



The **Constitution** Unit



UNIVERSITY OF
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1. The Executive

Barry Winetrobe

1.1 Ministerial issues

There was much criticism of the quality of ministerial talent (or of devolved politicians generally), from Lord Sewel and others.¹ The European External Relations Committee has added to the pressure for the various ministerial external relations responsibilities to be merged into a single portfolio, something the Executive (or the UK Government, fearful of the idea of a separate ‘foreign policy’ from the devolved administration) may not support.² On the same day, McConnell said at FMQs: “Members will be aware that the primary responsibility for external relations matters in the Executive lies with Mr McCabe, but that in the autumn last year we agreed, as part of the new ministerial responsibilities, to give Ms Ferguson a specific responsibility for dealing with international development issues.”³ The First Minister and the Deputy FM gave an on-the-record video briefing on 18 January.⁴ The Justice Minister, Cathy Jamieson, who has been the subject of much personal criticism since her elevation to ministerial rank, was embroiled in a bizarre episode, when it emerged that she had given some financial support several years ago to a relative who had been jailed for manslaughter.⁵ An unauthorised biography of the First Minister seems to be in the works.⁶

Details of the membership and frequency of meetings of Cabinet sub-committees were given in a WA of 5 January.⁷ There are four such committees currently: Legislation (established 2002); Sustainable Scotland (2002); Criminal Justice (2003), and Local Government (2004). In total there have been 10 cabinet sub-committees established since 1999.

1.2 Civil service issues

The Report of the Civil Service Commissioner, Alistair Macdonald, into the conduct of officials involved in the Holyrood Project was published in late November, advising that there was no need for any disciplinary action, a conclusion widely interpreted in the media as a ‘whitewash’.⁸ There have been reshuffles among the senior official ranks of the Executive, with Robert Gordon moving from heading the Crown Office to run the Justice Department, being replaced Norman McFadyen, who now combines his existing job as Crown Agent with Chief Executive of the Crown Office and Procurator Fiscal Service. The former head of the Justice Department, Jim Gallagher has been appointed as visiting Professor of Government in the Law School at Glasgow University.⁹ The media reported the pension package of former Permanent Secretary, Sir Muir Russell.¹⁰ Details of Executive staffing levels were given in WAs on 2 November and 27 January.¹¹

According to a press report in late February, the Executive’s Permanent Secretary, John Elvidge, would loyally seek to implement any future administration’s policy of having a separate Scottish devolved civil service.¹² The Finance Committee is conducting an inquiry designed to feed into the current inquiry into civil service effectiveness by the Commons Public Administration Committee.¹³ The Finance Minister has reported on the progress made through the Executive’s ‘Changing to Deliver’ programme.¹⁴ In a WA on 15 November, ministers set out their approach to the draft Civil Service Bill published that day by the UK Government.¹⁵

The civil service is a reserved matter. We have been consulted in detail by the UK Government over its commitment to consult on a draft Civil Service Bill which would put the current arrangements for the civil service on a statutory

footing. ... The civil service in Scotland is directly accountable to Scottish ministers for its actions, the direction in which it works, and delivering the priorities which are set for it. As the consultation paper makes clear, the draft bill would maintain this position and in particular the flexibility and responsiveness with which the civil service is managed in Scotland. It would not interfere with our responsibilities for pay, grading and management, nor would it inhibit the different ways of working which we have been developing to meet the needs of devolved government. The draft legislative proposals include provision for Scottish ministers to be consulted on the appointment of the First Civil Service Commissioner and involved in the appointment of a Commissioner to take a particular interest in Scotland; for the Civil Service Commission's annual report to be presented to the First Minister and laid before the Scottish Parliament, and for an annual report to be made to the Scottish Parliament on special advisers.

1.3 Relocation/Dispersal

The issue of relocation of civil service jobs, both Executive posts from Edinburgh to the rest of Scotland and of UK jobs to Scotland, remains a high-profile issue, especially in an atmosphere of overall job cuts. For example, the relocation of two relatively minor functions to rural areas were announced by WA on 8 November.

¹⁶ The most controversial relocation of recent times has been that of Scottish Natural Heritage to Inverness, with further reports of rising costs and continuing staff unhappiness.¹⁷ The Finance Committee took evidence from the junior Finance Minister on 11 January, and the Executive has published its *Relocation Guide*.¹⁸ On the dispersal of UK jobs, ministers set out their approach in reply to a PQ on 28 January.¹⁹

The Scottish Executive has not been consulted directly by the UK Department of Trade and Industry, or any other UK Government Department, on plans to disperse civil service posts from London. However, I have been assured that the UK Government is keen to see a share of the posts relocated from London and South East England coming to Scotland. Specific decisions about the deployment of civil service staff in UK departments are an operational matter for the department concerned. Scottish Development International (SDI) is in discussion with individual UK Government Departments, including the Department of Trade and industry, about specific projects as part of its role to attract high quality jobs and investment to Scotland. SDI keeps Scottish Executive ministers fully informed of developments.

1.4 Freedom of Information

As with the 2000 Act south of the border, the coming into operation of the Scottish FoI legislation has led to a rash of stories about the doings and spending of the Executive, especially in relation to expenses, hospitality and travel.²⁰ These 'revelations' are in addition to information gleaned by more traditional means such as PQs.²¹ The Executive has boasted of its adherence to the new openness regime, but the Information Commissioner has said that many Scots are still unaware of their FoI rights and has launched new advertising campaigns.²² He has also published his decision on releasing information about the Reliance escort contract.²³ For the Scotland Office's policy on more general release of information subject to an FoI request (ie under the UK 2000 Act), see a WA of 24 February.²⁴ Replying to a oral PQ about bringing housing associations within the scope of the 2002 Act, the

Minister for Parliamentary Business said that “the Executive will shortly issue a consultation paper on the criteria for bringing other bodies within the scope of the Freedom of Information (Scotland) Act 2002 ... It is in the Executive’s interest to ensure that proper information about all public bodies in Scotland is available to people, according to freedom of information legislation.”²⁵ On a related matter, the Executive’s website was relaunched at the end of November, with a new design. According to a press release of 25 February, it seems to be a heavily-used site.²⁶

1.5 Civic Participation

The Executive’s policy towards civic participation was set out in a WA to Robin Harper on 31 January, though it has announced cuts in its funding of the Scottish Civic Forum (which sees itself as the main ‘gateway’ for such participation). The reason for this move, according to the minister, is that “speaking to organisations and interest groups is an important part of the process. But I also want to see us getting beyond those and talking to Scots who aren’t members of a particular organisation.”²⁷ The Forum has been trying to persuade the Parliament to fund it, and this campaign included a Member’s Business Debate on 24 February.²⁸

Ministers have issued 904 consultations since July 1999, and have explained how these feed into the Executive’s policy processes:²⁹

The Executive is committed to consultation as an important way of involving people and organisations in the policy making process. Consultation on specific policy issues ensures that a wide range of views and experiences are taken into account in formulating policies, and provides an opportunity for all those with an interest in an issue to make a contribution. For all exercises, the responses received (or views put forward in consultation events) are analysed and considered along with other relevant evidence and information in reaching a final policy decision.

2. The Scottish Parliament

Mark Shephard

2.1 Parliamentary Pressure on the Executive and Westminster

The Executive suffered its first defeat since the fishing tie-up vote (see May 2001 Report). In the ferry tendering vote (December 2004), the Executive lost its motion to open Clyde and Hebrides ferry routes to competitive tendering by one vote. Despite the promise of additional investment by the Executive, the motion was defeated by 54 votes to 53, with 14 Labour MSPs and Margo Macdonald (Independent) abstaining.³⁰ Transport Minister, Nichol Stephen argued that the motion was in response to European legislation requiring tendering of ferries. However, several MSPs disputed the Executive's interpretation of the law and handling of the situation, citing clarifications from the Commission and past legal precedents as evidence that the Executive still had a degree of legal latitude in providing state aid to a monopoly service provider. Only one of the 14 abstainers represented a constituency that was directly affected by the move.

In February 2005, the Parliament also succeeded in forcing an Executive climb-down over Executive proposals to designate areas of Crown land as off limits to the public.³¹ The Executive was responding to UK government concerns over trespassing on Royal lands, but for most in the Parliament the Executive was perceived as going back on its commitments to the 'right to roam' principle enshrined in the recent Land Reform (Scotland) Act. Since the Executive faced enough opposition to this measure from its own backbenches, it was forced to withdraw its proposals for a Sewel motion assigning the Executive designation powers. Ironically, now that the Executive has withdrawn its right to designation powers, that right now falls to the UK Home Secretary.

The Labour Party suffered further embarrassment in December 2004 following the success of opposition motions on infantry regiment reorganisation and ID cards. The Parliament voted 61 to 59 (with 7 abstentions)³² in favour of a Conservative motion opposing Westminster plans for mergers of Scottish infantry regiments. A Liberal Democrat motion generally supporting the Conservative position was also approved by 60 votes to 55 with 12 abstentions. Further Liberal Democrat and Labour tensions were expressed in a February 2005 debate on ID cards prompted by the Greens. A Green motion opposing Westminster plans to introduce ID cards was passed (52 to 47 votes)³³ as 15 Liberal Democrats abstained.

2.2 People Power

In December 2004, a debate was held on child abuse in Scotland's children's homes. The debate was secured by the Petitions Committee and was the first debate on an issue raised by a petitioner to the Parliament. The petition (lodged in 2002) called for an inquiry and an apology. While a formal inquiry has so far not been forthcoming, the petitioner and all those suffering similar abuse did receive an official apology from the First Minister in the debate. This quarter also witnessed the largest petition ever lodged before the Scottish Parliament. In February 2005, representatives from the Fisherman's Association and the Cod Crusaders delivered a petition with 160,000 signatures that called on MSPs to pressure the UK government for a withdrawal from the Common Fisheries Policy. The petition prompted heated exchanges between the petitioners and members of the Petitions

Committee with the Committee agreeing to write to the Executive with details of the petition.³⁴

Other interests have resorted to extra-parliamentary means of attracting attention to their causes. In November 2004, the Parliament received a visit from Fathers 4 Justice (a group that campaigns for fathers' rights) and from protestors demanding an inquiry into infected blood products. The two blood protestors were removed from the public gallery for shouting demands for an inquiry. Earlier they had been arrested for throwing paint on the Parliament. Later that month, two representatives of Fathers 4 Justice (dressed in Santa costumes) were removed from the roof of the Parliament. While the policy effect of the extra-parliamentary tactics has so far amounted to nothing, both groups attracted some media attention to their causes.³⁵

2.3 Committee Reports and Inquiries (01 November 2004 – 11 March 2005)³⁶

Timescales and Stages of Bills, 3 November 2004, Procedures Committee

Budget Process 2005/2006 Executive Response, 11 November 2004, Equal Opportunities Committee

Budget Process 2005/2006 Submissions Received, 26 November 2004, Local Government and Transport Committee

Stage 2 Report to the Finance Committee on the 2005/2006 Budget Process, 15 December 2004, Communities Committee

Report to the Finance Committee on Stage 2 of the Budget Process 2005/2006, 15 December 2004, Environment and Rural Development Committee

Gambling Bill - UK Legislation, 16 December 2005, Local Government and Transport Committee

