

## *Devolution and the Centre*<sup>1</sup>

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### INTRODUCTION

Much of the debate on devolution before the enactment of the various pieces of devolution legislation was parochial. It had been parochial in concentrating on the opportunities, problems and implications of devolution within Scotland, Wales and Northern Ireland; little attention had been paid to devolution's impact on the UK as a whole or on the 'centre' — Whitehall and Westminster. One of the paradoxes of devolution was that it had been framed in Scotland and Wales in nationalist terms, yet it was sold as a means of maintaining the Union. So long as devolution remained an opposition desire, the significance of its UK and particularly Whitehall implications could be ignored. Historically, much had been made by parliamentarians of the implications for Westminster, or at least the House of Commons, of devolution — the West Lothian question — though there is little evidence that the English public found this important. Few seemed to know and fewer still cared that devolution would have an impact on Whitehall. Only a few academics, commentators and those working in Whitehall appreciated that this was an important matter.<sup>2</sup>

It was against this background of lack of preparation that the Government legislated for devolution. The idea of a Joint Ministerial Committee (JMC) to bring the four governments together emerged late at night in a Government amendment in the House of Lords.<sup>3</sup> Concordats between UK departments and the devolved administrations entered the vocabulary of British politics and became almost a panacea for the resolution of all kinds of disputes. The concordat became the shibboleth of devolutionists in much the same way that subsidiarity has for supporters of further European integration.

Significantly, the emphasis was on formal institutions. Frequent references were made to the need for co-operation and, at least implicitly, a new,

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<sup>2</sup> For a prediction of the effects of devolution on Westminster and Whitehall see *The Constitution Unit*, 1996, pp. 99-119, or Hazell and Morris 1999.

<sup>3</sup> HL Deb, 28 July, col.1487.

more pluralist political culture at the centre that would allow devolution to succeed, but these tended to be exhortations rather than detailed recommendations. There has been some evidence that a change in attitude has begun (or at least signals of that) but it remains too early to predict confidently that devolution signifies a shift in Whitehall culture.

And while the devolved UK is repeatedly cited by UK ministers as evidence of a revitalised union,<sup>4</sup> Whitehall remains inconspicuous. Despite its radical implications for the constitution — or at least for Whitehall — devolution has evolved since its enactment in a pragmatic, evolutionary, even typically British manner. To date, devolution has not so much resulted in a revolution in Whitehall so much as Whitehall has adapted to accommodate devolution. That may be testimony to the enduring strength and adaptability of the constitution or its innate conservatism.

In their contribution to *Constitutional Futures: A History of the Next Ten Years* in 1999 Robert Hazell and Bob Morris suggested that devolution would result in a number of changes to the machinery at the centre of the UK Government, Whitehall:

- the end of the territorial Secretaries of State;
- the end of the unified home civil service;
- the use of concordats and the development of legal and political structures of intergovernmental relations;
- the use of the JMC on devolution as the main forum for the debate of devolution issues;
- the establishment of devolution units within individual departments;
- representation of the devolved administrations in London; and
- representation for the devolved administrations to the European Union (EU).<sup>5</sup>

Of these predictions, only the less radical have so far come to fruition. Concordats have been agreed between Whitehall departments and the devolved administrations. The JMC on Devolution has acted as a forum for the discussion of various cross-border issues (although during the past year meetings have been infrequent). Whitehall departments have responded to devolution through the creation of devolution and nations and regions teams and the devolved administrations are beginning to make their presence felt on a European scale. However, the Scotland, Wales and Northern Ireland Offices remain (albeit with roles that have changed since devolution) and the civil service remains unified within Great Britain.

<sup>4</sup> See for example: WO Press Release, 'Speech by the Secretary of State for Wales, Paul Murphy, to the Regional Government and Devolution Conference in Valencia,' 31 October 2000; 'Cook says devolution will help ensure UK unity,' *The Herald*, 20 April 2001; 'Liddell aims to build on Holyrood-Westminster links', *The Herald*, 8 May 2001.

<sup>5</sup> Hazell and Morris 1999, pp 136-155.

**Figure 8.1. Key events in Whitehall: 2000-1**


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31 October 2000	Secretary of State for Wales Paul Murphy MP, addresses Regional Government and Devolution Conference in Valencia.
23 January 2001	Resignation of Peter Mandelson MP from post of Secretary of State for Northern Ireland.
24 January 2001	Appointment of Dr John Reid MP as Secretary of State for Northern Ireland and appointment of Helen Liddell MP as Secretary of State for Scotland.
11 February 2001	Resignation of Frank Roy MP as PPS to Helen Liddell, to be replaced by Jim Murphy MP.
27 February 2001	DGN 9 (Post-Devolution Primary Legislation Affecting Wales) published.
27 February 2001	DGN 5 (The Role of the Secretary of State for Northern Ireland Post-Devolution) published.
4 March 2001	William Hague MP announces that an incoming Conservative government would retain the post of Secretary of State for Scotland.
9 March 2001	Prime Minister Blair tells press of mistakes made by 'not letting go' of affairs in Wales, post-devolution.
23 March 2001	Revised edition of DGN 6 (Circulation of Inter-Ministerial and Inter-Departmental Correspondence) published.
19 April 2001	Robin Cook MP, Foreign Secretary, announces that devolution will 'stand the test of time as one of this Government's most radical achievements.'
11 May 2001	Children's Commissioner for Wales Act receives Royal Assent.
7 June 2001	Labour win the UK general election, confirming second term in office with another landslide victory.
8 June 2001	Reshuffle of Cabinet, with new responsibilities for the Deputy Prime Minister and departments responsible for the English regions.
11 July 2001	Cabinet Office press release outlines the structure and responsibilities of the new Office of the Deputy Prime Minister.

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These expectations were based on an appreciation of administrative processes — Hazell and Morris had avoided emphasising the party-political implications. All things being equal, these expectations were logical. We may surmise that one reason for the limited, indeed relatively conservative, nature of the changes that have been brought about has been the party political considerations that tend to be of particular importance in an election year.

However, had this been entirely correct, we might have expected the Blair government, re-elected with a huge majority, to use the opportunity of a post-election situation to press ahead with the more radical, and potentially politically sensitive, ideas. Instead, there has been little evidence of this. This appears to reflect a mixture of constitutional conservatism on the part of the government and party political considerations that pre-election had resulted in the government making commitments that have bound it even after it secured its second term.

