

## CONSTITUTION, EUROPE, EXTERNAL AFFAIRS AND CULTURE COMMITTEE

8<sup>th</sup> Meeting, 2023, Session 6

9 March 2023

**How is Devolution Changing Post-EU?**

1. The Committee concluded in its report on [The Impact of Brexit on Devolution](#) that there are fundamental concerns which need to be addressed in relation to how devolution works outside the EU.
2. The operation of the Sewel Convention, which the Committee views as being 'under strain', and the use of delegated powers in devolved areas are two significant areas in which the Committee believes devolution has begun to evolve following Brexit.
3. The Committee's recent scrutiny of Legislative Consent Memorandums (LCMs) for the [Northern Ireland Protocol Bill](#) and [Retained EU Law \(Revocation and Reform\) Bill](#) has highlighted the need to re-set the constitutional arrangements within the UK following EU withdrawal, both in respect of relations between the UK Government and the devolved governments and between the four legislatures and governments across the UK. The Committee's view is these relations are clearly not working as well as they should and this needs to be addressed.
4. Furthermore, the Committee's report on [The UK Internal Market](#) concluded that while the UK Internal Market Act has sought to address the tension between open trade and regulatory divergence within the UK that has arisen from the UK leaving the EU, it has led to tensions within the devolution settlement.
5. The Committee recognises that Common Frameworks have the potential to resolve the tensions within the devolved settlement through managing regulatory divergence on a consensual basis while facilitating open trade within the UK internal market. But the Committee believes there is a risk that the emphasis on managing regulatory divergence at an inter-governmental level may lead to less transparency and Ministerial accountability and tension in the balance of relations between the Executive and the Legislature. The Committee is concerned that this may result in reduced democratic oversight of the Executive and a less consultative policy-making process.
6. Through its inquiry [How is Devolution Changing Post-EU?](#) the Committee is now looking to explore how devolution is changing, and, importantly, how devolution should now evolve to meet the challenges and opportunities of the new constitutional landscape.

7. The [call for views](#) on this inquiry closed on 30 November 2022. It focused on the following questions, which the Committee will explore through the course of its inquiry—
  - How is devolution now working following the UK's departure from the EU, including the policy-making and legislative processes?
  - How should devolution evolve post EU exit, to meet the challenges and opportunities of the new constitutional landscape?
  - How much scope there is for regulatory divergence in areas such as environmental standards, food standards and animal welfare between each of the four parts of the UK;
  - Are there sufficient safeguards to allow regulatory divergence across the four parts of the UK in areas where there are disagreements between governments?
  - Are there sufficient safeguards to ensure an open and transparent policy-making and legislative process in determining the post-EU exit regulatory environment within Scotland and how it relates to the rest of the UK?
8. At this meeting, the Committee will take evidence from—
  - **Professor Hugh Rawlings**, Welsh Government Director for Constitutional Affairs and Inter-Governmental Relations 2004-2020;
  - **Dr Andrew McCormick**, Retired Northern Ireland Civil Service Permanent Secretary and Lead official on Brexit for the NI Executive 2018-2021;
  - **Philip Rycroft**, Permanent Secretary at the Department for Exiting the EU 2017-2019, and Senior civil servant Cabinet Office official on devolution 2012-2019 (virtually);
  - **Professor Jim Gallagher CB FRSE**, Director General for Devolution, Cabinet Office/Ministry of Justice 2007-2011, and Honorary Professor, Centre for Constitutional and Legal Research; and
  - **Paul Cackette**, Former Scottish Government Director.
9. This will give the Committee an opportunity to consider the views of former officials across the UK and devolved Governments on how devolution is operating and how it should evolve to meet the challenges and opportunities of the post-EU constitutional landscape.
10. The following papers are attached—
  - **Annexe A:** Summary of the work of the CEEAC Committee to date on devolution in the post-EU constitutional landscape.
  - **Annexe B:** Written submission from Professor Jim Gallagher.
  - **Annexe C:** Written submission from Paul Cackette.

