House of Commons
Scottish Affairs Committee

Scotland and the UK: cooperation and communication between governments

Fourth Report of Session 2009–10

Report, together with formal minutes, oral and written evidence

Ordered by the House of Commons
to be printed 23 March 2010

HC 256
Published on 31 March 2010
by authority of the House of Commons
London: The Stationery Office Limited
£0.00
The Scottish Affairs Committee

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Conclusions and recommendations
Summary

This Report examines the arrangements in place for communication between the UK Government and Scottish Executive, particularly when the UK Government formulates international policy which will specifically affect Scottish interests and devolved matters.

Generally there are effective channels of communication at both ministerial and official level between the two governments. Whitehall tends to overlook the Scottish angle of policy and legislation more often in those departments which are unfamiliar with devolved matters. We recommend that the Government ensures that each department has a devolution champion, who enjoys some continuity in that post, to ensure that there is a good level of awareness of devolution issues and that this awareness is maintained.

The revival of the Joint Ministerial Committee should provide an important forum for discussion between Ministers of the UK Government and devolved administrations. However, there is little opportunity for parliamentary scrutiny of the outcomes and effectiveness of the Committee’s meetings. The Government should publish agenda and timetables of Joint Ministerial Committees to allow more light to be cast on the intergovernmental cooperation process.

We encourage the UK Government to provide opportunities for Scottish Ministers to participate in European Council meetings, where appropriate and where there is agreement between the two governments on the line to take in negotiations.

We welcome the publication of the new Protocol for Avoidance and Resolution of Disputes as the 2001 Memorandum of Understanding between devolved administrations and the UK Government previously did not provide adequate guidance on how disputes between the UK and Scotland should be resolved. This was demonstrated during the communications between the governments on the UK’s negotiations with Libya on the Prisoner Transfer Agreement. The announcement that a revised devolution Memorandum of Understanding has been agreed is welcome, and we invite our successor Committee to scrutinise the new text of both the Memorandum once it has been published, together with the new disputes Protocol.

We recognise that good cooperation and communication between Governments cannot depend on a formal Memorandum of Understanding and the education of civil servants alone. It is necessary for both Governments to display the necessary political will to ensure that both understand each other’s point of view and demonstrate the mutual respect which should characterise all their dealings.
1. Introduction

1. On 20 August 2009 the Scottish Cabinet Secretary for Justice, Mr Kenny MacAskill MSP announced his decision to release the man convicted of the Lockerbie bombing on compassionate grounds. The reaction around the world to Mr Abdelbaset al-Megrahi’s release, and the press speculation surrounding the circumstances of the signing of the Prisoner Transfer Agreement between Libya and the UK, highlighted how Scottish decisions on devolved issues can impact UK interests and how UK foreign policy can impact on Scottish interests. On 21 October 2009 we agreed to hold an inquiry into the arrangements in place for communication between the UK Government and the Scottish Executive when the UK Government formulates international policy which will specifically affect Scottish interests and devolved matters, with specific reference to the case of Mr al-Megrahi.

2. The terms of reference for the inquiry were:

- Whether there are effective channels of communication between the UK Government and Scottish Executive to ensure that each is informed and can comment on decisions and policy of both administrations that affects the other;

- In particular, whether there are satisfactory arrangements in place between the UK Government and Scottish Executive to assess effectively the impact of UK foreign policy on Scottish interests and vice versa;

- How these arrangements functioned during the negotiations with Libya including the Prisoner Transfer Agreement (PTA) and the consideration by the Scottish Executive of the PTA application from Libya;

- How could the Joint Ministerial Committee be better used to improve the working relationships between the UK Government and Scottish Executive; and

- How will the revised Memorandum of Understanding and concordats between the UK Government and Scottish Executive improve matters.1

3. We decided that the inquiry would also include examination of the coordination between the UK Government and Scottish Executive in representing Scotland’s interests to the EU as well as Scotland’s interface with individual EU institutions. We had previously announced an inquiry into Scotland and the EU in July 2008 and requested written evidence on the representation of Scotland’s interests in EU policy making. We agreed to incorporate our previous inquiry into Scotland and the EU into our new inquiry.

The Scottish Parliament’s Justice Committee inquiry

4. The Scottish Parliament’s Justice Committee has recently concluded its own inquiry into the Scottish Executive’s handling of the application for prisoner transfer by the Libyan Government and the application for compassionate release by Mr Abdelbaset al-Megrahi.

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1 See Scottish Affairs Committee Press Notice 38 of Session 2008-09, www.parliament.uk/parliamentary_committees/scottish_affairs_committee
This inquiry focussed on “the process followed by the Scottish Executive in considering these applications and announcing the Cabinet Secretary’s decision.” It did not “consider the question of whether the Cabinet Secretary was right to conclude that compassionate release was justified in the circumstances.”

5. Our inquiry did not include an examination of: the prisoner transfer or compassionate release application process; or the circumstances surrounding the eventual release of Mr al-Megrahi; or the circumstances surrounding the bombing of Pan Am flight 103 over Lockerbie on 21 December 1988 and the trial of Mr al-Megrahi, as justice matters are devolved and therefore firmly within the remit of the Scottish Parliament.

Evidence received

6. We received written evidence on Scotland and the UK from Tam Dalyell, the Scotland Office on behalf of the UK Government, the Scottish Executive and the Royal Society of Edinburgh. We had previously received written evidence in response to our inquiry into Scotland and the EU from Dr Alex Wright, University of Dundee, the Scotland Office, Scottish Fisherman’s Federation and the Law Society of Scotland.

7. We took oral evidence on 12 January 2010 from the First Minister of Scotland, the Cabinet Secretary for Justice and the Permanent Secretary to the Scottish Executive; on 27 January from the Secretary of State for Justice, the Secretary of State for Scotland and the Director General of Devolution, Ministry of Justice; and on 10 February from the Minister for Europe and Deputy Head of the Communications, Institutions, Treaty and Iberia Group, Foreign and Commonwealth Office. We are grateful to all those who gave oral and written evidence to us.

8. This will be our last Report in the current Parliament. It is part of our remit to examine the policy of the Scotland Office and relations with the Scottish Parliament. We conclude that it is of great importance for the wellbeing of the people of Scotland that there is constructive and effective communication between the Scottish Executive and the United Kingdom Government and we recommend that our successor Committee in the new Parliament continue to scrutinise relations between the two governments.
2 Background

Memorandum of Understanding and protocols between the UK and devolved administrations

9. The UK Government, the Scottish Executive, the Welsh Assembly Government and the Northern Ireland Executive agreed a Memorandum of Understanding (MoU) setting out the principles that underlie relations between them. The latest version was laid before the House in 2001. In addition to the MoU, the Ministry of Justice (the Department with responsibility for the overall management of relations between the UK Government and the devolved administrations) has a concordat with the Scottish Executive and the Welsh Assembly Government. These concordats are intended “to promote constructive cooperation and communication.” They set out a working framework within which Ministers and officials may continue to develop relationships between the administrations. The primary aim is to “ensure that if either is planning action impinging on the responsibilities of the other, it gives adequate forewarning”. Each UK Government department is also “encouraged” to agree a bilateral Concordat with each of the devolved administrations.

10. The Foreign and Commonwealth Office does not have a separate concordat with the Scottish Executive as concordats for international and EU relations are contained within the MoU between the UK and devolved administrations (Parts B and D). The MoU states:

The UK Government will involve the devolved administrations as fully as possible in discussions about the formulation of the UK’s policy position on all EU and international issues which touch on devolved matters. This must, obviously, be subject to mutual respect for the confidentiality of those discussions and adherence to the resultant UK line, without which it would be impossible to maintain such close working relationships.

11. On reserved matters, the MoU states:

The UK Government represents the UK interest in matters which are not devolved in Scotland, Wales or Northern Ireland. Policy responsibility for such matters lies with the relevant UK Ministers and Departments. Within the UK Government, the Secretaries of State for Scotland, Wales and Northern Ireland will continue to ensure that the interests of those parts of the UK in non-devolved matters are properly represented and considered. The devolved administrations agree to provide the UK Government with any factual information and expert opinion available to them relevant to such non-devolved matters.

4 For more information on the Concordats, see www.dca.gov.uk/concordat/concordfr.htm
5 See Department for Constitutional Affairs guidance on devolution documents at www.dca.gov.uk/constitution/devolution/publications.htm#1
6 Cm 5240, para 19
7 Cm 5240, para 21
12. Alan Trench, of the Constitution Unit, School of Public Policy, University College London, has said that the concordats “must be among the least-used documents in government”. Of the MoU, Alan Trench said that it:

[...] mostly sets out high-level principles for intergovernmental relations, largely designed to preserve ways of working that had grown up before devolution [...] It is hard to resist the conclusion that the Memorandum of Understanding is no longer fit for purpose, and that neither it nor the existing bilateral concordats will be effective instruments when real differences between governments emerge.8

13. Sir John Elvidge KCB, Permanent Secretary to the Scottish Executive, told the Justice Committee during its inquiry into Devolution: A Decade On that bilateral concordats “have worked in the sense that they have set the right set of expectations about the standards that the relationships should reach. They do not stop things going wrong but that would be an unrealistic expectation of them.”9 He also told the Justice Committee that there were “cobwebs” on some of the structures for intergovernmental relations.10

14. Although the MoU states that it will be reviewed “at least annually” by the Joint Ministerial Committee and updated as necessary, the current MoU has not been amended since 2001 but had been the subject of recent review by all four administrations.11 The Scottish Executive’s evidence to us stated that “any measures which clarify intergovernmental relations are to be welcomed and revisions to the MoU are required both to reflect changed circumstances and to increase awareness and understanding of devolution”.12 However, the First Minister told us on 12 January 2010 that the changes proposed had not gone as far as the Scottish Executive would have wanted. For example, he thought that the revised MoU should include some form of dispute resolution—to include disputes on financial matters. He believed that a “referee” would enhance working relationships between administrations.13 However, he doubted that HM Treasury would agree to any mechanism of dispute mechanism which “impeded the Treasury’s position.”14

15. Whilst the Secretary of State for Scotland agreed that the MoU should be clear about who could instigate a disputes process if necessary,15 both he and the Secretary of State for Justice, when giving evidence to us on 27 January 2010, disagreed with the idea of an external arbiter as they feared it would “undermine the drive towards consensus”.16 The Secretary of State for Scotland said:

I think the knowledge of the existence of an external arbiter or referee would drive friction within the process, knowing that all someone had to do was to kind of blow
the whistle and take it out of the system, that would not avoid conflict, it would create it.\textsuperscript{17}

The Secretary of State for Justice believed that it would be “anti-democratic” to refer disputes to “some sort of arbitral court”. He continued:

Even where you have disputes between independent, wholly separate states, most disputes are resolved through direct bilateral negotiation, but within a single sovereign nation, the United Kingdom, with different jurisdictions for certain purposes, you have to be able to resolve these politically. [...] I can see why someone suggested some kind of referee, but my view is that it would end in tears.\textsuperscript{18}

16. The Secretary of State for Justice also noted that the Scotland Act already made provision for the highest level of arbitration if there was a dispute about relative powers, as the matter would now go to the Supreme Court.\textsuperscript{19} However, the Secretary of State for Scotland told us that “by goodwill on all sides” there had not yet been a formal process instigated.\textsuperscript{20}

17. The Secretary of State for Justice disagreed with the suggestion that the MoU was no longer fit for purpose as he saw the development of it as an evolving process “from a standing start in 1998.” However, he acknowledged that all administrations were seeking improvement in the MoU.\textsuperscript{21} The Secretary of State for Scotland confirmed that individually each administration had agreed on the changes to be made to the MoU, but a multilateral agreement was still needed to bring the revised document into effect. As announced by a Cabinet Office communiqué, the revised MoU was agreed by all four administrations at a meeting of the Joint Ministerial Committee (Domestic) on 10 March 2010.\textsuperscript{22}

**Protocol for avoidance and resolution of disputes**

18. The announcement on the revised MoU included publication of a *Protocol for avoidance and resolution of disputes* which sets out the process which should be followed by each administration. Ministers from the four administrations agreed that the dispute resolution process “should be fair, accessible, informed and responsive.” They also committed to further work to improve the process. \textsuperscript{23} The Protocol recognises that there could always be political differences of opinion between the UK and devolved administrations on which the parties will be unable to agree and on which the Joint Ministerial Committee (JMC) is unlikely to offer any prospect of resolution.\textsuperscript{24}

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\textsuperscript{17} Q 131
\textsuperscript{18} Q 120 [Rt Hon Jack Straw MP]
\textsuperscript{19} Q 120 [Rt Hon Jack Straw MP]
\textsuperscript{20} Q 120 [Rt Hon Jim Murphy MP]
\textsuperscript{21} Q 118 [Rt Hon Jack Straw MP]
\textsuperscript{22} “Ministers agree to further strengthen devolution”, Cabinet Office press release CAB 039–10, 8 March 2010
\textsuperscript{24} Cabinet Office, *Protocol for avoidance and resolution of disputes*, para 4
19. The Protocol states that efforts should be made to resolve differences at official and then ministerial level before invoking formally the JMC process. The relevant territorial Secretary of State should be made aware of any dispute that “threatens to be incapable of informal resolution”. Differences formally referred to the JMC secretariat as “disagreements” will be considered at a meeting of officials from the administrations involved and officials of the relevant territorial Secretaries of State within one month of the referral being received. The Protocol states that the outcome of this meeting will be:

- a proposal put to the relevant Ministers for their agreement;
- a report to the relevant Ministers seeking their agreement for a further round of the process at official level;
- or, exceptionally, a referral to the JMC. A disagreement so referred is known as a dispute.25

20. Where a dispute has been referred, a meeting of the JMC will be scheduled within one month (or another period with agreement). Ministers from the UK departments and devolved administrations involved in the dispute will be invited to the meeting, along with the relevant territorial Secretary of State. It is intended that this meeting will:

[...] provide a further opportunity for the parties to set out their positions and will facilitate discussion of shared interests, options for resolving the dispute and criteria for an agreed outcome. The Minister chairing may in advance of the meeting wish to make informal efforts to resolve matters.26

21. It is intended that the outcome of this JMC meeting will be one of:

- an agreement resolving the dispute;
- agreement to a further round of the process at ministerial level;
- or, exceptionally, agreement to notify JMC Plenary that the dispute remains unresolved.27

22. A record of “disagreements and disputes and the outcome or current stage each has reached” will be prepared for the JMC Plenary on an annual basis.28

23. In reaction to the publication of the Protocol, the First Minister said: “I said earlier this year that it was crucial for us to make that change, and in particular to ensure that it extends to financial issues. Today’s agreement is an important step forward in ensuring that Scotland’s interests are effectively represented and pursued”.29 Fiona Hyslop MSP, External Affairs Minister, said: “The dispute resolution process we have secured is based on the principle that it should be fair, accessible, informed and responsive. There is more to do

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26 Cabinet Office, *Protocol for avoidance and resolution of disputes*, para 13
27 Cabinet Office, *Protocol for avoidance and resolution of disputes*, para 14
28 Cabinet Office, *Protocol for avoidance and resolution of disputes*, para 15
and we also agreed today further work to examine the Statement of Funding Policy and how we can bring independent analysis to bear in order to help us resolve disputes where these arise”.30

24. We conclude that an updated Memorandum of Understanding between the UK and devolved administrations is long overdue. We therefore urge the Government to publish the agreed revised version as soon as possible. We welcome the publication of the Protocol for Avoidance and Resolution of Disputes which sets out the process for consideration of disagreements at official level and disputes at Ministerial level as we were not convinced of the need for an external arbiter. We recommend that the Joint Ministerial Committee review the Memorandum of Understanding at least every three years to ensure that it remains fit for purpose and should monitor the implementation of the new Protocol.

Other inquiries into intergovernmental relations

25. The ten year anniversary of devolution has prompted several reviews seeking to assess its successes and failures.

House of Commons Justice Committee

26. In May 2009, the Justice Committee published its Report titled Devolution: A Decade On which examined the impact of devolution and the development of devolution policy.31 It identified several changes that it thought ought to be made to improve the current infrastructure of intergovernmental cooperation and the procedures and practices of governance in the UK in order to facilitate the effective functioning of the system of devolution. Its recommendations and conclusions are referred to throughout this Report. In its Response, the Government acknowledged that there was “room to improve the level of awareness and understanding about devolution”.32

Commission on Scottish Devolution

27. The Commission on Scottish Devolution (“the Calman Commission”) was established by the Scottish Parliament and the UK Government to review the provisions of the Scotland Act and:

[…] recommend any changes to the present constitutional arrangements that would enable the Scottish Parliament to serve the people of Scotland better, improve the financial accountability of the Scottish Parliament, and continue to secure the position of Scotland within the United Kingdom.33

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32 Ministry of Justice, Devolution: A Decade On, Government Response, Cm 7687, July 2009, p 6
28. The Calman Commission published its final Report in June 2009 which made several recommendations with the aim of improving intergovernmental relations. It noted that formal mechanisms for cooperation had appeared to have fallen into disuse and concluded that “the near complete absence of scrutiny of intergovernmental relations at present is indefensible”.

29. The UK Government published its Response to the Calman Commission Report in November 2009, a White Paper entitled: *Scotland’s Future in the United Kingdom*. It accepted most of the Calman recommendations on intergovernmental relations, although it referred recommendations on improving communications between parliaments to the House of Commons and our Committee. We published our conclusions on the Calman Commission recommendations in our Third Report of this session, *Commission on Scottish Devolution*.

30. Whilst the Scottish Executive had stated that the Calman Commission’s remit was too narrow, noting that the consideration of either independence or federalism were outside the remit, it did say it would support the implementation of those recommendations identified for immediate action.

**Welsh Affairs Committee**

31. On 23 October 2009, the Welsh Affairs Committee announced an inquiry into “Wales and Whitehall” to investigate the Welsh devolution settlement and the relationships between Whitehall Departments and Welsh institutions, including:

- Awareness of the devolution settlement within the civil service and of the protocols which are in place in relation to legislation and policy affecting Wales;

- The extent of communication between Whitehall, the Welsh Assembly Government, the National Assembly for Wales and Welsh MPs; and

- Taking forward the findings of the Justice Select Committee in its recent substantial report *Devolution: A Decade On*.

It took evidence from both civil servants and Ministers, to which we found very useful to refer in the course of our inquiry. We understand that it is due to publish its Report on 26 March.

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35 Scotland Office, *Scotland’s Future in the United Kingdom*, Cm 7738, November 2009
3 The framework for intergovernmental relations

Introduction

32. When devolution was introduced in 1998, the UK Government and two of the devolved administrations were of the same political party. There can be little doubt that intergovernmental relations benefited from this. However, more recently the different parties in power across the United Kingdom, and the different policies held by those parties, have emphasised the need for a structure to ensure good communication between governments. It has become clear that without the political will for governments to work together, good relationships would not survive. Rhodri Morgan, former First Minister of Wales, recently told the Welsh Affairs Committee as part of its inquiry into Wales and Whitehall: “The key thing is whether a relationship is warm or cold […] It is a matter of attitude rather than the formality of the machinery […] The warm or difficult relationships mean a culture change at ministerial and civil service level”.39

33. In evidence to us on 13 January, the Secretary of State for Scotland acknowledged that the current political make up of the different administrations resulted in a complicated set of arrangements which did rely on goodwill to operate efficiently.40 He also admitted that there had not been good relations in the past between Scottish and UK Governments and concedes that they “do have to try and find different ways and additional ways of getting a better working relationship”.41

The role of the Scotland Office

34. The Secretary of State for Scotland is the custodian of the Scotland Act 1998: managing day to day devolution issues.42 He therefore has an important role in ensuring good intergovernmental communication exists between Westminster and Holyrood. That role has become more challenging for the Secretaries of State for Northern Ireland, Scotland and Wales as the political complexions of the devolved administrations changed.

35. Devolution guidance from the Ministry of Justice states that the role of the Scotland Office is to promote the devolution settlement by “encouraging close working relations between the UK Departments and the Scottish Executive, and between the UK and Scottish Parliaments”.43 However, it is not intended that the Secretary of State should act as a conduit for intergovernmental communication: normally departments would be expected to deal with the Scottish Executive directly but keep the Secretary of State closely informed about issues which involve both reserved and devolved matters, and more generally about relations with the Scottish Executive. Departments are expected therefore to copy the

39 Oral evidence taken before the Welsh Affairs Committee on 11 January 2010, HC (2009–10) 246–i, Qq 57, 61
40 HC (2009–10) 255, Qq 228, 278
41 HC (2009–10) 255, Q 257
42 “Role of the Scotland Office”, Scotland Office website, www.scotlandoffice.gov.uk
Secretary of State or the Scotland Office into all correspondence between UK Ministers and Scottish Ministers.\textsuperscript{44}

36. It is well documented that the current Scottish Executive has questioned the need for the Scotland Office and a dedicated Secretary of State. In evidence to us on 12 January, the First Minister told us that the role of the Scotland Office had been “overtaken by devolution” as the Scottish Executive found it better to deal with the relevant UK department direct than through an intermediary.\textsuperscript{45} In its Report \textit{Devolution: A Decade On}, the Justice Committee concluded that the quality of bi-lateral relationships between Scottish and UK Governments was crucial but that it was unable to judge whether the quality of such relationships would be as positive without the Secretary of State for Scotland as backstop.\textsuperscript{46}

37. The Secretary of State for Scotland believed that there was added value in having the Scotland Office working with the Scottish Executive as “part of a conversation” on policy development involving Scottish matters in both devolved and reserved areas.\textsuperscript{47} He told us that the Scotland Office was not in competition with the Scottish Executive, but complementary to it.\textsuperscript{48} He also believed that it was important for Scotland to have representation in the UK cabinet to ensure that Scottish interests were taken into account.\textsuperscript{49} Giving evidence to us on the Scotland Office White Paper on 13 January 2010, the Secretary of State told us that in his role he had instigated the jobs summit that took place in January and that he was willing to organise meetings on issues of concern north and south of the border.\textsuperscript{50} The new \textit{Protocol for Avoidance and Resolution of Disputes} published on 10 March stipulates that the Secretary of State should be informed of any potential disagreement between Scotland and the UK and that he and/or his officials should be present at the meetings of the JMC Secretariat, and the JMC itself, tasked with resolving the disagreement.\textsuperscript{51}

38. The Secretary of State also raised the issue of being kept in the loop on communications between the Scottish Executive and UK departments. Although he acknowledged that the Scotland Office was not “a mail redirection system which channels mail from north to south and south to north”,\textsuperscript{52} he believed that he might be able to provide more help to Scottish interests if he were copied into correspondence from the Scottish Executive to UK government departments. He told us on 13 January that at present, rather than being aware of a potential issue or problem from the point of enquiry, as the Scottish Executive did not

\textsuperscript{44} Ministry of Justice, “Devolution Guidance Note 3: the Role of the Secretary of State for Scotland”, para 5
\textsuperscript{45} Q 17
\textsuperscript{46} HC (2008–09) 529, para 48
\textsuperscript{47} Q 122
\textsuperscript{48} Q 127
\textsuperscript{49} Q 123
\textsuperscript{50} HC (2009–10) 255, Q 257
\textsuperscript{51} Cabinet Office, \textit{Protocol for avoidance and resolution of disputes}, paras 10 and 12
\textsuperscript{52} Q 128
copy him into their correspondence, he relied on the relevant UK department copying him into the response.53

39. We conclude that it remains a challenge for the Secretary of State for Scotland to prove the value of his role to the current Scottish Executive. However, we recommend that the Scottish Executive recognise the Secretary of State’s role as custodian of the Scotland Act and work with the Secretary of State to improve communication and cooperation between UK and Scottish Governments where possible. We welcome the introduction of the new Protocol for Avoidance and Resolution of Disputes which ensures that the Secretary of State is involved in the process aimed at resolving disagreements between administrations.

40. We note the Secretary of State’s concern that he is not copied routinely into correspondence sent from the Scottish Executive to UK Departments. We encourage the Scottish Executive to copy the Scotland Office into intergovernmental correspondence in future, as better and more open lines of communication are likely to enable the Scotland Office to offer its assistance to discussion at an earlier stage.

Joint Ministerial Committee

41. The Joint Ministerial Committee (JMC) was intended to be a forum in which Ministers of the UK Government and the devolved administrations could meet and discuss matters relating to devolution. The JMC is serviced by the Cabinet Office. The MoU between the UK Government and the devolved administrations sets out the JMC’s terms of reference:

- 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 United Kingdom;
- to keep the arrangements for liaison between the UK Government and the devolved administrations under review; and
- to consider disputes between the administrations.54

The First Minister told the Committee on 12 January that the purpose of the JMC meetings was not just to try to resolve disputes where they occurred, but to enable all parties to understand what each other’s positions were.55

42. Initially, in addition to the plenary session of the JMC (attended by the Prime Minister, Scottish and Welsh First Ministers, each together with one of their Ministerial colleagues, the Northern Ireland First Minister and Deputy First Minister, and the Secretaries of State for Scotland, Wales and Northern Ireland) there was also a JMC to consider European matters (JMC(E)) and sub-committees for specific subject matters such as health and

53 HC (2009–10) 255, Q 263
54 Cm 5240, para 23
55 Q 5
poverty and economic issues. It is widely acknowledged that whilst the JMC(E) met regularly and worked well, the plenary JMC and the sub-committees did not work. There were no meetings of the JMC between 2002–2008. The First Minister told the Committee on 12 January that, at the time that Rt Hon Jack Straw MP, as Foreign Secretary, was convening the JMC (Europe) Mr Straw had been unaware that other meetings of the JMC had ceased, suggesting an unfortunate lack of awareness. Commenting on the hiatus, the Secretary of State for Scotland said: “I do not want the Committee to conclude that because these meetings were not taking place there was not an almost daily flow of information and communication”. However, he acknowledged that despite the continued bilateral communication between Scotland and the UK, there was a need to get all of the administrations together in one room from time to time.

43. The First Minister told us that when the Scottish National Party came to power in Scotland, the former Prime Minister, Rt Hon Tony Blair, would not speak to him on a bilateral basis. The First Minister had believed that it was important to resume plenary JMC meetings and made requests to this effect to the UK Government, which concurred. The meetings have resumed and the committee structure is now in three formats: Plenary, Domestic and Europe. We look at the work of JMC (Europe) in detail in Part 5. The JMC sub-committees have been replaced by JMC (Domestic). The Government described the new arrangements in its response to the Justice Committee’s report Devolution: A Decade On:

The Joint Ministerial Committee has been revived […] with the formal designation of a Minister within the Government responsible for it (now the Rt Hon Peter Hain MP, separately from his Welsh responsibilities). The JMC has begun meeting in a new format, JMC (Domestic), which complements the work of JMC (Europe), and has commissioned a revision of the Memorandum of Understanding underpinning devolution.

44. At its most recent meeting, on 16 September 2009, the JMC Plenary discussed the economy, with the Prime Minister giving the leaders of the devolved administrations opportunity to comment on the forthcoming meeting of the G20 in Pittsburgh.

45. There have been two meetings since the JMC (Domestic) was established in March 2009 and welfare reform and migration were on the agenda. The First Minister believed
that the decision to make a broad “all-encompassing” domestic JMC would reduce the likelihood of meetings ceasing again, but as a successful mechanism for cooperation, the JMC (Domestic) had “some distance to travel.”67 However, the First Minister described himself as “an enthusiast of the possibilities of a revived, reinvigorated JMC structure”.68

46. The Justice Committee concluded that the JMC was the most appropriate vehicle for intergovernmental relations, but that more needed to be done to achieve a robust framework for intergovernmental relations after it had been allowed to fall into abeyance.69 The Government Response to the Justice Committee Report expressed confidence that the current structure of the JMC would provide stability and allow relationships between administrations to develop further by “sharing information, ideas and discussing real issues of divergence to reach working solutions.”70

47. The Calman Commission also criticised the JMC for the insufficiency and ad hoc nature of its meetings. It considered that informal contacts at official and ministerial level had stood in the place of formal intergovernmental arrangements. The Commission concluded that whilst informal working was necessary, it was an insufficient way of conducting intergovernmental affairs and not suitable long-term.71

48. Whilst we acknowledge that a formal framework for intergovernmental communication between the UK and devolved administrations cannot prevent conflict or dispute, we consider that it is healthy for robust debate and discussion to take place between Ministers on a regular basis. We conclude that it was regrettable that the plenary meetings of the Joint Ministerial Committee, together with the previous sub-committees, fell into abeyance in the years 2002–08. It is important for the UK Government and devolved administrations to meet regularly to discuss areas of joint concern affecting citizens across the UK. We recommend that the Government, in its response to this Report, set out the formal arrangements in place to ensure that Joint Ministerial Committee meetings continue so that our successor Committee can monitor the effectiveness of those structures.

**Improving transparency of the JMC**

49. Written evidence submitted to us by the Law Society of Scotland and the Royal Society of Edinburgh raised the issue of transparency of JMC proceedings, noting that it was difficult to gauge the success of the mechanisms as the process was unclear.72 The Calman Commission asserted that the lack of a mechanism for Parliament to scrutinise intergovernmental relations was “ indefensible”,73 particularly as information on the JMC meetings is not regularly published, although a communiqué is published after every JMC

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67 Q 3
68 Q 12
69 HC (2008–09) 529, paras 118–120
70 Cm 7687, p 7
72 Ev 51 and 59
The Commission concluded that the JMC should be more open to public and parliamentary scrutiny and recommended that agendas and timelines should be published in advance of each JMC (including JMC(E)) meeting with a communiqué on the Committee’s meeting issued afterwards. Professor Charlie Jeffery, Head of Politics and International Relations at Edinburgh University, also identified transparency of intergovernmental relations as an issue when giving evidence to the Justice Committee:

I suspect the lack of transparency in these arrangements is one of the biggest problems. When governments which are responsible to different electorates engage together in the resolution of disputes for the pursuits of common interest, I think there is an accountability issue. We really ought to know what positions were brought into discussions, where the differences lay, because differences are legitimate, and what was done to address them.

50. The Scottish Executive is keen to strengthen cooperation through review of the JMC: “the recommendations on the Joint Ministerial Committee (JMC) raise issues which merit serious consideration”. The UK Government’s White Paper, *Scotland’s Future in the United Kingdom*, reported that it was in discussions with the devolved administrations on whether it should introduce a future timetable for JMC meetings and on whether it should publish an annual report on the state of relations, to be laid before Parliament.

51. We conclude that there ought to be greater visibility of the Joint Ministerial Committee process, whilst still protecting the confidential nature of the meetings as a forum for frank and open discussion between Ministers. There would be merit in publishing timetables and agenda for both plenary and domestic sessions of the Joint Ministerial Committee. In its Response to our Report the Government should confirm whether it intends to lay before Parliament an annual report on the state of relations between the UK and devolved administrations and whether this will include information on matters discussed at the Joint Ministerial Committees.

**Interaction between civil servants in Scotland and Whitehall**

52. Understandably, the bulk of contact between governments takes place at official level. This necessitates a good understanding of the devolution settlement amongst civil servants in Whitehall who deal with matters that affect devolved issues and also those who work on reserved matters affecting Scottish interests. The written evidence to us from the Scottish Executive stated that:

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74 The most recent communiqué following the September 2009 plenary session can be found here: www.cabinetoffice.gov.uk/newsroom/statements/090916-jmc.aspx


76 HC (2008–09) 529, Q 28

77 Scottish Executive, *Response to the Recommendations of the Commission on Scottish Devolution*, para 25

78 Cm 7738, para 3.11

79 Q 10
There is a wide range of formal and informal contacts between the Scottish Government and Departments of the UK Government at both official and Ministerial level, covering all aspects of public policy. The extent to which communications work well or otherwise depends on a number of factors, including the scope for conflict or collaboration on the topic in question, the quality of communications between the parties, and the rapport between the individuals concerned. Relations tend to work best where there is regular contact and parity of esteem.80

53. Sir John Elvidge, Permanent Secretary to the Scottish Executive, told us that awareness of devolution had “faded over time”, particularly for those in Whitehall who had no reason to have regular contact with colleagues in the Scottish Executive.81 He told the Committee “I would be surprised if a month went by without somebody somewhere missing the need to think about the devolved dimension of something that they were doing”.82 However, he believed interaction between Whitehall and the Scottish Executive had improved at official level: “I am able to engage with my Whitehall colleagues most weeks of the year; whereas that had not been the practice for several years up to 2007 for purely practical reasons”.83

54. The First Minister of Scotland told us (and this was echoed by the Welsh Assembly Government’s written evidence to the Welsh Affairs Committee on its inquiry into Wales and Whitehall) that there was a tendency for Whitehall to treat the devolved administrations like any other government department.84 The Welsh Assembly Government described understanding of devolution across Whitehall as “patchy”: both in the awareness of how to deal with devolution issues generally and also the understanding of the asymmetric system of devolution across the UK.85 Rt Hon Paul Murphy MP, then Secretary of State for Wales, told the Justice Committee that in the 1990s there was “sometimes a constant battle with Whitehall Departments to get them to understand the significance of what was happening in Cardiff and Edinburgh”.86

55. Sir John Elvidge, Permanent Secretary to the Scottish Executive, said that there was a “risk that Scotland, Wales and Northern Ireland will be overlooked” by officials in Whitehall when developing policy: “I am frequently the boy at the back of the class putting up his hand and saying ‘please sir, there is another dimension to this’.”87 Sir Jon Shortridge, former Permanent Secretary to the Welsh Assembly Government, told the Welsh Affairs Committee that “the departmentalism in Whitehall means that it is built in to certain civil servants’ DNA that they have to be very cautious about what they say to each other. That is amplified, I think, when they realise they are talking to officials in a different jurisdiction”.88

80 Ev 61
81 Q 24
82 Q 26
83 Q 22
84 Q 11, Written evidence submitted to the Welsh Affairs Committee by the Welsh Assembly Government (WW9), para 5
85 Written evidence submitted to the Welsh Affairs Committee by the Welsh Assembly Government (WW9), para 2
86 HC (2008–09) 529, Q 99
87 HC (2008–09) 529, Q 255
88 Oral evidence taken before the Welsh Affairs Committee on 11 January 2010, Q 14
He also said “we have had lots of experiences where things have gone wrong because people who have had to deal with the issue at the Whitehall end have not sufficiently understood the context and the circumstances”.89 In his written memorandum to the Welsh Affairs Committee, he described the awareness of the Welsh devolution settlement in Whitehall as “disappointing”.90

56. In its Report *Devolution: A Decade On*, the Justice Committee acknowledged improvements in devolution awareness across Whitehall, but said the performance “remains patchy”. It recommended “full and comprehensive understanding of the policy areas that have been devolved to Scotland and Wales, but also full appreciation and consultation so that Welsh and Scottish interests are taken into account in policy making in reserved or non-devolved areas which will have an impact on the UK as a whole.”91 Sir John Elvidge gave evidence to the Justice Committee in February 2008. He argued in favour of “strong links” between the separate administrations of the UK,92 and expressed his belief that although there was commitment to shared learning between the administrations the civil service had not been very good at it thus far.93 The Justice Committee recommended a programme of secondments to enable better awareness of devolution in Whitehall and promote best practice and shared learning across all administrations.94

57. The Report of the Commission on Scottish Devolution “the Calman Commission” recommended in June 2009 that some UK Government departments would benefit from programmes that raise awareness of devolution and encourage them to consider the effects of their decisions in a devolved setting.95

58. The Secretary of State for Scotland told us the Calman Commission had been helpful in providing a “fresh understanding” of Scottish devolution issues amongst Whitehall departments,96 as had the large number of recent bills introduced which were directly relevant to Scotland.97 The challenge would be in maintaining that knowledge and understanding amongst officials.98 However, he acknowledged that civil servants in Whitehall had a tendency to work in silos:

If you are a civil servant sitting in London or somewhere else in the United Kingdom, it is not your core function to be trained in the specific detail of the balance of devolution across the different administrations, but it is really very

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89 Oral evidence taken before the Welsh Affairs Committee on 11 January 2010, Q 18
90 Written evidence submitted to the Welsh Affairs Committee by the Welsh Assembly Government (WW8), para 2
91 HC (2008–09) 529, para 75
92 HC (2008–09) 529, Q 221
93 HC (2008–09) 529, Q 220
94 HC (2008–09) 529, Q 220, para 85
96 HC (2009–10) 255, Q 275
97 Q 148
98 Q 148
important that each of those departments and organisations do have the capacity and expertise within those departments to understand devolution.99

59. Professor Jim Gallagher, Director General of Devolution at the Ministry of Justice, said that civil servants sometimes did overlook the consequences of devolution when developing UK policy, particularly those in departments that did not commonly deal with devolved issues. He told us that, organised by the Ministry of Justice, departments had been assessing where they got devolution right, and where they got it wrong.100 The review had shown that “What we know and what we see is those departments which have a senior champion at official level for [dealing with devolution] are those which are more likely to be successful”.101

60. The Government’s response to the Justice Committee Report provided a comprehensive list of action being taken to improve the awareness of devolution across Whitehall:

The Ministry of Justice and the Cabinet Office alongside input from the Territorial Offices is delivering innovative education and awareness products to help raise Whitehall’s ability to deal with devolution and is working closely with the National School for Government to ensure that as large an audience as possible can be captured. Part of the project involves updating the content of the Devolution Guidance Notes to ensure that they accurately reflect best practice and provide the best possible advice on how to deal with the realities of devolution.

The Cabinet Secretary has issued further guidance on devolution, supplementing and reinforcing what was already available. A central website on devolution has also been launched, focusing on the need of civil servants among other groups for better information and signposting on devolution issues. The Government agrees it should pursue further improvements in departments’ capacity for handling devolution.

The territorial offices play an important and ongoing role in ensuring that departments are sensitised to devolution concerns and the Government has taken steps to ensure they can play their full part in the development of policy.

The Government agrees that there is value in secondments to and from the devolved institutions, for the people involved, for the sending and receiving department and for the wider system. Some such exchanges have always taken place and the Government has given encouragement to them. Increasingly, individuals’ personal commitments may reduce flexibility to change location in this way. Nevertheless the Government will investigate further whether more can be done to facilitate exchanges with the devolved administrations.102

61. The Secretary of State for Scotland agreed that the Ministry of Justice, Scotland Office and Cabinet Office all had a role in holding seminars on devolution for Whitehall staff,

99 Q 148
100 Q 150
101 Q 150
102 Cm 7687, p 9–10
producing guidance and examining bills for any devolution implications. Sir John Elvidge, Permanent Secretary to the Scottish Executive, told us that in terms of improving knowledge of devolution and promoting better communication between UK and Scottish civil servants: “I take it for granted that it will need constant effort and constant leadership to move it to the right place”.

62. We welcome the action that the Government is taking to improve the knowledge of devolution matters amongst civil servants which has been shown to be occasionally wanting in the areas of Whitehall which have little to do with devolved issues or Scotland. We recommend that the Ministry of Justice ensures that each department has a “devolution champion” at senior level to ensure that structures are put in place to achieve and maintain higher levels of devolution awareness amongst staff.
4 International agreements directly affecting Scottish interests: case study Libya

Introduction

63. The Scottish Executive told us that successful communication between UK and Scottish Governments depended on the “the scope for conflict or collaboration on the topic in question, the quality of communications between the parties, and the rapport between the individuals concerned”.\(^{105}\) The arrangements for communication on reserved matters usually worked effectively, but relied on relations between officials in Scotland and Whitehall. On the reserved matter of foreign affairs, officials from the devolved administrations met regularly with the FCO Stakeholder Relations team to allow for exchanges of information.\(^{106}\)

64. However, despite the generally constructive relationship between governments, the Scottish Executive raised specific examples where it felt that the UK had not fully understood or accounted for the implications of the UK’s actions on Scottish interests. These examples included: not allowing Scottish Ministers to take the Chair at Council of Europe meetings (we look at this in Part 5); the refusal of the UK to include a Scottish Minister in the UK Delegation to the UN Framework Convention on Climate Change in Copenhagen in December 2009; and the failure to consult with the Scottish Executive over the Prisoner Transfer Agreement with Libya. It is the latter example which drew the world’s attention to the complexities of the devolution settlement and which we examine in this part of our Report.

65. The UK’s communication with Scotland over the UK’s relationship with Libya concerned three separate agreements:

- The Memorandum of Understanding between the UK and devolved administrations which sets out the arrangements on foreign affairs in its Concordat on International Relations;

- The Memorandum of Understanding between the UK and Libya which set out the agreement to commence negotiations on a Prisoner Transfer Agreement (on which the UK Government did not consult the Scottish Executive before it was signed); and

- The Prisoner Transfer Agreement between the UK and Libya which set out the terms and conditions for transfer of prisoners (on which the UK Government did consult the Scottish Executive before it was signed).\(^{107}\)

\(^{105}\) Ev 61
\(^{106}\) Ev 62
The “deal in the desert”

66. In May 2007, the then Prime Minister, Rt Hon Tony Blair agreed with Libya a Memorandum of Understanding in which he committed the United Kingdom to concluding with Libya a “judicial co-operation package”, including a prisoner transfer agreement (PTA), and agreements on mutual legal assistance, extradition and civil and commercial law.  

Memorandum of Understanding between Libya and UK signed 29 May 2007

Noting the desire of both sides to strengthen judicial co-operation, in the context of our increasing joint efforts in the field of justice and home affairs, and specifically of our recently enhanced co-operation on counter-terrorism.

The participants have reached an understanding that they will shortly commence negotiations on the following matters:
- Mutual legal assistance in the field of criminal law
- Mutual legal assistance in the field of civil and commercial law
- Extradition, and Prisoner Transfer

The two sides will work to conclude the negotiations and prepare these agreements in their final form; in the case of the last-mentioned agreement, working on the basis of the British model agreement on Prisoner Transfer presented recently to the Secretary for Justice during his visit to the United Kingdom of 22–24 May — to be signed within a period not exceeding 12 months from the date of signing this MoU.

The UK Government will seek to obtain the agreement of all three jurisdictions within the United Kingdom in each of those cases.

67. All four agreements were signed in London on 17 November 2008. On that same occasion, Mr Blair also signed a defence accord and witnessed the public signature of a major BP exploration contract worth £500m. Subsequently, it has been widely alleged that the political and judicial agreements were linked to the oil deal.

Arrangements on foreign affairs and the negotiation of the Memorandum of Understanding between Libya and UK

68. Arrangements between Scotland and the UK on international relations are set out in Part D4 of the 2001 Memorandum of Understanding between the UK Government and the devolved administrations. The Concordat on International Relations states that:

The devolved administrations will need to be aware of international developments that touch on devolved matters (including non-devolved matters that impact upon devolved areas) and to take account of the implications of these developments.

108 HC Deb, 12 October 2009, col 30
109 “Memorandum of Understanding”, BBC News Online, news.bbc.co.uk, 8 June 2007, Foreign and Commonwealth Office, Memorandum of understanding on the pursuit of agreements on judicial co-operation between the Great Socialist People’s Libyan Arab Jamahiriya and the Government of United Kingdom of Great Britain and Northern Ireland, House of Commons Library Deposited Paper 07/1638
110 HC Deb, 12 October 2009, col 30
112 Cm 5240, p 39
Therefore the FCO, and where appropriate other lead UK Departments, will provide the devolved administrations with timely, relevant and comprehensive information and analysis on international developments that may affect their responsibilities or be relevant to their interests. This will include relevant reporting from UK Missions overseas, and proposals for new UK legislation and early copies of proposed UK legislation on international relations.113

69. This provides clear guidance to the UK Government to provide the devolved administrations with information on foreign affairs matters that may affect devolved interests. The Memorandum of Understanding between the UK and Libya which agreed to negotiate a prisoner transfer agreement clearly falls into this category as the most notorious Libyan prisoner in the UK resided in a Scottish prison, and as justice is a devolved matter, any transfer under an agreement would require the approval of the Scottish Cabinet Secretary for Justice.

70. The Scottish Executive told us that “at no stage was the Scottish Government made aware of the content of the memorandum prior to its signing and therefore no opportunity was given to contribute or to raise concerns about the potential implications for Scotland”114. The First Minister told the Committee that this was incompatible with the arrangements on foreign affairs agreed between the UK and devolved administrations: he was “not certain that the full extent, the significance of the MoU [between UK and Libya], was understood across other Whitehall departments”.115

71. The Secretary of State for Justice told us that, following the announcement of 19 December 2003 that Libya would allow inspectors to see elements of its weapons programme, it was a matter of public knowledge that the UK and US were seeking an improvement in relations with Libya to create “a pathway for Libya […] to become a normally operating member of the international community.”116 However, he argued that the UK Government knew that a PTA with Libya would need to involve discussions with Scotland, but only when there was something “significant to discuss other than the fact that there was an aspiration by the Libyans for a PTA”.117 When asked why the Scottish Executive were not informed of the content of the MoU between Libya and the UK prior to its signing, the Secretary of State for Justice answered: “Where you are involved in complicated negotiations with a country like Libya they sometimes have to be handled with great confidentiality […] we have no interest whatever in keeping the Scottish Executive gratuitously in the dark about things”.118 He also told us “what you are discussing in terms of an MoU is the broad outlines of the aspirations you wish to achieve and then you get down to the detail”.119
72. The Secretary of State argued that the obligation to provide the devolved administrations with “timely, relevant and comprehensive” information on international developments that may affect their responsibilities did not mean that the UK Government should have kept the Scottish Executive informed before the MoU with Libya was signed. He said “There is certainly an obligation post the signing of an MoU. I think it depends entirely on the circumstances in which an MoU is signed.”

