

Public Administration and Constitutional Affairs Committee

Oral evidence: Devolution and Exiting the EU, HC 484

Tuesday 31 October 2017

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Watch the meeting

Members present: Mr Bernard Jenkin (Chair); Ronnie Cowan; Paul Flynn; Mr Marcus Fysh; Mrs Cheryl Gillan; Kelvin Hopkins; Mr David Jones; Sandy Martin; David Morris.

Questions 1 - 68

Witnesses

I: Professor Richard Rawlings, Professor of Public Law, University College London, and Professor Alan Page, Professor of Public Law, University of Dundee.

Examination of witnesses

Witnesses: Professor Richard Rawlings and Professor Alan Page.

Q1 **Chair:** I welcome our two witnesses to this first evidence session about exiting the EU and devolution. Could I ask each of our witnesses to identify themselves for the record?

Professor Page: Good morning. I am Alan Page, and I am the Professor of Public Law at the University of Dundee.

Professor Rawlings: I am Richard Rawlings, Professor of Public Law at UCL.

Q2 **Chair:** Thank you very much for joining us. The purpose of our Committee is to scrutinise Government and public services and to make reports and recommendations in order that the public should be able to have confidence in our system of government and public services. The purpose of this inquiry is to explore how we are going to adapt our arrangements in the United Kingdom between the four Parliaments and the four Governments in order for there to be a smooth and harmonious transition as we leave the European Union. I would invite you to give



short and crisp answers. I may pull you up if you go on too long, and the same goes for the questions. May I first call on Paul Flynn?

- Q3 **Paul Flynn:** The First Minister for Wales and the First Minister for Scotland describe this Bill as a naked power grab. Is that a fair description?

Professor Page: That was some time ago, and I think there have been suggestions since then that we have moved on from the language of “power grab”, which is not to say that we should not say something about the background to that language.

- Q4 **Paul Flynn:** There is nothing in the explanatory notes that has changed the Bill in forming laws. I know discussions are going on the whole time, but the Bill is as it was originally framed. There has been no retreat from that position that powers would be taken away from Scotland and Wales, powers they have now, and there is nothing in the Bill to indicate that they will be returned at any specific time. Is that not a fair description of a power grab?

Professor Page: Yes, I understand the background to that claim. I hesitate slightly over the language because there is a difference of view between what is and what is not devolved. I happen to take the view that things like agriculture are devolved to the Scottish Parliament and the Welsh Assembly. Therefore, in those terms you could talk about a power grab, but I do not find it particularly helpful language in understanding what the key or most important points are about this legislation and the process of leaving the European Union or the implications of that for the devolved institutions.

Professor Rawlings: I think Mr Flynn’s question goes to the heart of the controversy over the Bill from a devolution point of view, because I think it is possible to give two answers. The UK Ministers would say, “We are not grabbing because things are coming back from the EU that the devolveds in practice, because of the restriction to abide by EU law, did not have those powers in the first place.” There is a very careful insistence in the Bill on not rolling back devolution in that sense.

If, however, you look at it from the devolved perspective, they would look at powers coming back from the EU and they would say, “Who is grabbing the powers coming back from the EU?” Answer from their perspective: central Government. The very fact, Mr Flynn, that you can give two answers to that tells you a lot about the controversy surrounding this Bill, because it shows that it is possible here to have different constitutional perspectives.

Paul Flynn: Having only two answers is a pleasant relief.

Professor Rawlings: Well, I stopped at two.

- Q5 **Paul Flynn:** Yes. I have had the pleasure of hearing you at the Welsh Affairs Select Committee. Are you appearing at the Irish committees and



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the Scottish bodies as well? Is this not an example of the House of Commons' duplication of effort in the fact that this matter is being considered, I believe, by four Select Committees simultaneously?

Professor Rawlings: The first answer is yes. I am in the Scottish Parliament in a couple of weeks' time, and then I will be in the National Assembly. You would expect, wouldn't you, that we are now operating a system with several legislatures and Assemblies in the United Kingdom, and it seems to me only natural that the several legislatures and Assemblies—and, of course, we hope that the Northern Ireland Assembly soon starts working again—will all want to mount their own inquiries.

