece of legislation, I wonder what it is about?", flicks through the Explanatory Notes and sees a chunk of things about Sewel. What I am saying is at that stage it is not possible to say "This has been agreed by the Scottish Parliament", because they are working to their own timetable and I do not think it could be made any tighter really than it is, although that is a matter for Ms Curran. We want to give out the most information that we can give out at the earliest possible stage—I agree with you to that extent—but what I do not think it is possible to do at that stage is to say these things have been agreed because it is not impossible that the Scottish Parliament might withhold its consent, and then the measures would have to be withdrawn from the bill during its passage. I understand the spirit of what you are saying; I am not entirely sure there is a foolproof mechanism for delivering it.

Q93 Gordon Banks: A very quick point to try and tie this up. Minister, would you not agree that if a Sewel motion was notified at the appropriate point in time, early on in the process, it would not give single scrutiny or double scrutiny because of the other place, it would give triple scrutiny to that piece of legislation because of the scrutiny that happens in the House of Commons and House of Lords and also the discussion of the relevant part of Sewel in Holyrood?
David Cairns: Yes, I think that is true. I come back to the point I made earlier—I think it is important—it is our job, as Government, to get the legislation right, irrespective of the Territorial Extent of it, and to make sure that if there are issues of devolution that they have been resolved. If there are issues, even where the policy is reserved, but there is a different application because of Scots law in a particular area is different, we have to get all of that right. I do not think the question is one of inadequate scrutiny but of transparency and awareness, and I concede that there is an inconsistency at the moment in making people aware of where Sewel applies and the extent to which it applies. That is something we need to work at.
Gordon Banks: I mentioned the scrutiny because that was specifically the avenue that Danny was going down. I just feel that there is a way at an early stage to increase the scrutiny of the legislation and be a positive sign at that stage.

Q94 Mr McGovern: Danny just pointed out that the SNP vote when they choose to vote or choose not to vote. Recently they voted on changing the name of the Welsh Assembly; what that had to do with Scotland, I am not entirely sure. Minister, are you satisfied that adequate procedures and measures are in place to alert the Scottish Parliament and Executive when a Private Member's Bill here touches on devolved matters?
David Cairns: I read with interest the Clerk of the House's view on that; he has quite a long passage in his memorandum to you on Private Members' Bills. Essentially, the Government's position is quite clear on this: it is up to private Members to bring forward whatever they want to in a Private Member's Bill, it is not up to the Government to tell them what they should do. The Government is very clear that we will not support any Private Member's Bill which triggers Sewel unless all of the other stages have been gone through in relation to getting the consent of the Scottish Parliament. It is not up to the Government to tell private Members how they should go about introducing their own legislation. I was fortunate to come number two in the private Member's ballot a few years ago and I introduced a Bill, which applied only in Scotland; although it was entirely reserved, it was to do with employment. At that stage, I had to make sure that there were not any devolution aspects to this, and I did, and I was quite clear; it was a very clear-cut case. It is up to any Member who wishes to bring forward legislation to take those steps, but the view of the Government is clear and, to the extent that it is a matter for the Government, the Government will not support legislation that involves this House legislating in private legislation like that on a devolved subject which does not have the consent of the Scottish Parliament.

Q95 David Mundell: In your memorandum, you say that the Government "requires Bill teams to include in the Territorial Extent section of a Bill's Explanatory Notes a description of how a Bill applies to Scotland and whether or not it triggers the Sewel Convention". Are you willing to impose a standard form of wording for Territorial Extent in the Explanatory Notes, as it has been suggested they do tend to vary in quality?
David Cairns: I think that is the point I have been making, Mr Mundell. I think there is an inconsistency there. Certainly I think that we need to look at not necessarily a standard form of wording but certain bases it needs to cover. I think we need to look at where it has been done very well in something like the Equality Bill and say what are the elements here that allow people to understand where Sewel applies and the extent to which it applies. We are very open to improving that aspect of things, yes.

Q96 David Mundell: Should the Committee decide to recommend the full recommendations of the Scottish Parliament Procedures Committee be implemented here at Westminster, would that give you any specific concerns?
David Cairns: There is an interesting mix in the Scottish Parliament Procedures Committee's report of their own recommendations where they say, "We think this should be done" but they also report on other people's recommendations. I would not give any blanket assertion that would allow somebody to slip in a recommendation that came from an academic or someone that was not one of their

recommendations. As far as I am aware, they have got a two or three specific recommendations. This business about trying to put something on the Order Paper saying that this triggers Sewel, I am very attracted to that principle although I think there are timing issues. The issues on the Explanatory Notes that you just mentioned and getting copies of the legislative consent resolutions put into our process somewhere or other in the Library of the House of Commons, I think they are all very sensible recommendations and I would not have any problem with any of those. There are other recommendations in that report which we made and you may wish to go on to that I would have more reservations about. I have already addressed one in comments to Mr Alexander about joint sitting of committees looking at different things, I am not sure that adds an awful lot to anything. On those core recommendations, I think we can certainly make those work.

Q97 David Mundell: Last week at our evidence session in Edinburgh[11] one thing that was raised was alerting Scottish MPs to Sewel motions or legislative consent motions having been passed, although there was a recognition that Scottish MPs are not always on the relevant committees, but clearly they have colleagues who are. If that was a view, whose responsibility would you think that was, in the sense of the Scotland Office or Scottish Parliament or parliamentary authorities?
David Cairns: I have to be honest with you, I am not particularly attracted to the notion that we have to treat Scottish MPs differently to anybody else on this issue. My view is that legislation before this House is considered by every Member of this House on an equal footing and they should have access to the same information as everybody else. I would rather we did this through means that were universally available to all Members of Parliament. I know that different parties take different views on this issue, but my view is that getting it right in the Explanatory Notes, finding some way of getting on to the Order Paper at the earliest stage with the caveats that I have mentioned, so everybody can see this, is the best way of doing it. I am not generally in favour of having another layer that only applies to Scottish MPs particularly. As you say they might not be the ones on the standing committee stage of the Bill where there was a Sewel motion on it.

Q98 Mr McGovern: Minister, presumably though you would agree that ultimately it is a matter for the House rather than the Government to decide?
David Cairns: All legislation is ultimately a matter for the House because the Government puts its legislative proposals to the House and hopes to win, and more often than not does, occasionally does not. Ultimately, it is a matter for the House to decide whether or not any legislation is going to apply anywhere to anyone. That is as true of the bits which will apply in Scotland. Just as the Scottish Parliament has a vote on whether or not something will be Sewel-ed, and they have got the final backstop on it, so the House has got the final backstop on any legislation. The House can decide to pass or not pass any legislation or amend it through its parliamentary process. Ultimately, yes, you are right, it is a matter for the House.

Q99 Gordon Banks: Minister, you have already answered a large chunk of the question I was going to ask in answer to Mr Mundell's question about recommendations from the Committee and from witnesses. Can I put a supplementary to you? Can we assume that you would not be in favour of Holyrood parliamentary committees attending and participating in the Scottish Affairs Committee in Westminster?
David Cairns: I need to tease out your question. If you are talking about joint investigations between select committees and things, that is not really a matter for the Government. If you are talking about MSPs involvement in standing committees and scrutinising legislation, I think that is a separate issue which I have views on. I think there are lines of accountability, as I said in answer to an earlier question. MSPs are accountable to the Executive of the Scottish Parliament, MSPs are accountable to the electorate and that way we are accountable as well here. I am accountable to Parliament and I must account for our actions before committees such as this. I am not greatly in favour of blurring these lines of accountability. For what purpose? I am not really sure what the end purpose would be given, as I have said, that it is the job of this House to scrutinise legislation before this House, the job of the Scottish Parliament to scrutinise Executive legislation and legislation that is emanating from here which is the subject of the Sewel motion. I think there are clear lines of accountability and I would not be in favour of blurring them.

Q100 Gordon Banks: Certainly it was nothing to do with standing committees et cetera, it was related to select committees in Holyrood and a Scottish Select Committee if it was doing an investigation into something which the Holyrood Committee could work closely with this Committee on.
David Cairns: Ultimately, I think that is a matter for your Committee, Chairman. I do not think it is a matter for the Government to tell select committees how they should conduct their inquiries.

Q101 Gordon Banks: You do not have an opinion?
David Cairns: I do not have an opinion on how select committees should conduct their inquiries, that is a matter for the select committee. On the other one I was talking about, yes, because that involves Government legislation.

Q102 Danny Alexander: Would you agree with Alistair Darling's point that most Scottish MPs in the past have not necessarily known when a Bill has been subjected to a Sewel motion?
David Cairns: I have to be honest, most of my time as a Scottish MP has been spent as a backbencher and for most of that time I was not aware of many

[11] See Ev 1.

of the issues which were Sewel-ed. Extrapolating from me to everybody else I think it is probably right. That is not because we are all exceptionally tardy in our duties, it is partly because most Sewel motions are relatively technical, relatively minor, only applying to relatively small parts of Bills. We are all doing many other things; we serve on select committees; we are on different standing committees. We are dealing with issues which are before us. I think he is right, that is the reality. It does not cause me sleepless nights, to be honest with you. I do not think that it is the end of the world provided people have got the opportunity to know that, and this is where it comes back to consistent information, if we can say to the Scottish MPs, as anybody else, "The information is all there, it is on the Explanatory Note that was published in the bundle that came out with the Bill, we found some mechanism, with all the caveats I mentioned about tagging this on the order paper, the information is there for you to explore", I think that is the way we should approach this.

Q103 Danny Alexander: You make the point, quite rightly, that many Sewel motions are technical matters, they are not a major issue of policy. That is not necessarily always the case, and it has not necessarily always been the case. There have been some which have applied which have had significant implications. I would have thought in those cases that having Scottish MPs being aware of the risk is quite important. I wonder if you think there might be a role for the Scottish Grand Committee in that in ensuring that Scottish MPs are aware of the risk?
David Cairns: To be honest, I am not attracted to the idea of parallel scrutiny of the same piece of legislation. The big Sewel motions that you are speaking about on the big policy areas, essentially what they are doing is they are taking legislation that is being brought in to apply to England and Wales and making that applicable in this instance to Scotland. The job is to get the legislation right and I think that is the job of the scrutiny process at Westminster. The reason why MSPs specifically have to scrutinise the Sewel bit of it is because that is their only interaction with the legislation. The rest of the legislation is not for them to scrutinise because it is not before their House. I would be wary about setting up duplicate scrutiny of the same piece of legislation, I just do not think that it adds anything.

Q104 Danny Alexander: Even in the case where a piece of legislation starts its journey in the Commons and a Sewel motion, which is not purely technical, comes in quite late in the Commons process—so, for example, there may be no Scottish MP on the committee considering it—do you not think in those sorts of cases there may be scope for some additional level of scrutiny?
David Cairns: I do not think there is any place for duplication of scrutiny of the same piece of legislation. It is the job of all backbenchers to make sure that the legislation is right. We do that through the process of this House, the Second Reading of the committee stage, report stage and all the rest of it. Of course at Second Reading and at report stage it is perfectly possible for any MP, Scottish or otherwise, to come in and speak and move amendments on the legislation. I think there is an opportunity for Scottish MPs if they wish to take a particular interest on a particular bit of a particular bill that is the subject of the Sewel motion. I simply do not see any merit in setting up parallel or secondary bits of scrutiny.