73. The Scottish Executive disagreed with the Secretary of State for Justice that the MoU with Libya was merely an “aspiration” for a PTA. In follow-up evidence to us it told us that it was regularly sighted on MoUs/Joint Statements between the UK and other countries before they were signed. It gave the example of joint statements between the UK and China and India on education and said that these arrangements followed a “well-established pattern in accordance with the provisions of the devolution Memorandum of Understanding and its associated Concordats” across a wide range of policy areas.

74. The Scottish Executive argued that advance sighting of the MoU with Libya may have enabled the UK Government to negotiate a PTA with Libya with a carve-out provision for any individual prisoner, i.e. Mr al-Megrahi. This is because the MoU with Libya already specifically referred to “working on the basis of the British model agreement on Prisoner Transfer presented recently to the [Libyan] Secretary for Justice during his visit to the United Kingdom of 22-24 May [2007]”. As the Secretary of State for Justice told the Justice Committee on 24 November 2009, one of the problems that emerged when the UK was negotiating the PTA with Libya was that “initially they had been given the standard draft Council of Europe prisoner transfer agreements in standard form, which did not provide a specific carve-out for any individual prisoner”.

75. The Concordat on International Relations between Scotland and the UK clearly states that the Government should provide Scottish Ministers with information and advice on international developments that may affect their devolved responsibilities. Although the Concordat is not a legally binding document, we conclude that it was regrettable that the UK Government did not advise the Scottish Executive of the terms of the Memorandum of Understanding between Libya and the United Kingdom relating to the devolved matter of justice prior to signing.

76. In future, the UK Government must consider whether the interests of confidentiality outweigh the responsibility it has to keep the Scottish Executive informed of international agreements made on its behalf, particularly in cases such as this where Scottish Ministers will be forced to make decisions on highly emotive and controversial devolved matters as a result.

120 Q 156
121 Ev 67
122 Ev 65
123 Ev 65
124 “Memorandum of Understanding”, BBC News online, news.bbc.co.uk, 8 June 2007
125 Oral evidence taken before the Justice Committee on 24 November 2009, HC 55–i, Q 4
Negotiation of the Prisoner Transfer Agreement between Libya and the UK

77. Following the signing of the Memorandum of Understanding (MoU) between the UK and Libya in 2007, negotiations began on the terms of the Prisoner Transfer Agreement (PTA) between the two countries. The Scotland Office written evidence to us stated that there was “direct engagement with the Scottish Government on the drafting of the PTA throughout; and as is a matter of public record, the Government sought to include a clause that would exclude Mr al-Megrahi from the scope of the PTA at the request of the Scottish Ministers.”

78. In its memorandum to the Committee, the Scottish Executive said that relations between the UK Government and the Scottish Executive on Prisoner Transfer Agreements (PTAs) had “historically been good”. The initiative lies with the Ministry of Justice, but “Scottish interests have been informed and involved through the Scottish Prison Service at appropriate points prior to and during the negotiation of PTAs”.

79. The Cabinet Secretary for Justice confirmed in evidence to us on 12 January that the discussions between the Ministry of Justice and the Scottish Justice Department on common problems such as people trafficking, serious and organised crime and terrorism had been “harmonious and good”. In addition, generally PTAs were seen as “sensible” and a concept that the Scottish Government supported.

80. The First Minister told the Committee that he had many exchanges with the Secretary of State for Justice on the subject of the PTA and that there could not have been any doubt of what the First Minister’s position had been on the PTA. In his Statement to the Scottish Parliament on the compassionate release of Mr Al-Megrahi in August 2009, Mr MacAskill, said:

> Throughout the negotiations and at the time of the signing of the PTA with Libya, the Scottish Government’s opposition was made clear. It was pointed out that the Scottish Prison Service had only one Libyan prisoner in custody.

The Scottish Cabinet Secretary for Justice told us on 12 January that in his view, the PTA between Libya and the UK circumvented the due process of law in Scotland.

81. We heard that the Justice Secretary and First Minister had been repeatedly assured, first by Lord Falconer, then Secretary of State for Justice (in June 2007), and then by Rt Hon Jack Straw MP, his successor at the Ministry of Justice, (in July 2007) that Mr al-Megrahi would be excluded from the terms of the PTA with Libya. However, it became apparent

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126 Ev 56
127 Ev 62
128 Q 56
129 Q 62
130 Q 47
132 Q 64
133 Q 41, Ev 62
that Libya would not sign a PTA that allowed the exclusion of any particular prisoner. As mentioned previously, the Secretary of State for Justice referred to the original model of agreement given to the Libyans as a problem in negotiations as it had not allowed for a carve-out of particular prisoners. On 12 October 2009, the Foreign Secretary told the House that, following the request of the Scottish Executive, the Ministry of Justice negotiation team had sought to amend the standard PTA model agreement so as to exclude Mr al-Megrahi from the PTA with Libya. However, the Libyans would only sign a PTA without any specific exclusion. The Foreign Secretary stated that it would have been detrimental to the UK if it had ended negotiations as a result:

[...] this would have set back our wider national and commercial interests that flowed from normalised relations [...] Since the PTA involved no prejudice to the rights of the Scottish Executive, nor pressure on the Scottish Executive, the Government decided that it was right to go ahead.

82. The Scotland Office memorandum to us emphasized the Foreign Secretary’s argument:

The UK Government took the view that [the withdrawal of the Libyans from negotiations over this issue] would set back our wider national interests that flowed from normalised relations and the Government therefore agreed to the PTA text without the exclusion. Scottish Ministers were informed of this decision in advance, and were also kept informed in advance of signature of the PTA.

However, Kenny MacAskill MSP told us that in his view the UK Government “ran for cover”, and let the Scottish Executive deal with the issue.

83. The Secretary of State for Justice told us that “my officials [...] did their very best on this”. He believed that the Libyans always understood that it would be for the Scottish Executive to decide the result of any PTA application made on behalf of Mr al-Megrahi. He also emphasised that the UK Government had not promised the release of Mr al-Megrahi in return for a bilateral agreement with Libya. However, his description of the right of the Scottish Ministers to consider an application made under the PTA as a “veto” and an “absolute right to refuse the transfer” was overly simplistic. As the Scottish Executive pointed out in its follow up evidence to us of 6 February, the Scottish Cabinet Secretary for Justice could not simply decide to refuse a transfer request. There had to be a reason, and that reason could have been challenged in court through the judicial review process.

134 Oral evidence taken before the Justice Committee on 24 November 2009, HC 55–i, Q 4
135 HC Deb, 12 October 2009, col 31
136 Ev 56
137 Q 69
138 Q 162
139 Q 162
140 Q 163
141 Q 156
142 Ev 67
84. It is not within our remit to judge whether the benefits of the Memorandum of Understanding and Prisoner Transfer Agreement between UK and Libya were worth the concessions that had to be made by the UK negotiating team. However, the disagreement between the UK and Scottish Governments over the Prisoner Transfer Agreement throws up the question of how fundamental differences in opinion between the UK Government and devolved administrations can be resolved. Whilst we acknowledge that decisions on foreign affairs will always rest with the UK Government, we conclude that communications between Whitehall and Scotland at earlier stage during the Memorandum of Understanding negotiations could have produced a more satisfactory outcome with a possible carve-out for Mr al-Megrahi. We recommend that the Joint Ministerial Committee examine what lessons can be learned from the disagreements during negotiations over the prisoner transfer agreement.

Decision to reject the application for a prisoner transfer for Mr al-Megrahi

85. On 20 August 2009, Scottish Justice Secretary Kenny MacAskill MSP announced his decision to reject the Libyan Government’s application for a prisoner transfer of Mr al-Megrahi under the PTA.143 On 24 August 2009, in a statement to the Scottish Parliament, the Scottish Justice Secretary said one of the reasons for the rejection of the PTA was that the American Government and families of the victims were seemingly assured by the UK Government that Mr al-Megrahi would serve out his sentence in a Scottish prison.144 Mr MacAskill told us that the UK Government had declined to make representations or provide information to him on this topic.145

86. Regarding discussions between the US and UK Governments prior to the PTA and alleged assurances that Mr al-Megrahi would serve his whole sentence in Scotland, Mr MacAskill said in his statement of 20 August:

The United States Attorney General, Eric Holder, was in fact deputy Attorney General to Janet Reno at the time of the pre-trial negotiations. He was adamant that assurances had been given to the United States Government that any person convicted would serve his sentence in Scotland. Many of the American families spoke of the comfort that they placed upon these assurances over the past ten years. That clear understanding was reiterated to me, by the US Secretary of State Hillary Clinton.

I sought the views of the United Kingdom Government. I offered them the right to make representations or provide information. They declined to do so. They simply informed me that they saw no legal barrier to transfer and that they gave no assurances to the US Government at the time. They have declined to offer a full explanation as to what was discussed during this time, or to provide any information to substantiate their view. I find that highly regrettable.


144 SP OR 24 August 2009, col 18991

145 Q 67
I therefore do not know what the exact nature of those discussions was, nor what may have been agreed between Governments. However, I am certain of the clear understanding of the American families and the American Government. Therefore it appears to me that the American families and Government either had an expectation, or were led to believe, that there would be no prisoner transfer and the sentence would be served in Scotland.

It is for that reason that the Libyan Government’s application for prisoner transfer for Abdelbasit Ali Mohmed Al-Megrahi I accordingly reject.\(^\text{146}\)

87. On the issue of the request from the Scottish Executive for information, in its written evidence to us, the Scotland Office stated that:

[...] in July 2009 the Scottish Government asked the FCO for advice on the extent to which the 1998 UK-US letter to the United Nations Secretary-General (dated 24 August 1998) on the initiative for the trial of the Lockerbie suspects, and the UN Security Council Resolution 1192 (1998), created a commitment in relation to the place of future imprisonment of the Lockerbie accused. [...] The FCO replied to the Scottish Government in July that it did not consider that either the joint UK-US letter, UN Security Council Resolution 1192 (1998) or the accompanying discussions between the UK Government and the United States Government regarding the implementation of the trial initiative as set out in the joint letter, presented an international law bar to such a transfer under the PTA, where it was consistent with Scots law. Minister Ivan Lewis reiterated this advice in a letter to Scottish Justice Secretary Kenny MacAskill in August 2009.\(^\text{147}\)

88. The Secretary of State for Justice told us on 27 January that the Foreign Office “answered every question put to it by the Scottish Government in accordance with the laws governing devolution of power between the UK Government and Scottish Ministers in Edinburgh, and Scottish Ministers had all the information needed to make a decision under the Prisoner Transfer Agreement”.\(^\text{148}\)

89. Kenny MacAskill MSP disagreed that he had all the information that he needed: “the United Kingdom did not seem prepared to put forward any information other than to say that there had been a political, not legal, agreement” that Mr al-Megrahi would serve his sentence in a UK prison.\(^\text{149}\) He told us “Whether that was a sworn affidavit, a signed document or simply an understanding between governments, I do not know.”\(^\text{150}\)

90. We conclude that under the Concordat of International Relations, the United Kingdom Government had an obligation to provide relevant and comprehensive

\(^{146}\) Scottish Executive, “Decisions on the applications for prisoner transfer and compassionate release in relation to Abdelbaset Ali Mohmed Al-Megrahi”, Statement by Cabinet Secretary for Justice Kenny MacAskill MSP, 20 August 2009

\(^{147}\) Ev 56

\(^{148}\) Q 182

\(^{149}\) Q 70

\(^{150}\) Q 68
information and analysis to the Scottish Executive on the agreement made between the US and UK Governments on where Mr al-Megrahi would serve his prison sentence. Although the Scottish Executive was informed by the UK Government that there was no legal barrier to a transfer under the Prisoner Transfer Agreement, there is a disagreement between governments over whether the information provided to the Scottish Executive was comprehensive enough.

91. We conclude that it would be helpful if in future the UK Government could respond to requests for information from the Scottish Executive with either the relevant documentation or a clear explanation as to why it is not possible to provide the information so as to reduce the possibility of disagreements between the two Governments.

**Decision to release Mr al-Megrahi on compassionate grounds**

92. In the same decision of 20 August, Mr MacAskill granted Mr al-Megrahi’s application for compassionate release, so that he could “return to Libya to die”.151 Mr al-Megrahi arrived back in Libya on 21 August 2009.

93. Mr al-Megrahi was eligible to be considered for compassionate release under section three of the Prisoners and Criminal Proceedings (Scotland) Act 1993, which gives the Scottish Ministers discretionary power to consider applications. The 2005 Guidance from the Scottish Prison Service, which assesses applications under the Act, provides that all prisoners regardless of sentence length are eligible to be considered for such release. Mr al-Megrahi had applied for compassionate release on 24 July 2009 after being diagnosed with cancer in September 2008.152

94. In his statement to the Scottish Parliament, the Scottish Justice Secretary said the reason for granting Mr al-Megrahi compassionate release was that he was expected to live less than three months due to terminal prostate cancer. Mr MacAskill said that the medical reports, doctors, the Governor of the prison, the prison social work staff and the Parole Board all recommended compassionate release.153

**The UK Government’s role in Mr al-Megrahi’s release**

95. The Scottish Justice Secretary had the devolved power to make the decision regarding both the application for a prisoner transfer and compassionate release. The Justice Secretary said in his statement to the Scottish Parliament that it was for the reasons he stated—“and these reasons alone”—that Mr al-Megrahi would be released.154

96. The UK Government has repeatedly said it played no role in the decision to release Mr al-Megrahi as it was a decision for the Scottish Ministers alone. However, from the first

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152 *Ibid*.

153 SP OR 24 August 2009, col 18994

154 SP OR 24 August 2009, col 18996
reports anticipating the Scottish Justice Secretary’s announcement, there was speculation about the “deals” done in exchange for Mr al-Megrahi’s release, and allegations that the UK Government had pressured the Scottish Executive to grant the release.  

97. On 28 August, it was reported that Colonel Muammar Gaddafi’s son told The Herald there was an “obvious” link between trade talks between Libya and the UK and efforts to release the man convicted of the Lockerbie bombing. However, he also reportedly emphasised that the PTA and negotiations preceding it were unrelated to al-Megrahi’s actual release, saying that the PTA “was one animal and the other was the compassionate release […] They are two completely different animals. The Scottish authorities rejected the PTA. It did not work at all, therefore it was meaningless. He was released for completely different reasons”.  

98. On 2 September 2009, it was reported that the then Foreign Office Minister, Rt Hon Bill Rammell MP, had given a message to the Libyan Europe Minister, Abdulati Alobidi, in February saying that “neither the Prime Minister nor the Foreign Secretary would want Mr Megrahi to pass away in prison but the decision on transfer lies in the hands of Scottish Ministers”.  

99. The Prime Minister was reported as belatedly “endorsing” the decision of the Scottish Justice Secretary, stating on 2 September 2009: “I respect the right of the Scottish ministers to make the decision, and the decision”. In responding to allegations that the UK was behind Mr al-Megrahi’s release in exchange for business or oil deals, the Prime Minister was also reported as saying: “There was no conspiracy, no cover-up, no double-dealing, no deal on oil, no attempt to instruct Scottish ministers, no private assurances by me to Colonel Gaddafi”.  

100. On 12 October 2009, the Foreign Secretary, Rt Hon David Miliband MP, made a statement before the House of Commons regarding the UK Government’s role in the Scottish Justice Secretary’s decision. He said:  

Notwithstanding that any decision on release was for Scottish Ministers and the Scottish judicial system, the UK Government had a responsibility to consider the consequence of any Scottish decision. […] British interests, including those of UK nationals, British businesses and possibly security co-operation, would be damaged—perhaps badly—if Megrahi were to die in a Scottish prison rather than in Libya.

The Foreign Secretary went on to say: “Given the risk of Libyan adverse reaction, we made it clear to them that as a matter of law and practice it was not a decision for the UK
Government and that as a matter of policy [the UK Government] were not seeking al-Megrahi’s death in Scottish custody.”

101. In evidence before the House of Commons Justice Committee on 24 November 2009, the Secretary of State for Justice, Jack Straw, emphasised that the UK Government’s “advice” to the Scottish Executive regarding the application for compassionate release was not that the UK Government “wanted him released on compassionate grounds” but that it was “not seeking Megrahi’s death in Scottish custody”—the two positions were different. We recognise the distinction. In its memorandum to us, the UK Government repeated its assertion that the decision regarding the application for compassionate release was for Scottish Ministers alone.

102. The First Minister told us that the Scottish Executive was never in any doubt that the UK Government did not want al-Megrahi to die in prison. However, both the First Minister and the Cabinet Secretary for Justice were clear in evidence that the responsibility for the decision to release Mr al-Megrahi on compassionate grounds lay with Mr MacAskill alone, and that the Cabinet Secretary was prevented by his quasi-judicial role in this from seeking the advice of the UK Government on his decision. The First Minister told us that the UK and US Governments were given prior notice of the decision, as they had requested, in order to effect assurances from the Libyan government on the type of reception that Mr al-Megrahi would receive when returning to Libya.

103. Sir John Elvidge, Permanent Secretary to the Scottish Executive told us that the UK Government had been kept informed of the timescale of the decisions on the PTA and application for compassionate leave and of the potential implications of the decisions—irrespective of which way they went—to allow scenario planning. Robert Gordon, Director General, Justice and Communities, Scottish Executive, told the Committee that his colleagues had liaised regularly with officials in the Foreign and Commonwealth Office in Whitehall and the UK Embassy in Tripoli. Professor Jim Gallagher, Director General of Devolution at the Ministry of Justice, told us that the Scottish Executive “very professionally and courteously” told the UK Government at both official and Ministerial

161 HC Deb, 12 October 2009, col 31
162 HC Deb, 12 October 2009, col 31
163 Oral evidence taken before the Justice Committee on 24 November 2009, HC 55–i, Qq 10–11
164 Ev 56
165 Q 46
166 Qq 47, 48, 55
167 Q 88
168 Q 47
169 Q 49 [Sir John Elvidge]
170 Q 90 [Mr Robert Gordon]
level “when a decision might be made and very shortly before it, what the decision actually was”.\textsuperscript{171}

104. However, there did not appear to be any planning for joint media activity post-announcement.\textsuperscript{172} As a result, the UK Government response to Mr MacAskill’s decision appeared disjointed with the belated announcement from the Prime Minister on 2 September 2009. We conclude that the discussions between the UK Government and Scottish Executive in the run up to the announcement of Mr al-Megrahi’s release on compassionate grounds are a good example of how close cooperation and communication, even on the most sensitive and confidential of matters, can enable departments to plan for the impact on the UK of the decisions of devolved administrations. However, we consider it unfortunate that the official response of the UK Government to Mr al-Megrahi’s release in August 2009 did not reflect either the careful planning undertaken by both Governments beforehand or the information provided in the measured statement of the Foreign Secretary to the House of Commons on 12 October 2009. As a result, it appeared that the UK Government had not fully anticipated either the immediate media reaction or the subsequent international response. This is a matter for the UK Government to ponder.

\textsuperscript{171} Q 176
\textsuperscript{172} Qq 106–108
5 Scotland and the EU

Representation of Scotland at EU level

105. A number of devolved responsibilities, such as agriculture and fisheries, are significantly shaped by EU decisions, but Scotland is formally represented by the UK Government at EU level. The UK Government emphasised to us the benefits to Scotland of being part of the UK at the negotiating table, and also the importance to the UK of it speaking with a single voice on the wider world stage:

The UK is a highly respected force in the world’s leading multilateral organisations. We need therefore non sequitur to speak with a single voice to our international partners, whether in the EU, the UN, the Commonwealth or other bodies. The international challenges facing the UK are greater than ever—security and counter-terrorism, energy and climate change, and human rights and tackling global poverty. A unified response is vital to securing our national interests for all parts of the United Kingdom.173

106. How the UK Government works with Scotland on developing UK policy on EU matters, and on representing Scottish interests within the UK policy line, is underpinned by the Memorandum of Understanding and Part B1 (concordat on coordination of European Union policy issues). This states that “the UK Government wishes to involve the Scottish Executive as directly and fully as possible in decision making on EU matters which touch on devolved areas”.174 Of the UK’s interaction with Scotland on EU matters, the Scotland Office says that “overall we have a strong cooperative relationship with the Scottish Executive […] there are well-established mechanisms to ensure that the interests of the [devolved administrations] are fully represented in the EU and these processes have proven to work well”.175 The Scottish Executive’s written evidence stated that arrangements usually worked “effectively”,176 perhaps unsurprisingly the Scottish Executive felt that Scottish interests were often lost or diluted during their incorporation into the UK negotiating line.177

107. Regarding policy development, the Scotland Office stated that Scottish Executive officials took an active and participatory role in Working Groups considering issues that touched on devolved matters. In addition, a number of mechanisms are in place to manage communication between the UK Government and Scottish Executive: correspondence, official-level meetings and fixed bilateral and multilateral Ministerial meetings. For example, on justice matters, whenever there is a coordination meeting between Brussels and London, Edinburgh is also invited and participates fully.178

173 Ev 55
174 Cm 5240, p 17
175 Ev 45–46
176 Ev 62
177 Ev 63
178 Ev 46
108. The UK Government has stated that “every effort is made to arrive at common positions with regard to EU policy development and implementation […] the UK Government ensures that its final position represents the interests of the UK as a whole”.179 In his evidence to us, the Secretary of State for Justice expressed his opinion that Whitehall departments strove to be inclusive when dealing with devolved administrations and when developing the UK negotiating line. However, he also pointed out that the European Union is a treaty organisation and that the state which is bound to that treaty is the United Kingdom.180

109. The Scottish Executive says it is “committed to maintaining an active and constructive relationship with the UK Government on EU matters”. However, it believes that it has less access to and influence on EU institutions than other similar sized countries. It also notes that, along with other devolved administrations, it is no longer invited (since mid-2008) to attend the “fortnightly UK Government officials’ forum […] where key decisions are made on UK policy in EU matters, including those which impact on devolved responsibilities”181. Most significantly, it also considers that Scotland’s views are not always properly sought nor fully articulated in the UK’s responses at EU level.182

110. Evidence taken by the Calman Commission also drew attention to examples of the lack of consideration paid to the impacts of EU directives which have a disproportionate effect in Scotland, such as, for example, the nitrate directive. In another example, witnesses said that difficulties have been encountered in raising problems which are significant in Scotland but less so elsewhere in the United Kingdom, such as the abuse of diazepam.183

111. In a 2009 Advice Paper the Royal Society of Edinburgh give an example of an incident when Scotland was not consulted over a possible change to agriculture policy despite this being a devolved area:

The UK Government previously proposed ending direct support for agriculture under Pillar 1 when the CAP is reviewed after 2013. No attempt was made to assess the effect that such a change would have on agriculture across the UK. Given the distinctive nature of Scottish agriculture we regard this as an unacceptable failure in policy formulation that must not be repeated in the future.184

**Joint Ministerial Committee (Europe)**

112. Scottish Ministers are formally consulted on EU matters by the UK Government through Ministerial Committees. The Joint Ministerial Committee (Europe) (JMC(E)), which we touched on in Part Three, is one of the principal mechanisms for consultation on UK positions on EU issues which affect devolved matters. It enables Ministers from the devolved administrations to make UK Ministers aware of their priorities within the EU and

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179 Ev 46
180 Q 146
181 Ev 63
182 Ev 64
to contribute towards the UK negotiating line. As defined by the Memorandum of Understanding between the UK and the devolved administrations, the Committee’s objectives are to:

- take stock of relations;
- share information, and
- address particular issues or problems that have not been resolved.185

113. Unlike the domestic and plenary JMCs, the JMC(E) has met regularly over the past eight years. There is a general sense that it has been a more successful forum than the other JMCs and that it has worked well.186 The Committee generally meets four times a year in the fortnight preceding each European Council meeting. It is supported by a secretariat drawn from the Cabinet Office and the devolved administrations.187 The meetings are attended by UK Government departments as well as the devolved administrations in order to discuss and agree lines for the UK to adopt. All scrutiny documents are shared with the devolved administrations to allow them to participate fully in preparatory discussions.188 However, all documents and discussion at the JMC(E) are confidential.189

114. Chris Bryant MP, Minister for Europe, admitted that it was challenging to organise dates for the JMC(E) that were suitable for all Ministers.190 He said that he contacted the devolved administrations ahead of the meeting to see if they wished any specific matters to be placed on the agenda. Quite often issues or problems raised during those phone calls would be resolved by the time of the meeting.191 The presumption was that an unresolved issue would only come to JMC(E) when there had been an impasse elsewhere.192 The Minister also told us that even when there were differences of opinion at the meetings, the UK position was better informed for having an “effective and open discussion” on matters of dispute.193

115. In its written evidence to us, the UK Government refers to the JMC(E) as a “useful, efficient and effective meeting for all administrations.” It continues: “We have ensured that the meeting has a strong focus on coordinating matters of high interest to the DAs [devolved administrations] and that DAs and UK Departments have the opportunity to suggest agenda items […] In addition, senior officials from the UK Government and the DAs meet six times per year to make sure that the right issues are raised at ministerial level and to ensure a comprehensive sharing of information in advance of these meetings”.194

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185 Ev 47
186 Q 133 [Rt Hon Jack Straw MP]
187 Ev 46
188 Commission on Scottish Devolution, Serving Scotland Better: Scotland and the United Kingdom in the 21st Century, p 123, para 4.32
189 Cm 5240, para B1.4
190 Q 209
191 Q 215
192 Ev 47
193 Q 216
194 Ev 47
Agreements made at the JMC(E) were not legally binding “although the expectation is that administrations will support positions that they have contributed to and agreed”.195

116. As already discussed in paragraphs 49–51 above, written evidence submitted to us raised the issue of transparency of JMC proceedings, and stated that it was difficult to gauge the success of the mechanisms as the process was unclear.196 The Minister for Europe told us that as discussions at the JMC(E) centred on establishing the UK negotiating position for EU matters, it would not be in either Scotland’s or the UK’s interests to disclose the content of discussions.197 He also pointed out that many EU matters were ongoing, for example negotiations on the Common Agricultural Policy would continue for many years and any disclosure of internal discussions might weaken the UK’s position.198

117. The Royal Society of Edinburgh believed that the Scottish Parliament’s External and European Relations Committee was “severely constrained” in its ability to scrutinise the dialogue between Scottish and UK Ministers on EU issues. The Royal Society argued that the confidentiality provision in the Concordat between Scotland and the UK should be relaxed to enable the Committee to take evidence from Scottish Ministers in private on EU policy issues.199

118. We conclude that whilst there are sensible reasons for not disclosing the substance of discussions at Joint Ministerial Committee (Europe) meetings, there would be merit in publishing a timetable and agenda for the four meetings a year to provide some element of transparency to the proceedings. In its Response to our Report the Government should provide details of to what extent the confidentiality provision of the Concordat on coordination of European Union policy issues might be relaxed to allow Scottish Ministers to give evidence to the Scottish Parliament External and European Relations Committee in private.

**UK Representation to the EU**

119. The UK Representation to the EU (or UKRep), based in Brussels, is responsible for representing the views of all parts of the UK to the European Institutions. Specifically it promotes UK policy in Brussels, negotiating and lobbying the Commission, Parliament and Member States.200 The Scotland Office memorandum states that UKRep “involves the Scottish Executive as directly and fully as possible in decision making on EU matters which touch on devolved areas”.201 A “key relationship” for UKRep is with the Scottish Executive’s own EU Office in Brussels which was established on 1 July 1999. Although the staff work from separate offices, the Scottish staff form part of UKRep for diplomatic reasons.202 The office was created in order to “help focus UKRep’s activities with specific

195 Ev 47
196 Ev 51 and 59
197 Qq 217–218
198 Q 219
199 Ev 58
200 Ev 46
201 Ev 46
202 Ev 62
regard to issues of interest to Scotland, post-devolution.” According to the Scotland Office, this has “borne fruit on numerous dossiers, for example lobbying the European Commission and European Parliament on matters such as structural funds, spirit drinks, ferry services and anti-dumping of salmon.”203 The Scottish Executive also has offices in Washington and Beijing, operating within the British Embassies there.204

120. The Minister for Europe, told us that the two offices “work very closely together” and that the FCO valued the added contribution that the Scottish Executive EU Office made.205 David Slater, Deputy Head of the Communications, Institutions, Treaty and Iberia Group, FCO, told us that Donald Henderson, the Head of the Scottish EU Office had a pass to the UKRep office allowing easy access to the UK officials and also attended Heads of Section meetings. There were regular discussions between officials on different issues which ensured that both UK and Scottish offices understood each other’s positions.206 The Scottish Executive confirmed that the two offices maintained a “close and productive” working relationship with each other.207

121. There is evidence that the Scottish Executive is increasingly appreciating the importance of developing networks in Brussels which will allow Scotland to play a greater role in directly influencing the formulation of EU policy in its earliest stages. In his evidence to this inquiry the First Minister stated: “direct access to European institutions will always be better than going through another operator”.208 He emphasised that approaching Commissioners directly is very much part of the institutional culture of the European Union. The European and External Relations Committee of the Scottish Parliament has recommended that “the Scottish Government should consider the development of durable social partnerships in order to facilitate stakeholder engagement through the EU legislative process”.209 The UK Government’s position is that officials or Ministers from the devolved administrations are free to meet with the European Commission, “provided it is clearly understood who they are and that they do not represent the UK as a whole (the Commission are used to the concept of sub-national administrations)”.210 The Minister for Europe did not think that there was a problem with this.211

**Representation at the EU Council of Ministers**

122. As it is the UK that is the member state of the European Union, it is UK Government Ministers who represent UK (and Scottish) interests at the EU Council of Ministers. A

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203 Ev 46
204 Ev 56
205 Q 226
206 Q 228
207 Ev 62
208 Q 18
211 Q 227
particular bone of contention for the Scottish Executive was that Scottish Ministers could ask to attend the Council of Ministers but could only attend with the permission of the relevant UK Secretary of State, and if granted permission to speak, must speak to the agreed UK negotiating lines.\textsuperscript{212} Although noting that Scottish Executive officials attend a range of Working Group meetings the Scottish Executive memorandum stated that “[r]ecent experience has suggested that there is little scope for Scottish Executive attendance at informal Councils with the UK often citing pressure on spaces”.\textsuperscript{213}

123. On the subject of attendance at Council meetings, the Memorandum of Understanding between the UK and the devolved administrations states:

Decisions on Ministerial attendance at Council meetings will be taken on a case-by-case basis by the lead UK Minister. In reaching decisions on the composition of the UK team, the lead Minister will take into account that the devolved administrations should have a role to play in meetings of the Council of Ministers at which substantive discussion is expected of matters likely to have a significant impact on their devolved responsibilities.\textsuperscript{214}

The Scotland Office’s White Paper, \textit{Scotland’s Future in the United Kingdom}, made the following recommendation:

The Government is keen that UK Ministers make their decisions on whether or not it will be possible for a Devolved Administration to participate in a UK delegation on a timely basis, following clear guidance.\textsuperscript{215}

124. In evidence to us the Secretaries of State for Justice and Scotland both argued strongly that the Scottish Executive had substantial access to Council meetings. In follow-up evidence to us, the Secretary of State for Scotland stated that Scottish Executive Ministers had attended 112 Council meetings since 1999 and had led the UK delegation on five occasions.\textsuperscript{216} The Minister for Europe, told us that at Justice and Home Affairs Councils the Scottish and UK Ministers had “boxed and coxed” at Council meetings with one taking the seat for one subject and the other for the next subject. In his opinion, this arrangement had worked well.\textsuperscript{217}

125. Although he allowed that more Scottish Executive Ministers had attended Council meetings this year than last year and that engagement was improving, the First Minister told us that he felt there was a need for a protocol to be established on the composition and organisation of Council Meetings to ensure, for example, that in the absence of a UK Minister, it would be a Minister from a devolved administration that would take the chair.

\textsuperscript{212} Ev 63
\textsuperscript{213} Ev 63
\textsuperscript{214} Cm 5240, para B4.13
\textsuperscript{215} Scotland Office, \textit{Scotland’s Future in the United Kingdom: Building on ten years of Scottish devolution}, Cm 7738, para 3.13
\textsuperscript{216} Qq 141–142, Ev 67–71
\textsuperscript{217} Q 190
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in preference to a UK civil servant. The Scottish Executive took particular exception to the Cabinet Office guidance that specifies:

When a UK Minister is not present, unless the lead Secretary of State has agreed that a devolved Minister should speak on this basis, it will be for UKRep, as representatives of the UK Government, to lead, even if devolved Ministers are present.

126. In the First Minister’s view, the reason for a Council meeting was for ministerial representation. He gave the example of a UK civil servant taking the chair at a Council meeting when Richard Lochhead MSP, Scottish Cabinet Secretary for Rural Affairs and Environment, had been present. The First Minister also argued that in issues where Scotland’s interests exceed other areas of the UK, such as fisheries management and domestic ferry services, Scotland should take the lead in discussions at UK and EU level and should systematically sit on the Council Meetings with those issues on the agenda.

127. The Minister for Europe disagreed with the First Minister’s suggestion for a protocol. He believed that it must be for UK Government Ministers to decide who takes the chair at Council meetings. He explained that it would be difficult for the UK to allow a Scottish Minister to take the chair and negotiate on behalf of the UK on issues where Scottish policy differed widely from the UK position:

If we do not think that a minister from one of the devolved administrations is on-side then it is better if it is a British Foreign Office official who bats for Britain. Even if it is a member of the devolved administration, the person who would be responsible for it to Parliament is the British Westminster minister, and I think that is an important principle. That is the thing that guides the Westminster minister when deciding who should be sitting in the seat.

128. However, the Minister for Europe pointed out that Scottish Ministers had chaired 12 Council meetings in the past year and he believed that “In the vast majority of cases ministers are very happy to hand over the chair where there is a specific point that the Scottish Executive wants to make”.

129. We conclude that if it would be helpful to the UK to have a particular Minister from one of the devolved administrations in the chair, then the responsible UK Minister should ensure that this happens where possible. From the evidence that we have received, the UK Government appears to be open to this. However, we conclude that it is reasonable for the UK Government to prefer a UK civil servant to take the chair in preference to a devolved administration Minister if the devolved

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218 Q 31
219 Cabinet Office, *Working with the Devolved Administrations: Guidance for UK Government Departments*, para 35
220 Q 35
221 Q 34
222 Q 31–33
223 Q 193
224 Q 203
225 Qq 193, 195
administration does not agree with the UK negotiating line. We recommend that in such cases, the UK Government should provide appropriate notice to the devolved administration of its intention to field a civil servant in preference to one of its Ministers.

The regional dimension of the EU and subsidiarity

130. The Lisbon Treaty attempts to develop a more inclusive approach to dealing with National Parliaments and regional parliaments and assemblies making the European Union more accessible, responsive and democratic.\textsuperscript{226} The Treaty introduces several changes designed to allow national, sub-national and regional legislative bodies to assume an increasingly important role in EU activities and in the development and revision of EU legislation.

131. The principle of subsidiarity is “based on the presumption that action should be taken at the lowest level of governance consistent with the subject matter and the objective to be attained”.\textsuperscript{227} The amendments to the Treaties introduced by the Treaty of Lisbon makes the concept of subsidiarity into a legal principle defined in Article 5 (3) of the Treaty on European Union:

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if an insofar as the objectives of the proposed action cannot be sufficiently achieved by other Member States, either at central level or regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.\textsuperscript{228}

A 2008 briefing prepared by the Scottish Parliament Information Centre made the following statement on subsidiarity:

From the point of view of national and regional parliaments across the European Union one of the most significant aspects of the Treaty of Lisbon is the inclusion of new strengthened provisions on the principle of subsidiarity. These provisions provide national parliaments and, where appropriate, regional parliaments with a stronger role in the European Union legislative process.\textsuperscript{229}

132. National Parliaments are responsible for carrying out scrutiny of draft European legislation to ensure that it complies with the principle of subsidiarity, checking that the proposals set out in the legislation could not be more effectively made at national or sub-national level. Under Article 6 of the Protocol on the application of the principles of subsidiarity and proportionality, it is for National Parliaments to consult where appropriate regional parliaments or assemblies on their views on the local implications of

\textsuperscript{226} European Union, The Treaty at a glance, europa.eu/lisbon_treaty
\textsuperscript{227} House of Lords Select Committee on the European Union, Note by the Legal Adviser on Subsidiarity: Assessing a Proposal, November 2009, www.parliament.uk
draft EU legislation.\textsuperscript{230} If a National Parliament finds that the draft legislation under scrutiny violates the principle of subsidiarity it can submit a Reasoned Opinion to the relevant EU institutions. If one-third of national parliaments submit reasoned opinions the proposal must be reviewed by the responsible institution. This is the “yellow card” procedure. The institution may decide to maintain, amend or withdraw the draft. Reasons must be given for this decision. If a majority of national parliaments oppose a Commission proposal, and they have the backing of the majority in the European Parliament or 55% of the Members of the Council, the proposal is abandoned: this is the “orange card” procedure.\textsuperscript{231}

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133. Article 6 provides national parliaments with an eight week maximum period for submission of a Reasoned Opinion. National parliaments alone can play the yellow card, and they may consult regional assemblies as part of that process. This is not a new idea; it formalises an arrangement that National Parliaments have previously been encouraged to put in place. However, evidence given to the Calman Commission spoke of delays in making draft legislation available for scrutiny.\textsuperscript{232}

134. The House of Lords European Union Committee report on subsidiarity and the Reasoned Opinion Procedure notes that this process is significant for UK devolved administrations and that it brings:

\[\text{[...]}\text{ renewed hope that the early warning mechanism will give local government and regional assemblies greater access to the European lawmaking process and allow them to assess proposed EU legislation more closely with regard to its local financial and political impact.}\textsuperscript{233}

135. The Minister for Europe told us that the Government sends EU documents and explanatory memoranda with specific reference or interest to Scotland to the relevant committees in the Scottish Parliament at the same time as they are sent to the UK Parliament’s committees.\textsuperscript{234} If the Scottish Parliament wished to suggest to Westminster that it submit a Reasoned Opinion, the Minister considered that it would be for the Scottish and UK parliamentary committees to manage the mechanics of that.\textsuperscript{235}

136. In its 2008 Report, \textit{Subsidiarity, National Parliaments and the Lisbon Treaty}, the European Scrutiny Committee commented on the role of National Parliaments in ensuring that regional assemblies or parliaments are adequately consulted:

\begin{itemize}
\item \textsuperscript{230} EEPA, \textit{Protocol on the Application of the Principles of Subsidiarity and Proportionality}, www.lisbon-treaty.org
\item \textsuperscript{231} Ev 50
\item \textsuperscript{233} House of Lords, \textit{Strengthening National Parliamentary Scrutiny in the EU—The Constitution’s Subsidiarity Early Warning Mechanism}, Fourteenth Report of the European Union Committee, Session 2004–05, HL Paper 101, para 188
\item \textsuperscript{234} Q 231
\item \textsuperscript{235} Q 231–232
\end{itemize}
The European Scrutiny Committee would not be in a position to act on behalf of the devolved assemblies in spotting what—for them—might be objectionable proposals. 137. The Committee considered that the onus should be on the devolved administrations to obtain draft legislation, vet it and tell the Committee as quickly as possible if they have objections. The Committee would then invite the comments of the devolved Assemblies or Parliaments on the Committee’s drafts of opinions where the draft includes reference to a matter on which one or more devolved assemblies have expressed a view.\(^\text{236}\)
6 Conclusion

138. In the twelve years since the passing of the Scotland Act 1998, a sophisticated network of intergovernmental contacts and communication has developed. The Scottish Executive and UK Government communicate on a daily basis at both ministerial and official level and, from the evidence we have received, this appears to work well. It is widely acknowledged that whilst the Joint Ministerial Committee (Europe) met regularly and worked well, the plenary Joint Ministerial Committee and its sub-committees did not work. There were no meetings of the Joint Ministerial Committee between 2002-2008. Both governments agree that the recommencement of the Joint Ministerial Committees (Plenary and Domestic) will promote better understanding of each other’s positions. However, we conclude that there should be greater transparency of proceedings, through the publication of agendas and timetables of meetings to allow some degree of scrutiny of intergovernmental cooperation.

139. Whilst we heard that occasionally Whitehall did get it wrong and overlooked the Scottish angle of policy or legislation, this appears to happen where civil servants are less used to dealing with devolved issues. We believe this would become less common should the UK Government accept our recommendation that it ensures that each department has a devolution champion not only to monitor and promote the awareness of devolution within the department, but also to scrutinise policy for its possible impact on Scottish matters. These champions should hold this role for a sufficient length of time to enable them to become fully effective.

140. We conclude that the Scottish Executive had different expectations of the opportunities available to it to attend and take the chair at European Council meetings. From the evidence we have received, it appears that the UK Government is open to including Scottish Ministers in the delegation to the European Council, and indeed to inviting Scottish Ministers to lead the delegation. We conclude that the UK Government should continue to provide opportunities for Scottish Ministers to participate in and lead delegations where appropriate. However, the UK is the member state of the EU and it has the ultimate decision on the UK negotiating line. It would not be reasonable to expect the UK Government to put forward Scottish policy if it is divergent from the UK line, neither would it be reasonable to allow a Scottish Minister to lead a delegation or take the UK chair at the European Council of Ministers if the Scottish Minister does not intend to negotiate the UK line.

141. However, we conclude that whilst intergovernmental cooperation and communication does work well generally, the out of date Memorandum of Understanding between the UK Government and devolved administrations did not allow for differences of opinion between the governments, as became evident during the negotiation of the Prisoner Transfer Agreement between the UK and Libya. The UK Government failed to provide information to the Scottish Executive on two occasions when, under the Concordat of International Relations, it would have been expected to do. We conclude that the publication of the revised Memorandum of Understanding between the UK Government and devolved administrations is long overdue. We welcome the publication of the Protocol for Avoidance and Resolution of Disputes and we recommend that our successor Committee examines the revised Memorandum of Understanding, once it is
published, and scrutinises the operation of the new Protocol. However, we recognise that communication and cooperation will always rely on the political will of the two governments and it will be necessary for both governments to continue to work hard to achieve this for the benefit of the people of Scotland.