Stage 1 Report on the Further and Higher Education (Scotland) Bill, 20 December 2004, Enterprise and Culture Committee

Replacing the Members' Interests Order, 14 January 2005, Standards Committee

Minor Rule Changes, 21 January 2005, Procedures Committee

Reshaping the NHS? Workforce Planning in the National Health Service in Scotland, 25 January 2005, Health Committee

Railways Bill - UK Legislation, 25 January 2005, Local Government and Transport Committee

Stage 1 Report on the Gaelic Language (Scotland) Bill, 26 January 2005, Education Committee

Access to Dental Health Services in Scotland, 1 February 2005, Health Committee

Report on the Financial Memorandum for the Charities and Trustees Investment (Scotland) Bill, 2 February 2005, Finance Committee

Report on the Serious Organised Crime and Police Bill, 2 February 2005, Justice 2 Committee

Resubmission of Public Petitions, 8 February 2005, Public Petitions

Preliminary Stage Report on the Edinburgh Tram (Line Two) Bill, 9 February 2005, Edinburgh Tram (Line Two) Bill Committee

Final Review of Oral Questions, 9 February 2005, Procedures Committee

Preliminary Stage Report on the Edinburgh Tram (Line One) Bill, 16 February 2005, Edinburgh Tram (Line One) Bill Committee

Inquiry into the Effectiveness of Rehabilitation in Prisons, 21 February 2005, Justice 1 Committee

Stage 1 Report on the Transport (Scotland) Bill, 22 February 2005, Local Government and Transport Committee

Stage 1 Report on the Prohibition of Female Genital Mutilation (Scotland) Bill, 23 February 2005, Equal Opportunities Committee

An Inquiry into the Promotion of Scotland Worldwide: the Strategy, Policy and Activities of the Scottish Executive, 24 February 2005, European and External Relations Committee

Stage 1 Report on the Charities and Trustee Investment (Scotland) Bill, 2 March 2005, Communities Committee

Report on Arts in the Community, 3 March 2005, Enterprise and Culture Committee

Procedures in Relation to the Commissioner for Public Appointments, 4 March 2005, Procedures Committee

Restructuring Scotland's Tourism Industry: Report on the Review of Area Tourist Boards, 8 March 2005, Enterprise and Culture Committee

The Protection of Children and Prevention of Sexual Offences (Scotland) Bill, 10 March 2005, Justice 1 Committee

Finance Committee's Response to the Minister on 'The Relocation Guide', 11 March 2005, Finance Committee

2.5 Parliamentary Bills (01 November 2004 – 11 March 2005)³⁷

Executive Bills in Progress (latest stage reached):

- Budget (Scotland) (No.2) Bill: Passed on 9 February 2005, awaiting Royal Assent
- Charities and Trustee Investment (Scotland) Bill (Stage 1)
- Environmental Assessment (Scotland) Bill (Introduced: 2 March 2005)
- Family Law (Scotland) Bill (Introduced: 7 February 2005)
- Fire (Scotland) Bill: Passed on 23 February 2005, awaiting Royal Assent
- Further and Higher Education (Scotland) Bill (Stage 2)
- Gaelic Language (Scotland) Bill (Stage 2)
- Housing (Scotland) Bill (Preliminary Stage)
- Licensing (Scotland) Bill (Introduced: 28 February 2005)
- Management of Offenders etc. (Scotland) Bill (Introduced: 4 March 2005)
- Prohibition of Female Genital Mutilation (Scotland) Bill (Stage 1)
- Protection of Children and Prevention of Sexual Offences (Scotland) Bill (Stage 1)
- Smoking, Health and Social Care (Scotland) Bill (Stage 1)
- Transport (Scotland) Bill (Stage 2)
- Water Services etc. (Scotland) Bill: Passed on 9 February 2005, awaiting Royal Assent

Members' Bills in Progress (latest stage reached):

- Abolition of NHS Prescription Charges (Scotland) Bill (Introduced: 19 January 2005)
- Council Tax Abolition and Service Tax Introduction (Scotland) Bill (Introduced: 11 November 2004)
- Prohibition of Smoking in Regulated Areas (Scotland) Bill (Stage 1)
- Prostitution Tolerance Zones (Scotland) Bill (Stage 1)

Private Bills in Progress:

- Baird Trust Reorganisation Bill (Introduced: 27 October 2004)
- Edinburgh Tram (Line One) Bill (Preliminary Stage)
- Edinburgh Tram (Line Two) Bill (Preliminary Stage)
- Waverley Railway (Scotland) Bill (Preliminary Stage)

Executive Bills Passed:

- Tenements (Scotland) Bill: Passed on 16 September 2004, Royal Assent on 22 October 2004
- School Education (Ministerial Powers and Independent Schools) (Scotland) Bill: Passed on 6 October 2004, Royal Assent on 12 November 2004
- Emergency Workers (Scotland) Bill: Passed on 22 December 2004, Royal Assent on 1 February 2005

Members' Bills Passed:

- Breastfeeding etc. (Scotland) Bill: Passed on 18 November 2004, Royal Assent on 18 January 2005

Proposals for Members' Bills (01 November 2004 – 11 March 2005)

Following parliamentary debate of Procedure Committee proposals on 11th November 2004, Standing Orders for Members' Bills were amended on 12 November 2004. As part of transitional arrangements to new procedures, all Members' Bill proposals that had not been introduced in Session 2 automatically fell on 12 November 2004. Consequently, 35 Members' Bill proposals were dropped and four (which had been introduced) remained for consideration. Of these four proposals, Breastfeeding has passed, while Prostitution Tolerance Zones, Prohibition of Smoking in Regulated Areas, and Abolition of Council Tax and Service Tax Introduction are still being considered. Tommy Sheridan's Abolition of Council Tax became the last Members' Bill to be introduced under the old system.

Since 12 November 2004, there have been 12 proposals (two new) for consideration by the Parliament. In order of the date lodged, the two new proposals are:

- St. Andrews Day Bank Holiday Bill (Dennis Canavan, Ind.)

- Proposed Right to Die for the Terminally Ill Bill (Jeremy Purvis, Liberal Democrat)

In order of the date lodged, the ten old proposals that have been re-lodged are:

- Proposed Abolition of NHS Prescription Charges (Scotland) Bill (Colin Fox, SSP)
- Christmas and New Year's Day Trading in Scotland Bill (Karen Whitefield, Lab)
- Proposed Commissioner for Older People (Scotland) Bill (Alex Neil, SNP)
- Proposed Liability for Release of Genetically Modified Organisms (Scotland) Bill (Mark Ruskell, Green)
- Proposed Plastic Bag Environmental Levy Bill (Mike Pringle, Liberal Democrat)
- Proposed Green Transport Bill (Chris Ballance, Green)
- Proposed Local Government Elections (Scotland) Bill (David Mundell, Conservative)
- Proposed Civil Appeals (Scotland) Bill (Adam Ingram, SNP)
- Proposed Direct Elections to National Health Service Boards (Scotland) Bill (Bill Butler, Labour)
- Proposed National Register of Tartans Bill (Jamie McGrigor, Conservative)

As of 11th March 2005, only Colin Fox's Proposed Abolition of NHS Prescription Charges (Scotland) Bill has been introduced (see above).

Under the new rules, before supporting signatures are collected, now an MSP must submit his or her Bill to 12 weeks consultation. Following consultation, Members' Bills must attract at least 18 signatures (formerly 11) from at least half the parties or groups represented on the Bureau (currently three out of six total). Members are now restricted to two Members Bills at any one time, and to prevent last minute deluges of Bills at the end of a Session, no Members' Bills are now eligible for consideration after the last September before elections. Finally, to prevent duplication, the Executive can intervene to prevent consideration of those Members Bills where either the Executive or the UK government is planning similar legislation.

2.6 Cross-Party Groups

The number of cross-party groups approved by the Standards Committee increased from 50 to 56 this quarter. The six new cross-party groups are: Civil Nuclear Industry; Diabetes; Food; Loss of Consultant Led Services in Scotland - Solutions; Sustainable Forestry and Forest Products; and Tartan Day.

3. The Media

Philip Schlesinger

3.1 Still asking: ‘Whither SMG?’

The future of Scottish Media Group has been a constant theme in these reports, and questions about its future are still being posed. Richard Huntingford, chief executive of Chrysalis forecast a break-up in November 2004, suggesting that SMG’s radio and television assets would be subject to separate bids. He suggested that ITV would lead the charge, followed by predators interested in the radio holdings.³⁸ The take-over plays came in February 2005. SMG rejected an offer from the private equity group 3i – headed up by Labour peer Lord Alli, co-founder of TV production house Planet 24 – to buy its Virgin Radio holdings.³⁹ This bid was followed by expressions of interest from Virgin Group boss, Richard Branson, keen to bring the station back into his empire, which retains rights over the brand.⁴⁰ However, if everyone was waiting for SMG key shareholder, ITV, to make its play, they were disappointed. The company let it be known that it had no strategic designs on SMG at the present.⁴¹ Another big shareholder, Fidelity, also refused to countenance dismemberment.⁴² Despite the present cooling of the situation, many observers still think that SMG is bound to reconfigure in the medium term, not least because of strategic questions facing its television business.

SMG also came under pressure from the communications regulator, Ofcom, which reduced the minimum obligations on regional programming but refused to countenance any subsidy to the company to ensure that job cuts could be avoided. Ofcom’s research did show that demand for regional output, news in particular, was stronger in Scotland than in England.⁴³ The Secretary of State of Culture, Media and Sport, Tessa Jowell, threw no impediments in the way of Ofcom’s recommendations.⁴⁴ In its Phase 3 report on public service television broadcasting, Ofcom proposed keeping non-news programming in Scotland and the other nations at a higher level than England until the first region implemented digital switch-over.⁴⁵

SMG’s response was to float two initiatives. First, it sought to position itself as the pan-Scottish commercial channel, arguing that its franchise should be expanded to include that of Border TV. This would require legislative change at Westminster and there are indications that the idea has been actively considered inside Ofcom. The aim would be to tidy up the present demarcation lines between ITV and the Scottish franchises at the border.⁴⁶ Second, SMG revived the auld sang of having a pan-Scottish news programme, which had caused the BBC such grief when this took the form of proposing a ‘Scottish Six’ – an issue much aired in these reports. SMG proposed to Ofcom that ITV produce a special bulletin at 10.30 pm, replacing the networked ITV News. Quickly dubbed the ‘Tartan Ten-Thirty’, this has produced no denunciations of breaking up the Union, so far at least. The company also proposed more regional news within Scotland to address viewers’ demands. Scottish TV’s managing director, Bobby Hain, made it clear that if extra funding was not available, regional programming, news included, would disappear from the schedules. STV’s staff were concerned that the shake-up in regional output would result in job losses.⁴⁷

3.2 Last of the Governors?

In late December 2005, the new national BBC Governor was revealed as Jeremy Peat, chief economist at the Royal Bank of Scotland until March 2005. He succeeded Sir Robert Smith, chairman of the Weir group. Mr Peat is not known to have expertise in broadcasting but fits the quest for a range of expertise on the Board sought by BBC chairman Michael Grade. Peat will chair the Governors' audit committee.⁴⁸

But will he be the last of the Mohicans? The signs are that he will. That is because in the wake of the Hutton inquiry of 2003, the BBC's Governors have increasingly hung on a shooegly peg. They were seen as weak in their exercise of governance during the Andrew Gillian affair and although Michael Grade has increased their distance from BBC management, their restructuring now looks inevitable. A panel led by Lord Burns, and reporting to Culture Secretary Jowell in January 2005, recommended replacing the Governors with a Public Service Broadcasting Commission, rapidly dubbed Ofbeeb.⁴⁹ Ofcom is also thought to have ambitions to extend its regulatory remit over all of the BBC's activities.⁵⁰ Lord Birt, ex-BBC director-general and advisor to the Prime Minister, backed his friend Lord Burns' recommendation that the BBC licence fee be parcelled out to other broadcasters.⁵¹ Mrs Jowell did not buy the Burns proposals in their entirety. The government's Green Paper on Charter Review, published on March 2005, advocated replacing the BBC's governors with a Trust and kept the licence fee intact.⁵²

What does this matter to Scotland? The answer lies in another question. When the Governors are laid to rest what will remain of the principle of territorial representation at the pinnacle of public service broadcasting? With the coming of Ofcom, this principle was abolished at the regulator's top board level, being retained only for lower-level committees and the nations and regions advisory structure. The government's proposals – to the contrary – say that the new Trust will include 'members with the knowledge and expertise to understand and articulate the interests of devolved nations'.⁵³ We shall have to see precisely what that means. But it may well go with the grain of the BBC's present fervour for decentralisation.

