

T: 0300 244 4000

E: scottish.ministers@gov.scot

Clare Adamson MSP
Convener
Constitution, Europe, External Affairs and Culture
Committee
Scottish Parliament
Edinburgh
EH99 1SP

By email

21 December 2023

Dear Clare

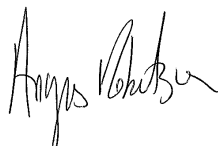
**Constitution, Europe, External Affairs and Culture Committee: Report on How
Devolution is Changing Post-EU**

I am writing to thank the Committee for its excellent report, which is well-informed and unanimous in its conclusions. I have considered these carefully and offer my initial response below: I have grouped my response thematically to address key areas.

I would be happy to return to this response if there are points you would like to consider further after the upcoming parliamentary debate, and once the UK Government has responded to the questions posed by the Committee.

The Scottish Government's view, as I set out below, is that a substantive shift in attitudes and behaviours on the part of the UK Government is a necessary first step if we are to see the structures and processes established by the Review of Intergovernmental Relations to operate fully as intended.

My thanks again to the Committee – the report offers a forensic analysis of the increasing threat to the exercise of devolved responsibilities since Brexit, and the need for a more rules-based, respectful and collaborative system of intergovernmental relations – and I look forward to participating in the debate on 9 January.



ANGUS ROBERTSON

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

Sewel

The Scottish Government shares the Committee's conclusions on the current operation of the Sewel Convention. The Convention is intended to provide the Scottish Parliament with a decision-making role in Westminster legislation for devolved purposes or which changes devolved competence. A Convention which can be observed or not by the UK Government, as it chooses, cannot provide any security to the Scottish Parliament that its responsibilities or views will be respected.

It is essential for the effectiveness of the Convention that it is scrupulously observed where there are disagreements between the Scottish and UK Governments, especially on matters of significance. The opposite has in fact occurred, with the Convention being set aside in areas where there are differences between the Scottish and UK Governments, and the powers and responsibilities of the Scottish Parliament are being adversely affected, notably the Internal Market Act. These are precisely the circumstances in which the Convention was intended as a safeguard for devolution.

It is worth noting that routine breaches of the Sewel Convention are a comparatively recent development: the Convention was observed scrupulously, barring one quickly rectified error, for most of the first two decades of devolution.

Like the Committee, the Scottish Government does not recognise the role the UK Government claims for itself as the government of the whole UK in devolved areas. The devolution settlement effectively transferred all executive functions in devolved matters to the Scottish Government, accountable to the Scottish Parliament. As the Committee observes, there is no category of UK bills identified in the Memorandum of Understanding or Devolution Guidance Note 10 that matches the UK Government's description, which is clearly different from the "not normally" circumstances set out in the Scotland Act.

This approach is an example where the UK Government has unilaterally changed the rules of the UK's constitutional arrangements and the devolution settlement in line with its own views. As the Committee also notes, the UK's constitution relies on the UK Government and Parliament abiding by a "self-denying ordinance".

The Scottish Government is firmly of the view that experience over the last few years demonstrates conclusively that these safeguards are not sufficient to protect Scottish democratic self-government. At the very least, the Sewel Convention should be put on a proper statutory footing to provide some guarantee that the UK Government cannot change the content and operation of the Convention as it chooses, as it is claiming to do currently.

Structures, Governance and the new IGR Landscape

The Review of Intergovernmental Relations (IGRR) was commissioned in March 2018 when Heads of Government agreed that officials should review and report on the existing intergovernmental structures, to ensure they were fit for purpose in light of the UK's exit from the EU. It was published in January 2022 by the UK Government, with all three devolved

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

governments agreeing to use this as the basis for engagement, provided it was kept under review.

It is the view of the Scottish Government that the Review sets out important principles for collaborative working¹ which, if adequately observed, lay the foundations for good intergovernmental working and as such, they will continue to guide our engagement and be the parameters against which we will assess the quality and effectiveness of intergovernmental relations.