As well as drawing on official documents and the published secondary literature, this chapter is based on interviews with over 40 UK government officials carried out in the spring and summer of 2001 for the 'Devolution and Whitehall' project being undertaken by the authors and Professor Robert Hazell at the Constitution Unit, which forms part of the ESRC's Devolution and Constitutional Change programme. It will examine how the centre has responded to devolution, dealing specifically with the courts, the impact of devolution on Whitehall departments and the territorial offices, and the changes to the central machinery of government made in June 2001 that will shape the way central government deals with devolution in the future.

#### DEVOLUTION AND THE COURTS

When preparations were being made for devolution, many observers expected that it would result in a great deal of work for lawyers. Even if the four governments avoided their differences becoming legal disputes, there was plenty of scope for challenges by third parties to the actions of the devolved institutions, questioning the extent of the bodies' statutory powers. To deal with such challenges each of the devolution Acts contains a schedule setting out a detailed procedure for dealing with 'devolution issues', which are largely issues of whether an Act or piece of secondary legislation is within the competence of that particular devolved institution.<sup>6</sup> Such issues are to be referred to the Judicial Committee of the Privy Council, and the law officers of the UK government and devolved administrations may be heard in the legal proceedings on them. The legal effect of giving such powers to the Judicial Committee (rather than to the House of Lords' Appellate Committee) has itself been the subject of some discussion, as it creates a 'dual apex' in the UK's judicial system.<sup>7</sup> It also means that a UK court sitting in London has become, in practice, the final court of appeal for certain Scottish criminal matters.

What has been striking, however, is the little use that has in fact been made in the first two years of devolution of the 'devolution issues' procedure. For

<sup>6</sup> Scotland Act 1998, Schedule 6; Government of Wales Act 1998, Schedule 8; Northern Ireland Act 1998, Schedule 10. For a discussion, see Burrows 2000, chap. 6.

<sup>7</sup> See Le Sueur and Cornes 2001, especially chaps. 2 and 5.

government lawyers advising on the powers of the devolved administrations and assemblies there may be a good deal of devolution-related work, but few other lawyers have been greatly affected. While the procedure has been used in a number of cases (three in 2000, and four to 31 July 2001), with one exception these have all concerned criminal prosecutions brought in Scotland. The challenges have been brought on the ground that the prosecution is contrary to the defendant's human rights protected under the Human Rights Act 1998 and section 57 (2) of the Scotland Act 1998.<sup>8</sup> The last year has however seen the first exception to that, in the case of *Anderson, Reid & Doherty v. Scottish Ministers and Advocate-General for Scotland*. This case challenges the lawfulness of the first Act passed by the Scottish Parliament, the Mental Health (Public Safety and Appeals) (Scotland) Act 1999, which provides for the continued incarceration of prisoners suffering from untreatable personality disorders (notably psychopathic disorders) as well as mental illness. This case, like previous challenges, is based on human rights grounds (Article 5 of the European Convention on Human Rights), and the Court of Session had little difficulty in dismissing the application when it was heard in May-June 2000.<sup>9</sup> The case came before the Judicial Committee in July 2001 but no judgment had been issued before the court rose for the summer.

Such legal challenges to the legislation and other decisions taken by the devolved institutions are likely to become more common over time. While Scotland will probably remain the principal object of such challenges, Wales and Northern Ireland are unlikely to be wholly immune. Whether the 'judicial architecture' of the UK will be adequate to cope with them is doubtful and has already, for example, been questioned by the UK's Senior Law Lord, Lord Bingham of Cornhill.<sup>10</sup> Already, however, the role of the Judicial Committee of the Privy Council is exciting some discussion in Scotland.<sup>11</sup> The supremacy of the Scottish High Court of Justiciary as the final court of appeal for Scottish criminal matters was carefully preserved under the Union with England of 1707. It has therefore come as quite a surprise to find that jurisdiction has in fact passed to a UK court, and doubly so that this is a consequence of devolution. This is aggravated by the detailed aspects of Scottish criminal law and procedure that have been the subject of appeals to the Judicial Committee, and by the apparent ignorance of Scottish law and procedure exhibited in those judgments. This legal intervention has proved a

<sup>8</sup> This prohibits a member of the Scottish Executive, including the Lord Advocate, from doing an act that is incompatible with Convention rights. See also sections 29 and 54 of the Scotland Act 1998, the former stating that all provisions of Acts of the Scottish Parliament are beyond the Parliament's legislative competence to the extent they are incompatible with Convention rights, and the latter providing that secondary legislation made by Scottish ministers is not competent to the extent it is incompatible with Convention rights.

<sup>9</sup> [2001] SC 1, 16 June 2001. The Court consisted of the Lord President, Lady Cosgrove and Lord Philip.

<sup>10</sup> See 'The Supreme Sacrifice', *The Times*, 17 July 2001.

<sup>11</sup> See *Le Sueur* 2001 and *Le Sueur and Comes* 2001.

particular source of concern to those who expected that the requirement to act only in accordance with human rights obligations would prove a rather remote restriction rather than an immediate and tangible constraint.

#### THE IMPACT OF DEVOLUTION ON WHITEHALL

With a cross-departmental emphasis on good practice and establishing sensible working arrangements with the devolved administrations the Whitehall response to devolution throughout 2000-2001 can clearly be termed pragmatic. The terminology of concordats and Devolution Guidance Notes (DGNs) has permeated every level of central government, ensuring that, for the most part, change has been in a practical rather than organisational sense.<sup>12</sup> Whitehall departments have responded to devolution by raising awareness and ensuring that the language of devolution was instilled in decision-making processes.<sup>13</sup> However, in keeping with the fragmented structure of UK central government, each department determined for itself what approach it should adopt.<sup>14</sup>

