

CONCORDAT BETWEEN THE SCOTTISH EXECUTIVE AND THE LORD CHANCELLOR'S DEPARTMENT

INTRODUCTION AND GENERAL PRINCIPLES

1. This Concordat sets out the understanding between the Scottish Executive and the Lord Chancellor's Department as to their future relationship. In this Concordat "the administrations" means the Office of the Scottish Executive and the Lord Chancellor's Department. The terms "LCD" and the "Executive" also include their respective Executive Agencies where appropriate.

2. This Concordat is intended to promote constructive co-operation and communication. It sets out a working framework within which Ministers and officials may continue and 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. There should be 'no surprises'. This forewarning should where possible be given in sufficient time to enable representations to be made, and for these to be fully considered.

3. This Concordat is a voluntary arrangement rather than a binding agreement or contract and so does not create any legally enforceable rights, obligations or restrictions. It does not create any rights to be consulted or prevent consultation beyond that required by statute. Any failure to follow the terms of the Concordat is not to be taken as invalidating decisions taken by the administrations. It has been drawn up in accordance with the principles outlined in the Memorandum of Understanding which defines the principles and practices guiding relations between the UK Government and the devolved administrations in Scotland, Wales and Northern Ireland. There are also concordats setting out the framework for co-operation on EU business, international matters and statistics. Where those matters are concerned reference should first be made to those concordats.

4. The administrations will exchange information and inform or consult each other on a wide range of issues in a wide range of situations. The Concordat is not intended to be an exhaustive description of every aspect of the relationship between them, or to preclude communications between them about issues or situations not covered in the Concordat. It is not feasible to prescribe in detail the circumstances triggering a need to invoke the arrangements set out in the Concordat; nor the exact form of communication and timescale involved. The administrations will use their judgment, taking into account the terms of the Concordat, in determining for any given issue the procedures, level of detail and timescale that appear reasonable and appropriate in a given circumstance. This judgment should, however, wherever possible be made in accordance with the general principle set out above of ‘no surprises’.

5. The principal channel of communications between the administrations should be bilateral contact at official or ministerial level. Most issues that affect the responsibilities of the administrations should be capable of resolution at this level. Formal contact at official level will normally take place between the subject area contact points as notified by the administrations. Formal consultation should normally be in writing. It should however be supplemented by regular informal contact wherever possible. This Concordat is framed in terms of the relationship between LCD and the Executive but in some cases the most effective way of conducting business will involve other UK departments or devolved administrations. Where relevant the two administrations will as far as possible abide by the Concordats drawn up between other departments in the four administrations.

DEVOLVED MATTERS

6. Certain matters for which LCD has responsibility are in Scotland devolved to the Scottish Executive. These matters include those listed at Annex A. In relation to such matters the two administrations will:

seek to involve each other, as and when appropriate, in policy formulation

- keep each other informed about developments
- give appropriate consideration to the views of the other and where possible allow a reasonable timescale for proper consideration of comments and representations
- inform each other at the earliest practicable stage of any proposal to change primary and secondary legislation, and to highlight the potential implications for the other's responsibilities;
- inform each other of any relevant information which comes to their attention which may require action by or have resource consequences for the other administration;
- give advance notification at the earliest practicable stage of substantive new policy announcements;
- share information, analysis and research, where such arrangements would be of mutual benefit.

JOINT AND CONCURRENT POWERS

7. These principles will also apply to those matters where the administrations exercise joint and concurrent powers. Joint powers are those where it is a legal requirement for Scottish Ministers and UK Ministers to act in agreement and together, or for UK Ministers to act only after consultation with the Scottish Ministers (or vice versa). Concurrent powers are those which either UK or Scottish Ministers or both will be able to exercise in Scotland.

RESERVED MATTERS

8. In relation to reserved matters for which LCD has the lead within the UK, LCD will inform the Executive as early as possible of proposals on matters likely to be of interest to the Executive. This will as far as possible be done before any public announcement is made, and in sufficient time to enable the Executive to make comments should it so wish and for these to be considered. Such matters include those listed at Annex B.

INTERFACE BETWEEN RESERVED AND DEVOLVED MATTERS

9. The Executive will consult LCD at an early stage when there is a possibility that a proposed policy or decision may relate to reserved matters for which LCD is responsible. This includes any possibility that proposed Scottish legislation might affect such reserved matters. LCD will similarly consult the Executive at an early stage where a proposed policy or decision on reserved matters may affect devolved matters.

JOINT WORKING

10. The administrations may set up, on a voluntary basis, joint working groups or committees where considered appropriate. The form which joint working may take is varied and will be determined by the particular circumstance.

11. Detailed arrangements on matters relating to administrative justice are set out at Annex C.

INTERNATIONAL MATTERS

12. Annexes A and B include responsibilities with regard to international matters. In such matters the two administrations will abide by the arrangements set out in the

Concordats on International Relations and on Co-ordination of European Union Policy Issues.