142. Our conclusions and recommendations point, we strongly believe, to a continuing need for there to be a Scottish Affairs Committee in the next Parliament, whatever the exact machinery of government arrangements for the Secretaries of State for the devolved jurisdictions may be. Part of that Committee’s responsibilities will include general oversight of the workings of the devolution settlement, a duty which it may be appropriate for the House to delegate specifically to the Committee in its standing order.
Conclusions and recommendations

1. We conclude that it is of great importance for the wellbeing of the people of Scotland that there is constructive and effective communication between the Scottish Executive and the United Kingdom Government and we recommend that our successor Committee in the new Parliament continue to scrutinise relations between the two governments. (Paragraph 8)

2. We conclude that an updated Memorandum of Understanding between the UK and devolved administrations is long overdue. We therefore urge the Government to publish the agreed revised version as soon as possible. We welcome the publication of the Protocol for Avoidance and Resolution of Disputes which sets out the process for consideration of disagreements at official level and disputes at Ministerial level as we were not convinced of the need for an external arbiter. We recommend that the Joint Ministerial Committee review the Memorandum of Understanding at least every three years to ensure that it remains fit for purpose and should monitor the implementation of the new Protocol. (Paragraph 24)

3. We conclude that it remains a challenge for the Secretary of State for Scotland to prove the value of his role to the current Scottish Executive. However, we recommend that the Scottish Executive recognise the Secretary of State’s role as custodian of the Scotland Act and work with the Secretary of State to improve communication and cooperation between UK and Scottish Governments where possible. We welcome the introduction of the new Protocol for Avoidance and Resolution of Disputes which ensures that the Secretary of State is involved in the process aimed at resolving disagreements between administrations. (Paragraph 39)

4. We note the Secretary of State’s concern that he is not copied routinely into correspondence sent from the Scottish Executive to UK Departments. We encourage the Scottish Executive to copy the Scotland Office into intergovernmental correspondence in future, as better and more open lines of communication are likely to enable the Scotland Office to offer its assistance to discussion at an earlier stage. (Paragraph 40)

5. Whilst we acknowledge that a formal framework for intergovernmental communication between the UK and devolved administrations cannot prevent conflict or dispute, we consider that it is healthy for robust debate and discussion to take place between Ministers on a regular basis. We conclude that it was regrettable that the plenary meetings of the Joint Ministerial Committee, together with the previous sub-committees, fell into abeyance in the years 2002–08. It is important for the UK Government and devolved administrations to meet regularly to discuss areas of joint concern affecting citizens across the UK. We recommend that the Government, in its response to this Report, set out the formal arrangements in place to ensure that Joint Ministerial Committee meetings continue so that our successor Committee can monitor the effectiveness of those structures. (Paragraph 48)
6. We conclude that there ought to be greater visibility of the Joint Ministerial Committee process, whilst still protecting the confidential nature of the meetings as a forum for frank and open discussion between Ministers. There would be merit in publishing timetables and agenda for both plenary and domestic sessions of the Joint Ministerial Committee. In its Response to our Report the Government should confirm whether it intends to lay before Parliament an annual report on the state of relations between the UK and devolved administrations and whether this will include information on matters discussed at the Joint Ministerial Committees. (Paragraph 51)

7. We welcome the action that the Government is taking to improve the knowledge of devolution matters amongst civil servants which has been shown to be occasionally wanting in the areas of Whitehall which have little to do with devolved issues or Scotland. We recommend that the Ministry of Justice ensures that each department has a “devolution champion” at senior level to ensure that structures are put in place to achieve and maintain higher levels of devolution awareness amongst staff. (Paragraph 62)

8. The Concordat on International Relations between Scotland and the UK clearly states that the Government should provide Scottish Ministers with information and advice on international developments that may affect their devolved responsibilities. Although the Concordat is not a legally binding document, we conclude that it was regrettable that the UK Government did not advise the Scottish Executive of the terms of the Memorandum of Understanding between Libya and the United Kingdom relating to the devolved matter of justice prior to signing. (Paragraph 75)

9. In future, the UK Government must consider whether the interests of confidentiality outweigh the responsibility it has to keep the Scottish Executive informed of international agreements made on its behalf, particularly in cases such as this where Scottish Ministers will be forced to make decisions on highly emotive and controversial devolved matters as a result. (Paragraph 76)

10. It is not within our remit to judge whether the benefits of the Memorandum of Understanding and Prisoner Transfer Agreement between UK and Libya were worth the concessions that had to be made by the UK negotiating team. However, the disagreement between the UK and Scottish Governments over the Prisoner Transfer Agreement throws up the question of how fundamental differences in opinion between the UK Government and devolved administrations can be resolved. Whilst we acknowledge that decisions on foreign affairs will always rest with the UK Government, we conclude that communications between Whitehall and Scotland at earlier stage during the Memorandum of Understanding negotiations could have produced a more satisfactory outcome with a possible carve-out for Mr al-Megrahi. We recommend that the Joint Ministerial Committee examine what lessons can be learned from the disagreements during negotiations over the prisoner transfer agreement. (Paragraph 84)

11. We conclude that under the Concordat of International Relations, the United Kingdom Government had an obligation to provide relevant and comprehensive information and analysis to the Scottish Executive on the agreement made between
the US and UK Governments on where Mr al-Megrahi would serve his prison sentence. Although the Scottish Executive was informed by the UK Government that there was no legal barrier to a transfer under the Prisoner Transfer Agreement, there is a disagreement between governments over whether the information provided to the Scottish Executive was comprehensive enough. (Paragraph 90)

12. We conclude that it would be helpful if in future the UK Government could respond to requests for information from the Scottish Executive with either the relevant documentation or a clear explanation as to why it is not possible to provide the information so as to reduce the possibility of disagreements between the two Governments. (Paragraph 91)

13. We conclude that the discussions between the UK Government and Scottish Executive in the run up to the announcement of Mr al-Megrahi’s release on compassionate grounds are a good example of how close cooperation and communication, even on the most sensitive and confidential of matters, can enable departments to plan for the impact on the UK of the decisions of devolved administrations. However, we consider it unfortunate that the official response of the UK Government to Mr al-Megrahi’s release in August 2009 did not reflect either the careful planning undertaken by both Governments beforehand or the information provided in the measured statement of the Foreign Secretary to the House of Commons on 12 October 2009. As a result, it appeared that the UK Government had not fully anticipated either the immediate media reaction or the subsequent international response. This is a matter for the UK Government to ponder. (Paragraph 104)

14. We conclude that whilst there are sensible reasons for not disclosing the substance of discussions at Joint Ministerial Committee (Europe) meetings, there would be merit in publishing a timetable and agenda for the four meetings a year to provide some element of transparency to the proceedings. In its Response to our Report the Government should provide details of to what extent the confidentiality provision of the Concordat on coordination of European Union policy issues might be relaxed to allow Scottish Ministers to give evidence to the Scottish Parliament External and European Relations Committee in private. (Paragraph 118)

15. We conclude that if it would be helpful to the UK to have a particular Minister from one of the devolved administrations in the chair, then the responsible UK Minister should ensure that this happens where possible. From the evidence that we have received, the UK Government appears to be open to this. However, we conclude that it is reasonable for the UK Government to prefer a UK civil servant to take the chair in preference to a devolved administration Minister if the devolved administration does not agree with the UK negotiating line. We recommend that in such cases, the UK Government should provide appropriate notice to the devolved administration of its intention to field a civil servant in preference to one of its Ministers. (Paragraph 129)
Formal Minutes

Tuesday 23 March 2010

Members present:

Mr Mohammad Sarwar, in the Chair
Ms Katy Clark
Mr Ian Davidson
David Mundell
Lindsay Roy
Mr Ben Wallace
Pete Wishart

Draft Report (*Scotland and the UK: cooperation and communication between governments*), proposed by the Chair, brought up and read.

*Ordered*, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 142 read and agreed to.

Summary agreed to.

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

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

*Ordered*, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

Written evidence was ordered to be reported to the House for printing with the Report, together with written evidence reported and ordered to be published on 12 January.

***

[The Committee adjourned.]
Witnesses

Tuesday 12 January 2010

Rt Hon Alex Salmond MSP MP, First Minister of Scotland, and
Sir John Elvidge KCB, Permanent Secretary to the Scottish Executive
Ev 1

Mr Kenny MacAskill MSP, Scottish Cabinet Secretary for Justice, and
Mr Robert Gordon CB, Director General, Justice and Communities
Ev 14

Wednesday 27 January 2010

Rt Hon Jim Murphy MP, Secretary of State for Scotland, Rt Hon Jack Straw
MP, Secretary of State for Justice and Professor Jim Gallagher, Director
General, Devolution, Ministry of Justice
Ev 24

Wednesday 10 February 2010

Chris Bryant MP, Minister for Europe, Mr David Slater, Deputy Head of
Communications, Institutions, Treaty and Iberia Group, Foreign and
Commonwealth Office
Ev 37

List of written evidence

1  Dr Alex Wright, University of Dundee  Ev 44
2  Scotland Office  Ev 45, 54, 67
3  Scottish Fishermen’s Federation  Ev 49
4  Law Society of Scotland  Ev 50
5  Tam Dalyell  Ev 54
6  Royal Society of Edinburgh  Ev 57
7  Scottish Executive  Ev 61, 64, 66
8  Letter from Chris Bryant MP, Minister for Europe  Ev 71
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Oral evidence

Taken before the Scottish Affairs Committee
on Tuesday 12 January 2010

Members present
Mr Mohammad Sarwar, in the Chair
Mr Alistair Carmichael Mr Ian Davidson Mr Jim McGovern
Ms Katy Clark Mr Ben Wallace
Mr Jim McGovern Pete Wishart

Witnesses: Rt Hon Alex Salmond MSP, MP, First Minister of Scotland, and Sir John Elvidge KCB, Permanent Secretary to the Scottish Executive, gave evidence.

Q1 Chairman: Good morning, First Minister and Sir John. Thank you for travelling from Edinburgh to London and welcome to today’s session. Before we ask detailed questions, would you like to make any opening remarks?

Mr Salmond: Only, Chairman, that I am delighted to be here. I doubt very much if this session is going to excite as much interest as another evidence session taking place in the precincts of Westminster; but, nonetheless, I think I am the first First Minister to give evidence to a select committee of this Parliament. Sir John, of course, has given evidence to the Justice Committee before. I think that is quite a helpful precedent and no doubt one that will be reciprocated with prime ministers giving evidence, or chancellors, or whoever, to Scottish Parliament committees as well. I am delighted to be here and delighted to hopefully help the Committee with your inquiry.

Q2 Chairman: Sir John, would you like to say anything?

Sir John Elvidge: No, thank you.

Q3 Chairman: We would like to start with some updates on the formal mechanisms for cooperation between Scottish and UK Governments. Firstly, could you update us on the current formal status of the Joint Ministerial Committee; is it back up and running in a sufficiently meaningful way after the four or five year hiatus?

Mr Salmond: As your question suggests, Chairman, there was a hiatus in some of the JMC plenary, as they are called, which I think lasted from October 2002; so when we took office there had been a five-year gap. I thought that was undesirable. I thought it was important to make an early initiative to resume these meetings. My mind was concentrated by another subject that you may be discussing—the question of the Memorandum of Understanding with Libya; but, more generally, there were a number of well-publicised issues. It struck me that the Joint Ministerial Committee had been envisaged as part of the devolution process so it struck me as important that it was resumed. I should say two other things: one is that the JMC (Europe) had been meeting regularly; so the original idea was to have a JMC plenary envisaging the Prime Minister, the leaders of the devolved administrations, and other relevant ministers perhaps every six months or so in terms of how it was originally envisaged—perhaps even less regularly but certainly regularly; and then there would be regular meetings of the JMC (Europe) specifically looking at European affairs; and then there would be subject JMCs for a particular subject as they came along. What happened at 2002, and just shortly thereafter, is the plenary went into abeyance and did not meet again and the subject committees then went into abeyance as well. All that was meeting was the Joint Ministerial Committee about Europe. In fact Jack Straw, who had been the Foreign Secretary over that period at one stage, actually told me he was convening the JMC (Europe) and he thought the other ones were meeting. He just assumed that they were going live, but in fact they were not. I thought it important to try and re-establish the process in terms of progress that has been made. There have been two plenary meetings since. Paul Murphy, who was put in charge of the process, wrote on 28 February 2008 to resume the process. Since then there have been plenaries in June 2008 and September of last year. There was a decision at the first of these plenaries to change the structure of the subject JMCs to make a broad, encompassing domestic JMC, because it was felt one of the reasons they had fallen into abeyance was that it was kind of ad hoc if it had to depend on individual subjects. There have been two meetings of JMC (Domestic) which was established on 11 March 2009 and 13 May 2009; and there is one set for next week, although it has to be said there is some doubt about that given the situation currently in Northern Ireland. To answer your question, the process has been re-established. Is it working effortlessly and satisfactorily? No, I think it has got some distance to travel.

Q4 Chairman: Alan Trench has said that the Memorandum of Understanding between the UK and devolved governments is not “fit for purpose”; and the Scottish Executive’s memorandum says that “Revisions to the Memorandum of Understanding are being considered by all the four administrations that are party to it”. The Scotland Office refers to the
Memorandum of Understanding between the UK and devolved governments in the context of positive relations between the parties. Could you update us on the current status of the Memorandum of Understanding and whether you are content with the changes proposed by the UK Government?

**Mr Salmond:** Changes have been agreed with all four administrations. That is not quite right. Changes have been proposed. It would be fair to say the changes do not go as far as we were suggesting; but the particular changes that have been proposed are some changes to the JMC (Europe) on improvements in the concordat on European issues; and secondly, and I think crucially, the addition of dispute resolution aspects which explicitly extend to financial issues. That is, to me, a very important improvement and change. We had a number of other suggestions but these are the ones which have been put forward. They were to go to the JMC (Domestic) next week. Although I believe the Northern Irish administration are in favour of these changes, there have been some delays for other reasons I believe in terms of signing them off, in terms of the working of the Northern Irish administration. The difficulty I think we have now, Chairman, is that it was hoped that these changes would be agreed by the JMC (Domestic) next week. As I say, although the meeting is still on as I speak, that would have to be I think in some doubt at the present moment, as to whether the meeting will take place next week. I hope, if it does not take place next week, it will take place soon; and the changes, particularly in dispute resolution, will be agreed.

**Q5 Chairman:** First Minister, do you believe that the relationship between the Scottish Government and the Government is satisfactory in terms of channels of communication, cooperation, working together for the greater good of the people? What are you doing to improve these relations if there is any needed improvement? What concrete steps you are taking to improve relations between the two governments?

**Mr Salmond:** I suppose my main step was to write to the incoming Prime Minister in August 2007, suggesting that we resume the JMC process. To understand why I think this is important—clearly we are now in a totally different situation than previously under devolution, in the sense that we now have different political complexities across the islands. We have an SNP Government in Scotland; we have a Labour-Plaid Cymru administration in Cardiff; and we have a Democratic Unionist Sinn Féin-led administration in Northern Ireland. That is a quite different political complexion from the earlier years of devolution. There are clearly going to be political differences in the administrations; but the purpose of the Joint Ministerial Committees is to try to not just resolve disputes where they occur—if that can be done—but also to understand what the positions are. Quite often things can develop not necessarily because there is a political difference—which is perfectly valid and legitimate—but just because there is a lack of understanding. Our main aim in terms of reinstituting the process and in improving the concordats is to emphasise the concept of parity of esteem, which of course was part of the understandings in the first place; but we felt that the reinstatement of the JMCs would help that process of emphasising parity of esteem. I have to say that the meetings of the JMC that have taken place since it was resumed have been very cordial. I would also say that in some issues, for example issues which are rather like the current one in terms of the severe weather, there is good cooperation; swine flu would be another example where there was excellent cooperation; the Glasgow Airport attack, again another example of excellent cooperation. Ongoing cooperation: I would cite the cooperation between the Department of Work and Pensions and Skills Development Scotland in terms of jobseekers and training as an excellent example of ongoing cooperation. There also have been examples of lack of parity of esteem or perhaps lack of understanding that there may be different policies, systems, contexts in Scotland than the UK departments are used to dealing with. I could cite a number of these examples as well if you wish.

**Q6 David Mundell:** Could I say, I very much welcome your presence at the Committee today and, as I think you indicated, I hope it will be the first of a series of appearances before committees here, because I think it is a fundamental part of the relationship between Holyrood and Westminster. To come back to the points you have just been making, some of your critics would suggest that you have a political advantage in ensuring that there is not a good relationship between Westminster and Holyrood. What positive evidence can you put forward to rebut that particular criticism?

**Mr Salmond:** I think probably the most positive evidence has been that I looked for the re-Instigation of a process of dispute resolution, of communication, of joint working between ministers, which had been in abeyance for at least five years before the Government in Scotland took office. Over that period of time there were many celebrated disputes, some of which got into the public domain between the then Scottish Executive and the administration, despite the fact they were of the same political party. For example, Attendance Allowance and free personal care was a particularly famous example. A long-running dispute now in terms of the Barnett consequentials or not of Olympic regeneration of spending would be another example. The evidence I would cite, David, is the fact that I was so keen on having this process resumed after it being in abeyance for a substantial period of time. I think like this: I think across a range of things, and I have cited some examples, it is the job of governments, of whatever political hue, just to get on with the job and cooperate to do that, and I have given you a range of examples. I think it is perfectly valid to have political differences either between political parties or indeed between governments. I think it is perfectly reasonable to have them ventilated in political debate. Could I just say to you, there are enough of these legitimate political differences in terms of aspiration for the future
constitutional status of Scotland without having to invent disagreements over other things. It has never been my purpose to invent disagreements. On the contrary, I have been looking for resolution and cooperation, where cooperation and resolution can be found.

Q7 David Mundell: You have to concede surely, given your comments there about parity of esteem, that some comments you have made in your capacity as First Minister of Scotland, and not in the capacity of Leader of the Scottish National Party, have not been reflective of a parity of esteem from your perspective? Whilst your memorandum indicates that UK Government has not accepted a change in relations over the period of devolution, leading to a lack of respect for Scotland’s status, surely there is plenty of evidence that you have not demonstrated a respect for Westminster and the UK Government?

Mr Salmond: If you are going to give me evidence, you have to concede that I use the media occasionally, do you not? Yes, occasionally I do! David, I think you would have to concede that. Am I conceding that I use the media? Yes, occasionally I do! David, I think you use the media occasionally, do you not?

Q9 David Mundell: But not in the context of the conduct of the dialogue between the Scottish Government and the First Minister of Scotland, and the Prime Minister and the UK Government. I think one thing that surprised many people, myself included, Mr Salmond, was that in the period of the recession nearly a year went by without you having any dialogue at all with Gordon Brown. What is the reason for that lack of dialogue? In this Committee today—and we will come on to discussing Mr al-Megrahi—there are going to be a lot of discussions around structures, and the structures of relationships; but most people looking from outside would think that it would be possible to resolve a lot of discussions in a quick phone call or in some form of dialogue; yet there appears to be none between you and the Prime Minister?

Mr Salmond: If we take the Prime Minister’s predecessor first, the first prime minister I dealt with, the Prime Minister’s predecessor would not speak to me at all from day one of the SNP Government. That was nothing to do with me; I was perfectly happy to speak to the Prime Minister, but I think that the then Prime Minister was upset with the Election result. I am delighted to speak to the Prime Minister at any time and would love to do so on much more regular occasions. I accept of course that the then Prime Minister has many, many competing demands, but the wish for communication from the Scottish administration—and I suspect the Welsh and Northern Irish administration—is very great. That is why we have been so keen to re-establish structures which at least would set in train that process. There have actually been two meetings about the recession with the Prime Minister and leaders of the devolved administrations. One took place last spring and the other was at the September JMC meeting where the issues of the economy and the recession were discussed in some detail. Would it be my wish that there had been more? Yes, it would, although it should be pointed out that these are not the only intergovernmental meetings. For example, the financial take place on a fairly regular basis. I think meetings like that are extremely useful. Hence the meeting and summit on jobs that was held in Easterhouse yesterday with myself and the Secretary of State for Scotland, and crucially the people employed in Scotland, in delivering the various programmes either under the Scottish Government or the Department of Work and Pensions in terms of enabling us to accelerate recovery.

Q10 David Mundell: Could I just ask Sir John a short question. In relation to relationships, Sir John, would you say that the centre of gravity in relationships between the two governments lies in ministers or in civil servants in terms of making relations work?

Sir John Elvidge: In volume terms inevitably the bulk of contact takes place at official level. There is a huge amount of day-to-day business that goes on between the two administrations; but in terms of issues of major significance then I think the centre of gravity lies at ministerial level.
Q11 Mr McGovern: In an earlier answer the First Minister, if I understood him correctly, seemed to suggest that Whitehall regards the civil servants who work with the Scottish Executive as being some sort of extension of Whitehall. I would agree that that is probably the case. Is the First Minister suggesting that civil servants who work in Scotland with the Scottish Executive should be absolutely isolated, separated, almost independent of the UK Government?

Mr Salmond: I am not suggesting they should be isolated, or indeed separated. The point I was making is that among some people in some departments in Whitehall there is still a tendency to regard not just the Scottish Government and its attending civil servants but the Welsh administration, and the Northern Irish administration probably to a lesser extent, as if they were still government departments like any other government departments. My view is that there is still an impression among some people that things are as they were just over ten years ago as opposed to there having been a political change. The political change is there now a national Parliament in Scotland with legislative powers and there are a group of ministers who are responsible to that Parliament. Yes, I believe the Scottish Civil Service should be responsible to the ministers, and the ministers should be accountable to that Parliament. There is a big difference between recognising the changes that have taken place since devolution and still having a mindset which harps back to a different era where the Scottish Office was another government department.

Q12 Mr Carmichael: My experience here as an MP for the last five years has been the opposite. Rather than thinking of Scotland as an extension of Westminster, it is next to impossible to get civil servants here to think about the Scottish aspects of United Kingdom responsibilities, because they see the word “Scotland” and something switches inside their brains and they say, “Oh, well that must be devolved”. You can go through a whole series of different legislative difficulties that have arisen as a result of that attitude. On this point about the need for more formalised structures, does it come down to this: that you need to have the formalised structures because the personal working relationships between London and Edinburgh are not as good as they were?

Mr Salmond: No, I think it was always envisaged to have structures which would take account of the new relationships. I cited a couple of celebrated disputes between the previous Scottish Executive and Westminster. There were many others, incidentally. I think what the formalised structures do is: one, they avoid disputes arising which are based on misunderstanding; or, to take your theory, just blindness of the Scottish situation, that Scotland is no longer relevant to certain policies or issues; and, secondly, I am an enthusiast of the possibilities of a revived, reinvigorated JMC structure. To give you an example: there is something, as you know, called the funding agreement, the funding rules, which sets what is and what is not Barnett consequentials and what is a legitimate part of funding and what is not; what is a legitimate part of borrowing and whether a JEREMIE application would be generally additional to funding or not, for example. Currently what happens with the administrations is they have discussions with the Treasury and they come to a disagreement and the Treasury resolves the dispute by saying, “Basically we were right and everybody else was wrong”. It is hoped that we can arrive at a position where there would be some form of dispute resolution, including financial matters, where some body or party can decide (and there is a variety of suggestions as to how it could be done) whether or not the interpretation of the funding rules is correct. That I think would be of great advantage. I think a former First Minister, Henry McLeish, would have found that of great utility when he was trying to pursue free personal care in Scotland.

Q13 Mr Carmichael: Are you content with the nature and level of personal relations between yourself and your ministers and ministers here?

Mr Salmond: I am certainly content with the nature of personal relationships between myself and my ministers. They may be better than the relationship between some ministers in the UK Government and their ministers! There are two things that strike me: where there are points of difficulty and crisis—and I cited a number of what might be termed “national emergencies”—I think the working position has been extremely good. People’s minds are concentrated on a major issue. Secondly, I would say that in these JMC structures by and large, certainly the plenary meetings, the relationship in terms of the formalised meetings has been excellent. I think you will always get a situation where politics will crowd in to certain aspects of things, although I think that would be inevitable and, to a great extent, legitimate. I think the task is to make sure that political differences genuinely held do not impede your practical working to do good things for our communities. My intention and concern has been to establish that; to get on with the practicalities and make sure things are done; to have the political debate certainly but to try and separate the two.

Q14 Lindsay Roy: You mentioned the structures and operational processes and I agree entirely that they are vital to joint working so, also though, is goodwill and a willingness to cooperate. Are you seeing a positive change in that regard in the working relationships?

Mr Salmond: I believe if we are successful, if not next week then in the near future, of having within the Memorandum of Understanding some form of dispute resolution, then that would greatly enhance the working relationships. If people know there is a referee because there are still debates, which are quite legitimate debates, over issues which are years’ old, which stretch back into the previous administration, it would be really good if there was a form of dispute resolution which would get over these things and decide one way or another. I think that would help enormously.
Q15 Lindsay Roy: That is comforting to hear, because I think people in Scotland are interested in political parties and politicians working together in the best interests of the Scottish people.

Mr Salmond: Yes, I agree with that. I hope that that dispute resolution procedure can be in place before the election, and before the General Election overtakes the Whitehall machine. Obviously there are other hugely important issues in terms of Northern Ireland just now. I should say that this is not a done deal. It is on the agenda for discussion at the JMC. It was sent there by the plenary meeting with a general feeling that this was necessary.

Q16 Lindsay Roy: There are positive messages coming from the partners that they want to move forward together?

Mr Salmond: Yes, and have such a procedure. I think there would still be some doubts from the Treasury as to whether there should be any dispute resolution mechanism that impedes the Treasury’s position. There was a lot of agreement at the last JMC plenary that such a thing should be done, and it was remitted to the JMC (Domestic) on the basis of finding agreement.

Q17 Pete Wishart: Good morning, First Minister and Sir John. Could I stay on the theme of structures and relationship-building and mention one operation in Whitehall we have not discussed yet, and that is the Scotland Office and just ask you, First Minister, what added value you feel the Scotland Office brings to the relationship-building, and what you possibly see as a role for the Scotland Office down here now?

Mr Salmond: I am on the record a number of times, as I think some other people are or some members of the Committee are, that I think the role of the Scotland Office has been overtaken by devolution. I think it would be better with departmental contact that the Scottish Government and its officials contact directly the relevant department. I do not think an intermediary is particularly helpful on many occasions. I think that would be more effective. That would be my basis. We had a meeting yesterday which was I think a very good meeting in terms of the job summit at Easterhouse, and I will continue to have these meetings. Meetings equally have been held with the DWP Minister in terms of the responsibilities. The responsibilities for Jobcentre Pluses are the Department of Work and Pensions' responsibilities. My view would be: better dealing directly with the relevant UK departments.

Q18 Pete Wishart: We know that the Scotland Office and the Secretary of State have often said that the role for the Scottish Government to be represented is through the UK institution, through the proper UK representation. I think he has got as far as describing Scotland as being the most influential small country in the world being representative of the UK. I do not know if you have got a particular view on that, and if you feel that in terms of international institutions—

Q19 Mr McGovern: The First Minister said in answer to an earlier question, I think it was to Mr Mundell, that he should cite evidence. When the First Minister says that members of this Committee share his view that there should not be a Scottish Office could he cite which members he is referring to?

Mr Salmond: I was referring to the one that just put his hand up—Alistair.

Q20 Mr McGovern: That is singular.

Mr Salmond: Obviously Pete.

Q21 Mr McGovern: That is two!

Mr Salmond: I live in hope, Jim! I was thinking of Alistair when I said it because I remember sitting behind him, if I am correct, in the Chamber where he made a particularly vigorous case in that direction. I have not heard you speak on the issue, Jim, but I am sure with Alistair’s eloquence you will be persuaded to the sense of that position.

Mr McGovern: Let us not get carried away!

Q22 Lindsay Roy: Sir John, in your evidence to the Justice Committee you stated there were cobwebs in some of the structures of inter-government relations. Have most or all of these cobwebs been dusted down, and are things operational as far as you are concerned?

Sir John Elvidge: Yes, I think there have been two sets of changes. The first is the set of changes that the First Minister has described; because my remark about cobwebs was specifically about the fact that substantial parts of the JMC machinery have fallen into prolonged disuse and clearly that has changed. It is also the case that I think we have been able to establish some better working arrangements at official level since 2007. I do not want to make too much of my own position, but it is a significant change that I am able to engage with my Whitehall colleagues most weeks of the year; whereas that had not been the practice for several years up to 2007 for purely practical reasons.

Q23 Lindsay Roy: That is something you have done personally?

Sir John Elvidge: Yes.
Q24 Lindsay Roy: Is Whitehall more aware and more sensitive to devolution issues now then because of that rapport and that relationship?

Sir John Elvidge: I think my colleagues in Whitehall are working hard to raise awareness of devolution. I think most of us would share the perception that awareness of devolution has gradually faded over time as we have moved forward from 1999. It was very much in people’s minds shortly after it first happened; and as it becomes part of normality awareness of it has faded for the many people in the Civil Service in Whitehall who have no reason for regular contact with colleagues in the Scottish Government. My colleagues in Whitehall regard that as a problem to be remedied, and they have put in place a series of steps to try to raise awareness again.

Q25 Lindsay Roy: Would you say now that civil servants in both governments are prompting each other to cooperate, that there are much more open channels of communication and much more cooperation and collaboration?

Sir John Elvidge: Once one has got to the point of civil servants talking to each other about a particular issue there is rarely a problem. The problem if it is going to occur is when no dialogue takes place when it should take place, because someone has not perceived the need for the dialogue.

Q26 Lindsay Roy: So the glass is more half full than half empty; but are there still areas where there are difficulties?

Sir John Elvidge: Yes. As I said in my evidence to the Justice Committee, this is not purely a post-devolution phenomenon; colleagues in London forgetting about the Scottish dimension was a fairly frequent occurrence before devolution; it is just that then there were different mechanisms for combating that, because the sharing of papers acted as a corrective. Now that papers are no longer routinely shared then clearly one needs different mechanisms. I would be surprised if a month went by without somebody somewhere missing the need to think about the devolved dimension of something that they were doing.

Q27 Lindsay Roy: In the interests of taking this forward, can you reveal where there have been the greatest difficulties in establishing that cooperative climate?

Sir John Elvidge: Yes, I think there is a functional answer to that. The greatest difficulties are in the areas where people have the least regular need to interact with their colleagues in the devolved administrations. One can map this in a fairly predictable way.

Q28 Mr Davidson: Could I just follow that up. To what extent is it different or on a different scale, this lack of dialogue between Westminster and Scottish Government civil servants, as compared to the extent to which some Westminster departments tend to be in silos and do not discuss it with anybody else? My understanding is that there are occasions when Holyrood departments, for example, have not had the dialogue with other Holyrood departments that perhaps they should have. To what extent is this almost inherent in the silo mentality that many civil servants have—quite understandably because of the way in which they work in departments—as distinct from being something that is, in a sense, almost deliberate?

Sir John Elvidge: It is very rarely deliberate. There is very rarely a conscious decision not to communicate. Yes, in all complex organisations one faces challenges of communication. There is a level of issue when things get beyond the person first working on them, when they may be working in a compartment, as it progresses towards wider decision-making when Whitehall departments would normally be consulting each other; and it is at that point that, in these instances where they are not used to engaging with the devolved dimension, they are likely to miss the devolved administrations out of that phase of the development.

Q29 Mr Davidson: I sit on the Public Accounts Committee and you have an equivalent in Holyrood. We constantly find that departments do not actually consult with other people that they should; and I am sure you find the same. I am not suggesting you are paranoid, but to what extent do you take offence at this because it is a new situation, the devolved administrations, as distinct from just general slowness by some civil servants in a department who should know better but do not?

Sir John Elvidge: I do not take offence at it; I regard it as an inherent problem of complex systems to be solved. I take it for granted that it will need constant effort and constant leadership emphasis to move it to the right place.

Q30 Mr Carmichael: Just to tidy off the points about the Scotland Office, first. I was struck, First Minister, that you described the meeting yesterday as “good and positive”. The press release that came from the Scotland Office said that this was the sort of thing you should be looking at instead of wasting your time with independence referendums. Is that the sort of added value that we get from the Scotland Office to the political communication?

Mr Salmond: I am responsible for many things but thankfully not the press releases of the Scotland Office. It would be of course logical if there was not a Scotland Office there would not be such press releases.

Q31 Mr Carmichael: To go to the question of interaction between Edinburgh and Europe, the picture that you paint in your memorandum to the Committee is one which describes Scotland very much as being a subordinate province in the UK, and the formal consultation mechanisms then subsume the Scottish interest into the wider UK interest, if I can put it like that. Does it come to this: a lot of the representation at EU level in the current constitutional arrangements comes down again to relationships between individuals and goodwill?

Mr Salmond: I am not certain of that. For example, there has been more attendance this last year at European Council meetings under this
administration than has been in the first year of devolution; so there is certainly more engagement. I think there are three types of issue: firstly, other things that could be done within the current structures, which would avoid daft things like, for example, a civil servant from a London department taking the lead chair when there is a Scottish minister there and things like that. The Calman Commission actually suggested that there could be improvements there and I agree. I think there should be a code of conduct which avoids daft things like that. Secondly, there is a more interesting issue where there is a genuine policy difference—and there are a number of occasions, agriculture would be an example, where there is more than a difference of emphasis, there is a difference of policy; fishing would be another example. A change which certainly I think would be useful is to try and identify, as other countries have done, issues where the Scottish Minister or the Scottish view should be the lead minister, the lead view. It is not difficult to isolate what these issues could be. Fishing, which is predominately a Scottish interest, two-thirds in terms of landings but in terms of ownership of the industry, what, 80 or 90% now; forestry; internal ferries I think would be another issue, where the vast majority of internal ferries are Scottish. So you could identify issues where the lead department properly would be the Scottish minister.

Q32 Mr Carmichael: In practice does that not often happen? To take the fishing example, is it not normally the Scottish minister that takes the lead in the bilateral?

Mr Salmond: No, certainly not at the Council meetings.

Q33 Mr Carmichael: No, in the bilateral?

Mr Salmond: I am open to correction here but in terms of the Scottish minister taking a lead at the Council, it would be very rare indeed and that would be a rarity. I am not saying it has never happened, but it has happened so rarely I can actually remember pre-devolution a major statement from Malcolm Rifkind where he actually led as Scottish Secretary at a Council, but it was so rare that it was a significant publicity occasion. It happens very rarely both pre- and post-devolution. The third issue I was going to mention was that it has to be accepted—and I am not arguing that if there is an agreed UK position a Scottish minister would not have to articulate that position—they would have to articulate that position. I am merely saying, if you could identify certain subjects where the assumption would be that the Scottish minister would lead then that would seem reasonably unfair if there was a difference or a divergence of policy, then the predominant interest would be the one that would be represented. That does not happen at the present moment. Thirdly of course, back to Pete Wishart’s point. I do think these things should be better, as you would expect, if Scotland were represented directly. Obviously where the UK and the Scottish position is identical then whoever makes the position you could argue it does not make any difference; although there will always be a difference of emphasis and style. Of course the issue really comes where the position is not identical and it is not the same; and there currently, in terms of the formality of Council meetings, the Scottish interest as you describe has to take a backseat, sometimes literally, and that is not satisfactory. The one thing I would say is that does not work—and not just since the Lisbon Treaty—in terms of the workings of other aspects of the European Union. Commissioners, whatever else people might say about them, are famously open to argument and to representations, not just from Government ministers but from Members of Parliament and Members of the Scottish Parliament as well. It is a very open system to influence.

Q34 Mr Carmichael: The particular focus of the question was about individual relations and goodwill. I am struck by the fact that Richard Lochhead was complaining quite recently about being virtually excluded—I cannot remember the exact form of words; but certainly he felt that he had not been able to get a Scottish position across on agricultural matters?

Mr Salmond: I think I am right—I am not sure of the occasion you are referring to—but there was an occasion where a UK official took the lead chair at a Council meeting when I think I am right in saying Richard was there as a minister, which I think was the reason for that particular difference. I think a protocol should be established whereby that does not happen and should not happen.

Q35 Mr Carmichael: So that was a matter of form rather than substance?

Mr Salmond: If it was only form rather than substance then we would have officials representing the UK, Scotland and every other country at Council meetings. Obviously the reason for a Council meeting is it is a ministerial representation. People imagine that politicians have a utility and therefore it is a matter of substance as opposed to form. There are many people in this room who take the opposite view, of course; certainly not Sir John, but some of his colleagues perhaps.

Q36 Pete Wishart: I would like to get your view on this: we have heard this morning is a real attempt to try and ensure that where difficulties present themselves they are challenged effectively and we put in place structures that are necessary to deal with these sorts of things. I think that goes a long way to how the relationship between the Scottish Government and Westminster is characterised, particularly in the press where it is always seen as some sort of battle, fight or challenge to authority. I am just wondering whether you have any sort of view on that and whether there are things that could be done to communicate that the two Governments do get on particularly well on more of these issues?

Mr Salmond: By definition cooperation is less of a story than an argument. That is just the way of the world. As I was saying earlier, the best examples of full cooperation are where a challenge has
presented—whether it be a Glasgow Airport attack or the current difficult situation with the severe weather conditions and examples like that; these had been very good examples. There had been good examples of joint working initiatives; there are examples of matters falling down perhaps not necessarily deliberately. There are one or two examples which are a bit more difficult to understand, where apparently there has been some sort of blockage on Scottish progress. For example, the location of the headquarters of the British-Irish Council where there was an overwhelming vote across these islands for Edinburgh, but that was blocked by the UK Minister for reasons that I am not sure I understand. You will always get a situation where examples like that will generate more publicity than examples of working. There are two other things I would say: one is, where there are legitimate political differences, then it is right and proper that these are expressed and that would apply as much to myself as a Labour politician in a Westminster Government. People have the right to express a different point of view. The second issue, which I am particularly interested in, is where any progress could be made, where there is a disagreement of policy. For example, there is a different policy towards the Common Fisheries Policy in terms of the Scottish administration and the UK administration. The Scottish administration is more hostile, to put it mildly, to the Common Fisheries Policy. Is there a way of making progress where there is a genuine policy difference? What I suggested was, it might be you could identify topics where the Scottish interest is predominant. The same thing perhaps could be done in Northern Ireland or Wales, but certainly the subjects are identified for Scotland. If not then we will always be in a position that the UK interest even if it is different from the Scottish one will be the one that is followed.

Q37 Pete Wishart: You mentioned a couple of issues that you say perhaps need to be looked at and present a bit of difficulty in terms of cooperation between Scotland and Westminster. I think the Barnett consequentials is something you mention, and another thing that is in the press is the further devolution of particular issues in the Calman Commission. Do you find that you have been able to secure the necessary assistance from Whitehall departments—and I am thinking of maybe the role of the Scottish Office—in order to try and help pursue the Scottish interest on these things? Is that something that has been forthcoming and something you have found to be useful?

Mr Salmond: On the issue of the Barnett consequentials and disagreements about the funding, I am hopeful that at some point we can get some form of adjudication on Treasury decisions, as well as other reforms of dispute resolution. That would be great progress. In other words, if you agree a formula towards that funding formula would be, most people would say that funding formula must be applied properly. The Olympic regeneration issue is one which, to be fair, I suppose its main champion is Rhodri Morgan, who was the first to seize the importance of that issue and to see the importance of that issue. It predates this administration, but nonetheless I suppose most fair-minded people would say that any adjudication of that would find that the regeneration expenditure should have Barnet consequentials; not the Olympic’s expenditure and the Games itself, but the regeneration expenditure. Therefore it would be one, whether it was Wales or Scotland, we would be very confident sending to adjudication. Have the Scotland Office been helpful on that particular argument? No, they have not taken that position.

Q38 Mr Davidson: Could I follow-up Pete’s point although not in quite as confrontational a fashion as Pete is adopting? There clearly has been a great deal of cooperation in terms of things like Sewel motions. My understanding is that there are now more Sewel motions being agreed with yourselves than there were under the previous regime. There is more legislation passed under Sewel motions here than legislation going through Holyrood. Clearly, the system is actually working quite well in a number of regards; but in terms of your point about parity of esteem and recognising the proper roles of each establishment, I am not clear—particularly in relation to your responses to Calman—how you square the question of clarity of esteem with the constant debates that take place in the Scottish Parliament on issues that are reserved. My understanding is that in government time you have got a debate—is it tomorrow—on Attendance Allowance. I understand that you might want to have a view on that, but in terms of your response again to Calman that does tend to blur the lines of responsibility and accountability. If we are to have parity of esteem—and we have always tended to hang back from commenting on what we think you are doing wrong even though politically we might disagree—you do not seem to have the same reservations. Can you just clarify why that is?

Mr Salmond: I am fascinated by this concept, Ian, of you holding back. If a hanging back Ian Davidson is a new phenomenon you must be moderating in your old age! It is a distinct mellowing of the position. On a new phenomenon you must be moderating in your understanding is that in government time you have more Sewel motions being agreed with yourselves than there were under the previous regime. Although not in quite as confrontational a fashion as Pete is adopting! There clearly has been a great deal of cooperation in terms of things like Sewel motions. My understanding is that there are now more Sewel motions being agreed with yourselves than there were under the previous regime. There is more legislation passed under Sewel motions here than legislation going through Holyrood. Clearly, the system is actually working quite well in a number of regards; but in terms of your point about parity of esteem and recognising the proper roles of each establishment, I am not clear—particularly in relation to your responses to Calman—how you square the question of clarity of esteem with the constant debates that take place in the Scottish Parliament on issues that are reserved. My understanding is that in government time you have got a debate—is it tomorrow—on Attendance Allowance. I understand that you might want to have a view on that, but in terms of your response again to Calman that does tend to blur the lines of responsibility and accountability. If we are to have parity of esteem—and we have always tended to hang back from commenting on what we think you are doing wrong even though politically we might disagree—you do not seem to have the same reservations. Can you just clarify why that is?

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railways, for example—I was rather hopeful that these issues could be dealt with before the Election. Indeed, the Scottish Parliament passed a resolution to that effect by a majority but still passed a resolution. That would just require a resolution of the Scottish Parliament in two weeks’ time and I think the Westminster Parliament in about a week’s time to get to the Privy Council meeting in March to effect these transfer of powers, which apparently are agreed between all the parties. That would leave then the financial issues and the broader constitutional debate which is not agreed between the parties to be discussed at that stage. In the same way, Ian, that I have been very happy to see Sewel motions passed when there is agreement, and for me they were non-controversial—with the Parliament’s approval, of course, because they could only be passed with the Parliament’s approval—then I held out the hope that everyone could see the utility of making progress on these specific Calman recommendations, which I believed had general assent. Unfortunately, I got a letter from the Secretary of State for Scotland yesterday saying that that was not a view he and the Prime Minister shared.

Q39 Mr Davidson: I understand that and I think it is welcome giving you the opportunity to repeat your views on Calman. Could I just clarify the point I made about Attendance Allowance and parity of esteem and the debating of reserve issues?

Mr Salmond: I am sure you will remember this because you and I both took part in these debates, but of course the essence of the Scottish Parliament’s ability to discuss whatever issue it chose in discussion, debate and resolution was not just part of the devolution proposal but also was seen at the time to be an essential right of a national Parliament. Even where it did not have legislative competence, its ability to discuss these things was hugely important. On the issue of Attendance Allowance in particular, then as you will remember, if I am right about the resolution that is coming forward, this was an issue which was first raised as a major public issue by Henry McLeish as First Minister, and one that he pursued very avidly and one, of course, which has accumulated as an issue over the years; because each passing year has seen that sum of Attendance Allowance, which under different arrangements would have been coming into Scotland’s Social Services, accumulating as an issue. Also, with the pressure on public services, no doubt many members of the Scottish Parliament think it is an issue which should be ventilated—if I interpret the motion properly.

Q40 Mr Wallace: Welcome, First Minister. As I am sure you may know from the inquiry, the inquiry is also looking at how these arrangements function during the negotiations on the Prisoner Transfer Agreement and Lockerbie. I would just like to take you back to some of your earlier points. It seems in your submission to the Committee, or the Scottish Government, that where issues are non-controversial or not very sexy it does not really matter, but where there are issues such as climate change, international treaty negotiations the UK Government has failed to involve you. The examples you gave were: Libya; climate change; Scottish Ministers’ attendance to the Justice Council.1 Do you think that is deliberate, or do you think that is a lack of understanding of devolution settlement still present in Whitehall?

Mr Salmond: As far as the climate change position was concerned, that was obviously not an oversight, because it was a well-ventilated position over a period of time where both the Scottish Government and indeed the third sector organisations in Scotland had lobbied very hard for a Scottish Minister to be at Copenhagen as part of the UK delegation; as indeed other ministers from other devolved administrations were at Copenhagen. As to the decision for them not to have that happen as part of the UK delegation, it was the case that the Scottish legislation passed was more ambitious than the UK legislation; but, equally, it is also the case that the UK were arguing for more ambitious targets. It may be that the UK legislation will move towards the 42% before too long. It also is the case that the Scottish legislation was passed unanimously in the Scottish Parliament; so I found the lack of agreement on having a Scottish Minister as part of the Copenhagen delegation extremely difficult to understand, given that it was a subject, albeit where there might be differences, where everybody has a shared interest and it would have been effective to have that. As far as the al-Megrahi case is concerned, I think it would have to be said that that was a breakdown of the Memorandum of Understanding. The Memorandum of Understanding—and remember I was two weeks in office when this occurred—is extremely clear. As far as I would read it, the Memorandum of Understanding says, in the concordat on international relations “the UK Government will consult the devolved administrations about the formulation of the UK’s position for international negotiations to the extent that the negotiations touch on devolved matters”. They are quite clearly in my view agreeing to a Memorandum of Understanding on a Prisoner Transfer Agreement which—although it was for any Libyan prisoner, there only actually was one in Scotland, Mr al-Megrahi—clearly touched centrally on Scottish Government responsibilities; and I cannot see how not informing the Scottish Government or consulting the Scottish Government could possibly be seen to be compatible with the concordat on international relations. The one other thing I would say about that is I am not certain that the full extent and the significance of that Memorandum was understood across other Whitehall departments. My reason for saying that is that both Lord Falconer first as Lord Chancellor and subsequently Jack Straw seem to believe, either in the case of Lord Falconer, that the Libyan Government had already been told that Mr al-Megrahi was to be excluded from any such PTA that would be negotiated; and in the case of Jack Straw

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as Lord Chancellor, he was extremely confident and readily agreed that that should be done, before subsequently having to change his position. The one thing I would say is, I am not certain that when that Memorandum of Understanding was negotiated in Libya, towards the end of May 2007, whether there was a general appreciation across the other relevant Whitehall departments of the full significance of what the Prime Minister then was doing. Certainly the devolution Memorandum of Understanding, in my view, was not followed—the concordat on international relations.