The establishment of 'devolution units' provides a practical example. The function of these generally small teams has been to provide information and increase familiarity with the complex and asymmetric distribution of powers following devolution within the department. Examples include the International and Constitution Branch in the Department of Health and the Regional Co-ordination and Devolution Directorate in the Department of Transport, Local Government and the Regions (DTLR). Such teams have, however, been largely reserved to the main departments providing front-line services, and accordingly the Ministry of Defence and the Department for Culture, Media and Sport do not have in-house devolution expertise. One exception was the devolution team in the Foreign and Commonwealth Office (although it has been wound down during the year). A particularly good example remains the DTLR's Regional Co-ordination and Devolution Directorate, originally established during the passage through Westminster of the three devolution Acts of 1998. Whitehall officials consider that such groups remain necessary, two years after the devolved administrations were established, due to continued questions over the division of powers between administrations caused by changes in policy, new legislation, and most recently the changes to departmental remits following the 2001 UK general election (discussed in more detail below).<sup>15</sup>

<sup>12</sup> The increase in use of the terminology of devolution has been seen in House of Commons debates. A basic search for 'concordat' in 1994 comes up with no hits, five for 1995, 20 for 1996, 63 for 1997, 329 for 1998, 400 for 1999, down to 248 for 2000 and 483 by end of June 2001.

<sup>13</sup> Interviews with Whitehall officials, March–July 2001.

<sup>14</sup> See Daintith and Page 1999, chaps. 2 and 10.

<sup>15</sup> Interview with Whitehall official, July 2001.

A number of departments had the benefit of retaining the majority of their pre-devolution functions. The Department for Education and Employment (DfEE) did not cede any functions to the devolved administrations (the Welsh and Scottish Offices already dealt with education matters in those countries) and so relationships, originally established with officials in the three territorial departments, could carry on much as they were with the three devolved administrations. And yet although the role of the department and its Secretary of State remained virtually unchanged, DfEE was initially slow to respond to the demands of liaising with the separate administrations.<sup>16</sup> Within the department the view that the effects of devolution would be minimal made it hard to generate interest in looking at the impact of devolution. Interest was quickly stimulated, however, by the announcement of the Scottish Executive's policy divergence from Whitehall over university tuition fees. While this triggered a change in approach this lay in practice rather than organisation, and it fell to the department's strategy division to raise awareness of the new settlement and its intricacies throughout the department.<sup>17</sup>

Other departments were perhaps not as fortunate and found that their responsibilities had narrowed on some levels while remaining static on others; where potential problems arose, it was in the interaction between levels. For example, while parts of DTLR transport policy remain a UK-wide responsibility (vehicle standards and emissions), others stretch only as far as Great Britain (licensing, roadworthiness and insurance), while others have been narrowed yet further to apply to England alone (roads policy). Mapping the scope of a UK department's responsibilities in this way is complex for the observer and no doubt confusing for many civil servants. Officials report that in dealing with the interaction between these policies in a pragmatic way, and in close co-operation with the devolved administrations, disputes over competences have been identified and resolved before becoming problematic. And while some departments may have been slower than others to catch on, the consensus is that interaction between departments, the territorial offices and the devolved administrations now comes as second nature when necessary.

The emphasis on partnership, emphasised through ministerial rhetoric and put into practice at the official level, has ensured that potential problems over policy divergence between administrations, the future of the unified civil service and claims of Whitehall control-freakery have, thus far, been largely diverted (see also Chapter 7).

#### THE WORK OF THE TERRITORIAL OFFICES

The three territorial offices — the Scotland Office (SO), Wales Office (WO) and Northern Ireland Office (NIO) — retain a key role even after devolution.

<sup>16</sup> Interview with Whitehall official, April 2001.

<sup>17</sup> Interviews with Whitehall officials, April–May 2001.

They link the devolved administrations with the UK government, and their Secretary of State acts as advocate for that territory within the UK Government. The NIO retains other functions as well, notably regarding security and policing, and the Northern Ireland Secretary also has the power to suspend devolution under the Northern Ireland Act 2000. What the territorial offices continue to do in post-devolution Whitehall is worth investigating in detail.

### **The Scotland Office**

The Scotland Office departmental report 2001 detailed the role of the office:

- to promote the devolution settlement for Scotland;
- to continue to represent Scottish interests within the UK government on matters reserved to the UK Parliament;
- to exercise certain residual functions in reserved areas, notably under the Scotland Act 1998, but also in relation to elections and private legislation;
- to pay grant to the Scottish Consolidated Fund;
- to provide legal advice and services to the UK government as regards Scots law.<sup>18</sup>

Its functions are therefore representative (both of Scotland to the UK Government, and vice versa), administrative (paying grant, advising on Scots law) and executive (to only a limited degree, for reserved matters). The SO is currently split into four divisions: the Parliamentary and Constitution Division, the Economy and Industry Division, the Social and Home Affairs Division, and the Finance and Administration Unit. The latter three are based in Edinburgh and Glasgow, with only the Parliamentary and Constitution Division residing south of the border, at Dover House in Whitehall.

A good deal of the work of the SO has centred around acting as an interface between Whitehall departments and the Scottish Executive. Areas of potential conflict or tension have been referred to the SO and its Secretary of State, allowing the stability of the settlement to be monitored and minimising accusations of ‘control freakery’ being levelled at Whitehall departments.<sup>19</sup> The SO has also performed a monitoring role — scrutinising legislative proposals from both Westminster and Holyrood in an attempt to identify clashes of competence. The SO and Office of the Advocate General have worked in tandem on this exercise, with over 40 of the SO’s 100 or so staff having legal expertise.<sup>20</sup> In parallel with this the 2001 departmental report listed eleven Orders in Council passed under the Scotland Act 1998 between April 2000 and March 2001 for the purposes of ‘fine-tuning’ the devolution settlement.<sup>21</sup> As of September 2001 another seven Orders in Council have

<sup>18</sup> SO 2001, Cm 5120, p6.

<sup>19</sup> Interview with Whitehall official, July 2001.

<sup>20</sup> Interview with Whitehall official, July 2001.

<sup>21</sup> SO 2001, CM 5120, at Annex 10 (Scotland Act Orders Made 2000-2001).



been added to this list, with a further Transfer of Functions Order to be made by the Privy Council in October 2001. The process of monitoring the legislative competence of the Scottish Parliament and making amendments to the devolution arrangements through Orders in Council has constituted a large part of the work of the SO since devolution.<sup>22</sup>

The SO retains a role in developing UK policy in relation to reserved matters. Incidences of the involvement of the SO include the Scottish economy,<sup>23</sup> the promotion of overseas trade interests, and government decisions affecting the oil and gas industry in Scotland.<sup>24</sup> The departmental report 2001 addresses these matters in the language of co-operation and partnership favoured by many of the Whitehall documents on devolution:

Good working relations have been established with the Scottish Executive and relevant Whitehall Departments with responsibility for reserved matters, which has been important to enable Scottish Ministers effectively to present UK policies in Scotland.