## Summary of the work of the CEEAC Committee to date on devolution in the post-EU constitutional landscape

1. The Constitution, Europe, External Affairs and Culture (CEEAC) Committee concluded in its report on [The Impact of Brexit on Devolution](#) that there are fundamental concerns which need to be addressed in relation to how devolution works outside the European Union (EU).
2. In its consideration of the UK internal market, the Committee also identified three significant and interrelated tensions arising from and/or exacerbated by the UK leaving the EU—
  - Tension between open trade and regulatory divergence;
  - Tension within the devolution settlement; and
  - Tension in the balance of relations between the executive and the legislature.
3. Building upon its work thus far in Session 6, the Committee is now looking to explore through its inquiry [How is Devolution Changing Post-EU?](#) how devolution is changing, and, importantly, how devolution should now evolve to meet the challenges and opportunities of the new constitutional landscape.
4. This paper provides a short summary of the key themes arising from the Committee's work on devolution in the post-EU constitutional landscape.

### Regulatory divergence

5. A key question for the Committee and for the Scottish Parliament has been the extent to which there might be regulatory divergence between Scotland and the rest of the UK in the post-EU landscape, and the extent to which the devolution settlement is robust enough to accommodate this divergence dynamic.
6. In the Committee's report on [The Impact of Brexit on Devolution](#), it noted that there are substantive differences between the views of the UK Government and the Scottish and Welsh Governments regarding future alignment and divergence with EU law, and that this therefore raises a number of fundamental constitutional questions for the Committee and the Parliament—
  - To what extent the UK can potentially accommodate four different regulatory environments within a cohesive internal market and while complying with international agreements;
  - Whether the existing institutional mechanisms are sufficient to resolve differences between the four governments within the UK where there are fundamental disagreements regarding alignment with EU law and while respecting the devolution settlement;
  - How devolution needs to evolve to address these fundamental questions.

7. In scrutinising the LCM for the Retained EU Law (Revocation and Reform) Bill, the Committee also considered that the Bill could accelerate this regulatory divergence within the UK internal market, and between the UK and the EU.

#### *UK Internal Market Act*

8. The Committee recognises the significant economic benefits of the UK internal market and open trade. However, it also believes that it would be regrettable if one of the consequences of the UK leaving the EU is any dilution in the regulatory autonomy and opportunities for policy innovation, which has been one of the successes of devolution. In resolving the tension between open trade and regulatory divergence, the Committee views it as being essential that the fundamental principles which underpin devolution are not undermined.
9. The UK Internal Market Act 2020 (UKIMA) seeks to address the tension between open trade and regulatory autonomy. UKIMA established two market access principles to protect the flow of goods and services in the UK's internal market post-Brexit—
  - The principle of mutual recognition, which means that goods and services which can be sold lawfully in one nation of the UK can be sold in any other nation of the UK; and
  - The principle of non-discrimination, which means authorities across the UK cannot discriminate against goods and service providers from another part of the UK.
10. UKIMA operates by disapplying legislation in one part of the UK which would prevent market access to goods and service providers which comply with the law in another part of the UK.
11. The Committee has recognised that while the UKIMA market access principles do not introduce any new statutory limitations on the competence of the Scottish Parliament or Scottish Ministers, they can automatically disapply Scottish legislation. While UKIMA may not affect the Scottish Parliament's ability to pass a law, it may have an impact on whether that law is effective in relation to goods and services which come from another part of the UK.
12. It is the Committee's view that UKIMA places more emphasis on open trade rather than regulatory autonomy compared to the EU Single Market, and that this has led to tensions within the devolution settlement.

#### *Common Frameworks and the UKIMA exclusions process*

13. The Committee recognised that Common Frameworks have the potential to resolve the tensions within the devolved settlement through managing regulatory divergence on a consensual basis while facilitating open trade within the UK internal market.