Q105 Mr Walker: How do you get involved in a piece of legislation where a Sewel motion is attached, bearing in mind that it is relevant to Scotland? Does that create any additional burden for yourselves in your role with the Scottish Office?
David Cairns: I think this is a good point to bring in some of the officials because they are the ones who engage in these discussions. As I have said, the Sewel motion is a point in a process, it is not the beginning of the process. Discussions take place prior to, first of all, an understanding that Sewel is triggered by this. Some of these things are very technical. Everybody has to agree this does trigger Sewel and there is a process involved there where lawyers will look at a particular issue. That is separate from the policy discussion about the desirability of it. Maybe I can bring Glenn in at this point because that is particularly what his job entails.
Mr Preston: It does happen on a regular basis where there is contact between officials in Whitehall departments and the Scotland Office. The Whitehall department will be seeking the Scotland Office's view on whether or not policy development or indeed provisions and instructions to bills, for example, will trigger the Sewel Convention. We will be asked to offer a view on that. With the help of our lawyers we will often give them that view. At the same time, we will put them in touch with the Scottish Executive which will want to come to a view itself on whether or not the provisions will trigger the Convention. That is a process that happens regularly on virtually every bill and indeed on specific bits of bills too.
Dr Wildgoose: The other point which follows on from what Glenn mentioned is that we have an important role in making sure that all UK bill teams are aware of these issues and that happens well in advance of introduction of the bills. That is part and parcel of the process of making sure that enough time is available to take account of the procedures which have to occur in the Scottish Parliament if a Sewel motion is laid. There is quite an important education facilitation type process which goes on at quite an early stage, well before any bill is introduced, in fact. That is quite an important element in this process as well.
David Cairns: There is another layer of that as well which is, as well as the day in, day out interaction at official level, we also have seminars in the Scotland Office where we bring together both ministerial colleagues from the Scottish Executive and here as well as officials from our office, their counterparts in the Executive and Whitehall Bill Teams, people who will be preparing legislation in the coming year. We say to them right off the bat, "Devolution is not something to be bolted on at the end of your

considerations of whatever your bill happens to be. It must cut all the way through it". This may be slightly daunting to one who has either come into the Civil Service after devolution, and therefore has no understanding of Scots law, even of how to go about it, or issues where there are fine legal points about whether something does trigger Sewel or not. What we want to say to colleagues across Whitehall is, "Look, help is at hand. We have a great deal of expertise here and we will help and advise you, but the best thing is for you to try and speak to one another as much as you can". Then there is a ministerial overlay at the end of the process. As part of the legislative process of clearing any bill before it comes in, I must signal that I am content that the devolution aspects of this particular bill have been resolved or understood and are in the process of being resolved. There is interaction and checks and balances really at every stage in this.

Q106 Danny Alexander: You gave, just then, a very interesting answer.
David Cairns: Oh, dear!

Q107 Danny Alexander: You said that everybody has to agree that the Sewel Convention does apply. You talked about that being a discussion between officials, that you are involved in signing off that you were satisfied that devolution aspects have been properly dealt with. Indeed, that will then potentially trigger a Sewel motion coming in at some point, and obviously a Sewel motion has to be debated by the Scottish Parliament, and there is a democratic process there. One level of agreement that is not sought is any sort of parliamentary approval at this end that the devolution aspects have been properly looked into or that a Sewel motion properly applies; there is no parliamentary scrutiny at the Westminster end on that point. Do you think that is a gap in the legislature at the moment?
David Cairns: No, I do not; we need to step back to first principles here. The Scotland Act is very clear the UK Parliament reserves the right to legislate across the UK on any issue, whether it is devolved or not. The Sewel Convention says we will not normally do this, and we have not done apart from one mistake, without the consent of the Scottish Parliament and the Scottish Parliament has its own mechanisms in place for granting that consent. Once that consent has been granted, it is then for this Parliament to legislate. I do not think we need to second-guess that. If the Scottish Parliament is content to allow us to legislate for that then we will legislate for that, and then it is for this House to scrutinise that legislation, as I have said repeatedly, through the normal channels that we scrutinise any legislation. I think, again, we have to understand by and large Sewel motions are about extending into devolved areas legislation that is being passed here and the agreement being sought is to allow us to do that. In all of this process all power resides, ultimately, not ultimately but in terms of respect under the Sewel Convention, with the Scottish Parliament, if they do not want us to legislate on something, we will not legislate; if they do want us to legislate on it, then we will legislate. I do not think us having to second-guess their consent adds anything to the process.

Q108 Mr McGovern: Minister, I think in terms of awareness of the subject of the Sewel motion, I am pretty much the same as you, largely unaware. I must admit there is a degree because I am an outsider. If people did do that, it is a problem, would you not accept the recommendations of the Procedures Committee would rectify that?
David Cairns: I think it goes some way towards it. Incidentally, I would have thought the prospect of having a statue of a 90ft naked woman in Dundee might give you more sleepless nights than the Sewel motion!

Q109 Mr McGovern: Definitely.
David Cairns: I think they would. I think it is about being able to say to everybody, "Should you wish to find this information, this is where you will find it". We give a guarantee in the Explanatory Notes that is where to look for it and you will get it there. The problem at the moment is it is inconsistent, sometimes it will be there, good as gold, and other times it will not be, and people have got to have the confidence to know in the specifics of a bill where to look for it. I would also add another point, at the time of the Queen's Speech in general terms—because obviously the bills announced in the Queen's Speech are not published as bills so we cannot go into too many particulars—we produce a note saying where Sewel is likely to be sought on any particular measure, which I think is the House of Commons Library, is it not?
Mr Preston: That is right, yes.
David Cairns: At that stage you can get a broad indication of the issues where a Sewel motion is likely to be sought and, therefore, where it is not likely to be sought. This could trigger in your mind the things to look out for, so when the Explanatory Notes of the particular bills then come through at the time the bill is published, which is some time after the Queen's Speech, you could then go and see exactly how it applies. There are various ways in which the information can be sought. I have to say, until the last Queen's Speech I did not realise that the Scotland Office did this either, so I am as guilty as anybody of not being aware that this happened, but it does happen. At a very early stage, as soon as the bills are announced in the Queen's Speech, there is a broadly indicative indication, if you can have an indicative indication, as to which bills are likely to attract Sewel or not.

Q110 Mr McGovern: That almost pre-empts the next question, Minister. Referring to that, the Secretary of State put it in a written statement for an opening speech, I think it is informal at the moment, do you think that arrangement should be formalised or is it sufficient as it currently applies?
David Cairns: I am not sure what we mean by formal and informal in this. We give an undertaking to do it, and we do it, and providing we continue to do it, I think that is sufficient. Of course, the point about

the Queen's Speech is that it is an announcement of a programme for Parliament and, therefore, many of the bills announced in the Queen's Speech do not exist for bills, they will be published during the course of that year. It is not always possible to give chapter and verse of the details exactly. What we do is at the very first opportunity we can give information we give it, and then we give out the most amount of information we can as the process goes on. Maybe we need to think about ways of drawing this to people's attention, the fact a lot of work goes into doing it by a lot of people and then nobody knows about it. We might have to think about ways to draw it to people's attention.

Q111 Mr Walker: Minister, what reassurance can you give the Committee that the Legislative and Regulatory Reform Act will not be used by HM Government to take the final decision on controversial, but devolved, matters away from the Scottish Parliament?
David Cairns: I think there has been some fairly lurid press speculation about this particular measure. I think I want to take a little bit of a step back and just say exactly what this measure is about and what it is not about. It is about furthering the Government's Better Regulation agenda. It is about reducing the administrative burden on the public and private sector. It is about allowing a speedier introduction of non-controversial Law Commission reports which are brought in at the moment, although I believe there is an average seven and a half year wait before they are brought in. There is recognition across all sides of the House that we need to be able to introduce regulatory reform orders in a better and more systematic way. Since the current Act was put into place in 2001, there have been 27 regulatory reform orders. I think most people accept that we really should be able to do better than that, not least of all your own party, Mr Walker, which bangs this drum as well. I think that is the broad principle about what we are trying to do. However, it is important that we build in some very significant safeguards into this. There are four or five quite significant safeguards that are being built into this. There has to be a statutory public consultation on any particular measure that is approved. The orders have got to be considered by the committees of both Houses, the Regulatory Reform Committee here and the Delegated Powers Committee (as it is called) in the other place and then they have to be considered by the relevant subject committee on the subject area that their role is covering with a power of veto by those committees. The Government has given an understanding that we will not seek to do anything that is highly controversial through this means. All of this is subject to judicial review. I think with those safeguards in place some of the more lurid headlines that we have seen about this will simply prove to be inaccurate.

Q112 Chairman: Minister, you will be aware that the Scottish Parliament has agreed that officially the name Sewel motions should be changed to Legislative Consent Motions. Are you in agreement with the Procedures Committee recommendations?
David Cairns: I think they have done that for a very good and sensible reason in that the whole concept of the Sewel motion had become controversial over and above the substance of it. There was an extent to which when they boiled this down to its essence they realised, as I said in my first answer, I think, that this was a very sensible mechanism, and that if it did not exist you would have to invent it. They felt that the term "Sewel motion" obviously had connotations which had been, I assume they believe, tainted. The reason why I think we would have to be a little bit careful about stopping referring to the Sewel motion here is it has taken a wee bit of time to get people here to understand what they are, what they are doing and what they are about and so when we talk to our English colleagues about Sewel motions, I think most of them understand what we are on about in so far as it impinges upon what we are doing. I think there was a very good reason why they made the change that they made. I am not sure the same pressure is on here to make that same change, but I am not ruling it out. I think in common parlance we know what we mean by a Sewel motion. It does not attract the same negative connotations that the phraseology attracted in Scotland, in a quite unfounded way, I have to say, but sometimes you have to accept the fact that the new name more accurately reflects what it does and that is what they have decided to do. I would not rule it out but we know what we mean by it here.

Q113 Mr Walker: Will the hostility from the press transfer to the new name, do you think?
David Cairns: It seems to me, and you will be as aware of this from your reading of the Scottish press as I am, a lot of the concerns have evaporated about this. There is now an understanding that Sewel motions are not about handing power back to Westminster, that the Scottish Parliament retains the right to legislate in devolved areas, even in this particular instance it has given its explicit consent for Westminster to legislate on that. I think there were some misunderstandings about that. Legislative Consent Motion actually does what it says on the tin, so to that extent I can understand why they have made that change. It seems to me that the interest has waned and moved on to other matters.

Q114 Chairman: Minister, as you know, we are conducting an inquiry on potential energy needs for Scotland also. There might be a possibility that in the future the UK Government will decide that they want to have nuclear power stations in Scotland. Let us say the Scottish Parliament's view is that they do not want to grant permission for nuclear power stations, what will be the mechanism to address that issue?
David Cairns: There is no mechanism to address the issue in the sense that we are very clear on this, Chairman. It is within the devolved competence of Scottish Executive ministers under the Electricity Act to give their consent to any large generating plant capacity, nuclear or otherwise. That is their

decision, and the Prime Minister has given an assurance that will remain their decision. I have given an assurance that remains their decision.

Q115 Chairman: Minister, could I thank you and your officials. That concludes our questions on the Sewel Convention. Did you wish to say anything in conclusion, perhaps on areas not covered already during our questioning?
David Cairns: No. I would like to thank you, Chairman, for the invitation today. We genuinely look forward to your report on this issue because I do not think there are enormous issues of principle here, it is an issue about transparency, making sure that people have the information that they need, when they need it. Any recommendations you can make will help facilitate that, certainly ones the Government will give very close consideration to.

Q116 Chairman: Before I declare the meeting closed, could I just ask if you are able to tell the Committee yet when the Government expects to publish its response to the report from the Arbuthnott Commission?
David Cairns: Our response will be forthcoming in due course. I would not expect this to happen before the Easter recess, however.
Chairman: Thank you very much, Minister. This has been a useful evidence session. Once again, thank you to you and your officials.

Tuesday 21 March 2006

Members present:

Mr Mohammed Sarwar, in the Chair

Danny Alexander	Mr Jim McGovern
Gordon Banks	Mr John MacDougall
Ms Katy Clark	Mr Charles Walker

Memorandum submitted by the Clerk of the House of Commons

Introduction

1. The Scottish Affairs Committee has requested the Leader of the House to provide a memorandum giving a House of Commons view on the recommendations made by the Procedures Committee of the Scottish Parliament for changes in the way the so-called Sewel Convention operates. The request includes the suggestion that such a memorandum should incorporate the advice of "the House's most senior Officers". This note is submitted in response to that suggestion.

Background

2. The Sewel Convention was, in effect, an undertaking given on behalf of the United Kingdom government that, although the Scotland Act 1998 preserves the right of the United Kingdom Parliament to legislate on any issue, whether devolved or not, Westminster will "not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament."[1] Although the undertaking was given in the United Kingdom Parliament during proceedings on the bill for the Scotland Act, and may well have influenced those proceedings, it has no formal legal or parliamentary status; and its subsequent development has depended almost entirely on an inter-governmental memorandum of understanding.

3. The Scottish Parliament has a clear interest in seeking a greater degree of formality in the operation of the convention; and the majority of the recommendations in the report of its Procedures Committee are aimed at ensuring that appropriate care and attention is devoted to the passing of "Sewel Motions" in that Parliament. The Westminster Parliament does not have such a direct interest in entrenching the convention in its procedures, because its legislative rights and authority are not at stake. And, as the vast majority of successful legislation at Westminster originates from the Government, and as the issue of whether or not a bill is going to deal with a devolved matter is something which is decided within Government well before introduction, the political reality is that good inter-executive co-operation will remain fundamental to the smooth operation of the convention. Nonetheless, as the undertaking was given in the United Kingdom Parliament, Westminster has a legitimate interest in receiving clear and timely guidance—

(a) when it is being asked to pass legislation to which the Sewel Convention applies, that that is the case; and

(b) in such a case, that the Sewel Convention has indeed been complied with.