In his role as Secretary of State for Scotland John Reid was being increasingly seen as ‘a government trouble shooter’,<sup>25</sup> and much has been made of his ‘expansionist’ view of the post, leading to friction with the then Scottish First Minister, Donald Dewar.<sup>26</sup> (It is notable how the staffing of the SO grew while he was Secretary of State.) But his work in and for the SO has also been portrayed in a favourable light, for example by Donald Macintyre of *The Independent*: ‘Reid’s strategic achievement in Scotland has been to give the Scotland Office, denuded of actual power, the authority it has.’<sup>27</sup>

**Figure 8.2. Ministers in the Scotland Office, at July 2001**

Helen Liddell	Secretary of State for Scotland	Appointed January 2001
George Foulkes	Minister of State for Scotland	Appointed January 2001
Jim Murphy	PPS	Appointed February 2001
Sandra Osborne	PPS	Appointed January 2001
Lynda Clark QC	Advocate General	Appointed May 1999

<sup>22</sup> Interview with Whitehall official, July 2001.

<sup>23</sup> Including the designation of assisted areas and regulation of the energy and financial services sectors in Scotland (for further details see SO 2001, p2).

<sup>24</sup> *Ibid*, pp. 2-3.

<sup>25</sup> ‘Reid takes over Ulster role’, *The Times*, 25 January 2001.

<sup>26</sup> Hazell 2001, p15.

<sup>27</sup> ‘The Blairite bruiser’, *The Independent*, 27 January 2001.

Helen Liddell was elevated to the post of Secretary of State for Scotland on 24 January 2001, following Reid's departure to the NIO. Liddell was previously minister for Energy at the Department of Trade and Industry (DTI), and between 1995 and 1997 was the junior opposition spokeswoman on Scotland. Reid had established a role for himself when Donald Dewar had been First Minister. This, allied with the fact that Henry McLeish is a much weaker First Minister, eased the task for Liddell on her appointment as Secretary of State for Scotland (see also Chapter 3).

### **The Wales Office**

The role of the WO post-devolution is to '... support the Secretary of State in his role of representing Wales in the UK government, representing the UK government in Wales, and ensuring the smooth working of the devolution settlement for Wales.'<sup>28</sup> In line with this role the WO's departmental report 2001 lays down the office's objectives as follows:

- to maintain effective working relationships with the Assembly and to ensure that the devolution settlement continues to operate equitably in the best interests of Wales;
- to ensure that the interests of Wales are fully taken into account in primary legislation which affects the Assembly's responsibilities;
- to promote Welsh interests in functions retained by the UK Government;
- to promote effective communication and co-ordination of policy in areas which straddle the boundary between transferred and retained functions;
- to keep under review the operation of the funding policy for the devolved administrations.<sup>29</sup>

Again, the roles are representative, administrative and executive. The representative function is rather different, however, given the nature of the Welsh settlement. As Welsh primary legislation has to be made at Westminster, the task of liaising between the UK department on one hand and the National Assembly on the other, and understanding the Welsh settlement from a UK government point of view, falls to the WO. The principles governing the process are laid down in DGN 9, issued in February 2001 after protracted discussions between the WO, Cabinet Office and National Assembly. (See Chapter 7 for further discussion of the legislative process affecting Wales, and Chapter 9 for discussion of how Westminster legislation has dealt with Welsh issues.)

One obligation is for the Secretary of State for Wales, Paul Murphy MP, to attend a debate at the National Assembly on the Queen's Speech and the UK government's legislative programme and on 18 December 2000 he duly attended at the National Assembly. And 2000-1 saw a major legislative

<sup>28</sup> WO 2001, Cm 5121, p6.

<sup>29</sup> *Ibid.*

achievement, which had involved much work for the WO. Following the publication of the report of the Waterhouse Inquiry into abuse of children in care in north Wales, close co-operation between the WO, the UK Department of Health and the National Assembly had already allowed the creation of a Children's Commissioner for Wales in Part V of the Care Standards Act 2000. The powers of the Commissioner were greatly extended in the Children's Commissioner for Wales Bill, the first Wales-only legislation to be proposed at Westminster following devolution, which gained Royal Assent on 11 May 2001 after an uncontroversial passage through both Houses of Parliament.

The 2000-2001 Parliamentary session saw other legislation similarly involving consultation with the WO — such as the Local Government Act 2000, the Transport Act 2000 or the Learning and Skills Act 2000. In addition the WO has been active in developing Welsh interests in reserved matters; in 2000-1 this particularly involved Home Office and Treasury responsibilities.<sup>30</sup>

**Figure 8.3. Ministers in the Wales Office, at July 2001**

Paul Murphy	Secretary of State for Wales	Appointed July 1999
Don Touhig	Parliamentary Under-Secretary	Appointed June 2001

### **The Northern Ireland Office**

Following the resignation of Peter Mandelson from the post of Secretary of State for Northern Ireland in January 2001, John Reid was appointed to succeed him. Under the Blair administration Reid had served as a junior minister at the Ministry of Defence, and as Minister for Transport. From 1999 he was Secretary of State for Scotland. Given the sensitivities of Northern Ireland it is also significant that Reid is a Catholic.

