

Nations and Regions: The Dynamics of Devolution

Quarterly Monitoring Programme

Devolution and the Centre

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Key Points:

- The SNP have criticised the Sewel motion procedure for ‘handing powers back to Westminster.’
- The National Assembly for Wales internal review of procedure recommended principles to be adopted at Westminster and Whitehall when drafting primary legislation affecting Wales.
- The Standing Committee on Regional Affairs met for the first time since the 2001 General Election.
- The House of Lords Select Committee on the Constitution has reported on *The Process of Constitutional Change*, and began an inquiry into *Inter-Institutional Relations in the UK*.
- The House of Commons Select Committee on Public Administration reported on House of Lords reform while the Conservatives and Liberal Democrats published their responses to the Government’s White Paper.
- The Scotland Office published a consultation document on the size of the Scottish Parliament in December 2001.
- The Fifth Periodical Review of the Boundary Commission recommends that the number of Scottish seats at Westminster be reduced to 59.
- The Judicial Committee of the Privy Council handed down judgment in *Procurator Fiscal, Linlithgow v (1) John Watson and (2) Paul Burrows and Her Majesty’s Advocate v JK*.

Devolution and Westminster:

1.1: SNP criticise Sewel motion procedure:

The Scottish Executive was criticised by the SNP on 30 January 2002 over the use of the Sewel resolution mechanism which allows Westminster to legislate on matters which are technically devolved to the Scottish Parliament. Mike Russell, SNP MSP for South of Scotland, charged the Scottish Executive with taking 'away decision making from Scotland' through its ready acceptance of the procedure during debate over Sewel motions regarding the Westminster bills on Adoption and Children and Police Reform, stating:

Increasingly, the Executive does not want the Scottish Parliament to do its job; it wants the Parliament's job done for it...The First Minister has argued that we should do less but do it better. However, Sewel motions simply give us less to do. They take away decision making from Scotland and hand it to someone else. The Sewel motion is a flawed procedure.¹

Mr Russell added that Sewel motions were meant to 'be the exceptions, not the rule' and that their continued, and frequent, use demonstrated a distinct lack of ambition on the part of the Executive:

The Administration is not pushing hard enough to devise Scottish solutions to Scottish problems. The Administration is not taking the Parliament seriously enough.²

As the Advocate General for Scotland, Dr Lynda Clark QC, stated in the House of Commons on 15 January 2002:

The Sewel motions procedure...states that this Parliament would not normally legislate with regard to devolved matters without the agreement of the devolved legislature...Sewel motions are the method by which the Scottish Executive seeks to obtain the agreement of the Scottish Parliament. They are a matter of practice, not law.

Since the Scottish Parliament was established in May 1999 there have been some 30 Sewel resolutions passed at Holyrood (a full list is reproduced below).³

¹ Scottish Parliament Official Report, 30 January 2002, Cols. 5881-5882.

² Ibid.

³ For an analysis of the use of the Sewel Motions procedure see Barry K. Winetrobe, 'Counter-Devolution? The Sewel Convention on Devolved Legislation at Westminster', (2001) 6 *Scottish Law and Practice Quarterly*, 286-292.

Westminster Bill	Sewel Motion Debated at Holyrood
Adoption and Children Bill	30 January 2002
NHS reform and Health Care Professions Bill	22 November 2001
Anti-Terrorism, Crime and Security Bill	15 November 2001
Adoption and Children Bill	24 October 2001
Proceeds of Crime Bill	24 October 2001
Adoption and Children Bill	5 April 2001
Armed Forces Bill	29 March 2001
International Development Bill	8 March 2001
Culture and Recreation Bill	8 March 2001
Criminal Justice and Police Bill	7 February 2001
Outworking Bill	31 January 2001
Health and Social Care Bill	17 January 2001
International Criminal Court Bill	18 January 2001
Tobacco Advertising and Promotions Bill	17 January 2001
Criminal Justice and Court Services Bill	5 October 2000
Political Parties, Elections and Referendums Bill	6 July 2000
Government Resources and Accounts Bill	6 July 2000
Care Standards Bill	22 June 2000
Insolvency Bill	1 June 2000
Race Relations (Amendment) Bill	25 May 2000
Learning and Skills Bill	18 May 2000
Regulation of Investigatory Powers Bill	6 April 2000
Political Parties, Elections and Referendums Bill	9 March 2000
Sexual Offences (Amendment) Bill	19 January 2000
Representation of the People Bill	13 January 2000
Sea Fishing Grants Charges Bill	8 December 1999

Financial Services and Markets Bill	23 June 1999
Electronic Communications Bill	23 June 1999
Limited Liability Partnerships Bill	23 June 1999
Food Standards Bill	23 June 1999 ⁴

Despite predictions that the procedure would be infrequently used the regularity of recourse to Sewel has aroused concerns at Westminster⁵ and Holyrood. There are, however, those who retain faith in the procedure:

Sewel motions are very good things, in that they show that the two Parliaments are working together. They exist to enable the Westminster Parliament to legislate in a devolved area with the approval of the Scottish Parliament. In other words, the devolution settlement has brought about exactly the right type of co-operative, efficient working between the two Parliaments.⁶

1.2: Calls for control over Scottish Parliament procedure to reside in Scotland:

Canon Kenyon Wright, who was a leading figure in the Scottish Constitutional Convention, has called for the Scottish Parliament to be given powers to amend the Scotland Act. In the run up to the release of the Scotland Office consultation document on the size of the Scottish Parliament (see below), a number of concerns were raised questioning the fact that a number of powers over the structure and procedures of the Scottish Parliament cannot be revised by the Parliament itself as they are part of UK law, passed at Westminster. Canon Wright said:

A constitutional commission, broadly representative of Scottish society, should be formed to monitor possible changes in the constitutional settlement. Just as the parliament itself was shaped in Scotland, any changes to the numbers, powers, financial arrangements or other fundamental aspects, must be subject to the parliament and people of Scotland.⁷

⁴ Data provided by the Scottish Parliament Information Office [February 2002].

⁵ Most notably by SNP members, for example: Annabel Ewing, House of Commons Debates, 4 December 2001, Col. 153; Alex Salmond, House of Commons Debates, 13 December 2001, Col. 1087; Alistair Carmichael, House of Commons Debates, 15 January 2002, Col. 142.