**Q42 Mr Wallace:** On the assurances that you received from Jack Straw initially that any PTA negotiated would not include al-Megrahi, it seems he gave you those assurances and then had two phone calls from Sir Mark Allen who was working for BP at the time and very quickly after those two phone calls suddenly a letter arrived in your office saying “We find it unable to exclude Mr al-Megrahi from the PTA negotiations, and therefore there is an overwhelming national interest”. I have never seen any detailed response of what “overwhelming national interest” is. Were you aware of any representations from BP at the time of the prisoner transfer negotiations or did it come to you as a surprise that suddenly Jack Straw had done a U-turn on it?

**Mr Salmond:** It was not sudden; can I put that to you. This took place over a period of time from 13 July when Jack Straw in Edinburgh—we had breakfast together, actually—agreed that Mr al-Megrahi would be specifically excluded from any PTA. In fact, he then, on 26 July, asked for agreement from the Scottish Government, which was readily given, on the nature and description of the clauses. It was on 19 December, after a lot of discussion where we were assuming that was going to happen, and we were content then with the position. It was on 19 December that Jack Straw told the Justice Secretary and cited the overwhelming interests of the United Kingdom. There was then a vigorous correspondence, which we put on to the public record, with me asking Mr Straw what these overwhelming interests were and we then had the explanation, which is on the public record. It should be said that the explanation at that time cited more security and other interests and the importance of Libya coming back into the international community of nations, but I note that when the Foreign Secretary made his statement to the House of Commons he was quite explicit that other factors, such as business interests, were also part of the UK Government’s judgment in these matters.

**Q43 Mr Wallace:** But during the time of this debate, I suppose, on the prisoner transfer arrangement, was the Scottish Government lobbied by companies such as BP or governments such as Qatar to include Mr al-Megrahi? Did you have any approach from any of your ministers?

**Mr Salmond:** We had no lobbying from BP. There was a meeting with the Qatari government, which is on the record, where the Qatari government raised the issue and were told what the formal process was as well. By that time, of course, we were in a formal process where people had the right to make representations to their view, but that was much later; that was in 2009. What you are asking me about is what I thought was in the minds of the United Kingdom Government in 2007, and what I am pointing to is that the statement from the Foreign Secretary was a fairly clear acknowledgement that there was a range of interests and the overwhelming interests of the United Kingdom included not just security matters but there seemed to be a range of business matters as
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well. It is also true that one of the reasons that the Scottish Government was so suspicious and opposed to the prisoner transfer mechanism was that we thought its genesis was, to say the least, open to question in terms of its motivation. Remember that the PTA was signed at the same time as major commercial deals were being signed and other matters, so that was one of the reasons, only one of the reasons, why the Scottish Government was so suspicious of the PTA. Can I just point out that I revealed to the world that the PTA had been signed. I think I am right in saying that the statement I made to the Scottish Parliament on 7 June 2007 was the first public statement that a PTA had been signed. Of course, my complaint about the matter was that we only found out after the event. I beg your pardon; I should have said that the Memorandum of Understanding looking forward to the PTA was being signed. The PTA, of course, did not get signed and agreed until much later.

Q44 Mr Wallace: That is the last question I wanted to ask on that. It does seem that when it suited the British Government to go and do a deal on whatever it conveniently left the Scottish Government out at the time. The assurances that the UK and US gave at the UN that Mr al-Megrahi would serve his sentence in Scotland were conveniently dropped and no consultation with you took place when it suited them in the deal in the desert on the MOU of that time, and therefore you were not required because you may have actually objected at the time. Is that your reading of the British Government’s behaviour?

Mr Salmond: I am trying to remember which inquiry said that there was a tendency for sofa government. It was the Butler inquiry, was it not? I suppose this might be marquee government. I believe that the UK Government, or the Prime Minister at the time, would anticipate strong Scottish opposition to the Memorandum of Understanding being signed. That may have been a reason—you will have to ask him—as to why the Scottish Government were not informed of that beforehand, and the Lord Falconer’s letter and also Jack Straw’s meeting with me persuade me that there were other people who were not in the loop as well. You will have to ask them, but certainly the Lord Falconer’s letter explicitly says, “This is not a difficulty. We have told the Libyans that when it comes to a PTA Mr al-Megrahi will not be included”; that is what he says in the letter, and Jack Straw in July of that year said quite openly that he did not see a great difficulty; they would just negotiate a PTA that gave us the assurances that we required. In terms of the Scottish Government’s opposition to a PTA, both because of the nature of its genesis and because of the fact, of course, that the Scottish Criminal Cases Review Commission was sitting and about to pronounce on whether Mr al-Megrahi could have an appeal, and, thirdly, because our belief and assumption in terms of the Lockerbie atrocity was that assurances had been given to the American Government and American relatives that in terms of a period of incarceration that would be served in a Scottish jail, for all these reasons, reasons I set out to the Scottish Parliament, it would have been assumed, I believe, that the Scottish Government would be opposed to such a Memorandum of Understanding and opposed to Mr al-Megrahi being part of a PTA.

Q45 Chairman: First Minister, would you have time to answer a few more questions?

Mr Salmond: Yes, I think you are taking evidence from Mr MacAskill, who obviously was the responsible Minister.

Chairman: Yes, he is supposed to be giving evidence at 11.30. In five minutes probably we will finish our questions.

Q46 Pete Wishart: You have dealt with the PTA arrangements. I just wondered, in terms of a compassionate release, whether you have received any correspondence subsequently from the UK Government and if you have got any understanding of what the view of the UK Government is about compassionate release. The Foreign Secretary said something about not wanting to see Mr al-Megrahi die in prison and we know very much that the strong views of the opposition parties in the Scottish Parliament about this, but have you any understanding of what the view of the UK Government is about the compassionate release of Mr al-Megrahi?

Mr Salmond: I think the Foreign Secretary’s statement is the clearest exhibition of the—I have it here. This is his statement to the Parliament on 12 October 2009: “We assess that, although the decision was not one for the UK Government, British interests, including those of UK nationals, British business and possibly security co-operation, would be damaged, perhaps badly, if Megrahi were to die in a Scottish prison rather than in Libya”. That is the Foreign Secretary’s statement of 12 October 2009. What I would say is that we were never in any doubt that the UK Government was following that position throughout this affair.

Q47 David Mundell: Did you have any direct discussions with the Prime Minister at the time of the release?

Mr Salmond: Did I have discussions at the time of the release? No, because the question of adjudication, which has rightly been described as a quasi-judicial role, was one for the Justice Secretary, and, of course, as you know and it is on the record, we gave the United Kingdom Government prior notification of the decision, as they had requested, as indeed we did the American government, and that was, as we understood it, to effect assurances from the Libyan government in terms of the reception that Mr al-Megrahi was to receive in Libya. Obviously, these assurances were not kept but that was one of the reasons for the prior information that was given to the UK Government. Mr MacAskill, and you can question him on it, would have liked to have more information from the UK Government on the precise nature of the understandings and commitments that had been given to the American government and relatives. If
you remember, Lord Falconer’s letter which I cited to you gave that as one of the reasons why Mr al-Megrahi would not be included in any subsequent PTA and that it had been made clear to the Libyans. The information that came in to Mr MacAskill last year from the UK Government was of a different nature altogether. They said instead that there was no legal bar, if I remember, either to a prisoner transfer agreement including Mr al-Megrahi or to a compassionate release. There was again an evolution of the United Kingdom Government’s position over the period. Before the period in which Mr MacAskill was adjudicating in that quasi-official role, first, the application for a prisoner transfer from the Libyan government, and, secondly, Mr al-Megrahi’s own application for compassionate release. I had many exchanges of correspondence with the responsible Minister in the UK Government, who was Jack Straw, all of which are on the record in terms of being formal, and there were also many phone calls about the issue. I do not think anyone could be in any doubt of what my position as far as the prisoner transfer agreement was.

Q48 David Mundell: Yes, but, as First Minister of Scotland, Scotland’s reputation is surely one of your concerns and you must have been aware, given the publicity and the build-up to the final decision, that this decision would have enormous repercussions, that it would be highlighted in the media across the globe, that there were also ramifications for the United Kingdom, and therefore this was not a situation in which Scotland and the devolved responsibilities in the United Kingdom and the reserved responsibilities should have been working as closely as possible together to ensure that both Scotland’s and the UK’s reputations were not damaged, that the decision-making process was understood, instead of what appeared to those looking on into the media, that there was a buck-passing exercise between the two governments?

Mr Salmond: Can I just draw your attention to what has to be done when there is a formal application for prisoner transfer or, for that matter, an application for compassionate release? It has to be considered by the responsible Minister, or alternatively by the First Minister, but by the responsible Minister in this case, in the way that Mr MacAskill adjudicated. He is in a quasi-judicial role. You are severely limited; in fact, I suspect—and I am not a lawyer—you would be opening yourself to all sorts of issues if you were seen to be moving outside the range of representations that are properly laid out in that process. As you know, Mr MacAskill would have preferred to have more information from the UK Government on this specific matter. There was no doubt in our minds what the UK Government’s view on the matter was, but we would have preferred to have more information specifically on the nature of the international agreements that had been offered at the time to particularly the American government and American relatives. That was precisely the point, that we did not have the information. We believed these agreements were in place. We had evidence from the American government, Mr MacAskill had, and the American relatives. We had indications from previous law officers from Scotland that they believed that to be the case. That was the information that Mr MacAskill was trying to draw out. Before that quasi-judicial process there could not have been more contact between the UK Government and Scottish ministers. As you know from the correspondence, my wish was to have that contact at prime ministerial level. Lord Falconer replied several times to me when he was Lord Chancellor, not to letters I sent to Lord Falconer but to letters I had sent to the Prime Minister. Jack Straw made it very clear that he was the responsible Minister and we had much contact, and it is quite clear that we did not agree on the prisoner transfer and Mr al-Megrahi’s inclusion in it. That was a difference of opinion.

Q49 David Mundell: You are focusing in your answer, Alex, on the decision and not the repercussions of the decision. Surely, knowing the impact it would have in the United States, in Libya, even on many people here in the United Kingdom, that was a matter of such significance that both you, with the interests of Scotland at heart, and the United Kingdom Government with its wider interests, should have been working together to manage rather than doing it, as I alluded to before, through the media.

Mr Salmond: I think you are quite wrong about that. Information, insofar as it could be provided from the terms of the quasi-judicial process, was supplied to the United Kingdom Government. The requests for that information were acceded to. Every effort was being made, and I can ask the Permanent Secretary to elaborate on that because you will find that we gave the UK Government as much warning, as much notice and as much information as it was proper to do, given the quasi-judicial nature of the judgment that Mr MacAskill had to make.

Sir John Elvidge: It may be helpful if I say that I am in no doubt that those parts of the UK Government that needed to be aware of the timescale for the decision and the potential implications of the decision, irrespective of which way the decision went, were fully informed and fully prepared. We did everything we could to ensure that the UK Government had every opportunity to prepare for the moment of decision, but I think the First Minister is right: there was an absolute distinction between bringing them inside the boundary of the decision, which would have been improper in process terms,—but on your concern about the repercussions I can assure you that we were very active at senior levels in making sure that there was—

Q50 David Mundell: An objective person would not have thought, in the aftermath of the decision, that the First Minister and the Prime Minister were singing off the same hymn sheet, would they?

Mr Salmond: I think the Foreign Secretary’s statement that I read out was a reasonable summary—that was certainly my understanding, admittedly phrased in parliamentary language, of
the UK Government’s position. I had never been in any doubt that that was the UK Government’s position and, given that the Foreign Secretary had stated: “We assess that, although the decision was not one for the UK Government, British interests, including those of UK nationals, British business and possibly security co-operation, would be damaged, perhaps badly, if Mr al-Megrahi were to die in a Scottish prison rather than in Libya”. That is a fair summary of the position that was communicated on many occasions. What the Prime Minister said between Mr al-Megrahi’s release and the Foreign Secretary’s statement was a matter for the Prime Minister, but that statement seems pretty clear. As you know, David, consistently in all the correspondence we have never wavered from our view in this matter. Our view in this matter, for a number of reasons, was that the prisoner transfer agreement, negotiated through the Memorandum of Understanding first signed in late May 2007, was a mistake. It was a mistake because it raised an expectation by the Libyan government that Mr al-Megrahi would be included in such a prisoner transfer. It was a mistake because it cut across the due process of Scots law, because one of the provisions of prisoner transfer is that legal proceedings would have to come to an end. It was a mistake because it cut across what we believed to be prior agreements with the United States government and the relatives. With regard to the prisoner transfer agreement, in our view it was not appropriate that Mr al-Megrahi was included in it, but, of course, though Mr MacAskill made the decision, I suspect that was some of the reasoning that he applied and stated in making that decision. Our position on it has been consistent throughout from when I first revealed to the Scottish parliament and the world that such a thing had taken place in terms of the Memorandum of Understanding; when I received the assurances first from Lord Falconer and from Jack Straw that it would not include Mr al-Megrahi, and subsequent correspondence where we asked for a change of heart and mind in terms of negotiation of the PTA. Our view in this matter has never wavered one iota. I think if you read the record you will see that the views of other people have tended to change in emphasis, at least over time.

Q52 Chairman: But you—
Mr Salmond: I am coming to that, Chairman, if I may, because the advice was that the PTA had certain criteria which had to be adhered to, and if you did not grant an application then you had to have cause and reason. Without cause and reason you would be extremely vulnerable to a judicial review. What were our causes and reasons? The two principal ones were outstanding legal proceedings. You will see that cited by Lord Falconer in that letter that I think it is highly significant for the Committee to have a look at. Outstanding legal proceedings were always within the discretion of Mr al-Megrahi and his advisers themselves, but that certainly would have stopped a prisoner transfer being granted because that is in the face of the prisoner transfer agreement. The other cause and reason for not granting a prisoner transfer in this case was to cite prior commitments that had been given to the American government and relatives. You will notice in Mr MacAskill’s statement when he announced his decision that he regretted the fact that the information from the UK Government had not been forthcoming to dispute the claim by the American government and the American relatives about the nature of these understandings. In fact, the UK Government said, if I remember the phrase correctly, that they were political rather than legal. That was the second basis on which you could have refused the prisoner transfer. The prisoner transfer was refused. I suspect it will not be challenged by judicial review because, of course, the effect of compassionate release, which you are quite right to say was decided on quite different criteria, nonetheless is to make any challenge to the refusal of prisoner transfer redundant.

Q53 Chairman: Thank you, First Minister, and Sir John for giving us evidence this morning. Before I declare the meeting closed, you will know that the Calman Commission has recommended that the First Minister should be invited to appear before the Scottish Affairs Committee to outline how Scottish Government legislation interacts with reserved models. Would you be happy to give evidence if you are invited on this basis?
Mr Salmond: A regular slot, I would have hoped, Chairman. Of course, I will give evidence wherever possible, and I am sure that that will be reciprocated, that the Prime Minister and the Chancellor of the Exchequer and other UK ministers will want to make themselves available as time allows to parliamentary committees.

Q54 Mr Davidson: I think that is very helpful because one of the Calman proposals was that there should be this exchange of ministers, and the Scottish Government, I think, said the First Minister does not have to justify the Scottish Government’s programme at Westminster. I do not think I have
however had such an enjoyable meeting with yourself—
I did qualify it—and in that spirit going forward, and
having Jim Murphy or the appropriate minister
speaking to the Scottish Parliament about our programme and you coming here to outline yours
would be an enormous step forward in dialogue.

Mr Salmond: Yes. The fact that I am here and
speaking to you in an enjoyable fashion, Ian, is a
tribute to both of ourselves, but, of course, it rather
testifies to the fact that I am perfectly happy and
willing to do it, time permitting. It is the case, and it
would apply to the Prime Minister and the
Chancellor of the Exchequer or any government
minister, that obviously their prime accountability is
to their parliament. It is the Parliament which
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would apply to the Prime Minister and the
Chancellor of the Exchequer or any government
minister, that obviously their prime accountability is
to their parliament. It is the Parliament which
disposes as to whether the Minister is the Prime
Minister; it is the Scottish Parliament that disposes
whether the First Minister is the First Minister, so
the line of accountability is to your Parliament, but
I see absolutely no reason why, time permitting, I
should not make myself available to committees of
this parliament. I see no reason why the Prime
Minister, time permitting, should not make himself
available or the Chancellor available to committees
of the Scottish Parliament. I know that the
committees in both parliaments will, in that normal
responsible way, rationally request to make the
maximum number of acceptances possible.

Chairman: Thank you once again, First Minister and
Sir John, for giving evidence.

Witnesses: Mr Kenny MacAskill, MSP, Scottish Cabinet Secretary for Justice, and Mr Robert Gordon,
Director General, Justice and Communities, gave evidence.

Q55 Chairman: Good afternoon, Justice Secretary
and Mr Gordon. Thank you for coming to give
evidence to the Committee today. Before we ask
detailed questions would you like to say anything in
your opening remarks?

Mr MacAskill: I have no formal statement to make.
Chairman. I just thank you for the invite here. I did
make it quite clear that the decision made on Mr al-
Megrahi was my decision, and my decision alone,
that I would accept the responsibility and face the
consequences and, equally, I am happy to account
for my decision because in making my decision with
regard to Mr al-Megrahi I followed the rules and
guidance and, I believe, adhered to the values
possessed by the people of Scotland. Equally, we are
conscious as a government that there is still a great
deal of concern amongst many about Lockerbie, the
fact that there has only been one person brought to
account and convicted, and that is disputed by some.
We have always said that we are happy to be open
and that we are happy to co-operate with any
inquiry anywhere that would have the appropriate
jurisdiction so that those who have doubts, those
who seek closure, can be given the support and the
entitlement that we believe they deserve because of
the atrocity that was perpetrated against not simply
people from the United States but people in a small
town in Scotland.

Q56 Chairman: Your memorandum states that the
Scottish Executive was not consulted at all on the
original Memorandum of Understanding with
Libya, although it affected the devolved area of
crime and justice. Is the al-Megrahi case reflective of
other instances where Scotland believes it has been
consulted too late on negotiations affecting devolved
justice-related issues?

Mr MacAskill: No. In the main the discussions and
the relationship between the Justice Department in
Scotland and counterparts south of the border has
been harmonious and good. We face common
problems in people trafficking, in serious and
organised crime, and in terrorism. As the First
Minister said when he gave evidence, when
significant challenges have occurred, such as the
Glasgow airport incident where those who
perpetrated that also sought to wreak carnage down
here in London, that co-operation took place not
simply between governments but between police
forces and indeed prosecutors, so in the main the co-
operation, we believe, is very good. Obviously, the
law of Scotland is separate and distinct from the law
of England and Wales. It has been thus for centuries
and, indeed, is protected within the Act of Union.

Q57 Mr Davidson: Could I just follow up this
question of the arrangements being good and sound.
I was on the Bill that dealt with the proceeds of crime
legislation and I know that you have expressed some
views saying that that needs to be updated and so on.
What is the mechanism and what have you actually
done to pursue that particular case, so that we can
understand how you follow things through and how
we respond at this end?

Mr MacAskill: There is a variety of ways in terms of
serious and organised crime. Obviously, we have
written to the Home Secretary indicating that we
think there should be a further tightening, and
indeed I have invited him to the next meeting of the
Serious Organised Crime Task Force that I
established, upon which not simply myself and
representatives of the police, but indeed of UK
organisations sit, if I can put it that way, such as the
Serious Organised Crime Agency and indeed
HMRC, so in these instances we seek to
communicate with the UK authorities to ask them to
make the requisite changes. Indeed, as the First
Minister has referred to and as Calman has
commented on, I have also written previously,
regrettably without success, and, indeed, met with
previous Home Secretaries, not with Mr Johnson, to
raise the issue of taking action to license airguns that
remain a scourge in our community.

Q58 Mr Davidson: Sorry, I wanted just to focus on
this one because it was one I was particularly
interested in. The way in which you proceeded with
this was simply to write to the Justice Secretary?
There is no other forum? The first I saw about this was when it appeared in the press. There have been a number of occasions, like the question of consultancy and so on, where these sorts of issues seem to appear in the press as a means of communicating rather than any other channels, and I want to be clear whether or not there are other channels apart from the press.

Mr MacAskill: It was not the press; it was a formal letter to the Home Secretary and, indeed, discussions were going on between officials because, obviously, in respect of serious and organised crime, and the proceeds of crime, some matters are reserved; some matters are devolved; some matters can be dealt with; and some matters require co-operation. It is a matter where we have recognised, as I say, that it is a problem that affects not simply the jurisdiction of Scotland, indeed not simply the UK, but serious organised crime is a global phenomenon now, which is why—

Q59 Mr Davidson: I understand. Sorry, I am just trying to be clear: a letter was sent and officials are discussing it?

Mr MacAskill: And, as I say, there are—

Q60 Mr Davidson: And there is no joint meeting? We heard earlier about joint ministerial meetings and so on. There is no forum in which, as the Justice Minister, you can raise this with your colleagues to try and get UK-wide agreement?

Mr MacAskill: I have invited the Home Secretary but he has declined, but I understand that he is sending officials to the next task force that, as I say, meets on a regular, if not quarterly, basis. As I say, these discussions are ongoing. I previously met with Jacqui Smith to discuss matters, in particular, as I say, weapons, but also other matters of relevance across the border, such as tackling alcohol abuse and, as I say, serious and organised crime.

Q61 Lindsay Roy: In your memorandum you state that relations between governments on the subject of PTAs has been historically very good. What was different in the case of the PTA with Libya?

Mr MacAskill: As the First Minister said, we only had one Libyan prisoner. I think we now have no Libyan prisoners. I practised law in the capital city, and indeed in Glasgow, for many years and I do not ever remember a Libyan national, so I do not know if we have ever had a Libyan prisoner. Any prisoner transfer agreement that was entered into had to deal specifically with Mr al-Megrahi unless, as was the matter raised by the First Minister back in June 2007, it was specifically excluded. I think it was beyond any reasonable competence to suggest that we could enter into a PTA with Libya and not be referring to Mr al-Megrahi unless he was excluded. Apart from him as far as I am aware there is not, and never has been, a Libyan prisoner in Scotland.

Q62 Lindsay Roy: Had you been specifically consulted about foreign nationals from other countries who were in Scottish prisons as part of the previous PTA discussions?

Mr MacAskill: Not in the main. We see PTA as a relatively good thing. There are foreign nationals, as indeed I have discussed with the High Commissioner of Jamaica, where we have prisoners in Cornton Vale Prison who have been drug couriers where they cause difficulties for the Scottish Prison Service and, as a government, we will have no difficulties in seeking to assist if they are required to return there, because in fact every prisoner transfer application that has been made that has met the appropriate criteria, I understand, has been granted by either myself or, more importantly, by my predecessors. In the main PTAs are sensible things. As a government, we would like to be able to be engaged with them because these matters, as I say, tend to have been entered into without us being kept in the loop, but the concept of PTAs is something that we support.

Q63 Mr Carmichael: In terms of this business about the motivation for the exclusion of al-Megrahi from the PTA, the suggestion has always been that the UK Government were passing the buck. Can I suggest to you that maybe bucks can pass both ways and the insistence on an exclusion was simply a passing of the buck back to the UK Government by the Scottish Government? This was a political process, not a legal one, was it not?

Mr MacAskill: I do not think it has ever been suggested that I passed the buck. Mr Carmichael, I made it quite clear that I would take responsibility for the decisions and should do so—

Q64 Mr Carmichael: I am not talking about the decision itself; I am talking about the PTA.

Mr MacAskill: The PTA, I think, probably goes back to this question raised by Mr Roy. When this occurred in June 2007 we were talking about only one Libyan national. That person had been convicted of the Lockerbie bombing. The point was approaching when the reference from the SCCRC, the Scottish Criminal Cases Review Commission, was about to be made to the Scottish courts and it certainly seemed to us that what was going on was circumventing the due process of law in Scotland, so, as I say, there was a variety of matters in which what was occurring without our cognisance, our acceptance, and indeed our views being taken into account, was going to potentially have significant consequences not just for the Government of Scotland but particularly for the law of Scotland.

Q65 Mr Carmichael: But this business about circumventing that presupposes, of course, that al-Megrahi would have abandoned all his appeals, for example.

Mr MacAskill: Yes, but equally the argument put to me by Mr Tony Kelly, the lawyer on behalf of Mr al-Megrahi, and I think it is accepted that it was possible to consider the matter on the basis that it could be homologated—and you will know what I mean by that, Mr Carmichael—and that I could have made a decision subject to Mr al-Megrahi abandoning his appeal. That was certainly the position put forward by Tony Kelly, the lawyer on behalf of Mr al-Megrahi. Whether or not that was
the position of the Labour Party, I do not know. He is the brother of the deputy Labour Justice spokesman in Holyrood, but whether they speak off the same script, I do not know.

Q66 Mr Carmichael: The concept of homologation in criminal procedure would be a fairly novel one, I think.
Mr MacAskill: Certainly our understanding is it could have been judicially reviewed had we refused it on that, if they indicated that it was their intention to abandon the appeal.

Q67 Mr Carmichael: Why were you so reluctant to consider the application under the PTA?
Mr MacAskill: Because I took evidence. As I say, as the First Minister said, an application came in once the PTA had been signed. That was within the competence and followed the rules. It was my obligation to deal with that. We could not refuse to consider the application for a prisoner transfer. It was appropriately made by the Libyan Government on behalf of Mr al-Megrahi. It was decided that I would be the responsible minister and that was made clear to the presiding officer and to Parliament by the First Minister. Therefore, I went into a quasi-judicial position where I would consider matters in terms of interviewing and listening to witnesses. I interviewed and spoke to Eric Holder, the United States Attorney General. Mr Holder advised me that it was the clear understanding of the American Government that when the agreement had been entered into for Mr al-Megrahi to be returned to face trial at a Scottish court, albeit located in The Netherlands, he would serve any sentence that was imposed, as indeed would his co-accused, had he been convicted, at a Scottish prison. That was the clear position of the United States Attorney General. Mr Holder also advised me that he not only was the current United States Attorney General but, indeed, he had been the Deputy United States Attorney General to Janet Reno when these discussions took place. That seemed to me to make him a very credible witness. Not only was he speaking for the American Government but he had been an active participant and he was adamant that there had been a clear understanding given to the United States Government. I spoke to the relatives of the American families and they too indicated that they believed that they had been given undertakings. It was for that reason, as the First Minister referred to earlier, that I asked the United Kingdom Government to come and give evidence or to provide me with representations as to their view. They declined to do so and, as I said in my statement and I say again, I think that is a matter of regret.

Q68 Mr Carmichael: You are saying basically that the United Kingdom Government entered into two separate bilateral agreements with two foreign powers which were mutually inconsistent?
Mr MacAskill: I know what was entered into in terms of the prisoner transfer agreement. What was entered into round about the decade before between Janet Reno and whoever was the UK minister I do not know, but both Eric Holder and, indeed, Secretary of State Hillary Clinton were clear that the United States Government believed that they had been given an undertaking. Whether that was a sworn affidavit, a signed document or simply an understanding between governments, I do not know. Again, as the First Minister referred to, reference was made by the United Kingdom Government to this being—and I put my inverted commas in here—a “political”, not legal agreement, so I do not know what was agreed, but what I said in my statement and what I stand by is that I believe that the United States Government and the United States families either were given or were led to believe that there was an understanding that Mr al-Megrahi would serve his sentence in Scotland, and it was on that basis that I refused the prisoner transfer application by the Libyan Government.

Q69 Mr Carmichael: Do you feel you were being used to get the UK Government out of a hole?
Mr MacAskill: I think people ran for cover. Beyond that, as I say, I accepted what went with the turf. As I said in my statement, it is a privilege to be the Justice Secretary in Scotland.

Q70 Mr Carmichael: On the PTA issue.
Mr MacAskill: I think on the PTA issue, as a government, we felt there had been disrespectful matters earlier on in terms of the PTA. In terms of providing the information, I do think it a matter of regret that Janet Reno, Hillary Clinton, John Brennan and others were all happy to advise of the United States position, but the United Kingdom did not seem prepared to put forward any information other than to say that there had been a political, not legal, agreement.

Q71 Mr Wallace: It is good to see you after many years in the Scottish Parliament, Justice Secretary. Could I just ask about this on the prisoner transfer agreement. Was it a reasonable ground, once an application was made under the PTA, to refuse it based on the fact that assurances had been given elsewhere? Was that not unacceptable?
Mr MacAskill: My understanding is that no application from a prisoner transfer agreement that has met all the relevant criteria has been refused either by myself or, indeed, any previous Justice Secretary. If the criteria are met, then transfers take place.

Q72 Mr Wallace: The criteria do not include objection from victims, et cetera. It is not one of the criteria.
Mr MacAskill: There is no reference to that at all, nor is there any reference to the nature of the offence.

Q73 Mr Wallace: Was it your understanding that the reason a PTA, including al-Megrahi, was inappropriate was that perhaps you took the same reasons that the American victims and the American Attorney General did, that the letter in 1998 between the UK and the US to the UN, which stated quite clearly that they expected the prisoner to serve his
full sentence in Scotland—I think that was the wording used—was enough of a commitment to say, “That is the assurance. That was the letter that was done back in 1998 to the UN. That was a commitment”, and therefore your understanding was that the UK would not change their position; they certainly would not do it unilaterally without discussing it with you?  

**Mr MacAskill:** No; I think there are two separate matters. One was when the PTA was entered into and the other was when the prisoner transfer application was made to me. I did not seek to pre-judge the decision I would have to make because I sat in a quasi-judicial capacity and it would have been wrong and that could have been challenged had I made a formal decision on the prisoner transfer application once received, but on the principle of the prisoner transfer application, then, obviously, as the First Minister has said, this was undermining due process that was taking place in Scotland. A reference was about to come in from the Scottish Criminal Cases Review Commission. Equally, we are conscious as a government that we can be judicially reviewed, whether by individuals, whether by foreign governments, whether on behalf of insurance companies or whether on behalf of aggrieved prisoners. We face that difficulty and do not have the same powers of protection as other states that have matters and negotiations with the UK Government to get that. As I say, it was certainly the position that had we refused a prisoner transfer application in respect of Mr al-Megrahi outright without any clear basis in fact, then we would have left ourselves open to judicial review. Indeed, I think it could be argued that, given every other application that met the appropriate criteria was always granted, there would be something perverse if you were not prepared to consider him, so we would have left our back exposed, so we opposed the principle of the PTA unless there could be exclusion for Mr al-Megrahi. Once that was signed it thereafter became inappropriate for me to make any formal comment because I would have to look at matters in a quasi-judicial capacity and, accordingly, I could not and would not pre-judge the position until I got the evidence.

**Q74 Mr Wallace:** How much anger was there? The position of the Scottish Government was that they accepted that assurance had been given in May, the objectives of the PTA, the PTA was then negotiated and done, the Justice Secretary under Jack Straw did a u-turn and suddenly al-Megrahi was included, due process started in Scotland. Not only was your due process being undermined but also an agreement that affected a mass murder was in effect imposed against your wishes.  

**Mr MacAskill:** I do not think “anger” is the word. We did feel aggrieved and that was why the issue was raised in Parliament and we sought to get (and did get) cross-party parliamentary support but, as I say, thereafter this was not a matter of a lingering or running sore. I had to make sure that when I considered matters in terms of the PTA I did so fairly and, as we made quite clear, it would be on the basis of looking at matters according to the rules, guidance and the laws of Scotland, not on the basis of any diplomatic, political or, indeed, economic considerations.

**Q75 Mr Wallace:** The First Minister said in his evidence before you came on that there had been a long suspicion that Mr al-Megrahi was always subject to some of these discussions. When did your suspicions first start?  

**Mr MacAskill:** I think it became quite clear. Our suspicions first started when it became quite clear that we had only one Libyan prisoner and when I spoke to the Scottish Prison Service, and, indeed, having been a lawyer in Scotland for 20 years prior to my election to Parliament, knowing that the Scottish jurisdiction is not awash with Libyan nationals perpetrating crimes in Scotland, it was self-evident that Mr al-Megrahi was that individual. As I say, my understanding at the present moment, and I am open to correction by the Scottish Prison Service, is that we have had no prior Libyan national and currently have no Libyan national. As I say, therefore, it was quite clear that unless Mr al-Megrahi was excluded, which was the request of the Scottish Government, then he was going to be the individual that was in the frame, so to speak. I also understand that south of the border the number of Libyan nationals within the English and Welsh Prison Service is quite limited. We are only talking about a couple, not even a handful.

**Q76 Pete Wishart:** Good afternoon, Kenny. It is nice to see you down here at our Select Committee. What was made of your visit to prison to speak to Mr al-Megrahi? There was a lot of confusion about why that was. Could you just clarify why you visited Mr al-Megrahi and was it to do with the conditions and the obligations set out in the prisoner transfer agreement? Why did you do it?  

**Mr MacAskill:** There were two reasons. First, this was the first prisoner transfer agreement that was entered into whereby an application could be made by the national government, not by the individual, and the application that came before me for prisoner transfer, not for compassionate release, came not in the name of Mr al-Megrahi but in the name of the Libyan Government. It had been made quite clear by Jack Straw that in these situations it would be appropriate, and indeed I think it is self-evident, that you should take the view of the individual. There could be an instance—it was not in this situation—where an individual did not wish to be transferred back, so accordingly it is self-evident that if a government makes an application, you should at least ask the person who is to be subject to transfer whether or not that is what they wish. That was the first reason that Jack Straw went and said that it was appropriate that we should take his views. Secondly, we are subject to judicial review. We had been, as I say, meeting and listening to others: telephone conversations with the US Attorney General, video links with American relatives in New York and

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2 **Witness amendment:** and without requiring the consent of the individual.
Mr MacAskill: No. It was made clear by Jack Straw giving evidence to the Westminster Committee on Human Rights, as I understand it, that where the application is made by a nation state or national government it is appropriate—and I accept that view; I think he is correct there—and indeed correct that you should take the views of the prisoner into account.

Q79 Mr Carmichael: But there is a quantum leap, is there not, between taking the views of the prisoner into account and going to see him in prison in person?

Mr MacAskill: That then takes you into the logical follow-on.

Q80 Mr Carmichael: Can you just bear with me a second—to take representations from somebody who had some of the best paid and the best qualified representatives that the firmament of the Scottish legal profession could provide? Surely there were other means by which it could be done.

Mr MacAskill: No. I think I come back to the causal link. The application was by the national government. Jack Straw says that when it is a national government the individual has to be consulted. I wrote to the individual. He wrote back saying he wished to make the representation. I do not think it would be correct for me to say, “I am not listening to you but I will listen to your lawyers”. I do not appoint his lawyers. He chose not to make the representation through his lawyers; he chose to make the representation himself.

Q81 Mr Carmichael: Moving forward in the future, if anybody else is in the same situation that Mr al-Megrahi is in, are you or any future Scottish Justice Minister going to have to jump in the car and head off to Barlinnie or Greenock or wherever it is?

Mr MacAskill: That would depend whether the application was made by the national government or by the individual. If the application, as I say, is made by the individual then I think you are not necessarily duty-bound to do so. When the application is made by the national government—

Q82 Mr Carmichael: You have to go and see them in person?

Mr MacAskill: Mr Carmichael, we all hope that we will never be in such a situation again. We have not faced a situation such as Mr al-Megrahi before and we are hopefully unlikely to again.

Chairman: Can we move on? This is a matter for the Scottish Executive to decide.

Q83 Ms Clark: I was going to pick up on some of the points that Alistair was making. I think there is a lot of surprise about the way it was handled and I think a lot of people are not clear why you went personally. Do you know whether Jack Straw has ever dealt with any of these applications and do you know whether he has ever met any prisoners personally, and has the Scottish Executive ever dealt with a

Witness amendment: in circumstances where the consent of the prisoner is not required.
prisoner transfer agreement case before and has any other Justice Minister ever met with a prisoner personally?

**Mr MacAskill:** I cannot comment on the position of Jack Straw, nor can I comment on the position of any predecessors. What I can say is that this is the only application I have ever had by a national government. I think this was the first PTA where an application could be made by a national government. I think this was the first PTA where an application could be and was made by the government, not by the individual.

**Q84 Chairman:** Can you tell us what are the shortfalls in the devolution Memorandum of Understanding which meant Mr al-Megrahi became an issue?

**Mr MacAskill:** I think that the shortfalls in the Memorandum of Understanding were simply that the PTA was entered into without taking account of the Scottish Government’s position. Had the Scottish Government’s position been accepted, had the initial position of Lord Falconer, and indeed Jack Straw, been adhered to, then the prisoner transfer application would not have been before me. That said, I would still in all likelihood have had to face the application for compassionate release which was Mr al-Megrahi’s right.

**Q85 Chairman:** But let us say the PTA agreement was not signed between Libya and Britain. Do you think the outcome of this request on release on compassionate grounds outcome would be different?

**Mr MacAskill:** No. If an application for compassionate release is made by any prisoner, and indeed there have been some 25 if my memory serves me well since devolution and many before then, they follow the guidance and advice that relates to compassionate release. As I said, every application for prisoner transfer application which met the criteria has been granted by me and by my predecessors. Equally, all 25 applications for compassionate release that met the appropriate criteria have been granted by myself and by my predecessors.

**Q86 David Mundell:** Mr MacAskill, I am not challenging the decision because, as you have said repeatedly, it was for you and you alone, and although I do not agree with it I do respect that. However, setting that aside, do you have any regrets at all about the way in which this whole matter was handled?

**Mr MacAskill:** No. I have regrets in terms of the difficulties that we got into because of the PTA or whatever, but I think I was well served by the staff who worked with me and who supported me. We followed, as I say, the rules and guidance. We believe that we came to the right decision for the right reasons.

**Q87 David Mundell:** You do not think the matter could have been better handled? You did not regret the fact that it was leaked or in the press a week or so before you made the decision? You do not regret the scenes that we saw in Tripoli? You do not regret seeing President Obama criticising Scotland? You do not think any of those things are a matter of regret?

**Mr MacAskill:** Can I say first of all there is a variety of matters that you have raised there. Clearly, in terms of the scenes of welcome to Mr al-Megrahi, that is a matter that we publicly stated was a matter of regret. We had been given assurances by the government of Libya that there would be no joyous celebration. Clearly, that was not adhered to. We had been, as was said by the First Minister, in discussion to forewarn the UK because had the decision, for example, gone the other way there were UK interests to protect. They had sought assurances from the Libyan government and we had co-operated with them and agreed that they should seek those assurances, and indeed the government of the United States sought assurances from Libya when I spoke to John Brennan, the Head of Homeland Security, the day before, so clearly the position is that the Libyans did not adhere to the undertaking that they gave to us, that they gave to the UK and the United States governments. That is a matter of regret because it did cause upset and distress to the victims but, as I say, that is a matter that the Libyans have to account for. As I say, we sought the relevant assurances. Aside from that, we followed the appropriate rules and regulations. You made reference to leaks apparently in the paper. I read in the *Sunday Post*, that most august of journals, before I made my decision that I apparently was not going to release him. I have to say, and I can say again, I had not made my decision when it was said by the *Sunday Post* I was not going to release him, so there is an awful lot of press speculation about Mr al-Megrahi. There is a media industry around Mr al-Megrahi, and indeed twice since I released him I have heard reports of his death, including one emblazoned across *Sky News* around the world when he was alive and well, so I would not believe everything you read in the papers about Mr al-Megrahi.

**Q88 David Mundell:** Mr MacAskill, nobody knows more than my constituents that there is a media industry around Mr al-Megrahi and the way in which the matter was handled did not help them in coming to terms with that decision. That is just for the record. Do you not yourself believe that you could have worked more closely with the United Kingdom Government once the decision was made in terms of managing the repercussions of that decision because it was inevitably going to impact both on Scotland and on the United Kingdom? Although the First Minister referred to the Foreign Secretary’s statement in October, we did not in the immediate aftermath have any evidence of the...
Scottish Government and the United Kingdom Government having a co-ordinated position on this issue.

Mr MacAskill: That is not true. As the First Minister said, we did co-operate fully and closely with the Foreign & Commonwealth Office. There had to be contingency plans. Had the decision gone the other way then, as I say, there would have been an impact potentially upon the interests of the UK, both nationals and government, so accordingly we were required to discuss and prepare with them. It was through them that we also sought to get assurances from the Libyan government confirming the assurances that we had been given in person that there would not be any scenes of celebration, so we fully co-operated with them there. What I can say is two other matters. One, I did not see any UK minister; indeed, many other people went as far away as possible from this decision. Secondly, to be fair, it would have been entirely inappropriate for me, sitting in a quasi-judicial capacity, to have then sought to do some back-room negotiations or advice. That just cannot be done. A high court judge does not get off the bench to go and ask an MP what he thinks he should do about a decision that is appearing before him. The decision fell to me. I took responsibility for it. I took the advice coming in from the Scottish Prison Service, from the prison governor, and indeed from the Parole Board. That is what I was required to do by the laws and guidance of Scotland, but I made that decision. To have sought to bring in anybody else would have, I think, tarnished the decision and left it open to judicial review.

Q89 David Mundell: But, again, like Mr Salmond, Mr MacAskill, you are seeking to muddy the waters in respect of the decision and the repercussions of the decision. I do not think anybody at this Committee has suggested to you that there should have been interference with your decision but once the decision was made it had repercussions both for Scotland, your Government and the United Kingdom and its Government, and therefore surely you should have been working together to manage those repercussions rather than allow them simply to unfold and to see, which I think any objective bystander would see, what was an attempt to pass the buck between the respective administrations as to who really took the decision.

Mr MacAskill: I am mindful of the point made by Mr Mc Govern, but I think I have already answered it and said that I had to make the decision because otherwise it would have been open to judicial review. We co-operated with the FCO because of the interests that could go either way and there were contingency plans appropriately, and thereafter I would be more than happy and delighted to engage on a more international stage, Mr Mundell, but you would be the first to criticise me and my colleagues of the Scottish Government if we sought to usurp our powers that are restricted to the devolved administration area.

David Mundell: It was shorter but it was not an answer.

Q90 Chairman: Mr MacAskill, who was involved in communications with the UK on this matter and what were the failings, if there were any?

Mr MacAskill: The communications with the UK Government came through officials and official channels. I do not know if Robert Gordon wants to add anything.

Mr Gordon: Chairman, my colleague, George Burgess, was in touch with colleagues in the Foreign & Commonwealth Office. I spoke to HM ambassador in Tripoli on a number of occasions. It was through those contacts that we had, as the Cabinet Secretary has said, further reassurance that the Libyan authorities had been asked by the UK authorities as well as by ourselves that the reception should be without great celebration and fuss.

Q91 Mr Wallace: The First Minister said, and Sir John Elvidge also said, that the Scottish Government did all it could to inform Her Majesty’s Government in Whitehall what was going on. Mr al-Megrahi was diagnosed with cancer in September 2008. At what stage did you then inform the UK Government of that fact and what was their response on what was clearly developing into a compassionate case rather than a PTA case in the year, almost that it took, before he was then released on compassionate grounds? Did they reply to you? Did they send you a letter?

Mr MacAskill: I am not medically qualified, which is why I followed the guidance given by the Director of Health and Care in the Scottish Prison Service, but additionally his diagnosis of prostate cancer was resulting in him being given treatment. It was only later on that it became quite clear that the treatment was not going to work and that his illness was terminal, and indeed at the time that the Scottish Government put in his prisoner transfer application, as I recall it in May 2009, he still did not meet the criteria. The application was only, as I say, eligible according to the guidance and rules when it was viewed as being within a likely three months’ termination if he remained in a Scottish prison.

Q92 Mr Wallace: I understand when did you inform the UK Government that he was diagnosed with cancer or that the cancer had become terminal, and then what was the response from the UK Government at that stage?

Mr Gordon: We had contact with the UK Government and the Libyan government, because obviously the Libyan government had been informed by Mr al-Megrahi that he had this condition, so we had, and the minutes of the various meetings have been put in the public domain, a series of meetings with the Libyan authorities where we discussed four things: his condition and the treatment he was receiving in Greenock Prison; his application for interim liberation which was before the courts, where we stressed that that was a matter for the courts, not for the Scottish Government; the progress of the negotiation of the prisoner transfer agreement, which again was a matter for the UK
Government; and the possibility of, at some stage, an application for compassionate release being made. We had a series of discussions every six months5 or so with the Libyan authorities, and the Foreign & Commonwealth Office was kept in touch with those discussions.

