



RESEARCH PAPER 99/84  
19 OCTOBER 1999

# Devolution and Concordats

This Research Paper sets out the subject areas devolved to the Scottish Parliament and the National Assembly of Wales. It also looks at the disputes resolution procedures and the new roles of the Secretaries of States for Wales and Scotland. On 1 October the *Memorandum of Understanding and Supplementary Agreements* was published by the Lord Chancellor. This sets out the concordats agreed between the UK government, the Scottish Ministers and the Cabinet of the National Assembly for Wales. It provides for a Joint Ministerial Committee, with representatives from each administration. The role of parliamentary scrutiny and the possibility that these concordats might be legally enforceable is discussed. The *Belfast Agreement* set out a scheme of devolution for Northern Ireland, but this part of the *Northern Ireland Act 1998* has not yet been implemented, so the scheme is not considered here. When or if a power sharing executive is formed in Northern Ireland, the *Memorandum of Understanding* will apply, subject to the agreement of that executive. The companion paper, Research Paper 99/85 *The Procedural Consequences of Devolution* provides information and background on the Procedure Committee proposals due to be debated on 21 October 1999.

Oonagh Gay

PARLIAMENT AND CONSTITUTION CENTRE

HOUSE OF COMMONS LIBRARY

**Recent Library Research Papers include:**

<b>99/69</b>	Economic Indicators	01.07.99
<b>99/70</b>	The August Solar Eclipse	30.06.99
<b>99/71</b>	Unemployment by Constituency - June 1999	14.07.99
<b>99/72</b>	<i>Railways Bill</i> [Bill 133 of 1998-99]	15.07.99
<b>99/73</b>	The National Lottery	27.07.99
<b>99/74</b>	Duty-free shopping	22.07.99
<b>99/75</b>	Economic & Monetary Union: the first six months	12.08.99
<b>99/76</b>	Unemployment by Constituency - July 1999	11.08.99
<b>99/77</b>	British Farming and Reform of the Common Agriculture Policy	13.08.99
<b>99/78</b>	By-elections since the 1997 general election	09.09.99
<b>99/79</b>	Unemployment by constituency – August 1999	14.09.99
<b>99/80</b>	Railway Organisations	20.09.99
<b>99/81</b>	Asbestos	05.10.99
<b>99/82</b>	By-elections since the 1997 general election	24.09.99
<b>99/83</b>	Unemployment by constituency – September 1999	13.10.99

*Research Papers are available as PDF files:*

- *to members of the general public on the Parliamentary web site,  
URL: <http://www.parliament.uk>*
- *within Parliament to users of the Parliamentary Intranet,  
URL: <http://hcl1.hclibrary.parliament.uk>*

Library Research Papers are compiled for the benefit of Members of Parliament and their personal staff. Authors are available to discuss the contents of these papers with Members and their staff but cannot advise members of the general public.

Users of the printed version of these papers will find a pre-addressed response form at the end of the text.

## Summary of main points

The *Scotland Act 1998* and the *Government of Wales Act 1998* introduced schemes of devolution to Scotland and Wales. The Scottish Parliament may legislate in subject areas which are not reserved to Westminster. The reserved areas are set out in Schedule 5 and enactments which may not be modified by the Scottish Parliament are set out in Schedule 4. The Scottish Ministers exercise executive power in the areas for which they have responsibility. The Secretary of State for Scotland will retain certain duties in relation to the *Scotland Act* and certain functions in relation to reserved matters and will seek to represent Scottish interests within the UK government.

There are three main differences between Scottish and Welsh devolution as set out in the *Government of Wales Act*:

- The subject areas devolved to Wales are listed in this legislation, rather than powers reserved to Westminster
- The National Assembly for Wales can make only delegated legislation and not primary legislation
- Power over devolved areas is transferred to the Assembly as a whole. The Assembly is a body corporate, which may exercise both legislative and executive functions. The Assembly is empowered to delegate its functions to its committees or to the First Secretary.

The Secretary of State for Wales will continue to represent Welsh interests in Cabinet and steer primary legislation through Westminster, as well as carrying out certain functions under the 1998 Act.

The 1997 white papers on Scottish and Welsh devolution stated that there would be non-statutory agreements between the new administrations which would be ground rules for administrative co-operation. These agreements were to be known as concordats. The first concordats on EU and international issues and on financial assistance to industry were published on 1 October 1999 as part of a *Memorandum of Understanding* between the UK Government, Scottish Ministers and the Cabinet of the National Assembly of Wales. This also gave details of the Joint Ministerial Committee which will contain ministers from each administration and which will attempt to resolve disputes as they arise. It will be serviced by a joint secretariat. Pending the formation of a power sharing executive under the *Northern Ireland Act 1998*, Northern Ireland is not yet included within the *Memorandum*.

There has been some uncertainty as to the possibility of legal challenge to concordats. The *Memorandum of Understanding* was the subject of debate in the Scottish Parliament and the National Assembly for Wales on 7 October 1999, but no plans for a separate debate on the *Memorandum* has yet been announced for the Commons. Concordats may well feature in the debate on the procedural consequences of devolution expected on 21 October 1999. Further details are contained in the companion Research Paper 99/85 *The Procedural Consequences of Devolution*.

## CONTENTS

<b>I</b>	<b>Devolution</b>	<b>7</b>
<b>II</b>	<b>Scotland</b>	<b>7</b>
	<b>A. Reserved and Devolved Subject Areas</b>	<b>7</b>
	1. General reservations:	7
	2. Specific reservations:	8
	3. Enactments protected from modification by the Scottish Parliament	8
	4. General exceptions to protection against modification by the Scottish Parliament	9
	5. Devolved Areas	9
	<b>B. Disputes Resolution</b>	<b>10</b>
	<b>C. Powers of the Scottish Executive</b>	<b>11</b>
	<b>D. Legislation by the UK Parliament</b>	<b>12</b>
	<b>E. Executive Devolution</b>	<b>12</b>
	<b>F. The Role of the Secretary of State for Scotland</b>	<b>13</b>
<b>III</b>	<b>Wales</b>	<b>15</b>
	<b>A. Devolved and Reserved Subjects</b>	<b>16</b>
	<b>B. Role of the Secretary of State for Wales</b>	<b>17</b>
<b>IV</b>	<b>Concordats</b>	<b>20</b>
	<b>A. Introduction</b>	<b>20</b>
	<b>B. Memorandum of Understanding</b>	<b>24</b>
	<b>C. Joint Ministerial Committee</b>	<b>26</b>
	<b>D. The Concordats and Parliamentary Scrutiny</b>	<b>30</b>
	<b>E. Legal Status of Concordats</b>	<b>32</b>
	<b>F. Confidentiality</b>	<b>34</b>

# I Devolution

Following the *Scotland Act 1998* and the *Government of Wales Act 1998* the United Kingdom now has forms of devolution in Scotland and Wales.<sup>1</sup> Devolution can be defined as the transferring of political decision-making from the centre to sub-national units. This is a process which is reversible in constitutional theory, since the United Kingdom is not a federal state. The sovereignty of the UK Parliament remains unaffected by the devolution settlements so that it retains full legislative power even over matters devolved to Scotland and Wales. It could even repeal the 1998 Acts, but in practice convention will restrict the exercise of legislative power to areas reserved to Westminster.

## II Scotland

### A. Reserved and Devolved Subject Areas

The Scotland Act provided for both legislative and executive devolution. The legislative powers of the Scottish Parliament were not listed in the Act. Instead, the subject areas where power to make legislation was reserved to Westminster were listed in Schedule 5. Schedule 5 has been criticised for the general nature of some of the subject areas reserved and the failure to list relevant existing legislation.<sup>2</sup> In addition, enactments protected from modification by the Scottish Parliament are set out in Schedule 4. The broad areas retained by Westminster are:

#### 1. General reservations:<sup>3</sup>

- The constitution
- Political parties
- Foreign affairs etc.
- Public service
- Defence
- Treason

Each of these headings contains a list of subject areas which fall within these titles.

---

<sup>1</sup> The *Northern Ireland Act 1998* introduces executive and legislative devolution to Northern Ireland, but this has yet to be implemented and so is not considered in this Paper. See Research Paper 99/49 for details of the implementation of the *Belfast Agreement*

<sup>2</sup> See Rodney Brazier in *Statute Law Review* 1998 'The Scotland Bill as Constitutional Legislation' and *Public Law* Summer 1999 'The Courts, Devolution and Judicial Review' which both discuss the difficulties of dealing with the drafting in Schedule 5

<sup>3</sup> Sch 5 Part I

## 2. Specific reservations:<sup>4</sup>

There are also more specific reservations in the second part of the schedule, grouped into 11 broad heads, cited A-L,<sup>5</sup> each having a list of different subheads, called sections and cited in the form, eg, C5.

- Head A - Financial and Economic Matters:
- Head B - Home Affairs
- Head C - Trade and Industry
- Head D - Energy
- Head E - Transport
- Head F - Social Security
- Head G - Regulation of the Professions
- Head H – Employment
- Head J –Health and Medicines
- Head K - Media and Culture
- Head L - Miscellaneous

These heads not only set out parts of specific enactments which are reserved, but also specific subject areas, including for example regulation of activities in outer space under Head L.