⁶ House of Lords Debates, 10 January 2002, Col. 687 (*per* Lord Sewel).

⁷ 'Steel says his job title is bizarre', *The Herald*, 21 November 2001.

Concerns over the inability of the devolved Parliament to appoint a temporary Presiding Officer have also been voiced following the news that Sir David Steel will require treatment for cancer.⁸ As Sir David stated in a meeting of the Scottish Parliament's Procedures Committee in November 2001:

There is one problem with the constitution of the Parliament, which is that it is still set up under the Scotland Act 1998. One has to go back to that Act if one wants to make any changes to our structure. I do not think that, in the long run, that is a sensible way to proceed. Apart from anything else, even if we in the Parliament agreed on sensible changes, we would have to persuade both Westminster Houses that they must give up time to change the Scotland Act 1998. The argument over whether there should be 129 MSPs has illustrated that difficulty clearly.⁹

1.3: Westminster Hall Debate on the Government of Wales Act 1998:

On 5 December 2001 the Plaid Cymru MP Elfyn Llwyd opened a debate on the Government of Wales Act by highlighting the shortcomings of the National Assembly established by that Act. Describing a recent report in the South Wales Echo under the headline 'Scrap the Assembly' in which 46% of people in Wales were said to not want the Assembly Mr Llwyd described the two primary shortcomings of the Assembly as being: that inclusive politics is a myth and that the Assembly is too weak.¹⁰

The myth of inclusive politics, and therefore of inclusive decision-making, Llwyd said was proved by the fact that the Cabinet system in the Assembly bears too much resemblance to that at Westminster thus preventing collective decision-making. In addition the committee system of the National Assembly cannot be independent of the Cabinet as ministers are able to take seats on committees.

⁸ 'Steel's complaints fall on deaf ears', *The Herald*, 27 November 2001.

⁹ Scottish Parliament Procedures Committee Official Report, 20 November 2001, Col. 1008.

¹⁰ House of Commons Debates, 5 December 2001, Col. 91WH-92WH. The figure of 46% of the people in Wales being in favour of abolishing the Assembly is in stark contrast to a survey carried out by NOP/BBC Wales in June 2001 which suggested that only 18% of people in Wales responded positively to the suggestion that 'Wales should have no elected Assembly or parliament'. See further J. Curtice, 'Hopes Dashed and Fears Assuaged?', in A. Trench (ed.), *The State of the Nations 2001: The Second Year of Devolution in the United Kingdom* (Imprint Academic, 2001), especially at pp. 228-229.

The weakness of the Assembly, Llwyd argued, was demonstrated by the fact that even in areas supposedly devolved to Wales, Westminster continued to pass a large number of statutory instruments. The example areas of health and education were given: during 2000 the National Assembly passed 70 SIs relating to health and education, during the same period Westminster passed 40. The foot and mouth outbreak of 2000 was cited as further evidence of an area where the Assembly had *de facto* control and yet seemed unable to act in certain cases without Whitehall sanction. In support of his argument that the National Assembly is over reliant on Westminster and Whitehall Llwyd quoted an article by Professor Rick Rawlings which stated that the:

High dependency of the Welsh scheme of devolution on administrative and political goodwill. It is to this effect a flimsy construction, which presupposes consensus and co-operation for legitimacy and effective operations.¹¹

Hywel Francis, MP for Aberavon, suggested that now was not the time to call for the Government of Wales Act to be reviewed in order to allocate further powers to the Assembly, saying that it would be 'inappropriate to call for additional powers without recognising the need for a further democratic mandate'. He added that evidence of the success of the National Assembly can be found in the establishment of the Children's Commissioner for Wales and securing additional funding for Objective 1 areas, and that the focus of attention should remain on making the 'present democratic settlement work'.¹²

Closing the debate the Secretary of State for Wales remained unconcerned about Plaid Cymru's reservations about the powers of the Assembly:

It is essential that we do not allow ourselves to get into a position where we use the constitutional questions to obfuscate the importance of the services themselves, and the delivery of them. We must not carry on talking so much about constitutional issues—frankly, they turn off most of our constituents, important though we think they are.¹³

A further debate on the effects of devolution in Wales was introduced by Lord Griffiths of Fforestfach on 13 February 2002, specifically dealing with the impact of devolution on the economic and social conditions in Wales.¹⁴

¹¹ House of Commons Debates, 5 December 2001, Col. 96WH (the article quoted by Mr Llwyd was R. Rawlings, 'The New Model Wales', *Journal of Law and Society*, Vol. 25, No. 4, December 1998).

¹² House of Commons Debates, 5 December 2001, Col. 105WH.

¹³ House of Commons Debates, 5 December 2001, Col. 115WH.

¹⁴ House of Lords Debates, 13 February 2002, Cols. 1138-1176.

1.4: Primary Legislation Affecting Wales:

The conclusion of the National Assembly for Wales internal review of procedure¹⁵ raised interesting questions for consideration at Westminster, not least with regard to primary legislation affecting Wales. The review stated that the National Assembly should have ‘the maximum possible input into primary legislation brought before Parliament’¹⁶ and that, where possible, the Assembly should seek to influence Westminster bills at the earliest possible stage.¹⁷ To this end the review suggested a set of principles to be observed by Government bills affecting the Assembly:

1. The Assembly should acquire any and all new powers in a Bill where these relate to its existing responsibilities.
2. Bills should only give a UK minister powers which cover Wales if it is intended that the policy concerned is to be conducted on a single England and Wales / GB / UK basis.
3. Bills should not confer functions specifically on the Secretary of State for Wales. Where functions need to be exercised separately in Wales, they should be conferred on the Assembly.
4. A Bill should not reduce the Assembly’s functions by giving concurrent functions to a UK Minister, imposing a requirement on the Assembly to act jointly or with UK Government / Parliamentary consent, or dealing with matters which were previously the subject of Assembly subordinate legislation.
5. Where a Bill gives the Assembly new functions, this should be in broad enough terms to allow the Assembly to develop its own policies flexibly. This may mean, where appropriate, giving the Assembly ‘enabling’ subordinate legislative powers, different from those given to a Minister for exercise in England, and/or which proceed by reference to the subject-matter of the Bill.
6. It should be permissible for a Bill to give the Assembly so-called ‘Henry VIII’ powers (i.e. powers to amend primary legislation by subordinate legislation, or apply it differently) for defined purposes, the test being whether the particular powers are justified

¹⁵

<http://www.wales.gov.uk/subiassemblybusiness/procedures/assemblyreview.htm>

¹⁶ Ibid, para. 4.2.