Proposed Changes to House of Commons Procedures

4. Against that background, I now comment in turn on the suggestions made by the Procedures Committee for changes to procedures at Westminster. Although the Scotland Office memorandum comments on a number of proposals made by those who submitted evidence to the Procedures Committee, I have limited myself to those which the Committee itself adopted in paragraphs 204 to 207 of its Report.[2]

Identification of Bills to which the Sewel Convention applies

5. The Procedures Committee suggested that one possibility might be "a system of certification by the Speaker, with Bills thus certified being labelled appropriately in official lists of Bills in progress throughout their passage",[3] along the lines of the provision under SO No 97(1) under which the Speaker may certify a bill as relating exclusively to Scotland, in which case its committee stage is normally taken in a Scottish standing committee.[4] However, the identification of provisions in a bill which might be covered by the Sewel

---

[1] HL Deb, 21 July 1998, col 791.

[2] *The Sewel Convention*: 7th Report, 2005 (Session 2) SNP Paper 428 vol 1.

[3] Paragraph 204.

[4] Though the most recent such Government bill to be so certified, the Scottish Parliament (Constituencies) Bill enacted in 2004, had its committee stage in Committee of the whole House.

Convention is a less straightforward task than determining whether or not Standing Order No 97 (1) is applicable; and so in practice the Speaker's decision would have to be informed by guidance from the draftsman and the Department responsible for the bill. And, unlike the application of SO No 97 (1), no procedural consequences would follow from certification. I therefore agree with the Scotland Office in finding this suggestion unpersuasive.

6. It is much more important that a Sewel Convention bill should be clearly identified as such in the Explanatory Notes accompanying it. The Scotland Office memorandum acknowledges that this information is not always given in as clear and explicit fashion as it might be; and I have no doubt that the House would welcome the adoption by Departments of a more consistent standard for conveying this information.

Communicating the Scottish Parliament's View

7. This is where tagging might be helpful. The Procedures Committee suggest that:

> . . . it would be appropriate for the Presiding Officer to send copies of each such resolution to the Speaker of the House of Commons and to the Lord Chancellor (as speaker of the Lords). It would then of course be up to those officers to decide how to communicate the receipt of the resolution to their Parliamentary colleagues—for example, orally in the Chamber, or through a notice in the relevant order paper.[5]

8. The Committee might like to consider the precise details of communication between the two Parliaments; it might be thought, for example, that a letter from the Clerk of the Scottish Parliament to the Clerk of the Parliaments and myself might suffice, rather than involving our respective presiding officers. However, whatever method of communication is adopted, it would be simple matter to note on the Order Paper against the bill in question the fact that the Scottish Parliament had agreed a Sewel Resolution in respect of it and to make the text of the resolution available to Members. Alternatively, as suggested in the Scotland Office memorandum, responsibility for making the text of the resolution available might rest with the Department in charge of the bill rather than with the House authorities.

Private Members' Bills

9. Most of the foregoing relates to Government bills. Private Members' bills present particular problems because they are largely outside the framework of communication between the UK departments and the Scottish Executive.

10. As the Clerk of the Parliaments and I explained to the Procedures Committee in the Memorandum that we submitted to its inquiry,[6] if a Member of either House proposes to introduce a private Member's or Peer's bill that extends to Scotland and deals in whole or in part with devolved matters, we draw the Member's attention to the fact that devolution issues are involved.

11. At present, when private Members' bills are published that, in our opinion, touch upon devolved matters, we generally alert the Chamber Office in the Scottish Parliament of that fact so that the Clerks can consider the need for a Sewel Resolution. We also try to keep the Scottish Parliament informed during subsequent stages of a bill of proposed amendments that might engage with devolved powers. In return, the Chamber Office lets us know if and when a Sewel Resolution has been agreed to in respect of each private Member's bill that engages devolved powers.

12. In that connexion, the Procedures Committee Report recommends that when a private Member's bill is introduced that makes provision for a devolved purpose or that alters the Parliament's legislative competence or the executive competence of Scottish Ministers, the Scottish Executive should normally lodged a memorandum on the bill within two weeks of it completing its first amending stage.[7] The mechanism for lodging the memorandum is a matter between the Scottish Parliament and the Executive, but the Commons Public Bill Office will continue to notify the Legislation Team in the Scottish Parliament of any private Member's bill which, in our view, engages devolved powers.

13. Though the current arrangement between the Commons Public Bill Office and the Legislation Team in the Scottish Parliament is on the basis of "best endeavours", it seems to be operating to the satisfaction of colleagues in Edinburgh.

14. If, however, it is felt that this relatively informal system of notification is insufficiently robust, then it must be for the Scottish Parliament and the Scottish Executive, rather than for Westminster, to make the judgment as to whether or not a Sewel Resolution is appropriate in the case of a particular bill. In order to

[5] Paragraph 206.
[6] 7th Report, 2005 (Session 2) SNP Paper 428 vol 2 p 116.
[7] Paragraph 167.

be able to make that judgment, the Scottish Executive will need to examine each private Member's bill for itself. I note in this connexion the statement in the Scotland Office's memorandum to the Committee, *The Sewel Convention: The Westminster Perspective*, that:

> The Government will not support a private Member' bill which includes provisions subject to the [Sewel] Convention without agreeing with the Scottish Executive that it will seek the consent of the Scottish Parliament to the inclusion of those provisions in the Bill.[8]

This would suggest that there is already a mechanism in place within the two Executives for making these judgments.

Roger Sands
Clerk of the House

15 February 2006

Memorandum submitted by the Clerk of the Parliaments

INTRODUCTION

1. This memorandum is supplementary to the note submitted by the Clerk of the House of Commons on 15 February. I agree with Roger Sands' summary of the background and, as he did, I will comment on the suggestions made by the Scottish Parliament's Procedures Committee in paragraphs 204 to 207 of their report.

TAGGING OF RELEVANT BILLS

2. I doubt whether, in the context of a self-regulating House, the Speaker of the House of Lords would have the power to certify bills. But it would certainly be possible for a note to be made in our Minutes and Orders of the Day indicating that the Scottish Parliament had agreed a Sewel Resolution in respect of a particular bill. We are currently engaged in a re-design of our procedural documents, and I will ask the working group concerned to take this into account in their proposals.

COMMUNICATING THE SCOTTISH PARLIAMENT'S VIEW

3. I agree with Roger Sands' suggestion that a letter from the Clerk of the Scottish Parliament to the Clerks of the two Houses at Westminster might be the simplest way to convey the Scottish Parliament's views. The text of the resolution could be made available to Lords Members through the Printed Paper Office.

IMPROVED EXPLANATORY NOTES

4. I fully support the suggestion in Roger Sands' note that the information in Explanatory Notes could be improved. The adoption of a consistent standard form of references to Sewel Resolutions would certainly assist Members of both Houses here to find this information quickly.

PRIVATE MEMBERS' BILLS &C

5. The current agreement between the Lords Public Bill Office and the Scottish Parliament is that we will attempt, on a "best endeavours" basis, to warn the Legislation Team in the Scottish Parliament of bills which engage devolved powers and might require a Sewel Resolution. We also try to keep the Scottish Parliament informed of significant non-Government amendments which might have devolution implications. We think that this arrangement has worked satisfactorily. There are relatively few Private Members' Bills in the Lords, and very few indeed which might require a Sewel Resolution.

6. As paragraph 14 of Roger Sands' note says, it must be for the Scottish Parliament and the Scottish Executive to judge whether a Sewel Resolution might be appropriate on a Private Members' Bill, and there appears to be a mechanism in place for making that judgment.

P D G Hayter

27 February 2006

[8] Paragraph 28.

Witnesses: **Mr Roger Sands,** Clerk of the House of Commons, and **Mr Frank Cranmer,** Clerk of Bills, House of Commons, gave evidence.

Q117 Chairman: Good afternoon, welcome, Mr Sands and Mr Cranmer, to our meeting of the Scottish Affairs Committee this afternoon. We are very pleased that you have been able to attend to give evidence on our inquiry into the Sewel Convention: the Westminster perspective. Before we start asking detailed questions, would you like to make a statement?
Mr Sands: Only, Chairman, just to clarify for the record the basis on which I am giving evidence. Your request was originally made to the Leader of the House for a memorandum giving what I think was described as the view of the House of Commons on the Sewel Convention, and I was asked by his office to prepare a paper, and he has sent that to you. Obviously, I cannot do any more than give you the view on the Sewel Convention of the House of Commons administration; I cannot talk on behalf of the House as a whole.

Q118 Chairman: We appreciate that, but we will ask the questions, and if at any stage you feel that you are unable to answer them for any reason, please say so. I do not think that we would be offended or upset by that. We have heard from Ministers both from the Scottish Executive and the Scotland Office how inter-governmental arrangements are co-ordinated. Can you briefly explain how inter-parliamentary arrangements are co-ordinated now?
Mr Sands: I will largely leave this question to Frank Cranmer, if I may, Chairman. I should say in general that relations between officials at Westminster and officials at the Scottish Parliament are generally cordial and good, fostered in a number of ways, formal and informal. I do have occasional discussions with my opposite number, Paul Grice,[1] but I cannot say that the issues which are before you at the moment ever cross my desk; however, they do arise from time to time in the Public Bill Office, and so I will ask Mr Cranmer to deal with that.
Mr Cranmer: Chairman, there are two channels here. One is Government Bills and the other is Private Members' Bills. Relations on Government Bills are between the UK Government and the Scottish Executive. Ministers, through their civil servants, keep in contact with the Scottish Executive so the Executive knows when a Sewel Convention is required in respect of a Government Bill. My concern is with Private Members' Bills, quite a few of which are drafted in my office. When I look at the bill drafted for the first time, one of the things that I try and bear in mind always is whether, if it applies to Scotland—though actually not many of them do—it engages devolved powers. If it appears to engage devolved powers we draw this to the attention of the Member concerned. The Bill quite often goes through a long drafting stage; and when it comes to fruition, and when it is presented and printed, we let the legislation team in the Scottish Parliament know so that they can pick it up. It is an entirely informal arrangement but it is an informal arrangement that is based on an exchange of letters between myself and Ken Hughes, who was the Clerk in charge at the time, saying that we would use our best endeavours to keep them informed. All I can say, Chairman, is that we have not had any complaints; the system seems to work well at an informal level.

Q119 Chairman: How often do you have to liaise with the Clerk of the Scottish Parliament or the parliament's legislation team over bills to which the Sewel Convention might apply?
Mr Cranmer: Probably two or three times a year. When the ballot bills come in we tend to treat those as a block. Occasionally, in the course of a year either a ten-minute rule or a presentation bill might engage Scottish devolved powers, but I cannot give you precise figures. However, I can find out and write to the Clerk, if that would be helpful.[2]

Q120 Chairman: Thank you very much. Some people say that the arrangements between the Scottish Parliament and the British Parliament or the British Government and the Scottish Government are working well because we have the same political persuasion in both parliaments. Are you satisfied that in future if we had a government of one political party in London and another in Scotland these arrangements would work satisfactorily?
Mr Sands: I think what would then be put to the test is whether a convention is good enough. There are various ways in which this restraint—which is what it is—on the Parliament here at Westminster could have been applied at the time the Scotland Act was being discussed. One, the most extreme, is that it could have been written into the Scotland Act itself; it could have been a legal constraint. The second is that it could have been some sort of self restraint imposed by a resolution or a Standing Order of the House, rather in the way that the *sub judice* rule, which we now think of as a rule, started off as a convention. It was rather like the Sewel Convention; the House would not debate matters that might prejudice cases coming before the courts. That eventually was turned into a rule, as we know it now. That would have been option number two. The third was the way the Government chose to go, which was to make an undertaking, which was on the record, and to then enshrine that undertaking in an inter-governmental memorandum of understanding. My own guess, for what it is worth, is that no incoming government here at Westminster would want to abrogate the Convention, but what might happen is that it would be used rather less frequently. I do not think that the procedures that have grown up around the Convention would need to be changed. I cannot see why that would be necessary.

Q121 Chairman: In your memorandum you set out in detail the arrangements in place for dealing with Private Members' Bills, which extend to Scotland, and leave wholly or partly the devolved matters. Are

[1] Clerk and Chief Executive, Scottish Parliament.

[2] See Ev 46.

these arrangements robust enough to deal with UK and Scottish governments of different political persuasions?