3.3 Pride and prejudice

The story that occupied the largest share of newsprint and airtime in the last quarter illuminated – once again – the nature of Scotland's media-political village and the temperaments of its inhabitants. The present author has previously analysed the dynamics of this phenomenon and recent developments show no noteworthy change.⁵⁴ If the brave new devolved order was intended to open up the political culture, it has done nothing to prise apart the politicians' tight embrace with the journos.

There are two interconnected parts to the story. First, the close friendly relationship between the family of Kirsty Wark, BBC *Newsnight* presenter and TV company director, and that of Jack McConnell, First Minister. Second, the long-running row that we have reported over *The Gathering Place*, the BBC Scotland documentary on the Holyrood building project – which was produced by Ms Wark's company. Ms Wark was a member of the panel convened by Donald Dewar, then First Minister, to select the Holyrood architect. Often referred to in media-speak as the uncrowned Queen of Scotland, there was bound to be much *Schadenfreude* in the event of her taking a fall.

The row began early in January 2005, when Ms Wark was criticised for inviting Mr McConnell and his family to her Majorca holiday home over New Year.⁵⁵ The response to initial allegations that this compromised Ms Wark's integrity as an impartial broadcaster were fiercely rebutted by her and Mr McConnell let it be known that his holidays were his own concern. Very quickly, concerns were aired about whether or not the close friendship has jeopardised the credibility of *The Gathering Place*, which was still being edited for screening in March 2005, a point emphasised by Labour's political opponents.⁵⁶ This has been a running sore in body politic as we have reported in the past. The story – now 'Villagate' - did not remain a mere Scottish stushie but quickly achieved national coverage both in the press and broadcasting.⁵⁷ Questions were also raised about whether Ms Wark should front election coverage and the BBC's senior management was plainly alarmed, as was the Board of Governors.

While questions were being raised about Ms Wark's good judgment, it next transpired that Mr McConnell's family had previously been guests of Ms Wark and her husband and fellow TV company director, Alan Clements. This turned into a row about whether Mr McConnell had received a gift in kind declarable under the ministerial or parliamentary codes.⁵⁸ The press and opposition politicians turned the case into a debate about cronyism in high places and invoked the earlier Wark connection with Mr Dewar. In the manner much beloved of the Scottish press in high moral flight, the spider's web of Ms Wark's many power connections was lovingly elaborated.⁵⁹ Mr McConnell next came out fighting, saying that his friendship was a private matter.⁶⁰

The initial refusal by Ms Wark and Mr McConnell to recognise widespread perceptions that something was amiss kept the media storm flying, as well as the questions coming from the Conservatives and the SNP.

It next transpired that Mr Wark and Mr Clements had themselves been guests at the First Minister's official residence on two occasions, which revelation urged sections of the press into greater investigative and denunciatory zeal.⁶¹ Lord Fraser of Carmyllie, who had headed the Holyrood inquiry and had long – and very publicly - sought the unedited taped interviews with Donald Dewar and architect Enric Miralles recorded for *The Gathering Place*, said he should have told about the relationship.⁶² He is a Conservative peer. The UK Conservative leadership also took up the matter with the BBC's Board of Governors, citing 'unacceptable' links between Ms Wark and Mr McConnell. The story had centred on a conflict of interests and the connection was indelibly made between a media-political friendship and the credibility of the BBC Scotland documentary.

Although the intensity of attention diminished for a while, the issue was not off the agenda for three entire months, with allegations of critics being cut from the programme being made well before it finally came to be aired. BBC Scotland's leadership was forced onto the back foot and had to give assurances that the programme would be balanced.

By start of March 2005, Kirsty Wark had been dropped from fronting BBC Scotland's general election coverage, corporation insiders making it clear that they

were worried about political perceptions of her impartiality.⁶³ *The Gathering Place*, began its run of four episodes on 10 March on BBC2 Scotland.

For the most part, critical comment was hostile. The background was set by denunciations of the programme's near to £1m budget, financed by the BBC, the Scottish Arts Council and Scottish Screen.⁶⁴ There were strong reactions in the Scottish Parliament to the programme's contention that MSPs were mainly responsible for the Holyrood fiasco.⁶⁵ There was widespread astonishment that the footage included no interview with Donald Dewar. This omission led to a scathing attack by Lord Fraser.⁶⁶ His damning verdict was echoed by John Campbell QC, counsel to the Holyrood inquiry who said he had learned nothing new, despite the claims that the programme would contain new revelations.⁶⁷ It is doubtful that we have heard the last of this matter.

4. Public Opinion

James Mitchell

4.1 Opinion Polls

With an election imminent, a few Scottish opinion polls have appeared. However, the very different findings leave us little better informed as to the state of public opinion. The only clear message from the polls, though one that comes as no surprise, is that Labour still commands a massive lead over all the other parties in Scotland, though anywhere between 33 and 52 per cent. The polls vary considerably as to the support for and position of each of the other parties ranging from putting the SNP in second to fourth place on between 15-23 per cent, the Tories on between 14-19 per cent and the Liberal Democrats between 12 and 23 per cent. While the times when the polls were conducted might explain some variation, these differences are such that there is little reason to have much confidence in the polls. Even if one is accurate, clearly others cannot be. As ever when considering polls, a note of caution is essential. Inevitably, the parties have focused on those polls which work to their advantage. This has generally meant that Labour has been reasonably content with polls showing that the gap between it and any of its rivals has narrowed as Labour fears complacency at least as much as its rivals while the other parties have all been keen to point to polls placing them at the head of the challengers to Labour. Table 4.1 sets out the findings of the more reputable polls.

	Labour	SNP	Cons	LibDem	SSP	Green	Others
TNS System Three voting poll for Westminster. Just under 1,000 adults in 41 constituencies canvassed end January/beginning February 2005. Commissioned by the SNP.	42	22	16	16	3		
TNS System Three voting poll for Westminster. Commissioned by the SNP. Published 13 March 2005.	46	23	16	13	1		
MORI poll of voting intentions for Westminster 957 adults aged 16 or over 24/1-5/4 with voting intentions compiled from 934 people aged 18 and over. Commissioned for	47	15	18	15			5

Grampian television.							
TNS System Three poll of voting intentions for Westminster 992 adults canvassed across 44 constituencies 31/3-7/4. Commissioned for SNP	45	23	14	14	2		

One poll asked voters for views on the constitution. The question asked was significant and unlike questions traditionally asked which are biased in favour of the status quo, this poll appears to have a pro-independence bias, hence the higher support recorded for this constitutional option.

‘Do you support or oppose Scotland becoming a country independent from the rest of the UK?’

	All %	Male %	Female %	18-34 %	35-54 %	55+ %	AB %	C1 %	C2 %	DE %
Support	46	45	46	56	50	32	31	43	50	55
Oppose	39	41	37	25	36	54	55	40	36	28
DK	15	14	17	20	14	14	13	17	13	17

TNS System Three poll of voting intentions on Scotland’s constitutional status. 992 adults across 44 constituencies from 31/3-7/4. TNS System Three used to produce monthly polls for the Herald newspaper.

Amongst the most controversial polls was that commissioned for Grampian television which purported to show that the SNP had fallen into fourth place on 13 per cent of the vote. Commentators were divided on the likely accuracy of the poll. However, a number of factors raise doubts about this poll. It was highly aberrant and interviews were conducted over an unusually long period of time (24 January until 5 April). The poll also misnamed the SNP as Scottish Nationalist Party which the party was quick to point to as evidence of a lack of professionalism. This may appear a rather minor point but such details are significant in any polity. Even casual observers of Scottish politics soon appreciate the importance to the SNP, especially one wing of the party, of calling it the Scottish National Party. Shibboleths signify belonging and in this case, MORI’s mistake suggested it did not belong to the Scottish political cognoscenti.

4.2 Local government by-elections

Moray Council: Speyside Ward 11 November 2004

PARTY	VOTE	%	+ or -
Independent	383	37.6	+11.3
Conservative	242	23.8	+10.8

Independent	232	22.8	+22.8
Independent	99	9.7	-0.1
Liberal Democrat	62	6.1	+6.1
MAJORITY	141		
Turnout	40%		

The SNP had previously held this seat but did not contest it. It is within an SNP-held Parliamentary constituency (both Scottish Parliament and Westminster).

Fife Council: Cupar North Ward: 11 November 2004

PARTY	VOTE	%	+ or -
Liberal Democrat	443	34.4	-20.7
Independent	379	29.4	+29.4
Conservative	342	26.5	+1.2
SNP	54	4.2	+4.2
SSP	40	3.1	-5.2
Labour	31	2.4	-8.9
MAJORITY	64		
Turnout	38.01%		

This seat had previously been held by the Liberal; Democrats and is within Liberal Democrat held (Westminster and Scottish Parliament) seat of North-East Fife.

Clackmannanshire Council: Clackmannan Ward: 2 December 2004

PARTY	VOTE	%	+ or -
Labour	498	54.4	-10.5
SNP	291	31.8	3.3
Conservative	54	5.9	+5.9
Independent	48	5.2	+5.2
Liberal Democrat	24	2.6	+2.6
MAJORITY	207		
Turnout	45.2%		

This was formerly held by a Labour councillor and is within the Labour held Westminster seat of Ochil which is held in the Scottish Parliament by the SNP. This is one of the more Labour-inclined parts of the constituency.

Falkirk Council: Inchyra Ward: 16 December 2004

PARTY	VOTE	%	+ or -
SNP	603	55.7	+41.3
Labour	282	26.1	-1.9
Independent	169	15.6	+15.6
Independent	28	2.6	+2.6
MAJORITY	321		
Turnout	35.5%		

This was formerly held by an Independent in fiercely contested Labour-SNP territory.