14. However, the Committee believes there is a risk that the emphasis on managing regulatory divergence at an intergovernmental level may lead to less transparency and Ministerial accountability, and tension in the balance of relations between the Executive and the Legislature.
15. It has also expressed concern that this may result in reduced democratic oversight of the Executive and a less consultative policy-making process. The Committee's view is that there is therefore a need to re-examine the UK's approach to intergovernmental relations within the context of Common Frameworks.
16. Common frameworks provide a mechanism for agreeing and managing divergence; however, in subject areas covered by UKIMA, the powers ultimately lie with UK Ministers to make exclusions from the market access principles. Under UKIMA, UK Ministers have powers to make exclusions from the market access principles where divergence is agreed through a Common Framework. There is an agreed intergovernmental process for considering such exclusions (and there is one already in place on single-use plastics).
17. The Committee welcomed the intergovernmental agreement on a process for seeking exclusions from the market access principles. However, it noted that there is very little detail in the public domain in relation to how this will work, no requirement for public consultation or parliamentary scrutiny of the process for seeking an exclusion, and neither is there any requirement for proposed exclusions to be made public.
18. The Scottish Government stated in its response to the Committee's report on the UK Internal Market that where "an exclusion from the provisions of the UK Internal Market Act is necessary to ensure the policy effect of devolved legislation, that will be made clear by the Scottish Government to the Scottish Parliament, in order to allow for proper consideration of the exclusion by interested parties."
19. When scrutinising the Retained EU Law Bill, the Committee also considered that the Bill provided insufficient time for the intra-UK divergence that is likely to be accelerated by the Bill to be managed through Common Frameworks and the UKIMA exclusions process, and that this could present uncertainty regarding the impact of decisions taken by Scottish Ministers to preserve REUL before the sunset, including the extent to which devolved assimilated law – REUL which remains on the statute book after 31 December 2023 – could be affected and disapplied by the UKIMA market access principles.

## Sewel Convention

20. The operation of the Sewel Convention—the mechanism for obtaining the consent of the devolved legislature where the UK Parliament intends to pass primary legislation in a devolved area—is one significant area in which the Committee has identified that devolution has begun to evolve following Brexit.
21. The Committee heard a consensus view that prior to Brexit, the Sewel Convention had worked effectively. Before 2018, the UK Parliament had never passed legislation without consent in a situation where the UK Government considered the relevant provisions of a Bill to fall within the scope of Sewel.
22. However, since 2018, a number of Brexit-related Bills have been passed at Westminster without the consent of at least one of the devolved legislatures. The Scottish Parliament has withheld consent in relation to the following—
  - The European Union (Withdrawal) Act 2018;
  - The European Union (Withdrawal Agreement) Act 2020;
  - The European Union (Future Relationship) Act 2020;
  - The UK Internal Market Act 2020;
  - The Professional Qualifications Act 2022; and
  - The Subsidy Control Act 2022.
23. A key theme of our work has been the extent to which the UK's withdrawal from the EU and the subsequent impact on the UK's internal constitutional dynamics has exposed the limitations of the Sewel Convention, with considerable and continuing disagreement between the UK Government and the devolved governments and parliaments.
24. The concerns that have emerged from our overall work examining the operation of the Sewel Convention following Brexit are two-fold—
  - The extent of the UK Government consultation with devolved governments on legislative proposals affecting devolved matters prior to the introduction of Bills at Westminster; and
  - The number of Bills at Westminster which are proceeding without the consent of the devolved legislatures.
25. The Committee believes that the Sewel Convention is under strain following Brexit and has noted the view that without reform, “there is a risk of the convention, and the legislative consent process that puts Sewel into practice, collapsing altogether.” The Committee's scrutiny of the LCM for the Northern Ireland Protocol Bill later reinforced its view that the Sewel Convention is under strain following Brexit.

26. Furthermore, in its report on the LCM for the Retained EU Law Bill, the Committee expressed concern that there appeared to have been limited engagement by the UK Government with the Scottish and Welsh Governments regarding devolved consent for the Bill. In the Committee's view, this would seem to be another example of the intergovernmental process, which is integral to the proper functioning of the Sewel Convention, not working as intended.
27. The Committee has highlighted the need to re-set the constitutional arrangements within the UK following EU withdrawal, both in respect of relations between the UK Government and the devolved governments and between the four legislatures and governments across the UK. The Committee's view is these relations are clearly not working as well as they should and this needs to be addressed.
28. There is also need for a much wider public debate about where power lies within the devolution settlement following the UK's departure from the EU. In particular, this needs to address the extent of regulatory autonomy within the UK internal market. The Committee's view is that any reform of the Sewel Convention needs to flow from the outcome of this discussion which also needs to be inter-parliamentary.