## 3. Enactments protected from modification by the Scottish Parliament<sup>6</sup>

The following is an outline of the UK enactments protected from modification by the Scottish Parliament either directly or by grant of delegated power under schedule 4:

- *Union with Scotland Act 1707/Union with England Act 1706*, arts 4 and 6 (freedom of trade provisions)
- *Private Legislation Procedure (Scotland) Act 1936* (private Bill procedure)
- *European Communities Act 1972*, part (key aspects of EC membership)
- *Local Government Planning and Land Act 1980*, sch 32 (designation of enterprise zones)
- *Social Security Administration Act 1992*, ss140A-G (rent rebate/rent allowance subsidy and council tax benefit)
- *Human Rights Act 1998* ('incorporation' of European Convention on Human Rights)
- the law on reserved matters<sup>7</sup>

---

<sup>4</sup> Sch 5 Part II

<sup>5</sup> There is no Head I

<sup>6</sup> Sch 4, Part I

<sup>7</sup> Defined in para 2(2). Includes restatements of the law on reserved matters (para 7(2))

- *Scotland Act 1998* (with 4 sets of exceptions in para 4(2)-(5))
- effect of s119(3) to transfer cost of judicial salaries from the Consolidated Fund to the Scottish Consolidated Fund
- amendments to *Crown Suits (Scotland) Act 1857*; *Crown Proceedings Act 1947*, and *Criminal Procedure (Scotland) Act 1995* as relate to the Advocate General
- amendments to parts of *Lands Tribunal Act 1949*, and *Scottish Land Court Act 1993*
- enactments relating to s56 shared powers

#### 4. General exceptions to protection against modification by the Scottish Parliament<sup>8</sup>

There are a number of exceptions to the prohibition against modification, set out in Part II of Schedule 4:

- restatements of the law (including those with modifications not prevented by Part I), but not the law on reserved matters
- operation of the effect of the *Interpretation Act 1978*
- changes to titles of legal offices: any court or tribunal, or its judge, chairman or officer; any holder of a non-ministerial office<sup>9</sup> or member of staff in the Scottish Administration and any register
- enactments for s70 purposes (i.e. relating to financial control, accounts and audit) and for s91 purposes (investigation of maladministration)
- variation in subordinate legislation procedures by Scottish Ministers, Scottish public authorities with mixed or no reserved functions, and others (except Ministers of the Crown) within devolved competence
- allowing the exercise of a s53 transferred function by a different person in certain specified circumstances.

#### 5. Devolved Areas

The boundaries of legislative competence as set out in Schedules 4 and 5 can be varied (in either direction) by an Order in Council, which would have to be approved by resolution in the Parliament and in both Houses of the Westminster Parliament<sup>10</sup> (s30), and which can have retrospective effect.

The Scottish Parliament has the power to make primary and secondary legislation in all areas of public policy where it has 'legislative competence'. The UK Parliament retains ultimate power to legislate for Scotland on all matters, but the UK Government expects a convention to evolve that Westminster would not normally do so without the Scottish Parliament's consent. Legislative competence is set out in various provisions of the *Scotland Act 1998*. The broad subject areas where it has competence are:

---

<sup>8</sup> Sch 4, Parts II and III

<sup>9</sup> This provision entrenches the title of ministerial offices such as First Minister

<sup>10</sup> The type of legislative procedure to be used is specified as Type A under Schedule 7 of the *Scotland Act*

- health and personal social services
- education and training
- local government
- housing
- some aspects of economic development
- the environment
- agriculture, fisheries, food and forestry
- sport and the arts
- criminal and civil law

A purported Act of the Scottish Parliament will not be valid law if any of its provisions is outside the Parliament's legislative competence on any of the following five grounds<sup>11</sup>

- it would form part of the law of a country or territory other than Scotland, or confer or remove functions exercisable otherwise than in or as regards Scotland
- it relates to reserved matters set out in Schedule 5
- it is in breach of the restrictions in Schedule 4
- it is incompatible with any of the Convention rights<sup>12</sup> or with European Community law
- it would remove the Lord Advocate as head of the systems of criminal prosecution and investigation of deaths in Scotland.

## **B. Disputes Resolution**

S29 provides that an Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Scottish Parliament. Before a Bill is introduced into the Parliament the Presiding Officer must decide whether or not a Bill is within the competence of the Parliament and a member of the Scottish Executive must separately state that the Bill is within its competence, under s31. The Advocate General, the Lord Advocate or the Attorney General may refer the question of whether a provision of a Bill is within the legislative competence of the Scottish Parliament to the Judicial Committee of the Privy Council under s 33, and until the issue is resolved, the Presiding Officer may not submit the Bill for Royal Assent. In addition, the Secretary of State may also make an order prohibiting the Presiding Officer from submitting the Bill for Royal Assent, in strictly limited circumstances under s35.

In terms of executive functions the Secretary of State can prevent a member of the Scottish Executive from taking action which the Secretary believes is contrary to international obligations, under s58, which also gives the Secretary power to direct the Scottish Executive to take action to fulfil an international obligation. S58 also gives the

---

<sup>11</sup> s29(2)(a)-(e)

<sup>12</sup> that is, rights under the European Convention on Human Rights, as defined in the *Human Rights Act 1998*

Secretary power to revoke subordinate legislation incompatible with international obligations or in the interests of defence and national security.

The Judicial Committee of the Privy Council will hear devolution disputes for Wales and Northern Ireland, as well as for Scotland. For further detail see Chapter 7 of *The Scottish Parliament: An Introduction*<sup>13</sup>.

### C. Powers of the Scottish Executive

The Scotland Act also transfers executive power to the new Scottish government. In formal legal terms, power is exercised by the 'Scottish Ministers' a statutory collective term for the ministers of the Scottish Executive. This term is defined in s44 as the First Minister, other ministers appointed by the First Minister under s47 and the two law officers (the Lord Advocate and the Solicitor General for Scotland). These are known collectively as 'the Scottish Ministers'. There are also junior Scottish ministers, who are not part of the Executive. S53 transfers prerogative and executive functions relating to devolved matters to the Scottish Ministers.<sup>14</sup> The exercise of a function is outside the devolved competence of the Executive if it would be outside the legislative competence of the Scottish Parliament itself, and so the Executive cannot act to circumvent the limits of legislative competence.<sup>15</sup> Disputes as to the extent of the competence of the Executive can also be treated as 'devolution issues' and referred to the Judicial Committee under Schedule 6.

S52 enables statutory functions to be conferred directly on the Scottish Executive by Act of the Scottish Parliament for example. These statutory functions may be exercised by any member of the Executive, thus following the UK government principle that the duties of secretaries of state are in theory interchangeable.

S56 allows Scottish Ministers to share power with UK ministers in certain defined policy areas, such as s39 and 40 of the *Road Traffic Act 1988* (road safety information and training). UK ministers also retain power to make regulations for Scotland to implement EU obligations, and the Scottish Ministers have no power to make subordinate legislation or do an act incompatible with EU law or rights under the European Convention of Human Rights.<sup>16</sup>

---

<sup>13</sup> Jean McFadden and Mark Lazarowicz 1999. See also the comments of Lord Hope of Craighead in SCOLAG August 1999 'Judicial Review of the Acts of the Scottish Parliament'

<sup>14</sup> The Scottish Administration is defined in s 126 as the Scottish Executive, the junior ministers, holders of non-ministerial offices, such as Keeper of the Records of Scotland, and staff of these bodies (not the staff of the Secretary of State for Scotland)

<sup>15</sup> S54(2)(3) of the *Scotland Act 1998*

<sup>16</sup> For further background see a Research Note from the Scottish Parliament Research and Information Service (SPICE) 99/09 *The Legal Basis for the European Union*. See also *Scotland, Britain and Europe: Diplomacy and Devolution* Scottish Council Foundation 1999

The *Memorandum of Understanding*<sup>17</sup> document contains concordats on the coordination of EU policy issues, which includes the implementation of EU obligations. See below for further details.