Mr Sands: I do not think the situation would change. It would only be if a change of government provoked political tensions and rows here about things like English votes for English matters, which provoked back-benchers here at Westminster to press the issue more than they tend to now in the sort of Private Members' Bills they brought forward. Frank will correct me if I am wrong, but I was in the Public Office Bill at the time of devolution and we did have this discussion about how we would approach back-benchers who came in with bills that appeared to impinge on devolved matters; and we agreed we would draw it to Members' attention. My experience was at that time that when we did, for most Members it came as a surprise to them and they said, "we must change that if it does apply to Scotland", and they were generally very amenable. I do not know if that is still the case.

Mr Cranmer: I think that people do not want things to apply to Scotland inadvertently. I also think—but this is only an impression—that generally there are fewer Private Members' Bills that apply to Scotland now than prior to devolution. People tend to think in terms of legislating for England and Wales. There is another point that the Committee might bear in mind, and that is that whatever the political complexions of the governments in Edinburgh and in London, the first hurdle for a Private Member's Bill is to get the approval of the UK Government. David Cairns made this point when he came before you last week.[3] If it has not got the UK Government's backing, it is not going to proceed any further anyway.

Q122 Mr McGovern: In its Report the Procedures Committee made a number of suggestions of how Westminster procedure might be changed, and in their view, at least, improved: for example, "tagging" relevant Bills in parliamentary documents; mentioning any Sewel implications in the explanatory notes; or the Scottish Parliament's Presiding Officer might send copies of any legislative consent resolution to Mr Speaker and the Lord Chancellor. What are your views on these suggestions?

Mr Sands: I have dealt with this to some extent in paragraphs 4 *et seq* of my memorandum. I think that those recommendations are quite sensible, and I do not perceive any difficulty for us in applying them. The one about explanatory notes is a matter for government, and the Scotland Office in its written evidence and David Cairns in oral evidence last week acknowledged that the way explanatory notes currently identify devolved provisions in Bills tends to be a bit patchy. It could be standardised with advantage. When it is done well, it is fine. There is a section in the explanatory notes on the current Police and Justice Bill with some such heading as "Territorial Extent", and it sets out provisions that may apply to Scotland very clearly. If that practice were followed in a consistent way, the House would have all the information it would reasonably want about the Bill as introduced. What it does not have, which would probably be an advantage to it, is any information about the Scottish Parliament's input into this proceeding through the passing of what they are now going to refer to as a Legislative Consent Motion. The further recommendation of the Procedures Committee that these motions when passed by the Scottish Parliament might be sent to us and made available to Members I think is a good idea, and we would be happy to co-operate with that. That would then go back to the first bit that you mentioned, which is tagging. Obviously, if we received from the Scottish Parliament a Sewel motion and the accompanying memorandum to be deposited for the information of Members, it would be a natural thing to do to flag that up on the Order Paper, in the way we now draw attention to relevant select committee reports and that kind of thing, when the bill next came before the House. This would not be on introduction; it would probably not be until Report stage and third reading.

Q123 Mr McGovern: I apologise if there is an element of repetition in the questions—and I think you have covered part of this in your previous answer. In his evidence last week David Cairns did seem to be fairly relaxed about the Procedure's Committee's suggestions. Are there any procedural reasons why any, or all, of these suggestions could not be adopted at Westminster?

Mr Sands: I do not think so—certainly not the ones we have just discussed. I have expressed reservations, as has the Scotland Office, about the proposal that the Speaker might certify a bill as bringing in the Sewel Convention. I think that this is better done by government because they are involved in the process of preparing, considering and drafting bills, and discussing them with departments and the Scottish Executive at a far earlier stage than we see them. The process of identifying provisions which might entrench on devolved responsibilities can be, I imagine, in some cases quite a complicated exercise, which we are not necessarily very well resourced to do. The Speaker would need advice. We can provide it to the best of our ability, but I suspect it would be much better done within government and therefore reflected in the explanatory notes, rather in a Speaker's certificate.

Q124 Ms Clark: Following on from that, in your memorandum you counsel against a bill being certified by the Speaker as one to which the Sewel Convention might apply. Is the gist of your concern that, as the determination of whether Sewel might apply is basically a political choice, and that the Speaker should not be drawn into a possibly contentious area, therefore it is Government Ministers should make such that decision?

Mr Sands: I do not think it would be a politically sensitive determination for him. Whether a Bill engages the Sewel Convention or not is essentially a legal issue, not a political one. The Speaker does give

[3] See Ev 46.

certificates now in a variety of situations, and he gives some certificates constrained by the law. The most obvious case is when he has to certify various matters for the purposes of the Parliament Act, a matter on which Officers of the House advise him. Those matters, although sometimes quite contentious in their consequences, are relatively cut and dried and straightforward. It is a relatively straightforward matter to determine whether the requirements of the Parliament Act have been met or not. Determining in a bill of 500 clauses or something like that whether there are a few bits in the schedules that may apply to Scotland is a much more difficult exercise and one which I would hesitate to advise the Speaker on. We would have to, in effect, get our own advice from the department concerned; and if that is the case, why should the department not do the job of tagging in the explanatory notes?

Q125 Danny Alexander: In your memorandum at paragraph 8 you give two options for alerting Members to the fact that the Sewel Convention might apply or does apply to a particular bill. Would you agree that the better option would be a note on the Order Paper alerting Members that the Scottish Parliament had agreed a Sewel motion in respect of a bill, and therefore make the text of the resolution available in the Vote Office, for example, rather than relying on Government departments to do it, by making the text of the resolution available to the House? Last week David Cairns said to us that so far communication from the Government has been quite patchy in this matter. Would it not be better to have the first option?

Mr Sands: I agree. I think it would be more appropriate because the passing of a Sewel resolution is a parliamentary action by the Scottish Parliament and therefore it is right that that should be communicated parliament to parliament and dealt with in that way. The bill on its introduction is a Government Bill and at that stage is just that. That is why I have expressed a preference for tagging a bill in the first instance through the explanatory notes. However, once one has got to the stage of a Sewel resolution I think it should be dealt with by the Parliament.

Q126 Danny Alexander: Is there an issue there with regard to the timing of a Sewel motion going through the Scottish Parliament? You mentioned that often you would not necessarily know here that a Sewel resolution had been applied until Report stage of a Bill, but that may not necessarily be an issue from the point of view of making clear on the Order Paper that one has been applied. One of the concerns I raised last week was whether that gives sufficient time for the House here to be aware of the Sewel motion in the context of its debates on the bill before it gets passed over to the House of Lords.

Mr Sands: I have learnt quite a lot when drafting this paper and preparing for this meeting. I had no real idea before that how the Scottish Parliament went about agreeing Sewel motions. I gather that until this Report from their Procedures Committee it had been a bit hit and miss, and sometimes it was fairly casual. As I understand it now there is going to be a regular procedure with time targets attached to it, and that they will aim to have agreed a legislative consent resolution in time before we reach the final amendment stage of a bill in the first House, that is to say, for a bill introduced in the House of Commons, Report stage; so that if for one reason or another the Sewel motion were rejected, it would be possible for amendments to be put down to strike out the offending parts of our bill. If they keep to that timetable then it would be perfectly feasible for us to follow the sort of procedure that is suggested in their committee report and which I have just been discussing with Mr McGovern.

Q127 Mr MacDougall: With respect to formal communication between the two Parliaments, which do you consider to be the better option: Presiding Officer to Speaker and Lord Chancellor; or Clerk to Clerk?

Mr Sands: The Presiding Officer route imparts a greater degree of formality, which might be seen to be attractive, but it does inevitably impose an extra link in the chain because the necessary information has got to be conveyed to the right office at Edinburgh, and then when it gets down to the Speaker's Office here it must be conveyed to Frank's office for action to be taken. If time were tight, I suspect that in the end it would be found it would be better to do it official to official.

Q128 Gordon Banks: Danny has already mentioned this, and we had this discussion—the suggestion that most Scottish MPs are not aware when a Sewel is taking place. Has anybody from this House made a complaint to you that they were not aware of the Sewel motion being relevant and therefore they felt that they may have been debarred from putting forward amendments, or taking part in appropriate debate at the appropriate level because of this lack of knowledge?

Mr Sands: Nobody has complained to me, but I do not know if they have to the Public Bill Office.

Mr Cranmer: Nobody has complained to my office, no.

Mr Sands: Ignorance is bliss!

Mr MacDougall: Would they know who to complain to?

Q129 Danny Alexander: It has become the practice of the Secretary of State after the Queen's Speech to put down a written ministerial statement indicating which of the likely future bills coming forward in that session might have a Sewel motion attached to them or have implications under the Sewel Convention. Do you think it would be advisable for that list also to be published in *Hansard* or, as Gordon said, for MPs to have as many opportunities to learn about it as possible; or do you think the current procedure is quite sufficient?

21 March 2006 Mr Roger Sands and Mr Frank Cranmer

Mr Sands: I fished out the statement that was made in *Hansard* after this year's Queen's Speech, and it literally has one sentence. "I have placed in the Libraries of the House a note summarising the likely application to Scotland of the bills announced on 17 May." There is nothing other than that in *Hansard* and anyone who is interested would have to go to the list in the Libraries. I do not know how extensive the note that was placed in the Library was, but I would have thought it was preferable in principle for it to appear in full in *Hansard*. It is a matter of some constitutional significance.

Q130 Danny Alexander: I think your point about constitutional significance is correct. Without wishing to draw artificial distinctions, there are particular issues for Scottish MPs in relation to these matters. It may well be the case that at the Queen's Speech stage, when this memorandum is placed in the Library, having some debate in the Scottish Grand Committee, for example, might be a way of alerting Scottish Members to bills that are likely to have Sewel implications, legislative consent implications, in the following session.

Mr Sands: The reservation I would have about that is that it is fairly evident, reading the evidence that you have received, that a lot of the provisions which engage the Sewel Convention in the technical sense are pretty small beer, to be honest; and any such debate would be hugely miscellaneous because there would be a bit here, a bit there, and I cannot believe that it would be a satisfactory Grand Committee type debate. Whether there might be some other convention developed that the Secretary of State has a briefing session with Scottish MPs, to alert them at the same time as the statement comes out—I would have thought that that sort of thing might be more productive.

Q131 Mr MacDougall: Even though the Scotland Act appears to prevent a Scottish Parliament committee meeting with a Westminster committee in Scotland, is there any reason why a Standing Order similar to SO No.137A(3) could not be used so that under our procedures they could meet in that way?

Mr Sands: The procedure that you refer to relating to the Welsh Affairs Committee was devised a year or so ago and I think it was called "Mutual Reciprocated Enlargement"—the terrible term used to describe that procedure. If we were to do it in the way that you have suggested, Mr MacDougall, it could not be mutual and it could not be reciprocated. From our point of view it would still be possible as long as the MSPs who came down here to join a meeting were not deciding anything on behalf of the House. If they were contributing to a discussion and perhaps assisting in the taking of evidence, it would not be a problem. When the Welsh Affairs Committee have done this with committees of the National Assembly for Wales, they have not produced joint reports; they have deliberated jointly and taken evidence jointly, and then they have gone away and drawn their own conclusions and made their own decisions separately. As long as that dividing line is observed, we could do it.

Q132 Mr McGovern: In answer to John's question you have said that it could happen, but again following the example of joint working between committees in the National Assembly for Wales and the Welsh Affairs Committee, do you consider there to be merit in members of Holyrood's Parliamentary committees being able to attend and participate in meetings of the Scottish Affairs Committee?

Mr Sands: I notice that David Cairns last week expressed a certain reservation about this. He said that each institution ought to be accountable for the performance of its own functions, and I have some sympathy with that. I am not a great believer in bringing everything together into a great amalgamated soup; but there can be specific issues where you can detect a definite value that would be added by doing this. I think for the consideration of a piece of draft legislation that was going to have a major effect in Scotland but was essentially going to proceed as Westminster legislation, I can imagine there might be such value added; but as something to be done on a routine basis, I would not advocate it myself. Here I have to say I am perhaps stepping out of line!

Q133 Mr Walker: I think we are coming to the nub of the debate here with this question. Do you consider that the model of Standing Order No.137A could be extended beyond Select Committees to permit MSPs to take part in a meeting of the Scottish Grand Committee to discuss matters of mutual interest or concern—for example the Report from the Arbuthnott Commission—perhaps on similar lines to one of the proposals considered by the Modernisation Committee about MEPs taking part in debates at Westminster?

Mr Sands: I do remember expressing a view to the Leader of the House about that last matter; in fact I may even have submitted a memorandum to the Modernisation Committee. We could have MEPs here participating in a kind of European grand committee, again as long as they are just contributing to the discussion and not purporting to reach decisions on behalf of the House of Commons, or participating in any decision-making process. I have no doubt that we could devise a Standing Order that would work, if that is what the House decided it wanted.