The conclusions of the Review also contained a number of practical improvements to the structures and processes that support IGR that are intended to create the conditions for constructive collaboration on common challenges, in a way that is more respectful of reserved/devolved responsibilities such as:

- a fairer and more transparent dispute resolution process;
- an impartial Secretariat staffed from across the governments;
- provision for more regular and frequent meetings with a built in oversight and escalation route and more transparent arrangements for formal intergovernmental meetings – with shared responsibility for agenda setting and chairing meetings.

As the Committee notes, implementation of the proposals set out in the Review has been disrupted by various events, such as the absence of Ministers in Northern Ireland since 2022, and changes of Ministerial responsibility in the UK Government in summer and autumn 2022.

The Scottish Government agrees with the Committee's observation that the Memorandum of Understanding needs to be updated to reflect the new machinery set out in the Review, as well as developments in the post EU-exit landscape. However, the Scottish Government considers that more time is needed to allow the new structures and processes in the Review become fully established, including a more regular pattern of ministerial and official level engagement, so they can be appropriately reviewed.

It is also worth noting that the MoU is an agreement between the four governments and cannot be unilaterally updated. We look forward to the restoration of devolved power-sharing institutions in Northern Ireland so that NI Ministers can engage in any process to review the operation of current IGR structures as well as an update of the MoU. Officials will also continue to engage with the Scottish Parliament officials, through the joint post-Brexit scrutiny working group, to ensure that the scrutiny and reporting arrangements highlighted in your Committee's report are taken into account as the work of the group progresses in the new year.

Although the IGR proposals deliver many elements of what the Scottish Government set out to achieve from the review and offer the prospect of improvements to current processes, these proposals alone will not deliver the step change in attitude and behaviour from the UK

¹ As noted in the Committee's report at para 42, the principles are: maintaining positive and constructive relations, based on mutual respect for the responsibilities of the governments and their shared role in the governance of the UK; building and maintaining trust, based on effective communication; sharing information and respecting confidentiality; promoting understanding of, and accountability for, their intergovernmental activity; and resolving disputes according to a clear and agreed process.

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

Government that is needed if there is to be a genuine improvement in intergovernmental relations.

As the government has repeatedly highlighted, the UK Government's handling of Brexit, and imposition of the UK Internal Market Act 2020, despite explicit refusal of consent under the Sewel convention, show that procedural improvements alone are not enough on their own to reset the relationship between governments.

The real test will be whether the UK Government is capable of delivering the goodwill and trust for improved intergovernmental relations and that the proposed arrangements lead to more meaningful engagement with productive outcomes. The evidence so far suggest that procedures and processes, however well designed, can only be effective if they are applied with good faith and consistently by all parties.

Common Frameworks and the Internal Market Act

The Scottish Government would challenge the Committee's view that there is complete agreement between the administrations on frameworks being the correct mechanisms for managing regulatory divergence post-EU. If this were this the case, it is unclear why the UK Government felt it necessary to impose the Internal Market Act, which is entirely incompatible with the principles and approaches fostered through Common Frameworks.

However, we note that all four governments of the UK are still engaged in the Common Frameworks programme. We agree that frameworks, and specifically, the agreed principles under which they are intended to operate, offer the best extant model for managing the practical regulatory consequences of a devolved UK operating outwith the harmonising effect of EU law.

The purpose of common frameworks is set out in the statement of principles agreed at JMC (EN) in October 2017². In the Scottish Government's view these principles, if adhered to, can support a balanced and proportionate approach to ensuring regulatory coherence across the UK, while at the same time respecting the powers and autonomy of all governments, and their respective legislatures, in respect of devolved matters previously subject to EU law.

The Scottish Government does not believe that a wholesale review of the purpose of common frameworks is required at the moment. Rather, we would like to see a renewed commitment from all parties to Common Frameworks and adherence to the agreed 2017 statement of principles, which balance the need for a functioning internal market with respect for devolution. Confusion as to how frameworks operate can be best addressed with greater consistency and application of agreed common frameworks processes.