Q93 Mr Wallace: It is fascinating about the Libyan government but the question remains, given the First Minister’s evidence, when did the Scottish Government inform the British Government that Mr al-Megrahi was suffering from a condition such as cancer and when it got more serious or when it was not responding to treatment, or was the first the British Government knew that he was suffering from such condition when he applied for compassionate release, which was back in July 2009? Was that the first they knew about it or were they informed? That is the question.

Mr Gordon: Mr al-Megrahi’s lawyers announced publicly in October 2008 that he was suffering from terminal prostate cancer, so that was known by everybody at that stage.

Q94 Mr Wallace: There was no formal process? What you are saying is that the Scotland Office or the Foreign Office had to rely on reading it in the paper to know as opposed to you writing a letter, given the fact that my colleague, Mr Mundell, pointed out that the release of Mr al-Megrahi, whether compassionate or a PTA, would have a major impact on both the British image and the Scottish image and relations with other countries? There was no formal mechanism where you wrote a letter to the British Government and said, “Mr al-Megrahi has now been diagnosed with terminal cancer one month after he was originally diagnosed with cancer, and therefore there is a compassionate release issue”, or when he applied for compassionate release did you then notify the British Government, or was it just left up to hope that someone opened a newspaper and rang you up, because it was a material issue that affected the status of Mr al-Megrahi?

Mr MacAskill: It was always part of his prisoner transfer application that we could put it back in the margins. The reason he wanted to go home was that he was terminally ill. That was one of the positions being put forward by his agents, both in the public domain and indeed elsewhere. There was ongoing correspondence that we have put out except where parties have refused to allow that. It is quite clear that the information relating to his health is there. As I say, it was a fluid situation. His health is ongoing in terms of his demise, but, as I say and as I have answered within the Scottish Parliament, we are not in the business of giving a running commentary on his private health matters.

Q95 Mr Wallace: I am sorry, but the First Minister gave evidence to this Committee just before you to say that at every stage and every opportunity he kept

5 Witness amendment: ‘months’ to be replaced by ‘weeks’, sentence to read: “We had a series of discussions every six weeks or so with the Libyan authorities . . . .”

Q96 Mr Wallace: So you cannot put it in the margins; it is a separate application. Mr al-Megrahi gets terminal cancer and no-one in the Scottish Government thinks it is relevant to inform the UK Government, given that it could be a major ground for release under a separate application that does actually happen 12 months later?

Mr MacAskill: The UK Government were aware, and I will let Robert give more precise details, because there had to be various scenario planning entered into with the FCO as to what may happen or may not happen, as I say. That was the position. Robert, I do not know if you want to expand upon that.

Mr Gordon: I am sorry if I misled you in my previous answer, but we, the Scottish Government, were in touch with the Foreign & Commonwealth Office and with the British Embassy in Tripoli throughout. The first formal encounter was when I came to London with a colleague and we met the Foreign Office and we also met the Libyan authorities, and the Foreign Office knew then that Mr al-Megrahi had terminal cancer. I cannot remember the precise date of that meeting but the note of that meeting is in the public domain. We then entered into a regular series of meetings with the Libyan authorities because it was clear that any decision on a prisoner transfer agreement would be for the Scottish Government, that any decision on any compassionate release application that might be forthcoming would be for the Scottish Government and that it was the Scottish Government and the Scottish Prison Service which would tell the Libyan authorities how Mr al-Megrahi was being treated in Greenock Prison. We were having those meetings with the Libyan authorities but we were also keeping the Foreign & Commonwealth Office and the Embassy in Tripoli abreast of what was going on.

Q97 Mr Wallace: And they never made a response in the sense that they just said, “It is up to you”? So when you did your scenario planning—and if you can inform the Committee of the date that you informed them that would be helpful—did they have any response other than to just say, “That is up to you”?

Mr Gordon: As Mr MacAskill and the First Minister have made clear, the UK authorities were obviously interested in the implications of any decision for UK residents in Libya, so when it came to the final scenario planning at the point before Mr MacAskill reached his decision on the prisoner transfer application and on the compassionate release application, there was scenario planning with the various parties, but always on the basis that the decisions could go either way.
Q98 Mr Wallace: And when was that final scenario planning? Can you remember the date?
Mr Gordon: The final scenario planning was a matter of days before the decision. It was ten days before.

Q99 Pete Wishart: Can I also explore the scenario implications because we were very confused as to what the UK Government response to the compassionate release was? The closest we have got to a UK response was that a statement was read out by the First Minister from the Foreign Secretary saying that he would prefer that Mr al-Megrahi did not die in a Scottish jail, but for ages we did not know what the UK position was, and this was really confusing. We knew what the positions of the Conservatives and the Liberals were because they opposed the compassionate release of Mr al-Megrahi, but for such a long time on such an important decision we did not know what the position of the UK Government was. For a while it seemed like the opposition in the Scottish Parliament were almost spokespeople for the UK Government in their opposition. Until we got that clarifying statement from the Foreign Secretary it was all very confused, but even after that there was again Cabinet Secretary's going on the media saying we opposed this. Have you got an opinion about what the known view of the UK Government is, and have they made any contact with you to say what they feel about this position of days before the decision. It was ten days before.

Mr MacAskill: No. I can only reiterate what the First Minister has said in terms of the parliamentary response. As I say, I made the decision in a quasi-judicial capacity and therefore I was very circumspect as to how I dealt with individuals, whether my own Cabinet colleagues or indeed any Cabinet Ministers have expressed a view?
Mr MacAskill: Oh, yes, it would have been entirely inappropriate for them to have interfered.

Q100 Chairman: Do you believe that it was right for the British Government not to interfere in your area of devolved issues?
Mr MacAskill: That is a matter for the British Government.

Q101 Mr Davidson: Would it also have been inappropriate for them to have commented and to have expressed a view?
Mr MacAskill: Yes, indeed. Mr MacAskill: To be fair, I think Jack Straw accepted that it was my decision and therefore left me alone to make that decision.

Q102 Mr Davidson: You are losing me. Can I just clarify though whether or not you are saying that in your view the British Government should have expressed an opinion?
Mr Davidson: Are you saying that in your view the British Government should have expressed an opinion?

Q103 Chairman: Before you made a decision.
Mr MacAskill: That is a matter for the British Government.

Q104 Mr Davidson: Yes, indeed.
Mr MacAskill: To be fair, I think Jack Straw accepted that it was my decision and therefore left me alone to make that decision.

Q105 Mr Davidson: That is right, and therefore it was inappropriate to criticise him for not expressing a comment.
Mr MacAskill: I am not making any comment either way.
Mr Davidson: Fine, thank you. That is helpful.

Q106 David Mundell: Can I ask you, Mr Gordon, to clarify in relation to this scenario planning, did any of that involve managing the repercussions of the decision, whether there would be any media activity jointly by the Scottish Government, the UK Government, whether statements would be released, whether representations would be made from ambassadors? Did it involve any proactive activity by either the Scottish Government or the UK Government post the decision?
Mr Gordon: The main emphasis was on looking at the mechanics of different decisions and what different parties would have to do in the event of particular decisions. It included making arrangements for the statement which the Cabinet Secretary was going to be making to be broadcast and to be made available to victims' families, their representatives and a whole lot of planning about how the decision would be communicated to everybody who had an interest in that at the appropriate time.

Q107 David Mundell: But there was no speculation on likely responses and how those responses should be managed to protect or preserve the UK's or Scotland's reputation or interests?
Mr Gordon: I think the terms of the Cabinet Secretary's statement, and he can answer on this, his statement, over which he spent a great deal of time, was to set out as completely and fully as he could the rationale for the decision and all the factors that had been taken into account and the reason for coming to that decision. It seems to me that that was the key element, that whatever decisions were taken some people would be dissatisfied, and it seemed to me at the end of the day that the key thing was that he should have a statement with which he was content which would stand the test of scrutiny by the various interests, and I believe that is what has happened.

Q108 David Mundell: Once that statement was made the view from both the Scottish Government and the UK Government was that there was no need for any further proactive activity?
Mr Gordon: Obviously, I cannot speak for the UK Government.
Q109 David Mundell: But you were in these scenario plannings.

Mr Gordon: But the issue for us was that the Cabinet Secretary, as he and the First Minister have explained, was following due process and reaching a decision taking the appropriate factors into account on both applications that were before him and then making a statement which set out the basis for that and then standing by that statement.

Chairman: I am afraid Mr MacAskill has to leave in a few minutes’ time, Jim, very briefly, and we expect a brief answer as well.

Q110 Mr McGovern: You can keep asking the Committee Members to be brief but you do not seem to be asking the witnesses to be brief. I was on holiday in the United States last summer and if anyone asked what I did for a living, obviously, I was honest and told them I was a Member of Parliament. The American people were very quickly critical that we had let this convicted terrorist go free, and when I pointed out that it was not a UK Government decision, it was a Scottish Executive decision, they were quite surprised to hear that. When I came home the local press contacted me and asked me questions about it, and I said just what I have said here just now. One of your colleagues, Joe Fitzpatrick, MSP for Dundee West, criticised me in the press for not stepping up for Scotland. It seems to me that the Scottish Executive or the SNP in particular, whenever something goes wrong, says, “Big boy in London did it and ran away”, but for the very first time they were not able to say that. The decision was yours and yours alone. I am not criticising you particularly but your colleague here, Mr Wishart, seems to want to implicate the UK Government in the bad news story.

Mr MacAskill: I said at the outset, and I say it again: it was my decision and I stand by it. I have never sought to criticise anybody for disagreeing with it. I do have some views about some people who seem to have had no view until such time as I had taken a position, but, as I say, I took the decision I did. With regard to the United States, all I can say is that the relationship between Scotland and the United States is long-standing. Our men are currently serving with them in Afghanistan, as they have served in previous hostilities.

Q111 Mr McGovern: That is the British Army.

Mr MacAskill: I have met with the Consul General, I have met with congressmen since the decision and, as I say, I think the relationship between Scotland and North America will continue. I would also point out that although the United States Government expressed their opposition to the decision the Catholic Church in the United States and indeed the Presbyterian Church issued their support.

Q112 Mr McGovern: What is the significance of that?

Mr MacAskill: I have to say I was delighted in Scotland when the Cardinal came out in support and indeed the Church of Scotland as well. It may be that that is not a matter that interests you, Mr McGovern, but I have to say that when I get support for my decision from them I do feel some sustenance and some pride.

Q113 Chairman: Can I thank the witnesses for their attendance this afternoon. Before I declare the meeting closed would you like to say anything in conclusion that you feel we have not covered during our questions?

Mr MacAskill: As I say, this Government and myself in particular are more than happy to fully co-operate in any jurisdiction, whether it is here or elsewhere, so that we try to assuage the fears and the pain that still exists from those who have suffered as a result of the Lockerbie tragedy. As I say, we are open to fully co-operating. What matters we can we make public and, as I say, when asked we attend.

Chairman: Thank you for your attendance.
Wednesday 27 January 2010

Members present
Mr Mohammad Sarwar, in the Chair
Mr Ian Davidson
Lindsay Roy
Mr Charles Walker

Mr Ben Wallace
Pete Wishart

Witnesses: Rt Hon Jack Straw MP, Secretary of State for Justice, Rt Hon Jim Murphy MP, Secretary of State for Scotland, and Professor Jim Gallagher, Director General, Devolution, Ministry of Justice, gave evidence.

Q114 Chairman: Good afternoon, Secretaries of State and Professor Gallagher. I would like to welcome you all to today’s evidence session. Perhaps, Professor Gallagher, you could introduce yourself for the record.

Professor Gallagher: My name is Jim Gallagher. I am the Director General for Devolution and I work principally in the Ministry of Justice.

Q115 Chairman: Before we start asking detailed questions, would you like to make any opening remarks?

Mr Straw: I do not think so is the answer, thank you.

Mr Murphy: Hello. It is good to be here, again.

Q116 Chairman: It is nice to see you the second time.

Mr Straw: In my case for the first time.

Q117 Chairman: Alan Trench from the Constitution Unit has said that the Memorandum of Understanding between the UK and devolved government is not fit for purpose and Sir John Elvidge, Permanent Secretary to the Scottish Executive, told the Committee that there are “cobwebs” on some of the structures for intergovernmental relations. Would you agree with that assessment?

Mr Murphy: Chairman, I think the principle behind this is firstly accountability. It is a way in which politicians who are elected by different mandates, different geographies, are accountable for what happens through the process. So it is about accountability and it is also about trying to drive consensus, and I think the creation of an external arbiter or referee who is potentially accountable would undermine the drive towards consensus because I think if people in all the administrations and all the ministers, all the complexity of all the politics of all the devolutions that we have across the United Kingdom, if they know the kind of ethos is to try and find consensus then I think that is what would drive them and that would be the dynamic in the conversations. I think if everyone knew we just have to start a dispute here and the chances are an external referee may find in my favour, that would alter the nature of the process. So I think at the moment we are not

Q118 Chairman: Could you update us on the current status of the Memorandum of Understanding and the timetable for publication of the revised version?

Mr Murphy: Chairman, it is certainly my understanding—and if I have got it wrong Jack can correct me—that individually each of the administrations involved agree with the content and substance, but it is something that we need a multilateral agreement on and the current hiatus in Northern Ireland, which we are not here to speculate on, makes that more difficult at the moment, but there will be a genuine hope that once that has settled signing could take place.

Mr Straw: That is the situation, when it is settled, and just reflecting what Jim has said, you asked specifically whether we accepted the strictures of the Constitution Unit. The direct answer to that is, no, because, as Jim said, we are in an evolving situation here. We began from a standing start in 1998 and if you look at the creation of devolved institutions in any other jurisdiction in the world these take a long time and often have far more birth pangs and early childhood pangs, as it were, than have the relationships between the devolved administrations in the United Kingdom. Everybody’s interest is to make these things work, and on the whole I think we do, but as Jim has said, they are certainly capable of improvement and we have been earnestly seeking that improvement as well.

Q119 Chairman: The First Minister told us that he would like to see a mechanism for dispute resolution included in the MoU. Is there a role for a “referee” in the working relationships between the devolved administrations and the UK Government?

Mr Murphy: Chairman, I think the principle behind this is firstly accountability. It is a way in which politicians who are elected by different mandates, different geographies, are accountable for what happens through the process. So it is about accountability and it is also about trying to drive consensus, and I think the creation of an external arbiter or referee who is potentially accountable would undermine the drive towards consensus because I think if people in all the administrations and all the ministers, all the complexity of all the politics of all the devolutions that we have across the United Kingdom, if they know the kind of ethos is to try and find consensus then I think that is what would drive them and that would be the dynamic in the conversations. I think if everyone knew we just have to start a dispute here and the chances are an external referee may find in my favour, that would alter the nature of the process. So I think at the moment we are not
convinced by the need for an external referee outside the bounds of accountability, which would reduce, I think, the chances of driving consensus.

Q120 Chairman: If a dispute arises between the devolved administration and the UK Government, what mechanism then do you believe should be used to resolve that?

Mr Murphy: Chairman, so far, by goodwill on all sides, there has not been a formal dispute process instigated. That is my understanding, and that is with all the complexities of all the different politics across the United Kingdom. So I think with continuing goodwill that precedent, which is now established, can continue. As I alluded to, Chairman, in one of my earlier answers, what we are looking to do, however, in the revised Memorandum of Understanding is to be clear that if someone did wish to instigate a dispute it is clear as to how that would happen, but it has never happened thus far.

Mr Straw: Chairman, as Jim said, ultimately these disputes, differences of view—and there has certainly been a number of those, but they have been resolved—have to be settled politically because otherwise, in my submission, it is anti-democratic to refer these to some sort of arbitral court. Jim said, “To whom would the arbiter be accountable?” Even where you have disputes between independent, wholly separate states, most disputes are resolved through direct bilateral negotiation, but within a single sovereign nation, the United Kingdom, with different jurisdictions for certain purposes, you have to be able to resolve these politically. Bear in mind that, as I say, one of the features of the political structure we have in this country is that there are elected representatives from the same pieces of ground, as it were, the same communities, sitting both in the devolved assemblies and in the Westminster Parliament and in the devolved assemblies and the Scottish Parliament, quite rightly, the executives are responsible to their elected representatives and here the same electors who elect, in this case, for example, Members of Parliament from Scotland, from all parties, hold ministers accountable here. I can see why someone suggested some kind of referee, but my view is that it would end in tears. The other point to make, however, is that in the structure of the Scotland Act there is provision for the most high level of arbitration if there is a dispute about relative powers because the matter will now go to the Supreme Court in, as it were, the shoes of the Judicial Committee of the Privy Council.

Q121 Mr Davidson: Can I just follow up that point, Jim? Surely you have been a trifle over-optimistic in assuming that these disagreements will always be between, as it were, men and women of goodwill who have an interest in reaching a consensus. It is possible to imagine a situation where some people motivated by the politics of grievance would seek to identify and pursue grievances in order to demonstrate that a resolution cannot be found. What then happens in these circumstances if, for their own political reasons, people perhaps in the run-up to an election did not want to reach a consensus?

Mr Murphy: I think it is a fair question, but it has not yet been born from experience but it is important. You cannot inoculate a process and a structure wholly from those kind of malevolent motivations, of course, certainly in the build up to an election, but I think as trust is established and the process does become more embedded there will be little public reward for people to behave in that kind of shrill manner. As well as listening to Jack, of course, I was scribbling while he was speaking and I think I am right in saying that across the current four administrations that we are talking about there are six different political parties involved. That is a complicated set of arrangements and devolution politics is more complicated across the United Kingdom, not deliberately but just as a consequence of how we have established these things, different electoral systems, different administrations, different names for different bodies. So I think it is more complicated, not by design but as a consequence of decisions we have taken. I think, Ian, your point is a fair one. It does rely on some goodwill and, of course, those things come in peaks and troughs. I think it is an invert kind of cycle to the electoral cycle often.

Mr Straw: Say you had a referee and he or she came to a view, which would have to be down on one side or the other, there would then come the question, how is the referee’s decision enforced? Do you have to go to the High Court here, to the Court of Session in Edinburgh, to get an order to require the relative administration, whether it is the Whitehall administration or the Scottish Executive, to enforce it? If they then say, “We are very sorry, we can’t do this because,” for example, “it requires legislation and we can’t get this through”, what do you do then, or, “It requires money and we haven’t got the money”, or it requires us to stand on our head politically? What do we do then? Do we then say we are going to make it a criminal offence to ignore the order? Do you send the Tipstaff round? We have had some experience in different contexts of trying to enforce such matters in this way and, as Jim says, and I want very strongly and powerfully to underline the point he is making—it is a powerful point he is making, whether mine is powerful is another matter—that you have to resolve these in a political way and that is the way these things are ventilated.

Q122 Chairman: Can we move on to another issue. The First Minister in giving his evidence to the Committee also told us that the Scottish Executive preferred to deal directly with the relevant department in Whitehall. Why is it necessary for communications to be channelled through the Scotland Office?

Mr Murphy: There is no compulsion about going through the Scotland Office and there is no compulsion from Whitehall to go through the Scotland Office as it communicates with the Scottish Government. It is simply an issue of whether the Scottish Government thinks it would be helpful to
have that communication, whether it would be helpful for the Scotland Office to be working with the Scottish Government as part of a conversation, as part of detailed policy development, as in the Justice and Coroners Bill, and there are many other examples of that. There is no compulsion about it, of course, but I think it is a matter of good and effective government and it would pick up on the JMC process about our working together, which I think is important.

Q123 Mr Davidson: I think that working together does imply a desire to work together and I think we were pretty surprised in a previous hearing to hear that the Scotland Office was not as a matter of course even informed as a courtesy that the Scottish Executive was contacting Whitehall or Westminster departments. What can be done to resolve that and introduce a better working relationship? I cannot see why anybody from the Scottish Executive would not want, as a matter of courtesy, simply to inform the Scotland Office unless they were deliberately trying to undermine it.

Mr Murphy: To put this point gently, Chairman, the people who currently run the Edinburgh Government—and I am not casting aspersions, a more general aspersions, it is just simply that as a political philosophy they do not believe in the existence of the Scotland Office. I suspect they think it saves them money not to send a letter with a stamp on it to an organisation whose existence they do not support. My argument would be that while the Scotland Office continues to exist—and my argument also is that Scotland is no less important than Wales or Northern Ireland around the Cabinet table and, therefore, a full-time Secretary of State repairs the damage and the mistake of having a part-time Secretary of State for Scotland—and while there are people willing to work for Scotland, exclusively for Scotland, around the Cabinet table within Whitehall it makes sense for them to be copied into this correspondence.

Q124 Mr Davidson: Do we have the same difficulty in Wales with the Wales Office and the Northern Ireland Office about the devolved administrations declining to keep them in the loop?

Mr Murphy: I am happy, Chairman, to provide details in writing on that, unless Mr Gallagher wishes to comment?

Professor Gallagher: As it happens, Chairman, I was asked a very similar question by the Welsh Affairs Select Committee last week and there are certainly some people in Wales who take the view that the Wales Office does not add sufficient value to the process, but there are others who agree that there is a role that has to be discharged. On any view, the UK Government will have things to do for and about Scotland, and for and about Wales, and will have to have some arrangement, whether it is called the Scotland Office or the Wales Office, and whether it is a full-time or part-time Secretary of State is a political judgment, but there are functions which have to be discharged and will continue to have to be discharged over the long run. So the question which was put to me last week was, will the Wales Office weather the line? Well, the job it does will not, and I think the same argument applies in relation to the Scotland Office.

Q125 Mr Davidson: It seems a bit petty then, does it not, for somebody not to be copied into correspondence in these circumstances?

Mr Murphy: It may just be an efficiency thing, why duplicate the paperwork? I think it would be more helpful if, as a matter of course, this sort of thing did happen. Perhaps that is something the Committee will wish to reflect on.

Mr Straw: If I may say so, Chairman, it would also serve no purpose because say my office gets a letter from the Scottish Minister of Justice—there is quite a lot of traffic this way—we copy it in to the Scotland Office because ensuring, as Mr Gallagher says, that there is coordination within Whitehall is very important.

Q126 Pete Wishart: Just on that point, Secretary of State, you think it would be more helpful if it came directly to you if there was a concern by Scottish ministers? I know you have been involved in a number of issues recently with some Scottish ministers. Would you prefer to have that correspondence received directly or would you think there is a use for it to be channelled through the Scotland Office before it came to you?

Mr Straw: I have got no particular view about this, to be perfectly honest. As I say, what is crucial and I have said, as you know, as a matter of record, if there is a continuing issue between the Scottish Executive and matters relating to my Department then the correspondence may well be direct and certainly the focus will be, but my own view as the Secretary of State is that it makes better sense for everybody to be knitted up regardless of the top addressee on the letter or email.

Q127 Pete Wishart: I am just trying to get at what added value the Scotland Office does give as a middleman between Scottish ministers and your Department because there has been a number of really meaty issues that they have been dealing with.

Mr Straw: Can I just say from my perspective, representing an English constituency and in this job and my position as Home Secretary having day-to-day responsibilities principally for England and Wales, and some reserved ones, but also when I was the Foreign Secretary for the whole of the UK, having a voice in Cabinet for Scotland makes, in my view, a big difference to the representation of Scottish interests. I do not, Mr Wishart, see this as some sort of competition with the system of Scottish governance, which after all we established and we are proud of, but it is complementary to that and I genuinely think that if there was not that representation both for Wales and Scotland—which have different histories and their provenance as members of the United Kingdom is different, and in Scotland very markedly different institutions in many fields—they would be the losers from that.
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Q128 Mr Walker: I have no strong views about Scotland’s future. I am sure if it decides to become fully independent the world will go on, but it does strike me that even if Scotland does follow the independence route having a Scotland Office is a good idea. It probably would not have a minister, but bearing in mind this country sits right on our border and has five and a half, six million people in it and that it would be our nearest trading partner, we must have a Scotland Office, surely?

Mr Murphy: Firstly on this question, and the previous one, no one is arguing, Chairman, that all correspondence has to come through the Scotland Office or the Wales Office. That is not a sensible way and the Scotland Office is not a mail redirection system which kind of channels mail from north to south and south to north. That is not the function and job creation that I think any holder of this post would wish. Rather than saying it is either/or, it is the issue of just doing it simultaneously so that the Secretary of State for Scotland is aware of some of the issues relating to the UK Government and the government in Edinburgh. On Charles’s point about not having clear—

Q129 Mr Walker: Personally, I do not have a strong view but I can see the need for a Scotland Office.

Mr Murphy: Of course. Under your scenario whereby if Scotland was ever to become independent, of course there would still be an office in London but it would be called an embassy! It would be an embassy rather than a department.

Mr Straw: It may be a High Commission.

Mr Murphy: Are you applying for the job?

Mr Straw: Certainly not!

Q130 Mr Walker: Would I be right in thinking that in the role of the Scotland Office you do have Scotland’s interests at heart at the end of the day? You are not trying to compete with the Scottish Parliament or the First Minister, you are trying to promote Scotland’s interests?

Mr Murphy: Of course. That is right. The primary purpose of the Scotland Office is the guardian of the devolution settlement. That is the primary function of the Scotland Office and it is the core purpose of the Scotland Office in the same way, I suspect—I cannot speak for Wales—it is a similar core function for the Wales Office.

Q131 Mr Walker: Since I have got the floor, I will be very brief. The idea that we would get some sort of referee to adjudicate on disputes is just totally ridiculous. Just for the record, that is ridiculous. This is why we elect politicians, to grapple with difficult issues and come to a compromise and a view, and I just hope you really do not give this any more thought whatsoever because otherwise we could halve the number of MPs in the House of Commons, if not reduce it to a quarter of the current level, and just farm it all out to referees.

Mr Murphy: Mr Walker has made his point his own way. I would perhaps put it a little more delicately. Just finally on this, Chairman, I think the knowledge of the existence of an external arbiter or referee would drive friction within the process, knowing that all someone had to do was to kind of blow the whistle and take it out of the system, that would not avoid conflict, it would create it.

Chairman: We move on to the Joint Ministerial Committee. Lindsay Roy.

Q132 Lindsay Roy: Gentlemen, in your view why was the Joint Ministerial Committee allowed to fall into abeyance for four or five years? How fully has it been re-established and how well is it working at the present time?

Mr Murphy: As to why it was not exactly as it should have been, I think after 2007 in the St Andrews Agreement in Northern Ireland there was a sense that devolution in Northern Ireland is becoming much more established. The process of continued bilateralism was not sufficient, but it is important. Bilateralism will still happen, of course, between different administrations but it is important to get all of the administrations together in one room from time to time. I volunteered to answer this question first because Jack, as former Foreign Secretary, did make sure that the European Union Joint Ministerial Committee did meet, I think, four times a year in advance of the European Councils. It is the domestic JMC which met much less regularly.

Q133 Lindsay Roy: Was it felt that things had been working well in terms of the devolution settlement? Was that part of the reason? That is what I am trying to get to.

Mr Murphy: Part of it would be that things were being handled in a bilateral sense, so the UK Government, the Scottish Government, the Welsh Assembly Government, but when it became an established fourth player in the process, when it became much more embedded, then it became more difficult and there was a sense of, “Let’s try and get this show on the road again.” Chairman, I do not want the Committee to conclude that because these meetings were not taking place there was not an almost daily flow of information and communication.

Mr Straw: The area where it had the most sort of practical implications, Mr Roy, was relations with Europe where you are dealing with reserved matters and devolved matters all the time. As Jim says, the JMC Europe process was kept going very actively and I think everybody has acknowledged that it worked quite well—well, very well, I think, on the whole.

Q134 Lindsay Roy: Can I pick up on the latter point? How fully has it been re-established and how well is it operating now?

Mr Murphy: It met twice last year, so the JMC Europe, I think, have met four times in advance of European Councils and the JMC domestic met twice. I think welfare reform and migration were two of the substantial issues that were discussed, and there was also the JMC plenary session, which met twice as well.
Q135 Lindsay Roy: There was good functional operation?

Mr Straw: Yes. You will have to ask others what they thought of the chairman of the JMC Domestic because I was the chairman, but I think we had a full agenda. Part of the reason why we were not having more frequent meetings—this is not a lame excuse, it is a reason—is that trying to find dates which suit everybody can be quite difficult.

Q136 Mr Davidson: Were there any requests by any devolved administrations for meetings of any of the JMCs which were refused?

Mr Straw: I think whilst the JMC (D) was not meeting there were requests for it. You need to check the record.

Q137 Mr Davidson: You say the JMC (D). Which one was that?

Mr Straw: D, the domestic one. Obviously people were content with the JMC Europe process meetings. It is fair to say that I think there were suggestions that the overall JMC machinery should be proceeding, and that in fact has now happened.

Professor Gallagher: It is may be worth explaining, Chairman, that when we talk about the JMC we mean the plenary meeting, which is everybody, and we have now a system in which we have effectively established two sub-committees, one which was always working, which is the JMC Europe, and a new JMC Domestic, which substitutes for ones that did not work, which were early on in 1999 and 2000 where we had a JMC on health and a JMC on poverty and economic issues, and they did not quite engage. As far as we can see, the JMC Domestic seems to have the scope, a wide enough agenda to meet regularly and do something useful.

Q138 Mr Davidson: I just want to be clear, though, that we have not had a long list of requests from devolved administrations for meetings of the Domestic Committee which then were not met. These requests for meetings have always been met, maybe not in the exact timetable but there should not be a manufactured grievance there about not having meetings?

Professor Gallagher: I think it is fair to say that in about 2007 the Scottish administration did say they would like the JMC to meet, and it did meet.

Mr Murphy: Chairman, it may be helpful on the basis that Mr Davidson has asked for us, to provide specific information about when such requests happened.

Chairman: That would be helpful.

Q139 Lindsay Roy: The Scottish Executive has suggested that the UK Government has a lack of respect for Scotland’s status, especially in the context of international affairs. They cited one or two examples about Libya and Copenhagen. Do you agree with that view?

Mr Murphy: No. I am sorry for being so abrupt, Mr Roy, in my answer, but for the benefit of being direct my answer would be no, I do not agree with that. In international relations, of course, Scotland is pretty proud to be part of the United Kingdom it is a member state of these international institutions, that negotiate treaties, they attend international fora, but that is not in any way belittling the role that Scottish Government Ministers can play. I think they attended 112 different European Union meetings, ministerial meetings, on occasion being the lead minister, sitting in the chair on behalf of the United Kingdom on occasion. I understand. It has attended 112 of these meetings. In terms of Copenhagen, the fact is that they were trying to come to an international agreement, a binding agreement between all those nations, which was pretty complicated, as we discovered. Ed Miliband did a pretty heroic job in getting to where we did get to. Ed made sure that the UK in its entirety was pretty well represented at the Copenhagen Summit. I do not agree with the point. Of course Scotland, if it was independent—and I think that is the sentiment behind the assertion of others—could attend all of these meetings, but it is whether it believes its international clout would be enhanced or diminished by virtue of doing so.

Q140 Lindsay Roy: So it is to do with, in your view, a structural status rather than the development of good working relationships and ongoing goodwill?

Mr Murphy: It is clear, Mr Roy—and I am putting this as neutrally as I think is appropriate, pretty neutrally—people who want to see Scotland remove itself from the United Kingdom make an argument that Scotland would be better off if it regularly attended these things. Against that judgment, is, is Scotland more powerful being part of the fifth largest economy and a permanent member of the UN Security Council through the United Kingdom? That is a decision that the people of Scotland reflect on. It is a sentiment and they weigh up the balance of this argument every time they go to the ballot box, and I think the people of Scotland are pretty sensible in seeing what is in Scotland’s interest.

Q141 Mr Davidson: You said that there have been Scottish representatives in attendance on a whole number of occasions. I think it would be helpful if we had later a submission just to say how many occasions that actually was. If I quote you correctly, you also said that there were occasions when a Scottish representative had spoken in the absence of a UK minister. Is that correct?

Mr Murphy: Chairman, it has happened and what might be helpful, again at Mr Davidson’s behest, is that I think the figure is 112 occasions that the Scottish Government (or as they used to be called the Scottish Executive, but for the purpose of this answer the Scottish Government) has attended EU Council meetings, the sectoral Council meetings, whether it is fisheries or agriculture. I think the figure is 112, but of course we can get the details of that to the Committee. In respect of whether it was a Scot from the previous Labour, Lib Dem or the current SNP administration, certainly Scottish Government Ministers have sat in that UK delegation chair and led and spoke on behalf of—
Q142 Mr Davidson: I find it surprising to hear that because when the First Minister was giving us evidence recently he said, “In other councils, when no UK Minister is present the UK gives preference to their own senior officials speaking rather than an elected minister from a devolved administration.”

Mr Straw: Mr Davidson, can I just say that to my certain knowledge, since I issued the invitation, a minister from the Scottish Executive has spoken on behalf of the UK in Justice and Home Affairs Councils. I will try and remember what the issue was, but in my experience and the experience of my colleagues, but certainly speaking personally, far from being exclusionary they are sought to be inclusionary, so ministers of the Scottish Executive come to the briefing sessions which are held, a sequence of meetings that I undertake in the British Permanent Representative’s residence for breakfast. We go through matters. Some of the issues, as I say, relating only to the UK, entirely reserved, are quite sensitive but I work on the basis of trust, and there you go. As I say, I am afraid I cannot recall the exact subject, but what I can recall is that the issue was a devolved issue but the interests of the Scottish Government and the interests of the UK Government were similar. To be blunt, the Scottish Minister knew rather more about it than did I! So I said, “Why don’t you do it?”, so she said, “Yes.”

Q143 Mr Davidson: I do not find what you say incomprehensible, but what you are saying directly contradicts the evidence which the First Minister gave us and I am wondering if you are suggesting, therefore, that he is fallible?

Mr Straw: Well, the issue of fallibility is between him and his maker and not for me, but if you are asking me for the record, I am your witness as to what has happened. Self-evidently, Mr Davidson, when I was Foreign Secretary, when we were in the General Affairs Council and Jim was Minister of State for Europe, you do not have a member of the Scottish Executive or the Welsh Assembly, because that is about representing effectively reserved matters, but on Justice and Home Affairs most are devolved, some are reserved, it is quite a mixture.

Q144 Mr Davidson: We were also told by the First Minister that the former Prime Minister, Tony Blair, would not speak to him. So this evidence calls into question whether or not that is correct either, does it not? Have you any evidence that the Prime Minister refused to speak to the First Minister? I mean, it must be true if Alex said it!

Mr Straw: I am sorry; as I said in quite a different context last week, you will have to ask Mr Blair that!

Q145 Pete Wishart: Getting back to the issue at hand, I think there is absolutely no question whatsoever that as long as Scotland is part of the UK of course it is UK ministers who should lead on any multilateral discussions, that is taken for granted, but surely devolved administrations have a real key interest, particularly when it comes to things like fishing. Scotland has the vast majority of UK fisheries. Surely it should be expected that Scottish Ministers should have a role in these negotiations? Again, when it comes to something like climate change, you obviously will be aware, Mr Straw, that Scotland has particularly challenging climate change legislation?

Mr Straw: Even I know that.

Q146 Pete Wishart: For goodness sake, surely it would be the simplest thing in the world to agree and say, “Of course a Minister from the Scottish Government would be helpful and consensual to come along as part of the UK delegation to put that very progressive, challenging discussion”.

Mr Straw: Can I just say this: within the European Union, as I say, we seek to be very inclusionary, and Jim has referred to the long list which proves that point. I do not know any Minister who is seeking to be exclusionary. What would the point be, because we are there to represent all parts of the United Kingdom, either directly or indirectly? Sometimes—and I have signed letters to Kenny MacAskill to this effect—the size of the delegation we are allowed means that it is not possible to take a Minister from any of the devolved administrations and that is routinely the case in respect of the Justice and Home Affairs informal meetings, where I think I was unable to go but Lord Bach went on my behalf, we had altogether I think two places. On the issue of negotiations, any negotiation in international negotiations—and this can include a formal negotiation for a new legal instrument within the European Union—these are interstate negotiations because the European Union at its basis is a treaty-based organisation, an international institution, and the state party to the EU Treaty is the United Kingdom. That is just the fact, so it is fundamental that at that sort of point of negotiation the lead has to be taken by the United Kingdom. As I say, it is day by day inclusionary and day by day sometimes Scottish Ministers in practice are speaking on behalf of the United Kingdom, and in a sense why not?

Mr Murphy: Chairman, I agree with what Jack has said and picking up on Mr Wishart’s question—I am not going to get into the infallibility point, not of the First Minister or anyone else, my priest would get me into bother, if no one else—this point about inclusionary rather than exclusionary, when I became Minister for Europe I tried to instigate what I hoped would be regular meetings with the Scottish Government’s Minister for external affairs, and I think from memory it was Fiona Hyslop who was doing the job, and again I was a little bit surprised that that was not in place and I tried to make that happen. As Jack has alluded to, in the build up for these European Council meetings, there is nothing to be gained by excluding people from the conversations so that gathering of JMC Europe chaired by the Foreign Secretary with all the devolved administrations and Minister for Europe is a really important forum. In terms of this thing about the 112, someone—not myself or Jack—who has done their homework had this list and of course, Chairman, I could read it into the record but I do not think you or anyone else would thank me for doing
so. We will clear up all the scribbles on it and make sure there is a copy, but just for the record from what I can see the last Scottish Government Minister to speak at one of these grand gatherings was in Brussels, the Education Youth and Culture Council on 12 May of last year, Mr Michael Russell, to give him his Sunday name.

Q147 Mr Davidson: Can I ask about the work of Whitehall departments because in evidence to this hearing and also, I understand, in the Wales equivalent there has been some evidence about some Whitehall departments not having the awareness of devolution that they ought? Can I just clarify whether or not in your view this is an unwillingness to take account of devolution by these departments or whether it is just an example of particular departments being, as it were, in silos and not being aware of anybody else outside themselves, never mind the devolved administrations?

Mr Murphy: I think you partially answer your own question in your own way. I am just surprised you are not asking about your aircraft carriers!

Q148 Mr Davidson: I will come on to that in a moment because I am leaving at half past three for the aircraft carrier!

Mr Murphy: Of course there is a tendency in departments, a tendency in many organisations to think within the confines of the immediacy in which you work, and that is true in government organisations in the same way as it is elsewhere in life. Part of this answer is something I alluded to earlier, that the government’s architecture on politics in the United Kingdom has become more complicated over the past ten years. If you are a civil servant sitting in London or somewhere else in the United Kingdom, it is not your core function to be trained in the specific detail of the balance of devolution across the different administrations, but it is really very important that each of those departments and organisations do have the capacity and expertise within those departments to understand devolution. That work is carried out by MoJ and the Scotland Office with civil servants and with ministers. The only other thing I would say is that in recent years the Queen’s Speech has had a large proportion of the Bills directly relevant to Scotland, in fact most of the Bills have been directly relevant to Scotland, so that in itself has created the opportunity within Whitehall departments to have a better understanding in a policy term about the nature of devolution across the United Kingdom, not just the UK and Scotland, because a new set of policy officials develop an understanding. I think that is a legacy of these Bills, that you have got to maintain that legacy inside these departments.

Q149 Mr Davidson: Thank you. Just moving on from that, do you as the Scotland Office have a particular role in increasing awareness of devolution? How can we measure how successful you are?

Mr Murphy: We do have a role. The Ministry of Justice, the Scotland Office, the Cabinet Office all have a role in having seminars, producing publications, and when it comes to crafting a Bill and making sure that it is devolution proof, making sure there is an understanding of whether a legislative consent motion has been necessary or would be necessary, all of those—education is the wrong word but it is the only one I can think of—is an educational process through the system in Whitehall. I do say again—and this comment is offered impartially—I think there will be a similar process necessary inside all of the devolved administrations across the UK in understanding Whitehall because that is another way in which you could minimise unintended friction. In terms of whether you are successful or not, I hope we get it right more often than we get it wrong. It is a continual learning process.

Q150 Mr Davidson: Presumably the only measurement of success is the extent to which the number of grievances reduces, because I am generally in favour of reducing the paranoia that is obviously felt by some in the Scottish Executive, making them feel that they are being done down all the time, and all the rest of it. We have tried to explain to them that this is not deliberate, it is just accidental and it has to do with the culture of Whitehall. So presumably if it diminishes then things will get better?

Professor Gallagher: Chairman, I think Mr Davidson’s question has, as the Secretary of State says, the seeds of its own answer and that is that things do occasionally go wrong as pieces of UK Government policy get developed and it is not wholly surprising that this does sometimes happen. When you think of a piece of policy work inside a government department which is not commonly dealing with devolution, or perhaps in an arm’s length body of government which does not normally interact with the devolved system, they are under a lot of pressure to do something, it may be political pressure, it may be time pressure, and devolution is only one of many things they are going to have to get right. Mostly, in fact, of course it is got right. As the Secretary of State says, particularly in relation to the legislative process, that actually works quite well—not perfectly, but pretty well. What we have been doing over recent months is a bit like painting the Forth Bridge because at official level we have run a process under which departments have been assessing their own capability to see where they get it right and where they get it wrong and what structures they can put in place to improve their chances of getting it right. What we know and what we see is those departments which have a senior champion at official level for this are those which are more likely to be successful, and where we see risks are inevitably—not in individual departments so much as in bits of departments which have not had to deal with this issue before, which might be a purely England and Wales department, it might be a purely England department and, as the Secretary of State put it, it is not their core business to be involved
in the constitutional architecture. These problems will never go away but they can be reduced by doing that kind of thing.

Q151 Mr Davidson: I think we are really just seeking reassurance that there is not some sort of grand conspiracy, as has been suggested?

Professor Gallagher: We are not as well organised as that!

Q152 Mr Davidson: That is what I thought, actually. That was my view.

Mr Murphy: To continue the theme of infallibility, it is more often a sin of omission than a sin of commission!

Mr Straw: If I may just add, to underline the point Professor Gallagher was making on legislation, the Sewel Convention was established and it has never been breached. There have been over 100 legislative consent motions, civil motions, since then. Sometimes where there is a request for a change in law which has to go into UK Government legislation, for example following the Law Lords’ decision in Somerville, it is quite complicated across Government because every government department had an interest and wanted to have a say in this matter, but in the end we got there and provision to deal with the difficulty created by the Somerville decision is now in the Constitutional Reform of Governance Bill and that is something the Scottish Executive wanted. Jim and I understood the case they made. It took quite a lot of work to broker it around Whitehall. Anyway, it is happening, but there are other areas, for example the Bribery Bill, which is before the House of Lords at the moment and parts of that will apply to Scotland because it suits the Scottish Executive that it should. There are provisions in both major pieces of legislation we have had in the last two years, the Criminal Justice and Immigration Act 2008 and the Coroners and Justice Act 2009, which have got Sewel motions and parts of that will apply to Scotland because it suits the Scottish Executive that it should. There was no argument about that, Scotland had a separate criminal justice jurisdiction, so that was that. As soon as there was anything significant to discuss other than the fact that there was an aspiration by the Libyans for a PTA there were indeed discussions with the Scottish Executive.

Q153 Pete Wishart: We will maybe move on to, I suppose, the subject which sparked this investigation and that is the release of Mr Abdul Baset al-Megrahi, particularly to do with the prisoner transfer arrangements in the Memorandum of Understanding that was signed between the UK Government and Libya in 2007. This is where, quite clearly, the devolved and reserved powers come into close contact and I think we have been very interested in the way this has all worked. In terms of the PTA, you are obviously aware that this did impact upon the powers and jurisdiction of the Scottish Government. Why were Scottish Government Ministers not informed about the MoU with Libya when the only real Libyan prisoner of any significance, I think the only Libyan prisoner who was actually in incarceration in the UK, was the Lockerbie bomber?

Mr Straw: Mr Wishart, I was not Foreign Secretary at the time, nor was I Justice Minister at the time this was going on because at that particular time I was Leader of the House, so I was not directly involved with the case, so what I am about to say is to offer an interpretation about the sort of circumstances that can arise, and Professor Gallagher may want to add to this. Where you are involved in complicated negotiations with a country like Libya they sometimes have to be handled with great confidentiality. I think you are aware from everything the Secretary of State and I have said that we have no interest whatever in keeping the Scottish Executive gratuitously in the dark about things. Why on earth should we? What purpose would this serve? We knew—everybody knew—that to be operational any Prisoner Transfer Agreement would be operated by the Scottish Executive and we sought earnestly as well, although did not succeed, to meet the United Kingdom, and also the United States, under which Libya agreed to have the International Atomic Energy Authority come in to inspect its previously wholly covert and actually very large nuclear weapons programme. In return there would be a programme which would provide a pathway for Libya essentially to become a normally operating member of the international community. That then led to further progress over a period and then, as you will recall, in the late spring, early summer of 2007 this speeded up with meetings between the then Prime Minister, Tony Blair, and Colonel Gaddafi, and there was a great deal of bilateral contact between officials. It is at this point worth remembering that we are a single nation. I am not making a debating point here, but as long as we are we are represented at any kind of international forum by Her Majesty’s Government and by the Prime Minister and the Foreign Secretary principally. Everybody knew that a Prisoner Transfer Agreement covering the United Kingdom would have to involve discussions with the Scottish Executive without question. There was no argument about that, Scotland had a separate criminal justice jurisdiction, so that was that. As soon as there was anything significant to discuss other than the fact that there was an aspiration by the Libyans for a PTA there were indeed discussions with the Scottish Executive.