West Dunbartonshire Council: Dumbarton West Ward: 17 March 2005-05-09

PARTY	VOTE	%	+ or -
Labour	607	50.1	-11.1
SNP	287	23.7	+3.1
Independent	141	11.6	+11.6
SSP	130	10.7	-7.5
Conservative	30	2.5	+2.5
Green	16	1.3	+1.3
MAJORITY	320		
Turnout	41.7%		

This was previously held by Labour and is in solidly Labour territory. Both at Westminster and the Scottish Parliament, the ward is within a labour seat.

Midlothian Council: Dalkeith/Woodburn Ward: 17 March 2005-05-09

PARTY	VOTE	%	+ or -
Liberal Democrat	742	52.6	+30.4
Labour	418	29.6	-18.6
SNP	179	12.7	-4.9
SSP	48	3.4	-5.3
Conservative	24	1.7	-1.6
MAJORITY	324		
Turnout	42%		

This was previously a Labour ward in Labour constituency.

5. Scotland/UK Relations

Alex Wright

5.1 The Scotland Office and the Queen's Speech

The Scotland Office issued a press release relating to the Queen's Speech on November 23rd 2004 stating that:

The majority of bills in the legislative programme include provisions which would apply in Scotland, and show a Government committed to delivering opportunity and security for all. Flagship bills such as the child benefit bill, the commission for equality and human rights bill will make a real difference to the lives of many Scots.

Under 'notes for news editors' the release listed Bills:

Applies to Scotland: Predominantly or Wholly Reserved Matters:

- Child Benefit
- Commissioner for Revenue and Customs
- Consumer Credit
- Disability Discrimination
- European Union
- Gambling
- Identity Cards
- International Organisations
- Judicial Pensions
- National Lottery
- Railways
- Road Safety

May apply Wholly or in Part to Scotland: Mixture of Devolved and Reserved Matters

- Animal Welfare
- Constitutional Reform
- Drugs
- Education
- Inquiries
- Management of Offenders
- Serious Organised Crime
- Equality

Bills not applying to Scotland. These Bills only apply to Scotland in marginal or consequential areas, if at all.

- Charities
- Clean Neighbourhoods and Environment
- Criminal Defence Service
- Crossrail
- Mental Capacity
- Public Services Ombudsman (Wales)
- School Transport
- Transport Wales⁶⁸

By dividing the legislative programme into three sections, the Scotland Office helped underline the extent to which UK legislation will be of relevance to matters

devolved to the Scottish Parliament. One consequence of this was it helped fuel the debate over the use of Sewel motions.

5.2 Sewel Motions

The issue of Sewel Motions has for some time now been a bone of contention (see previous Monitor Reports). Holyrood's procedures committee recently offered the following explanation of their usage.

The Sewel convention is primarily about obtaining the Parliament's consent to provisions in UK Bills that change the law on devolved matters – that is, where it would be competent for the Parliament to legislate itself if Westminster did not. But the convention – at least as currently articulated by the UK Government – is also about obtaining the Parliament's consent to provisions that are on reserved matters but whose purpose is “to alter the legislative competence of the Parliament or the executive competence of Scottish ministers”.

The rationale for this is that changes of this sort, if made using the order-making powers in the Scotland Act (section 30 or 63), would require the Parliament's approval (i.e. the orders have effect, under the Act, only if approved by resolution of the Scottish Parliament as well as the two Houses at Westminster). Where equivalent changes are made in Westminster Bills, therefore, it is considered appropriate at least to seek the Parliament's approval in the non-binding form of a Sewel resolution.

In considering this aspect of the convention, the main question is likely to be whether the process of dealing with any requests for Sewel consent of this sort should be any different for the process for dealing with requests for consent by Westminster legislation on devolved matters (recognising that some Bills may contain provisions of both sorts).

As far as the reference to Scottish ministers was concerned in the first paragraph, a footnote in the committee's paper explained:

Under the Scotland Act, the range of powers and responsibilities devolved onto Scottish Ministers is not identical to the range of legislative powers devolved to the Parliament itself, and each can be altered independently of the other by UK legislation.⁶⁹

However, matters came to a head in the aftermath of the Queen's speech during mid-November which outlined the UK Government's legislative programme (see above). A number of the legislative proposals had implications for Scotland. One such example related to the 'right to roam'. It was subsequently reported that the Scottish LibDems were considering rebelling over whether the Westminster bill on serious and organised crime should be granted a Sewel motion.⁷⁰

The following month, the usage of Sewel motions attracted the attention again. On this occasion, the Transport and Local Government committee voted by five to three for 'only a minister to give oral testimony' rather than inviting a wider selection of witnesses including representatives from churches and local authorities. A few days later the committee split along party lines when it was agreed to recommend to MSPs that Holyrood should agree to a Sewel motion regarding the Gambling Bill.⁷¹

5.3 The Procedures Committee and the Sewel Convention

The Procedures Committee agreed to conduct an inquiry into the Sewel Convention at its meeting on December 21st. By this time 54 pieces of legislation had been subject to a Sewel motion⁷² and there was a growing awareness that such extensive use of this mechanism had not been foreseen by its author Lord Sewel, who himself was to be invited to appear before the committee. Other potential witnesses included Henry McLeish, the former First Minister and Anne McGuire of the Scotland Office. But before it questioned its witnesses the committee needed to determine its remit with regard to the inquiry. A draft of its remit stated:

The general view of Committee members at the last meeting was that the inquiry should have a broader, rather than a narrower scope, looking at the whole process of how consent for relevant UK legislation at Westminster is sought and obtained, and not merely at the procedural mechanics of handling Sewel motions. On this basis, it is suggested that the title of inquiry refers to the wider Sewel convention, rather than just to Sewel motions.

However, members noted that its ability to inquire more widely on this subject could be constrained by the Procedures Committee's remit – “to consider and report on the practice and procedures of the Parliament in relation to its business”.

That remit indeed puts two important limits on the scope of an inquiry on this topic.

For one thing, it means this inquiry (like any other Procedures Committee inquiry) should remain directed at making recommendations to the Parliament about how best to manage the Parliament's own business. Since, in this instance, the business is directly connected to what goes on elsewhere, it will be necessary (particularly if the inquiry is to have the broader remit sought) to look beyond the confines of the Parliament itself, including considering the relevant practices of the Executive and the UK Government and the procedures operated at Westminster. This is a legitimate part of a Procedures Committee inquiry provided it is done in order to inform recommendations about how the Parliament's own procedures should operate.

The other main limit is that this must be an inquiry into the process rather than the substance. It should not be an inquiry into the general reasons given in support of Sewel motions, still less about the merits for their use in any particular instance. As a result, it would not be appropriate for the Committee to take a view on the frequency of use of the Sewel convention for example.

Instead, it is suggested that a starting point for a broader inquiry is to understand how the perceived need for something like the Sewel convention as it now exists arose from the terms of the Scotland Act (or Bill, as it was at the time the convention was first articulated). The Act asserts Westminster's continuing right to legislate on all the matters also devolved to the Scottish Parliament, while making no formal provision for deciding disputes as to which legislature should in fact legislate in any particular instance. In this context, it is presumably necessary to put in place some mechanism to enable those decisions to be made.

The general question the Committee might wish to consider in a broader inquiry is what that mechanism should be – specifically, whether the established mechanism (namely a Sewel motion lodged by the Executive, inviting the Parliament to consent to Westminster legislating for devolved matters by means of a named Bill) should be altered.⁷³

The above is of particular interest for a number of reasons. Firstly, it is notable because the Scottish Parliament will examine the practices and procedures of the UK Government and Westminster. Second, it will also address the issue of dispute resolution as to whether Westminster or Holyrood should legislate in a particular instance. Such disputes would be more likely to arise if there were different parties in government in Edinburgh and in London. Last but by no means least, by considering whether the Sewel convention is the most appropriate mechanism, or if not that it should be altered, the Committee is asserting Holyrood's entitlement to call for the reform of inter-parliamentary conventions such as this.

The document was also of interest because it highlighted the ad hoc characteristics of the arrangement. The draft stated:

The process is not, at present, governed by any specific, formal procedure. Sewel motions are simply treated as any other type of motion, and there are no specific rules about when they should be lodged or whether they can be debated in the Chamber before being decided. There are also no rules governing whether or at what stage a request for Sewel consent is referred to a committee or what the committee is expected to do if it is so referred.

It then called into questions the procedures relating to Executive memorandums:

The Executive's practice is to prepare a memorandum to accompany each motion, explaining the relevant provisions of the UK Bill and the case for giving Sewel consent – but these memorandums are not governed by any Parliamentary rules. They tend to be published only electronically (and only for a limited period) on the Executive's website, and because they are neither produced as a category of Parliamentary document nor as an Executive document there is no formal record of their existence within the Parliamentary system (i.e. in the Bulletin or on the Parliament's website). There is in addition, no requirement on the Government to make copies of the UK Bill itself, or its Explanatory Notes, available to MSPs (although these are of course publicly available, and SPICe usually makes copies available before each Sewel debate). The inquiry could usefully consider whether these aspects of the process could be improved.⁷⁴

The draft then highlighted the ad hoc way that procedures within the Parliament had evolved:

At present, the Minister for Parliamentary Business (in consultation with other business managers and the relevant committee convener) considers whether to refer each request for Sewel consent to a committee. The practice has been that, if it is so referred, the Bureau will then recommend that the Sewel motion itself should not be subject to any debate within the Chamber unless the committee so requests (in which case a short debate is scheduled). However, a request is only referred to a committee in the first place if there is a consensus among business managers to do so – otherwise it is scheduled for debate in the Chamber. In practice, referral to committees is now very much the norm.

This process has evolved over time, essentially at the Executive's initiative (though in discussion with other parties and the Committee), but it remains largely ad hoc, ungoverned by specific Rules (unlike the process followed for every other significant category of Parliamentary business). The Committee

may wish to consider whether it is appropriate for these items of business to be referred to committees by such an informal process, or whether it would be preferable to have these decisions made by the Bureau, subject to the endorsement of the Parliament, in the same way as for the referral of Bills or statutory instruments for example.⁷⁵

A subsequent passage in the draft highlighted the underlying dilemmas resulting from usage of the convention. One such example could occur when Holyrood had assented to a motion in relation to a particular Bill but it then underwent amendment at Westminster, thereby calling into question ‘its compatibility with the terms of consent (and who judges that compatibility)’.⁷⁶ The draft then highlighted two contrasting perspectives on the ramifications of the convention. It stated:

The underlying question here is central to what the Sewel convention is about. On one view, the purpose of the convention is to ensure that the two Parliaments don’t attempt to legislate simultaneously in the same area, and therefore the principle should be that if the Parliament gives consent at all, that consent should be as unqualified as possible. If the Parliament wishes to dictate the detailed consent of the legislation, this argument goes, then it should legislate itself; but if it is to consent to Westminster legislating, it must leave it to Westminster (which includes the Scottish MPs to whom Scottish interests can make representations) to decide the details of how that legislation should work.

The opposite view is that this would be tantamount to the Parliament writing a blank cheque. On the latter view, the Parliament was established to be the principal forum for considering devolved matters, and it should therefore retain as much control as it reasonably can over how those matters are regulated by legislation – including by setting clear limits on any Sewel consent it gives, and then monitoring whether Westminster remains within those limits.⁷⁷

The draft then indicated that the committee might prefer to avoid becoming embroiled in the dispute (outlined above) over its role. A subsequent passage addressed the more fundamental question of whether ‘it is appropriate to have a mechanism through the Government and the Executive, rather than a mechanism that operates between the two Parliaments.’⁷⁸ For the time being the ‘convention is expressed in a “memorandum of understanding” between the Government and the devolved administrations’.