Q134 Mr Walker: I suppose it would provide a useful opportunity for Members to meet their MEPs and put a face to a name as well. That would be good. What is your view on joint working of Westminster and Holyrood committees' scrutiny of draft legislation affecting Scotland?

Mr Sands: I think I have already given that. It is conceivable that there might be a piece of draft legislation which had a large portion which engaged the Sewel Convention and which Members here might feel they needed the input of MSPs to reach a judgment about.

Q135 Ms Clark: You have given us your views on joint working of Westminster and Holyrood committees but as Scottish devolution beds down more fully do you expect that there will need to be any other changes to parliamentary procedure here at Westminster?
Mr Sands: No, I do not, to be honest. I think it has worked with minimum of friction, and a minimum of formality. I do not see any development on the horizon in devolution that is likely to affect that, but I am not a magician so my crystal ball may be inadequate.

Q136 Chairman: Mr Sands, we appreciate that you cannot speak on behalf of the House of Lords, but we have written to the Leader of the Lords to advise her of our inquiry, but if we were to put to the Clerk of the Parliaments the same questions that we have put to you, would it be reasonable to assume that his responses would not be radically different from your own?
Mr Sands: I have seen the letter that Paul Hayter wrote to you on 27 February, Chairman, and I think it is clear from that that they would not be radically different, no.

Q137 Chairman: Mr Sands, Mr Cranmer, thank you very much for your evidence this afternoon. We have concluded our questions. Before I declare the meeting closed, would you like to say anything on areas that we have not covered?
Mr Sands: No, Chairman, I do not think so. It has been a pleasure to be here. Both of us as it happens, more years ago than I care to remember, were clerks to the Scottish Affairs Committee, in pre-devolution days when things were rather different.
Chairman: Thank you very much for your evidence.

Memorandum submitted by Mr Frank Cranmer, Clerk of Bills, House of Commons

During the course of the meeting on Wednesday 21 March I undertook to let you know how many times the Public Bill Office had contacted the Legislation Team in the Scottish Parliament in relation to private Members' bills that appeared to us to engage devolved powers. The list of bills since the beginning of Session 2004–05 is as follows:

Human Tissue Act 2004 (Amendment) Bill 2004–05

Right of Reply and Press Standards Bill 2004–05

Renewable Heat Bill 2004–05

Employment Tribunals (Representation and Assistance in Discrimination Proceedings) Bill 2004–05

Council Tax Benefit Bill 2004–05

Procurement of Innovative Technologies and Research Bill 2005–06.

I should also like to clarify something that I said in oral evidence. In answer to Question 121 I referred to David Cairns's evidence in general terms and said that "the first hurdle for a private member's bill is to get the approval of the UK Government". That is true—but what I forgot to mention specifically was that Mr Cairns also said, in answer to Question 94, that the Government "is very clear that we will not support any Private Member's Bill which triggers Sewel unless all of the other stages have been gone through in relation to getting the consent of the Scottish Parliament". In a sense, that puts the devolution dimension into rather sharper focus.

28 March 2006

Tuesday 28 March 2006

Members present

Mr Mohammad Sarwar, in the Chair

Danny Alexander
Gordon Banks
Ms Katy Clark
Mr John MacDougall
David Mundell

Memorandum submitted to the Scottish Affairs Committee by Barry K Winetrobe, Reader in Law, Napier University

Summary

This inquiry provides an opportunity for the House to complement the recent reforms of "Sewel" business in the Scottish Parliament by improving the way it handles "Sewel Bills". Some suggestions were made in Holyrood's Procedures Committee report, and three categories of proposals are outlined in this submission. Recognition of the distinctive nature of "Sewel business" at Westminster, along these lines, would improve the effective of parliamentary scrutiny of such legislative proposals, and the quality of resulting legislation. It would also act as an important and necessary instance of cross-parliamentary initiative and action in the multi-layer governance system that devolution has created.

Sewel: An Inter-parliamentary Issue

1. With a background in public law, and having worked for many years on parliamentary and constitutional issues in the House of Commons Research Service and, through its first year, in the Scottish Parliament Information Service, I have been interested in, and written about, the Sewel Convention over the last four years, and welcome this inquiry by your Committee. Coming immediately after the major report by the Scottish Parliament's Procedures Committee,[1] this inquiry provides the House of Commons with a timely and necessary opportunity for the two parliaments to coordinate and complement their handling of "Sewel" business to the benefit of both.

2. In my writing about the Sewel Convention,[2] and elsewhere, especially a commissioned paper for the House of Lords Constitution Committee's inquiry into devolution a few years ago,[3] I have been concerned that, under devolution, relations between the UK's parliaments and assemblies should be enhanced. The operation of the Convention is an instance of devolution business which formally was said to be a matter between the two parliaments, but which, in practice, has been dominated and driven by the two executives. This was criticised by the Constitution Committee,[4] and the Scottish Parliament's Procedures Committee concluded that [5]

> . . . the upshot has been that what was originally envisaged as an inter-Parliamentary convention has emerged in the form of an agreement and set of working practices within the structures of government. Whatever practical advantages this has, it has created the perception of an Executive-driven process in which the Parliamentary role is secondary. Perhaps unfairly, this has contributed to the suspicion and even hostility with which the whole Sewel process has been regarded in some quarters. We therefore believe it would now be in everyone's interests if the Parliament as a whole was to assume a greater degree of control and ownership over the process, including by embedding the main elements of Sewel scrutiny into the standing orders.

3. Following the Procedures Committee report, the Parliament has now, for the first time, embedded its "Sewel business" in Standing Orders, which officially describes it as "Legislative Consent" business.[6] The Procedures Committee appreciated that it was limited in practice in the extent to which it could comment upon, and suggest changes in, Westminster's handling of Bills to which the Scottish Parliament has given

---

1 *The Sewel Convention*, Procedures Committee, 7th Report, 2005, SP Paper 428, October 2005.

2 "Counter-devolution? The Sewel Convention on devolved legislation at Westminster" (2001) *Scottish Law and Practice Quarterly* 286; "A partnership of the Parliaments: Scottish law making under the Sewel Convention at Westminster and Holyrood", chapter 2 of R Hazell & R Rawlings, *Devolution, Law Making and the Constitution*, Imprint Academic, Exeter, 2005, and "Sewel reform at Holyrood: balancing the political and procedural" *SCOLAG Journal*, November 2005, 248–9 (the last article was written before the present inquiry was announced).

3 *Devolution: Inter-Institutional Relations in the United Kingdom*, 2nd Report, 2002–03, HL Paper 28, January 2003, Appendix 5, pp 59–69.

4 Constitution Committee report, paras 130–2.

5 Procedures Committee report, para 135.

6 Chapter 9B, which uses "Legislative Consent" terminology for what had hitherto been informally called Sewel motions, memorandums and so on.

its "legislative consent" under the Sewel Convention. However, as your Committee will be aware, its report did examine this issue,[7] as it regarded Sewel business as the Scottish Parliament's "principal interface with the Westminster Parliament."[8] It noted the examples in my evidence to it of recent occasions where the House of Commons has been willing to shape its procedures and practice to accommodate external parliaments and related governance institutions,[9] and offered, "in a spirit of inter-Parliamentary dialogue", some suggestions for changes to "associated procedures in Westminster".[10] These would assist the aims of the reforms it proposed for Holyrood's handling of Sewel business, such as "enhancing the opportunities for scrutiny and increasing transparency", and, more generally to replace current persistent misunderstandings and controversy about the operation of the Sewel Convention with "a degree of consensus and a shared understanding" of this important parliamentary devolution mechanism.[11]

The Benefits of Reciprocal Westminster Sewel Reform

4. The Procedures Committee inquiry received evidence, not least from members and officials at Westminster, of the scrutiny at Westminster of what may be for convenience called "Sewel Bills". The Clerks of the two Houses recognised that the Convention "has little effect on procedure in either House", and the fact that a Bill before Westminster has been the subject of a "Sewel consent" "is not communicated *formally* to either House."[12] Some Westminster witnesses supported the proposals for change in the two Houses which the Committee made; others even went further, suggesting forms of joint scrutiny by Westminster and Holyrood.

5. The current inadequacy of Westminster's treatment of "Sewel Bills" was tellingly illustrated by the evidence on 19 October to your Committee of the Scottish Secretary, Alistair Darling. Referring to the Scottish Parliament's "Sewel Motion" consent mechanism, as applied to any particular Bill being considered at Westminster, he said that "my guess is Members of this Parliament are probably not aware of it, either (a) that there is one, or (b) what happened to it."[13] Presumably it was the combination of such comments by Mr Darling, and the publication of Holyrood's Procedures Committee report, which contributed to your Committee's decision shortly after to hold this present inquiry. In addition, this inquiry can fill in one gap left by the House's Procedure Committee's review of the procedural consequences of devolution, promised in its May 1999 report,[24] not having yet taken place.[25]

6. Your inquiry provides the opportunity for the House of Commons[16] to recognise that a "Sewel Bill", a concept which arose out of the devolution scheme enacted by the UK Parliament, is, like exclusively Scottish Bills, a distinctive type of parliamentary business, which should require some degree of distinctive parliamentary procedure and practice.[17]

7. Appropriate reform of the handling of "Sewel Bills" at Westminster, complementing recent changes at Holyrood, would bring direct benefits:

- improved parliamentary scrutiny of a category of legislation, especially (but not solely) by Members representing that part of the UK affected by the unique "Sewel" aspect of these Bills;
- improved quality of legislation subject to that enhanced scrutiny;
- greater acceptance, especially in Scotland, that the legislation, and the scrutiny to which it has been subjected at Westminster, more fully takes account of the wishes, needs and interests of Scotland;
- removal of much of the "constitutional" argument since 1999 about the "Sewel Convention", based on deficiencies in legislative scrutiny;
- enhanced cross-parliamentary co-operation between Westminster and Holyrood, which could serve as a template for such collaboration in other appropriate areas, and
- recognition of the legitimate and vital role of Scottish MPs at Westminster in participating in the legislative process on Sewel Bills.

---

7 Procedures Committee report, paras 115–123.

8 Procedures Committee report, para 209.

9 Procedures Committee report, para 121, including joint activities with committees of the National Assembly for Wales (now in SO No 137A), and the Modernisation Committee's proposals to allow EU Commissioners and MEPs (but not members of the devolved parliaments/assemblies) to participate in EU scrutiny (Modernisation Committee, "Scrutiny of European business", 2nd report, 2004–05, HC 465, March 2005, paras 67–73.

10 Procedures Committee report, paras 203–7, 220: tagging of relevant Bills; improved Explanatory Notes, and means for communicating the Parliament's view to Westminster.

11 Procedures Committee report, para 210.

12 Procedures Committee report, paras 60 and 118.

13 *Scotland Office annual report 2005*, HC 580-i, 2005–06, 19 October 2005, Q18.

4 Constitution Committee report, paras 130–2.

5 Procedures Committee report, para 135.

16 Taking account of the consistent views of the Constitution Committee, it is assumed that any proposals made by your inquiry, and accepted by the House, would encourage the House of Lords to make any appropriate parallel reforms to the legislative process there.

17 The Committee in 1998 produced an early and very thoughtful analysis of how devolution would affect the governance of the UK: *The operation of multi-layer democracy,* 2nd report, 1997–98, HC 460, December 1998.

Some Options for Changes to Westminster Handling of "Sewel Bills"

8. Any proposals would require careful consideration, and would have to be procedurally effective and robust. They would also have to take account of the many different ways and times in the legislative (or pre-legislative) process that a "Sewel context" for a Bill or proposed Bill can arise. Whether and how any such changes can be implemented, in terms of specific procedures and practices, is essentially a matter for Members and officials of the House itself. From my perspective, there seem to be several levels of possible reforms which could be considered, ranging from the straightforward which can be accommodated within existing procedures and practices, to those which would require significant changes to existing arrangements at Westminster (and possibly also at Holyrood, and within the two governments).