**Figure 8.4. Ministers in the Northern Ireland Office, at July 2001**

John Reid	Secretary of State for Northern Ireland	Appointed Jan. 2001
Jane Kennedy	Minister of State	Appointed June 2001
Des Browne	Parliamentary Under-Secretary	Appointed June 2001

Despite the inevitable 'stop-start' nature of devolution to Northern Ireland thus far, as a result of both the suspension of the devolved institutions

<sup>30</sup> WO departmental report 2001, pp. 7-8. Particular interest has been paid by the WO to crime and policing in Wales. In addition the WO has established regular contact with the Treasury's Devolved Countries and Regions Team.

between February and May 2000 and the replacement of Peter Mandelson by John Reid as Secretary of State in January 2001, the NIO has maintained a commitment towards making devolution work. This commitment is perhaps best illustrated by the self-denying ordinance against initiating new policy from the centre imposed by NIO ministers during the 2000 suspension. Of course, the extra dimension imposed by the Belfast Agreement adds to the responsibilities of the NIO; the NIO has to ensure that the political conditions enable the peace process to continue, with the eventual goal being a second stage of devolution to Northern Ireland.<sup>31</sup>

The retention of responsibility for law and order and security functions ensures that the role of the Secretary of State for Northern Ireland bears a heavier policy burden than the equivalent post in the Scotland and Wales Offices and that the NIO retains an active role in the administration of the province. For as long as policing, criminal justice and prisons lie within the remit of the NIO there is little chance that the department will be significantly reduced in size or even significantly reformed in the near future. This wider jurisdiction is reflected in the aim of the NIO, as set down in the departmental report 2001:

To secure a lasting peace in Northern Ireland, based on the Good Friday Agreement, in which the rights and identities of all traditions in Northern Ireland are fully respected and safeguarded and in which a safe, stable, just, open and tolerant society can thrive and prosper.<sup>32</sup>

In contrast to the other territorial departments, ensuring the smooth operation of the devolution settlement is one of many responsibilities for the NIO. In March 2001 relationships between the NIO, Whitehall departments and the Northern Ireland administration were described as 'positive and constructive.'<sup>33</sup> And in these fields significant steps have been made; following the recommendations of the Patten Report, the Police (Northern Ireland) Act received Royal Assent on 23 November 2000, the Office of the Police Ombudsman was opened in November 2000 and, perhaps most symbolically, the Maze Prison was closed in September 2000, following the continued release of prisoners under the Northern Ireland (Sentences) Act 1998. It was these responsibilities that were to largely exclude the NIO from the debate over the future role of the territorial Secretaries of State throughout 2000-2001.

### **The Continuing Roles of the Territorial Secretaries of State**

Much of the debate surrounding the machinery of government prior to the 2001 UK general election concerned the future of the territorial Secretaries

<sup>31</sup> DGN 5 (The Role of the Secretary of State for Northern Ireland) recognises the commitment towards further devolution to Northern Ireland.

<sup>32</sup> Northern Ireland Office 2001, Cm 5122, p8.

<sup>33</sup> *Ibid.* p9.

of State. Indeed within Whitehall (and outside it) views on the future of the offices were polarised, especially with regard to the role of the Secretary of State for Scotland; most civil servants agreed that the office 'brought value' to the devolution settlement, and provided an avenue into Whitehall business for the Scottish administration, but a vocal minority insisted that post-devolution a separate department of state for Scotland simply could not be justified.<sup>34</sup>

Since the transfer of powers from the old Scottish Office to the Executive in Edinburgh it has been alleged that it is becoming increasingly unclear what the actual role of the Scottish Secretary is.<sup>35</sup> The official position is that the Secretary of State remains to ensure the smooth implementation of the devolution arrangements and to oversee relations between Whitehall and Holyrood, and yet since devolution the office has undergone a more profound change. One of us has suggested that during the tenure of John Reid the office became the post of 'Minister for Spin' due to having more time on his hands than fellow cabinet members as a result of a lighter policy burden.<sup>36</sup> These claims were countered by Helen Liddell who asserted that in her first seven weeks in the job she had been 'run ragged.'<sup>37</sup> When the issue was raised at Westminster by the Conservative MP James Gray in a written question, he received a rather terse response:

*Mr Gray:* To ask the Secretary of State for Scotland what discussions she has had with the Prime Minister concerning the future of her department.

*Mrs. Liddell:* I have regular discussions with the Prime Minister on a wide range of issues...<sup>38</sup>

Of the three territorial Secretaries of State, the office of Secretary of State for Scotland remains the most obvious candidate for reform. With the demands of the ongoing peace process in Ireland it would be almost impossible to alter the position of the NIO. While the Welsh Secretary has to represent the interests of the National Assembly in the legislative process at Westminster, the office of Scottish Secretary seems *prima facie* the most redundant. Various suggestions for change were tabled in the run-up to the general election, amid speculation that this was where Blair — notoriously reluctant to tamper with the organisation of Whitehall — would choose to cut. Robert Hazell's argument was that a 'Secretary of State for the Union' could:

... take a more strategic and forward looking view, and lead government thinking on the unresolved issues of devolution: finance, representation at Westminster

<sup>34</sup> Interviews with Whitehall officials, May and July 2001. See also Hazell, 2001, p14.

<sup>35</sup> See Parry and Jones 2000, and James Mitchell, 'Tell us again, what does the Scottish Secretary do?', *The Sunday Times* (Scotland edition), 28 January 2001.

<sup>36</sup> *Ibid.*

<sup>37</sup> 'Liddell 'run ragged' as Scottish Secretary', *The Herald*, 20 March 2001.

<sup>38</sup> House of Commons Written Answers, 3 April 2001, Column 169W.

and the English Question. A combined Secretary of State could also help to ensure mutual learning between the devolved administrations and the UK government from the policy experiments released by devolution.<sup>39</sup>

This was echoed publicly by one other think-tank.<sup>40</sup> The debate surfaced in the media, with reports in the run-up to the UK general election that this would happen.<sup>41</sup> The Tories picked up on the issue too; writing in *Scotland on Sunday*, William Hague, then Leader of the Opposition but using terms that have become familiar through their use by government ministers, outlined the Conservative Party's plans to 'strengthen the Union and improve the government of Scotland.'<sup>42</sup> Hague argued that to ensure a strong voice for Scotland at Westminster and in Europe it would be necessary to retain the post of Secretary of State for Scotland. Labelling any plans to remove, or merge, the offices 'a serious mistake', Hague proposed an increased UK role in Cabinet for the Secretary of State for Scotland allowing the post holder to lead UK delegations at an international level. (It was generally not noticed that Hague planned to combine the office with another Cabinet post, as part of his plans to reduce the overall size of the Cabinet; in reality the SO would have become an appendage to a larger Whitehall department.)