When the Procedures Committee met on January 18th 2005, MSPs considered the draft remit of the inquiry. The ensuing discussion highlighted the sensitivities raised by Sewel. Mr Jamie McGrigor (Conservative) observed:

Our party’s view is that the Sewel mechanism was supposed to be the exception rather than the rule. However, more than 50 Sewel motions have been lodged and even Lord Sewel has complained that that is excessive. We have to consider that issue. Sewel motions seem to be used for everything now.

Iain Smith (Liberal Democrat), the committee’s convener responded:

We must be clear that it is not for the Procedures Committee to make a judgement about the political issues; it is for the Parliament to decide whether

Sewel motions are appropriate. However, I would say that a lot of Sewel motions concern administrative issues relating to base legislation that is reserved, such as consequential changes to courts procedures in relation to drugs laws. Many of those matters are not major policy issues; they are mainly administrative. A brief analysis of the types of Sewel motion that there have been would show whether that is the case.

McGrigor then referred to the Sewel motion on Civil Partnerships which had earlier been a source of controversy (See previous Monitor Report). To which the Smith replied:

That is right. There have been one or two Sewel motions on major policy issues. I do not want to get into discussions on particular Sewel motions, but the legislation on civil partnerships involved an amalgamation of devolved and reserved issues. That meant that it would not have been possible for the Scottish Parliament to have passed the same legislation that was to be passed at Westminster; it could only have passed only part of that legislation. Although we must examine how the Scottish Parliament deals with such issues, I do not think that it is for the committee to decide whether the Parliament should have used Sewel motions in particular cases.⁷⁹

5.4 ID cards concession

Jack McConnell reportedly managed to persuade UK ministers that Scotland was a special case as far as the introduction of identity cards was concerned. The introduction of the cards was announced in the Queen's Speech in November and they fell under powers reserved to Westminster (See section 5.1 above). However the Lib Dems (in particular Jim Wallace, the Deputy Firsts Minister) wanted the scheme to be implemented differently in Scotland. This was because transport and the NHS fell within Holyrood's competence. Consequently, pensioners will have to produce their ID card when they draw their pension but citizens in Scotland will not have to produce them when using NHS services or transport facilities provided by local authorities.⁸⁰

5.5 Defence

Although defence is reserved to Westminster that did not deter MSPs from holding a debate over Mr Hoon's support for the amalgamation of six Scottish regiments. The issue of the amalgamation has become increasingly politicised in part because Scottish units such as the Black Watch have been at the forefront of military operations in Iraq. MSPs voted by 61 to 59, with seven abstentions, in favour of the retention of the regiments. Although the vote was of little material consequence, it serves to affirm that Holyrood can debate and vote any issue, including matters that have been reserved to Westminster.

5.6 Boundary Commission

The Boundary Commission submitted its fifth periodical report on the parliamentary constituencies. As had been suggested in previous Monitor Reports, it called for the number of Scottish constituencies at Westminster to be cut from 72 to 59. Alistair Darling, the Scottish Secretary of State told MPs at Scottish Questions on November 30th:

I have today received the Boundary Commission's report. Once I have considered the Commission's recommendations, which I expect to do shortly,

I will lay the report before Parliament together with a draft Order in Council giving effect, with or without modifications, to the recommendations.⁸¹ Mr Darling expected the recommendations to take effect in February 2005, in good time for the next UK election.⁸² The Parliamentary Constituencies (Scotland) Order was laid before the Westminster Parliament on December 14th 2004. In so doing, The Parliamentary Constituencies (Scotland) Order 1995(2) was revoked.

5.7 Commission on Boundary Differences and Voting Systems

The changes to Scottish constituencies at Westminster (See above) will mean that the Westminster constituencies will no longer be coterminous with those of constituency MSPs at Holyrood. During the last year or so, that led to concerns (See previous Monitor Reports). In addition the introduction of an STV electoral system for local government in Scotland would mean that the electorate now has to deal with a different system for each level of government. Consequently, the Commission on Boundary Differences and Voting Systems was set up to 'assess views on the proposed changes to constituency boundaries and voting'.

Professor Sir John Arbuthnott, its chairman commented:

There will soon be different constituency boundaries for the Westminster and Holyrood parliaments and a different voting system for each level of government in Scotland.

These reflect significant developments in the evolution of our democratic process. It is therefore important that we assess the extent to which confusion and difficulties might be caused for voters, electoral administrators and public bodies.

This commission was set up to take an independent view on the impact of these changes on voter participation, relationships with MPs and MSPs, and the service provided to constituents by their elected representatives. Areas that we have been asked to make recommendations on include the pattern of electoral boundaries in Scotland; arrangements between elected representatives to provide the best service to their constituents; and the method of voting in Scottish Parliament elections.⁸³

The Commission aims to submit its recommendations to the First Minister by the end of the year.

5.8 Supreme Court

MSPs voted, on January 19th, by 63 to 56 in favour of motion for Westminster to establish a Supreme Court under the UK Constitutional Reform Bill.⁸⁴ The proposal for a Supreme Court had previously attracted criticism from the SNP and senior figures in the Scottish judiciary (See previous Monitor Reports)

5.9 Ross Finnie evidence at Commons on CFP

Ross Finnie rejected Tony Blair's policy unit's proposals for community fish quotas, when he appeared before a Commons committee on the future of the industry.⁸⁵ From time to time Scottish ministers have agreed to provide oral testimony at Westminster. Wendy Alexander was one such example, during the early days of devolution. UK ministers have, however been reluctant to appear before Holyrood's committees. An early example, was Dr John Reid, when he was the Scottish Secretary of State (See previous Monitor Report). More recently other

senior figures refused to appear before the European and External Relations Committee (See previous Monitor Report). As far as the latter is concerned, the only exception has been the ministers for Europe, but even in such instances as these, technically they were 'appearing' before the committee, as opposed to providing 'oral testimony'.

6. Scotland/International Relations

Alex Wright

6.1 Regleg

The First Minister's presidency of RegLeg culminated with the Edinburgh Declaration during a summit at Scotland's capital city on November 30th 2004. The Declaration re-iterated of the demands set out in previous Declarations, such as the Flanders Declaration when Henry McLeish was first minister (See previous Monitor Reports). It began by pointing out that there were 73 regions in the EU with their own governments and directly elected parliaments with law making powers. As such, their populations accounted for 'around' half the EU citizens. The Presidents welcomed the Treaty establishing a Constitution for Europe, which was signed on October 29th 2004. The signatories of the Declaration then welcomed a host of provisions, which had been set out in the Constitutional Treaty. These included the recognition of linguistic and cultural diversity, the respect for the national identities of the Member States, inclusive of regional and local self-government and recognition in the definition of the principle of subsidiarity with regard to the role of regional and local government and welcomed the protocol on subsidiarity and proportionality together with the creation of an early warning system for ensuring respect for the principle. They also applauded the obligation that the onus would fall on the European Commission to take into account the regional and local dimension and to consult widely before proposing legislation.

The Presidents set out a number of demands, which had yet to be met. These included:

Provision for Member States to designate certain of their regions as "Partners of the Union", enjoying specific rights at the European level, because the regions have exclusive competences and shared competences with Member States.

The establishment of the Committee of the Regions as a fully-fledged institution.

The provision of a legal basis for cross-border and interregional co-operation

The stable protection of languages that are official in some regions of the EU.

One further demand related to the European Court of Justice (ECJ). On the one hand they welcomed the 'power for either Chamber of a national parliament (through its Member State) or the Committee of the Regions to bring an action to the European Court of Justice on grounds of infringement of the principle of subsidiarity by a legislative act'. But they also demanded 'the right of regions with legislative powers to appeal directly to the European Court of Justice to protect their prerogatives or where other European bodies exceed their competence'. This last item had been extremely contentious for Henry McLeish when he had been First Minister. A somewhat similar demand had been made in the Flanders Declaration albeit that they only asked for this to be 'considered' by the then Member States. The use of 'considered' was held to be of significance for Scotland because it could be taken to mean that the reference to direct access to the ECJ fell something short of a formal 'demand'. Even so, the mention of the ECJ proved to be extremely controversial at the time and it attracted criticism from colleagues in the Labour party in London and from senior sources at the Foreign and Commonwealth Office (See previous Monitor Report). This time around, however, the Edinburgh Declaration merited

little of the media's attention and the reference to the ECJ was no longer a bone of contention. Thus to some extent it can be supposed that London is no longer as concerned with the Executive's evolving foreign affairs' agenda compared to the first few years of devolution (See McLeish's testimony to the European and External Affairs Committee, below). The Presidency of RegLeg now passes to Bavaria.

6.2 Inquiry into the promotion of Scotland worldwide

The Parliament's European and External Relations Committee is nearing the end of its inquiry into promoting Scotland worldwide. This inquiry has been running for many months and it remains to be seen whether the committee can arrive at a coherent report given the breadth of written and oral evidence. The committee has heard evidence from the former First Minister, Henry McCleish, who appeared before MSPs on November 23rd 2004. When the committee's Convener, John Swinney (SNP) asked him about 'difficulties' that he encountered in his relations with Westminster, McLeish replied:

The immediate issue is how we use existing United Kingdom institutions such as embassies, but we will also want to look closely at how the British Council and the British Tourist Authority represent our interests. On Westminster, it is quite clear to me after the recent vote on a regional assembly in the north-east of England that there is not a huge appetite in London for much further devolution and regionalism. My concern is that, for most people at Westminster, devolution was about domestic policy that would meet an aspiration that this country had had for nearly a century. However, there was little recognition at that point that Scotland might want to shape some of the things that we are involved in a different way or that we might want to shake [sic?] it in a complementary but nonetheless different way from that of Westminster.