¹⁷ Ibid, para. 4.6.

for the purpose of the effective implementation of the relevant policy. Where such powers are to be vested in a UK Minister for exercise in England, they should be vested in the Assembly for exercise in Wales.

7. Assembly to have power to bring into force (or 'commence') all Bills or parts of Bills which relate to its responsibilities. Where the Minister is to have commencement powers in respect of England the Assembly should have the same powers in respect of Wales.¹⁸

The review stated that the work of the Modernisation Committee and Constitution Committee offered a useful mechanism for the review of both 'parliamentary procedures and co-operation with devolved bodies to be reviewed and improved'.¹⁹ Furthermore suggesting the expansion of links with Westminster's 'Welsh' structures:

We also see the potential for benefits in establishing more formal arrangements for communication and collaboration with our colleagues at Westminster. For example, an annual meeting between Assembly Members and the Welsh Grand Committee or the Welsh Affairs Select Committee could be held to discuss the UK Government's legislative programme and its impact on Wales.²⁰

1.5: The Welsh Affairs Committee:

Minutes of Evidence taken by the Welsh Affairs Committee on 23 October 2001 were published on the House of Commons website in early January 2002. The Secretary of State for Wales, Paul Murphy MP, the Head of the Wales Office, Alison Jackson, and the Office's Principal Finance Officer, John Kilner, appeared before the Committee to discuss aspects of the Wales Office's Departmental Report 2001. Whilst devoting a significant proportion of the meeting to the financial (the Office's inability to pay invoices on time) and administrative (the poor record of the Office in replying to correspondence) workings of the Office, the meeting demonstrated that at least some of the criticisms of the territorial offices found during 2001 in the national press²¹ are beginning to surface in Westminster, namely that the responsibilities of the Scotland and Wales Offices are not sufficient to justify the existence of separate Departments of State.

¹⁸ Ibid, annex V.

¹⁹ Ibid, para. 4.15.

²⁰ Ibid, para. 4.13.

²¹ See the November 2001 Devolution and the Centre Monitoring Report.

The Secretary of State for Wales began by outlining the functions of the Office, which can be summarised as follows:

- To act as liaison between Westminster and Whitehall and the National Assembly for Wales;
- To present the Government's legislative programme to the National Assembly;
- To handle the way in which legislation affecting Wales is handled at Westminster; and
- To ensure that Wales is effectively represented in the UK Cabinet (a role which involves Paul Murphy and Don Touhig being members of some 22 Cabinet Committees).

However, Bill Wiggin, the Conservative MP for Leominster, remained unsatisfied by this response, suggesting:

...from what I have heard today in [the Secretary of State's] opening comments he does not actually run anything, he is not evaluated and sometimes does not even have the intention of telling people what he gets up to. We have a department with only 18 people who can answer letters and a department which does not pay its bills.

And Mr Murphy, however, did little in his response to suggest that these criticisms were misplaced, saying:

- One of the reasons for my existence is to ensure that we have smooth relations between the Assembly and Westminster and Whitehall in these areas of devolution. It is that protection of the constitutional settlement which is so vital to us in Wales which is the main *raison d'être* for the existence of the Wales Office and for my position at the Cabinet table.

The Welsh Affairs Committee have taken evidence in Cardiff as a part of their inquiry into Objective 1 funding. The meeting took place on 21 January 2002 and evidence was heard from the Secretary of State for Wales, the First Minister of the National Assembly for Wales, Rhodri Morgan AM, and from Officials from Her Majesty's Treasury. At the time of writing details of the meeting had not been published.

1.6: The Territorial Grand Committees:

The Welsh Grand Committee met on 28 November 2001 to discuss the implications of the Pre-Budget Statement for Wales.

The Scottish Grand Committee met on 28 November 2001 and 13 February 2002 to discuss Scotland in the World and Scottish Energy in the 21st Century respectively.

The Northern Ireland Grand Committee debated the Draft Criminal Injuries Compensation (Northern Ireland) Order 2001 on 13 December 2001.

1.7: The Standing Committee on Regional Affairs:

After a period of inactivity following its inaugural meeting in 2001 the Standing Committee on Regional affairs met again on 18 December 2001. The Committee has been re-appointed with a new chair, the MP for the Scottish constituency of Clydesdale, Jimmy Hood, and three other new members: Henry Bellingham, Norman Lamb and John Mann. The full membership of the Committee is detailed in the table below.

Jimmy Hood (Chair)	Labour	Clydesdale
Candy Atherton	Labour	Falmouth and Camborne
Henry Bellingham	Conservative	North-West Norfolk
Karen Buck	Labour	Regent's Park and Kensington North
Louise Ellman	Labour	Liverpool Riverside
Nigel Evans	Conservative	Ribble Valley
Andrew George	Lib Dem	St Ives
Norman Lamb	Lib Dem	North Norfolk
John Mann	Labour	Bassetlaw
Denis Murphy	Labour	Wansbeck
Ian Pearson	Labour	Dudley South
Lawrie Quinn	Labour	Scarborough and Whitby
Anthony Steen	Conservative	Totnes
Derek Wyatt	Labour	Sittingbourne and Sheppey

For details of the debate see the February 2002 English Regions Monitoring Report.