9. Those which could be described as a minimalist approach could include those which have been suggested during Holyrood's Procedures Committee inquiry, and elsewhere:

- "tagging" of relevant Bills, by a form of Speaker certification (similar to that for exclusively Scottish Bills), and noting of relevant Scottish Parliament reports and debates in "Order Papers", Official Reports etc of the two Houses;
- "requiring" improved Explanatory Notes to Bills, setting out their "Sewel" context, including a summary of the relevant Holyrood scrutiny of the relevant Legislative Consent Motion;
- routine explanation and analysis in relevant House of Commons Research Papers and Standard Notes of the "Sewel context" of the provisions of relevant Bills, including a summary of the relevant Holyrood scrutiny of the relevant Legislative Consent Motion;
- formal means (a) of receiving the Scottish Parliament's view on a "Sewel Bill" (eg whether or not Consent has been given, and the form of any such Consent), and (b) for the transmission to the Parliament of relevant developments during the Westminster legislative process, directly and officially, on a parliament-to-parliament basis.

10. Those which would require some adjustment of existing procedures and practices could include:

- representation on relevant Standing Committees of Members representing Scottish seats, as appropriate to the degree to which a Bill contains "Sewel" provisions and, where possible, to reflect party balance and opinion on these provisions within Scotland as well as in the House;
- reference of Bills to more than one Standing Committee, to enable "Sewel provisions" to be considered by a form of "Scottish Standing Committee";
- arrangements made to facilitate the transmission of the views of interested Scottish groups and individuals on these provisions, at appropriate legislative or pre-legislative stages (such as select committee consideration of draft legislation with actual or potential "Sewel provisions"), including the holding of relevant sittings within Scotland;
- creation of forms of joint scrutiny of relevant legislative proposals by committees or members of the House of Commons and the Scottish Parliament, perhaps based on the existing arrangements devised recently for joint activities with the National Assembly for Wales;[18] by variation of the proposed arrangements for participation by EU Commissioners and MEPs to participate in EU scrutiny, or by appropriate use of special standing committees.

11. Those which would require more fundamental change in current Westminster arrangements would be those which, in effect, created what the Richard Commission described in the Welsh devolution context, as a "new legislative partnership,"[19] where in the absence of a fully integrated cross-parliamentary legislative scrutiny process for "Sewel Bills", there could be a substantial degree of "co-legislating" for such legislative proposals. The recent history of Welsh devolution has demonstrated how difficult such co-legislating can be in practice, under that unique constitutional system. However, the proposed changes within, and built upon, the provisions of the current Government of Wales Bill, may provide some guidance, taking account of the differences in legislative power between Holyrood and the Assembly.

12. Westminster already co-legislates in the area, for example, of delegated legislation under the Scotland Act 1998 itself which is subject to parliamentary procedure in Westminster and Holyrood.[20] Thus the idea of shared procedure for "Sewel" legislation would not be unprecedented, even though, strictly speaking, what the Scottish Parliament does when granting its "legislative consent" is not a parliamentary legislative process as commonly understood.

13. While any arrangements must, of course, be designed to suit its own particular circumstances (such as, for example, the particular devolution scheme to which it applies), it would assist both consistency and public understanding if they are based on as substantially similar principles and procedures as is practicable. Any such reforms towards co-legislating would require the willingness of both parliaments, but especially Westminster, to adjust its existing arrangements to accommodate the arrangements of the other, in areas such as the parliamentary calendar, legislative processes, "privilege" issues, publication of information and so on.

---

[18] SO No 137A.

[19] Report of the Richard Commission on the powers and electoral arrangements of the National Assembly for Wales, 2004, para 14.

[20] Scotland Act 1998, s115 and sch 7.

Conclusion

14. That this inquiry itself is taking place is important both for the future success of Scottish devolution, and for enhancing the central role of the two parliaments, as it demonstrates that:

— Westminster is willing to do what is necessary to make the operation of devolution as effective and robust as possible, even where it means changes to its own settled ways of doing business; and

— a matter such as the handling of "Sewel Bills" is, and should be, one primarily for the two parliaments themselves, on behalf of the public they each represent.

19 December 2005

Witness: **Mr Barry K Winetrobe**, Reader in Law, Napier University, gave evidence.

Q138 Chairman: Good afternoon, Mr Winetrobe. First, may I welcome you to our meeting today. We are very pleased that you have been able to attend to give evidence to our inquiry into the Sewel Convention: the Westminster perspective. Before we start with detailed questions, do you have any opening remarks that you would like to make?

Mr Winetrobe: Thank you. I have a very short opening statement, if that is agreeable to the committee. I am very grateful for the opportunity to appear before this committee. I do not wish to repeat the points I made in my full written submission, but to use this opening statement to provide some wider context perhaps to my remarks, especially in the light of the interesting written and oral evidence the committee has already received both here and in Edinburgh. It is encouraging, not just that the committee has undertaken this inquiry partly in response to a report from a fellow committee at Holyrood, but also that there seems to be general agreement across the two parliaments and two governments for the principle of some change to parliamentary and executive practice to improve the operation of the Sewel Convention. It demonstrates that whatever views there may be across the political spectrum on wider constitutional questions, there is willingness to make current arrangements work as effectively as possible. Much of the evidence you have heard reinforces the important underlying point that the two parliaments, while similar in many fundamental ways, have some relevant differences which the whole Sewel issue has helped to highlight. Apart from procedural variations in the legislative process and in the parliamentary calendars, and so on, the two relevant main differences here themselves interlinked are: the issue of parliamentary culture and ethos, the distinctive ethos of the new Scottish Parliament, based on its founding principles of openness, accountability, sharing of power and equal opportunities, means that Holyrood is explicitly intended to be an inclusive, interactive working parliament, which has to take as much account of the public as of government in how it does its business. This has implications both for public awareness of what is going on in the Parliament in its name and in opportunities for meaningful public engagement in that parliamentary business. Westminster has traditionally been a more inward-looking, "private" parliament, though it has clearly taken steps in recent years to enhance its engagement with the public. The second main difference is the executive-parliamentary relationship: while the UK Government is clearly dominant in this Parliament, not just in numerical terms, but in setting the business and the more general powers of initiative over parliamentary procedures and practices, as you have heard in the evidence from the Scotland Office, there is supposed to be a very different relationship in devolved Scotland. For example, there is no Leader of the House; business is arranged through a business committee, the Parliamentary Bureau, and proposed business is subject to approval by the whole Parliament; changes to Standing Orders are the responsibility of the Procedures Committee, and perhaps most importantly of all, there is no equivalent of Standing Order no 14(1) here giving the Government an explicit monopoly over virtually all business. The early operation of the Sewel Convention demonstrated that, though it was formally expressed in terms of the two parliaments, both administrations saw it as essentially an inter-governmental matter, and there was an impression then that the Scottish Executive could "handle its parliament" in ways familiar at Westminster. To conclude, while these differences may make inter-institutional matters such as the operation of the Sewel Convention potentially complex, they are not, in my view, insuperable obstacles, so long as each parliament respects the other's role, ethos and practices, and is prepared, as far as possible, to accommodate the genuine interests of the other where relevant, such as in Sewel business.

Q139 Chairman: We believe, Mr Winetrobe, that you are in a unique position being a former officer of both the House of Commons and of the Scottish Parliament, and so know how both parliaments work from the inside. However, now that you are in academia, presumably you are able to take a more detached view of both parliaments. How would you judge the current relations between the two parliaments? Do you consider them to be satisfactory, or do you think that there is room for improvement?

Mr Winetrobe: I think on a day-to-day informal level relations between the two parliaments at all levels from presiding officers down through officials and to members, committees and so on there is a very good working relationship. My concern has always been that that relationship has been essentially informal and has not been built up to the same degree of intensity and formality as inter-governmental relations have been. I am not saying that it should or it requires that degree of formality, but especially from the point of view of the two

governments, I think they regard intergovernmental relations as the real, important business of governing, that relations between the two parliaments are in some senses secondary, and that these have been built up on an as-and-when basis. There are very good relationships at all levels between staff, between committees and, as I say, between presiding officers. I think whenever possible greater co-operation, co-ordination, greater amity between all the parliaments and assemblies within the UK is to be welcomed.

Q140 Chairman: Do you think that there is any issue or any area that needs improvement?
Mr Winetrobe: One of the reasons why in my opening remarks I tried to say that one of the main differences was this idea of the executive parliamentary relationship is that the Scottish Parliament is supposed to be a far more autonomous parliament in relation to its executive and that that is something that has taken people in Scotland quite a while to get used to as to what that actually means. A lot of people came from a Scottish Office background or a Westminster background where the idea of a Leader of the House, the Government having control of business and so on is so embedded in the culture that it is almost taken for granted. Therefore, I think any opportunity that allows the two parliaments as autonomous institutions to speak to each other, to work with each other, to liaise directly with each other, is to be welcomed. I think that was one of my main concerns from an academic point of view all the way through how the operation of the Sewel Convention played out since 1999, that it was very much driven by the two executives where the parliaments were being driven along by them. While that might be understandable, however regrettable in my view, at Westminster, it was contrary to the stated ethos of the Scottish Parliament and to some extent was clashing with how it was trying to operate in all its other respects.

Q141 David Mundell: Just following on from that, do you not think that part of that is a symptom of the general similar political complexions of both parliaments at the moment? That would not be possible if there was a significant difference in the main parliamentary make-up, would it?
Mr Winetrobe: Do you mean relationships between the two parliaments or the two governments?

Q142 David Mundell: I mean with the executives to drive things through the parliaments?
Mr Winetrobe: Yes, things would be very different in so many different respects if we had governments of different political colours in London and Edinburgh. As you know, how that would work, nobody knows. It would depend very much on what these two governments are. There are many different permutations that you could have which would have different sorts of consequences. One would assume that, for example, from your perspective, a Conservative government in either place would have a more Unionist perspective and therefore would have a tendency, a predisposition, to co-ordinated working perhaps, whereas perhaps an SNP-dominated government in Scotland might want to test the boundaries more and therefore that would produce a different set of circumstances. I do not think anybody can say any more than that at the moment.

Q143 David Mundell: I think the importance, which is one of the reasons that the committee wants to look at this issue, is that the process and practices have to be robust enough to be able to withstand whatever political arrangements are in place. There is always scope for those in office to try to manipulate the system, but at the core you do need to try to have robust procedures which minimise the opportunity for that.
Mr Winetrobe: In principle, yes; in practice, I think it is probably fair to say, especially in the last 20 or 30 years, at Westminster there has been more of a tendency overtly that when you come to power, especially after a long period out of power, to some extent you get to remake the rules and re-make the parliamentary rules to some extent as well that suit your particular circumstances because we have gone from one very large majority to a period of almost minority government and then to another very large majority, and every set of circumstances is different. To some extent, in an ideal world, yes, parliamentary procedures, almost by definition, should be things that should withstand the vagaries of any particular political situation, but in practice one has to accept that these things will have an impact, and especially when you have a multi-level government system as we have had since 1999. To some extent, there has to be some acceptance of making rules to fit that particular set of circumstances. I heard the earlier evidence and read the earlier evidence and this question has cropped up by yourself and other members. To a large extent, I think that if we did have those sorts of differential governments in the sense of more antagonistic governments in the two places, then the Sewel Convention in its operation would be the least of the issues in everybody's concern. I think the whole parameters of the relationship within the United Kingdom would change anyway and the Sewel Convention and whether that worked or operated would change with it.

Q144 David Mundell: Going back to the Procedures Committee report from the Scottish Parliament, you have made a number of suggestions how Westminster procedures might be changed. Examples were tagging relevant bills in parliamentary documents, mentioning any Sewel implications, explanatory notes, and the Scottish Parliament's Presiding Officer sending copies of any legislative resolution to Mr Speaker and the Lord Chancellor. Do you have specific views on these suggestions?
Mr Winetrobe: I am fully in favour of them. I think I was probably the one that suggested them in the first place in my submission to the Procedures Committee, so I am fully in favour of them. I suggested various other ones which the Scotland

Office and the clerks and people here are not so keen on, such as certification, but these are more complicated procedural matters.

Q145 David Mundell: Of the things that you suggested which were not accepted, is there anything that you think is particularly significant or were the decisions enough to go with them? Is it a matter of preference or is there anything that was significant from your suggestions?