## **D. Legislation by the UK Parliament**

On 9 June the First Minister made a statement to the Scottish Parliament on future legislation by Westminster<sup>18</sup>. He noted that both the UK Government and the Scottish Executive, supported by the Procedure Select Committee, expected that a convention would develop that Westminster would not normally legislate with regard to devolved matters without the consent of the Scottish Parliament. The Scottish Executive would expect the UK Government to oppose any private Member's bill which sought to alter the law on devolved matters. The statement also noted that a number of bills would not be enacted before July 1, although they covered devolved areas, and accepted that these would be proceeded with as UK legislation. An accompanying document described the relevant bills.<sup>19</sup>

## **E. Executive Devolution**

In addition, the Scottish Executive is also responsible for the exercise of some administrative functions in areas where the legislative competence remains with Westminster. This is known as executive devolution. Prior to devolution most of these powers were exercised by the Secretary of State for Scotland. Examples include the administration of European Structural Funds and civil nuclear emergency planning. S63 allows transfers to be made by Order in Council and the *Scotland Act 1998 (Transfer of Functions to the Scottish Ministers Etc) Order*<sup>20</sup> provided for the transfers on July 1.<sup>21</sup> The Order mainly consists of a list of enactments conferring functions transferred to the Scottish Ministers, or functions to be exercised subject to the agreement of or consultation with the Scottish Ministers. Any statutory function of a UK minister, including a power to make subordinate legislation, where these are exercisable in or as regards Scotland, can be the subject of an order under s63.<sup>22</sup>

The Prime Minister announced in a Parliamentary Answer of 30 June that the First Minister would give advice, by convention, to the Crown in respect of those functions which the Queen exercised personally and which fell within devolved competence, and not those exercised on her behalf by a UK Minister. Examples given were the royal

---

<sup>17</sup> Cm 4444 October 1999

<sup>18</sup> *Official Report, Scottish Parliament* 9 June 1999 c 358

<sup>19</sup> *Legislation at Westminster about matters within the legislative competence of the Scottish Parliament* 9.6.99

<sup>20</sup> SI 1999 no 1750

<sup>21</sup> A guide to the draft orders was also published

<sup>22</sup> For further detail on s 63 see Himsworth and Munro's *The Scotland Act 1999*

prerogative of mercy and of appointments to regius professors of the ancient Scottish universities. The Answer also noted that the First Minister would contribute to Privy Council business in the same way as the Secretary of State for Scotland had done and a paper was deposited in the Library with further details.<sup>23</sup>

## F. The Role of the Secretary of State for Scotland

The White Paper *Scotland's Parliament*<sup>24</sup> stated that the focus would be on 'promoting communication between the Scottish Parliament and Executive and between the UK Parliament and Government on matters of mutual interest; and on representing Scottish interests in reserved areas' (para 4.12).

The Secretary of State has very few formal powers and duties in the *Scotland Act*. In contrast to the *Government of Wales Act* the Secretary of State has no powers to attend and participate in the Scottish Parliament. Also, in contrast to the *Scotland Act 1978*, the Scottish Executive, including the First Minister, are appointed directly by the Crown and not by the Scottish Secretary. Nor does he have a role in considering legislation from the Scottish Parliament before Royal Assent.

The Secretary of State does have some power to intervene to prevent the enactment of legislation by the Scottish Parliament in certain circumstances, under s35.<sup>25</sup> The power is restricted to areas where he has reasonable grounds to believe that the legislation would be incompatible with international obligations or the interests of defence or national security. There are similar powers under s58 in respect of executive functions exercised by the Scottish Executive. The Secretary of State can direct the Scottish Executive to introduce a Bill into Parliament to rectify perceived incompatibilities with international obligations. However these powers are only intended for use in exceptional circumstances. Because the conduct of elections to the Scottish Parliament is reserved to the UK Parliament, the Secretary of State has powers under s12 to make orders in relation to the conduct of the elections. He has powers under Part III of the Act to make payments and adjustments to the Scottish Consolidated Fund.

In the Westminster Parliament, the Secretary of State will continue to answer questions, but only in respect of his new responsibilities. The Procedure Committee reported in May 1999 on arrangements for Westminster after devolution and recommended that Scottish Questions continue on a monthly basis, but that the duration should decrease to thirty minutes (paragraph 12). The report is due to be discussed on the floor of the House on 21 October 1999.<sup>26</sup>

---

<sup>23</sup> Dep 1290 *Scotland Act 1998: Scottish Business of the Privy Council*

<sup>24</sup> Cm 3658

<sup>25</sup> See notes in Himsworth and Munro's *The Scotland Act 1998*

<sup>26</sup> Research Paper 99/85 provides background for this debate

Evidence to the Scottish Affairs Committee in July 1999<sup>27</sup> stated as follows:

5. With the transfer of Ministerial functions of the Secretary of State to Scottish Ministers (in respect of functions for devolved matters exercisable in or as regards Scotland), consideration has been given to the future exercise of functions for reserved matters in Scotland that have previously been undertaken by Secretary of State for Scotland. Certain of these functions are being transferred to lead UK Ministers. The Secretary of State for Scotland will retain certain functions in relation to reserved matters, for example, on the conduct and funding of elections, the activities of the Parliamentary Boundary Commissioners for Scotland (PBCS) and the making of private legislation at Westminster; and a statement on these residual functions will be made in due course.

**Reserved matters: Scottish interests**

6. The White Paper listed the matters reserved to the UK Parliament: the constitution of the UK; UK foreign policy; UK defence and national security; the protection of borders; the stability of the UK's fiscal, economic and monetary system; common markets for UK goods and services, much of the regulation of energy and transport priorities; employment legislation; social security policy and administration; the regulation of certain professions; and certain other matters presently subject to UK or GB regulation or operation including the UK Research Councils, nuclear safety, regulation of broadcasting and film distribution; data protection, equality legislation and certain matters in the health sector.

7. In practice, the Secretary of State will seek to represent such Scottish interests within the UK Government, and to support lead UK Ministers in the presentation of UK policies and achievements in relation to reserved matters in Scotland.

**Devolution settlement**

8. The Secretary of State will have an important role to act as guardian of the devolution settlement for Scotland within the UK Government. There will need to be a continuing capacity within the UK Government to consider Scottish interests in further constitutional reforms, including any adaptations to the Scotland Act that may be thought necessary in the light of experience; to ensure effective implementation of the Scotland Act and to interpret the Act. (The Advocate General for Scotland has certain similar functions which are exercised independently in her capacity as a UK Law Officer). The task of promoting the settlement also has more general implications. The Secretary of State will want to promote effective co-operation and consultation between the UK Government and the Scottish Executive, to ensure that policy making and legislation, both in London and in Edinburgh, works effectively in respect of reserved and devolved matters respectively. He will want to promote co-operation between the two

---

<sup>27</sup> Role of the Secretary of State for Scotland: Memorandum by the Scottish Office July 1999 Dep 1459 printed in Scottish Affairs Select Committee The Work of the Scottish Office HC 771 1998-9

Parliaments. Finally, he may need to act as an honest broker, where appropriate, for disputes between Scottish and UK Ministers, or exceptionally to intervene as required by the Scotland Act.

9. As guardian of the devolution settlement, the Secretary of State will also be responsible for the grant that will be payable to the Scottish Consolidated Fund in accordance with the Statement of Funding Policy for the devolved administrations.<sup>28</sup>

According to a Parliamentary Answer there were 30 staff in post in July 1999 in the Secretary of State's offices in London and Edinburgh.<sup>29</sup> Following the July reshuffle, there is only one junior minister in Scotland, Brian Wilson, who is known as Minister of State, Scotland Office. The new Secretary of State for Scotland was appointed in May 1999 and is Dr John Reid. In his evidence to the Scottish Affairs Committee Dr Reid announced that his office would be known as the Scotland Office. Lynda Clark, in the new post of Advocate General<sup>30</sup> is a minister in the Scotland Office for administrative purposes.

### III Wales

There are three main differences between Scottish and Welsh devolution, as set out in the *Government of Wales Act 1998*:

- the subject areas devolved to Wales are listed in the legislation, rather than the powers reserved to Westminster.
- The National Assembly for Wales can make only delegated legislation and not primary legislation.
- Power over devolved areas is transferred to the Assembly as a whole. The Assembly is a body corporate which may exercise both executive and legislative functions. The Assembly is empowered to delegate its functions to its committees or to the First Secretary. It subsumes what was formerly the Welsh Office, although a residual part remains to service the Secretary of State for Wales.

A general guide to the Welsh Assembly is available from its website.<sup>31</sup> The Institute of Welsh Affairs has produced the *National Assembly Agenda An Assembly Handbook: The Essential Guide to the National Assembly for Wales* has also been published by Prestige Guides.

---

<sup>28</sup> See also oral evidence given by John Reid, Secretary of State for Scotland to the Scottish Affairs Committee HC 771 1998-9

<sup>29</sup> HC Deb 23 July 1999 c 721W

<sup>30</sup> The Advocate General is a member of the UK Government who advises on Scottish legal matters

<sup>31</sup> From [www.open.gov.uk](http://www.open.gov.uk)

## A. Devolved and Reserved Subjects

S22(1) of the Act provides for the transfer of any functions exercisable by a UK minister in relation to Wales, or for the function to be exercisable concurrently with the Assembly, or with the agreement of the Assembly. Under s22(2) the Secretary of State lays an order in council before Parliament for the transfer of such functions in Schedule 2 of the Act as he considers appropriate. The fields listed in Schedule 2 are:

- Agriculture, forestry, fisheries and food
- Ancient monuments and historic buildings
- Culture
- Economic development
- Education and training
- Environment
- Health and health services
- Highways
- Housing
- Industry
- Local government
- Social services
- Sport and recreation
- Tourism
- Town and country planning
- Transport
- Water and flood defence
- Welsh language

The *National Assembly for Wales (Transfer of Functions) Order 1999*<sup>32</sup>, Schedule 1, lists a series of enactments which confer functions on the Assembly. These enactments include local and private acts, and statutory instruments. In many of the Acts only certain sections are transferred. The transfer order also provides for the exercise of functions relating to cross border bodies. Schedule 2 lists enactments where UK ministers are constrained in the exercise of their functions by the requirement to reach agreement with the Assembly or to consult with it. The order came into force on July 1. Further orders are possible under s22 to devolve more functions and a further order is expected shortly to deal with some omissions and drafting deficiencies. This order is not expected to extend the boundaries of devolved functions.<sup>33</sup>