Psychologically, the Westminster view is probably that Scotland should keep very much to domestic policy while complementing Westminster on external affairs, where that is necessary, without undermining what is happening at Westminster. I can accept all that. On the other hand, we will increasingly find that there are issues, problems and challenges that we will want to tackle differently, where we might find that concern is expressed about how different we should be able to be. The issue is not so much about powers – many of the things that we could do would not require further devolution of powers – but about spirit. I submit to the committee that Westminster might be uneasy about our moving further in that direction. The issue can depend on personalities at Westminster and who deals with the issues that are raised. I remember dealing with the Flanders agreement which was signed with 11 regions in Brussels before the 2001 general election. On that occasion I spoke to the then Foreign Secretary Robin Cook, who was absolutely excellent. Although it was an election period, he saw what we were doing as complementary rather than in any way as destabilising or threatening to our existing relationship. I fear that there could be difficulties. However, if good will is expressed on both sides, I am sure those difficulties can be overcome.⁸⁶

Mr Kenneth Raffan (Lib Dem) then asked McLeish about the reference to 'forbidden territory' in his written submission. Was it he said 'a case of the

Executive treading very warily so as not to upset Whitehall or Westminster?’
McLeish replied:

Post devolution, there has always been a concern. Devolution was a new initiative, a new development and a new set of ideas, so there was a psychology that said we should move slowly, which was perhaps fair at the time.⁸⁷

Mr Raffan subsequently, touched on McLeish’s assertion in his written submission that Scotland should ‘no longer have a part-time approach to Scotland’s place in the world’. This related to ministerial responsibilities at the Executive. During the last six years the issue of whom exactly has responsibility for European and External affairs has been in a state of flux. Sometimes this was primarily the responsibility of the First Minister and his deputy, with other more junior ministers having a more tangential involvement, which related to their remit (Dewar). On other occasions more junior ministers were formally allocated the European and External Affairs portfolio (McLeish). At the present time both the First and Deputy First Ministers have an involvement in foreign affairs but so too do a number of their more junior colleagues, alongside their domestic remit. McLeish did not believe this was sufficient. He told MSPs on the committee:

I was referring to the fact that a minister who has enormous domestic responsibilities cannot also have responsibility for external affairs. That is what I said – we might get onto this – that it would be useful to have a statement of intent that, because the international scene is vital in all its forms, we should have a dedicated minister with responsibility for external affairs and the resources with which to carry that role out.⁸⁸

He added subsequently;

That would do a number of things. First it would provide a focus. Secondly, it would allow us to develop a strategic overview. Thirdly, it would provide a policy focus and, equally important, it would be a statement of intent. Despite how well we have done in many areas, we come back to the issue of how world class we want to be. Other countries, such as Ireland and the Scandinavian countries, and some smaller states in America have shown us that things can be done differently. If we had a dedicated department and minister, we could do things differently too.⁸⁹

However, when Irene Oldfather (Labour) pointed out that Scotland was a devolved part of the UK and that it benefitted from being a part of the UK delegation compared to some of the smaller states in the EU. McLeish acknowledged that he was ‘not talking about a manifesto for constitutional change, which some people might want’.

Yet McLeish was critical of the attitude of the civil service, when he responded to a question from Margaret Ewing (SNP) about calls for a separate civil service for Scotland. He observed:

Until 1997, the UK was one of the most centralised countries in Western Europe. That situation changed dramatically in 1997. However, it often takes much longer for such changes to be appreciated more widely. The north-east of England referendum result on a regional assembly was not surprising, given the political input. However, I believe that there is also resistance from the civil service in London to decentralisation. The civil service has a

distinguished background in global affairs that goes back centuries, but it is still highly centralised.⁹⁰

He later suggested that Scotland should lead not just delegations at the Council of the EU where appropriate but that it should also take the lead on policy (e.g. fishing).

When Robin Cook, the former foreign secretary appeared before the committee, he denied that the Foreign Office regarded the Executive's involvement in foreign affairs as 'forbidden territory. He also objected to the creation of a single department of European affairs under a single Scottish cabinet minister. He told MSPs on the committee that:

The reality is that you can't separate a domestic policy from its international dimension, and I don't think it's helpful culturally, psychologically, to suggest that one department that it could subcontract its external relations work to somebody else. What's important is that every department mainstreams its European and external dimensions and recognises that it's operating in an interdependent world.⁹¹

6.3 Iraq Debate

MSPs conducted a lively debate on the demand by the Scottish Socialist Party that the UK's troops should be withdrawn from Iraq immediately. This was rejected.⁹² As with the debate on defence (See Section 5.5 on Scotland- UK relations), debates such as these are of little material consequence due to defence being reserved to Westminster.

6.4 Fresh Talent Initiative

The First Minister's Fresh Talent initiative has faced a number of hurdles recently. The Initiative was a response to Scotland's declining population. The intention was therefore to encourage more people from other countries to migrate and settle in Scotland. This particularly applied to skilled workers including those possessing or studying for a degree. As far as the latter were concerned it had been hoped that students from overseas who were studying in Scotland would receive a visa extension at the end of their studies so that they might remain in Scotland a bit longer or perhaps even permanently, if they so wished. However this proposal has not been without its problems because the border between England and Scotland is porous and thus there is nothing, it would seem, to prevent an individual securing a visa extension on the basis that they would remain in Scotland but then heading down south (See previous Monitor Reports). McConnell's proposals have been watered down by the Home Office and that Labour at Westminster was sensitive to fears that in England that the number of immigrants was too high. In the event, Labour proposed to introduce a pan-UK immigration policy, which would be based on a points system. But Des Browne, the immigration minister, confirmed that the system would be 'weighted in favour of parts of Scotland' (e.g. it is weighted in favour of those areas with specific job shortages).⁹³ For its part, the SNP, proposed that Scottish based immigrants should be deported if they broke residency rules by moving to other parts of Britain.⁹⁴

6.5 EU and Sewel memorandum on European Union Bill

In January 2005, the Executive published a Sewel memorandum on the European Union Bill. The motion put to the Parliament is:

European Union Bill: that the Parliament agrees that those provisions in the European Union Bill that relate to the implementation of EU obligations which are within the legislative competence of the Scottish Parliament including those which confer powers on the Scottish Ministers should be considered by the UK Parliament.

It subsequently explained that the European Union Bill had two main purposes. These were:

First, to make provision enabling the Treaty to become part of UK law, principally by amending the European Communities Act 1972. Those provisions are contained in part I of, and schedules 1 and 2, to the Bill (and include certain consequential Scottish provisions). The Bill makes provision consequential on the bringing of the Common Foreign and Security Policy within the terms of the Treaty and provides for the implementation of Common Foreign and Security Policy obligations by regulations. Those provisions are contained in Part 2 of the Bill.

Second, to require the holding of a referendum on the question of whether the United Kingdom should approve the Treaty. Those provisions are contained in Part 3 of the Bill.⁹⁵

7. Relations with Local Government

Neil McGarvey

7.1 Council Tax

This quarter has witnessed a series of reports all related to council tax. The Accounts Commission's annual assessment of council tax collection rates was released this quarter. In its annual report on council performance, it said the country's 32 authorities failed to collect £132m in 2003-04, or 8.3%. The report compares the performance of councils in a number of key areas including council tax collection rates, payment of invoices and employee sickness levels. The national collection rate of 91.7% was up on the previous year's 91.4%, the fifth marginal rise in successive years. Levels varied widely from 85.1% in Glasgow to 97.8% in the Orkney Islands. Overall, 28 councils improved their rate and four deteriorated. The commission's report also showed that councils were catching up on their English counterparts. In 1996-97, the gap in collection rates north and south of the border was 8.7%, but by last year that had narrowed to 4.8%, with English councils collecting 96.5% of their money against Scotland's 91.7%.⁹⁶

Despite this, the collection figures were criticised by both the Scottish Executive and opposition parties. Tom McCabe, finance minister, said the slight improvement was not good enough: 'There is absolutely no excuse for councils not to take all practical steps to collect unpaid council tax or community charge debts. Any pound not collected is a pound that is not being spent on local services'.

The annual announcement of above-inflation rises in council tax levels was accompanied by an Executive statement announcing there were ready for a "root-and-branch" review of council funding and functions, after authorities announced yet another year of above-inflation tax rises. From April, the Scotland-wide average rise will be 3.9%, taking the average band D bill from £1053 to £1094. However, band D charges will range from £956 in Western Isles to £1213 in Glasgow. The current water bill for a band D home will add a further £348. Percentage increases in the levy ranged from 2.2% in Labour-controlled West Dunbartonshire to 5.5% in SNP-led Angus. Inflation on the CPI index is currently 1.6%. In a break with previous years, councils refused to forecast tax rises for the two years after 2005-06 in protest at what they regarded as an unworkable financial settlement which they received from the Scottish Executive. John Pentland, finance spokesman for the Convention of Scottish Local Authorities (Cosla), said ministerial hopes of increases sticking to 2.5% were "never a reality", given the level of grant from central government.

In Scotland, council tax bills include a charge for Scottish Water, which remains a public sector institution. The Executive this quarter announced a policy that water bill rises be pegged at or below inflation for the next four years. The move ends years of steep rises since the nationalised monopoly was created in 2002. Increases for businesses from 2006 to 2010 will also be kept below the executive's measure of inflation of 2.5%.⁹⁷ As an aside it was interesting to note that Sam Galbraith, the former minister, wrote a newspaper article suggesting that the future for Scottish Water may be to move to the private sector.

A separate Accounts Commission report on financial reserves in council also caused some political controversy when it highlighted that councils had record reserves of more than £1bn – a rise of 25%. Reserves across the 32 councils rose £211m to £1050m in the year ending March 31 2004, making them equivalent to 10% of all council spending budgets. Whilst acknowledging that councils had to maintain adequate reserves to maintain financial flexibility, Tom McCabe, the finance minister, suggested some councils were maintaining unreasonably large reserves. He also agreed with the commission that councils must now produce clear policies on their reserves as part of ‘robust financial planning’, and explain them to the public. Cosla, on the other hand, accused the Accounts Commission of pursuing a cheap headline, arguing that it was wrong to present an all-Scotland figure as reserves and balances are something that should be treated on a case-by-case basis with councils holding balances in accordance with local needs and a strategy for long-term investment.⁹⁸

A submission by the Chartered Institute of Public Finance and Accountancy (Cipfa) to Sir Peter Burt's review of Scottish local government finance came down firmly in favour of the retention of the council tax. The submission said Cipfa supported ‘progressive property taxation as the basis of local authority funding in Scotland ... Based on consideration of cost of collection, collectability and predictability, a reformed council tax . . . may represent the most appropriate basis.’ Cipfa advocated having more bands to make the tax more progressive, with a change in the current ratios between bands. At present, band H bills are twice band D and treble band A. It argued, ‘The prescribed and narrow relationship between band H and band A maintains the regressive nature of the tax’. Cipfa also said councils should in future be allowed to raise more than half their own income. Part of this would involve returning the setting of business rates to individual authorities. Overall the CIPFA submission will probably provide the Labour members of the Executive with ammunition against their Liberal Democrat colleagues who have long campaigned for a more radical reform of local taxation based on income rather than property.⁹⁹

7.2 Edinburgh Congestion Charge Referendum

Edinburgh city council's road toll proposals were rejected by its citizens in a referendum. The council's flagship transport policy was rejected by 74 per cent of voters. This was based on an impressive turnout of almost 62 per cent from an electorate of 291,000. The result was a significant setback to the council's Labour leadership, but it also has wider implications for transport policy more broadly.¹⁰⁰

The council believed it had to something to tackle existing and future congestion across Edinburgh, and pledged to use revenue from the tolls to improve public transport. It pointed out that commuting traffic levels in Edinburgh have gone up by 70% in the past 20 years.¹⁰¹ It claims net revenue would have been £761m over 20 years and money would have been used to fund transport improvements, such as trams. Rather than simply being asked whether they supported the £2-a-day charging scheme, residents voted on the council's ‘preferred’ transport strategy, which includes tolls. It was a significant setback for Edinburgh Council's Labour leadership which admitted after the result that there was no ‘Plan B’.

The council's plans to reduce congestion were blocked because of a mixture of opposition to the principle of road tolls and concerns over the design of the scheme.

The proposed tolls would have ran from Monday to Friday and feature two cordons - one around the city centre and one just inside the city bypass. The inner cordon would have run from 7am to 6:30pm, while the outer would operate from 7am to 10am. Drivers would only be charged the £2 once in any one day. The charge only applies to journeys into the city. The 'No' campaign was led by groups such as Edinburgh's Federation of Small Businesses. It emphasised the costs of the charges for retailers in Edinburgh city centre, citing negative evidence of the impact of the London congestion charge from the London Chamber of Commerce on retailers there.