1.8: The House of Lords Select Committee on the Constitution:

The Select Committee on the Constitution published its report on *Changing the Constitution: The Process of Constitutional Change* on 13 February 2002.²² The Committee recommended that the Government review their approach to dealing with issues of constitutional significance, and revive the Constitution Secretariat in the Cabinet Office to 'ensure a more integrated approach'.²³ The report did not advocate a Department of Constitutional Affairs, nor did it recommend any specific changes to Parliamentary procedures relating to constitutional bills.²⁴ Although the role of the House of Lords in constitutional matters was endorsed by the Committee:

Given the emphasis now on scrutiny of constitutional affairs in the House of Lords, not least through the creation of the Constitution Committee, we believe it is at least appropriate for the lead minister [on constitutional affairs] to remain in the upper House. We also note that committees of this House have a reputation for not adopting a partisan approach. We believe that this attribute is especially valuable in the context of considering constitutional developments.²⁵

Ministerial responsibility for constitutional affairs was raised in evidence to the Committee from Professor Rodney Brazier of the University of Manchester. Professor Brazier suggested that the fragmented nature of Whitehall's treatment of law, justice and constitutional affairs remains inadequate (an argument compounded by the recent division of powers amongst the Cabinet Office, DTI and DTLR with regard to policy on regional government). Professor Brazier justified his assertion on three grounds:

- Ministerial responsibility for law, justice and constitutional affairs should lie in the House of Commons—having the head of one of these departments sitting in the House of Lords merely serves to compound the fragmentation;
- The *ad hoc* acquisition of powers demonstrated in the Home Office and Lord Chancellor's Department is no substitute for a division based on 'functions and efficiency';
- The position of the Lord Chancellor as Head of the Judiciary, Government Minister and sometime judge is anomalous and no longer sustainable.

²² Select Committee on the Constitution, 4th Report (Session 2001-02), HL 69.

²³ *Ibid*, para. 51.

²⁴ *Ibid*, paras. 54, 61.

²⁵ *Ibid*, para. 54.

Professor Brazier's solution would be to create a Department of State responsible for Constitutional Affairs (in addition to the Home Office and a Department of Law, the latter of which would not be under the custodianship of the Lord Chancellor). The Department of Constitutional Affairs would take on responsibility for those 'constitutional' matters currently held by the Lord Chancellor's Department, the roles of the Secretaries of State for Scotland and Wales, and issues relating to devolution (including devolution to the English regions). As shown above, however, the Committee were not persuaded by Professor Brazier's argument.

The Committee has, as of January 2002, begun an inquiry into *Devolution: inter-institutional relations in the United Kingdom*, focusing on relations between the four administrations within the UK and the role played by the various Parliaments and Assemblies in the devolved UK. Specifically the Committee will be looking at the following issues:

- The formal structure and operation of intergovernmental relations (IGR);
- Arrangements within the Government of the United Kingdom (including the roles of the Secretaries of State for Scotland Wales and Northern Ireland, and the Cabinet Office);
- The machinery and practice of dispute resolution (including the use of the Joint Ministerial Committee on Devolution for the resolution of political disputes and the Judicial Committee of the Privy Council for the examination of legal disputes);
- Finance, fiscal matters and the Barnett formula;
- The role played by legislatures in scrutinising inter-governmental relations as conducted by the devolved and UK administrations;
- The nature of relationships between the legislatures in the UK;
- The methods by which Westminster legislation affecting the devolved administrations is considered and scrutinised;
- European Union matters;
- The operation of the Civil Service;
- And the effects of devolution on the unity of the United Kingdom.

Evidence is to be submitted to the Committee by the 27 February 2002. The Committee will be taking oral evidence from Professor Vernon Bogdanor (University of Oxford) on 20 February 2002, from the Deputy Prime Minister, John Prescott, on 27 February 2002, and from the Secretaries of State for Scotland, Wales and Northern Ireland on 10 April 2002. In addition the Committee will hear evidence from UK

Government civil servants from the Cabinet Office and Territorial Departments on 20 March 2002.

The Constitution Committee is expected to continue to take evidence until July 2002 and will be holding meetings in Edinburgh, Cardiff and Belfast. The report on *Devolution: Inter-institutional relations in the United Kingdom* is expected to be published by the end of the current Parliamentary session.

1.9: House of Lords Reform:

The debate over the future of the House of Lords has continued with the Liberal Democrat and Conservative parties adding their proposals to those contained in the Government's White Paper of November 2001.²⁶ The Liberal Democrats, proposing a chamber composed of a maximum of 300 members, with an 80% minimum of elected members, suggested that the Government's proposals on composition were not a 'sufficiently radical departure from the present position to be defensible in democratic terms'. Their response to the White Paper added that:

The Liberal Democrats believe that the second chamber should contain directly elected representatives from the nations and regions of the UK.

Election should be on the basis of Proportional Representation. We prefer this to take the form of Single Transferable Vote. We would only consider a regional list system on the basis of open lists.

Meanwhile the Conservative party has advocated a chamber, or senate, composed of 300 'predominantly elected members', but rejected the regional elections favoured by the Government and the Liberal Democrats. In their document *Delivering a Stronger Parliament: Reforming the Lords* the Conservatives suggest that:

We believe that so far as possible Senate constituencies should be county-based and reflect the strong sense of historical identity in our shires and great-metropolitan cities.

We see no insuperable difficulty with constituencies of different sizes as the Boundary Commission assures equality of representation in the Commons and the Senate is a body which all who have written on the new House agree should have strong regional roots. Counties would provide this in a way the Government's artificial regions never could.

To those who have said a county-based system would lead to a more rural stamp to the Senate, we would retort that this may be another way

²⁶ For further details of which see the November 2001 Devolution and the Centre Monitoring Report.

in which it could balance the tendency of the executive and the Commons to reflect urban—and specifically—metropolitan attitudes.²⁷

The House of Commons Select Committee on Public Administration has conducted its own inquiry into reform of the Second Chamber.²⁸ Endorsing a chamber with a maximum of 350 members comprising a 60% elected element, with a further 20% appointed independent members and a final 20% political nominees (both of the latter to be selected by an independent appointments commission) the Committee went further than recent proposals for reform of the Lords to look into various matters relating to devolution.²⁹ While supporting the view of the Government and the Liberal Democrats that members of the reformed second chamber represent the Nations and Regions of the UK (and that elections should be from constituencies based on the current European Parliamentary regions of the UK³⁰) the Public Administration Committee looked into the issue of links with the devolved administrations, stating:

The second chamber could be extremely valuable in strengthening the ties between the devolved institutions and Westminster. In his evidence to us the Leader of the House suggested that there might be attractions in indirect election by the devolved assemblies as one 'entry route' to the second chamber, which would bring us closer to the model for second chambers which exists in much of Europe. Indirect election was rejected by the Royal Commission, but in part because they found no demand at that early stage of devolution from amongst the devolved institutions. Views may since have changed, and this is an issue which we hope the House of Lords Constitution Committee might explore in its second

²⁷ The Conservative Party, *Delivering a Stronger Parliament: Reforming the Lords* (January 2002), paras. 6.28-6.29.