### **Delegated powers**

29. Another area in which the Committee has identified that devolution has begun to evolve following Brexit is the significant step change in the approach to the use of delegated powers during the preparations for EU exit and its aftermath.
30. When the Scottish Parliament was established in 1999, UK Ministers' powers to make secondary legislation in devolved areas were transferred to Scottish Ministers with only a few exceptions. A key exception was the power to make secondary legislation that implemented EU obligations. Before EU exit, UK Ministers regularly used that power, with the Scottish Government's consent. However, that power was for implementing policy decisions that had been agreed at EU level rather than implementing the UK/Scottish Governments' own policy. The UK Government did not generally have powers to make secondary legislation in devolved areas and did not often do so.
31. However, new powers that are exercisable within devolved areas were conferred on UK Ministers by primary legislation which deals with EU withdrawal, for example the EU (Withdrawal Agreement) Act 2020, and by primary legislation which deals with the new relationship between the UK and the EU, and other post-EU primary legislation, such as the EU (Future Relationship) Act 2020, the Agriculture Act 2020, and the Fisheries Act 2020. The result being that more secondary legislation which is within the Scottish Parliament's competence may be made in the UK Parliament rather than in the Scottish Parliament.

32. The Committee has highlighted that there is a considerable difference between delegated powers being conferred on Ministers to deliver a legal obligation to comply with EU law and delegated powers in the same policy area without this constraint.
33. In the Committee's report on [\*The Impact of Brexit on Devolution\*](#), it identified two significant areas of concern regarding delegated powers—
- The scope of delegated powers being conferred on UK Ministers in devolved areas and on Scottish Ministers where these powers are concurrent; and
  - Consent to the use of powers by UK Ministers in devolved areas, with the Sewel Convention not applying to secondary legislation.
34. The scope of delegated powers being conferred by the Northern Ireland Protocol Bill and the Retained EU Law Bill was central to the Committee's scrutiny of the LCMs for these Bills. It took the view that, within the wider context of the scope of delegated powers in other Bills related to the UK leaving the EU, these powers presented a significant risk to the balance of power between the executive and the legislature both at a UK and devolved level.
35. The Committee's view is also that the extent of UK Ministers' new delegated powers in devolved areas amounts to a significant constitutional change, a view which it has reiterated in its reports on the LCMs for the Northern Ireland Protocol Bill and Retained EU Law Bill.
36. It has considerable concerns that this has happened and is continuing to happen on an ad hoc and iterative basis without any overarching consideration of the impact on how devolution works. This raises a number of questions which require further detailed scrutiny—
- Whether it is appropriate for UK Ministers to have considerable new delegated powers in devolved areas without any overarching consideration of the impact on how devolution works;
  - To what extent there is a risk to the Scottish Parliament's legislative and scrutiny function from the post-EU increase in the size and use of delegated powers both at a UK level in devolved areas and by Scottish Ministers;
  - How the post-EU limitations of the Sewel Convention need to be addressed in considering the effectiveness of legislative consent mechanisms for secondary legislation.
37. The Committee believes there is an urgent need to address the ad hoc and inconsistent approach to consent mechanisms for the exercise of delegated powers by UK Ministers in devolved areas. Different approaches have been adopted across EU-exit related legislation, with some Bills, including the

Northern Ireland Protocol Bill and Retained EU Law Bill, having no requirement to seek the consent of the Scottish Government or Scottish Parliament before exercising delegated powers in devolved areas.

38. The Committee's view is that it is a fundamental constitutional principle that the Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence.

**CEEAC Committee Clerks**  
**March 2023**

***Brexit, the Sewel Convention and the Constitutional Status of the Scottish Parliament***

***Evidence to the Constitution, Europe, External Affairs and Culture Committee***

***Professor JD Gallagher CB FRSE***

***February 2023***

An important effect of the way in which Brexit was implemented by the then UK government was that the Sewel convention, which manages the boundary between devolved and reserved legislative powers, was breached on several occasions. This was both undesirable and unnecessary: undesirable because it undermines the status of the devolved institutions, and unnecessary because it would have been possible to implement Brexit a way which did not do so. Choosing not to do so was indicative of constitutional carelessness.