The referendum highlighted many important issues in local government in Scotland. There were threats of legal action from Fife on the principle that the introduction of tolls would have serious implications for commuters working in Edinburgh. It highlighted the fragmented nature of existing structures of local government. It was also noticeable that the Scottish Executive stood back from the whole debate and campaign and offered little by way of policy leadership on what is an important aspect of transport policy. The 'No' vote effectively blows a hole through the UK government's transport strategy, destroying the prospects of similar localised toll schemes and jeopardising longer-term plans for a more radical UK-wide road pricing system. The Transport Secretary, Edinburgh MP Alistair Darling, had voiced support for the proposals.

7.3 Councillor Salaries

A decision on whether councillors should be paid £20,000 salaries after the 2007 local elections has been postponed by Scottish Executive ministers, who this quarter set up the fourth consecutive committee to look into the issue. This probably reflect is the political sensitivity of the issue inside the Scottish Labour Party. Lord Sewel, a former Labour minister and former President of Cosla, chaired a committee which reported this quarter, with the proposal for a £20,000 basic salary, and up to £50,000 for those leading the biggest councils. It also backed plans for introducing pensions and severance payments for those who leave elected office. At present, most of Scotland's 1222 councillors earn a basic £7000 allowance, with many on additional responsibility allowance, totalling £25,000 at most for leading the biggest councils. The Kerley Committee had previously recommended a £12,000 basic salary in order to preserve the tradition of part-time councillors. It suggested that it would be a mistake to professionalise the role, and require all councillors to go full-time.¹⁰²

7.4 Serious and Organised Crime and Police Bill

The Scottish Police Federation (SPF) expressed concern that the Serious and Organised Crime and Police Bill now going through Westminster amounted to "creeping politicisation" of the police. The Bill creates a Serious and Organised Crime Agency (Soca), which is intended to be the British equivalent of the FBI to tackle drug smugglers, people-trafficking and paedophiles. One consequence will be that Scottish ministers are given the power to direct chief constables in order to settle any turf wars between Soca, the eight Scottish forces, and the Scottish Drug Enforcement Agency. The SPF said such a power would undermine the operational independence of the police and the "tripartite" structure of modern policing, in

which powers are shared between ministers, local police authorities and chief constables, with the latter in day-to-day control of policing in their area.

9. Chapter 9: Legal Disputes

9.1 Holyrood Project

Sir Robert McAlpine, the construction company, announced in late December that it would be suing the SPCB over the procurement tendering process for the Holyrood Project construction management contract, when it lost out to Bovis under very controversial circumstances, discussed in the Fraser Inquiry Report. It is apparently claiming £4.31m (1% of the final construction cost), which would have been the fee it would have earned had it won the contract.¹⁰³ The case has now begun in the Court of Session before Lord Clarke, and is due to continue in late March.¹⁰⁴

Although the relevant facts relate to the pre-devolution period, the SPCB had acquired all appropriate legal rights and liabilities of the old Scottish Office in 1999, and so seems to be the proper defender in this case. The SPCB has declared that it will vigorously defend the case, and doubtless will be hoping that, whatever the strict legal position, any adverse consequences, such as financial penalties, will ultimately be borne by the UK Government or the Executive rather than the Parliament itself. Even though the case may be decided on technical legal issues, such as whether the action is out of time, it may provide some useful legal commentary on aspects of the devolution scheme, including the respective roles and legal rights and duties of key bodies such as the SPCB and the UK and devolved successors to the old Scottish Office.

9.2 Possible challenge to parliamentary procedure

There seems to be a possibility of the Parliament becoming involved in a judicial review action involving the Forth Estuary Transport Authority, which seems to be in relation to the validity of the parliamentary procedures for the 2002 Order which set it up. There is little public information on this potential action, other than what was recorded in the minutes of the SPCB meeting of 18 January:¹⁰⁵

13. The SPCB noted the ongoing judicial review proceedings and the possible involvement of the SPCB in relation to part of the challenge which concerned parliamentary procedures for this order.

It appears this relates to a campaign against proposed increases in the Forth Bridge tolls, which were the subject of a public inquiry. While an application for interim interdict to halt the inquiry was rejected by a court, it is understood that the objectors have also sought judicial review of the 2002 Order, including a challenge to aspects of its parliamentary procedure. If this case proceeds at all, it may be primarily against parties other than the SPCB on behalf of the Parliament.

However, any legal action which seeks to question parliamentary proceedings (something which cannot generally happen at Westminster because of privilege and related legal 'immunities') is extremely rare, and could lead to further judicial consideration of the legal basis of the devolved Parliament.

9.3 Slopping out & prison segregation

As has been the case since 1999, almost all devolution cases have been in relation to ECHR challenges, especially in the areas of criminal justice. The most visible recent example is the rejection by the Inner House of the Court of Session of the Executive's appeal in the prison 'slopping out' case (see chap 9 of the May 2004 Report).¹⁰⁶ Apart from the potential policy and financial impact of this adverse (for

the Executive) judgment, the case was interesting for the court's view that "in civil proceedings in Scotland in which a finding is sought from the court that there has been an act or a failure to act by a public authority which is incompatible with the requirements of Article 3 of the European Convention on Human Rights, the appropriate standard of proof is the ordinary standard of proof applicable to civil cases in Scotland, namely, proof on a balance of probabilities."¹⁰⁷

In another case, concerning the segregation of prisoners,¹⁰⁸ Lady Smith, in the Outer House of the Court of Session, made some interesting observations on public law issues, including the use of public interest immunity (PII) certificates, and grounds of review such as proportionality and unreasonableness. Of more direct relevance here is her consideration of the legal basis of the devolved Scottish administration, in the context of the application or otherwise of the *Carltona* principle, concerning the lawful delegation of authority to officials to act on behalf of, and in the name of, ministers.¹⁰⁹ She said:

[73] As the petitioners were, in the time bar chapter of the debate, astute to observe, the Scotland Act is a constitutional settlement which had the effect of setting up a new governmental framework for Scotland. The executive government of the country is now carried out in a new way, through the Scottish Executive whose membership is, in terms of s. 44, defined as comprising the First Minister, such ministers as he appoints, the Lord Advocate and the Solicitor General. Those members are the respondents and they can be assisted by any junior minister appointed under s.49. The tasks of government are, further, carried out by office holders who are not members of the Scottish Executive, as listed in s.126(8)(a) and SI 1127 of 1999 promulgated under s.126(8)(b), and members of the staff of the Scottish Administration appointed under s.51(1). At the heart of the new structure is the fact that the First Minister and the ministers that he appoints must be members of the Scottish Parliament and they can be called to account by the Parliament, to the extent that they must relinquish office if it resolves that the Scottish Executive no longer enjoys its confidence: ss.45(2) and 47(3)(c) .

[74] Further, the executive government that is carried out under the new system is in respect of a range of matters that is so wide that the legislature appears to have found it more convenient to specify which matters are reserved to the Westminster Parliament than to specify those in respect of which the Scottish Parliament has legislative competence. Clearly, there is much to be done in the course of the daily work of governing Scotland within the ambit of the devolution settlement and it would be surprising indeed if the functions vested in each of the respondents were such that they could personally attend to each and every one of them. Conversely, as Lord Greene MR said, in *Carltona* at p.563, the picture is that: "the functions which are given to ministers are functions so multifarious that no minister could ever personally attend to them."

[75] It is accurate to observe that the respondents, unlike ministers of the Crown, are creatures of statute, a statute which imposes certain limitations on the powers of the Scottish Parliament, as discussed in

Whaley v Lord Watson and that there is no existing authority which confirms the availability to them of the *Carltona* doctrine but I do not see that these observations are such as to bar its application to their circumstances. There are strong practical reasons for it to apply, in circumstances where the public interest is evidently and adequately protected by the respondents being not only answerable to the Scottish Parliament but vulnerable to judicial review in the event of a question arising as to the appropriateness of a decision made by or an action of a civil servant on their behalf. Further, were it to be the case, as the petitioners would have it, that Rule 80(5) and (6) orders require to be signed by one of the respondents that would mean, in practice, that such an order signed by, say, the Minister for Tourism, Culture and Sport would be valid whereas one signed by an experienced civil servant who had worked for many years in the Scottish Prison Service would not. That would be an odd result. I recognise that the converse would also apply, namely that a civil servant working in the department for Tourism, Culture and Sport would, given the particular structure of the Scottish Executive, under *Carltona* have the power to act on behalf of the Justice Minister. That does not, however, seem to be such an odd result given the fact that the Justice Minister, being answerable to the Scottish Parliament, could be expected to organise the discharge of her responsibilities so that no civil servant who does not have the appropriate knowledge and experience is able so to act. In short, I agree with the sentiments expressed by Lord Macfadyen in *SHBA v The Scottish Ministers*, regarding the applicability to the respondents of the analogous *Bushell* doctrine, one which bears striking similarities to the *Carltona* one, and I see no good reason in principle or practice for not holding that the *Carltona* doctrine applies to the respondents. I should add that I do so without resorting to the line of reasoning adopted by Lord Justice Sedley in *R v Birmingham Justices* which involved consideration of the powers of a police authority, a body different and distinct from the devolved government of Scotland.

9.4 Hunting cases

Though the anti-hunting legislation applicable north and south of the border is different, the substantive legal challenges, especially on human rights grounds may be similar.¹¹⁰ The UK Government is expecting that the outcome to legal challenges to the Scottish legislation itself will be a precedent for any cases against its new Act.¹¹¹ The English challenge on Parliament Act grounds (thus far unsuccessful, and extremely unlikely to be more successful if there are any further appeals) has no relevance to the Scottish situation. In Scotland, attempts prosecute those allegedly breaching the 2002 Act have so far not succeeded.¹¹²

10. Parties

James Mitchell

10.1 SSP new leader

Colin Fox MSP was elected leader of the Scottish Socialist party, replacing Tommy Sheridan. Press reports had predicted a close contest but Fox defeated the party's press and policy co-ordinator Allan McCoombes at the party's conference in February by 252 votes to 154. Tommy Sheridan had resigned as leader in November, purportedly because he wanted to be a good 'socialist Dad' after announcing that his wife was expecting their first child. However, newspaper reports suggested that divisions within the six member team of SSP's at Holyrood and other personal matters had led to Sheridan's resignation.

Sheridan and Rosemary Byrne MSP backed Fox as leader while McCoombes had the support of his partner Carolyn Leckie MSP, Rosie Kane MSP and Frances Curran MSP. Fox had criticised his opponent for being too 'aloof' and 'intellectual' to lead the party and insisted that the leader had to be one of the party's MSPs.¹¹³ After the result became known, Fox acknowledged that his rival had strong support in Glasgow and the west of Scotland and stated, 'I want to go out to those who voted for Alan, principally in Glasgow, and reassure them that rank-and-file democracy is safe in my hands.' Press reports that Fox was less keen on independence appear to have been confounded by the higher profile given to independence in the party's campaign material since Fox's leadership.

The party had considered permanently adopting a new style collective leadership. This had been in place since Sheridan's resignation but a party meeting in December had very narrowly rejected the idea by 42 votes to 41.¹¹⁴ Fox was elected as SSP List Member for the Lothians in 2003.