The second question about the House of Commons, yes, obviously from an evidence giver's point of view it is quite energy sapping to be asked by different Committees, but again you can see it in the sense that this particular Committee has a general overview function, whereas specialist Committees such as Environment or Home Affairs and so forth will want to be looking at the implications for Brexit in their particular areas. You can see inevitably there will be a plurality of Committee inquiries.

Q6 Paul Flynn: On 12 September, the Scottish and Welsh Governments simultaneously published legislative consent memoranda. The memoranda stated that neither Government would present a legislative consent motion for the Bill in its current form. Are they not inevitably on a collision course on this, and would it not be a constitutional outrage for this Bill to go through without the consent of the devolved legislatures?

Professor Page: What they said was that they would not bring forward a motion in respect of the Bill in its present form, but I think they left open the possibility that were the Bill to be amended in certain respects, then they would bring forward such a motion. That is really where we are at the moment. You rightly emphasised that the Bill is as it is at the moment, and the question is, can it be changed in such a way as to secure the consent of the devolved legislatures? In other words, can this be done by agreement rather than pushing it through in the face of opposition from the devolved legislatures?

Q7 Paul Flynn: The Sewel convention states that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. What force does the Sewel convention have?

Professor Page: We know following the Miller case in the Supreme Court that it does not have the force of law, confirming what is already written into the devolution legislation that this Parliament retains the power to legislate in respect of devolved matters. It is not justiciable; it is not legally enforceable, the convention. The courts will not discuss its meaning, scope of application and so on, which leaves the consequences or the implications to the political process. Were this Parliament to legislate notwithstanding the opposition of devolved legislatures, the argument would undoubtedly be made that that was a constitutional



outrage; it was unconstitutional. How exactly that would play in the court of public opinion is another thing.

- Q8 **Paul Flynn:** The Supreme Court established the supremacy of Parliament, but do you not think that the Sewel convention is politically binding, even if it is not legally binding?

Professor Page: I would certainly take the view that it is, yes.

- Q9 **Mr Jones:** Just briefly on the issue of the Sewel Convention, which was purported to be incorporated into statute by both the Scotland and Wales Acts but which the Supreme Court subsequently ruled, as you rightly said, did not have binding effect, there is also a declaration I think in both pieces of legislation that the relevant bodies are permanent parts of the constitution. There is this fad for declaratory legislation. Would you like to comment as to what you feel is the purpose of Parliament passing law that is quite clearly on the face of it not binding and, frankly, would not be held up in court at a later stage?

Professor Page: I think it represents a solemn and binding commitment. It is the most solemn expression of intention that you can provide under our constitution.

- Q10 **Mr Jones:** Even though it is not binding?

Professor Page: Even though it is not binding. The difference is that it is not me as a Minister saying it, it is not me as the Prime Minister saying it and it is not me as a Member of the House of Lords saying it. It is this Parliament saying that the Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom's constitutional arrangements. I think it is worth pointing out as well that they will not cease to be so without the people of Scotland voting in a referendum, and I assume the Welsh legislation is to the same effect. I do not think it is pointless.

- Q11 **Mr Jones:** You have the wriggle room in both pieces of legislation with the use of the word "normally", and no doubt we will be discussing that at great length during this session. Again, does that not sound rather weaselly coming in a piece of legislation?

Professor Page: It does not sound weaselly in a convention. What the legislation faithfully did was implement the agreement of the Smith Commission that the convention be put on a statutory footing, and that is precisely what it did, word for word, including the weaselly word "normally".

Professor Rawlings: Could I add to that, because I would like to draw an answer to the two questions together, if I may, Chair? I have published a report on this whole set of issues, which was published about 10 days ago, and I believe it has been made available to the Committee. I would want to make two points. First, I hope we do not get to the issue of whether the UK Parliament decides that it has to override a refusal of



legislative consent. I would sincerely hope that we do not get there, and my own view is that it would be unwise and unnecessary to get there. We may have to, at the end of the day, but I very much hope that we do not.

Secondly, it comes back to the question posed by Mr Flynn. I think what is happening is that the Scottish and the Welsh Governments have both tabled legislative consent memorandums, as they are required to do by Standing Orders in the devolved Assemblies, and at the same time, as Professor Page said, they have made it clear that on the Bill as currently drafted they would not recommend legislative consent. I think our working assumption has to be that the Bill as currently drafted simply will not get legislative consent in the Scottish Parliament and the National Assembly for Wales.