²⁸ Select Committee on Public Administration Fifth Report, *The Second Chamber: Continuing the Reform*, 14 February 2002, HC 494.

²⁹ For a detailed discussion of the possible role and functions of a territorial second chamber see M. Russell, *Reforming the House of Lords: Lessons from Overseas* (Oxford University Press, 2000), pp. 283-290.

³⁰ *The Second Chamber: Continuing the Reform*, at para. 106: 'We agree with the Government that elections for the second chamber should be based on the same regional constituencies as those used in the European Parliament elections. These members are to represent the 'nations and regions', and it makes sense for their constituencies to match the nations and regions of the UK. It also helps to distinguish them further from MPs in the House of Commons: the larger the area, the less likely they are to do constituency work. We also recommend a formal convention to prevent this.'

inquiry, just starting, which is to be concerned with inter-institutional relations in the newly devolved UK.³¹

The Public Administration Committee's report has been welcomed for finding the so-called 'centre of gravity' on the subject of Lords reform and exposing the 'untruth of the claim that consensus is unattainable'.³²

³¹ Ibid, at para. 76 (the Committee repeated this suggestion at para. 104). For a more recent examination of the role which a reformed House of Lords may with regard to devolution see: R. Hazell, *Commentary on the White Paper: The House of Lords—Completing the Reform* (Constitution Unit, January 2002), pp. 20-21.

³² 'Unfinished Business: Ministers must act and reform the Lords', *The Guardian*, 18 February 2002.

Devolution and Whitehall:

2.1: Scotland Office announces consultation on the size of the Scottish Parliament:

The consultation document announced by Helen Liddell on the size of the Scottish Parliament was published in December 2001 by the Scotland Office.³³ The document seeks the views of interested parties on ‘the case for retaining or ending the linking of Westminster and Holyrood constituency boundaries...in the light of experience now gained of the Scottish Parliament’s operation.’³⁴ Under s.86 of the Scotland Act the guarantee to Scotland of a minimum of 71 Westminster seats was removed and the Boundary Commission was required to apply the electoral quota for England (approximately 70,000) to Scotland. Furthermore, Schedule 1 to the Act provided that the constituency boundaries for the Scottish Parliament be co-terminous with those of at Westminster. Consequently, under the Scotland Act 1998, the size of the Scottish Parliament would be reduced in line with Scottish representation at Westminster (although list members would remain in largely the same proportions to the number of constituency members as they exist at present).³⁵

However, both John Reid and the current Secretary of State for Scotland have stated that this element of the Scotland Act may be open to review should a compelling case be made that the Scottish Parliament maintain its 129 MSPs.³⁶ Perhaps the most persuasive argument in favour of maintaining the current number of MSPs lies in the well-regarded work of the committee system of the Scottish Parliament³⁷—the Parliament’s committees have already been described as ‘overworked’ and any

³³ *The Size of the Scottish Parliament: A Consultation*, Scotland Office, December 2001 (responses are due by 31 March 2002).

³⁴ *Ibid*, para. 3.1.

³⁵ The current ratio of list members to constituency members in the Scottish Parliament is 56:73.

³⁶ A point reiterated in the preface to the consultation document by Helen Liddell.

³⁷ During the Westminster Hall debate on the Scotland Act 1998 held on 27 November 2001, the Committee system of the Scottish Parliament was widely praised: see for example Col. 196WH (Rosemary McKenna MP) and Col. 198WH (John Thurso MP).

reduction in the number of MSPs would only serve to compound this problem.³⁸ In addition it has been suggested that the minor parties would suffer through having a more slender chance of gaining regional list seats, and that the smaller pool of MSPs would reduce the number of candidates able to fill ministerial office. With this in mind the Scotland Office consultation document sought answers to the following questions:

- What would be the consequences of the reduction required by the Scotland Act on the operation of the Scottish Parliament, and in particular on the Committee system, the workload of MSPs, the service provided to constituents and the role of members elected from the list system?
- What practical effect and issues would arise in their relationship as constituency representatives between MPs, MSPs and councillors if the present number of MSPs were to be retained and non-coterminous boundaries between Westminster and the Scottish Parliament constituencies created, and how could any difficulties be overcome?
- What are the implications where shared constituency boundaries are not in place for electoral administrators and local authorities in relation to the registration of voters and the conduct of elections, and what would need to be done to ensure the effective and efficient running of the democratic process?³⁹

Following the publication of the Scotland Office consultation document the Boundary Commission for Scotland published its Fifth Periodical Review on 7 February 2002. Applying the electoral quota for England to Scotland the Boundary

³⁸ See J. Mitchell *et al*, 'Scotland: Maturing Devolution', in A. Trench (ed.) *The State of the Nations 2001: The Second Year of Devolution in the United Kingdom* (Imprint Academic, 2001), pp. 58-60; B. Winetrobe, *Realising the Vision: An Audit of the First Year of the Scottish Parliament* (Constitution Unit, October 2001).

³⁹ *The Size of the Scottish Parliament: A Consultation*, Scotland Office, December 2001, para. 3.4. Although the document was published in December 2001, by 13 February 2002 *The Herald* suggested that the response rate had been disappointing: 'Helen Liddell's consultation process is in danger of turning into farce as the Scotland Office revealed that only 15 people had responded since it was first announced in December. ('Boundary plan sets scene for MSP cuts'). By 27 February the number of responses had increased to 32 (information obtained from the Scotland Office).