The Scottish Government's view of how the UK Internal Market Act's Market Access provisions should interact with the operation of Common Frameworks is clear: the Act is wholly irreconcilable with the principles and approaches fostered by Common Frameworks. Mutual recognition and non-discrimination principles are common features of internal market regimes around the world, most notably the European Single Market. However, in other

2

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/652285/Joint_Ministerial_Committee_communique.pdf

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

regimes these principles are balanced by the principles of consent, co-design, proportionality (i.e. sufficiently wide exclusions to recognise that other policy objectives may sometimes carry more weight than market access), subsidiarity, formal equality between parties, and appropriate protections for local powers and autonomy.

The IMA lacks all these essential characteristics of a well-functioning and sustainable internal market. The frameworks exclusions provisions which UK Ministers agreed to in December 2020³ can offer a degree of mitigation and protection from the Act's effect. However, the process can only function if all parties adhere to the rules and do not seek to misrepresent what is required to agree an exclusion.

In relation Parliamentary and stakeholder scrutiny and oversight of the operation of Common Frameworks and the IMA exclusions process, the Scottish Government agrees that there is a need for transparency: we are committed to alerting the Parliament at the earliest opportunity where engagement is planned or underway on managing substantive policy divergence issues through a Common Framework, including engagement to agree an IMA exclusion. We can see that most recently in the case of a proposed ban on sale of glue traps in the Wildlife Management and Muirburn (Scotland) Bill, a matter lying outside a common frameworks, but where an IMA exclusion is required in the Scottish Government's view.

On the issue of a supplementary agreement on Common Frameworks and the operation of the IMA, including exclusions, as part of a new MOU: the Scottish Government has no issue in principle to exploring this proposal further. However, as already noted, new structures and agreed processes can only have limited value unless they are rigorously adhered to by all parties. Where existing constitutional norms and conventions, and associated structures and processes, are routinely disregarded, we see little merit in developing yet further systems until there is an appreciable shift in attitudes and behaviours, including consistent adherence to current norms.

Delegated Powers and Scrutiny

The Scottish Government recognises the Committee's concerns at the unprecedentedly complex scrutiny challenges the Scottish Parliament has faced since Brexit, including powers to make secondary legislation in devolved areas which UK Ministers are taking for themselves.

We recognise the merit in the committee's recommendations regarding new intergovernmental agreements on how the use of delegated powers should work, and particularly in recognising the constitutional principles that:

- devolved Ministers are accountable to their respective legislatures for the use of powers within devolved competence; and

³ <https://hansard.parliament.uk/Lords/2020-12-15/debates/30D48FC1-D74D-4627-8045-405C01172EAA/UnitedKingdomInternalMarketBill> . See also the agreed exclusions process published a year later: <https://www.gov.uk/government/publications/process-for-considering-ukim-act-exclusions-in-common-framework-areas>

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

- the Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence.

These principles are fundamental to the effective operation of the devolution settlement. On one level, they are so self-evident that they should not require articulation.

The Scottish Government accepts that UK wide powers can be appropriate when there is, for example, a mixture of devolved and reserved powers involved, or there is merit in a UK or GB wide approach. However, the Scottish Government also recognises that devolved responsibility should be respected in designing and using such powers.

The Scottish Government will always argue for statutory requirements for consent from Scottish Ministers in these circumstances, although on occasion we may recommend legislative consent to other arrangements where these are acceptable: the Electronic Trade Documents Act 2022 was an example of where consent was granted in these circumstances

As noted above, Scottish Government officials will continue to engage with the Scottish Parliament to ensure that the Committee's report is taken into account as this work progresses in the new year.

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

The Scottish Parliament, Edinburgh EH99 1SP
www.gov.scot

a b c d ~~efg~~ a