Of course, that leaves open the possibility of amendments to the Bill and also the work on common frameworks, which I am sure we will come on to talk about. Clearly, the Scottish Government and the Welsh Government are leaving open the possibility that if there are amendments and if the work on common frameworks goes well, they may well be minded later on in the process to recommend legislative consent.

Following, for example, the illustration of the Wales Act 2007—and Mr Jones will be obviously very aware of this—we got legislative consent from the National Assembly for Wales very late on in the process after, in fact, I believe there was the financial settlement with the Treasury. Again, I am sure colleagues around the table would in a sense expect and anticipate colleagues in the devolved Assembly and Parliament to do that. You would wait, wouldn't you, until you see as much as you can see of the final deal before you decide whether you would recommend legislative consent to your Assembly or Parliament? That just seems to be natural political behaviour.

Q12 Ronnie Cowan: Professor Rawlings, in your paper "Brexit and the Territorial Constitution" you say, "The prospect of essentially 'English' departments taking on UK-wide responsibilities by dint of the repatriation of EU competences naturally raises concern elsewhere in the Union about conflicts of interest." You also go on to say, "Attention is drawn to the double-hatted character of Whitehall, the large-scale functional fusion of UK Government with the Government of England in a classically non-federal system." Is this a time now to create a federal system?

Professor Rawlings: Elsewhere in the report, Mr Cowan, you will see that I say that I just don't think this is a federal moment. It seems to me that the conditions are just not right, if indeed they are ever going to be. It seems to me that the Scottish Government would have no interest in going down the federal route, because clearly the Scottish Government's agenda is ultimately an independence agenda for Scotland, so why would you get involved in a formally written federal project? Likewise, if you believe in a united Ireland in Northern Ireland I think you are going to be



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very suspicious and very hesitant about the idea of moving towards a federal United Kingdom.

Then, of course, there are the broader ones that colleagues will no doubt be familiar with from the old Kilbrandon report about how you fit England into a federal structure in terms of the sheer size of England and what the relationship would be between an English Parliament and a UK Parliament. There have always been significant conditions around the construction of a federal system for the UK, and I think at this particular moment, especially where we are in Scotland and Northern Ireland, the prospect of a federal solution just is not on the table.

In a way, my report is about how you navigate that. What should the approach be? What approach in particular should the UK Government be taking in the context where we do not have a federal system and where, frankly, we are not going to have a federal system overnight to deal with the kinds of issue that are being raised by Brexit?

Chair: We have had some quite long questions and some quite long answers, so we need to move ahead rather more quickly now.

Q13 **Sandy Martin:** Could you outline the operation of clauses 10 and 11? What are the strengths and weaknesses of the clauses? Do you think that they are ultimately going to enhance or decrease the powers of the devolved Governments?

Chair: Let's let them deal with that, shall we?

Professor Page: Clause 10: this is the corresponding powers for the devolved institutions corresponding to clauses 7 to 9. Strengths: clause 10 acknowledges that the devolved institutions have a role to play in getting the statute book into shape, ensuring continued compliance with the UK's international obligations, and the implementation of any withdrawal agreement. It acknowledges that there is a role for them in all of this.

Weaknesses: if you compare the powers that the devolved institutions will have with the powers that UK Ministers will have, the powers that the Scottish Ministers, for example, will have are hedged about by a whole series of restrictions that do not apply to their UK counterparts, and the devolved institutions understandably take objection to some of these restrictions and have sought their removal. At the same time, UK Ministers have virtually unfettered power to legislate in pursuit of these objectives across the whole of the United Kingdom, including in those areas that are devolved to Scotland, Wales and Northern Ireland. That is clause 10.

Clause 11 takes us back to where we began. The strength of clause 11 is that it secures legal continuity. The argument is that the devolved institutions were bound beforehand and that, therefore, they should continue to be bound after exit day. In my view, that is a justification that does not stand up to or does not withstand serious scrutiny, because



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the obligation on the devolved institutions to comply with EU law is rooted in EU membership. It is about ensuring that the UK as a member state can comply with its obligations as a member of the European Union; it is not caught short because Scotland, Wales or Northern Ireland is doing something contrary to EU law.