Despite the suggestion that the SO bears a lighter policy load than prior to devolution, the staff of the SO has increased to 107. The WO too has six more staff in April 2001 than it did the previous year, taking its total number up to 46, while the total staff of the NIO has remained static, at 190.

**Figure 8.5. Staff of the territorial offices**<sup>43</sup>

	Northern Ireland Office	Scotland Office	Wales Office
April 2000	190	86	40
April 2001	190	107	46

What do all these people in the SO do? The role of the SO post-devolution is clearly limited. While Westminster legislation has turned out to be more complex than was expected before devolution (see Chapter 9), the bulk of that work falls on the WO rather than the SO. The SO's functions are

<sup>39</sup> Hazell 2001, p5.

<sup>40</sup> See, for example, Hunt, 'Remodelling Government', IPPR, summarised in *The Times*, 16 December 2000.

<sup>41</sup> See 'Blair plans Ministry of Justice in big shake-up of Whitehall,' *The Independent*, 20 March 2001; 'Downing St studies ways to reshuffle ministry pack,' *Financial Times*, 12 March 2001. There have, however, also been reports that the Government's plan to create a Secretary of State for the Union had been 'shelved for the foreseeable future', see for example 'Scotland Minister "has no job to do"', *The Herald*, 19 March 2001.

<sup>42</sup> 'Play the Scottish Card', *Scotland on Sunday*, 4 March 2001.

<sup>43</sup> Sources: SO, 2000, 2001; WO 2000, 2001; figures for the NIO were taken from Civil Service Staffing Statistics, available at [www.cabinet-office.gov.uk/civilservice/index/statistics.htm](http://www.cabinet-office.gov.uk/civilservice/index/statistics.htm) as no comparable figures were contained in the NIO departmental reports.

comparatively limited. One suggestion is that the size of the office was due to empire building by Reid; this is rejected by officials, but a public case why the office needs to be so large has still not been made.

## GOVERNMENT AT THE CENTRE

At the heart of central government lies a small network of officials charged with making sure the whole machine works. For present purposes 'the centre' is treated as the central departments of state — not just the Cabinet Office, and the network surrounding the Prime Minister at 10 Downing Street, but also HM Treasury. However, Number 10 plays only a limited day-to-day role in devolution, and is mainly concerned with aspects of inter-governmental relations. The Treasury too has scaled down its involvement with devolution matters, having only a relatively small team dealing with devolution. The Cabinet Office is, however, a prominent player, not just at the interface with the devolved administrations but also acting as a resource for other Whitehall departments.

### **HM Treasury**

At first glance it appears that the Treasury plays a central part in devolution. In contrast to the legal arrangements, finance remains heavily centralised. Funding is allocated to the devolved administrations according to the Barnett Formula (discussed in detail in Chapter 6), by the UK Government which continues to have sole responsibility in this area. However, the Barnett Formula is simple to administer even if it is complex in its working and effects. The Treasury does have a devolved countries and regions team, but this is small (nine officials). As Chapter 7 discusses, the role of the Treasury in dealing with the devolved administrations is relatively limited — certainly nothing like the detailed control of spending that UK departments face through departmental expenditure controllers.<sup>44</sup> When settlements are relatively generous to the devolved administrations (as with Wales and the funding for Objective 1 in the 2000 Comprehensive Spending Review; see Chapter 6), that happens for political reasons rather than administrative ones. Officials are of course adamant that the Barnett Formula is not open for review or even discussion. While finance remains centralised at the UK level, and for all the power of the Treasury in finance matters, at an administrative level the Treasury is not in fact an active player in devolution.

### **Cabinet Office: The Constitution Secretariat**

Various arms of the Cabinet Office are and have been involved in the management of devolution. Two of the most notable examples are the

<sup>44</sup> See Thain and Wright 1995.

Central Secretariat, with responsibility for civil service staffing, and the European Secretariat, which carries responsibility for EU matters. The most prominent however, has been the Constitution Secretariat.

The Constitution Secretariat was established following the 1997 general election to manage the incoming Labour government's extensive constitutional reform agenda. It was placed at the focal point of the Whitehall machinery dealing with devolution. The Secretariat forged close contacts with the central co-ordination units in each of the devolved administrations, encouraged bilateral contact between departments and the devolved administrations, and rightly saw devolution as a process, not an event.<sup>45</sup> The Constitution Secretariat's website detailed its role as:

- to work alongside departments with lead responsibility for each element of the Government's constitutional reform programme;
- to service the collective decision-making necessary to deliver the Government's objectives;
- to undertake a co-ordinating role in bringing together interested departments and ensuring cohesion across the programme as a whole;
- to act as the secretariat to the Joint Ministerial Committee on Devolution (JMC); and
- to act as the secretariat for the British–Irish Council (BIC).<sup>46</sup>

Co-ordinating the government's constitutional agenda across Whitehall was undeniably necessary, but was in practice more concerned with raising awareness and managing relationships than the implementation of policy. But the additional brokering role with the devolved administrations (see Chapter 7), provided an essential means by which potential disputes could be identified and dealt with without resort to the formal machinery set up under the *Memorandum of Understanding* (MOU).<sup>47</sup> Although prior to devolution, officials at the centre believed that the co-ordination mechanisms set up under the MOU would be regularly invoked to deal with potentially divergent policy positions between the administrations, this has not been the case. The success of the Constitution Secretariat in this management role can be attributed to various factors:

- the simple fact that prior to devolution there were no explicit supervisors of relations between Whitehall departments and the territorial offices;<sup>48</sup>
- consultation between UK departments and the devolved administrations has been encouraged, and has continued between individuals with established working relationships;

<sup>45</sup> Interview with Whitehall Official, May 2001.

<sup>46</sup> [www.cabinet-office.gov.uk/constitution/index.htm](http://www.cabinet-office.gov.uk/constitution/index.htm) (visited June 2001).

<sup>47</sup> Cabinet Office 2000, Cm. 4806.

<sup>48</sup> Interview with Whitehall official, March 2001.