This short note explains the convention's background and significance, and sets out how to ensure that it is safeguarded against such governmental interference in future.

*A little history*

Sewel was enunciated during the passage of the Scotland Act 1998, to reconcile the apparent contradiction between the British tradition of Parliamentary sovereignty – that Parliament can legislate on anything, and a subsequent Parliament can overrule a previous one - and the creation of democratically legitimate devolved legislatures.

It took the form of a constitutional convention. All constitutions, even the most fully codified, rely to a degree 'unwritten' conventions about how they operate in practice. But since the UK constitution is famously uncodified, conventions matter a great deal here, and can even be seen as more powerful than legislation. For example, only convention says that the party which can sustain a majority in the Commons forms a government. So seeking to regulate the devolved/ reserved boundary by convention was not an unreasonable thing to do.

Indeed for 20 years or more the convention operated well. As originally enunciated it related only to legislation on devolved matters, but it was extended swiftly in practice to legislation altering devolved powers<sup>1</sup>. Thus all the primary legislation extending devolved power was passed only with the consent of the Scottish Parliament.

In 2016 the convention was given a somewhat firmer status by referring to it in an Act of Parliament alongside a declaratory provision confirming devolution as a permanent part of the UK constitution. This made it statutory in one sense; but the Act simply acknowledges to the convention's existence, and does not place explicit or additional legal constraints on government or Parliament. As a result, and because of the drafting of the convention (which has always included the word "normally", suggesting it may not apply in exceptional circumstances) the Supreme Court concluded that the convention was not enforceable by the courts. This was a disappointment, as it implied that Parliament's statutory acknowledgement of the convention had no effect.

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<sup>1</sup> By analogy with the provisions in the Scotland Act which allow for the alteration of devolved powers by Order in Council, which also require consent. The detailed operation of the convention is set out in administrative guidance.

*The constitutional function of the Sewel convention*

Sewel is more important than it sounds. It is not just a pragmatic sharing out of tasks. (“Don’t keep a dog and bark yourself.”) Instead it seeks to give constitutional permanence to the Scottish Parliament and its powers, to match the political reality of their permanence, despite the doctrine of Parliamentary sovereignty. A core idea of federalism is that under the constitutional rules each level of government has power and responsibilities that are its own alone. Sewel was intended to achieve that outcome for devolution in the UK. Unthinkingly overriding it in pursuit not of Brexit (the convention would not have empowered Holyrood to prevent the UK leaving the EU) but of a particular, centralised, way of implementing it was a piece of constitutional carelessness. It now needs to be repaired. This note explains how, and how that fits into wider constitutional change.

*Statutory force for Sewel, and constitutional protection for that statute*

The Sewel convention should now be given full statutory force, so that no law can be made or have effect which alters devolved law or powers unless the consent of the devolved legislature has been secured to it<sup>2</sup>. That would achieve the desired result but the challenge is that a sovereign Parliament could simply either repeal such a law or disapply it in any given case.<sup>3</sup> The UK needs a new kind of constitutional protection for the statute which gives effect to the Sewel convention, and other constitutional statutes as well.

Most countries have written, codified, constitutions so that constitutional laws have a different status from ordinary laws, and the procedure for changing them is different and more difficult than for ordinary legislation<sup>4</sup>. Constitutional laws are, in the jargon, ‘entrenched.’ But the British tradition is different. The courts acknowledge that some laws are constitutional in nature, but they can be amended or even repealed by Parliament just like any other law.