Take EU membership away and that ceases to have any justification. Why would you expect Scotland, Wales and Northern Ireland to be bound after the UK has left? Surely you would expect the exact opposite, and I think that was the starting point for the devolved institutions' response to the Bill. That in turn then gives rise to the suspicion—which takes us back to the point at which we started—that the real purpose of clause 11 is not to secure legal continuity but to strip the devolved institutions of any bargaining power that they might have when it comes to the discussion of common frameworks and all the rest.

The weakness of clause 11 I would have said is that it contributes to a climate of suspicion in which the devolved Administrations suspect that this is about removing powers from them and that, as Professor Rawlings explains in his paper, Whitehall Departments will find it convenient to hang on to these powers rather than to pass them on.

The other thing that I would add is—and we could perhaps come on to this—beyond that I do not see a justification for clause 11 and I can see ways in which we could proceed perfectly well without it.

Q14 Sandy Martin: On that specific point, Professor Page, it is going to be extremely difficult to carry through Brexit at all. Do you believe that the devolved Administrations should have any role in the bargaining process?

Professor Page: The bargaining process over what the domestic implications are? Absolutely, yes.

Q15 Chair: Sorry, that was an ambiguous question my colleague asked. Are you suggesting that the devolved Assemblies and Governments should be involved in the negotiations between the UK Government and the EU? Is that what you are asking?

Sandy Martin: I may have misunderstood, but I was taking it that Professor Page was saying that he saw the basic intention of clause 11 as to inoculate against any involvement of the devolved—

Professor Page: Not so much to inoculate against any involvement but to prevent them or to weaken them when it comes to the discussion or issues that will have to be discussed about common frameworks and so forth in the wake of EU exit.

Q16 Chair: It is about what happens in the wake of EU withdrawal, not about the process?

Sandy Martin: Yes, not during the process.

Professor Page: Not the negotiations.



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Professor Rawlings: I would really like to emphasise this, Chair. The debate over clause 11 is not a debate about should Brexit happen or should Brexit not happen. It is about if power is coming back from the EU to the UK as a result of Brexit, how are we going to appropriately allocate those powers around the UK constitution? What is going to be the appropriate balance between the centre and the devolved Administrations? The concern from the devolveds is that clause 11, when it comes to that negotiation, when it comes to that set of discussions, is essentially stacking the cards in favour of the centre.

Just to pick up Mr Cowan's point—because I do not think we did pick it up otherwise—there is a particular concern, and we cannot get away from this, that the UK Government do have two hats. They are central Government, but we are not in a federal constitution so they are also the Government of England. It is not simply a question of conflict of interest. All colleagues will know, whatever institutions we come from, institutions have their subcultures, their networks, and their assumptions. The big Departments in Whitehall—I mean a Department like DEFRA—are essentially English Departments. That is what DEFRA does: it regulates and subsidises in relation to farming and so on in England. There is inevitably a concern in the other parts of the country that their interests will tend to get lost because of that, not necessarily because of some sort of conspiracy thing; it is just subconsciously about how institutions operate in practice.

Q17 **Sandy Martin:** I know there is a lot of concern about clause 11 creating a conferred powers model for the powers of devolved Administrations rather than the reserved powers model. Would you say that that was one of the dangers of clause 11?

Professor Page: As clause 11 is envisaged as working in the Bill, yes, that is undoubtedly a danger because, as you know, the Scottish settlement from day one has been a reserved powers model whereby the Scottish Parliament has the power to legislate in all areas save for those reserved to this Parliament, to the UK Parliament. What we are now talking about is the Scottish Parliament and the National Assembly for Wales continuing to be bound by retained EU law as opposed to EU law, save where it is decided that they should not be bound, which from the point of view of someone trying to work out what the Scottish Parliament can and cannot do is going to make it an extraordinarily difficult task, because you are going to work through the things that we cannot do and then we have this retained EU law restriction, but has it been lifted and, if so, in what way? It will just make legislating that much more difficult.

Q18 **Chair:** Professor Rawlings, do you need to add anything to that?

Professor Rawlings: No. I think that that in a sense is a very important point from an end user's perspective. I think there is a danger in this that we can tend to focus in terms of negotiations between Governments, but we also have a responsibility to produce a product at the end of the day



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that business can work with, consumer groups can work with and so forth. It has to be clear.