- the devolved administrations have regularly attended meetings in Whitehall and received papers.<sup>49</sup>

Despite the practical change which devolution has effected in Whitehall, the reality of the progression has been one of evolution rather than revolution.<sup>50</sup> Indeed those at the centre remain relaxed about the potential discord which many have predicted will result in the event of a devolved nationalist administration, believing that good working relations at official level can minimise tensions. With the emphasis during 2000-2001 on maintaining working relationships and putting into practice the principles enshrined in the MOU and accompanying concordats, many officials believe that the desire of politicians to provide 'good service', reinforced by established working practices, will enable relations between the four administrations to continue much as they do at present.<sup>51</sup>

### **The Mechanics of Devolution: Devolution Guidance Notes**

Adding to the values of co-operation and consultation inherent in the MOU the Constitution Secretariat has continued to produce DGNs throughout 2000-2001.<sup>52</sup> Though formally only guidance to Whitehall departments and their officials about how to deal with devolution matters, DGNs are as a matter of practice drafted in conjunction with the devolved administrations affected and so represent agreed positions about detailed matters of administration. That means they are particularly useful to outside observers as a guide to how devolution is supposed to work from day to day.<sup>53</sup> A full list is reproduced below.<sup>54</sup>

By the end of July 2001 the only DGN which remained unpublished was DGN 7 (*Court Proceedings regarding Devolution Issues under the Scotland Act 1998 and the Government of Wales Act 1998*). This is perhaps surprising bearing in mind the amount of litigation already heard by the Judicial Committee of the Privy Council under the Scotland Act 1998, and now the first challenge to Scottish legislation has been heard, the Government's seeming lack of progress on this front is perplexing.<sup>55</sup>

Some of the recent DGNs are worth noting. DGN 9, *Post-Devolution Primary Legislation Affecting Wales*, agreed between the UK government

<sup>49</sup> Interview with Whitehall official, June 2001.

<sup>50</sup> Interview with Whitehall official, May 2001.

<sup>51</sup> Interview with Whitehall Official, May 2001.

<sup>52</sup> For details of previous DGNs published see Hazell, 2000, pp. 161-163.

<sup>53</sup> To this extent DGNs can be said, like concordats, to function as 'soft law': see Rawlings 2000.

<sup>54</sup> All DGNs are available on the Cabinet Office website at [www.cabinet-office.gov.uk/constitution/devolution/guidance/dgn.index.htm](http://www.cabinet-office.gov.uk/constitution/devolution/guidance/dgn.index.htm)

<sup>55</sup> For further details of the case see the August 2001 Devolution and the Centre Monitoring Report available on the Constitution Unit website ([www.ucl.ac.uk/constitution-unit/](http://www.ucl.ac.uk/constitution-unit/)). For further details of the cases involving devolution issues heard by the Judicial Committee see Le Sueur and Comes, 2001, pp. 22-24.

**Figure 8.6. Devolution Guidance Notes published at August 2001**

<b>DGN1</b>	Common Working Arrangements (21 January 2000)
<b>DGN2</b>	Handling Correspondence under Devolution (21 January 2000)
<b>DGN3</b>	Role of the Secretary of State for Scotland (21 January 2000)
<b>DGN4</b>	Role of the Secretary of State for Wales (21 January 2000)
<b>DGN5</b>	Role of the Secretary of State for Northern Ireland (27 February 2001)
<b>DGN6</b>	Circulation of Inter-Ministerial and Interdepartmental Correspondence (Revised 23 March 2001).
<b>DGN7</b>	Court Proceedings regarding Devolution Issues under the Scotland Act 1998 and the Government of Wales Act 1998 (to be published)
<b>DGN8</b>	Post Devolution Primary Legislation affecting Northern Ireland (Published April 2001)
<b>DGN9</b>	Post Devolution Primary Legislation affecting Wales (27 February 2001)
<b>DGN10</b>	Post Devolution Primary Legislation affecting Scotland (21 January 2000)
<b>DGN11</b>	Ministerial Accountability after Devolution (28 July 2000)
<b>DGN12</b>	Attendance of UK Ministers and Officials at Committees of the Devolved Legislatures (30 March 2000)
<b>DGN13</b>	Handling of Parliamentary Business in the House of Lords (30 March 2000)

and the Cabinet of the National Assembly, sets down guidance to be followed by Whitehall departments when dealing with legislation affecting the Assembly's responsibilities. Like other DGNs, the document encourages interaction between administrations from an early stage. Although it notes that policy control remains with the UK government, it outlines that the Cabinet of the Assembly must be consulted on Westminster bills which purport to:

- confer new functions on the Assembly;
- alter the Assembly's existing functions (including legislation on, for instance, freedom of information, which would affect the overall discharge of its duties and those public bodies for which it is responsible); or
- otherwise affect areas which are the responsibility of the Assembly, including where it will otherwise be responsible for implementation in Wales, though policy control remains with the UK Government.<sup>56</sup>

Early identification of possible disagreements is fundamental; by the time any proposed legislation reaches the Cabinet's Legislative Programme

<sup>56</sup> DGN 9, para 1.

committee (LP) to gain drafting authority and a commitment for parliamentary time, those issues need to have been addressed and, as far as possible, resolved. The approach is strikingly different to that outlined in DGN 10 on primary legislation for Scotland of a year earlier, indicating a more relaxed view about the practicalities of devolution a year on.

DGN 8, *Post-Devolution Primary Legislation* affecting Northern Ireland, was published by the Cabinet Office in April 2001, and again stresses the importance of co-operation and early consultation. Bearing in mind the sensitive political climate in Northern Ireland it is not surprising that DGN 8 is termed in much stronger language than its Welsh equivalent. While legislative proposals affecting Wales must be referred to the National Assembly, in Northern Ireland similar referrals must be made at the earlier policy stage. The DGN goes as far as to recommend that Whitehall departments should liaise with their Northern Ireland counterparts when ‘considering’ legislation on reserved matters (particularly on matters which may in the future be devolved).

DGNs are complemented by *Devolution in Practice: a checklist for officials*, agreed by members of the four UK administrations and issued in spring 2001. The document offers a set of principles to be referred to by officials during their dealings between administrations and unsurprisingly emphasises communications, consultation and confidentiality. It complements the values enshrined in the MOU and notes the importance of ‘effective and efficient relationships between the administrations’ to make the system work.<sup>57</sup>

### **Remodelling the Centre**

To widespread surprise Blair embarked on a major re-organisation of the machinery of government in the wake of the UK general election. And he did not do the expected — despite all the discussion over the future of the territorial departments and their Secretaries of State, these were almost the only parts of central government to be left untouched.