The main legislative task of the Assembly will be to take over the function previously exercised by the Secretary of State for Wales in making statutory instruments. In an

---

<sup>32</sup> SI 1999 no 672

<sup>33</sup> See question to the First Secretary on Second Transfer of Functions Order, *Welsh Assembly Record of Proceedings* 17 September 1999

average year the Secretary of State made 150 instruments on his own, and 400 with other ministers.<sup>34</sup> The 1998 Act allows new procedures for the scrutinising and amendment of statutory instruments.<sup>35</sup>

In common with Scotland, the Assembly may not act in a way incompatible with EU law<sup>36</sup> and cannot act contrary to the ECHR.<sup>37</sup> A UK minister may direct the Assembly not to take actions incompatible with any international obligation.<sup>38</sup> Any legal challenge on a 'devolution issue' is governed by Schedule 8 and the Judicial Committee of the Privy Council is the final arbiter.<sup>39</sup>

## B. Role of the Secretary of State for Wales

The White Paper *A Voice for Wales*<sup>40</sup> said that the Secretary of State would continue to participate fully in the government's policy formulation, legislative and resource decisions and represent the needs of Wales in Cabinet and Cabinet committees. The Secretary of State would also sit on relevant standing committees in the Commons considering legislation which affected Wales (para 3.34).

Because primary legislation for Wales will still be dealt with at Westminster, the Secretary of State for Wales has a much greater involvement in the legislative process at Westminster than the Secretary of State for Scotland. The Secretary of State also has a formal role within the Welsh Assembly, in that under s76 of the Government of Wales Act 1998 he is entitled to attend and participate in the proceedings of the Assembly. He is also bound to undertake consultation with the Welsh Assembly about the Government's legislative programme unless there are considerations relating to a bill which make it inappropriate for him to do so (s31). One consideration would be where a bill had no effect on Wales.<sup>41</sup>

In evidence to the Procedure Committee the powers and responsibilities of the Secretary of State not transferred to the Assembly were set out in detail:<sup>42</sup>

1. The Secretary of State will be a member of the UK Cabinet and will be responsible for ensuring that Cabinet decisions are taken with full regard to the interests of Wales. He will form his own view on matters under discussion but will take account of the Assembly's views in doing so.

---

<sup>34</sup> See Richard Rawlings *Journal of Law and Society* 1998 'The New Model Wales'

<sup>35</sup> For further information see *Agenda* Summer 1999 'A Crowded Legislative Timetable'

<sup>36</sup> S106(7)

<sup>37</sup> S107 see *Agenda* Summer 1999 'Skirmishes in a Minefield of Statutes' for background

<sup>38</sup> S108

<sup>39</sup> See Rodney Brazier in *Public Law* Summer 1999 'The Courts, Devolution and Judicial Review' for further details

<sup>40</sup> Cm 3718 July 1997

<sup>41</sup> See Lord Williams of Mostyn HL Deb 15 July 1998 vol 592 c 314

<sup>42</sup> Procedure Committee *The Procedural Consequences of Devolution* Annex Explanatory Note from the Welsh Office printed with Minutes of Evidence 30 March 1999 HC 185 1998-9

2. The Secretary of State will be responsible for all primary legislation which affects Wales where it is proposed that powers be given to the Assembly, including any Bills which relate only to Wales. In most cases other Cabinet colleagues will be in the policy lead, as now, and the Secretary of State will agree with them the provisions for Wales that need to be included in the Bills and will ensure that Welsh interests are considered during their passage through Parliament. For any clauses that relate only to Wales, the Secretary of State will arrange for instructing Parliamentary Counsel and usually have the conduct of the Assembly provisions in Standing Committee.
3. The Secretary of State will be responsible for all Parliamentary procedures relating to those subordinate legislative instruments made by the Assembly which continue to be subject to Parliamentary procedure.
4. The Secretary of State will be responsible for all Welsh matters connected with the Palace.
5. The Secretary of State will act as lead UK Minister for minority languages.

*Powers, obligations and rights of the Secretary of State under the Government of Wales Act 1998 (the Act)*

6. The most significant of these powers are shown in italic type. Several of the others will be exercised to achieve the initial Transfer of Functions but are not time limited; this means that in the future it will be possible to transfer other functions to the Assembly under the Act.

ss3(3)(4), 36(5) The Secretary of State has powers to change the date of elections and referenda after consultation with the Assembly.

s11 The Secretary of State has powers to make provision for the conduct of elections to the Assembly.

s12 The Secretary of State may recommend to Her Majesty in Council that she make an Order in Council disqualifying holders of certain offices from becoming Assembly members.

s15 The Secretary of State must specify the amount of the security to be lodged in judicial proceedings as to disqualification.

s17 The Secretary of State may limit the salaries of Assembly members who are also members of other public bodies.

s22 The Secretary of State may with the agreement of the Assembly recommend to Her Majesty in Council that she vary or revoke the Order in Council transferring Ministerial functions to the Assembly.

s25 The Secretary of State may make specific transfers to the Assembly.

s31 *The Secretary of State has a duty to consult the Assembly about the Government's proposed legislation as soon as is reasonably practical after the beginning of each session of Parliament. This must include participating in proceedings of the Assembly on at least one occasion, but is not confined to that.*

s39 The Secretary of State may provide that the Local Government (Contracts) Act 1997 shall apply to contracts entered into by the Assembly.

s76 *The Secretary of State may attend and participate in any proceedings of the Assembly but may not vote. He has the right to see any documents which are made available to all Assembly members.*

s80-s83, s88 *The Secretary of State will give the Assembly its annual budget after deducting the cost of running his own office. He must make a statement of how much he estimates that will be and how it is calculated. He may also make loans to the Assembly from the National Loans Fund. He must prepare annual accounts.*

s90(6) The Secretary of State may recommend to Her Majesty in Council, after consultation with the Assembly, that she remove the Auditor General for Wales from office on the ground of misbehaviour.

ss96, 146, 147 The Secretary of State has powers to add to the functions of the Auditor General for Wales in specified circumstances.

s144 The Secretary of State has powers to make provisions for the accounts, their audit and for reports on the activities of specified bodies.

ss151, 153 The Secretary of State has powers to make provisions consequential to the Act.

*Note:* The term "Secretary of State" in the Act does not necessarily mean the Secretary of State for Wales; in most cases he or she is the likely person to exercise these powers but for a few (e.g., s15, s36(5)), the Home Secretary may be more appropriate.

In a Parliamentary Answer on 1 July the Secretary of State for Wales, then Alun Michael, set out his functions as follows:

- Functions relating to his or her membership of the UK Government.
- Responsibility to ensure that the interests of Wales are fully considered in the workings of the UK Government.
- Responsibility to steer primary legislation relating to Wales through Parliament.
- Functions relating to the fact that this House will vote the Main Estimate to the Secretary of State for Wales, who will make a grant to the Assembly after deducting the cost of running his own office.
- Responsibility to consult the Assembly on the Government's legislative programme.
- Responsibility to ensure that the arrangements for co-operation between the Assembly and the UK Government are working effectively.<sup>43</sup>

He went on to say:

All other functions of the Secretary of State for Wales transfer to the Assembly. It may be helpful for the House to know the way the provisions of the Government of Wales Act are being put into practice. The Assembly has delegated responsibilities to me as First Secretary of the National Assembly for Wales. Onward delegation to my Assembly Cabinet has enabled us to create a positive and dynamic relationship between my Assembly Cabinet and other Subject Committees which mirror the portfolios of Assembly Secretaries. I am placing in

---

<sup>43</sup> HC Deb 1 July 1999 vol 334 c 255W

the Library a copy of the Assembly papers relating to the responsibilities of the Assembly Secretaries and the intended way to deal with cross-cutting issues.<sup>44</sup>

Following the July reshuffle, Paul Murphy was appointed Secretary of State and there is only one junior minister, David Hanson who is the parliamentary under secretary of state.

## IV Concordats

### A. Introduction

There were no plans to create separate civil services in Scotland and Wales, in contrast to the Northern Ireland Civil Service, set up following the partition of Ireland in the 1920s. However, a new version of the Civil Service Code applicable to British civil servants was issued in May 1999.<sup>45</sup> The first two paragraphs set out the constitutional position as follows:

1. The constitutional and practical role of the Civil Service is, with integrity, honesty, impartiality and objectivity, to assist the duly constituted Government of the United Kingdom, the Scottish Executive or the National Assembly for Wales constituted in accordance with the Scotland and Government of Wales Acts 1998, whatever their political complexion, in formulating their policies, carrying out decisions and in administering public services for which they are responsible.
2. Civil servants are servants of the Crown. Constitutionally, all the Administrations form part of the Crown and, subject to the provisions of this Code, civil servants owe their loyalty to the Administrations in which they serve.

Concerns were however expressed about the potential for conflict of loyalties. John Osmond of the Institute of Welsh Affairs posed the question as follows:<sup>46</sup>

Civil servants serving the Assembly, because they will be working so publicly and closely with so many more politicians, will experience an entirely different level of transparency of information than with which their counterparts in Whitehall are accustomed. There may be a fear within Whitehall of leakage of information if they work too closely with civil servants in Cardiff. In itself, this may tend to set one group apart from the other.