Mr Winetrobe: As I tried to indicate in my submission to this committee, I think there are different levels of suggestion and the ones that seems to have had general acceptance, the three that you have mentioned, are ones that are pretty minimalist, things that could be introduced without any real change to anybody and it makes pretty common sense. I am in favour of more joint working between the two parliaments. Procedurally how that works, and I realise it is complicated, I think if the will is there in both parliaments, and I accept it is a matter for the will of both parliaments for all sorts of reasons, then more can be done. I think we are now beyond a stage where, from the perspectives of both parliaments, maybe both had to respect the other's position and give them space. I do not like to use words like "maturity" and what not, that the Scottish Parliament is maturing or whatever it might be. I do not think that is the right way to look at it. I just think that to some extent at the beginning each had to give the other space and not tread on their toes and so on. I think now both parliaments can do more together without raising huge constitutional questions in the way that Sewel unfortunately did. It was perhaps an unnecessarily controversial issue for five years, but perhaps it has been a good cathartic experience because it has been shown that there is a lot of common sense underneath the party political constitutional issues. I think that can be applied without anybody giving away their constitutional preferences about the United Kingdom and so on and that more working, whether it is by joint committees or informal meetings or joint scrutinies or attending each other meetings can be done, especially from this place. When this place wants to do these sorts of things, it can do so. We have seen that with Wales; we have seen it with the proposals for European scrutiny. I thought it was a pity that that proposal from the Modernisation Committee[4], I think it was, was quite happy to see MEPs come along and take part and European Commissioners come along and take part, but somehow it was not proper or seemly or necessary for members of the devolved parliaments and assemblies to attend. Frankly, I could not see why that was the case. I think that was a missed opportunity.

Q146 Danny Alexander: To follow up that point about the joint working, do you think there is a case for Westminster to adopt a Standing Order similar to Standing Order number 137A(3) to permit the Scottish Affairs Committee to meet jointly with a Holyrood committee at Westminster under our procedures as an example of the sort of joint working that you are talking about?

Mr Winetrobe: I would be in favour of anything like that. As for how it works out procedurally, and I have learnt from working in both parliaments that procedure is not something that is just devised from on high to obstruct matters, there are good reasons for procedural issues to be considered. It might be that the differences between the legal powers and privileges of the two parliaments make some methods of joint working difficult, but all these things can be worked round with good will and for appropriate purposes. I am not saying that it should be a bit like the Belfast Agreement mechanisms or the related devolution British Irish Council or British Irish Parliamentary Body, that you have summits and meetings just for the sake of it, but when there is a good reason for joint working of some sort, then any procedure problems or niceties or interests can be overcome.

Q147 Mr MacDougall: I am going back to the point you were making about maturity, as you mentioned and I am not sure what you call it, and that we gain experience at the beginning and have to move on. I think there is a general moving on now and there is a greater confidence that prioritisation within the Scottish Parliament is much more relevant than it may have been in the very early years. Taking up that point, you said that there was an encouraging theme, if you like, regarding the two governments, or almost an acceptance that there is some need for some change at some level—and that is what we are trying to get information on by taking evidence now—and if the executive were to improve operation of the Sewel Convention that would be welcomed. We talked about the how we go about that and what would be acceptable or not to both parliaments. Do you believe that the Procedures Committee's proposals indicate at this level not a maturity but more confidence that they can come forward in their own right at this stage and say, "We have established ourselves now as to what we intend to do and therefore the time is ripe to have this dialogue that previously might not have been possible"?

Mr Winetrobe: I am not sure about that dressing up as if it was something deliberate in the first few years that the two parliaments maintained their distance. I do not think there was anything deliberate about it. It was just simply how things happened. The new parliament was inevitably inward-looking in the sense of getting itself up and running. This place, this committee in particular, had to adjust to that new scenario. With the media we have in Scotland and with the multiplicity of parties with different constitutional views, obviously every single thing was picked over and could be made into a great shock horror story. Therefore, to some extent, nobody was allowed to step back and think of these things. You were always being driven to do the business, get your business through, and react to things. I do not think in any sense, and perhaps you

[4] Select Committee on Modernisation of the House of Commons, 2nd Report of Session 2004-05, *Scrutiny of European Business*, Second Report 2004-05, HC 465-I, paras 67-73

were not intending it to mean that, there was anything deliberate about the two parliaments maintaining any sort of distance and that now they can join together. What I mean is that any sense of one intruding on the other in some sort of unwelcome way, this sort of misconception, is now dissipated because both parliaments have realised that they have their own spheres; everybody recognises the existing legal constitutional position whether you are from a party that supports that or disagrees with it. While you have these situations I think there is a lot that can be done within these parameters. If we have changes of government, then there will be a new situation.

Q148 Mr MacDougall: Therefore, if for example Westminster accepted the Procedures Committee's recommendations, where would you see the significant improvements coming from, in which areas, and how would you see the benefits of that?
Mr Winetrobe: One of the reasons why I was emphasising the Scottish Parliament's principles in my opening statement was that the Scottish Parliament is explicitly meant to be one that is very open and transparent. As somebody who now works in academia and therefore is not inside either one or other of the parliaments and therefore does not have any special access to the information or what is going on than potentially any other member of the public, I was very conscious in the Sewel context of quite how much was going on under the surface without any real public transparency. I think that anything that happens in terms of informed consent, informed debate, informed scrutiny, in both parliaments must be good in terms of governance, in terms of the proper jobs of any parliament, and in terms of public legitimacy and awareness. A lot of what was allowed to emerge as the Sewel controversy for the first five years was based on this unfortunate opaqueness of the existing procedures and I think there is now a general recognition amongst the two governments as well that a formalisation of the procedures and more openness actually helps; it does not hinder the process of governing. It has made Sewel a non-issue. The most interesting thing was that when the Procedures Committee report came out last autumn, I do not think it got one line in any of the newspapers in Scotland, whereas they had been on and on about Sewel for years.

Q149 Mr MacDougall: Just touching on that point, in your submission you have referred to that issue. You talked about arrangements between the two parliaments and matters being arranged between the two governments. How do you think that situation should be addressed and re-addressed? Also, if I can add a supplementary to that, and you can deal with this in the same breath if you like, if the Procedures Committee's suggestions were adopted, do you therefore consider that that would benefit both parliaments equally, or do you think there would be a greater benefit to one parliament than to the other?
Mr Winetrobe: My understanding from following what the Procedures Committee did was that they were very conscious of the limitations of their own remit. They could only advise about the procedures of their own parliament. Therefore they were devising a system that fitted the reforms that they wanted to happen, the benefits they wanted to flow from their perspective, but, at the same time, they were very conscious that Sewel business in a general sense happens in two parliaments as well as other places. Therefore, I think what they have done is try to devise a system that complements or fits in with what happens at Westminster and also would be sufficiently flexible that changes such as those it has suggested or could foresee might be possible at Westminster could be accommodated within their new arrangements. I think they were primarily working for the benefit of their own parliament but with an eye to: this is one piece of the jigsaw and if you want to reciprocate, then it should fit neatly together. I am delighted, and I must say slightly surprised, that that is exactly what has happened and that you are conducting this inquiry. I think that shows a great hope for the future, not just in terms of the Sewel business but in dealing with other issues that might arise.

Q150 Mr MacDougall: On the question of balance, do you see who benefits more of the two or is that equal?
Mr Winetrobe: I am not sure. I have never really thought about it in those terms. I think that the improvements in the procedures from the point of view of the Scottish Parliament and the Scottish Executive are potentially great and it seems to be working a lot better. For the Scottish public it works a lot better because it is a lot more transparent, even though it might only be a few people like me who actually follow it in any great detail. Potentially, anybody can now see what is going on, which I think is a fundamental principle. I think it should be better here. What the Secretary of State said to you last autumn has crystallised the whole issue down here. I think it has made everybody more aware down here that things could be improved, whether at government level or at parliamentary level. It might not necessarily be at the level of parliamentary procedure; it might just be in parliamentary practices and so on that I think the benefits will flow here as well and the benefit to the whole system of governance that is covered by subjects that are dealt with by way of the Sewel Convention will be more than the sum of its parts. It will be of benefit all round.

Q151 Ms Clark: Can you think of any other initiatives that we could introduce that would improve the working relationship between Westminster and Holyrood?
Mr Winetrobe: I am not sure that is for me to say because a lot of it is what happens to suit the particular parliaments and their particular members at any particular point in time. As I say, I am not arguing for some big formal framework in the way inter-governmental relations are set up with joint

ministerial committees and so on and the equivalent of that in concordats because I do not think that is necessary, but there should be good working relationships and both parliaments should look to make the way they do their business not only efficient for themselves but potentially open to incorporate the other parliaments in the UK and in relation to Wales where obviously the need for co-operation was far more important because of the different legislative powers and processes. I still think there is a need for that joint working, even in the relationship between Scotland and the UK. For things to change here, a lot of it is, as I said before, integral to the way things happen here. As you see from the Scotland Office's evidence, to some extent the Government runs the parliament in that sense in terms of the rules of the game as well as just playing out and winning the votes. That is something I have never been in favour of and therefore a lot of that would not just be a matter of Scottish-UK relations or Sewel relations; it would be a more fundamental change to this Parliament. Things that I suggested in my submission are matters that would have to change across the board. I am not suggesting it is something that would necessarily happen or happen soon. There is this idea of the memberships of standing committees and of select committees reflecting the different interests, and that might be a territorial interest of Scottish MPs on a bill that has Sewel implications. I saw what the Minister said, quite rightly, in the legal and formal sense of all members being equal and all members representing the whole United Kingdom, but in practice we know that if somebody comes from a particular area, they are more likely to have some understanding of that and to some extent put in that point of view, that perspective. Certainly, in the first five years or so, so many Sewel bills went to standing committees that had no or very few Scottish members. To some extent that is still the same. One of your Members was a member of the Legislative Regulatory Reform Bill committee and I am sure would not have regarded himself as the Member from Scotland in that respect. Mr Carmichael said in his evidence to the Scottish Parliament's Procedures Committee that it is an imposition, an unfair imposition, if someone happens to be a Member from Scotland on a standing committee on a bill to which consent has been given and that to some extent they bear the whole burden of having to represent Scottish interests in that respect. So I think there are more fundamental issues about how you do legislative business that are far wider than just simply arising for Westminster in a rather peripheral context.

Q152 Danny Alexander: The last point you made is important in terms of the role that Scottish MPs may or may not have in scrutinising legislation to which a Sewel motion has been applied. Do you think there may be a role for the Scottish Grand Committee in this respect? I know that you suggested in your submission the idea of setting up specific Scottish standing committees to enable the newly-added Scottish elements of the bill. Bearing in mind that the Minister said to us that many Sewel motions are very minor matters but there are some that have a greater significance, I wonder if there may be a role for the Scottish Grand Committee in perhaps giving some opportunity for Scottish MPs to scrutinise that, perhaps a Sewel motion when it arrives or the bill in that way, so that you are not put in that position of being the sole representative of Scotland on any standing committee, or indeed having a standing committee where there are no MPs from Scotland. By the time the Sewel motion arrives, that committee has already been composed and nothing can be done about it.

Mr Winetrobe: One of the difficulties about making any hard and fast recommendations—and it was something I found very quickly though I knew it instinctively when I was looking through the 38, or whatever it was, Sewel bills in the first five years—is that they arise in so many different ways. Some were private members' bills, some were Lords' bills, some were private peers' bills, and so on. They come in all sorts of ways. They are draft bills, carry-over bills, and so on. Not all bills have a Sewel aspect right from the beginning; that may come later. It is very difficult to make any hard and fast rules. The Scottish Parliament's committee very quickly accepted that and tried to make the rules that it introduced in its standing orders as flexible as possible to accommodate whenever a Sewel issue arises. Within the context of a greater presumption and greater practice for things like draft bills and so on where you know that there is going to be a Sewel element in advance, then that might be an area where the Scottish Grand would be an appropriate or convenient mechanism. I am not sure—again this is a matter of procedure and therefore it is not something I am expert in at all—whether it would be suitable in each and every case to simply summon the Scottish Grand Committee each time just to tell it, "Here is a very minor thing". It would be like one of these SI[5] committees where the business would be over in two minutes or something like that. You do what is appropriate to the particular scale of it. Some are very minor, but some are extremely important. In some, as with the Legislative and Regulatory Reform Bill at the moment, what is the formal subject of the legislative consent motion is a very minor part of the bill but the much bigger part of the bill is something that, strictly speaking, is outside the Scottish Parliament's remit but it has exercised people in Scotland just as much as it has exercised people in the rest of the country. To some extent there are issues like that about "we cannot let this go by without at least putting down our marker or making our point, even though we are not actually giving consent to anything" because that is a different part of the bill. There are so many different sets of circumstances that I would not want to get into the situation, even if I pretended to have enough procedural knowledge, to say, "This is appropriate for a joint committee" or "this is appropriate for Scottish Grand Committee" or "this is a situation where you could perhaps split the bill into two standing committees and revive something like the

[5] Statutory Instrument

old Scottish Standing Committee". I think each would depend on what was the best way to scrutinise these provisions effectively.