Q154 Pete Wishart: Did you think there would be any value at all in informing the Scottish Government in advance of any MoU being signed, given that the al-Megrahi situation was going to be such a massive issue in any Memorandum of Understanding, and also the fact that you were starting to walk down the particular path of the prisoner transfer arrangement? The Scottish Government, for example, in its memorandum says that at no stage were the Scottish Government aware of the content of the memorandum prior to its signing and therefore no opportunity was given to contribute or to raise concerns against the potential application. It would perhaps have been helpful just to have a conversation with the Scottish Government about what was being intended by it.

Mr Straw: Mr Wishart, I was not Foreign Secretary at the time, nor was I Justice Minister at the time this was going on because at that particular time I was Leader of the House, so I was not directly involved with the case, so what I am about to say is to offer an interpretation about the sort of circumstances that can arise, and Professor Gallagher may want to add to this. Where you are involved in complicated negotiations with a country like Libya they sometimes have to be handled with great confidentiality. I think you are aware from everything the Secretary of State and I have said that we have no interest whatever in keeping the Scottish Executive gratuitously in the dark about things. Why on earth should we? What purpose would this serve? We knew—everybody knew—that to be operational any Prisoner Transfer Agreement would be operated by the Scottish Executive and we sought earnestly as well, although did not succeed, to meet...
the Scottish Executive’s negotiating wishes. As I say, that is the background. If Professor Gallagher has any further details he can offer them.

Professor Gallagher: The only further detail I would want to add, Chairman, is that one has to distinguish quite carefully between the MoU, which is an international agreement, which essentially committed the UK and Libyan Governments to work on a number of possible areas of cooperation, of which judicial cooperation was one, amongst which the PTA did in the event form part.

Mr Wallace: I am just reminded they refused the transfer on the day they agreed to release him on compassionate grounds. It was not like, “We have assessed the PTA and he is not going,” and then he came back with a compassionate request. He was going out the door because he had been compassionately released, so it was no big deal, he was on his way home to Libya.

Mr Straw, it is absolutely clear then that if an agreement, PTA, was not signed between the UK Government and Libya and the Libyan government or anybody else applied for, on compassionate grounds, the release of Megrahi, they would have released him anyway? Mr Straw: That is not a matter of international law, that is a matter of domestic Scottish law and practice.

Mr Wallace: But you would have known under the devolution settlement you could never have used compassionate grounds as a basis for negotiations with Libya. You could use a PTA as part of discussions with Libya about coming in from the cold. You could say in your negotiations on the WMD in 2003, for example, when the Libyans raised al-Megrahi, which they did—and I think what is interesting is that it must have surely then occurred to the government four years later when the Libyans start talking about a prisoner transfer deal that we
were talking about al-Megrahi, a mass murderer in a Scottish jail—it would have been beyond the wit of man to think. “Well, therefore we don’t have to inform Scotland!”

Mr Straw: Scotland were informed. We debated briefly the timing and I made a suggestion as to why there was not exactly contemporaneously information, although what Scotland could have done about the information I am not entirely clear at that stage. The fact that the Libyan government had particular views about Megrahi was on the record. It did not require negotiation, public or private, you can go on Google and find that out. What the Libyan government were repeatedly told, and they acknowledged they understood all the way through, was that a PTA gave the Libyan government and any Libyan prisoner concerned no right to transfer. It gave them a right to make application, but the decision would be made, if it were in respect of a prisoner in a Scottish jail, by the Scottish Executive.

Q161 Mr Wallace: Nevertheless, the Libyans made the PTA and the inclusion of al-Megrahi a critical part of the negotiations. In the letter you wrote to Kenny MacAskill on 19 December 2007 you said: “The wider negotiations with the Libyans are reaching a critical stage and in view of the overwhelming interests of the UK, I have agreed that in this instance the PTA should be of the standard form and not mention any individual.” That is after a letter you wrote to him in September, where you said: “My officials will make it clear to the Libyan authorities that without this addition,” e.g. the exemption, “the PTA will not be able to be concluded.” So they realised it was an important part of the negotiations.

Mr Straw: The sequence here was that we had these discussions. I took over the discussions from Lord Falconer.

Q162 Mr Wallace: So you had been part of the 2003 dealings?

Mr Straw: Yes, of course, and my role there was very private. It has been completely private for many, many months, many years, and then on 19 December, at about ten o’clock at night—and the reason I remember this is because it ended up having to be coordinated from my study in Blackburn after a rather heavy Friday’s pre-Christmas engagement. I do not mean “heavy” in a Scottish way but heavy in terms of work. I also remember all the background to this very acutely, so there was never any dubiety about this. It is not the case that Mr Megrahi was the only Libyan prisoner who was in a jail in the United Kingdom, that is quite wrong. What happened over the summer was that I went to see the First Minister and the Justice Minister in Edinburgh and they said they would like to see an exclusion in respect of Mr Megrahi. We then went through hoops to work out how that could be achieved and various suggestions were put forward. I then wrote to Kenny MacAskill on 28 September 2007 saying, “I have noted your preference for an exclusion clause to apply not just to Mr al-Megrahi but to anyone convicted of involvement in the Lockerbie bombing. I agree with your proposal.” The proposal was for a preference. “My officials will therefore seek to amend the draft agreement as follows...” So we were involved in a negotiation and if you are involved in a negotiation it is not a good idea to disclose your bottom line to anybody. Those negotiations went on. My officials and our officials did their very best on this. This process began and it became clear round about the beginning of November that we might face a choice where if we insisted on an exclusion which, whether by name or by wording, specifically covered Mr Megrahi we would not be able to get an overall agreement with Libya at that stage, as I spelt out to Mr MacAskill following various telephone calls with him, that we had to make an overall judgment. I told him that we had not been able to secure an explicit exclusion and went on to say that it therefore would be a standard form. I mean, all of these are slightly bespoke but broadly in the standard form. I reiterated the point which, as I say, the Libyans absolutely understood always, that there was a discretion in respect of any PTA applications that would rest with the Scottish Executive, as indeed was and is the case. That is the background there.

Q163 Mr Wallace: Mr Straw, the issue about this is, what were Libya going to do? They had already allowed the International Atomic Energy Agency in to see the WMD. They had already taken quite large steps in the last four years and if we were not going to give them al-Megrahi within the PTA, a potential, they were going to do what? The thing that sort of riles me and I find difficult is that you wrote a letter on 23 September, I believe, and another one really underlining, “We’ll tell them we don’t think we can give an exemption”, you took two phone calls from a man called Sir Mark Allen, who was a consultant for BP at that time, paid for by the private sector, not by the government, he was not a civil servant any more, and then after that you changed your position on it. Now, I can understand that if you would then release the information, the correspondence with Sir Mark Allen on that subject which you are blocking to me from the Ministry of Justice. It is odd. a man from BP rings you up, the position has changed, an oil deal is signed, and nowhere in this process is the victim included. You may say the justification was about trade at the end of the day, but the reality is that if it was trade it did not consult the Scottish Executive, clearly. When the Libyans were asking for al-Megrahi it was clear from the very outset they were talking about one man, probably Britain’s biggest mass murderer in a jail who was a Libyan. I think we should know to what extent commitments HM Government gave in exchange for trade and whether that included al-Megrahi and it does not really matter about what Scotland’s jurisdiction is on it.

Mr Straw: At no stage was any undertaking promised, hinted, given to the Libyans that in return for an overall bilateral arrangement Mr Megrahi would be released and, what is more, the proof of that, Mr Wallace, is in what then happened because he was not released under any arrangement which
Mr Straw: I am sorry, decisions about the release of something I could not countenance. How far do we released on compassionate grounds is just simply Shipman and the idea that he would have ever been may have killed 230 people might have been Harold killing over 230 people. I think the only person who out the enormity of the crime, he was convicted of compassionate person but, as my colleague pointed people under compassionate grounds. I am a very Q167 Mr Walker: decision was right, that decision was wrong. of evidence before a Select Committee to say that I would not dream one way or another in the course court and for any process of review that followed it. held under Scottish law. That was a matter for that England and Wales as well as, in this case, a court the decisions of courts, and this applies to courts in Scotland. That is my view about it. Q164 Mr Wallace: You could release the notes of the conversations. Not the transcripts, there are none, but the notes? Mr Straw: Well, that is another matter. Q165 Mr Wallace: Will you? Mr Straw: I am sorry, decisions about the release of material under FOI are dealt with separately. Under that fine measure, Chairman, Mr Wallace will be aware that what can follow is a decision by the Commissioner and an appeal to the tribunal and other processes. Mr Walker: I just have a couple of questions. Do you believe that the conviction of al-Megrahi was unsafe? Do you believe it was a fair conviction? Did you have any concerns about the conviction? Mr Straw: If you do not want to answer this question you can just say, “I think this is not within the remit of the Committee.” Mr Straw: Thank you for that, Chairman. Mr Walker, it is not my role to come to judgments about the decisions of courts, and this applies to courts in England and Wales as well as, in this case, a court held under Scottish law. That was a matter for that court and for any process of review that followed it. I would not dream one way or another in the course of evidence before a Select Committee to say that decision was right, that decision was wrong. Q166 Chairman: Mr Straw, we have come close to getting a view of the UK Government because the Foreign Secretary in a statement said that he did not want to see Megrahi die in a British prison. He said that, but then other Secretaries of State had different views. I think Ed Balls had said something about being unhappy about the decision. If every Secretary of State is offering a view or position on this, how can we get a sense of the collective UK Government view if there are individual members of the Cabinet who are saying one thing and others saying another thing.
Mr Straw: Mr Wishart, you asked me my opinion about this. As I say, my opinion about this is that this was legitimately, lawfully a matter and exclusively a matter for the Scottish Justice Minister and that is my view about it.

Q174 Mr Walker: Secretary of State, we all suffer from a terminal condition and we will all die eventually. Al-Megrahi is still alive. If he is still alive in two or three years, would your view be that perhaps we had released him a little too quickly?

Mr Straw: Mr Walker, let us be clear about this. The “we” does not apply. Part of the devolution settlement was that it is the Executive’s responsibility for the justice system which has been in practice always wholly separate and that was part of the settlement, the Act of the Union in 1707, so that rests with the Scottish Executive. That is the position. I am afraid I am in no position whatever to speculate about the longevity or otherwise of Mr Megrahi, nor indeed of anybody else here, except to note your dismal observation that we are all born with a terminal condition and the only question is when it arises.

Q175 Mr Walker: In your case, I hope later rather than sooner!

Mr Straw: That is very kind of you. Thank you very much. I will tell my constituents!

Mr Murphy: I take that personally, Chairman!

Q176 Chairman: Secretary of State, the Scottish Executive told us that it kept the UK Government informed in advance of the timescale and the result of its decisions to ensure that everyone was fully prepared. To the outside world the communication between governments on the announcement of the decision appeared muddled and unclear. In hindsight, could the UK Government’s reactions have been better handled?

Professor Gallagher: On the question of information, Chairman, it is entirely fair to say that while the Scottish Executive at both official and ministerial level made it plain, very properly, that this was a decision for them, they did very professionally and courteously tell the UK Government at both official and ministerial level, although Mr Straw was on holiday at the time, how their consideration was progressing, when a decision might be made and very shortly before it what the decision actually was.

Q177 Chairman: But, Professor Gallagher, the Secretary of State is saying that he heard the news of the compassionate release via the BBC website, so there were no problems of communication.

Professor Gallagher: Yes. He is allowed to be on holiday. He was on holiday.

Mr Straw: The fact of the event was on the website. Can I just say that much though I am very fond of my private office and anybody who has ever worked for me, I have a rule when I am on holiday which is that if they want to get in touch with me they should first judge whether I need to make a decision about it. If it is simply to inform me of something, then I can find out about it from a local newspaper or these days find it on the website. That is why I think, to the extent they were aware of this at a late date, they correctly followed this, as it was, protocol that I have, pact that I have with them. I had no decision whatsoever to make, so they would leave me and, more importantly, my wife be on holiday.

Q178 Mr Wallace: Can I just move on, Secretary of State, to issues about the United States? Obviously when Mr Megrahi was released there was real anger from certain elements of the United States Government. Mr Mueller wrote the very explicit letter, the Director of the FBI, the then Deputy Attorney General at the time, the current Attorney General, made it quite clear that he thought the UK Government had given assurances that Al-Megrahi would in no way be released from jail but serve his sentence in jail. Since those statements, the UK Government has admitted that they said, “We didn’t want to see him die in jail”, that is on the record, and the Scottish Government has said that the UK did give those assurances. What is the Government’s position? Did you give assurances to the United States or not that Mr Megrahi would see his days out in jail?

Mr Straw: The Foreign Secretary said what he said and that is on the record. For the reasons I have explained, which is I was not doing the job any more, I cannot give you chapter and verse about the traffic that was taking place between us and the United States. It is not in my knowledge, Mr Wallace, one way or another. Of course, almost as soon as I became Foreign Secretary in 2001 I met the representatives of the families of those who were killed in Lockerbie and had a lot to do with them at that stage, and that continued from time to time over that period. Of course I was aware of their concern and their intense anger and the huge concern in the United States. We were aware of that and it was raised in very strong terms by various members of the United States administration. However, our relations with the US administration and with individual office holders like Eric Holder (no pun intended), the Attorney General, remain very good and they are close.

Q179 Mr Wallace: In 2003 you were Foreign Secretary when the UK and the US wrote the letter to the UN giving a commitment as part of the whole issue towards sanctions on Libya and the handing over of the accused. You used the phrase, “If found guilty, the two accused will serve their sentence in the United Kingdom.”

Mr Straw: I have not got the reference in front of me. He was actually sentenced in January 2001, so I think that letter related to some time earlier. I think your quotation is accurate, but I think the letter—

Q180 Mr Wallace: Do you think that was what the Americans took as the assurance?

Mr Straw: Well, you would have to ask the Americans that. What we said at the time was on the record. What was not anticipated at that time was that Libya would cease to be a pariah state, that...
there would be this negotiation with Libya, in which I may say the United States was fully and completely involved, absolutely involved. The operation with respect to the Libyans’ very extensive nuclear weapons programme was a US/UK operation and was covert for a long, long time, but the US were completely involved in the arrangements with led to the public announcement between the US, ourselves and the Libyans on 19 December.

Chairman: Mr Straw has to leave at four o’clock, so I request that colleagues ask brief questions and I request the witnesses to give brief answers, please.

Q181 Mr Wallace: It is the last one from me. Just on this, Mr MacAskill said that he had asked the UK Government to be provided with the information he requested on assurances the UK had given to the US and he says that the UK Government will not release it to them.

Mr Straw: When did he make that request?

Q182 Mr Wallace: 24 August. “I sought the views of the United Kingdom Government. I offered them the right to make representations or provide information. They declined to do so. They simply informed me that they saw no legal barrier to transfer and that they gave no assurances to the US Government at the time. They declined to offer a full explanation. I found that highly regrettable.”

Mr Straw: My understanding is that this request went to the Foreign Office, it did not go to my Department, and my understanding in any event is that the Foreign Office answered every question put to it by the Scottish Government in accordance with the laws governing devolution of power between the UK Government and Scottish Ministers in Edinburgh, and Scottish Ministers had all the information needed to make a decision under the Prisoner Transfer Agreement.

Q183 Chairman: Secretary of State, why did you not provide Mr MacAskill with the information he requested on the assurances the UK had made to the US Government? Was it because of security reasons?

Mr Straw: As I say, it was a request for information which was answered by the Foreign Office and not by my Department or by me, but my understanding is that in fact the Foreign Office did answer every question that was asked of it, and I think the record makes that clear as well.

Q184 Chairman: Finally, the First Minister told us that he was willing to appear before our Committee, at which he appeared this month. Mr Straw, would you be willing to give evidence before a Scottish Parliament Committee?

Mr Straw: I have not yet been invited to give evidence. On the whole, I require little invitation to offer my views in any forum. By the way, I would consult the Scottish Secretary of State in order to ensure we had a coordinated response!

Mr Murphy: That is a very good answer.

Q185 Chairman: Mr Murphy, do you have a view on it?

Mr Murphy: I have offered my views to this Committee before that I would love to participate in the democracy of the Scottish Parliament, but the Scottish Government continues to say that is not something they would like to see happen. I would love to address the Scottish Parliament after the Queen’s Speech to explain the legislative programme of the UK Government, in a similar way to which the Secretary of State for Wales addresses the Welsh Assembly. I think if it is good enough for Wales, it is good enough for Scotland.

Q186 Chairman: Could I thank the witnesses for their attendance. Before I declare the meeting closed, would you like to say anything in conclusion, perhaps on any issue that we have not covered during our questions?

Mr Straw: It has been a pleasure.

Chairman: Thank you very much.
Wednesday 10 February 2010

Members present
Mr Mohammad Sarwar, in the Chair
Mr Ian Davidson
David Mundell
Lindsay Roy
Mr Charles Walker

Witnesses: Chris Bryant MP, Minister for Europe, and Mr David Slater, Deputy Head of the Communications, Institutions, Treaty and Iberia Group, Foreign and Commonwealth Office, gave evidence.

Q187 Chairman: Good afternoon and welcome to today’s session. Thank you for coming. Would you like to introduce yourselves for the record? Chris Bryant: Yes. I am Chris Bryant. I am MP for the Rhondda and the Minister for Europe. Mr Slater: I am David Slater. Foreign Office official. I am the Deputy in the Department that deals with institutions and treaties for the European Union. Chris Bryant: A very exciting job!

Q188 Chairman: Before we start detailed questions would you like to make any opening remarks? Chris Bryant: I do not think so.

Q189 Mr Walker: That is a good start! Chris Bryant: I am in your hands, Chairman.

Q190 Chairman: The memorandum submitted by the Scottish Executive suggests that Scottish interests are not always taken into consideration when UK policy on Europe is being formulated, and that the current formal and informal consultation mechanisms are insufficient because Scottish interests invariably get absorbed into the “GB negotiating line”. Is this a version of events that you recognise? Chris Bryant: No, it is not. The Scottish “take” is represented not only by the Scottish Executive but also, of course, by the Scottish Office. We have tried as much as we possibly can to make sure that where there are specific elements that relate more directly to Scotland than to the rest of the UK that Scottish interest is represented in our EU policy. There have been many occasions when Scottish ministers have been able to take the seat at Council meetings. For instance, in Justice and Home Affairs Councils, it has been possible for the UK minister and the Scottish Executive minister to Box and Cox; one of them speaking for the UK on one subject and then another speaker taking the seat for the next subject. I think it works pretty well. In the time that I have been in this job, and in the time when I was in my previous job as Deputy Leader of the House I also sat on it, the other element that I think also works well is the JMC(E), which is the Joint Ministerial Committee (Europe), which brings together members from the devolved administrations and the relevant minister for whatever subject is the key subject that is coming up before the next European Council. We hold four of those a year and I think they are pretty effective.

Q191 Chairman: Why do you think the Scottish Executive has this view that their interests are not well represented there? Chris Bryant: Because sometimes we disagree. There are policy areas where we simply disagree, and that is inevitable, but because the 1998 Act does not devolve European or foreign affairs to the devolved administrations, in the end it is the UK that decides what the British position is. There will be occasions when there are disagreements that we are not able to bridge. We try as much as we possibly can to get round that, but if there is a point-blank disagreement then in the end it is the UK decision that holds.

Q192 Chairman: We understand that during the UK Government Presidency of the EU, the UK discussed ending direct support for agriculture under Pillar 1 after 2013 without consulting the Scottish Executive. Agriculture clearly has “distinctive importance” in Scotland, so what do you think attributed to this oversight? Chris Bryant: I believe that the Common Agricultural Policy is one of the elements of the European Union that is most in need of radical reform. I think it is absolutely crazy that 43% of the EU budget is spent on agriculture. There are moral issues as well because it makes it more difficult for poorer countries in the world to compete with European agriculture. We have been on a sustained campaign for years to try and reform the Common Agricultural Policy. I think it is a shame that Scottish Executive ministers have one minute supported reform of the Common Agricultural Policy and then the next minute resiled from that position and then gone back to supporting the reform of it. Wanting to collapse Pillar 1 is a very important part of what we need to do and, in the end, it is the UK, because this is not a devolved responsibility, that takes that decision on the UK position.

Q193 Chairman: The Calman Commission has recommended a “code of conduct” for meetings between UK ministers and the devolved administrations which could stipulate, for example, that when a UK minister is not present at a Council meeting, a minister from the devolved administrations should chair. Would you welcome an agreement of this kind? Chris Bryant: No, I disagree with that. If, for instance, it was the declared policy of the Scottish Executive that on a particular issue they were wholeheartedly opposed to the UK position and if,
Chairman: If you have not got it now.

I only apply to Scotland, it also applies to Wales and the UK that is saying it. Incidentally, this does not affect if it is the whole of the UK, that is the case, should they take the lead role?

We would want to be able to achieve a consensus and move forward together, but I do not want to budge from my bottom line which is that in the end where these are not devolved responsibilities it sticks with the Westminster Government to decide who represents and what the line is that is taken.

Q194 Mr Davidson: Could we maybe get a paper outlining how many occasions ministers from the devolved administrations have actually chaired such meetings?

Chris Bryant: If you ask longer questions I might be able to answer because I think I have got it here somewhere.

Mr Davidson: If you arrange to let us have it at a later stage, if you have not got it now.

Q195 Chairman: You can drop a note to the clerk of the Committee.

Chris Bryant: I think I am right in saying that there were 12 occasions last year, but I will write to you.

Q196 Lindsay Roy: Is there a set of criteria by which decisions on ministerial attendance can be reached in terms of chairing or being part of a delegation? Do you have a set of criteria?

Chris Bryant: Being part of the delegation is very different from taking the chair. By “taking the chair”, I do not mean being the chairman of the session, I mean being in the British seat around the table of 27-plus that there are. The difficulty about establishing any set of criteria is that unless you were to have a criterion which was, “When we all agree it does not matter who it is who is presenting the line. When we disagree it will be the UK Government minister that decides”, but that is a very short criterion—

Q197 Lindsay Roy: The First Minister expressed the opinion that in some areas Scotland has a greater interest than other areas of the UK, for example in fisheries or domestic ferry services. Do you accept that Scotland has a greater interest in these areas? If that is the case, should they take the lead role?

Chris Bryant: It is absolutely true that there are occasions when Scotland has a particular interest, and for the most part we would want to be able to accommodate that within the UK position because obviously it is far more effective if it is the whole of the UK that is saying it. Incidentally, this does not only apply to Scotland, it also applies to Wales and with some very specific issues in Northern Ireland. One of the issues that affects the devolved administrations differently, for instance, is the question of language: Scottish Gaelic, Welsh, Irish Gaelic and so on. We try as much as we possibly can to forge a common position, but there will be times, not particularly driven by party politics but just by a different outlook, when there will be disagreement and you have to have a firm view on who then takes the decision on what the British position is.

Q198 Lindsay Roy: Do you accept that Scotland has a greater interest in fisheries than the UK as a whole?

Chris Bryant: No, I do not think I do. The whole of the UK has an interest in fisheries. I do not know about ferry services. I think Austin Mitchell would say that he takes every bit as much of an interest in fisheries as any Member of the Scottish Parliament. Of course, there are large areas in Scotland that have absolutely no interest in fisheries.

Q199 Mr Walker: Just following up on what Lindsay said, I am pretty relaxed if Scotland wants to become an independent nation and have an independent foreign policy, but as far as this current settlement is concerned it is not a devolved matter, going to Europe and having conversations, negotiations with the EU, it is something that is reserved by the UK Government. It sort of annoys me when I see the Scottish First Minister suggesting, and I think to make mischief, that his ministers, who have actually no international mandate, would go and represent the UK at these negotiations. It is not part of the deal and it causes me some concern. I think it would cause my constituents some concern. I think it would cause my constituents some concern if a Scottish minister who does not sit in the UK Parliament was out there negotiating on behalf of the UK plc in general.

Chris Bryant: I am not as relaxed as you are about the question of whether Scotland wants or achieves independence for 150 different reasons.

Q200 Mr Davidson: Would you like to tell us those?

Chris Bryant: In the end I believe in the Union and I think it would be entirely counterproductive for Scotland. I think Scotland would probably then argue, and I have heard the Scottish First Minister argue, that they would then be admitted into the European Union, but there is no guarantee that they would. Actually they would have to go through a whole accession process which would undoubtedly take at least two, if not three, four or five years.

Q201 Mr Walker: It is a decision for Scotland to take, that was what I was trying to get across. It is a decision that they may make at some stage in the future.

Chris Bryant: I will do my level best to persuade them not to take that decision because for the whole of the UK it is better that we are a united Union.
Q202 Mr Walker: Until that decision is made—
Chris Bryant: I have another 143 reasons!

Q203 Mr Walker: You have made some good points. What I am saying is until that decision is made, and it may never be made by Scotland, at the end of the day it is very important that we have UK ministers sitting in the UK national parliament negotiating on behalf of us regardless of whether Scotland feels it has a special interest or not in the issue. By all means take counsel and advice from Scottish ministers, but I want to see Chris Bryant, or your equivalent in the Conservative Party, sitting in the chair representing the UK’s interests.

Chris Bryant: Up to a point, M’lud, because I cannot stress enough how difficult it is to field ministers all the time at every Council because of parliamentary duties here. I think Parliament has changed enormously in the last 15 years with the number of adjournment debates that have to be fielded by ministers, the number of times we vote, and a whole series of other things which have put much bigger pressure on ministers physically being here. That means there are times when it is enormously useful to us that we can have somebody else who sits in the British seat. If we do not think that a minister from one of the devolved administrations is on-side then it is better if it is a British Foreign Office official who bats for Britain. Even if it is a member of the devolved administration, the person who would be responsible for it to Parliament is the British Westminster minister, and I think that is an important principle. That is the thing that guides the Westminster minister when deciding who should be sitting in the seat.

Q204 Mr Walker: I do not mean this in a partisan way, and I hope you do not take it in that way, I am saying this as a concerned citizen. I was not really aware that Members of the Scottish Parliament could go along and sit in the UK seat and negotiate on behalf of the UK, and that worries me. Regardless of who was in power in Scotland, be it the SNP, Labour or the Conservatives one day, it just concerns me that is happening. I am intrigued as to why it is allowed to happen when Scotland was not given the right to have an independent foreign policy, I suppose.

Chris Bryant: I know there is an instance coming up in a few weeks’ time when there is an Education Council and it is the Welsh Assembly Member for the Rhondda who is the Education Minister in the Welsh Assembly and he is going. I am entirely relaxed about that, as long as the person who has decided who is sitting in that seat is the person who is accountable to Parliament, because if it goes wrong it is that person’s fault, not the Scottish Executive person or the Welsh Assembly person who has been sitting in the seat.

Q205 Mr Walker: If it was, say, a regional planning issue, have there been occasions when we have sent perhaps the leader of the county council along to represent UK views?

Chris Bryant: No. Obviously we try to field Westminster ministers as often as possible, but in some debates, because Council meetings happen in various different styles, sometimes it is just one seat per country and sometimes you will have two seats because you are in a wider hemisphere, and then you might want to have both of you having an opportunity to speak because the other person might be adding something to the British contribution, but it is still the UK British contribution.

Q206 David Mundell: Following through on that, Minister, another point that Mr Salmond raised was the relative merits of officials and ministers from the devolved institutions, because in his evidence he did cite an occasion, or occasions, when officials had been put in the chair in preference to ministers attending. Is that decision made on the balance of the issue? What would be the criterion that would have determined that viewpoint?

Chris Bryant: In a sense it is the criterion I referred to earlier, which is when we all agree and the relevant minister knows that the Welsh Assembly minister or Scottish Executive minister will advance the UK British argument then we are entirely relaxed about it. However, where we know that there is a radical difference of view and we feel pretty confident that the relevant minister would advance an argument which was the opposite of the British Government argument then we would be better off putting an official in the seat.

Q207 David Mundell: That would be the criterion that would apply?

Chris Bryant: Yes. If I might just explain, the constitutional reason for that is this kind of double lock, which is first of all who is accountable to Parliament for the UK position—it has to be the Westminster Government minister, so it has to be that person who takes the decision on who is sitting in the chair—secondly, foreign affairs is not a devolved responsibility. There is that double constitutional lock.

Q208 David Mundell: I just wanted to raise that point because Mr Salmond had raised it with us. I think it is true to say, and you alluded to it, there are far less differences than Mr Salmond would lead us to believe between the Scottish and UK positions. Is that your view?

Chris Bryant: Absolutely. As I have said already, on justice and home affairs, which you might think would be the most contentious kind of area because it is quite contentious within Westminster politics, we have a very similar set of positions and the way that we have worked with the opt-outs and the opt-ins has very much worked in concert.

Q209 David Mundell: What role would you see for the Scotland Office in the development of the EU negotiation position so that it is fully representative of the UK interests combining both the Scotland Office responsibilities and the devolved responsibilities?

Chris Bryant: There is no reason why in certain circumstances it would not be a Scottish Office minister or a Welsh Office minister representing the
UK position. The Government is the Government, it is one. The Wales Office, the Scottish Office and Northern Ireland Office are all represented on the Joint Ministerial Committee (Europe) which meets, as I say, four times a year before the European Councils. I try to ring the devolved administrations before that meeting just to see whether there are any specific things they want put on the agenda. If I had a sort of reluctance about those meetings, it is that it is quite difficult to organise a day of the week that works for Parliament, the Scottish Parliament, the Welsh Assembly and the Northern Ireland Assembly, so quite often we will have more Westminster ministers than we will have devolved administration ministers.

Q210 David Mundell: At what stage of the process in developing the UK position do you judge is the point at which the process, whether it be from the Scotland Office or Scottish Government, is most susceptible to influencing the position?

Chris Bryant: Before we have even thought of it normally. I think it is a general rule in politics, is it not, that if you can get your argument in before somebody has started formulating their argument then you probably stand a better chance of influencing it. This is also true in Europe. A lot of European issues are very slow burn ones. We have already referred to the Common Agricultural Policy and that tends to roll extremely slowly.

Q211 David Mundell: Within the EU, do you find that there is an understanding of Scotland’s position within a devolved UK, that other Member States understand our devolved arrangements within the UK?

Chris Bryant: Asymmetric devolution is common to quite a lot of Europe. Spain is probably the best example, and it did it only ten years before we did. They fully understand not only the complexity of trying to have a national position but also the fact that the goalposts move quite a lot because with Spanish devolution over the last 15 years, every time there has been a new coalition government there has had to be a new round of negotiations on what should be devolved and what should be reserved. You can repeat those arguments in Belgium in particular where they have found it difficult to sustain a government because of devolution issues and in Germany. Some of this affects some of the external policy of the EU, for instance towards Kosovo.

Q212 Mr Davidson: The Joint Ministerial Committee (Europe) seems to work better than any of the Joint Ministerial Committees (Domestic). Is that your understanding of the position?

Chris Bryant: I am just trying to rehearse in my mind the meetings of both that I have been to. I cannot really hold a view on the (Domestic) because I have not been to many.

Q213 Mr Davidson: We had a memo from the Royal Society of Edinburgh, which is a greatly august body, at least in its own eyes, which suggested that Scottish interests might be better served by “more formal proceedings of the JMC on Europe, with the Scottish Executive free to note its dissent, which would give Whitehall a stronger incentive to reach agreement”. Recognising that is coming from a sectional and nationalist—with a small ‘n’—perspective, nonetheless do you think there is any advantage in such a formulation?

Chris Bryant: No, it is twaddle.

Q214 Mr Davidson: Get off the fence, tell us what you really think!

Chris Bryant: It is just not how it works. On the vast majority of these issues there is general agreement and I think some people, doubtless for their own pettifogging reasons, want to create a row about the process rather than about any of the substance because there is not much row about the substance. I think that is a diversionary tactic.

Q215 Mr Davidson: The general issue about lack of transparency in the inter-governmental relationship has been identified by some as a problem: it is difficult to identify in some cases how exactly a final decision has been reached, particularly when the devolved administrations have a different perspective. How can it be made more clear how this system works in order to give some reassurance to devolved administrations and their citizens that their interests have actually been taken into account in some way and not just simply ridden roughshod over?

Chris Bryant: If I take the case of Wales, which I obviously know slightly better by virtue of being a Welsh MP, my experience on the JMC(E) was that I would ring up Rhodri Morgan or Rhodri would ring me up about two weeks before the meeting. He would have a list of four or five things that he thought needed to be taken into account and one issue where he thought maybe the British position and the Welsh position did not quite align. Almost invariably, I think invariably, by the time it got to the meeting itself all of those issues had been resolved and it was merely a matter of how we could best deploy the arguments within Europe so as to achieve the same outcome. That has actually been my experience of talking to Alex Salmond prior to JMC(E) meetings as well. We have notified him of things that are coming up where there might be a special Scottish interest and sometimes we have been telling them rather than them telling us. I think it is an entirely pragmatic basis that we work on.

Q216 Mr Davidson: I want to be clear about this. Collaboration between yourselves and the Scottish Executive has generally been okay, been informal, except on those occasions when somebody chose to make a row?

Chris Bryant: Pretty much. At the December Council we had a discussion about fisheries and it was slightly complicated by the fact that the Scottish Minister had changed that morning, but nonetheless it was an effective and open discussion which better informed our position.
Q217 Mr Davidson: There are two separate issues here. One is the question of finding a resolution to the position, as it were, working out what you are going to do. The second is for those on the outside working out what is happening inside this black box. Is there any way in which people outside can actually be clear that what has happened is that you and Alex or you and Rhodri have had a phone conversation and it has all been worked out? You can see how to concerned citizens it all appears to be magic and the assumption for those who are optimistic is that everybody has collaborated and worked together nicely, and for those who are suspicious they just assume that they are being sold down the river. How do you overcome that?

Chris Bryant: It is really difficult because my instinct is to say, “we will publish a transcript of every conversation we have”. However, I think that would not be in the British interest and also not in the Scottish interest because—

Q218 Mr Davidson: Foreigners would read them.

Chris Bryant: Well, because it is part of our negotiation position, is it not. It is establishing our negotiating position and it would be a fool who would publish all of that, I think.

Q219 Mr Davidson: There is no reason why a lot of that could not be published much after the event though. Knowing that it might come out at a later stage might have some advantages to those who were of a paranoid nature. I can see the difficulty. The other difficulty presumably is that people then strike much more of a posture knowing that it is subsequently going to come out.

Chris Bryant: Exactly. On top of that, in a lot of negotiations they are a constant negotiation. For instance, on the EU Budget and Common Agricultural Policy, that is not a debate that will be finished in 2010. If we publish our negotiating discussions prior to that I think we would be cutting off our nose to spite our face.

Q220 Mr Davidson: Can I clarify whether or not any of the devolved administrations have sought ways of making this process more transparent or have they been quite happy to go along with the way in which it is operating at the moment?

Chris Bryant: At the moment we are consulting on a new Memorandum of Understanding. Have we had anything in on that?

Mr Slater: I think we have had a signal from both the Scots and the Welsh that they are happy with it. We are waiting on Northern Ireland.

Chris Bryant: I am not aware of them specifically asking that they should all be opened up to the world and we should have public meetings.

Q221 Mr Davidson: Devolved administrations have access to UK Government policy process but the obligations of confidentiality mean that the Scottish Parliament’s External and European Relations Committee cannot scrutinise dialogue between the Scottish and UK Governments on EU issues. It is a question of how the Scottish Parliament committee knows that their ministers have been following their line in discussions with you. What can be done to allow a devolved parliament’s committee to take evidence from the devolved parliament’s minister about confidential discussions that they have had?

Chris Bryant: That is for them to decide, is it not?

You could argue exactly the same of British ministers when they go to Brussels because elements of the meetings may be held in public but a lot of the discussions are held in private.

Mr Davidson: That is not the point that has been raised with us. The devolved parliament would want to hold its ministers accountable but their defence has been, “We cannot discuss this because it is confidential”. Is there any way out of this or not?

Q222 Lindsay Roy: I think that comes down to trust.

Chris Bryant: I think it comes down to political judgment really. Obviously there are things that you can discuss publicly and there are other things whereby if you were to do so at a particular moment you would be undermining the British and, for that matter, the Scottish position. I was going to be rude about Nationalists and then I decided not to be.

Q223 Mr Walker: There are not any here, I do not think.

Chris Bryant: No, I know.

Mr Walker: So you can be.

Q224 Mr Davidson: It is enjoyable but it does not necessarily achieve a lot.

Chris Bryant: Exactly.

Q225 Mr Davidson: A bit like shooting fish in a barrel. Another weakness that we have identified is that in the collaborative structures there is the lack of planning for conflict resolution. You seemed to indicate earlier on that if yourselves and devolved administrations disagree then they lose basically, which is a resolution of a sort. It is difficult to see any other way in which this can be sorted out. Is that correct?

Chris Bryant: It is really. It is interesting that the European area was one of the areas where the Calman Commission did not signal that there were lots of things that needed to change. I would have thought that the conflict resolution on other issues, which ends up with the legal committee of the Privy Council, is an area that is rather more open to need for reform, to be honest.

Q226 Lindsay Roy: What is your impression on the current levels of contact and collaboration between UKRep and the Scottish representation in Brussels?

Chris Bryant: I think it is very good. They work very closely together. I know that we value the added contribution that they can make. Incidentally, it is not only in Brussels, it is Washington and Brussels where there is a Scottish Executive Foreign Office, as it were.
Q227 Lindsay Roy: Do you have any indication of how frequently the Scottish Executive approach commissioners independently of the UKRep? Are you kept informed if that is the case?  

Chris Bryant: I think for the most part it is a pretty open relationship. I do not think there are great clamours. Anyway, if anybody were to be wandering around the European Parliament lobbying against British interests we would find out pretty fast.

Q228 Lindsay Roy: Again, quite a positive story.  

Chris Bryant: That is my impression, yes. Talking to Kim Darroch, the UK Rep in Brussels, he speaks warmly and kindly of the relationship.  

Mr Slater: Could I just come in here? I spoke to Donald Henderson about this yesterday, funny enough. He has got a pass to the UKRep office and he goes to the Heads of Section meetings. He says that his tactic is he stores up if he has got three or four issues, he walks across, picks off our officials and talks to them and makes sure they understand what the Scottish position is, he then understands exactly what our position is, and it is worked out as far as possible at official level. We ask the question, “What have you been doing about this? Who have you been talking to?” As the Minister says, it is very transparent. From Kim’s and Donald’s sides they both say it works very well.

Q229 Lindsay Roy: It is not particularly relevant, but I know Donald Henderson quite well and that gives me some confidence.  

Chris Bryant: I have not met him, so I cannot comment.  

Mr Walker: Lindsay is a good judge of character.

Q230 Lindsay Roy: Thanks very much.  

Chris Bryant: What do you think of Charles?  

Mr Davidson: Life is too short!

Q231 Chairman: Under the terms of the Treaty of Lisbon the principle of subsidiarity is enshrined in European Union law. What, in your opinion, will be the implications of these changes for the UK and its relationship with the devolved administrations?  

Chris Bryant: The main issue is really in terms of the yellow and orange card system which is now available to parliaments. That lies with the Westminster Parliament, which has two Houses. What we do is for any explanatory memoranda and EU documents that go the European Scrutiny Committee in the Commons and to the Lords European Union Select Committee, any that have specific reference to Scotland or might be of specific interest to Scotland, Wales or Northern Ireland, we send them to the relevant committees in those devolved administrations as well. They get them at the same time as our European scrutiny committees here. It is then for the Scottish Parliament and Parliament, rather than Government, to decide how they want to manage that relationship around a yellow or an orange card. For instance, if the Scottish Parliament wanted to suggest to Westminster that it should invoke a yellow card, the two relevant committees need to think of a way of doing that. I have written to the Chairmen of the two committees here, Lord Roper and Michael Connarty, to suggest a way forward on that.

Q232 Chairman: A UK regional assembly might have grounds for challenging draft legislation on the basis, for example, that it does not take account of regional and local factors; it may also want to stop the objections of a national parliament to legislation which would impact upon their devolved authority. In your view, would the mechanisms of collaboration and coordination between the UK Government and devolved administrations be sufficiently robust to respond to a situation like this?  

Chris Bryant: Yes, broadly speaking I think so. Some of these issues have to be resolved by Parliament rather than by Government, and by Parliament rather than the Executive. Some of these issues after the interplay between those are relatively not as developed as the relationship between the governments. The Scottish Executive’s relationship with Westminster Government is fairly well delineated and people understand how it works and we have systems, but the same is not yet true. I think, of the relationship between the Scottish Parliament and the Westminster Parliament, and I think that needs to improve.

Q233 Chairman: How will you be collaborating with the Scottish Executive to put in place mechanisms for regional assembly subsidiarity and proportionality monitoring?  

Chris Bryant: I think that is in relation to the yellow and orange cards again. As I say, I have written to the Chairman of the European Scrutiny Committee and to Lord Roper and I think they have to develop that specific relationship with the Scottish Parliament rather than Government to tell them how to do it. In the end, it is the Westminster Parliament that invokes the yellow or the orange card, not the Government.

Q234 Chairman: The protocol on the role of national parliaments in the European Union requires that national parliaments allow regional assemblies the full eight week period to scrutinise draft legislative acts. Do you anticipate that there are currently, or could be in the future, any problems in complying with the timeframe for consultation set out in this protocol?  

Chris Bryant: Broadly speaking, no. We pretty much do this already and have done for a while. That is why we send documents that are relevant directly to the relevant committees in the different devolved administrations. I just issue a caveat because there is a provision to be able to override, which is sometimes necessary. Just as we do that here on occasions, I have tried to cut down the number of times when we have to use that override, which might be for security reasons or emergency economic reasons. I have tried to cut the number down here, but I cannot say absolutely that it will never happen.
Q235 Chairman: This question might be a bit difficult to answer. Would an independent Scotland have more influence and bargaining power in Europe than it currently has within the United Kingdom?

Chris Bryant: No.

Q236 Chairman: A simple statement.

Chris Bryant: I could expatiate at length on this subject, but I think that would bore you.

Q237 Mr Davidson: Undoubtedly!

Chris Bryant: Thank you, Ian.

Q238 Lindsay Roy: Calman spoke about the breakdown of communication and collaboration between governments. This seems to have been a success story in relative terms. Calman talked about having structure, process and goodwill and a perceived need to come together, and I think that has been very clear in the case of the European Union. Has the goodwill always been there or have there been attempts to generate a culture of blame when things go wrong?

Chris Bryant: For the most part it is an excellent relationship; it works. It works on the basis of trust and people being able to talk to each other and getting on the phone whenever they need to do so. We are all thoroughly aware that people have general elections to win and political battles to fight, but I think we all know when to discount those elements of the discourse that is going on. I should say that is exactly the same as in any diplomacy. As I go round Europe I know when a general election is coming up in France, Spain, Italy, or wherever. We are all politicians, we know when to see the nugget of real concern as opposed to the froth of insincere concern. I have noted how to work that out in some countries, albeit in a different context.

Lindsay Roy: That is very reassuring.

Q239 Chairman: People in Scotland obviously expect and want politicians from all political parties to work together for the greater interest of the Scottish people. During our evidence with the UK Ministers and First Minister it was obvious that these structures and relationships are reasonable and they are working well, so why do some politicians want to draw a dividing line and say that we are not working together? Do you think this is some political motivation behind this, or any other reason to score points?

Chris Bryant: Yes. What was it Shakespeare said? Not Shakespeare. “A politician is a quilted anvil on whom the blows are never heard”. I suppose sometimes we do engage in— I do not mean “we”, but politicians—slightly exaggerated talk on issues where they want not to talk about the substance but the process. I think this process has worked pretty well because on most substantial issues we are of one mind and the British position is pretty consistent. I find it irritating, tedious and frustrating when people pretend that there are difficulties which I do not think really exist.

Q240 Mr Davidson: Before the Chairman moved on to the question of the role of an independent Scotland, and so on, part of the briefing that we had gave us the suggestion that there might be substantial difficulties if Scotland sought to be independent in the EU and reference was made to the reaction to an independent Kosovo where I think there were five European countries that expressed concern. I think it would be helpful if you could let us have a paper telling us how these things have moved on. They were last discussed informally in the House about two or three years ago and obviously the EU has moved on in terms of how it is likely to react to any secessionist state. Is it possible that you could give us a paper outlining, for example, because I do not know, the names of the five countries that are likely to be hostile to the membership of a secessionist Scotland from the example of Kosovo and other examples where things have happened that might give us an indication that progress to membership of the EU would not be a smooth unblocked one?