The second, more fundamental issue relates to the Welsh civil service more generally: the question of their particular allegiances and future career prospects...How hard should a civil servant push policies agreed in the Assembly

---

<sup>44</sup> Dep 1304

<sup>45</sup> *The Civil Service Code* issued by the Cabinet Office 13 May 1999. Research Paper 97/5 *The Accountability Debate: Codes of Guidance and Questions of Procedure for Ministers* gives background to the creation of the *Civil Service Code*

<sup>46</sup> *Adrift but Afloat: The Civil Service and the National Assembly* John Osmond IWA 1999

which are inimical to those being pursued in London? This is not the same question as currently faces civil servants pursuing differing departmental agendas within an overall framework laid down by the Whitehall Cabinet, and more particularly the British Prime Minister.

In *Constitutional Futures: A History of the Next Ten Years*<sup>47</sup> Robert Hazell has suggested that 'it cannot long be acceptable in Edinburgh or Cardiff for the professional head of their civil service to be the Cabinet Secretary in London' (p138).

The white papers *Scotland's Parliament*<sup>48</sup> and *A Voice for Wales*<sup>49</sup> noted that the Scottish Executive and the Welsh Assembly would need to develop mutual understandings with UK departments covering the appropriate exchange of information, advance notification and joint working. Such agreements would be non-statutory and were named concordats. The term first appeared in the Welsh white paper<sup>50</sup>, whereas *Scotland's Parliament* referred to mutual understandings.<sup>51</sup> In February 1998 guidance on concordats between the Scottish Executive and UK Government departments<sup>52</sup> and on concordats between the Welsh Assembly and UK departments<sup>53</sup> was issued. Guidance on concordats between the Northern Ireland Executive and UK Government departments was also issued in June 1998.<sup>54</sup> Draft texts of the actual concordats were not made available however with this guidance. Instead the general principles were set out to advise departments on questions such as scope and liaison arrangements.

The Guidance emphasised that concordats were not designed to create legal obligations or restrictions, but would act as the ground rules for administrative co-operation and exchange of information. It was intended that concordats would be published once agreed by the newly elected administrations. There were no plans to submit concordats to parliamentary approval, whether at Westminster or Edinburgh or Cardiff. Attempts to create formal procedural requirements for concordats were resisted by ministers during the passage of the *Scotland Act* and the *Government of Wales Act*.<sup>55</sup> Ministers have however noted that the possibility that concordats might be legally enforceable to legal challenge to an extent. Henry McLeish, then junior minister, said :

For example, if the Scottish Executive did not follow the consultation procedure set out in a concordat, it could be judicially challenged on the ground that the

---

<sup>47</sup> Ed Robert Hazell 1999

<sup>48</sup> Cm 3658

<sup>49</sup> Cm 3718

<sup>50</sup> Paras 3.40 and 2.24

<sup>51</sup> Para 4.12-14

<sup>52</sup> Dep 6157

<sup>53</sup> Dep 6136

<sup>54</sup> Dep 98/1134

<sup>55</sup> HC Deb 25 March 1998 vol 309 c 617, HC Deb 31 March 1998 vol 309 c 1158-9, HL Deb April 1998 vol 588 21 c 1132, HC Deb 12 May 1998 vol 312 c 193

concordat had created a legitimate expectation that the procedure would be followed.<sup>56</sup>

Lord Falconer of Thoroton, then Solicitor General, said:

It may well be the case that they will create a legitimate expectation of consultation. For instance, if one party to a concordat suddenly ceased to consult the other in accordance with the concordat, the result might be that its decisions could be challenged by way of judicial review, so it is wrong to say that there will be no legal underpinning to these concordats. The precise limits of that underpinning would have to be worked out by the courts in the context of the terms of the concordat itself.<sup>57</sup>

Academics and other commentators examined the possibility of the legal enforceability of concordats. Richard Rawlings, from a Welsh devolution perspective, has described concordats as “qualitatively different, uncharted constitutional territory, precisely because the Assembly is not a Whitehall animal. The parties are not equal parties. Arrangements will also need to be sufficiently robust to cope with a situation of ‘cohabitation’”.<sup>58</sup>

He has criticised what he described the “lack of underpinning” for concordats, warning that “whereas in formal legal terms such arrangements appear low in the hierarchy of rules governing administration, the civil servant naturally sees things differently ... Parliamentary supervision over the concordats is lacking, a common feature of pseudo-contract as a form of administrative rule-making.” Having raised the point about the potential impact which the doctrine of legitimate expectations might have for judicial review, he concluded: “The concordats are a fine example of the reworking of the informal character of the British constitution. But soft law usage of this kind demands firmer underpinning in a changed constitutional landscape” (pp 502-3).

The Institute of Welsh Affairs’ Constitution Working Party, in its proposals for amendments to the then Government of Wales Bill in 1998, suggested that there be a statutory requirement for concordats between the Assembly and the UK departments generally and on EU matters in particular.<sup>59</sup> The unique nature of the Assembly as both an executive and parliamentary body and the continued reliance on Westminster for primary legislation has perhaps heightened concerns in Wales about the merits of maintaining a close relationship with Whitehall. This has been considered by John Osmond of the Institute of Welsh Affairs who noted:<sup>60</sup>

How the relationships work in practice will depend on the political will on either side..[T]he executive character of Welsh devolution means there will be

---

<sup>56</sup> c 193

<sup>57</sup> HL Deb April 1998 vol 588 21 c 1132

<sup>58</sup> *Journal of Law and Society* vol 25 no 4 December 1998 ‘The New Model Wales’

<sup>59</sup> *An Effective National Assembly* Institute of Welsh Affairs 1998 p 8

<sup>60</sup> *Adrift but Afloat: The Civil Service and the National Assembly* Institute of Welsh Affairs 1999 p 9

continual legislative inter-action between Wales and Whitehall. This could require both sides having a vested interest in a smooth relationship, or become an irritant in the workings of the two administrations. The concordats are intended to help ensure the former scenario occurs. At the end of the day, however, the outcome will depend on the political, rather than the administrative direction that is given.'

He thought that the process of agreeing concordats would also have an impact on Whitehall departments, making them become 'more self-consciously English departments. This process can only heighten the separation between the civil service in England, Wales Scotland and Northern Ireland, accentuating the difference between Wales and England in the process'(p9).

Ron Davies, the former Secretary of State for Wales, commented: 'At the end of the day, however, these 'concordats' can be imposed on the Assembly- with power resting in Whitehall.'<sup>61</sup> During the Assembly debate on the *Memorandum of Understanding* on 7 October 1999 he said:<sup>62</sup>

The concordats were not part of a carefully thought out scheme of devolution. The Labour Party did not consider them in great detail before the general election. The idea of concordats emerged during the process of writing a White Paper two years ago and in the process of writing the legislation. They represent a practical response to immediate problems which emerged during the time when devolution was being translated from a political aspiration into a constitutional reality. They evolved essentially to ensure that the process of government, the way in which Wales was governed at an official level, as well as on a political level, could proceed unhampered by the constitutional change that we were making.

The Scottish Affairs Select Committee report into multi-layer democracy<sup>63</sup> published in November 1998 raised some concerns about potential bureaucracy of more formal processes, such as concordats. It believed that 'Parliament should have a role in overseeing the operation of these agreements' (para 42). The report concluded:

59. We were frequently told that there would be constant consultation and discussion between Scottish and UK ministers and officials, but there is no provision for an open forum at parliamentary level for the public discussion of matters of common concern. Even the announcement by Baroness Ramsay on 28<sup>th</sup> July of joint Ministerial arrangements does not go very far to remedy this deficiency.

60. There is considerable and legitimate potential scope for disagreement between state and sub-state (and even between sub-states) even where both administrations are of the same political complexion, but any disagreements will be exacerbated when they

---

<sup>61</sup> *Devolution: A Process, not an Event* Gregynog Paper vol 2 no 6 1999 p 14

<sup>62</sup> *Record of Proceedings, Welsh Assembly* 7 October 1999

<sup>63</sup> *The Operation of Multi-Layer Democracy* HC 460 1997-8

are not. And inevitably, even if the political control in the UK and in Scotland start off the same there will come a time when they differ; the staggering of elections, the proportional representation systems for electing the devolved assemblies which will favour the creation of coalition administrations and the possibility of people voting differently in regional and national elections all tend towards such an outcome. This makes the possibility of reaching common ground for a delegation to Brussels, agreement on a disputed point of *vires* or even on a matter of honest political disagreement, more difficult to achieve.

## **B. Memorandum of Understanding**

Following some months of press and parliamentary speculation about the publication of the concordats, the document containing the *Memorandum of Understanding* (MU) and the first concordats was published on Friday 1 October, in Edinburgh, London, Cardiff and laid before the respective parliaments and assemblies. The UK version was published as Cm 4444, by the Lord Chancellor, who chairs the Ministerial Committee on Devolution Policy. The MU and supplementary agreements were between the UK Government, the Scottish Ministers and the Cabinet of the National Assembly of Wales.