10.2 Parties confer prior to UK general election

With a UK general election imminent, parties in Scotland held special conferences which were in each case little more than pre-election rallies. The conferences gave an indication of the issues on which the parties would fight the general election. The SNP focused on the Scottish Executive's health record.¹¹⁵ So too did Tony Blair in his speech to the Scottish Labour Party in conference in Dundee. However, the striking difference was that the Prime Minister focused on health in England despite addressing the party's Scottish conference.¹¹⁶ The *Daily Record*, Labour's principal Scottish media mouthpiece, focused heavily on Gordon Brown's speech to the conference suggesting that Brown was a greater electoral asset than Blair.¹¹⁷

At the Liberal Democrats Scottish conference, Charles Kennedy attacked the 'illiberal' and 'authoritarian' tendencies of Labour. He identified five Labour seats in Scotland which his party expected to win setting a target against which his party would be judged at the forthcoming election.¹¹⁸ In contrast, the SNP leader has been unusually modest and cautious, as compared with past predictions, in his various responses to questions about the number of seats his party would win. At the SNP conference, Alex Salmond attacked Gordon Brown for forgetting Scotland.¹¹⁹ Michael Howard's visit to Dumfries for his party's Scottish pre-election conference was undermined when the Tory leader was approached by

Sharon McMillan, the mother of a small child killed by an airgun two weeks before. Howard's response was deemed to be unsympathetic and insufficiently robust by failing to demand a ban on airguns.

11: Public Policies

Barry Winetrobe

11.1 Public services policy

As has been noted in this and previous Reports, one of the key developing issues in Scottish devolution is the extent to which the Scottish Executive has chosen not to follow a path of public services reform similar to that of the UK Government. While this can, too simplistically, be described in ‘old’ and ‘new’ Labour terms, the imminent UK general election has focussed the minds especially of Scottish Labour MPs seeking re-election by voters who will have at the forefront of their minds the quality of many core public services for which these MPs have no responsibility. In areas such as health and education, there is a growing perception, however justified, that the more radical, Blairite policies are finally bearing fruit in England, whereas the Executive’s approach of piling in ever-greater amounts of money, but apparently without the same degree of radical reform, is not.

Naturally, the Executive rejects this analysis, and points to areas where they are demanding that extra investment must be accompanied by modernisation and change. Nevertheless, the perception of a lack of delivery in the public services, allied to that in economic development and growth generally (even though the devolved administration has less control over the latter), is potentially electorally damaging for Labour in Scotland. The Executive has just published its infrastructure investment plan, described as ‘complet[ing] the series of documents on the Executive’s spending plans... alongside the *Scottish Budget: Spending Proposals 2005-08: Enterprise, Opportunity, Fairness* and the *Efficient Government Plan: Efficient Government - Securing Efficiency, Effectiveness and Productivity.*’¹²⁰

11.2 Economic issues

The ‘Smart, Successful Scotland’ economic strategy has been ‘refreshed’, and the *Scottish Economic Report* was published in November.¹²¹ At the same time, the Scottish impact of the Chancellor’s Pre-Budget Report was debated.¹²² As usual economic statistics have produced a rather mixed message with strong GDP growth counter-balanced by declining manufacturing exports.¹²³ The SNP initiated a plenary debate on the economy on 3 February, amid claims that the Executive was not matching its claimed emphasis on economic growth by its funding decisions, though Ministers still try to maintain an optimistic front.¹²⁴ The Executive and the STUC have concluded a concordat on fair employment practices.¹²⁵

11.3 Energy

Energy policy, mainly a reserved matter (though one with significant environmental, social and economic policy aspects), is becoming a more salient issue in devolved Scotland, with a plenary debate on 27 January, and another on energy efficiency on 24 February;¹²⁶ wind power becoming extremely controversial, and growing calls for serious consideration of reviving the nuclear industry.¹²⁷

11.4 Fresh Talent Initiative

The Fresh Talent Initiative, whereby the Executive is addressing the economic effects of population decline through targeted initiatives to attract inward migration, is now one year old. It is a policy largely subject to the twists and turns of the UK

Government's wider immigration policies, especially so in the run-up to the general election, as was seen following the Home Secretary's recent announcements of proposed tightening of the immigration and asylum regimes, with opposition claims that the UK Government is undermining the Executive's efforts.¹²⁸ Tory criticisms were blunted by reports that a senior UK frontbencher, Dominic Grieve, had made derogatory remarks about Scotland.¹²⁹ For a description of how the Executive liaises with the UK Government over relevant aspects of immigration policies, see a WA of 31 January.¹³⁰

11.5 Health

Health policy is clearly the area where the Executive is having the greatest difficulty in 'delivering'. Whichever targets Ministers choose, they not only seem to be missed, but things appear to be getting worse rather than better.¹³¹ New plans seem to be a step towards the more radical changes seen south of the border, including greater use of private resources.¹³² Health costs seem to be growing significantly, especially the free personal care for the elderly scheme, and care home fees.¹³³ The much-trailed sexual health strategy was finally launched, though there were claims that it has been much diluted under religious pressure.¹³⁴ Audit Scotland produced a critical report on NHS Scotland.¹³⁵ The performance of the *NHS 24* call service is to be reviewed.¹³⁶ The Health Committee published a major report into the NHS workforce, amid continuing debate over hospital reorganisations.¹³⁷ The value of the free eye test pledge has been questioned by opticians, and public sector dentistry is under pressure.¹³⁸ Ministers have been getting into trouble over their public health messages, with the Justice Minister threatened with legal action after calling for retail outlets in her constituency to stop stocking a popular form of 'tonic wine', and the First Minister apparently quoted as saying that it was OK to get drunk once in a while.¹³⁹

11.6 Rural & Environmental issues

The annual EU fishing negotiations seemed to have been relatively painless for the Scottish industry, though it appears that Scots fishing has been granted an extra 3 days a month allocation in error.¹⁴⁰ The Environment Minister¹⁴¹ and two officials appeared before the Commons' DEFRA Select Committee, as part of its UK fishing inquiry, when it was sitting at Holyrood.¹⁴² The controversy over the proposed 'royal trespass' provisions for Scotland through a Sewel motion led to criticism of the Executive's commitment to the 'right to roam' and to its important package of land reform generally.¹⁴³ The Parliament has also been debating other environmental issues, such as green jobs and climate change, with the Environment Committee conducting an inquiry into the latter issue.¹⁴⁴ Scotland seems to be in quite a bit of bother with the EU over its environmental record.¹⁴⁵

11.7 Education

The Education Minister set out policies on schools, and the Parliament has been examining, in particular, class sizes.¹⁴⁶ There are other troublesome issues for Ministers, such as teaching staff shortages and rising costs.¹⁴⁷ The Executive seems to be signalling its willingness to see more 'radical' schools reform, such as the 'schools of ambition' programme, with the First Minister letting it be known that old 'progressive' policies have failed.¹⁴⁸ The School Education (Ministerial Powers and Independent Schools) (Scotland) Act 2004 received Royal Assent on 15

November, and the Further and Higher Education Bill has passed its Stage 1 scrutiny.¹⁴⁹ The Tories set out their education policy based on parental choice.¹⁵⁰

11.8 Law & Order

The period was dominated by the impact of UK proposals, such as in the Serious Organised Crime and Police Bill, and their application to Scotland through the Sewel process. There was much disquiet about the proposed ‘royal trespass’ provisions (subsequently dropped from the Sewel motion), and others said to be contrary to Scottish policing traditions.¹⁵¹ The ID cards legislation causes inter-party and intra-party splits, north and south of the border.¹⁵² The Executive issued an ‘apology’ for cases of institutional child abuse in a plenary statement and full debate on 1 December.¹⁵³ The Parliament debated issues such as reoffending; victims and witnesses, and the reform of the prosecution services.¹⁵⁴ The treatment of young offenders continues to cause problems for the Executive.¹⁵⁵ As the prison population reaches new records, the Justice 1 Committee published a report on rehabilitation in prisons.¹⁵⁶

11.9 Social affairs

Poverty and related problems are much discussed, including twice in plenary debates in January entitled ‘making poverty history’ and ‘closing the opportunity gap’.¹⁵⁷ The First Minister hosted an anti-sectarianism summit in Glasgow; an independent report on parades and marches was published, and the Parliament debated an anti-racism strategy.¹⁵⁸ Gaelic policy moved forward with the Gaelic Language Bill progressing, and the Scottish Secretary’s announcement that Gaelic would be included in the new biometric passports.¹⁵⁹ There is to be a review of the ‘right to buy’ policy, and the latest statistics on housing were published on 15 February.¹⁶⁰ Violence against women and domestic abuse were debated on 4 and 23 November; a study on human rights legislation was released, and the Executive was questioned about the proposed creation of a Scottish Human Rights Commission.¹⁶¹

11.10 Transport

Following months of lively debate on both the substantive policy itself and the fairness of the process, the Edinburgh congestion charge referendum produced a massive ‘No’ vote. This may have implications for public transport and environmental policies, not just for the city and for devolved Scotland, but for other British cities seeking to follow London’s lead.¹⁶² Otherwise, the main transport development was the progress of the UK Government’s Railways Bill which devolves further powers to Scotland,¹⁶³ and the Executive’s response to this enhancement.¹⁶⁴ The Executive’s Transport Bill is proceeding through the Parliament, and the proposed national transport agency is to be based in Glasgow.¹⁶⁵ The scrapping of the Skye Bridge tolls led to demands for similar action for the other main road bridges. Plans were announced for a national concessionary bus travel scheme.¹⁶⁶

¹ But, perhaps unexpectedly, not from Tam Dalyell: “Hard-working MSPs”, *Scotsman*, 21 December 2004: thescotsmanscotsmans.com/letters.cfm?id=1452402004. See “Merry-go-round of ‘mediocrity’”, *Scotsman*, 20 December 2004: thescotsmanscotsmans.com/scotland.cfm?id=1449932004, and FMQs, 23 December 2004:

www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-04/sor1223-02.htm#Col13302

² Committee PN, 24 February: www.scottish.parliament.uk/nmCentre/news/news-comm-05/ceu05-002.htm.

³ FMQs, 24 February 2005:

www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-05/sor0224-02.htm#Col14747

⁴ SE PN: www.scotland.gov.uk/News/Releases/2005/01/18161604

⁵ “Jamieson tells of nephew’s blackmail attempt”, *Herald*, 23 February 2005: www.theherald.co.uk/news/34006.html

⁶ “Jack set for warts and all biography”, *Scotland on Sunday*, 28 November 2004: scotlandonsunday.scotsman.com/scotland.cfm?id=1368842004

⁷ www.scottish.parliament.uk/business/pqa/wa-05/wa0105.htm

⁸ Report: www.scotland.gov.uk/library5/government/holyrood3.pdf; SE PN, 25 November 2004: www.scotland.gov.uk/News/Releases/2004/11/25133828; “Pressure over Holyrood all-clear”, *BBC News*, 26 November 2004: news.bbc.co.uk/1/hi/scotland/4043773.stm. See also FMQ, 24 February 2005: www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-05/sor0224-02.htm#Col14745

⁹ SE PNs, 11 November 2004 and 9 December 2004: www.scotland.gov.uk/News/Releases/2004/11/11152723 and www.scotland.gov.uk/News/Releases/2004/12/09104738

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