- Q19 **Chair:** This question about reserved and conferred models, how do you persuade somebody that this is not just some kind of theological debate or one about political perception? How does it actually affect the lives of ordinary voters in Scotland, England, Wales or wherever?

Professor Page: It will have the effect of hamstringing the devolved legislatures so that they will not be able to do that which is sensible, because instead of having discrete policy areas that belong to them—

- Q20 **Chair:** That is because certain powers have been reserved, not because it is a conferred model or a reserved powers model?

Professor Page: Right. The advantage of the reserved powers model is that it allowed the devolution of discrete, meaningful, sensible policy areas—for example, agriculture, education and health—so that one can look to the Scottish Parliament to legislate in those areas. When you move into a conferred powers model, and Wales has a much longer experience of this, then you do not have that same relatively straightforward model.

- Q21 **Chair:** Forgive me for pressing on this. The reserved powers models were, within the EU, very tidy and quite binary, and they did not create the challenges that will exist for, for example, having the equivalent of shared competencies between the UK Parliament and Government and the devolved Governments and Parliaments. It is necessarily going to be much messier than it was and much less tidy than it was. What does it matter whether we call it a conferred model or a reserved powers model? What does that matter?

Professor Page: Let's drop the language of reserved and conferred and just talk about how messy it is going to be. Our common objective, I think, is that—

- Q22 **Chair:** That is the substance of the change that has to be dealt with, is it not?

Professor Page: Not necessarily. I would argue you do not need clause 11 at all, but what you do need are common frameworks.

- Q23 **Chair:** We will come to that in a minute. Anything to add, Professor Rawlings?

Professor Rawlings: I would simply say—and I think Mr Jones in particular will understand where I am coming from—one of my concerns is that we may be producing uncertainty and a lack of clarity that in turn will lead to litigation. Mr Jones in particular will be very well aware of all the Supreme Court litigation that we have had around the conferred powers model.

Chair: Mrs Gillan, too.



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Professor Rawlings: I am sorry, Mrs Gillan. Yes, absolutely, of course, Mrs Gillan in particular, because you would have been their responsible Minister at the time. I apologise for that.

I think we have to remember, Chair, that this goes to an issue of competence for the devolved Administrations. In a way, all the discussions about meanings in the Bill become very sharp when we get to the devolved Administrations because it is a question for them as to whether or not they actually have powers. The Government lawyers have to be able to advise, the Presiding Officers of the National Assembly and the Scottish Parliament will have to make rulings as to whether something is within competence, and again they will be open to challenge in areas where, frankly, challenge is very likely. Of course, we are talking about market regulation, and where there is market regulation there is money involved, and where there is money involved there are lawyers involved. We have to be very aware of that.

Just very quickly to finish, it seems to me that where we want to get to at the end of the day, however we get there, is reserved powers models and in the reservations the reservations covering common frameworks. For example, a reservation could read, "The subject matter of such and such", the subject matter being the relevant common framework that you are keeping on a pan-UK basis.

Chair: Thank you. Anybody else on this point? David Jones, briefly.

Q24 **Mr Jones:** Briefly, you touched on it in the last part of your answer there and you said a few moments ago, too, that the debate is essentially about where the balance lies between the United Kingdom Government on the one hand and the devolved Administrations on the other, by which I infer that you mean that there should be such a balance struck, that some powers should be held at a Westminster level and others passed down to—

Professor Rawlings: Very much so.

Q25 **Mr Jones:** Yes. Well, isn't that the position of the Government? The Government have said that essentially what we are engaging in through clause 11 is establishing a holding pattern and that in due course there will be powers passing further down to the Welsh Assembly, the Scottish Parliament and so on. Is it just a question of how this is to be achieved and are you saying that clause 11 is not the way of achieving it?

Professor Rawlings: I think that is right. Absolutely, it seems to me that we will need some common frameworks. If one thinks about a clear example like animal diseases, it would be ridiculous if we did not have an agreed common framework across the United Kingdom on something like animal diseases. I am sure that—

Q26 **Paul Flynn:** On badger killing, there are two different policies in Wales and in England.



Professor Rawlings: Yes, sure, and then you get—

Paul Flynn: Wales does not kill badgers and we have reduced the level of disease. England kills badgers and increases the level of disease.