The document contains:

- an introductory *Explanatory Note*
- Part I: *Memorandum of Understanding* (MU)
- Part II: *five supplementary agreements*:
  - A. Agreement on the Joint Ministerial Committee (JMC)
  - B. Concordat on Co-ordination of European Union Policy Issues
  - C. Concordat on Financial Assistance to Industry
  - D. Concordat on International Relations
  - E. Concordat on Statistics

The Lord Chancellor, Lord Irvine of Lairg, (who chairs the UK Ministerial Committee on Devolution Policy and presented the document to the UK Parliament) said:<sup>64</sup>

"The publication of the MoU and Concordats marks a further stage in implementation of the Government's plans for devolution to Scotland and Wales. I am confident that these agreements will lay a solid foundation for co-operation between the UK Government and the devolved administrations in Scotland and Wales."

The SNP spokesman Alex Neil expressed immediate criticism: 'it is clear that the concordats are heavily weighted towards London's interests, which is why they are more akin to Westminster-imposed diktats. The proposed joint ministerial committee is clearly biased in Westminster's favour since it would always be chaired by a UK minister –including the adjudication of disputes- and ultimately by Tony Blair'. David Letchie for the Conservatives attacked the decision to publish the

---

<sup>64</sup> *Cabinet Office press notice* 1.10.99 "Lord Chancellor Publishes Concordats For Scotland And Wales"

document at a press conference rather than in a statement to the Scottish Parliament.<sup>65</sup>

During the debate on the concordats held by the Scottish Parliament on 7 October, the First Minister, Donald Dewar, said:<sup>66</sup>

The documents are not rules for procedure, designed for a nation state that is living uncomfortably with a partner that has recently been relegated to the status of next-door neighbour. As I have stressed, the Scottish people voted for devolution—not independence—and to retain the significant advantages that come from being part of the United Kingdom. That is the basis on which the arrangements described in the document have been constructed and on which the document should be judged. The concordats are about delivering on our promises to the people of Scotland. They are about different Administrations recognising their responsibilities. That is why they should be welcomed.

A set of overarching concordats are intended to apply ‘broadly uniform arrangements across Government to the handling of matters with a EU dimension; financial assistance to industry; international relations touching on the responsibilities of the devolved administrations and statistical work across the UK.’<sup>67</sup> Separate concordats were printed in Cm4444 for coordination of EU policy issues for Scotland and Wales and for international relations, which were agreed with the Foreign and Commonwealth Secretary. The other main concordat was that relating to financial assistance to industry which was agreed with the Chief Secretary to the Treasury. A final concordat on statistical work across the UK was the responsibility of the Economic Secretary.

Further bilateral concordats will also be published by individual UK departments. The Explanatory Note explained the position of Northern Ireland, as follows:

All of the drafts refer where appropriate to devolved institutions in Northern Ireland. The proposed arrangements as regards Northern Ireland are without prejudice to the position of the Northern Ireland Executive Committee to be established in accordance with the Northern Ireland Act 1998. Until functions are devolved to Northern Ireland Ministers, they will play no part in the proposed arrangements. The Secretary of State for Northern Ireland will participate in their stead, with support as required from Northern Ireland Departments.

No separate Northern Ireland version of the MU was issued.

The explanatory note in Cm 4444 sets out UK ministerial responsibility for the document:

Ministerial responsibility within the UK Government for the MoU and JMC agreements lies with the Lord Chancellor in his capacity as Chairman of the

---

<sup>65</sup> *Scotsman* 2 October 1999 ‘Dewar spells out the ground rules’

<sup>66</sup> *Official Report, Scottish Parliament* 7 October 1999 c 1106

<sup>67</sup> Explanatory Note Cm 4444

Cabinet's Devolution Policy Committee. The Foreign and Commonwealth Secretary is responsible for the Concordats on the Co-ordination of European Union Policy Issues and on International Relations. The Chief Secretary to the Treasury is responsible for the Concordat on Financial Assistance to Industry; and the Economic Secretary for the Concordat on Statistics. The Secretaries of State for Scotland, Wales and Northern Ireland also have responsibilities within the UK Government for promoting the devolution settlement, for ensuring effective working relations between the Government and the devolved administrations, and for helping to resolve any disputes which may arise.

### **C. Joint Ministerial Committee**

The *Memorandum of Understanding* (MU) provides for the establishment of a Joint Ministerial Committee (JMC). This will consist of Ministers of the UK Government, Scottish Ministers, Members of the Cabinet of the National Assembly for Wales [and Ministers of the Northern Ireland Executive Committee]. The plenary meetings will be chaired by the Prime Minister, and other meetings will be chaired by the responsible UK minister (para A1.3). It is worth noting that there are no ministers to represent England, as opposed to the UK. The Introduction to the MU states: 'UK Ministers and their departments represent the interests of England in all matters' (para 1).

The terms of reference for the JMC are:<sup>68</sup>

- To consider non-devolved matters which impinge on devolved responsibilities, and devolved matters which impinge on non-devolved responsibilities
- Where the UK Government and the devolved administrations so agree, to consider devolved matters if it is beneficial to discuss their respective treatment in the different parts of the UK
- To keep the arrangements for liaison between the UK Government and the devolved administrations under review
- To consider disputes between the administrations

The Joint Ministerial Committee was announced, on behalf of the UK Government, by Baroness Ramsay of Cartvale during the Scotland Bill's Lords committee stage:<sup>69</sup>

I can assure the noble Lord that the Government intend that all the devolved administrations should be as fully involved as possible in discussions with the UK Government about the formulation of their policies on all issues which touch on devolved matters. Indeed, a great deal of thought has been given to how the UK Government and the devolved administrations should interact on matters of communal interest.

---

<sup>68</sup> Cm4444 para 23

<sup>69</sup> HL Deb 28 July 1998 vol 592 col 1487. Her remarks came in reply to a new clause moved by Lord Selkirk of Douglas (Lord James Douglas-Hamilton MSP) proposing the establishment of an Interparliamentary Consultative Commission, comprising senior ministers of the UK and Scottish governments, and all opposition party leaders and the Speaker/Presiding Officer of the two parliaments

The Government intend that there should be standing arrangements for the devolved administrations to be involved by the UK Government at ministerial level when they consider reserved matters which impinge on devolved responsibilities. It is envisaged that this would be achieved through the establishment of a joint ministerial committee of which the UK Government and the devolved administrations would be members. The joint ministerial committee will be an entirely consultative body, supported by a committee of officials and a joint secretariat. Further details of the standing arrangements will be announced later. Where there is agreement between the parties that it should do so, the JMC could also discuss the treatment of devolved matters in the different parts of the UK.

These standing arrangements will run in parallel with and underpin the bilateral concordats between the Scottish executive and departments in the UK Government. These arrangements would be non-statutory. The Scottish executive cannot, of course, be committed in advance to any particular form of liaison. That said, however, the UK Government believe that there will be strong mutual benefits from such liaison arrangements and we would expect the devolved administrations to recognise this also. The Government believe that these non-statutory arrangements, together with the provisions in the devolution Bills, will enable the United Kingdom to work more effectively in future, giving due and appropriate weight to each of its main components.

The announcement received relatively little publicity, compared to speculation about the possibilities of the British Irish Council (BIC). The BIC was also intended to be a consultative body consisting of representatives from the devolved administrations, the UK Government, the Irish Government together with representatives from the Isle of Man and the Channel Islands.<sup>70</sup> The delay in implementing the Belfast Agreement has meant that the BIC has yet to meet.<sup>71</sup> However the *Agreement* envisages that the JMC will be the one of the principal mechanisms for discussion on UK positions on EU issues which affect devolved matters (para A1.9). The BIC is thought by commentators to be unlikely to be important in the devolution context, apart from those issues which have an Irish dimension.<sup>72</sup>

---

<sup>70</sup> The BIC was therefore a body for executive, rather than parliamentary cooperation. However the *Belfast Agreement* stated that ‘the elected institutions of the members will be encouraged to develop interparliamentary links, perhaps building on the British-Irish Interparliamentary Body.’ Strand Three, para 11

<sup>71</sup> For further detail on the British Irish Council and the Belfast Agreement see 98/57 *Northern Ireland: Political Developments since 1972*. The British Irish Council is dependent on the coming into force of the Belfast Agreement. A Treaty between the Irish and UK Governments on the creation of the BIC was signed on 8 March 1999. The text of the Treaty can be found on the Northern Ireland Office website accessible from [www.open.gov.uk](http://www.open.gov.uk)

<sup>72</sup> See Robert Hazell and Bob Morris in *Constitutional Futures: A History of the Next Ten Years* ed Robert Hazell 1999 pp 138-9

The MU states that disputes may be referred formally to the secretariat, which will comprise staff from the Cabinet Office and the devolved administrations. The *Agreement on the Joint Ministerial Committee* noted that:

A2.5 It is recognised that the staff of the UK Government and the devolved administrations who make up the component sections of the Joint Secretariat are likely also to be involved in coordinating their own administrations' stance towards JMC business. The UK Government and the devolved administrations recognise that there will sometimes come a point in discussions between the administrations at which the different parties will need to reserve their position or, especially when legal proceedings seem likely, cease to participate in joint discussion of an issue.