This is not necessarily a bad thing, as a balance has to be struck between constitutional rigidity and flexibility. Traditional defenders of the British constitution have favoured the latter, relying on the force of conventions and (implicitly) the good sense of the British political class – what Prof Peter Hennessy called the ‘good chap’ theory of government to ensure stability. But today the reality is that, in the absence of a genuinely powerful second chamber, the principle of Parliamentary sovereignty has become in practice the sovereignty of a Commons majority – famously described by Quintin Hogg as an ‘elective dictatorship’ – and conventions

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<sup>2</sup> The precise drafting would be for Parliamentary Counsel, but “*No law shall have effect which is within the legislative competence of the Scottish Parliament or alters its powers except by it or if its consent to the making of the law has been secured.*” is one possible formation. Note this applies to secondary as well as primary legislation, and applies in all circumstances not just normally. It would enable disputed or borderline cases to be determined by the courts,

<sup>3</sup> Eg pass a law saying “*notwithstanding the provisions of [the Sewel statute] these devolved laws are amended as follows....*”

<sup>4</sup> Changing the US constitution is for example in modern political circumstances exceptionally difficult. So for example the million electors of Rhode Island chose as many US senators as the 40 million Californians.

and unwritten norms have not constrained it. The behaviour of Boris Johnson's administration demonstrated that beyond argument.

Some as a result argue for a wholly codified UK constitution, allocating and entrenching power as other places do, but that is at least for now unreachable. I instead have proposed new powers for a reformed second chamber of Parliament to be able to reject legislation which breaches constitutional norms (such as the Sewel convention) so as to give constitutional protection, a form of 'political entrenchment', to Scottish devolution and other constitutional laws. This would be a big change to UK constitutional practice, but it is entirely consistent with the principle of Parliamentary sovereignty, and distinguishes it from the untrammelled power of a Commons majority. It implies of course reform to create a democratically legitimate second chamber with a different composition and electoral basis from the Commons.

These ideas have been accepted by the Labour Party's Commission on the Future of the UK and are likely to be the policy of an incoming UK Labour government. They are a direct response to the damage which the Brexit process has done to the underlying structure of the devolution settlement and I commend them to the Committee.

## CONSTITUTION, EUROPE, EXTERNAL AFFAIRS AND CULTURE COMMITTEE

### EVIDENCE SESSION – 9 MARCH 2023

#### WRITTEN SUBMISSION – PAUL CACKETTE

##### *Introduction*

1. My name is Paul Cackette. I am a retired Scottish Government civil servant. Prior to my retirement in January 2021, I worked in a range of roles in the Scottish Government and its predecessors. I was appointed to the Senior Civil Service in 2000.
2. In my work with the SG-
  - a) I held a number of roles in the Legal Directorate, including as Legal Secretary to the Lord Advocate, Deputy Solicitor to the SG and then from May 2018 to June 2019 Interim Director of Legal Services and Head of the Government Legal Service in Scotland;
  - b) I held a range of policy posts, including Head of Civil Justice and International Division (with responsibility for Justice and Home Affairs (JHA) portfolios of the EU) and Chief Planning Reporter. Prior to retiring, I was redeployed to Covid work, initially as Director PPE and then Director of Outbreak Management.
3. Since retiring, I have been appointed as Visiting Professor of Public Law at Strathclyde University.
4. On 10 February, I was invited to give evidence to this Committee, in light of my past experience as above as a follow up to its Report “The Impact of Brexit on Devolution” on the basis that-

*“The Committee is now looking to explore how devolution is changing, and, taking a solutions-focused approach, how devolution should now evolve to meet the challenges and opportunities of the new constitutional landscape.*

*This includes how it should evolve in response to some the challenges that the Committee has already considered and highlighted in its previous reports and scrutiny, such as with regards to: the Sewel Convention, delegated powers, where power lies within the devolution settlement, regulatory divergence, and intergovernmental relations.”*

5. Although I am now a former employee of the SG and, as above, have not been close to policy thinking in effect since June 2019, I am happy to assist the Committee as much as I can and summarise an outline of my response to those questions as follows.