The change reached far and wide. One effect is that responsibility for constitutional affairs is now divided between just two Whitehall departments: the Lord Chancellor’s department and the Cabinet Office. While the transfer of human rights, freedom of information and data protection from the Home Office to the Lord Chancellor’s department has left the former resembling a Ministry of the Interior, the latter seems to have taken on the role of a Ministry of Justice in all but name.

The creation of the Office of the Deputy Prime Minister following the general election heralds a potential strengthening at the centre of Whitehall. The appointment of John Prescott to the position of ‘Cabinet enforcer,’ a

<sup>57</sup> Available at: [www.cabinet-office.gov.uk/constitution/devolution/devolution.htm](http://www.cabinet-office.gov.uk/constitution/devolution/devolution.htm)

more significant figure than previous incumbents and supported by four ministers,<sup>58</sup> indicates an increased role for Prescott, not least with regard to devolution. Some of the responsibilities are relatively light; the Deputy Prime Minister (DPM) carries ministerial responsibility for the BIC and will deputise when necessary for the Prime Minister at meetings of the Council. As the Council has fallen into disuse during 2000 (see Chapter 7), this is unlikely to be onerous. More important is the fact that Prescott also chairs the new Cabinet Committee on the Nations and Regions (CNR)<sup>59</sup> which replaces the former Devolution Policy (DP) committee chaired by Lord Irvine. CNR has broad terms of reference: 'To consider policy and other issues arising from devolution to Scotland, Wales and Northern Ireland; and to develop policy on the English Regions.'

Prescott also has serious back-up in his new role. Following the general election the Constitution Secretariat has been remodelled and merged into a Devolution and Regions Division of the Cabinet Office's General Policy Group. While retaining general responsibility for managing devolution and its role as secretariat for the Joint Ministerial Committee on Devolution and BIC, the group will also be involved in the production of the White Paper on Regional Governance (and took over officials from the former DETR for this). Devolution has become a free-standing area incorporating aspects of policy on the English regions but separate from the (now largely completed) constitutional reform agenda. Like the Constitution Secretariat — the Devolution and Regions division will be involved primarily in the business of relationships rather than policy, becoming involved when cross-administration issues are at stake, when information or advice on the devolution arrangements are requested, or when the Westminster legislative programme is involved, much as the Constitution Secretariat was. Added to this the DPM's responsibility for the Regional Co-ordination Unit and the nine Government Offices in the Regions, 2001 has seen a significant increase in the number of officials reporting to the Cabinet Office.

With regard to regional government for England, no less than three departments are involved (see also Chapter 5). The Government Offices for the Regions and the Regional Co-ordination Unit will report to the DPM in the Cabinet Office. Responsibility for the Regional Development Agencies has been transferred to Patricia Hewitt at the DTI, with only 'regional policy' remaining at what is now the DTLR). Following this division of

<sup>58</sup> Barbara Roche MP, Christopher Leslie MP, Lord Macdonald of Tradeston and Baroness Morgan of Huyton.

<sup>59</sup> It is chaired by the Deputy Prime Minister and its other members are the Leader of the Commons, the Lord Chancellor, the Home Secretary, the Secretaries of State for Environment, Food and Rural Affairs; Work and Pensions; Transport, Local Government and the Regions; Health; Trade and Industry; Education and Skills; Culture, Media and Sport; Northern Ireland, Wales and Scotland; the Chief Secretary to the Treasury, the Leader of the Lords, the Chief Whip, the Minister without Portfolio, the Attorney General, the Advocate General for Scotland, and the Minister of State at the Cabinet Office (Barbara Roche). The Foreign and Defence Secretaries also receive papers.

responsibility, press reports suggested that after having completed the forthcoming White Paper on English regional government Prescott would hand over the implementation of the policy to Stephen Byers in the DTLR. Regional Government was always going to be the subject of fierce Whitehall turf wars; this division of responsibility can only increase that risk.

Daintith and Page observed in 1999 that, 'The role of the centre is no longer confined to advice and assistance; it is also increasingly one of encouraging and exhorting departments and agencies to move in desired directions.'<sup>60</sup> While the Constitution Secretariat concerned itself with the 'management' of devolution here we may be seeing the development of a more active centre. One of the criticisms of the Constitution Secretariat was that, although it had a clear understanding of the decisions made by the devolved administrations, it was inherently reactive, and not strong enough to exert an influence on the ways in which departments worked.<sup>61</sup> The remodelled centre may indeed prove to be a driving force behind policy on devolution to the nations and regions, if problems over the division of responsibility surrounding devolution to the English regions can be overcome.

## CONCLUSION

Noreen Burrows has noted that in a country 'whose constitutional mantra is that there is no written constitution, the deference to the written word in the devolution process is astonishing.'<sup>62</sup> In addition to the primary legislation itself, there is secondary legislation, written codes and concordats. It is not so much that a formal written constitution is in the making, but that devolution has spawned a substantial written addition to 'the set of laws, rules and practices that create the basic institutions of the state and its component and related parts.'<sup>63</sup> Within the text of concordats and DGNs alone we are seeing a codification of 'the relationship[s] between the different institutions' of the state, a codification which may redefine the operation and study of the United Kingdom constitution in years to come.<sup>64</sup>

Nonetheless, Whitehall has accommodated devolution without too much difficulty. In large measure this is because devolution did not involve a new layer of government but changes in the accountability of an existing structure. Whitehall has long understood that the component parts of the UK are treated differently, that the UK is a union, not a unitary state. Changes that have been introduced post-devolution have built on existing arrangements.

<sup>60</sup> Daintith and Page 1999, p385.

<sup>61</sup> Interviews with Whitehall officials, March 2001, July 2001.

<sup>62</sup> Burrows 2000, p2.

<sup>63</sup> House of Lords Select Committee on the Constitution, *Reviewing the Constitution: Terms of Reference and Method of Working*, 11 July 2001, HL 11, para 50.

<sup>64</sup> *Ibid.*

However, it remains early days. It is too early to say whether the growth of the 'written word' suggests a 'carefully controlled process'<sup>65</sup> or codification embodying a union state.

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<sup>65</sup> *Ibid.*