Commission recommended that the number of Westminster constituencies in Scotland should be reduced from 72 to 59.⁴⁰

The proposed changes would see Edinburgh and Aberdeen lose one seat each and Glasgow lose three of its 10 Westminster constituencies. The Dunfermline East seat held by Gordon Brown would be merged into Dunfermline and West Fife, and the seats held by Alistair Darling in Edinburgh and John Reid in Lanarkshire would be abolished as the electoral maps around the areas are redrawn. Reports have stated that the Labour party have the most to lose, as they currently hold 56 of the 72 seats, but the Conservatives might also lose their weak foothold in Scotland as the Galloway and Upper Nithsdale seat of Peter Duncan MP would be extended to include Dumfries, currently held by the Labour MP Russell Brown.⁴¹

Should the Scotland Act be amended to enable the Parliament to retain its 129 MSPs Magnus Linklater of *The Times* has suggested that it would be interpreted as a victory for the SNP:

...the unthinkable would have to happen: the Scotland Act would have to be redrafted. This was the one thing that Mr Dewar, and other guardians of the devolution settlement, never wanted to see. They saw the Act as a powerful bastion of the Union, a sure defence against any Nationalist intrusion. Time and again within the Parliament, Nationalist attacks have been countered with the unyielding argument that the Act is inviolable.⁴²

Although, as calls for the Act to be amended have recently been seen in the Scottish Parliament's Procedures Committee, most notably by Sir David Steel, such a development could well be seen as a victory for the Parliament itself. At the time of writing however, reports have suggested that 'the pendulum is swinging in favour of keeping the Scotland Act'.⁴³

2.2: The Continuing Roles of the Territorial Secretaries of State:

During November 2001, the Campaign for the English Regions, in their proposals to the DTLR for consideration in the Government's White Paper on English Regional

⁴⁰ For further details, including maps of current and proposed constituency boundaries, see: <http://www.bcomm-scotland.gov.uk/index.html>

⁴¹ BBC News Online, 'Bell tolls for Scottish MPs' seats', 7 February 2002 (<http://news.bbc.co.uk/>).

⁴² Magnus Linklater, 'One cut that the Scots Nationalists will welcome', *The Times*, 7 February 2002.

⁴³ 'Boundary plan sets scene for MSP cuts', *The Herald*, 13 February 2002.

Government, added their voice to those campaigning for the abolition of the offices of Secretary of State for Scotland and Secretary of State for Wales. The proposals, in the document *Democratic Regions*, detail the CFER's position on reforms in Whitehall and Westminster following devolution to the English Regions and suggest that the two Territorial Secretaries of State should be replaced by a single Secretary of State and department for the Nations and Regions:

[The department] would also gain the relevant responsibilities of the Secretary of State for Transport, Local Government and the Regions, and his/her department. A Secretary of State for the Nations and Regions should have a powerful voice in Cabinet, backed up by junior Ministers. S/he will be a powerful voice for the interests of regions at the highest of levels.

Following the CFER's suggestions, the Scottish and Welsh Affairs Select Committees would be replaced by a Select Committee on the Nations and Regions. The Scottish and Welsh Grand Committees would be retained, and the Standing Committee on Regional Affairs would be given an expanded remit.⁴⁴

The Office of Secretary of State for Scotland came under further fire in February 2002 when an article in the *Daily Telegraph* suggested that Helen Liddell had such a light workload that she was able to work a three day week with time to spare to take French lessons at Dover House.⁴⁵ Coming only shortly after it had been suggested that the cost of running the Scotland Office had doubled during the last year such claims were likely to be particularly damaging.⁴⁶ Despite Liberal Democrat claims that the reduction in workload was a natural consequence of devolution, and indeed that it demonstrated the success of the devolution arrangements⁴⁷, the SNP and Conservatives took a predictably more hostile approach. The Tory MP Teddy Taylor suggested that 'devolution had turned the position of the Scottish Secretary into a

⁴⁴ The document *Democratic Regions*, is available at the CFER website: <http://www.cfer.org.uk/>

⁴⁵ 'The minister with time for tuition', *The Daily Telegraph*, 5 February 2002.

⁴⁶ A report in *The Scotsman* suggested that the cost of running the Scotland Office had increased from £3.9m in 1999-2000 to £7.3m in 2000-2001 (over the same period it was suggested that the number of civil servants working in the Office had increased from 57 to 113): see 'Call to scrap Liddell's position', 21 January 2001. See further SNP Press Release, 'Scotland Office waste of money—should be wound up now', 20 January 2002.

⁴⁷ See Comments of John Thurso MP, quoted in 'French lesson gives Liddell un problème', *The Scotsman*, 6 February 2002 and 'Scottish secretary's role under fire', *The Guardian*, 6 February 2002.

“political joke”⁴⁸ While the SNP’s Pete Wishart (North Tayside) tabled an early day motion in the House of Commons calling for the abolition of the Scotland Office:

That this House notes the extremely light ministerial engagements of the Secretary of State for Scotland, as revealed by a report in the Scottish edition of the *Daily Telegraph* on 5th February; and believes that this reinforces the case for abolishing the Scotland Office and transferring its resources to the Scottish Parliament for spending on health and education.⁴⁹

The following day however an amendment to the SNP motion was lodged by the Labour MP David Cairns (Greenock and Inverclyde) praising the achievements of the Scotland Office and recognising its necessary role:

That this house recognises the important role played by the Scotland Office; supports in particular the Scotland Office and its ministers in their crucial role as Scotland’s voice in Westminster, Whitehall and the wider world; recognises that the Scotland Office and the Scottish Executive each have responsibility for 50 per cent. Of Government monies invested in Scotland; and believes that it is essential that the Scotland Office and the Scottish Executive continue to work in partnership on behalf of Scotland.⁵⁰

David Cairn’s motion had, at the time of writing, gained the signatures of 23 MPs, all of whom belong to the Labour party.

⁴⁸ ‘The minister with time for tuition’, *The Daily Telegraph*, 5 February 2002.

⁴⁹ EDM 806 (05.02.02). At the time of writing the EDM had only been signed by 4 (SNP) MPs: Pete Wishart, Annabelle Ewing, Angus Robertson and Michael Weir.

⁵⁰ EDM 806A1 (06.02.02). The signatories at the time of writing were: David Cairns, Anne Begg, Jim Dobbin, David Hamilton, Mark Lazarowicz, John MacDougall, Martin O’Neill, Russell Brown, Brian Donohoe, Tom Harris, Iain Luke, David Marshall, Jim Sheridan, Michael Connarty, George Galloway, Eric Joyce, John Lyons, Ann McKetchin, Betty Williams, Alan Meale, Bill Tynan, Bill Etherington and Rudi Vis.