FINANCIAL ARRANGEMENTS

13. The two administrations will act in accordance with the Statement of Funding Policy, published by Treasury on 31 March 1999.

CONFIDENTIALITY

14. The two administrations will abide by the principles regarding confidentiality set out in the Memorandum of Understanding.

15. Particular considerations apply to consultation between the administrations on appointments, including judicial appointments and appointments to Cross Border Bodies specified under S88 of the Scotland Act 1998. These will be carried out on a confidential basis between named official(s) as notified by the administrations in writing, or their successors as notified from time to time in writing. The administrations will deal with any issue arising under this heading as swiftly as possible so as to meet any deadlines set. Any correspondence involving judicial appointments or re-appointments will be carried out under the cover of "Appointments – In Confidence".

GENERAL ADMINISTRATION

16. The administrations will consult each other where appropriate on correspondence and parliamentary business, and public statements and announcements, in accordance with the arrangements set out in the Memorandum of Understanding and any accompanying guidance.

17. The Executive will inform LCD in advance of public statements which can be prepared well in advance on devolved matters which are the responsibility of LCD in England and Wales, or which impact on reserved matters. LCD will inform the Executive in advance of public statements which can be prepared well in advance on LCD responsibilities which are devolved matters in Scotland or impact on such matters.

18. The administrations will abide by the arrangements set out in the overarching Concordat on Statistics regarding communication on statistics, analysis, monitoring and research.

LEGISLATION

19. Where LCD has a policy interest the Executive will send to the LCD contact point for that policy:

- a copy of primary legislation, both when first published as a Bill and when it has received Royal Assent
- a copy of secondary legislation when made.

REACHING AGREEMENT

20. The administrations are committed as far as possible to handle matters through normal administrative channels, either at official or ministerial level. Every effort will be made to avoid disputes. When this is not possible, disputes will be considered by senior officials, and, if necessary, Ministers to seek a mutually acceptable resolution.

21. Where a dispute cannot be resolved by these means the matter may be formally referred to the Secretariat of the Joint Ministerial Committee, subject to the guidance set out in Agreement on the Joint Ministerial Committee. The administrations will inform the other beforehand of any proposal to involve the JMC and will allow the other to make appropriate representations. The JMC Secretariat will also be consulted at an early stage.

22. The administrations will also inform the other beforehand of any proposal to invoke the intervention powers contained in the Scotland Act 1998, and will allow the other to make appropriate representations.

REVIEWING BILATERAL RELATIONS

23. It will be open to LCD or the Executive to propose alterations to the Concordat at any time to reflect changes in policy or to administrative practice including any changes to the Memorandum of Understanding and overarching Concordats. Annexes may be added, removed or amended as and when the need arises, by agreement between LCD and the Executive. No amendment shall take place without mutual discussion and agreement.

24. This Concordat will be reviewed one year after its agreement by the administrations. The timing of future reviews will then be agreed. The Review will consider the functioning of bilateral relations generally as well as the terms and conditions of the Concordat. It will take place on the basis of brief written reports from each administration to the Permanent Secretary of LCD and the Secretary of the Scottish Executive Justice Department.

**MATTERS FOR WHICH LCD IS RESPONSIBLE IN ENGLAND
AND WALES AND THE EXECUTIVE IN SCOTLAND**

Questions of civil law and in particular the general principles of private law including private international law.

The law of persons, obligations, property and actions and administrative law.

Questions of procedure, jurisdiction and enforcement in civil cases.

The service of process and the taking of evidence in civil cases.

Divorce law.

Private law on children.

Family law.

Parental responsibility.

Parentage.

Representation of children in family proceedings.

Enforcement of family law framework governing pension sharing.

Legal framework for decision-making on behalf of mentally incapacitated adults.

Other family law.

Law reform.

Publicly financed or organised legal services (including legal aid)

The regulation of relations with the legal professions.

Policy on judicial appointments.

The handling of devolution issues in the courts.

Functions in relation to civil judicial co-operation under various international conventions, including those relating to the civil aspects of international child abduction and REMO.

Certain matters relating to administrative justice (including tribunals, inquiries and ombudsmen) (see detailed arrangements at Annex C).

Records management.

Overarching issues relating to the Law Commission and Scottish Law Commission.

ANNEX B

RESERVED MATTERS FOR WHICH LCD ARE RESPONSIBLE WITHIN UK WHICH ARE OF INTEREST TO THE SCOTTISH EXECUTIVE

Judicial salaries and pensions.

Those international matters on which LCD has the lead within the UK.

The structure and composition of the House of Lords Appellate Committee (the final Court of Appeal for Scottish civil law).

Certain matters relating to administrative justice (including tribunals, inquiries and ombudsmen) with regard to reserved matters (for detailed arrangements see Annex C).