It is intended that the Joint Secretariat will liaise as necessary with the Joint Secretariat to the British Irish Council established following the Belfast Agreement (para A2.4).

Proceedings of each meeting will be confidential 'in order to permit free and candid discussion' (para A1.11). One of the functions of the secretariat could be "reviewing constitutional issues of importance to all [four] administrations, such as guidelines for officials of one administration who have to give evidence before the legislature of a different administration" (para A2.2f).<sup>73</sup>

The JMC is intended to operate as a mechanism to avoid legal confrontation over the devolution settlement. However the Memorandum noted that statutory powers remained in place:<sup>74</sup>

If formal intervention should become necessary, the UK Government will whenever practicable inform the devolved administration of its intentions in sufficient form to enable that administration to make any representations it wishes or take any remedial action.

The SNP have highlighted what they regard as the 'UK-centric' bias in the JMC arrangements. Alex Neil said on 1 October:<sup>75</sup>

"The proposed Joint Ministerial Council is clearly biased in Westminster's favour, since it would always be chaired by a UK Minister – including in the adjudication of disputes – and ultimately by Tony Blair. UK Ministers, including the Prime Minister, represent and reflect the Westminster interest, and are obviously not impartial players."

---

<sup>73</sup> The relevant official guidance is *Departmental evidence and response to select committees* (January 1997 edition), more commonly known as the 'Osmotherly Rules'. See Research Paper 97/5 *The Accountability Debate: Codes of Guidance and Questions of Procedure for Ministers*

<sup>74</sup> Para 26

<sup>75</sup> *SNP press notice*, 1 October 1999 'Publication of concordats: SNP criticise London-biased documents'

During the debate in the Scottish Parliament Mr Neil added:<sup>76</sup>

Let me make some suggestions about the joint ministerial committee. Why should not we recognise the conflict that could result from asking one minister to represent both English and UK interests? Why do we not insist that, on the ministerial committee, the majority view of the four devolved Administrations rather than the view of the English minister should be the UK view? Why do we not insist that the chairmanship be rotated among the four Administrations? Why do we not insist that the subject committees be chaired by people from the four Administrations?

Annabel Goldie, for the Conservatives, said:<sup>77</sup>

There is a feeling—unworthy, perhaps—that the committee's status may deliberately have been made vague. It may be a deliberate fudge to deal with Governments of different colours in different parts of the United Kingdom. If the Conservatives were in government in the United Kingdom and in Scotland, those fears would be groundless. However, if there are to be different Administrations in different parts of the United Kingdom, there may be difficulties in the way in which the joint ministerial committee functions.

In an examination of the role of the JMC from a Welsh perspective, John Osmond commented:<sup>78</sup>

The new institution will be hugely important in the future governance of the United Kingdom. It will be the forum where the key relationships are worked through, where grievances are dealt with, and disputes resolved ... It is hoped that the new institution will achieve the squaring of the circle of a political contradiction at the heart of the devolution exercise. That is to say, it will enable the UK administration to engage at the highest level with the leadership of the devolved Assemblies in a situation where there is no shared collective responsibility. Plainly it will be an innovation of some magnitude in British political governance. It is likely to become much more than the fire-fighting emergency service intimated by the Cabinet office official quoted above. Rather it is likely to develop into an essential gear box at the core of the emerging devolution machine within the new United Kingdom polity.

---

<sup>76</sup> *Official Reports, Scottish Parliament* 7 October 1999 c 1115

<sup>77</sup> c 1122

<sup>78</sup> *The National Assembly Agenda* Institute of Welsh Affairs 1999 p 354-5

Vernon Bogdanor, in his recent updated study of devolution, considered that the JMC ‘provides institutional recognition of the fact that devolution creates a situation of interdependence rather than a separation of powers’. He compared and contrasted these emerging mechanisms in the UK with more formal arrangements in Canada and Germany, and suggested that a reformed second chamber at Westminster could provide such a forum.<sup>79</sup>

#### **D. The Concordats and Parliamentary Scrutiny**

There was no intention to involve the Westminster Parliament, the Scottish Parliament or the Welsh Assembly in the drafting or publication of concordats. However the concordats were subject to debate in both the Scottish Parliament and the Welsh Assembly.

The Scottish Parliament debated the MU on 7 October, and a vote was held to endorse it and the accompanying concordats. However the MU was not referred to a parliamentary committee for further research or consideration. The SNP moved an unsuccessful amendment to renegotiate the terms but lost by 76 votes to 31.<sup>80</sup> On a point of order John Swinney, for the SNP, pointed out that the Welsh Assembly was being asked only to ‘take note’ of the MU and not to agree formally to its terms. In response, Donald Dewar said that the Scottish Executive was allowing the Parliament a greater say than the Cabinet in Wales.<sup>81</sup>

The MU was not examined in advance of such plenary consideration by any parliamentary committee, which could have, for example, taken evidence from the relevant ministers, officials and other interested parties.<sup>82</sup> No committee of the Scottish Parliament currently has a remit explicitly covers what may be described as the ‘core devolved executive’ issues as such, and the Executive’s relations with the Parliament, in the way that, for example, the House of Commons Public Administration Committee can examine the UK government and administration.<sup>83</sup>

---

<sup>79</sup> V Bogdanor, *Devolution in the United Kingdom*, 1999, pp 284-5. The terms of reference of the Royal Commission on Reform of the House of Lords requires it to take “particular account of the present nature of the constitutional settlement, including the newly devolved institutions”. See Research Paper 99/85 *The Procedural Consequences of Devolution* for further details

<sup>80</sup> *Minutes of Proceedings, Scottish Parliament* 7 October 1999

<sup>81</sup> *Official Report, Scottish Parliament* 7 October 1999 c 1100

<sup>82</sup> *The Sunday Herald*, in its editorial on 3 October, commented on concordats: “Agreed in London they will now be laid before the Scottish Parliament this week and imposed without any right by MSPs to amend or reject any aspect of them” (Is the new politics: sleazy, autocratic, undemocratic”, *Seven Days* section, p 6)

<sup>83</sup> This committee was formerly the Public Service Committee, and developed out of the civil service arm of the old Treasury and Civil Service Committee. It and its predecessor committees have investigated issues such as the Next Steps Initiative on executive agencies, the role and function of the civil service, ministerial responsibility and parliamentary accountability, and *Questions of Procedure for Ministers* (now the *Ministerial Code*). In evidence to the Procedure Committee the clerk indicated that the committee would take an interest on the impact of devolution on the civil service and would continue to take an interest in civil service matters across the UK

Alex Neil, for the SNP, complained about the lack of parliamentary input:<sup>84</sup>

The concordats were drafted in London and amendments were then submitted by the Scottish Executive. The Scottish Parliament has seen neither the original drafts from London nor the Scottish Executive's proposed amendments. We do not know what those amendments were, or whether they were accepted or rejected; if they were rejected, we do not know why. This Parliament is entitled to know those things. Why has the Scottish Executive refused to answer even the most basic questions raised by members about the negotiations?

In opening the debate in the National Assembly for Wales, the Business Secretary, Andrew Davies, said:<sup>85</sup>

We might wish to have formal interparliamentary links with the UK and Scottish Parliaments, whether as a corporate body or between Subject Committees here and their counterparts in London and Edinburgh.

He resisted an amendment from Mike German of the Liberal Democrats which raised the issue of concordats with the whole Assembly, rather than the Cabinet. Mike German said:<sup>86</sup>

We cannot underestimate the importance of this document because, as Andrew has rightly said, it lays out the relationships between Wales and other parts of the UK. However, we cannot underestimate the importance of the amendment. It is significant that the motion asks us to 'note' the memorandum of understanding and does not ask us to approve it. The amendment which I have tabled asks us firstly to express concern that the only channels of communication being established are with the Assembly Executive. That is contentious, in a corporate body in which there is no majority party. In the second half, the amendment proposes that we establish 'protocols for communication'. It does not suggest that we should change the Memorandum of Understanding or propose direct alteration of it. However, we should arrange other protocols for communication between the Assembly and the United Kingdom and other UK devolved administrations.

In evidence to the Procedure Committee the academic members of the Study of Parliament Group's Study Group on Westminster and the Welsh Assembly raised the possibility of a concordat between Westminster and the Assembly as a whole, noting that the Assembly would not be able to call Departments to account for their behaviour under the concordats.<sup>87</sup>

---

<sup>84</sup> *Official Report, Scottish Parliament* c 1114

<sup>85</sup> *Record of Proceedings, Welsh Assembly* 7 October 1999

<sup>86</sup> *Record of Proceedings, Welsh Assembly* 7 October 1999

<sup>87</sup> HC 185 1998-9 Evidence 10 February 1999 para 4.2(e)

So far, there has been no indication that the MU will be the subject of a separate debate in the Westminster Parliament. However it is likely to be discussed in the Commons in the context of the debate on the procedural consequences of devolution on 21 October.