Chris Bryant: It is quite interesting you mention Kosovo because one of the countries that will not recognise Kosovo is Spain. In part, Spanish ministers have said to me that is because they worry about secessionist ideas in Spain, in particular in the Basque region and perhaps Catalonia as well. Whereas the UK, where obviously we have had political rows over the last however many years about devolution and home rule for Ireland and independence for Scotland, Wales and so on, were the first country, I think, to recognise Kosovo and have campaigned very vigorously for Kosovo and hope one day that Kosovo will be able to be first of all an applicant and then a member of the European Union. I am very happy to write in with further details. I cannot remember the other four countries that have not recognised Kosovo. We campaigned quite vigorously to try and persuade countries to recognise Kosovo. The last country to do so was Mauritania and the one before that was Tuvalu. Within the Union, I think it is very difficult for the Union to cope with a Member State that started to divide itself and that will not change.

Mr Davidson: It would be very helpful for us to have background information on that.

Q241 Chairman: Can I thank the witnesses for their attendance. Before I declare the meeting closed would you like to say anything in conclusion on any issue which we have not covered during our questions?

Chris Bryant: No. Thank you very much for having me.

Chairman: Thank you very much.
Written evidence

Memorandum from Dr Alex Wright, University of Dundee

Summary

— The primary route for representation of Scottish interests remains the Council of the EU. As Scotland is a part of the UK, then by default the UK Government takes the lead over promoting and defending Scotland’s interests in the Council.

— Past history suggest that this has been not always adequate.

— The EU until the early 1990s failed to involve its regions adequately

— Problems persist over the influence of the EU’s regions and stateless nations and their capacity to hold the EU to account even though much EU policy impacts directly at the sub-state level.

1. The Representation of Scotland’s interests in the European Union (EU)

1.1 The primary route for the representation of Scottish interests in the EU remains the UK Government. This is because the Council of the EU remains the focal point for promoting and defending the interests of the member states and by default—their territories, including Scotland. That is not to say that the European Parliament lacks any role—it can be of worth to Scotland not least because of the increasing use of the co-decision procedure. However, the Parliament essentially reflects the interests of the EU’s citizens rather than one state or territory.

1.2 Consequently, few interest groups would neglect governmental channels when they sought to influence the EU. As Scotland has its own government the latter would be their primary point of influence unless the interest group in question was part of a UK group, when the parent body might articulate a pan-UK position. The Scottish government would consult the relevant interests in Scotland and then transmit that upwards to the “lead” UK Department in London. This has posed its own challenges in the period prior to legislative devolution in 1999 and anecdotal reports from within the Scottish Executive a couple of years ago suggest problems still persist:

(a) Sometimes Scotland is “forgotten” by the lead department with the result that the Scottish Executive/Government is not consulted at all or perhaps too late.

(b) There is no assurance that the Scottish position on a particular policy will be accommodated satisfactorily by the lead department. There are a number of possible reasons for this, namely:

Scotland’s interests can be quite divergent from those of the rest of the UK (eg oil, whisky, the environment and fisheries); and

The political leadership may not share the same view with their colleagues in Scotland concerning a particular EU proposal which is due to come before the Council of the EU.

1.3 Whilst interest groups do not neglect other channels including approaching the Commission and other member states, this is usually conducted via trans-national pressure groups or ad hoc lobbies (which the fishing sector has participated in from time to time).

2. The Regional Dimension of the EU

2.1 In the early years of the EEC/EU, there really was not a regional dimension to the EU, save for the inception of the structural funds in the early 1970’s. The regional element rose up the political agenda in the late 1980s in part because of the reform of the Funds, which meant that individual regions had to bid against fixed criteria and also because the European Single Market would impact directly on the interests of sub-state actors such as local authorities and Non-Departmental Bodies. Allied-to-which, the regions themselves were increasingly concerned from the Single European Act that powers which were exclusive to them or which they shared with the government of their member state were being transferred to the European level. As far as the latter was concerned they did not participate in the Council of the EU, although that changed post-Maastricht (depending on the internal constitutional arrangements of the member state). Despite the creation of the Committee of the Regions after Maastricht, the influence of the regions themselves is open to doubt. In some instances, for example, Germany and Belgium, internal mechanisms have been agreed which are designed to safeguard the powers of the sub-state units in relation to further transfers of power to the EU. In addition they may be allowed collective representation in the Council of the EU when the subject relates to powers within their competence.

2.2 Even so by 2001 the Commission conceded in its white paper on Governance:

“The expansion of the Union’s activities over the last 15 years has brought it closer to regions, cities and localities, which are now responsible for implementing EU policies from agriculture and structural funding to environmental standards. The stronger involvement of regional and local authorities in the Union’s policies also reflects both their growing responsibilities in some Member States and a stronger engagement of people and grass root organisations in local democracy.”
Yet the way in which the Union currently works does not allow for adequate interaction in a multi-level partnership; a partnership in which national governments involve their regions and cities fully in European policy-making. Regions and cities often feel that, in spite of their increased responsibility for implementing EU policies, their role as an elected and representative channel interacting with the public on EU policy is not exploited.”


2.3 Since 2001 both the doomed Treaty on the Constitution and the (yet to be fully ratified) Lisbon Treaty have tacitly acknowledged that the regions (and in Scotland’s case stateless nations) need to be dealt with more inclusively. As far as the latter is concerned, the intention is that their cultures and welfare needs to be respected. From a democratic perspective they must have involvement in the opportunity for state parliaments to object to the proposal by the Commission (as set out in both the treaties). Westminster was keen to involve the Scottish parliament in such a scheme (which has yet to come to fruition because of deadlock over the Treaty reform). In practice however, if this scheme comes to fruition it will be problematic to implement from a Scottish perspective in part because a) the time allowed for consultation by the EU is too brief b) it would be something of a challenge for the Scottish parliament to secure potential allies amongst other regions/stateless nations in the EU over a given proposal.

Both in terms of the promotion of Scottish interests and democratic accountability European integration has posed a challenge for Scotland and that remains true to the present day.

*August 2008*

**Memorandum from the Scotland Office**

1. The UK Government welcomes the opportunity to contribute to the Committee’s inquiry into Scotland and the European Union (EU).

**Summary**

— Like England, Wales and Northern Ireland, Scotland is an active member of a Double Union: the United Kingdom and the European Union. This double Union empowers Scotland so that it is able to speak with a stronger voice and with greater impact. It is essential that Scotland retains this position of influence as we face new strategic challenges, such as climate change, against a backdrop of expanding globalisation.

— The UK is a significant player within the EU and all parts of the UK benefit from our considerable influence; our choice to opt in or out on key issues and our voting weight. The terms of our membership have been negotiated over a period of 35 years and in a number of treaties. The benefits are clear when comparing our position to that of those nations currently applying to join the EU, who must accept the standard terms of membership. For example, Scottish interests recently opposed the proposals put forward by the European Commission for a regulation on “Applicable law and jurisdiction in divorce matters”. The UK’s response fully reflected these views and, in the event of European legislation on the matter, the UK Government is able to act to protect Scots law in Europe by exercising our right not to opt-in. We are also able to use our substantial voting weight to secure the best possible outcomes for all parts of the UK, including our allocation of Structural Funds. Given our unique and privileged position within the EU, Scotland is not at risk of being isolated and not at risk of being overlooked.

— As a Member State, the UK is responsible for relations with the EU for all parts of the UK and the UK respects this responsibility. The emphasis in EU negotiations is on working as a UK team for the whole of the UK. It is vital that we speak with one coherent voice if we are to effectively influence decision making in the EU and deliver for the people of the UK. Accordingly, the UK Government works hard to ensure that interests from all parts of the UK are taken into account from the early stages of policy development through to negotiations in the EU. The occasions when Scottish Ministers have disregarded the agreed UK position, despite being fully involved in the process of collectively developing policy, have been rare; however, those occasions (eg recent criticism of the Common Fisheries Policy) have been disappointing. We are pleased to note that overall we have a strong co-operative relationship with the Scottish Executive and other devolved administrations. Examples of our recent collaborative successes with clear benefits to Scotland include structural funds, spirit drinks, ferry services and anti-dumping of salmon.

— During the UK Presidency in 2005, the UK Government increased the number of Joint Ministerial Committee (Europe) meetings in order to fully engage the devolved administrations and help ensure that they were directly involved in a number of ways. This included a Council Working Group chaired by the Scottish Executive EU Office and several meetings being held in Scotland, including the second round of the EU-Norway negotiations on fisheries. Scotland is also directly represented as part of the UK in other ways: Scottish elected representatives make up part of the UK contingent in the European Parliament, the Committee of the Regions and the European
Economic & Social Committee. In addition, we are currently negotiating the use of Scottish Gaelic within the EU to increase accessibility. If the Treaty of Lisbon enters into force, there will also be opportunities for Scotland to develop a more direct relationship with other parts of the EU.

**Representation of Scotland in the EU as part of the UK**

2. The UK Government is fully committed to working closely with all of the devolved administrations (DAs) on all EU matters that relate to devolved responsibilities. Our commitment is expressed in the Memorandum of Understanding and Concordat on co-ordination of European Union Policy issues, as agreed with the Scottish Executive. There are well-established mechanisms to ensure that the interests of the DAs are fully represented in the EU and these processes have proven to work well.

**UKRep**

3. The UK Representation to the EU (UKRep Brussels) promotes UK policy by shaping thinking in Brussels, and by negotiating and lobbying so that decisions reflect interests of all parts of the UK. To that end:

   — it monitors and analyses developments in the EU, particularly in the Commission and European Parliament, and among Member States;
   
   — it contributes to the development of UK policy towards the EU; and
   
   — it lobbies the Commission, European Parliament, Member States and other smaller EU institutions such as the Committee of the Regions and the Economic and Social Committee; negotiates for the UK in the Council of Ministers; and negotiates with the Commission on UK-specific issues.

4. UKRep involves the Scottish Executive as directly and fully as possible in decision making on EU matters which touch on devolved areas (including non-devolved matters which impact on devolved areas, and non-devolved matters which have a distinctive impact of importance in Scotland). The key relationship in Brussels is with the Scottish Executive’s EU Office (formerly known as SEEUO), established on 1 July 1999. The office was created in order to help focus UKRep’s activities with specific regard to issues of interest to Scotland, post-devolution. This has borne fruit on numerous dossiers, for example lobbying the European Commission and European Parliament on matters such as structural funds, spirit drinks, ferry services and anti-dumping of salmon.

5. UKRep is responsible for representing the views of the UK to the European Institutions. Its work is complemented by that of the Executive’s EU Office. To underpin this activity, UKRep and the Executive’s EU Office maintain a constant dialogue, both on specific dossiers, and at a more strategic level. UKRep and the Executive’s EU Office exchange early information on policy developments within the Commission, Council and Parliament and assist each other more generally on lobbying. The Executive’s EU Office also provides UKRep with notes on the current areas of particular interest to Scottish Ministers. Where appropriate, joint lobbying strategies on specific EU dossiers are produced, for example, encouraging all Scottish MEPs to lobby the Commission on a cross-party basis. The relationship is working well as demonstrated by the Scotland in Brussels section of the Scottish Executive’s website.

**Policy development**

6. Scottish Executive officials take an active and participatory role in Working Groups considering issues that touch on devolved matters. In addition, a number of mechanisms are in place to manage communication between the UK Government and Scottish Executive: correspondence, official-level meetings and fixed bilateral and multilateral Ministerial meetings. For example, on Justice matters, whenever there is a co-ordination meeting between Brussels and London, Edinburgh is also invited and participates fully. These provide an effective means of ensuring that detailed information and views on dossiers of interest to Scottish Ministers are routinely shared from an early stage and that every effort is made to arrive at common positions with regard to EU policy development and implementation. Scottish Ministers also receive and are invited to comment on all Explanatory Memorandums on EU proposals that relate to devolved responsibilities, giving them early sight of proposals, an opportunity to feed in comments and an indication of UK Government policy. Through these processes, the UK Government ensures that its final position represents the interests of the UK as a whole.

**Agreement to the final UK position**

7. Scottish Ministers are formally consulted on EU matters through Ministerial Committees. The Joint Ministerial Committee (Europe) (JMC(E)) operates as one of the principal mechanisms for consultation on UK positions on EU issues which affect devolved matters. It is supported by an informal “Joint Secretariat” drawn from Cabinet Office and the DAs as set out in the Memorandum of Understanding (MoU) between the UK Government and the DAs. The UK Government values the input of the DAs on devolved matters within the EU context and ensures that JMC(E) meets four times a year in the fortnight preceding the
European Council. This approach means that Ministers from the DAs are up to speed on and can contribute to the UK’s priorities for the forthcoming Council and it provides a clear and regular schedule for JMC(E) meetings to take place.

8. The Committee’s terms of reference are defined by the MoU between the UK Government and the DAs. The objectives of the Committee are to take stock of relations, share information and to address particular issues or problems which have not been resolved bilaterally. The presumption is that an unresolved issue will only come to JMC(E) when there has been an impasse elsewhere. It provides a valuable opportunity for UK and DA Ministers to raise EU policy matters:

— of particular interest to the DAs;
— where DA views would be useful in formulating the UK position; or,
— where the DAs feel that there are particular issues that the UK Government needs to be aware of when negotiating in Brussels on behalf of the whole of the UK.

JMC(E) is also the forum where the DAs can make UK Ministers aware of their priorities for working within the EU and seek views on these from other DA and UK colleagues. It is a consultative body rather than an executive one, which means that it reaches agreement rather than makes decisions. Its agreements are not legally binding although the expectation is that administrations will support positions that they have contributed to and agreed.

9. The UK Government is keen that JMC(E) remains a useful, efficient and effective meeting for all administrations. We have ensured that the meeting has a strong focus on coordinating matters of high interest to the DAs and that DAs and UK Departments have the opportunity to suggest agenda items. Additionally, the Secretariat has introduced new processes to ensure that meetings run as smoothly as possible and maximise opportunities for the DAs to raise issues of concern at both Ministerial and official level throughout the preparation process. The Minister for Europe has offered bilateral calls with his DA colleagues in advance of each JMC(E). In addition, senior officials from the UK Government and the DAs meet six times per year to make sure that the right issues are raised at Ministerial level and to ensure a comprehensive sharing of information in advance of these meetings.

Council of Ministers

10. The emphasis in negotiations at meetings of the Council of Ministers is on working as a UK team. A UK Government Minister retains overall responsibility for the negotiations, determining how each member of the team can best contribute to securing the agreed UK policy position, and generally leads discussions. It is both appropriate and sensible for UK Government Ministers to have this role as they represent the whole of the UK; this avoids any conflict of interest that Ministers from the DAs would face, representing only part of the UK, and an arbitrary division of policy leads based on changing objectives across the UK.

11. Scottish Ministers are, however, often invited by the relevant UK Minister to attend Council meetings where matters that relate to devolved responsibilities are discussed. For example, Scottish Ministers have attended recent meetings of the Fisheries Council and Justice & Home Affairs Council. This is in recognition of the fact that policy does not remain static in negotiations and continuing involvement is a necessary extension of participation in formulating the UK's initial policy positions. The role of Scottish Ministers and their officials at Councils is to support and advance the single UK negotiating line which they played a part in developing.

12. By way of example, a number of key elements of fisheries policy affect the whole of the UK and it is essential that close and effective working relationships remain in place in order for UK priorities to be delivered in the EU. The UK fisheries industry makes a major economic contribution to the UK economy, with almost £3 billion being spent by consumers on fish products annually. In 2006, the UK fishing industry had 12,934 fishermen: 7,116 in England and Wales, 5,205 in Scotland and 613 in Northern Ireland. Generally there have been good working relationships and regular communication and discussion with the DAs on fisheries. This has enabled all parts of the UK to work closely with the industry to foster a co-ordinated approach to safeguard accessibility of fisheries resources and to ensuring that the UK’s obligations under the Common Fisheries Policy are successfully met.

13. The UK generally leads on negotiations at the Fisheries Council and the interests of all parts of the UK and fishermen from throughout the UK are taken into account in arriving at the formal UK negotiating line. At Ministerial level there are regular meetings between the UK Fisheries Minister and his devolved counterparts to ensure that there is a consistent approach to the various negotiations in Brussels and elsewhere. Each year, at the December Council, the UK negotiates its share of the total fishing opportunity available to Member States. Last November, agreement on the key objectives for the UK was reached at an early stage and all four Ministers who attended the Council meeting, including all three DA Ministers, publicly acknowledged that the outcome of the Council represented a significant achievement for the UK. We continue to promote such effective working relations in advance of future Councils.
Direct representation of Scotland in the EU as part of the UK

European Parliament

14. Along with France and Italy, the UK has the second largest number of MEPs in the European Parliament. UK MEPs work to secure the best deal for people of the UK and work with other MEPs to influence the European Parliament on a wide range of issues that directly affect people in the UK. Scotland directly elects seven of these MEPs and is strongly served by all the MEPs for the UK, many of whom hold influential positions in the Parliament. Due to a redistribution of Parliament seats, to reflect the accession of new states to the EU, the UK will elect fewer MEPs at the next European Parliament elections, which means that Scotland will elect six MEPs instead of seven MEPs. The European Regional Returning Officer for Scotland is coordinating planning for the 2009 European Parliamentary elections and has established a European Elections Planning Group to this end. The UK Government is helping ensure that the electoral regulations and rules are fit for purpose in the Scottish context.

Committee of the Regions and the European Economic & Social Committee

15. The Scottish Parliament directly nominates four Scottish Councillors to the 24 Member UK complement in the Committee of the Regions and four to the 24 Member UK complement in the European Economic & Social Committee, reflecting the number of people in Scotland per Committee Member. Both Committees provide Scotland with access to and influence upon key decision makers in Europe. The Committee of the Regions was established by the Treaty of Maastricht and acts as a consultative body with powers to give non-binding opinions on EU draft legislation. The Council of Ministers or the Commission must consult it on a number of areas and legislation in those areas cannot be adopted until the Committee has delivered its opinion or the deadline for doing so has expired. The European Economic & Social Committee is another influential consultative body within the EU and was established by the Treaty of Rome to provide a forum for the different economic interest groups within Europe.

Scottish Gaelic

16. The UK Government, in close co-operation with the Scottish Executive, is currently negotiating arrangements for the use of Scottish Gaelic at an EU level, to aid the representation of Scottish Gaelic speakers in Europe and better reflect the devolution settlement. Under the intended arrangements, Scottish Gaelic will be able to be used:

— by UK representatives in speeches to the Council of Ministers (not Working Groups) and the Committee of the Regions (plenary sessions) (both passive interpretation only);
— in any written correspondence (including from members of the public) with the Council of Ministers, European Parliament, European Commission, Committee of the Regions, and the EU Ombudsman (translation of both the correspondence and reply); and
— for the deposit of EU legislation adopted by co-decision by the Council of Ministers and European Parliament (a certified translation into the Council archives).

An agreement is in place between the Council of Ministers and the UK to this effect, and negotiations are underway with the European Parliament and the Committee of the Regions.

Treaty of Lisbon

17. The Treaty of Lisbon would provide many opportunities for greater direct engagement in the future. For the first time, the EU would extend the principle of subsidiarity to include the Scottish Executive and local government and require Commission consultations to consider and include Scottish aspects. This would provide an opportunity for Scotland to further build and develop direct relationships in the EU and influence European policy, whilst retaining the benefits of being part of the UK.

Operation of EU Structural Funds

18. The UK Government is responsible for Structural Funds policy and negotiating with the EU. Scottish Ministers are responsible for delivery of the Funds within Scotland.

19. The UK Government's Structural Funds Policy Group focuses solely on policy issues relating to the future of the Structural Funds and consists of representatives from the DAs and those UK Departments with an interest in Structural Funds Policy issues. We ensure that all parts of the UK are fully and thoroughly consulted on all issues before a UK view is communicated. UKRep assists in lobbying in Europe and has helped secure significant investment in Scotland. For example, the UK was able to use its influence to negotiate a special deal at the Berlin Council in 1999 for the Highlands and Islands and this helped GDP per capita rise to over 75% of the EU average in just a couple of years. Following the Treaty of Nice, Structural Funds are subject to Qualified Majority Voting, reducing the ability for Member States to secure special deals but enabling those Member States with substantial voting weight to influence the decision; this keeps Scotland, as part of the UK, in a significantly strong position.
20. Within a negotiated EU framework the UK Government is responsible for distributing the UK allocation of Structural Funds to all parts of the UK. From 2000–06, Structural Funds spending provided over £1.1 billion of support for Scotland. The European Committee of the Scottish Parliament, undertook a substantial inquiry into the allocation process and found that the allocation process was “relatively transparent and objective” and that “Scotland is receiving an appropriate share of the Structural Funds allocated to the UK by the EU.”

21. We have included DA officials in the UK Government’s Structural Funds Implementation Group, which supports the co-ordination and implementation of UK programmes and provides a forum for the exchange of experience and best practice. In devolved areas, responsibility for managing EU programmes in Scotland lies with Scottish Ministers and their agencies. They plan and manage these programmes with the EU Commission, receive receipts from the EU Commission and are able to spend these receipts in full. This spending is additional to spending determined by the Barnett formula and these arrangements ensure that the Scottish Executive is able to fully draw down its allocation of EU receipts from the Commission.

October 2008

Memorandum from the Scottish Fishermen’s Federation

**Summary:**

— EU policy for the conduct and regulation of fisheries is formed and executed via the Common Fisheries Policy (CFP).

— For Scotland commercial catching of wild fish is a devolved matter, appropriately so, given the Scottish dominance within the UK industry.

— It is self evidently important that the best interests of the Scottish fishing industry are included in the UK representation on the matter in the EU.

— The essence of the 2002 revision of the CFP was to move from centralised control (“one size fits all”) to more regional solutions. The Regional Advisory Councils (RACs) of stakeholders were formed.

— The presence of Scottish representation in Brussels plays an important part in exercising influence on behalf of the Scottish portion of the UK’s case in decision making affecting commercial fishing. This will assume a much increased importance with the advent of co-decision on fisheries matters; this will come with the final ratification of the Lisbon Treaty or its successor.

1. The management of European fisheries presents a comprehensively difficult problem of management, regulation and compliance. This is entirely predictable, given the requirement to agree with all entitled member states the division of access to a finite, mobile resource. At stake is the sustainability of the resource itself, which could fall victim to inadequate scientific knowledge, injudicious fishing, external factors such as climate change or any combination of these and other factors. The present instrument of management is the CFP and it should be noted that if it did not exist, it would be necessary to invent a framework with much the same ingredients. This is not to defend the CFP, but to highlight the superficial argument sometimes advanced that it should be scrapped. Root and branch reform is the actual requirement.

2. The Scottish fishing industry takes a place in the life of Scotland and of the UK beyond that suggested by its turnover as a percentage of national wealth for two main reasons. Firstly, for those areas in which it is based it is of vital importance to the local communities. Secondly it has fundamental importance as a primary food-producing industry, using as its raw material a natural resource which can be made entirely sustainable if accessed and regulated correctly. The Scottish industry recognises most clearly its own duties to behave responsibly and to innovate and lead in the pursuit of sustainability.

3. For this reason, Scotland’s voice in influencing the management and regulation of fishing must be heard in Edinburgh, Whitehall and Brussels. Arrangements for communication with Brussels do exist but are largely ad hoc. Noting the presence of the Scottish Government representation in Brussels, the missing structure is that which will formalise the dialogue between the Scottish fishing industry and the Scottish government representation. This will become much more important with the advent of co-decision in EU fisheries matters at some time in the future.

October 2008
Memorandum from the Law Society of Scotland

INTRODUCTION

1. The Law Society of Scotland (“the Society”) welcomes the opportunity to put forward evidence to the House of Commons Scottish Affairs Committee (“the Committee”) as part of its inquiry into Scotland and the European Union.

SUMMARY

2. The Society’s evidence will focus on representation of Scotland’s interests in EU policy making and the interface between individual European Union and Scottish institutions. The submission does not deal specifically with the regional dimension of the EU or the operation of EU structural funds.

3. The main points of the Society’s submission are:

— the important overlap of EU issues and competences devolved under the Scotland Act 1998 (“the 1998 Act”);
— the importance of transparency in the formulation of a UK policy line and in the implementation of EU legislation in areas of devolved competence; and
— the comparatively less transparent processes, from a Scottish point of view, underlying the formulation of policy in reserved areas.

GENERAL COMMENTS

4. The position of Scotland and Scottish institutions with regard to the EU post-devolution is one of current and constant interest because the complex layers of constitutional arrangements and, along with Wales and Northern Ireland, its relative novelty in the UK constitutional set up. The intra-UK framework for this relationship was set out in 1999 but has continued to develop since then and is an issue which has recently been much debated both in the context of the UK’s engagement with the EU and through the prism of a more general consideration of the devolution settlement for Scotland. For example, both at the UK Parliament and in the Scottish Parliament recent inquiries have either examined how the Scottish government and Scottish Parliament deal with European issues1 or have considered this question as part of a broader remit, for example, an examination of the effects of the Lisbon Treaty.2

So far in the life of the EU, there has been no formalised role for national parliaments in the European decision-making process.

It has been left to each individual EU country to decide how far to involve its national parliament in European law-making, and very different practices have arisen.

Under the Treaty, however, the involvement of national parliaments in the EU legislative process is increased and formalised.

For the first time, the adoption of EU legislation will be subject to prior scrutiny by national parliaments, which will be given the opportunity to challenge proposed legislation if it does not conform to the principle of subsidiarity (ie legislation should be adopted at the appropriate level).

If one-third of national parliaments object to a proposal, it is sent back to the Commission for review (a “yellow card”).

The Treaty also introduces what has been dubbed an “orange card”: if a majority of national parliaments oppose a Commission proposal, and they have the backing of the European Parliament or the Council, then the proposal is abandoned.

5. In its 2007 inquiry Devolution: a decade on, the House of Commons Justice Committee also examined the nature of the devolution settlement as it relates to EU matters, and the European Select Committee will soon publish its own report Subsidiarity, National Parliaments and the Lisbon Treaty. In addition, the constitutional arrangements for Scotland’s relationship with Europe is also likely to be considered in the context of the inquiries of the Commission on Scottish devolution (also known as the Calman Commission) and the Scottish government’s National Conversation on Scotland’s constitutional future which was launched in 2007.

6. It is probably unsurprising that this issue should emerge so frequently in such diverse inquiries. The significant overlap of devolved and EU competences in Scotland—and the political significance of some of these issues—mean that dealing with the EU is a particularly important question for the Scottish government and the Scottish Parliament. The areas affected include devolved, or partially-devolved, competences such as fisheries policy, agriculture, the environment and transport. In addition to these areas of more traditional EU competence has been added, since the Maastricht Treaty and the 1999 Tampere Council, the area of justice and home affairs which has become increasingly significant and is, of course, one of the key areas of competence devolved under the Scotland Act and which has formed a substantial part

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of the Scottish Parliament’s policy and legislative deliberations since 1999. The perceived need for cross-border action on all criminal matters, and particularly terrorism, and the current consideration of the EU's justice priorities and legislative programme for the five years from 2010 will enhance this significance, whether with or without the integration of justice issues into the mainstream of EU law envisaged in the EU Reform Treaty. It seems highly probable therefore that the EU’s work in the field of justice and home affairs will continue to expand and deepen.

7. The Society therefore considers that it is timely that the Scottish Affairs Committee consider the issue of Scotland and the European Union in the context of its other work and evidence.

Legislative context

8. The legislative context within which EU matters are dealt with is worth noting. Section 53 of the 1998 Act confers on Scottish Ministers, within the competences conferred by the 1998 Act, the functions carried out by Ministers of the Crown. However, this general statement is moderated by section 57(1) in relation to Community obligations which states that:

“Despite the transfer to the Scottish Ministers by virtue of section 53 of functions in relation to observing and implementing obligations under Community law, any function of a Minister of the Crown in relation to any matter shall continue to be exercisable by him as regards Scotland for the purposes specified in section 2(2) of the European Communities Act 1972.”

9. This provision thus specifically allows for the possibility of EU obligations within the competence of Scottish ministers to be dealt with at a UK level.

Specific Comments

Reserved/devolved issues

10. As noted above, Scotland’s relationship with the EU has been recently considered both in Westminster and in the Scottish Parliament, and is currently being considered as part of broader deliberations on the relationship of Scotland with the rest of the UK. It is therefore clear that, although under the Scotland Act 1998 many areas of legislative and policy responsibility which a...'ect Scotland are reserved to the UK Parliament, it is not possible to divorce consideration of Scotland and EU issues from how the devolution settlement is organised, and how EU issues are dealt with in Scotland.

11. In addition, given the position of the UK as Member State within the EU, the two issues of how reserved and devolved issues are dealt with in this context are linked as, in both cases, internal UK processes taking into account Scottish interests function to produce a UK position on issues being negotiated at an EU level. There are, however, important legal, institutional and conventional differences between the way in which devolved and reserved issues are dealt with in this context which makes it worthwhile considering the two areas separately.

EU issues falling within the devolved competences set out in the 1998 Act

Formal mechanisms

12. In the inter-governmental phase of EU legislative deliberations a UK position has to be arrived at and adopted by means of internal negotiations within the UK. For devolved issues, this UK “line” will have to take account of the views of devolved administrations as well as Whitehall departments and therefore formal mechanisms for arriving at a UK position were established as part of the devolution settlement. These mechanisms include the Concordat on Co-ordination of European Union Policy Issues and a Joint Ministerial Committee (JMC) to deal with European issues. These allow for the Scottish government to put forward its views and represent Scottish interests in formal setting with a clearly established framework.

13. Although the JMC (Europe), unlike similar joint ministerial committees dealing with other issues, has met regularly during the period since devolution it is unclear how successful these mechanisms have been because this is not an entirely transparent process. However, it does have the advantage of providing a forum where these issues can be brought forward and debated and requires formal cognisance of Scottish representations.

14. The issue still remains, however, as to what should happen when there is direct conflict between a Scottish position and that being advocated by a UK department. There is at least the potential for this to happen in areas, such as the question of whether to opt in to a measure under Title IV (EC Treaty) on judicial co-operation in civil matters or immigration or asylum measures.

15. If the Lisbon Treaty enters into force this potential area of conflict will expand to include decisions on whether to opt in or out of proposals in the field of criminal law and procedure, a highly-politicised area where Scots substantive and procedural law and Scottish institutions, including the courts, the prosecution and the legal profession, are distinct from other parts of the UK. How divergences of opinion will be dealt with in practice is a difficult and delicate issue which will bear thorough consideration and the question of the transparency of such debates is also an issue.
16. The Lisbon Treaty would also add to areas of potential conflict with regard to the enhanced role of national parliaments in scrutinising EU policy proposals. The issue of a lack of consensus between the UK Parliament and the Scottish Parliament may also need to be considered.

17. In addition to formal meetings of the JMC, Whitehall departments leading on EU negotiations in a particular area also continue to carry out the same work of consulting stakeholders more generally—including those within Scotland and other devolved areas—and meeting and discussing with Scottish civil servants as part of everyday work. The Scottish government also consults with stakeholders as a way of forming its own response to EU proposals and informing the view which it feeds into intra-UK negotiations. The Scottish Parliament may also launch inquiries into particular issues with a view to influencing debate.

Scottish Parliament and Scottish government

18. The presentation of the Scottish position within a UK “line” has proven, however, to be only one way in which Scottish views are put forward in the pre-legislative stage. A number of other procedures have, over the years, supplemented the original devolution mechanisms and operate now alongside them to put forward Scottish views.

Scottish government Brussels Office

19. Following devolution, the Scottish Executive quickly established a Brussels office to monitor developments and support the work being carried out in this area. The UK’s official representative body in Brussels, the UK Permanent Representation (UKRep) continues to represent the UK position in Brussels and in particular in Council meetings. The Scottish government office has significantly fewer staff resources in Brussels than UKRep and must be reliant to a great extent on information that flows from that body. However, a presence in Brussels enhances the opportunities for understanding the issues at stake and the context in which they arise, and thus for more meaningful contribution to debate both intra- and extra-UK.

Scottish Parliament Brussels Office

20. The House of Lords and House of Commons are both represented in Brussels by offices in Brussels. Following long-standing calls for specific Scottish Parliament representation in Brussels, the decision to create a Scottish Parliament Brussels Office was taken in 2004. The Office currently consists of one member of staff whose principal function is the monitoring of EU developments with a view to feeding information back to the Parliament, and in particular the Europe and External Relations Committee.

Scottish government and Scottish Parliament engagement with the European Commission

21. The Scottish government can and does submit its own responses to Commission consultations in areas of interest, as does the Scottish Parliament, in both cases generally after canvassing views of interested parties through a formal inquiry or consultation. In the Parliament’s case, such inquiries have included the taking of evidence from Commission officials and MEPs. The Scottish government also carries out its own negotiations with the Commission on certain issues. These contacts enhance the possibility of influencing Commission proposals as early in the procedure as possible and before it may be necessary to form an official UK position.

Relationship with Council

22. It should also be noted that Scottish ministers have also on occasion led the UK negotiating team in Council meetings because of a particularly significant Scottish interest or expertise in this area. This is particularly the case for fisheries policy. However on these occasions it is the UK rather than specifically Scottish view which is put forward. It is not however clear how the allocation of seats at any given Council is determined and whether the Scottish Government is regularly represented on other issues, for example, justice.

Relationship between Scottish Parliament and UK Parliament committees

23. In areas of devolved competence, both Scottish Parliament Committees and the relevant UK Parliament committees will be considering the same sorts of issues at the same time. The scope for sharing of information between the two parliamentary structures seems unclear and where, for example, the European Scrutiny Committee may identify issues of significance in its own scrutiny of a matter the method by which such issues could be raised with the relevant Scottish Parliament committee are not, so far as the Society is aware, formalised. The Society can see the benefit of closer links between the two Parliaments in this area.

Implementation of EU legislation within the devolved competences

24. Under the European Communities Act 1972, EU legislation is generally transposed by secondary rather than primary legislation, in the Scottish Parliament as in the UK Parliament. EU instruments falling within devolved competences can be implemented either by the Scottish Parliament or by Westminster as part of its wider implementation within the UK. The procedure for dealing with the UK implementation of a Scottish competence under the 1972 Act has however some important difference to the conventional procedures required where primary legislation is being used.
25. In the case of Bills dealt with in the UK Parliament with provisions applying to Scotland which are within the Scottish Parliament’s competence, by convention the Scottish Parliament gives its consent to such action by way of a “Legislative consent motion”. The procedure for such motions is set down in Scottish Parliament Standing Orders. Legislation which may require such consideration is also generally identified by the UK government at the point when it is proposed in the Queen’s Speech. This whole process enhances the transparency and appropriateness of decisions to legislate in this way by giving the opportunity for scrutiny by the relevant parliamentary committees, including evidence from Scottish ministers and other bodies where considered necessary.

26. However, as is noted in the report of the Scottish Parliament’s European and External Relations Committee on its 2008 inquiry into the transposition of EU Directives (from paragraph 65):

“There is currently no obligation on the Scottish Government formally to inform the Scottish Parliament of any new EU obligation which concerns devolved matters and which it will be the responsibility of the devolved administrations to implement. Nor is it required formally to consult the Scottish Parliament if it elects to use section 57(1) of the Scotland Act 1998 and allow the UK Government to implement a directive on its behalf. However, the Committee is notified retrospectively of the use of section 57(1) through the Scottish Government’s six monthly update on transposition. Currently, therefore, the scrutiny role of the parliament is limited to the stage at which the Scottish Government lays legislation before the parliament and the scope for parliamentary scrutiny at that point will largely depend on whether it takes the form of primary or secondary legislation. As such, a key decision for the Scottish Government, that is, whether to legislate itself or whether to pass back responsibility for implementation to the UK Government, is currently taken in the absence of any parliamentary scrutiny.”

27. Amongst its general recommendations on greater transparency in the implementation process, the European and External Relations Committee report therefore also put forward a number of recommendations dealing with consultation with stakeholders and engagement with the parliament during the transposition process, the provision of information on timescale and summary of any specific Scottish interests to be addressed during the transposition process and an explanation of the reasons for using section 57(1).

28. If adopted, such recommendations would, in the Society’s view, significantly contribute to the transparency of decision-making regarding the use of section 57(1) and allow for the appropriate level of parliamentary and wider scrutiny of such decisions.

EU issues reserved to the UK Parliament under the Scotland Act 1998

Formal mechanisms

29. Where an issue which is the subject of EU deliberations is devolved the interest of the Scottish government and Parliament in considering its effects is clear both at pre- and post-legislative stage. The position is different, however, for issues which are reserved, but where there may be a specific Scottish interest or issue. In these areas, which are extensive, policy responsibility lies with the relevant Whitehall Department with it falling to the Secretary of State for Scotland to ensure that Scottish interests are properly represented and considered.

30. In comparison with devolved issues there is clearly an even greater potential for lack of transparency in the process by which Scottish views are put forward, because of the less extensive opportunities for scrutiny of government action, with a particular Scottish focus. In addition, there is necessarily greater emphasis on Whitehall-based civil servants appreciating specifics of Scottish institutional arrangements or its legal system, and identifying and engaging with the appropriate external bodies in order to formulate a view. This depends on a high level awareness of the Scottish situation and there is still the potential for geographical and political dislocation of Scottish agencies, organisations and regulatory bodies from London-based policy-making without the benefit of Scottish interests being put forward in the context of more regularised forums of communication, such as the JMC.

The UK Parliament

31. The UK Parliament and its committees, and in particular the European Scrutiny Committee, play, of course, an important role in scrutinising EU policy proposals and legislation and identifying issues of significance. Its consideration of specifically Scottish issues, however, has to be seen in the context of its extremely heavy workload and the other concerns of the committee.

October 2008
Memorandum from Tam Dalyell

1. Whether there are effective channels of communication between the UK Government and Scottish Executive to ensure that each is informed and can comment on decisions and policy of both administrations that affects the other

   In a situation, where it is the perceived political advantage of those in charge at Westminster, and those in charge (not only the SNP) at Holyrood, to disagree, the one with the other, there can be no effective channel of communication.

2. In particular, whether there are satisfactory arrangements in place between the UK Government and Scottish Executive to assess effectively the impact of UK foreign policy on Scottish interests and vice versa

   Unless Scotland becomes indistinguishable from a separate state, foreign policy should be clearly a matter for Westminster. Starting with Jack McConnell’s Malawi endeavours, the thin end of the wedge, there has, perhaps inevitably, been abuse of the “Devolution Settlement” for purposes of political posturing.

3. How these arrangements functioned during the negotiations with Libya including the Prisoner Transfer Agreement (PTA) and the consideration by the Scottish Executive of the PTA application from Libya

   With considerable acrimony. In my view the unspoken truth is that Alex Salmond knows perfectly well that Mr Megrahi is innocent, and out of human decency, and concern about having an innocent man die in a Scottish prison, decided with Mr MacAskill, to get him to Tripoli. I understand that neither the First Minister nor the Justice Secretary could admit to their inner beliefs, on account of the shame it would bring on the Scotland Office and the Scottish Justice System.

4. This inquiry will also include examination of the co-ordination between the UK Government and Scottish Executive in representing Scotland’s interests to the EU as well as Scotland’s interface with individual EU institutions. This was previously a separate inquiry which will now be included into the new inquiry

   If either or, more likely, both political leaderships do not wish to be co-ordinated, inevitably they will enter into a blame game.

5. How could the Joint Ministerial Committee be better used to improved the working relationships between the UK Government and Scottish Executive; and

   I am totally cynical. Westminster and Holyrood, if there is a scintilla of difference of opinion, will operate for their own political ends.

6. How will the revised Memorandum of Understanding and concordats between the UK Government and Scottish Executive improve matters.

   On a civil service network it may be possible to be constructive, but the notion that there will be understanding, let alone concordats, is cloud-cuckoo land.

   The whole episode relating to Pan Am 103 serves yet again how flawed is the Devolution Legislation in Britain.

   One cannot have a sub-ordinate Parliament in part, though only part, of a unitary state. It will come apart at the seams—and the case of Mr Megrahi is a manifestation of this situation.

   29 October 2009

Memorandum from the Scotland Office

SCOTLAND AND THE UK: CO-OPERATION AND COMMUNICATION BETWEEN GOVERNMENTS

1. The UK Government welcomes the opportunity to contribute to the Committee’s inquiry into co-operation and communication between Governments.

SUMMARY OF MEMORANDUM

— Co-operation and communication lies at the heart of UK Government’s engagement with the Devolved Administrations.
— The foreign policy area of international relations is a responsibility of the UK Government and the UK Parliament.
— It is imperative that the UK speaks with one voice on the international stage to preserve the authoritative voice that we have in Europe, the UN and other international organisations.
— When developing the UK’s position in the international arena the UK Government engages with all three Devolved Administrations (DAs) where policy implementation or responsibility falls to any, or all three.
— The UK Government is fully committed to working closely with the DAs on all EU matters that relate to devolved responsibilities. This commitment is set out in the Memorandum of Understanding. Preparations for EU Council meetings via the Joint Ministerial Committee (Europe) network best illustrate this engagement and have a proven record.

— The UK Government engaged appropriately with the Scottish Government during the negotiation and conclusion of the Prisoner Transfer Agreement (PTA) with Libya.

Co-operation and Communication

2. Co-operation and communication is at the heart of the Government’s approach to devolution across all three Devolution Settlements; these principles are enshrined in the Memorandum of Understanding (MoU). Paragraph 4 of the 2001 MoU states that:

All four administrations are committed to the principle of good communication with each other, and especially where one administration’s work may have some bearing upon the responsibilities of another administration. The primary aim is not to constrain the discretion of any administration but to allow administrations to make representations to each other in sufficient time for those representations to be fully considered.

3. At the plenary meeting of the Joint Ministerial Committee (JMC) in June 2008 Ministers commissioned officials to consider and present revisions to the MoU; these have been broadly welcomed to date and the Government looks forward to agreeing the updated MoU with the DAs as soon as possible.

4. Successful co-operation can be demonstrated in many different ways:

— Agreement between the Scottish Government and UK Government in relation to those parts of UK Bills requiring the consent of the Scottish Parliament in line with the Sewel Convention: over 100 Legislative Consent Motions have been passed since 1999.

— Successful programme of secondary legislation under the Scotland Act 1998 to ensure that legislation taken forward in the Scottish Parliament can be fully implemented; additional powers are granted to Scottish Ministers where appropriate and to devolve further powers to the Scottish Parliament, for example legislative responsibility in relation to railways within Scotland.

— Establishment by the UK Government of quadrilateral meetings between the Secretary of State for Scotland, the First Minister, CBI and STUC to work together to provide the best possible support for Scottish jobs and Scottish businesses during the current economic climate.

— The many contacts in place at official and Ministerial level—on both a formal and informal basis to share information and exchange ideas on a daily basis in the interests of the people of Scotland.

5. Recognition of the importance of good working relationships is at the heart of all our work, whether it has domestic or international focus. The Committee’s specific interest in this inquiry relates to the co-operation in place on international policy matters. This Memorandum sets out the responsibilities of the UK Government for foreign policy; details formal and informal means of co-operation and communication with the Devolved Administration in Scotland. Specific details are also provided in relation to the Prisoner Transfer Agreement between the UK and Libya.

Foreign Policy and the United Kingdom

6. The Scotland Act 1998, like the devolution settlements for Wales and Northern Ireland, reserves international relations to the UK Parliament and Government. The Government’s White Paper Scotland’s Parliament very clearly acknowledged that special arrangements would be needed for the handling of international relations:

“...the guiding principle is that the UK should be able to speak with one voice in the international arena...”

7. The UK is a highly respected force in the world’s leading multilateral organisations. We need therefore non sequitur to speak with a single voice to our international partners, whether in the EU, the UN, the Commonwealth or other bodies. The international challenges facing the UK are greater than ever—including in the fields of the global economy and financial stability, defence, security and counter terrorism, energy and climate change, and human rights and tackling global poverty. A unified response is vital to securing our national interests for all parts of the United Kingdom.

8. However in the development of a consistent UK line on the international stage we work closely with the Devolved Administrations where matters of policy that fall within their devolved remit are at stake. The Memorandum of Understanding also sets out rules governing the involvement of representatives from the Devolved Administrations in joining UK delegations on the international stage: it is the responsibility of the UK Minister to determine who can make up the UK delegation, and this decision will vary from case to case depending on variety of factors including the size of delegation and issue under discussion.
9. British Embassies and High Commissions represent the whole of the UK and offer support to Devolved Administration Ministers on official visits and other activities overseas. FCO officials both at home and overseas also regularly provide advice to the DAs on the international aspects of their devolved responsibilities.