Q153 Gordon Banks: On the issue of the Scottish Grand Committee, going back a few sentences, you mentioned that it is possible that the Scottish Grand Committee could be a procedure that could consider something if it had long enough notice in advance. What about the situation, and I am sure this concerns Danny Alexander a little more, when debate of Scottish Members within the House may have been restricted because of not knowing that there is a Sewel motion applicable? Do you think that the Scottish Grand Committee could be kicked in to be an additional form of scrutiny later on in the process as opposed to early on in the process, which you mentioned in your evidence a few minutes ago, to provide a mechanism where Scottish Members could play catch-up on something that has already gone through a certain level of its parliamentary process?
Mr Winetrobe: I suppose the easy answer to that would be that you would hope that that sort of situation did not arise in the first place, that you did not have to play catch-up. Assuming it did, yes, it might well be the case. Then that goes back to this question of initiative. Who is it that summons the Scottish Grand Committee? Whereas in the Scottish Parliament, at least formally, these sorts of issues are a matter for its Business Committee, the Parliamentary Bureau, all these sorts of things about when committees meet, what business they deal with, are all matters essentially for the Government. So it is not a matter like this committee of deciding to meet. The Scottish Grand Committee, as far as I am aware, cannot in effect itself decide to meet because it does not exist in its own right in that sense. Again you go back to relying on a government agreement to put forward the relevant motion for the committee to meet. It might not in particular circumstances be in its interests; it might be a matter of genuine controversy. It might be one of the "Sewel" bills that is very political, whether party political or political with a small "p", that it might not want yet another forum where discussion, debate and argument could be reported on by the press. Why should they give it yet another opportunity?

Q154 Gordon Banks: You mentioned a few minutes ago that when the Clerk of the House gave his evidence last week he counselled against the bill being certified by the Speaker as being one to which the Sewel Convention would apply. Do you think there a practical point to certification or is it purely just symbolic?
Mr Winetrobe: I am not wedded to certification as such. My point when I suggested that originally was simply to recognise that these bills had some distinctiveness about them and therefore required or should have some sort of distinctive procedure or process applied to them. It might not be a formal different procedure but there should be a recognition that there was something special about it in that sense, like a money bill, like an exclusively Scottish bill, and so on. I accept that there might be procedural reasons why certification as such is not the way to do that. The important thing is that in some way in a formal, official and parliamentary context it tells both Parliament itself, its Members and the wider public, "This is a bill which has had this particular form of treatment applied to it in Scotland and therefore it should potentially be looked at with maybe a slightly different perspective down here".

Q155 Gordon Banks: It has become practice after the Queen's Speech for the Secretary of State to put a written statement down in the library of the bills that will be affected. I think the Clerk of the House said last week that he thought perhaps a better procedure would be actually to list this in Hansard, thereby providing that information not only to parliamentarians but also to the wider world. Do you think that would be a more beneficial process than the statement being placed in the House library?
Mr Winetrobe: I am certainly in favour of anything that makes information available to the wider public. As somebody who used to work in the Library, the placing in the Library system is not a method of publication, although most things that are like that would be published in some other way. It would be on somebody or other's website. Yes, I think there are ways that make it more transparent, more open to the public. In an ideal world, perhaps you would have an oral statement by the Scottish Secretary about which he could be questioned by yourselves immediately after the Queen's Speech in the same way as for other announcements made about details of bills by other Ministers. Or after the Budget, various Ministers like the DWP Minister come up and make a statement about the implications. Perhaps, if it has now become so institutionalised in that way, the practice could be for an oral statement immediately after the Queen's Speech stating, "These are the bills on which we will seek the agreement of the Scottish Executive and Scottish Parliament for the operation of the Sewel Convention". Then everybody would know it and yourselves and other Members would have an opportunity to debate and discuss it at that point.
Gordon Banks: Being a new Member here, I think transparency is not only important for the wider world; it is also important for us here. Many Members here are not aware of the pertinence of Sewel to legislation. That is the point.

Q156 Danny Alexander: Taking on your suggestion about the oral statement as a way of possibly developing the practice that Gordon has referred to, if it was not an oral statement before the whole House, it might be appropriate for either an oral statement to the Scottish Grand Committee or indeed a bit of quizzing of the Secretary of State on these matters at this committee in order to try to find some way of getting the Government to talk more openly about what is going on in this.

Mr Winetrobe: I think these sorts of ideas are definitely worthy of consideration. That is a sensible use of the Scottish Grand Committee, for example, especially if it took place perhaps in Edinburgh rather than in London. The Scottish Grand or this committee would discuss it; it would all be out in the open and it would be as available to the people in Scotland, to Members in Scotland, as to Members such as yourselves. To some extent, this idea of information is not just a matter for those provisions which are subject to the Sewel Convention. Other things where the Government in a government bill might regard the extent to which it intrudes—that is not the right word—or relates to devolved matters might just be incidental, and therefore the Sewel Convention does not kick in. As you have heard from your other witnesses, the new procedures at Holyrood say that the Executive will still have to put down a memorandum to say that it is not seeking a Sewel legislative consent motion in those circumstances. There are many other examples where peripherally things might affect Scotland that are never made clear. I am not saying that they should be announced from the rafters and that they will create a great fuss, but when you do come across them by accident, you think: I wonder how many people really know that? There is one going through at the moment on the Government of Wales Bill, a very minor amendment to the interpretation provision that means, in effect, another one of these sorts of powers to amend Scottish legislation can happen under the Government of Wales Bill. That has not, to my knowledge, been discussed here. It is not something that is going to engage the House of Lords or the Constitution Committee or the Delegated Powers Committee and so on. There should be a way, whether it is through explanatory notes or whatever, that at least everybody is told, however peripheral, however residual, however minor this might be, that this is potentially crossing the devolved/reserved boundary.

Q157 Danny Alexander: Taking that idea one step further, when we are talking about the possibility of the Scottish Grand Committee meeting in Edinburgh, might it be sensible—and again this is about the joint working issue that we discussed before—to allow MSPs to take part in such meetings with the Scottish Grand Committee in the same way as there has been discussion about allowing MEPs to take part in relevant committees here already?

Mr Winetrobe: As I said before, I think there are obviously legal and procedural issues—I will not say problems or insuperable problems. There obviously are issues. It is perhaps understandable that neither parliament wants to say, "We want just, in effect, to be the guests of the other; we want it to be a joint meeting under both auspices" in the way there are joint committees of the two Houses here, but that is not possible because of the differential legal and constitutional positions and questions of privilege, questions of legal liability, all these sorts of things. All that can be got over and to some extent the National Assembly and the House of Commons were very creative over what is now Standing Order 137. As far as I am aware on that particular measure, the Transport Bill or whatever was the original one, it worked very well. It has now become institutionalised in your Standing Orders. There are always ways of doing things and you can always find a precedent. I think there is some Government of India bill or committee back in the Thirties that was the precedent for that way of joint working. One thing you learn in this place is that there is always a precedent. You might have to go back several hundred years but there is always a precedent for everything. All I am saying is that it can be done if the will is there in both parliaments and neither stands upon its privileges. I think the Scottish Parliament has been as guilty of that at times as perhaps this place or some of its Members or committees may have been in the eyes of the people in Scotland. These are the sorts of things that maybe you were talking about. I hope these are passed now.

Q158 Chairman: What is your view of how the existing inter-governmental arrangements work in practice?

Mr Winetrobe: I am sure formally that the inter-governmental relations work efficiently from the point of view of the two governments. Again, there is a lot of politics, with a small "p", involved in it. There are issues because of the differential electoral cycle, apart from anything else, and one parliament's election is in the middle of the other parliament's period in parliament, and both sides are therefore very conscious of making their point and showing that they are as independent as possible. There have recently been lots of suggestions that ministers and officials of the two administrations are not getting on well from time to time. There may or may not be anything in that because these things are of necessity conducted in private, but, in terms of getting things like the Sewel business through, as far as I can understand, it seems to work adequately. There has only been the one piece of legislation that slipped through inadvertently without having a Sewel motion applied to it that it should have had. From that point of view, I suppose it is working. A lot of the rest is, as Mr Mundell said before, essentially politics and personalities. The formal mechanisms have not actually had to kick in much. A lot of that may well be to do with the two governments being of roughly the same political persuasion with the coalition in Scotland and perhaps other differences between the main parties, shall we say. I think both governments and both administrations widely, officials as well as ministers, have regarded it almost as a point of honour not to have disputes, which is something in the rest of the world where you have federal systems or similar types of systems is not regarded as a sign of failure; it is regarded as a routine part of having a multi-level system of government. There will be disputes and that was why all these arrangements were set up in the Scotland Act and in these concordats and so on. That was not a sign of failure. It was just simply an inevitable part of doing business. Thus far, one can only assume from what we have read and followed that everybody has bent

over backwards to make sure that there have been no formal disputes in the sense of a court case or a referral to the Judicial Committee or an appeal to the Joint Ministerial Committee or any of these formal mechanisms. If that is the definition of it working well, I suppose, yes, it is working well.

Q159 Chairman: Do you not think that the present arrangements between the two parliaments and the two governments have worked well because both governments are mainly formed by one political party. If there was going to be a different political complexion between the Scottish Parliament and the British Parliament, do you think that the present arrangements are adequate to suffer the pressures from different governments?
Mr Winetrobe: I do not think anybody knows the answer to that. As I suggested at the beginning, I think to some extent you have to accept that arrangements are set up to suit the particular political realities at that particular point in time and that, depending on what these new realities are, and there could be so many different scenarios depending on which parties are involved in government in Scotland and in London, some of these arrangements might formally change; some bits that are being used just now might not be used any more. Things like the Sewel Convention might not be used under different sets of circumstances. That does not mean that it is abolished or officially repealed in any way. It just sort of falls into abeyance because of our unwritten constitution and the fact that so much of the devolved arrangements, especially at this inter-governmental level, are not matters of law or written down in any formal sense. They can just lie there; they do not have to be formally repealed. The Joint Ministerial Committee is supposed to meet annually, and I do not think it has met for a few years now, for example. Everybody learns what to use. There was a tendency at the beginning to try to dot all the i's and cross all the t's and nail everything down very tightly, especially from Whitehall's perspective, to make sure that these three new administrations out there did not run off and do their own thing without them knowing what was going on. They have learnt that a lot of that has worked out differently. A lot will depend on matters that are really nothing to do even with devolution. As we have seen from the Government reshuffle in June 2003, changes in the Scotland Office and the Scottish Secretary were almost a by-product of other changes. That might well have as much impact, even without changes of government. Whether there is still a Secretary of State, whether there is still a Scotland Office, all these sorts of issues will have as much impact on how relations work.

Q160 Chairman: The committee members are very pleased that you have taken a great deal of interest in our inquiry. Would you like to comment on any of the views expressed by previous witnesses?
Mr Winetrobe: I do not think so. You have had a very good range of witnesses for the purposes of your inquiry, up to today, and that like perhaps people here and in Scotland when we first read the Scotland Office's submissions, we thought "this is a bit negative". Maybe it was not quite so negative. I tend not so much to agree with the people from the Scottish Parliament that actually they were more supportive of these proposed changes than appeared at first glance. I think it was possibly just that Westminster/Whitehall mindset and that there was a fear, whether within the Scotland Office or perhaps from other parts of the government machine of: do not have any hostages to fortune; do not make any promises on process or practice that might in any way potentially compromise the Government's complete freedom to run its legislative programme as it sees fit and feels is necessary. From their point of view, that is perfectly understandable. Therefore, issues of a second stage at the Scottish Parliament or things that might kick in at the very end of process down here, close to Royal Assent, obviously are matters that everybody recognised right from the very beginning were not going to be very sympathetically looked at because that is just not a real option. I look forward to reading your report. I think there is great potential and optimism for some small steps to be undertaken that will not shake the rafters of this place. As I say, to some extent my interest in it is in what it says for the whole issue of co-operation between Scotland and the United Kingdom, both at government and at parliament level, that shows that when both parliaments and both governments are all willing to look at something objectively, there are ways in which things can be improved without anybody winning or losing or giving ground or losing face, and so on. To that extent, although it has been a horrible five years in some respects about Sewel, it has been a very good learning process for everybody in both places. I think the whole system of governance in the UK has come out of it better. Depending on what you suggest, the most important thing then is what the Government and Parliament here decides to do with that. I think that gives great hope for the future.

Q161 Chairman: Mr Winetrobe, thank you very much for your evidence. That concludes our questions. Before I declare the meeting closed, do you wish to say anything in conclusion perhaps on areas not covered by our questioning?
Mr Winetrobe: No. I think we have had a very interesting discussion, at least from my point of view.
Chairman: Thank you very much for your evidence. That will be extremely useful when we compile our report.

Printed in the United Kingdom by The Stationery Office Limited
6/2006 340243 19585