##### **Report on “The Impact of Brexit on Devolution”**

6. I read this Report with interest and agree its findings and conclusions.
7. In particular-

- I share the concerns as to the way in which the use of Legislative Consent Motions has developed;
- I would be concerned if powers under the Internal Market Act 2020 were used to constrain the ability of the SG, if thought fit, to keep pace with appropriate developments under EU law (so far as relating to devolved matters), on the basis of maintaining regulatory alignment within and across Great Britain;
- Specifically I see no reason why maintaining regulatory alignment is essential for Scottish businesses except (arguably) where they wish to trade in the rest of the UK but not anywhere in the EU; and
- in principle I do not understand why, under the Internal Market Act and the Subsidy Control Act 2022, there seems to be a presumption that maintaining regulatory alignment equates to alignment with the framework determined by the UK administration and Parliament, ahead others.

***Where power lies within the devolution settlement and intergovernmental relations***

8. I would indeed go further as, in my view, the Scottish devolution settlement is at a watershed moment.

9. This is partly as we navigate the post-Brexit environment, but - as importantly as that - is due to two factors-

- Attempts to ascertain the “settled will” of the Scottish people in a way that can enjoy a consensus have reached the end point of traditional thinking. This is evidenced by the outcome of the IndyRef2 decision by the Supreme Court and the fact that the model of meeting concerns since 1998 (ie by giving more and more powers to the SP) has run out of road. Though some are identified in the Brown Report, there are few appropriate powers now left to devolve and no evidence that such a model has in fact worked; and
- Though not a direct consequence of Brexit, the use by the UKG of, or their view that there was a need to use, section 35 to block the Gender Recognition Reform (Scotland) Bill instead of using other legislative or engagement/policy means to address the concerns set out in their Statement of Reasons raises questions - beyond political reactions and views on the policy - about proper administration by and interactions between both Governments.

10. I recognise that the political will may not exist at this point to shift either dial, but in my view the work of this Committee is essential in exploring what changes might be possible in all these regards.

11. My interest in this issue relates primarily to the operation of inter-governmental relations. Others are better placed than me to discuss more fundamental structural options worthy of exploration.

12. I can speak from my practical experience as a lawyer and as a policy lead (including from times when the UK were part of the EU, as representing Scottish interests in the UK

JHA negotiation team) about the challenges, mechanics and reasons why and how inter-governmental relations can work or fail.

13. Michael Keating's Paper on inter-governmental relations very usefully sets out the development of dispute resolution processes. I agree with much of that paper and the work attached to it, especially the Paper comprising a comparative overview prepared in 2015 for the Devolution (Further Powers) Committee.

14. My interest is how, ahead of the stage being reached that a dispute is recognised or triggered, such relations can be improved to ensure better joint working in support of policy outcomes (primarily not of a constitutional nature) where interests are shared or overlap, by way of ensuring the right level of co-operation and intervention at the right time. The aim would thereby be to limit to need for recourse to inter-governmental relations mechanisms as part of dispute resolution processes and provide channels for joint resolution of policy challenges short of "nuclear options" such as the use of section 35.

15. While recognising considerable challenges to improving joint working, possible structural options in pursuance of that aim include-

- an enhanced (or separate) protocol for joint working between administrations as a means of securing timeous, policy informed, consistently applied and transparent engagement in areas of common interest, designed to identify consequential or implementation effects or implications crossing boundaries<sup>5</sup> and work together towards on awareness raising and the resolution or identification of shared understandings (including with appropriate escalation procedures short of but ultimately feeding into inter-governmental relations mechanisms as part of dispute resolution processes), subject to Parliamentary consideration and stakeholder views in due course;
- an enhanced Parliamentary committee scrutiny system of issues at bullet 1, reporting, in the case of a Bill, to the lead Committee for the Bill, building on the Delegated Powers and Law Reform Committee, but going beyond delegated *powers* and addressing the above consequential or implementation effects or implications both where crossing boundaries within the wider UK context and in the Scottish only devolved context (holding SG and UKG officials to account and engaging with policy stakeholders with an interest);
- a formalisation of the process of Scottish parliamentary reviewing of primary legislation at a set interval after passing (say 5 years), considering the effectiveness of the legislation in delivering the desired policy outcomes (as has been done previously to a limited extent only); and
- establishing a joint inter-parliamentary scrutiny committee to address the above consequential or implementation effects or implications both where crossing boundaries within the wider UK context.

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5 Both geographic and on the reserved/devolved divide in Scotland.