TRIBUNALS

1. The Prime Minister has charged the Lord Chancellor with a leading role in relation to tribunals. The Lord Chancellor has responsibility within Government for developing central co-ordination of tribunal questions in England and Wales and, in association with him, the Scottish Ministers exercise corresponding responsibility in Scotland. Where in particular cases there are good reasons for doing so, the Lord Chancellor's Department also exercises administrative responsibilities in relation to individual tribunals

2. The Lord Chancellor has responsibility for the following matters in connection with tribunals:

- Administration;
- Appointments (on his own or in consultation with others); and
- Rules and regulations

In relation to matters concerning tribunals in Scotland for which the Lord Chancellor has responsibility, the principles set out at paragraphs 6 and 7 of the concordat will apply. In addition the principles set out in paragraph 15 apply to tribunal appointments.

i) ADMINISTRATION

3. The Scottish Ministers are responsible for providing staff and premises for the Social Security and Child Support Commissioners and the Pensions Appeals Tribunals and premises for the VAT and Duties Tribunal in Scotland. (*Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc) Order 1999 Schedule 4 paragraph 2*). Where a tribunal other than these, for which the Lord Chancellor has responsibility, wishes to sit in Scotland the Justice Department will assist with arrangements so far as it is able. The Lord Chancellor's Department will keep in touch generally with the Justice Department over developments in the administration of tribunals for which it is responsible in England and Wales which might have an impact in Scotland.

ii) APPOINTMENTS

The Lord Chancellor makes appointments/dismissals

- Appointment of the panel of Chairmen to sit in *Appeal Tribunals constituted under the Social Security Act 1998*.
- Dismissal for incapacity or misbehaviour of Chairmen who sit in *Appeal Tribunals constituted under the Social Security Act 1998*.

The Lord Chancellor makes appointments jointly with the Scottish Ministers

- Appointment of Chairman and members of the Scottish Committee of the Council on Tribunals.

The Lord Chancellor makes appointments/dismissals after consultation with the Scottish Ministers

- Appointment of Chairmen of the *Banking Appeal Tribunal* in respect of Scottish institutions;
- Appointment of Chairman and 2 Deputy Chairmen of the *Copyright Tribunal*;
- Appointment of Chairman and Deputy Chairman of the *Data Protection Tribunal*;
- Appointment of legally qualified members of the *Financial Services Tribunal*, including at least one person qualified in Scots law;
- Appointment of Chairman of the *Friendly Societies Appeal Tribunal* in Scottish cases;
- Appointment/dismissal of *Social Security and Child Support Commissioners*;
- Appointment of a Deputy *Social Security and Child Support Commissioner*;
- Appointment of *Special Commissioners for Income Tax* from the legal profession;
- Appointment of the “appointed person” to hear appeals under the *Trade Marks Act 1994*;
- Appointment of the President of the *Transport Tribunal*;
- Appointment/dismissal of a judicial member of the *Transport Tribunal*;
- Appointment of the President of the *Valued Added Tax (VAT) Tribunals*;
- Appointment of the President of the *Appeal Tribunals constituted under the Social Security Act 1998*.
- Dismissal for incapacity or misbehaviour of the President of the *Appeal Tribunals constituted under the Social Security Act 1998*.

The Lord Chancellor and the Scottish Ministers make appointments

- Panels of chairmen and ordinary members of the *Reserved Forces Appeals Tribunal*;

The Lord Chancellor or the Scottish Ministers make appointments

- Chairman of the *Building Societies Appeal Tribunal*;

The Lord Chancellor determines the duration of appointments after consultation with the Scottish Ministers

- Chairmen and ordinary members of the *Reserved Forces Appeals Tribunal*

iii) RULES AND REGULATIONS

The Lord Chancellor makes rules/regulations after consultation with the Scottish Ministers

- Rules to regulate proceedings in the *Copyright Tribunal*;
- Subject to Treasury approval, rules to regulate fees in the *Copyright Tribunal*;
- Rules relating to appeals to the *General Commissioner of Income Tax*;
- Rules relating to appeals to the *Special Commissioners of Income Tax*;
- Procedural rules for *VAT tribunals* for Scotland;
- Some regulation making powers in relation to determination of questions on appeal to *Social Security and Child Support Commissioners* ;
- Procedural rules in connection with *Social Security and Child Support Commissioners*
- Procedural regulations concerning appeals to the *Social Security and Child Support Commissioners*;
- Regulations concerning procedures before *Social Security and Child Support Commissioners*;
- Regulations relating to appeals from a *Social Security and Child Support Commissioner* on a question of law;
- Regulations delegating functions to nominated officers (*Social Security and Child Support Commissioners*).
- Procedural rules relating to *Transport Tribunals*.

The Scottish Ministers are supported in the exercise of their functions by the Courts Group of the Scottish Executive Justice Department.