Professor Rawlings: Absolutely. Then it goes to the specificity of the common framework: how far is the common framework going to be taken? Clearly, that is a whole further set of questions. So, yes, there are going to be common frameworks. There must be common frameworks in certain situations, and that is open for discussion and negotiation.

Just to finish the answer to Mr Jones, because I think he asked two questions, I think it should be done the other way round. I know this Committee is very concerned about the lack of trust that has developed between central Government and the devolved Administrations, and to think about a realistic way we can generate that trust.

What I would suggest to the Committee is that if you go along to the devolved Administrations and wave what I would call legislative blunderbuss in their faces—which is clause 11—that is not a good way of building trust with the devolved Administrations. I know what you are saying, Mr Jones, about the intention of the Government. That is not clear on the face of the Bill. The Bill itself is not written in terms of a transitional arrangement when it comes to clause 11.

Mr Jones: We know from pronouncements that the Government have said—

Professor Rawlings: Yes, but having been formerly a legal adviser to the House of Lords Constitution Committee, one of the things that the wise old owls on the Constitution Committee told me first up was Governments come and go, Ministers come and go; what matters is on the face of the statute book.

Chair: Mr Cowan briefly, and then we must move on.

Q27 **Ronnie Cowan:** As an alternative to Mr Jones's proposals, would it not be better if we gave all the powers that were due to Scotland up to Scotland immediately? Then over the course of time we could negotiate which ones we would like to give back.

Professor Page: I think it is perfectly possible to do that.

Q28 **Ronnie Cowan:** It is?

Professor Page: Yes. I can explain how to do it.

Ronnie Cowan: Marvellous. We will do that some time down the road at some point.

Q29 **Chair:** Professor Page, you only described these powers originally as notionally devolved.

Professor Page: Nominally devolved.



Chair: Nominally devolved.

Professor Page: Nominally devolved, yes, that is right. I did, in fact, anticipate that we would find ourselves going down this particular route whereby the UK Government would be able to argue that you will end up with more real powers afterwards than you had before, because these powers were exercised at the EU level and you had little real say in what was actually decided.

If we step back for a moment and think about what the implications of withdrawal are for the devolution settlements, I did this piece of work for the Scottish Parliament way back at the beginning. I went through all the EU competences. What I was struck by was how few had gone to the devolved legislatures. Most of them will come to this Parliament. I ran through what the explanation for this is, and the explanation, the conclusion I came to, was that the reservations, the reserved matters, which dictate that these powers will fall to this Parliament, essentially are for the most part about—and I coin the phrase—a UK single market.

What we are forgetting in all of this, and we were discussing this before we came in as to whether or not the parliamentary drafter had thought about it, is the work that is done already in the devolution settlements in terms of preserving the UK single market. A vast amount of work is done, so the problem is not one of just clause 11 and if we don't have clause 11 we will not be able to do anything about this. My solution quite simply would be this: one, to recognise the work that is done by the existing devolution settlements and—following up Mr Cowan's suggestion—just to simply have a standstill agreement, whereby we all agree that we are not going to do anything that will imperil common frameworks until we work this question out. It is a perfectly logical way of doing it.

The other factor in this, and the third element, is mutual self-interest. Where is it in the interests of Scotland, Wales, Northern Ireland or, indeed, England to take action that would imperil the UK single market? It is in all our interests to keep it going. So, unlike the European Union, which is still trying to create a single market, we already have one. All that we are trying to do is prevent damage to that market. That is what the Lancaster House declaration was about.

Q30 **Chair:** Just to challenge you on a bit of detail, if we were to do a free trade agreement with the EU concerning agricultural products, they would expect us to have UK regulation on fertiliser regulations, GMO marketing and cultivation, for example. Those matters will be devolved unless we reserve these powers.

Professor Page: But what is there to prevent us agreeing on GMO regulations?

Chair: That I perfectly understand, yes.

Professor Rawlings: Can I add one thing to that because I think it is very important? Can I draw the attention of the Committee to existing



powers in the devolved legislation, intervention powers from the Secretary of State, where the Secretary of State has powers to require action by the devolved Administrations and legislatures or to prohibit it if those actions are either required for the purposes of international obligations or if the devolveds are threatening to do something that would offend international obligations. Those powers are already there and, of course, they have not tended to come to the fore because we have been inside the European Union, with all of that. If we were to have a withdrawal agreement, a treaty with the European Union, then those intervention powers are already there on the face of the devolution statutes.