## **E. Legal Status of Concordats**

The text of the concordats contain a number of statements which represent firm undertakings. Examples include:

- EU policy issues: The UK Government will ‘provide the devolved administrations with full and comprehensive information, as early as possible, on all business within the framework of the European Union which appears likely to be of interest to the devolved administrations, including notifications of relevant meetings’ (para B3.2)
- Financial assistance to industry: The UK Government ‘commits itself to adequate consultation to a reasonable timescale with the devolved administrations on its dealings with the European Commission (and other European Union institutions as appropriate) on state aid policy’ (para C18)
- International relations: FCO will consult with the devolved administrations about certain consular appointments and offices (para D3.25)
- Statistics: ONS will provide a range of professional, technical and personnel service to the three GB administrations (para E10.7)

Some of these are matched by reciprocal undertakings by the devolved administrations (eg para C18). There is also a relevant provision in the *Memorandum of Understanding* relating to non-devolved matters: ‘The devolved administrations agree to provide the UK Government with any factual information and expert opinion available to them relevant to such devolved matters’ (para (21)).

The question of the legal enforceability of these undertakings therefore arises. In the debate in the Scottish Parliament, Donald Dewar said:<sup>88</sup>

Clearly, there are situations in which a judicial review of the actions of any Administration can arise. I presume that that is a reflection of the fact that the power to go to court to ask for a judicial review remains if it is thought that an Executive or Administration has acted unreasonably and prejudiced the interests of an individual. The documents are not legally binding in the sense that a finger can point and say, "I read such-and-such in paragraph X. That has not been carried out and I ask for a declarator that it should be." However, the general power of judicial review, presumably, remains.

Winding up the debate, Jim Wallace, Deputy First Minister, referred to the comments by Henry McLeish in 1998, quoted above:<sup>89</sup>

---

<sup>88</sup> *Official Report, Scottish Parliament* c 1102

<sup>89</sup> *Official Report, Scottish Parliament* 7 October 1999 c 1156

One of the most substantive issues raised in the debate concerned the legal position of the documents. There have been some helpful references to questions that I asked Mr McLeish in 1998. It was clear from the response that was given and from the very useful briefing from the Scottish Parliament information centre that the documents do not give any legal justifiable rights to people. However, it is not unheard of for documents that are essentially administrative to give rise to issues of judicial review. The documents that we are discussing, however, do not give any new legal rights.

In the debate in the Welsh Assembly on 7 October the Business Secretary, Andrew Davies, said:<sup>90</sup>

Some have said that these documents should be legally enforceable. The Executive does not agree. Post-devolution politics in the UK is about a mutual recognition of responsibilities and an acceptance that co-operation is better than conflict. Trying to make that approach enforceable in law would only serve to demonstrate how far relations have broken down or how little faith we have in the goodwill of others. We believe it is better to keep them as firm statements of intent and commitment

The concordats are not treaties in international law<sup>91</sup> but can be seen to resemble framework agreements between government departments and executive agencies.<sup>92</sup> However, concordats are unlikely to be as uncontentious as framework agreements given the possibility of different political imperatives. Chief Executives of agencies are appointed by their sponsoring departments and do not owe separate political allegiance. The Memorandum emphasises the non-legal basis of agreement, stating that “this memorandum is a statement of political intent, and should not be interpreted as a binding agreement ... It is intended to be binding in honour only” (*para 2*). It also states that “concordats are not intended to be legally binding, but to serve as working documents” (*para 3*). Similar formulations are employed in the concordats.<sup>93</sup>

---

<sup>90</sup> *Record of Proceedings, National Assembly of Wales 7 October 1999*

<sup>91</sup> HC Deb 12 May 1998 vol 312 c 193

<sup>92</sup> For further information on framework agreements see Research Paper 97/4 *The Accountability Debate: Next Steps Agencies*

<sup>93</sup> See para B1.2 of the EU Concordat, para D1.2 of the International Relations Concordat and para E1 of the Statistics Concordat

English administrative law has developed the concept of ‘legitimate expectations’ and this has achieved recognition from the Scottish courts.<sup>94</sup> The concept is based on the idea of fairness, and in the context, could be said to apply if any person was able to assert that they were entitled to expect one or both governments to act or decide in a particular way specified or indicated in a concordat, when in fact they did not so act or decide.<sup>95</sup> There is some case law to the effect that relevant persons had a right to expect published administrative guidance to be followed.<sup>96</sup>

There would be a number of hurdles that any such challenge on such grounds would have to surmount. Any claimant would have to show that they had sufficient standing to pursue the legal action (generally more difficult in Scotland than in England), and that they were prejudiced by some administrative action that affected them that was contrary to the concordats. These hurdles may be problematic if concordats are, as ministers have consistently claimed, essentially internal guides to administrative arrangements between two or more governments, rather than statements of substantive policy or practice affecting any third parties.

## F. Confidentiality

There is an emphasis throughout Cm 4444 on the importance of confidentiality. The MU states:<sup>97</sup>

Each administration will wish to ensure that the information it supplies to others is subject to appropriate safeguards in order to avoid prejudicing its interests. The [four] administrations accept that in certain circumstances a duty of confidence may arise and will between themselves respect legal requirements of confidentiality. Each administration can only expect to receive information if it treats such information with appropriate discretion.

Particular concern is expressed about mutual respect for the confidentiality of discussions on EU and international issues ‘and adherence to the resultant UK line, without which it would be impossible to maintain such close working relationships’.<sup>98</sup>

---

<sup>94</sup> For the Scottish position, see C Ashton & V Finch, *Administrative Law in Scotland*, 1997, pp 337-346

<sup>95</sup> A famous instance in recent times was the GCHQ case where it was held that civil service unions had a legitimate expectation to be consulted about substantial changes in their members’ conditions of service (such as removal of their rights to belong to a union), notwithstanding the Crown’s legal rights under the prerogative, because of the Crown’s consistent and well-established past practice of such consultation: *CCSU v Minister for the Civil Service* [1985] AC 374 (the CCSU lost the case on national security grounds)

<sup>96</sup> Such as in the telephone tapping case, *R v Home Secretary ex p. Ruddock* [1987] 2 All ER 518. But see, for example, *Rea v Parole Board for Scotland* 1993 SLT 1074 (no legitimate expectation by a prisoner of release on licence simply because he had previously been informed of a release date, which had earlier been recommended by the Parole Board and accepted by the Secretary of State)

<sup>97</sup> Para 11

<sup>98</sup> Para 19

This paragraph was criticised by Ron Davies, former Secretary of State for Wales, in the Assembly debate on 7 October as follows:

I cannot accept that. Firstly, I do not understand the meaning of 'adherence to the resultant UK line'. If you look at paragraph A1.10 we have a definition of the JMC and how it operates and the delicious use of the English language when it says that the JMC 'will reach agreements rather than decisions'. That means the decision will be taken by the lead Minister, who will be the Minister of Agriculture or the Secretary of State for the Environment or Health or whatever. They will take the decision and hope then to persuade the Minister from Wales, Scotland, Northern Ireland to agree. If they do not agree, tough, there is no vote, the line is resolved by the British Cabinet Ministers. That is the meaning of the sentence. A decision will be taken by the Minister who will hope to get his colleagues from Scotland, Wales and Northern Ireland on board and if not, well, the decision is taken.

Going back to paragraph 19, we have to ask to what extent are those decisions taken by UK Cabinet Ministers now binding on Cabinet Ministers from Scotland, Wales and Northern Ireland? That concerns me. There is no attempt at clarifying this. What it means if we strip it down to its basics is that as a precondition to taking part in these talks, Cabinet Ministers from Wales, Scotland, Northern Ireland will have to agree to be bound by the decision taken under the process described on page 10 which is effectively the decision of the British Cabinet Minister. That concerns me in the light of the discussions we have had about Europe and about the way that Europe will develop in the future. I hope that Alun can give us some reassurance. I am sure that he will come up with some assurance before the end of this debate, if he has not already prepared it in advance.

In response Alun Michael said:<sup>99</sup>

On the reference to the adherence to a UK line, when it comes to jointly representing the UK within Europe, it is a matter of a relationship, not being bound to a line that has been taken by central Government... The point is that, if we are part of a process, which as I indicated earlier will lead to our gaining some of our objectives, then clearly we must adopt a team approach with Europe. However, we need to maintain a watch on this. If we were being taken for granted and not gaining anything from the relationship, then it would be right for this Assembly to say let us look again at how this agreement has been reached. That is why it is so important that we should have a process of review.

---

<sup>99</sup> *Record of Proceedings, Welsh Assembly 7 October*

The consultation paper published with the draft Freedom of Information bill published in May 1999<sup>100</sup> noted that where information was passed by the UK Government in confidence to the devolved administrations, this information would be held in confidence and would be dealt with in accordance with the UK FOI Act (para 49). The draft bill contained Clause 23 which exempted information ‘which would, or would be likely to, prejudice relations between any two administrations in the United Kingdom’. The draft bill has been considered by the Public Administration Select Committee<sup>101</sup> and a Lords Select Committee<sup>102</sup> but neither report considered this exemption in detail.

---

<sup>100</sup> *Freedom of Information: Consultation on Draft Legislation* Cm 4355 See Research Paper 99/61 *Freedom of Information: The Continuing Debate* for background on the draft bill

<sup>101</sup> HC 570 1998-9

<sup>102</sup> *Report from the Select Committee appointed to consider the Draft Freedom of Information Bill* HL 97 1998-9