Intergovernmental Relations:

3.1: Whitehall denies involvement in devolved decision-making:

Following the suggestion of the First Minister for Scotland in Scotland on Sunday that the Scottish Executive are 'looking over our shoulder every time we want to make a decision', the Duke of Montrose asked the UK Government:

Whether devolved administrations are free to make their own decisions within their competences without intervention from central government.⁵¹

For the Government, Lord MacDonald of Tradeston suggested that any 'looking over their shoulder' was done merely to assure themselves of the continued support of central government, adding that the transition from Scottish Office to Scottish Executive was such a great step that it is remarkable how 'seamless' the process has been. Pressed on the issue of whether the UK Government intervenes in the decision-making processes of the devolved administrations by the Labour peer Lord Jones, Lord MacDonald replied:

...we do not intervene. We leave matters inside the jurisdiction of the devolved administrations.⁵²

3.2: The British-Irish Council:

In the House of Commons the Conservative member for Southend West, David Amess, asked the Deputy Prime Minister to make a statement on his role in relation to the British-Irish Council. Mr Prescott replied that he carries Ministerial responsibility for the Council of the Isles and deputises for the Prime Minister if he is unable to attend. The Deputy Prime Minister was then asked about the frequency which the BIC has met, Tim Collins pointed out that the aim stated in the Belfast Agreement was that the Council meet at summit level twice annually⁵³ (something which has not been achieved, the last meeting of the British-Irish Council being held in December 1999) and wondered whether this would happen during 2002. The

⁵¹ House of Lords Debates, 10 January 2002, Col. 685.

⁵² Ibid, Col. 686. Also see 'Whitehall 'keeps out of Scottish issues', *The Herald*, 11 January 2002.

⁵³ Belfast Agreement, Strand 3, para. 3: 'The BIC will meet in different formats: at summit level, twice a year, in specific sectoral formats on a regular basis, with each side represented by the appropriate minister; in an appropriate format to consider cross-sectoral matters.'

Deputy Prime Minister responded that it was still the intention of the Government that the BIC meet twice a year and that the next meeting would take place in Jersey.⁵⁴

⁵⁴ House of Commons Debates, 9 January 2002, Cols. 526-527.

Devolution and the Law:

4.1: Interventions made by the Advocate-General for Scotland in cases raising 'Devolution Issues':

In a Parliamentary question on 25 January 2002, Alistair Carmichael asked the Advocate-General on how many occasions she had intervened in cases raising devolution issues under the Scotland Act 1998, the Advocate-General responded that she had intervened in 21 cases 'raised by other parties.'⁵⁵ A full list is reproduced below:

- Margaret Anderson Brown v Stott (Procurator Fiscal Dunfermline).
- PF Forfar v John Raymond Lea.
- PF Forfar v Maitland Mackie.
- Karl Anderson, Brian Doherty and Alexander Reid v The Scottish Ministers and the Advocate General for Scotland.
- Samuel Watson Bowman and Robert Barr Brown v HMA.
- David Shields Montgomery and Andrew Alexander Marshall Coulter v Her Majesty's Advocate.
- Thomas Porter and John Smith v Her Majesty's Advocate.
- Nordvik Salmon v Lord Advocate.
- Her Majesty's Advocate v Robert MacIntosh.
- Thomas Francis Monaghan.
- Gerrie v Ministry of Defence.
- County Properties.
- Sludden v The Scottish Ministers.
- Heritage Scotland v The Scottish Ministers.
- Hans Hill and others for the Trustees of Mount Ellen Golf Club v The Scottish Ministers.
- Norman and Peter McLean v Her Majesty's Advocate and the Advocate General for Scotland.

⁵⁵ House of Commons Written Answers, 25 January 2002, Col. 1127W-1128W.

- James Brouillard v Her Majesty’s Advocate.
- Janet McKenzie v South Lanarkshire Council and the Scottish Ministers.
- Kenneth Mills.⁵⁶

The Advocate-General stated that since May 1999 over 1300 cases raising ‘devolution issues’ have been intimated to her.⁵⁷ In addition, Dr Clark expanded on the circumstances in which she will intervene in such proceedings:

The reasons for intervention will vary according to the circumstances and the criteria are not rigid. In considering intervention I always have very much in mind the need to avoid unnecessary delay in criminal proceedings and the cost of intervention to the public purse. I have taken the view that intervention should not be a routine matter. I might for instance intervene where the case raises human rights issues of serious concern to the Government and I am satisfied that these are more likely to be resolved satisfactorily with my intervention. Experience has shown that the vast majority of devolution issues are disposed of satisfactorily by the courts, without any need for my intervention and consequent public expense. Where cases reach the Judicial Committee of the Privy Council, intervention is particularly apt because that is the final authority. But even in these cases my intervention may not be necessary. My role as Advocate-General is not to intervene in cases at any level, at significant public expense, merely because there is an interesting legal point to be debated.⁵⁸

However, following criticisms of the role of the Secretary of State for Scotland the Advocate-General has also been under fire during the early months of 2002. According to *The Scotsman*:

⁵⁶ Information provided by the Scotland Office, February 2002.

⁵⁷ In response to a question tabled by Annabel Ewing of the SNP the Advocate General indicated on 8 February 2002 that the precise number of cases intimated to her raising ‘devolution issues’ was 1375. 85% of the devolution minutes have raised questions relating to Article 6 of the European Convention on Human Rights. House of Commons Written Answers, 8 February 2002, Cols. 1213W-1214W.

⁵⁸ House of Commons Written Answers, 25 January 2002, Cols. 1125W-1126W. ‘When a devolution issue under the Scotland Act arises in a Scottish court or where a devolution issue under the Government of Wales Act arises in a Scottish court, the Advocate-General has the right to be notified of the issue and thereafter has the right to participate in the proceedings (N. Burrows, *Devolution* (Sweet and Maxwell, 2000), pp. 158-159).’

...the job appears to involve little more than fielding questions in the Commons for five minutes once a month and advising the Government on the intricacies of Scots law.⁵⁹

Dr Clark was further criticised for ‘refus[ing] to list in detail what her responsibilities were.’⁶⁰ This latter point is perhaps unfair bearing in mind the exhaustive description of the role and responsibilities of the Advocate-General that Dr Clark gave to the Scottish Affairs Committee in November 2001.⁶¹

4.2: Procurator Fiscal, Linlithgow v (1) John Watson and (2) Paul Burrows and Her Majesty’s Advocate v JK:⁶²

The two appeals, heard jointly by the Judicial Committee of the Privy Council, concerned the right to a fair trial within a reasonable period of time contained in Article 6(1) of the European Convention on Human Rights. The first concerned two police officers prosecuted for perjury, the second the prosecution of a minor for sexual offences. The perjury case had resulted in a 20 month delay between the charge and the trial. The case of the minor involved a 28 month delay between charge and trial. Previously the High Court of Justiciary had held that both delays were unreasonable and therefore amounted to a breach of Article 6(1) of the Convention.