10. While international negotiations and diplomacy are rightly conducted by the FCO on behalf of the UK as a whole, the Devolved Administration in Scotland also has its own presence in some countries (see below) to promote devolved policy interests on the international stage. For example in line with other regional governments from elsewhere in Europe, the Scottish Government now have their own office in Brussels. This helps enable more direct engagement with the EU and other member states with respect to devolved interests. The Scottish Government also has offices based within the British Embassies in Washington and Beijing. These “Scottish Affairs Offices” enable direct interaction in fields such as the development of cultural, educational and trade and investment links and help promote Scottish interests.

PTA with Libya

11. The Committee has specifically sought evidence on communications between the UK Government and the Scottish Government in relation to the Prisoner Transfer Agreement with Libya.

12. The then Prime Minister signed a Memorandum of Understanding with the Libyan Government on 31 May 2007. This Memorandum referred to the negotiation of agreements between Libya and the UK in four areas: prisoner transfer, mutual legal assistance in the field of criminal matters, mutual legal assistance in the field of civil and commercial matters and extradition. The Memorandum represented the progress in our relations with Libya during the last decade. The Foreign Secretary’s statement to the House of Commons on 12 October 2009 (Volume 497, Number 121) highlighted the change that Libya has undergone: from pariah state to a state that has abandoned its support for international terrorism and stopped its pursuit of weapons of mass destruction.

13. Whilst the signature of the Memorandum was rightly for UK Government, respecting the reservation of foreign affairs, the operation of the Prisoner Transfer Agreement in relation to any prisoner held within a Scottish Prison was rightly a matter for the Scottish Ministers. The starting point for negotiations on the PTA text with Libya—as with all of the other PTAs—was with the text from the model agreement, based on the Council of Europe Convention. The Memorandum stated its clear view, that the model agreement enabled Scottish Ministers to properly exercise their devolved powers, from the very outset of discussions on the terms of the PTA. There was direct engagement with the Scottish Government on the drafting of the PTA throughout; and as is a matter of public record, the Government sought to include a clause that would exclude Mr Al-Megrahi from the scope of the PTA at the request of the Scottish Ministers.

14. The Libyan Government insisted that the only PTA they would sign was a PTA without any such exclusion. The Government faced a choice: it could sign a PTA without the exclusion but which would enable the Scottish Ministers to exercise their absolute veto over the return of Mr Al-Megrahi; or it could withdraw from the negotiations, thereby preventing an application for prisoner transfer of Mr Al-Megrahi. The UK Government took the view that such a withdrawal would set back our wider national interests that flowed from normalised relations and the Government therefore agreed to the PTA text without an exclusion. Scottish Ministers were informed of this decision in advance, and were also kept informed in advance of signature of the PTA.

15. Letters released by the FCO on 1 September 2009—and reiterated by the Foreign Secretary during his statement in the House of Commons—confirmed that in July 2009 the Scottish Government asked the FCO for advice on the extent to which the 1998 UK-US letter to the United Nations Secretary-General (dated 24 August 1998) on the initiative for the trial of the Lockerbie suspects, and UN Security Council Resolution 1192 (1998), created a commitment in relation to the place of future imprisonment of the Lockerbie accused. It was a constitutionally appropriate approach for the Scottish Government to make this request as the Concordat on International Relations provides for the FCO to advise on developments regarding international relations to the devolved administrations on issues affecting devolved responsibilities.

16. The FCO replied to the Scottish Government in July that it did not consider that either the joint UK-US letter, UN Security Council Resolution 1192 (1998) or the accompanying discussions between the UK Government and the United States Government regarding the implementation of the trial initiative as set out in the joint letter, presented an international law bar to such a transfer under the PTA, where it was consistent with Scots law. Minister Ivan Lewis reiterated this advice in a letter to Scottish Justice Secretary Kenny MacAskill in August 2009.

17. The decision taken by the Scottish Justice Secretary on 20 August this year regarding the applications for compassionate release of Al-Megrahi and his transfer under the PTA were, as Scottish Ministers have publicly stated, decisions for them alone. The Foreign Secretary’s statement made clear that it would have been wrong for the UK Government to intervene in this decision making process.
18. The Scottish Affairs Select Committee announced its inquiry titled *Scotland and the European Union* on 21 July 2008. Consideration of European matters has been subsumed within this wider inquiry on cooperation and communication. The Government previously submitted a memorandum to the Committee in October 2008, providing a detailed assessment on Scotland and the European Union. We draw this memorandum in full to the committee’s attention.

19. Scotland’s membership of two Unions: the United Kingdom and the European Union, ensures that Scotland is able to speak with a stronger voice and with greater impact. As on the wider international stage, the United Kingdom is a significant player within the EU and all parts of the UK benefit from our considerable influence, ability to opt in or out on key issues and our voting weight.

20. As our earlier Memorandum to the Committee stated, the UK, as the Member State, is responsible for relations with the EU for all parts of the UK; this is responsibility we respect and take seriously. Our focus is on working as a UK team for the whole of the UK in negotiations and Council meetings. At the outset of policy development we work closely with all three Devolved Administrations, taking account of their views when developing the UK line. We see our successful negotiations within Europe over 35 years as testament to the strength of this commitment and our efforts to deliver a policy line that accurately represents the views of the UK as a whole.

21. There are many examples of how Scotland has benefitted in Europe from its membership of the UK. Recent successes include:

- The successful negotiation by the UK Government (in close co-operation with the Scottish Government) for the use of Scottish Gaelic at an EU level for correspondence, speeches by UK Ministers to the Council of Ministers and the deposit of legislation. This is a major step forward in the representation of Scottish Gaelic speakers in Europe.

- The successful negotiation by the UK Government of an opt-out from European policies on Justice and Home Affairs; this means that, by virtue of being part of the United Kingdom, Scotland benefits from valuable opt-outs in devolved areas.

**The Role of the Joint Ministerial Committee**

22. The MoU set out the Joint Ministerial Committee framework. The JMC machinery provides a formal consultation role with Devolved Ministers on a wide range of matters where there is an interaction between reserved and devolved policy matters. The Joint Ministerial Committee (Europe) (JMC(E)) specifically addresses European matters and has operated successfully from the outset of devolution. JMC(E) meets four times a year, prior to each European Council. This has enabled the Devolved Administrations to be informed and help to inform, the UK line for these key European negotiations. Official level meetings in advance of the Ministerial meetings ensure that appropriate exchanges take place and that contacts are in place for regular exchanges throughout the year.

23. We are currently reviewing the operation of the JMC framework. Any alteration to the existing operation of JMC will be by agreement of the UK Government and the three Devolved Administrations; however the UK Government has already signalled its support for additional JMC(E) and JMC(E) (Officials) meetings throughout the calendar year, to allow for detailed discussion of strategy and policy issues outside of the immediate preparations for Council meetings.

November 2009

**Memorandum from the Royal Society of Edinburgh**

**Summary**

- It is essential for the success of devolution that there is a robust system, developed in partnership between the UK Government and devolved administrations, to manage and resolve intergovernmental issues. More effective structures are needed to resolve potential issues of conflict and to encourage joint working on areas of shared responsibilities.

- The success of devolution and the success of the UK as a whole depend upon upholding the principles of coordination and communication which underlie the devolution settlement. There must be interaction between the UK and Scottish Governments where reserved and devolved responsibilities are likely to impact on one another.

- The JMCs have met infrequently and have in the main had limited impact. Within a stronger JMC system with clearer guidelines, more regular meetings, enhanced transparency and publicity, there will be incentives to agree. It is important that these should evolve into serious political forums.
— It is important that consideration is given to the relationships and interactions between civil servants who are responsible to the different governments. Opportunities should be taken to facilitate personal relationships, training and frequent contact between civil servants from UK departments and Scottish directorates.

— Many of the issues over which the European Union has responsibility impact upon policy areas which are devolved to the Scottish Parliament. Consequently the structures between the devolved government, Westminster and Brussels should ensure that the devolved accountability to Holyrood is adequately respected in those policy areas.

— The Scottish Parliament’s External and European Relations Committee (EERC) is severely constrained in its ability to scrutinise dialogue between the Scottish and UK Governments on EU issues. The Scottish Affairs Committee could consider whether the confidentiality provision of the Concordat governing the relationship should be relaxed to enable the EERC to take evidence from the Scottish Ministers in private on EU policy issues.

— There is an important issue of accountability in Scotland concerning the transposition of EU Directives. In areas that lie within the legislative competence of the Scottish Parliament, it may be more suitable, in order to achieve the best results, for Scotland to adopt a form or method different from that adopted by the UK. We would therefore welcome clarification of the circumstances in which a Scottish instrument should be used or when Directives should be implemented in the UK by Westminster legislation.

BACKGROUND

1. The Royal Society of Edinburgh (RSE), Scotland’s National Academy, welcomes the opportunity to respond to a number of the issues raised by the Scottish Affairs Committee’s inquiry into Scotland and the UK: cooperation and communication between governments. The RSE is well placed to respond because of the multi-disciplinary breadth of its Fellowship which permits us to draw upon experts in politics, public administration, constitutional law, European and external relations, science and business and industry, in preparing this paper.

2. The issues raised by the Scottish Affairs Committee are contained within a broad political context. We strongly encourage the Committee to refer to the final report of the Commission on Scottish Devolution which dedicated much time to considering the arrangements for inter-governmental and inter-parliamentary working. In this response to the Committee, we have drawn upon our earlier written and oral evidence to the Commission. We have concentrated on broad, high level issues of process where inter-governmental interactions and relationships within the frame of the devolution settlement could be improved, and which we believe help promote good governance throughout the UK. We have not commented on the case of Mr Abdelbaset al-Megrahi as we do not have the full facts and precise details. The RSE would be pleased to discuss further with the Committee any of the issues raised in this paper.

3. It is essential for the success of devolution and good governance across the UK for there to be a robust system of coordination between the UK Government and devolved administrations in managing and resolving inter-governmental issues. In the first two terms of the Scottish Parliament this issue did not rise to prominence as the Administrations at Westminster and Holyrood largely came from the same political party. The change of governing party in Scotland after the 2007 Scottish Parliamentary elections could be considered as a test of the robustness of inter-governmental arrangements. It has demonstrated that more effective structures are needed to resolve potential issues of conflict and to encourage joint working on areas of shared responsibility.

INTER-GOVERNMENTAL RELATIONS

4. Any devolved or federal system of government needs to have mechanisms regulating the relationships between the two levels. These have two important purposes: policy co-ordination and conflict resolution. The post-devolution system is relatively undeveloped in this regard. In practice much policy coordination and some resolution of conflicts take place bilaterally between UK Government departments and the relevant Scottish Ministers. The main multilateral formal mechanisms for co-ordination and conflict resolution are the Memorandum of Understanding, the Concorde signed in various fields and the Joint Ministerial Committees (JMCs). These were little used when the two levels of government were dominated by the same political party, except for the JMC on Europe in preparing for meetings of the EU Council of Ministers. Typically, inter-governmental relations were ad hoc and informal in nature and on an issue-by-issue basis involving different groups of officials, and so they have remained, with little opportunity for public scrutiny.

5. There are a number of areas of policy where shared interests or overlapping competences make it important for the Scottish and UK Governments to work together. We offer five examples:

— There is a strong case for looking at the connection between reserved and devolved powers in relation to initiatives in social inclusion and climate change.

— The shared infrastructure of the UK makes it essential that there is co-operation between the devolved and UK administrations. Transport, broadband provision, water and waste require co-ordination to sustain the efficiency and resilience of the national network.

— Energy policy requires co-ordination to ensure the efficient operation of the generation and transmission system for electricity so that it is able to maximise energy security and minimise emissions and price.

— Both the UK and Scottish Governments are developing a mechanism for joint policy making within the context of the respective UK and Scottish marine bills.

— The university sector is another area where co-operation is important given that there is a mix of devolved and reserved powers, to ensure that flow of students and academics in both directions and the collaborative research strengths of the sector across the UK are maintained.

6. However, we caution that if too many matters are taken into the inter-governmental policy machinery, Scotland will lose its policy capacity and be overwhelmed by the larger weight of the Whitehall capacity.

7. We are not in a position to comment on the detail of the Prisoner Transfer Agreement (PTA). The Agreement does, however, serve to demonstrate how the Scottish Government’s competences for criminal justice can be directly impacted upon by UK foreign policy and vice versa. It is therefore important that such issues are addressed via an agreed inter-governmental convention within the UK.

8. During its Inquiry into the Future of Scotland’s Hills and Islands, the RSE Committee was very concerned that, during its presidency of the EU Council of Ministers, the UK Government proposed ending direct support for agriculture under Pillar one after 2013 without having consulted the Scottish Government or the other devolved administrations and without any consideration of the implications for agriculture and the environment in the various parts of the UK. Given the distinctive nature of Scottish agriculture this was an unacceptable failure in policy formulation that must not be repeated.

9. The success of devolution and the success of the UK as a whole depend upon the principles of coordination and communication which underlie the devolution settlement. If these principles are not upheld then devolution itself will be undermined. The above examples serve to emphasise that there must be interaction between the UK and Scottish Governments where reserved and devolved responsibilities are likely to impact on one another.

10. In order to improve the way in which the Governments and Parliaments interact in shared interests or overlapping competencies it is important to re-examine the relationships and structures of devolution. The JMCs envisaged in the original settlement have met infrequently and have in the main had limited impact. Since they represent the governments concerned, they are essentially a political mechanism. Serious disputes about competences may then need to be resolved by the courts. Within a stronger JMC system with clearer guidelines, more regular meetings, enhanced transparency and publicity, there will be incentives to agree. We note that the JMC (Domestic) has been established for discussion of non-European issues in which the devolved administrations have an interest. We hope that these will evolve into serious political forums.

Civil service

11. The post-devolution approach to policy coordination has relied heavily on civil service collegiality with issues between Westminster and Holyrood being referred to Ministers only when necessary. It is important, therefore, that consideration is given to the relationships and interactions between civil servants who are responsible to the different governments. Opportunities should be taken to facilitate personal relationships and frequent contact between civil servants from UK departments and Scottish directorates, and to ensure that the training of civil servants takes the reality of devolution into account. This would go some way to ensuring that information is shared and would enhance the potential for “joined-up government”. We agree with the Commission on Scottish Devolution (recommendation 4.22) that some UK Government departments would benefit from programmes that raise their awareness of devolution and encourage them to consider the effects of their decisions in a devolved setting.

Parliamentary relations

12. Developing relationships between the Parliaments would also help to improve understanding of the procedures of each institution and contribute to the exchange of ideas. In certain areas of policy it may also be desirable to establish joint committees, for example where there is a degree of shared or overlapping competence.

5 http://www.royalsoced.org.uk/enquiries/hill_and_island_areas/index.htm
THE RELATIONS BETWEEN THE UK AND SCOTLAND’S INTERESTS IN INTERNATIONAL AFFAIRS

13. International affairs are within the remit of Westminster, with perhaps the most important of these being the relationship with the European Union. Many of the issues over which the European Union has responsibility impact upon policy areas which are devolved to the Scottish Parliament. Consequently the structures between the devolved government, Westminster and Brussels should ensure that the devolved accountability to Holyrood is adequately respected in those policy areas.

14. The UK is the member state with responsibility for engaging with the structures of the EU. As such, Scottish interests have to be promoted by Westminster. To be so promoted, they have to be compatible with the interests of the whole of the UK. This can confer a strong political advantage provided that the UK sympathetically represents Scottish interests in the positions it takes with the Council of Ministers and in discussions with the Commission. It is incumbent on Scotland to develop the necessary relationship to ensure that its needs are reflected appropriately. Achieving this requires investment, since it involves the building of a very close, constructive and professional relationship with the UK Government departments involved, and with the office of the UK Government Permanent Representative (UKREP); sophisticated lobbying at both technical and political levels; an intimate understanding of the procedures and people involved in the European Commission; and sound intelligence on other member states’ positions.

15. From a UK perspective however, difficulties can arise if Scottish interests are not congruent with those of the UK as a whole. As there are a number of areas of devolved policy where Scotland has a distinctive case to make, this is an obvious constraint. Agriculture and fisheries are prime examples where it is important for the Scottish Government to have a significant role in shaping and representing the UK position.

16. As many of the powers with an EU dimension have been devolved, the UK Government accepted from the outset that the devolved administrations should have an input to UK policy on those EU issues that impacted on devolved competences. Under the terms of the concordats subsequently negotiated, the UK Government agreed to allow the devolved administrations access to those UK Government policy processes. However, this access is bound by obligations of confidentiality, effectively debaring both the UK and Scottish Governments from reporting on discussions. As UK Government Ministers are not accountable to the Scottish Parliament this means that the Scottish Parliament’s External and European Relations Committee (EERC) is severely constrained in its ability to scrutinise dialogue between the Scottish and UK Governments on EU issues. In the interests of open and accountable government the Scottish Affairs Committee could consider whether the confidentiality provision should be relaxed to enable the EERC to take evidence from the Scottish Ministers in private on EU policy issues. Provided that evidence is treated in confidence a measure of accountability would be achieved. We note that such an arrangement appears to work well in Denmark.

Parliamentary scrutiny

17. There is an important issue of accountability in Scotland concerning the transposition of EU Directives. Whereas Directives prescribe “the result to be achieved”, it is left to national authorities to determine “the choice of form and methods” (Article 249 EC Treaty). In areas that lie within the legislative competence of the Scottish Parliament, it may be more suitable, in order to achieve the best results, for Scotland to adopt a form or method different from that adopted by the UK. We would therefore welcome clarification of the circumstances in which a Scottish instrument should be used or when Directives should be implemented in the UK by Westminster legislation.

18. This raises a wider point of parliamentary scrutiny of EU legislation. We anticipate there being some scope for enhanced influence to the extent that the Scottish Parliament moves pro-actively to take advantage of the opportunities to make common cause with the UK Parliament under the new subsidiarity provisions in the Lisbon Treaty. It has to be noted, however, that the “scrutiny reserve” of the UK Parliament is limited and it can be overridden by the UK Government. There is a case for strengthening the scrutiny functions of the Scottish Parliament with respect to inter-governmental discussions on EU matters.

Joint Ministerial Committee on Europe

19. Although the JMC on Europe has been active, it is the UK Government that has the last word on policy. In order to enhance transparency and accountability, without putting the UK’s European commitments at risk, the Committee should consider whether Scotland’s position in relation to policy coordination could be strengthened by more formal proceedings of the JMC on Europe, with the Scottish Government free to note its dissent, which would give Whitehall a stronger incentive to reach agreement.

ADDITIONAL INFORMATION AND REFERENCES

The Society would like to draw attention to the following Royal Society of Edinburgh responses which are relevant to this subject:

— The Royal Society of Edinburgh’s Inquiry into the Future of Scotland’s Hills and Islands (September 2008);
— The Royal Society of Edinburgh’s submission to the Commission on Scottish Devolution, Review of the Experience of Devolution in Scotland (September 2008);
— The Royal Society of Edinburgh’s submission to the Commission on Scottish Devolution, The Future of Devolution within the Union (February 2009); and
— The Royal Society of Edinburgh’s submission to the European and External Relations Committee of the Scottish Parliament, Future Reform of the EU Budget (September 2009).

November 2009

Memorandum from the Scottish Executive

SUMMARY

1. Communication between the Scottish Government and United Kingdom Government is underpinned by the Memorandum of Understanding and Supplementary Agreements which were established in 1999 as a set of principles which would underlie relations following devolution, although not be legally binding.

2. Ten years on and circumstances have changed; and while most of the original agreements continue to work effectively, the time is right for a review.

3. Although Scotland’s relations with the UK Government and governments of other countries have developed since devolution, it is not apparent that the UK Government’s understanding of these developments has grown apace.

4. The UK Government’s frequent failure to take onboard the implications of its actions on a devolved Scotland has manifest in a number of recent events. The failure to consult with the Scottish Government over the Prisoner Transfer Agreement with Libya is the most high profile, but not the only instance. The UK Government has refused to include a Scottish Minister in the UK delegation to the UN Framework Convention on Climate Change in Copenhagen in December 2009 despite the issues under discussion having a clear impact on devolved responsibilities, the Scottish Parliament having passed a world leading Climate Change Act and Ministers from a number of Europe’s regional administrations participating at the Conference as members of their Member State delegation. In the context of EU Council of Ministers meetings, the UK refused to allow a Scottish Minister to attend the Justice Council in September 2009, despite the existence of a separate Scottish legal system. In other Councils, when no UK Minister is present, the UK gives preference to their own senior officials speaking, rather than an elected Minister from a devolved administration.

5. The Committee’s inquiry into cooperation and communication between Scotland and the UK is therefore a timely indication of the importance of these issues. The Scottish Government is keen to contribute to any measures which help clarify inter-government relations.

RESPONSE

6. The Scottish Government response to the specific questions forming the Committee’s terms of reference is below.

Whether there are effective channels of communication between the UK Government and Scottish Executive to ensure that each is informed and can comment on decisions and policy of both administrations that affects the other

7. The Memorandum of Understanding (MoU) and Supplementary Agreements between the United Kingdom Government, Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee set out the principles which ought to underpin co-operation.

8. There is a wide range of formal and informal contacts between the Scottish Government and Departments of the UK Government at both official and Ministerial level, covering all aspects of public policy. The extent to which communications work well or otherwise depends on a number of factors, including the scope for conflict or collaboration on the topic in question, the quality of communications between the parties, and the rapport between the individuals concerned. Relations tend to work best where there is regular contact and parity of esteem.

In particular, whether there are satisfactory arrangements in place between the UK Government and Scottish Executive to assess effectively the impact of UK foreign policy on Scottish interests and vice versa

9. The MoU also sets out the principles which ought to underpin co-operation with respect to international relations. In particular, Annex D1 of the MoU treats the relationship between the UK Government and the Scottish Government on International Relations.
10. In the context of the reservation of international affairs to the United Kingdom by the Scotland Act 1998, these arrangements usually work effectively and depend on relations between Scottish Government officials and their counterparts in relevant Whitehall departments, usually either the Foreign and Commonwealth Office or the Department for International Development. Officials from the Scottish Government’s International Division, along with officials from the other Devolved Administrations, meet regularly with the FCO Stakeholder Relations team to allow for exchanges of information.

11. For the most part, Scotland’s interests overseas are represented and pursued by the UK Government and the British Embassy and Consular network. In addition the Scottish Government directly runs three offices overseas to represent key Scottish interests.

12. The then Scottish Executive established an office in Brussels in 1999 to represent its EU interests. For diplomatic purposes, the staff there form part of the UK’s Permanent Representation to the EU (UKRep). They work from separate offices and although they maintain close and productive working relationships with UKRep, they take their political and policy direction from Edinburgh not London.

13. Two smaller offices were opened in Washington in 2000 and Beijing in 2005. These operate from within the British Embassies there. In addition to these Scottish Government offices, Scottish Development International maintains a network of 21 overseas offices across the world pursuing Scottish Government priorities in relation to international trade and inward investment. While Scottish officials can and do take active roles in WHO, OECD and UNESCO programmes, Scotland does not have direct representation on key decision-making structures within these organisations.

How these arrangements functioned during the negotiations with Libya including the Prisoner Transfer Agreement (PTA) and the consideration by the Scottish Executive of the PTA application from Libya

14. Relations between the UK Government and Scottish Government in relation to Prisoner Transfer Agreements have historically been good. The initiative lies with the Ministry of Justice, but Scottish interests have been informed and involved through the Scottish Prison Service at appropriate points prior to and during the negotiation of PTAs, most of which present no difficulties.

15. These arrangements broke down in relation to the PTA with Libya. On 29 May 2007, the United Kingdom Government signed a memorandum of understanding with Libya to begin negotiations on a variety of legal matters, including prisoner transfer. At no stage was the Scottish Government made aware of the content of the memorandum prior to its signing and therefore no opportunity was given to contribute or to raise concerns about the potential implications for Scotland.

16. The First Minister wrote to the Prime Minister on 7 June 2007, expressing his concern that it was felt appropriate for the United Kingdom Government to sign such a memorandum on matters that are clearly devolved to Scotland, without any opportunity for the Scottish Government or Parliament to contribute. The ensuing correspondence during the negotiation of the Prisoner Transfer Agreement has been published on the Scottish Government website, www.scotland.gov.uk/lockerbie, and on the Ministry of Justice website.

17. When the Brown Government came to office in London the position seemed initially to change. At meetings with the Justice Secretary and the First Minister in Edinburgh on 13 July 2007 the Lord Chancellor gave assurances that Lockerbie would be excluded from the terms of the PTA.

18. Throughout the negotiations and at the time of the signing of the PTA with Libya, the Scottish Government’s opposition was made clear. Notwithstanding that, the UK Government was unable to secure, as requested by the Scottish Government, an exclusion from the PTA for anyone involved in the Lockerbie Air Disaster. As a consequence Mr Al-Megrahi was eligible for consideration for transfer in terms of the PTA entered into by the Governments of the United Kingdom and Libya.

19. During the consideration of the application by the Libyan Government for transfer of Mr Al-Megrahi, it became apparent that a critical issue was the extent of any agreements or assurances given in connection with the pre-trial negotiations. Representatives of the United States Government were adamant that assurances had been given that any person convicted would serve his sentence in Scotland. Many of the American families spoke of the comfort that they placed upon these assurances over the past 10 years.

20. The Scottish Government sought the views of the United Kingdom Government on this issue. The UK Government were offered the opportunity to make representations or provide information. They declined to do so. They simply informed the Scottish Government that they saw no legal barrier to transfer and that they gave no assurances to the US Government at the time. They declined to offer a full explanation as to what was discussed during this time, or to provide any information to substantiate their view. The Scottish Government find that highly regrettable. As a result, the Scottish Cabinet Secretary for Justice did not know what the exact nature of those discussions were, nor did he know what may have been agreed between Governments.
21. The Scottish Government nevertheless ensured that the UK Government were kept informed of the progress of the application for Prisoner Transfer and the subsequent application for compassionate release to allow them to consider the potential impact on UK foreign policy. At the UK Government’s request, they were given advance notice of the decisions.

This inquiry will also include examination of the co-ordination between the UK Government and Scottish Executive in representing Scotland’s interests to the EU as well as Scotland’s interface with individual EU institutions. This was previously a separate inquiry which will now be included into the new inquiry.

22. The Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee set out the principles which ought to underpin co-operation with respect to international relations. In particular, Annexes B1 and B4 treat the relationship between the UK Government and the Scottish Government on European policy issues.

23. The Scottish Government is committed to maintaining an active and constructive relationship with the UK Government on EU matters. The Scottish Government seeks to contribute to developing the UK negotiating position, sharing our ideas, resources and experience with Whitehall counterparts so that Scotland’s interests are taken into account.

24. Scotland is subject to the EU’s laws and regulations, involved in its policy making processes and accountable for transposing EU law into our own national law within devolved policy areas. While Member State participation in EU decision making processes is considered to be an aspect of foreign affairs, and consequently is reserved by the Scotland Act 1998, key aspects of the UK’s implementation of EU obligations falls to the Scottish Government.

25. The Scottish Government has an office in Brussels to represent its EU interests.

26. The Scottish Government takes an active part in the Joint Ministerial Committee (Europe) and has been working with the UK Government and the Devolved Administrations to make improvements to ensure Scottish interests are better recognised and it becomes a more effective forum for dispute resolution. The Scottish Government, along with other Devolved Administrations, is no longer invited (since mid-2008) to attend the fortnightly UK Government officials’ forum, known as Darroch Cunliffe, where key decisions are made on UK policy on EU matters, including those which impact on devolved responsibilities.

SCOTLAND’S INTERFACE WITH INDIVIDUAL EU INSTITUTIONS

27. The Scottish Government is determined to strengthen its direct links with the EU where it can and will seek to maximise opportunities arising under the current constitutional settlement.

28. Scotland has more limited access to, and influence on, decision making than similarly sized European countries. Mechanisms exist for Scottish interests to be fed into the decision making process, directly and via the UK. However, these are often lost or diluted during their incorporation into the UK negotiating line, even where Scotland carries a disproportionate share of the UK’s interests.

Council of Ministers

29. Scotland is represented at Council meetings by the UK Government; when Scottish ministers attend Council meetings it is part of the wider UK delegation, not in their own right. The Concordat on Coordination of European Union Policy Issues supplementary to the Memorandum of Understanding with the UK Government states that decisions on Ministerial attendance at the Council of Ministers will be taken on a case-by-case basis by the lead UK Minister but devolved administrations should have a role to play in meetings where discussion is expected of matters that impact on devolved responsibilities, and Ministers from the devolved administrations may speak also for the UK in Council, subject to prior agreement.

30. Although Scottish Ministers can ask to attend Council, they can only do so with the permission of the relevant UK Secretary of State, and if granted permission to speak, must speak to the agreed UK negotiating lines. In practice, the UK does not always ask for the views of Scottish Ministers.

31. Scottish Ministers have attended 33 separate Council meetings since May 2007 (12 in 2009). Scottish Government officials also attend a range of Working Group meetings. Recent experience has suggested that there is little scope for Scottish Government attendance at informal Councils with the UK often citing pressure on spaces.

European Parliament

32. Under current arrangements Scotland has six MEPs, considerably less than Member States of a comparable size to Scotland such as Denmark and Finland. The Scottish Government ensures Scottish MEPs and other MEPs in key positions are briefed on the Scottish Government’s position so that they can promote Scottish views across the European Parliament.
European Commission

33. The Scottish Government contributes to formal UK consultation exercises which follow Commission proposals, although Scottish views are not always fully articulated in the final UK response. The Scottish Government also responds independently to proposals that are of particular importance to Scotland. Scottish Ministers regularly meet with EU Commissioners and other Commission representatives both in Brussels and in Scotland so they can witness first hand the unique challenges that often face Scotland.

The Economic and Social Committee

34. Scotland currently nominates three members of the Committee. Member States of a comparable size to Scotland, such as Denmark and Finland, each nominate nine members.

Committee of the Regions

35. Scotland has four full members and four alternative members who can attend if the full members are unable to. Member States of a similar size to Scotland, such as Denmark and Finland, each have nine full members and nine alternative members.

How could the Joint Ministerial Committee be better used to improved the working relationships between the UK Government and Scottish Executive

36. The Scottish Government is considering ways in which the operation of the JMC may be improved with the United Kingdom Government, the Welsh Assembly Government and the Northern Ireland Executive. Some suggestions were made by the Commission on Scottish Devolution, but these did not cover all aspects of the JMC’s operation.

37. The Scottish Government believes that inter-governmental relations will rely on a clear and shared understanding of the principles of cooperation; clear, robust and fair procedures for the resolution of disputes between administrations; and the commitment of all parties to respect and abide by the form and spirit of those principles and procedures.

How will the revised Memorandum of Understanding and concordats between the UK Government and Scottish Executive improve matters.

38. Revisions to the Memorandum of Understanding are being considered by all the four administrations that are party to it. The Scottish Government’s view is that any measures which clarify inter-governmental relations are to be welcomed and revisions to the MoU are required both to reflect changed circumstances and to increase awareness and understanding of devolution.

November 2009

Supplementary memorandum submitted by the Scottish Executive

Thank you for your letter dated 18 January 2010 requesting further information on some of the issues covered in my evidence to the Committee on 12 January. I am happy to oblige, and enclose a further submission from the Scottish Government which covers the questions you raise.

Responses to questions raised by the Chair, 18 January 2010

1. You referred in your evidence to instances where the two Governments had not cooperated satisfactorily. Please provide the Committee with examples.

In addition to the examples cited in the Scottish Government’s written and oral evidence (eg Olympic regeneration consequentials; refusal to allow a Scottish Minister to be part of the UK delegation to Copenhagen) there have been frequent instances where the UK Government has, in our view, not lived up to the principles of parity of esteem and constructive engagement contained in the Memorandum of Understanding between the UK Government and the devolved administrations. These range from examples of failing to consult us in good time or at all about policy statements on issues affecting devolved responsibilities, to major blockages on or delays to progress in matters directly in the interests of the Scottish public. Examples of the latter include:

— In October 2007 the House of Lords held in the Somerville case that human rights claims under the Scotland Act were not subject to the one-year time bar that applies to such claims under the Human Rights Act. The Scottish Government did not have the powers to correct this anomaly and although we immediately asked the UK Government to act, it took nearly 18 months to secure their agreement to remedial action.
2. In your memorandum you stated that the Scottish Executive was not made aware of the contents of the Memorandum of Understanding (MoU) between the UK and Libya prior to its signing. Had you previously been privy to the contents of MoUs between the UK and other countries before they were signed?

This particular MoU was not an agreement to negotiate just any Prisoner Transfer Agreement. The MoU referred specifically to “working on the basis of the British model agreement on Prisoner Transfer presented recently to the [Libyan] Secretary for Justice during his visit to the United Kingdom of 22–24 May [2007]”. We would argue that that model was not an appropriate starting point in this case, and that an exclusion should have been built in before any model was discussed. Jack Straw, in his evidence to the Justice Committee on 24 November 2009 (see my response to Q4) admits that “One of the negotiating problems that emerged with Libya was that initially they had been given the standard draft Council of Europe prisoner transfer agreement in standard form, which did not provide a specific carve-out for any individual prisoner…” Had there been prior contact with the Scottish Government, this problem could have been avoided.

However, we are glad to say that we are regularly sighted on MOUs/Joint Statements between the UK and other countries before they are signed. Prisoner Transfer Agreements are one example but we have also been consulted on joint statements with China’s and India’s Education Ministries and in the last year the Home Office have kept us up to date on potential/actual new Mutual Legal Assistance treaties (focusing on extradition arrangements and cross-border co-operation in criminal investigations and proceedings). These arrangements very much follow a well-established pattern in accordance with the provisions of the devolution Memorandum of Understanding and its associated Concordats. This pattern is followed across a wide range of policy areas.

It is, of course, self-evident that if the UK Government does not share the contents of agreements it has with other countries with us, we will be unaware of their existence, unless they are made public. The UK Government may be able to shed light on other agreements it has concluded without reference to the Scottish Government.

3. In evidence, it was made clear that Mr MacAskill felt that the UK Government did not provide him with a full description of the assurances it had made to the US Government and the victims’ families regarding where Mr al-Megrahi would serve his prison sentence. Who was involved in the communications with the UK requesting information on the discussions between the UK and US Governments on this matter?


As noted in the letter of 22 June, there had been a meeting on 13 February 2009 between Scottish Government and FCO officials and the British Ambassador to Libya. At that meeting and in subsequent telephone conversations, the FCO offered to provide advice on the UK/US Government agreements with the UN. It subsequently became clear that that advice would only be provided if requested formally in writing, which is what the letter of 22 June did.
4. How should the current devolution Memorandum of Understanding be amended to tackle disputes between the UK and the devolved administrations?

Central to the review of the Memorandum of Understanding is the need for a dispute resolution mechanism which:

— is underpinned by the principles of parity of esteem and mutual respect;
— sets out clear objective procedures; and
— recognises that this is a mechanism to be used in handling disputes between governments, not departments of a single administration.

Fair and robust procedures should not vest all power or levers in the hands of one administration, and there should be an element of objective or disinterested assessment of the issue. And fundamentally we need commitment from all parties to respect and abide by these principles and procedures.

5. Do you believe that Scotland should not be subject to international agreements which have been made in the interests of the UK as a whole, but which are specifically against the states interests of Scotland?

Any agreements made by the UK Government should reflect fully the interests of Scotland as a constituent part of the UK. If such agreements are not in the best interests of Scotland, there is serious doubt that they could be described as being in the best interests of the UK as a whole. Indeed the Concordat on International Relations makes clear that there is “a mutual determination to ensure that there is close cooperation in these areas between the United Kingdom Government and the Scottish Ministers with the objective of promoting the overseas interests of the United Kingdom and all its constituent parts”.

It is important that international treaties directly affecting devolved matters should be put to the Scottish Parliament, in the same way that the UK Parliament will have a formal role in ratifying treaties under the current Constitutional Renewal Bill.

31 January 2010

Supplementary memorandum from the First Minister, Rt Hon Alex Salmond MSP, MP Scottish Executive

I listened with interest to the evidence given to the inquiry by Jack Straw and Jim Murphy on 27 January and in light of their comments I thought it would be helpful if I offered further clarification on a number of points.

EU Council

I would like to correct an apparent misapprehension that I may not have been correct in asserting that on occasions UK officials took the seat in Council in preference to a Scottish Minister. In his questioning, Ian Davidson MP stated that he found it “surprising” that “when no UK Minister is present the UK gives preference to their own senior officials speaking rather than an elected minister from a devolved administration”.

I do not take issue with the subsequent discussion between Mr Davidson, Mr Straw and Mr Murphy on Scottish Ministers having spoken at councils several times and attended many times—this is correct. It would be unfortunate however, if the Committee (and indeed the public record) were left with the impression that I was mistaken in my own evidence to the Committee on 12 January. Here I was making the point that changes should be made to current arrangements where “a civil servant from a London department tak[es] the lead chair when there is a Scottish minister there”.

Lest there be misunderstanding, I have attached documentary evidence (an exchange of letters between Richard Lochhead, Cabinet Secretary for Rural Affairs and the Environment and Hilary Benn, Secretary of State for Environment, Food and Rural Affairs from May 2009) that this has happened and that the Secretary of State for Environment, Food and Rural Affairs would expect that to be the case in the majority of cases in Councils within his remit.

I stand by my original assertion that this unacceptable situation should not be allowed to continue.

Copenhagen Delegation

I was also interested in the comment made by Jim Murphy that “Ed [Miliband] made sure that the UK in its entirety was pretty well represented at the Copenhagen Summit.” I can only assume he is referring to the inclusion of a Scottish Government official as a member of the UK Delegation—it certainly does not mean the inclusion of a Scottish Minister; despite our repeated representations to UK Ministers to recognise that a Scottish Minister would strengthen the delegation not dilute it.

6 Q 142.
7 Not printed.
8 Q 139.
PRISONER TRANSFER AGREEMENT

Moving on to the comments Jack Straw made in response to questions on the Libyan PTA, he stated that “as soon as there was anything significant to discuss other than the fact that there was an aspiration by the Libyans for a PTA there were indeed discussions with the Scottish Executive”. The Memorandum of Understanding with Libya, I would suggest, is much more significant than a mere “aspiration” by the Libyans for a PTA. It records an “understanding that [the UK and Libyan Governments] will shortly commence negotiations on the following matters:

— Mutual legal assistance in the field of criminal law;
— Mutual legal assistance in the field of civil and commercial law;
— Extradition; and
— Prisoner Transfer.”

and that “The two sides will work to conclude the negotiations and prepare these agreements in their final form; in the case of the last-mentioned agreement, working on the basis of the British model agreement on Prisoner Transfer presented recently to the Secretary for Justice during his visit to the United Kingdom of 22–24 May—to be signed within a period not exceeding 12 months from the date of signing this MoU.”

I am sure the Committee would agree that this goes far beyond an “aspiration” for a PTA, and amounts to a commitment to negotiate within a set timescale on a PTA—and not just any PTA but one based on a model agreement already shared with the Libyan Government.

I also noted that Jack Straw refers to the sentencing state deciding to exercise a “veto”. The UK Government has previously talked loosely about Ministers having an “absolute veto”. I consider those references to be misleading.

Jack Straw’s letter of 11 February 2008 had accepted that “as with any decision taken by a public body, a decision in relation to the transfer of a prisoner under the terms of the PTA may be subject to judicial review.” However he saw “no reason why any such challenge should not be successfully resisted within the Scottish legal system.”

My response of 18 March noted our understanding that that confidence was not based on actual experience of successfully resisting such challenges in the courts—simply a hope or expectation that that could be done. I suggested that such confidence might well turn out to be misplaced, and that an exclusion in the PTA would have avoided uncertainty.

The UK Government has not demonstrated that any veto exists. Ministers cannot simply decide to refuse a transfer request—they must have a reason, and that reason can be scrutinised by the courts.

In Megrahi’s case, a reason was identified—the fact that the American families and Government either had an expectation, or were led to believe, that there would be no prisoner transfer and the sentence would be served in Scotland—and the request refused. Had it not been for the decision to release Megrahi on compassionate grounds, the refusal of the prisoner transfer application could have been challenged.

I hope the Committee finds these points of clarification helpful.

6 February 2010

Supplementary memorandum submitted by the Scotland Office

Thank you once again for the opportunity that you gave to both Jack Straw and me to appear together before your Committee on 27 January to give evidence as part of your Co-operation and Communication between Governments inquiry.

At that session I committed to provide you with details of the attendance of Scottish Government Ministers at EU Council meetings. I understand you also raised this matter with Chris Bryant, Parliamentary Under Secretary of State for Foreign Affairs when he gave evidence on 10 February. I am responding on behalf of us both.

As I stated during the evidence session I understand that Scottish Government Ministers have attended 112 meetings since the establishment of devolution in 1999. As the Memorandum of Understanding between the UK Government and the Devolved Administrations makes clear, it is the lead UK Government Minister who is responsible for determining the make-up of the UK delegation for each Council meeting, and this Minister will have in mind the need to ensure that the best possible presentation of the UK line is put forward at each meeting to deliver maximum benefits for people across the United Kingdom.

From the outset of devolution we have recognised the beneficial role that attendance by Scottish Government Ministers can offer for Council meetings where there is a particular focus on devolved policy matters, such as fishing, the environment, or where distinct areas of the law are under consideration, such as justice matters.

Q 153.
The Scottish Government make publicly available a complete list of each Council meeting where their Ministers have formed part of the UK delegation. This information can be accessed here:


For the ease of the Committee I also attach this information as a numbered Annex to this letter. The Committee also sought information from Chris Bryant on the number of occasions that the Scottish Government Ministers led the UK delegation—these are marked up in the Annex material.

**MINISTERIAL ATTENDANCE AT EU COUNCIL MEETINGS**

### Attendance in 2009

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### Attendance in 2003

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Letter from Chris Bryant, Minister for Europe, to the Chairman of the Committee

I am writing in response to the follow-up questions posed by Mr Ian Davidson following my evidence session before the Scottish Affairs Committee on 10 February.

The first question related to the number of occasions ministers from the Devolved Administrations had occupied the UK seat at Council meetings. I understand that the same question was also put to Jim Murphy during his evidence session and Jim provided you with a separate response on 3 March on this question.

The second question had two parts:

— an update on the non-recognition of Kosovo by various EU Member States; and

— whether the position of other EU Member States towards Kosovo, or other secessionist states, provided an indication of how they might react to any application to join the EU from an independent Scotland.

Recognition of States is a political decision for other individual States to take. Given the discretionary nature of recognition and the different circumstances in which new States come into being, it is difficult to draw parallels.

At present, five EU Member States do not recognise Kosovo as an independent State: Cyprus, Greece, Romania, Slovakia and Spain. They consider that Kosovo’s unilateral Declaration of Independence was not issued in accordance with international law. We are awaiting the International Court of Justice’s advisory opinion on the legality of Kosovo’s Declaration of Independence.

The circumstances in which Kosovo declared independence, and the UK recognised its independence, are unique due to factors including the violent break-up of the former Yugoslavia and the unprecedented UN administration of Kosovo. No assumptions can therefore be made regarding the attitude of Kosovo non-recognitioners towards any claim of Scotland to statehood and independent EU membership.

At present Scotland is part of the EU by virtue of the UK’s membership. If Scotland left the UK and applied to join the EU as an independent country, it would need the agreement of all of the Member States of the EU at that time to agree an increase in the number of Member States of the EU; and then to agree to open accession negotiations with Scotland. The current process for accession negotiations requires that a candidate country must adopt every aspect of the acquis communautaire, currently divided into 35 chapters. For example, accession negotiations would require Scotland to accept the provisions of the Common Fisheries Policy (CFP) in full and to demonstrate their capacity to apply the CFP effectively, eg sufficient measures in place to reduce discards, reduce fleet over-capacity, and effective fixed quota and vessel management plans.

Following the introduction of the Lisbon Treaty, new Member States are also expected to commit to meeting the criteria for adoption of the Euro and joining Schengen. This would lead to the establishment of new border controls between England and Scotland.

These negotiations would be likely to last several years; accession negotiations with Norway were conducted fastest, but even these took two years. In contrast, Spain’s accession negotiations took six years. At the conclusion of negotiations, the Member States of the EU would then need to agree to an Accession Treaty granting Scotland membership of the EU, which would have to be ratified by all Member States in accordance with their national requirements—a process that could also take several years.
It is very difficult to predict what would happen if Scotland decided in the future to leave the UK in terms of potential EU membership. There are no precedents to indicate how this would be done, since there is no previous case of part of a Member State splitting off to become an independent state within the EU. But in my opinion there would be a significant period of time of real uncertainty during which Scotland’s membership of the EU would be in doubt.

24 March 2010