The Judicial Committee of the Privy Council allowed the appeal of JK, the minor, but dismissed the appeals of the two policemen. In the case of the juvenile the court stated that, having regard to the United Nations Convention on the Rights of the Child and the Beijing Rules, cases involving minors should be handled with utmost urgency—urgency that had not been evident in the 28 month period between charge

⁵⁹ ‘Pressure grows on law officer’, *The Scotsman*, 21 January 2002. *The Times* sketch writer was equally scathing of Dr Clark’s role: ‘For ten, interminable minutes every month, Dr Clark must regurgitate quantities of antiquated Scottish legalese in the absolute certainty that virtually nobody is following a word she says...On Tuesday *The Times* reported the discovery of the world’s largest pile of fossilised dinosaur vomit; but that was before yesterday’s questions to the Advocate-General for Scotland (Ben Macintyre, ‘MPs consider everything at once and nothing at all’, 13 February 2002).’

⁶⁰ ‘Pressure grows on law officer’, *The Scotsman*, 21 January 2002.

⁶¹ Scottish Affairs Committee, Minutes of Evidence, 7 November 2001, especially questions 29-36, available at <http://www.parliament.uk/commons/selcom/scothome.htm>

⁶² [2002] UKPC D1. Judgment handed down 29 January 2002.

and trial for which no satisfactory explanation had been given. In the case of the police officers Lord Bingham, the Senior Law Lord, said:

Police officers are, by reason of their occupation, peculiarly susceptible to accusations of misconduct, many or most of which are found upon examination to be malicious, fabricated or self-serving. The credibility of the accusers is often very suspect. The strong public interest in the integrity of the police, and the interest of individual officers in vindicating their reputations, require that accusations of misconduct against officers, when made, should be carefully and independently investigated by a body other than the police themselves. Even when, as here, strong criticisms of a police officer are voiced from the bench, the need for careful and independent investigation remains before any proceedings, whether criminal or disciplinary, are initiated. This inevitably takes time.⁶³

Lord Bingham also stated that no case before the European Court of Human Rights had found such a period to be in breach of Article 6, aside from *Mansur v Turkey*⁶⁴ in which there had been special distinguishing circumstances.⁶⁵

4.3: The Justice (Northern Ireland) Bill:

The Justice (Northern Ireland) Bill was debated in Standing Committee on 14 February 2002 and implements the recommendations of the Review of the Criminal Justice System in Northern Ireland. The Review was established in June 1998 under the Good Friday Agreement and reported in March 2000.⁶⁶

The Explanatory Notes to the bill detail its main aspects as follows:

- To amend the law relating to the judiciary and courts in Northern Ireland, including provision for the creation of a Judicial Appointments Commission and for the removal of judges, changes to eligibility criteria, a new oath and provisions to make the Lord Chief Justice head of the judiciary in Northern Ireland;

⁶³ [2002] UKPC D1, para. 57.

⁶⁴ [1995] 20 EHRR 535.

⁶⁵ [2002] UKPC D1, para. 56.

⁶⁶ Criminal Justice matters are excepted under the Northern Ireland Act 1998 and so remain within the remit of the Northern Ireland Office. Details of the Review of the Criminal Justice System and the Department's other work in the area can be found at: <http://www.nio.gov.uk/issues/justice.htm>

- To provide for the appointment of the Attorney General for Northern Ireland after devolution and to establish a public prosecution service;
- To establish a Chief Inspector of Criminal Justice and a Northern Ireland Law Commission;
- To set out the aims of the youth justice system and to make other provisions dealing with the youth justice system, including extending that system to 17 year olds;
- To provide for the disclosure of information about the release of offenders in Northern Ireland to victims of crime and to confer on victims the right to make representations in relation to the temporary release of offenders; and
- To provide for measures in relation to community safety.⁶⁷

Under the Northern Ireland Constitution Act 1973 the Attorney General for England and Wales has also been the Attorney General for Northern Ireland. The Review Group suggested that the devolution of criminal justice functions be accompanied by the transfer of responsibility for such functions to a politically neutral Attorney General for Northern Ireland. The Attorney General for Northern Ireland would be appointed by the First Minister and Deputy First Minister acting jointly.⁶⁸ Persons would be suitably qualified for the post if they were a member of the Northern Ireland bar of at least ten years standing, or a solicitor of the Supreme Court of at least ten years standing.⁶⁹ As a politically independent appointment, the Attorney General for Northern Ireland would be precluded from being a Member of Parliament or a Member of the Northern Ireland Assembly.⁷⁰ And although the office holder would be able to participate in the proceedings of the Assembly, he or she would be unable to vote.⁷¹

Under Clause 28(1) of the bill the Attorney General for England and Wales would become Advocate General for Northern Ireland, and by virtue of the post would, along with the Solicitor General, hold the same rights of audience as members of the

⁶⁷ Available at: <http://www.publications.parliament.uk/>

⁶⁸ Justice (Northern Ireland) Bill, clause 23(3).

⁶⁹ *Ibid*, clause 23(4).

⁷⁰ *Ibid*, clause 24(6) and 24(7).

⁷¹ *Ibid*, clause 26(1).

Northern Ireland Bar.⁷² Schedule 7 of the bill further details the functions of the office of Advocate General for Northern Ireland who would:

...take over the responsibilities of the Attorney General for Northern Ireland for instituting devolution proceedings in the courts under schedule 10 of the Northern Ireland Act 1998. He also takes over responsibility for referring the question of whether a bill would be within the legislative competence of the Northern Ireland Assembly to the Judicial Committee of the Privy Council.⁷³

⁷² Ibid, clause 28(3).

⁷³ House of Commons Library, Research Paper 02/07, 18 January 2002, Oonagh Gay, Pat Strickland and Sally Broadbridge, p.54.

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