- Q31 **Kelvin Hopkins:** Following on from that debate, I think my questions perhaps add a little more complication. Can you say or explain whether converting EU law into a new body of UK law as retained EU law will affect all the nations of the UK in the same way? If not, why would this not be the case and what will be the consequences?

Professor Rawlings: I will have a go at that. The position that I would want to emphasise—again, it comes back to Mr Cowan’s original question—is that we do have a different situation with England. We have to remember that the UK Government are the central Government but they are also the Government for England. When we have Brexit, working on that basis, we will then have parliamentary sovereignty in this place in the sense that we can say we have always had parliamentary sovereignty but we all know that as long as we have been within the European Union Acts of Parliament had to navigate the requirements of the European Union in practice. That will go, and clearly we do not know to what extent there will be a withdrawal agreement and so on but, in general terms, that will go. That means that Westminster will be able to pass new Acts of Parliament changing things as Westminster thinks appropriate. Of course, we tend to think of that on a pan-UK basis, but Westminster is also the legislature for England so that if Westminster wanted to change retained EU law for England, clearly it could do so: parliamentary sovereignty. If we jump over to Northern Ireland, Wales and Scotland, they are devolved Administrations and devolved legislatures.

However we define common frameworks—we can have that argument—in terms of the Bill they will be constrained because they will not be able to change retained EU law to a very considerable extent—we can talk about that—so immediately there is a different situation. It comes about because of the nature of our constitution. We do not have a federal constitution. We have this double-hatted nature of UK governance. I think that is why it is so important to keep that double-hatted character in mind. Brexit does produce the situation that you have a shift in the constitutional positions of England over there and the three Celtic countries over there. As long as we are within the EU, EU law applies across. Once we are with Brexit, England and the United Kingdom will be having parliamentary sovereignty. The devolveds? Well, they are



devolved so they have devolved powers but there are also, of course, reserved powers.

- Q32 **Kelvin Hopkins:** I won't pursue it now, but I have to say I can see complications arising in certain areas. My next question: what problems could arise if powers were repatriated directly to devolved institutions? How would these problems be best dealt with?

Professor Page: In my earlier answer I indicated I thought that was a very good question. I am not sure that problems would arise if you adopt my preferred course or recognise the limitations that are already there in the devolution legislation, and you would need some form of standstill agreement whereby we all agree that we are not going to do anything that harms the UK single market until we have worked out this business of common frameworks, which we will need to do. I think it can only be done by sitting down and going through these 111, 64 and—what is it?—149 other EU competences that intersect with devolved powers.

- Q33 **Kelvin Hopkins:** Would your approach not require a degree of consensus, agreement and friendship between the devolved Governments and the central Government?

Professor Page: That would be my ultimate goal, yes.

Professor Rawlings: Mr Hopkins, this is why I think we are both very pleased with the fact that the Joint Ministerial Committee on European Negotiations met for the first time for seven or eight months about eight days ago and set out a set of principles. All of the Administrations at the Joint Ministerial Committee committed themselves, first, to the proposition that, yes, there will be a need for some common frameworks and, secondly, it is our collective aim to work together to create those common frameworks. That is just a beginning and, of course, we are going to have a big debate about those common frameworks: where we need them and what they should be. That seems to me to be entirely the right way of proceeding.

If I can draw colleagues' attention to some very interesting and important evidence from the Secretary of State for Scotland, David Mundell, before the Scottish Affairs Committee last week, he made clear that work is now going on rapidly in the light of that JMC meeting and two particular things are happening. He talked about a "dive down" that involves officials taking the lists and working down in their specialist areas as to where they think common frameworks might be required and what those common frameworks might look like. In my report I have tried to give them some design questions that they might be interested to look at for doing that. To me, that is exactly what should be happening.

At the same time David Mundell talked about a body called an amendments forum, where apparently the lawyers and officials from the UK Government and the devolved Administrations are going to be meeting in the next couple of weeks to talk through possible



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amendments to the EU (Withdrawal) Bill dealing with this whole issue of devolved competence. That seems to me to be exactly what should be happening. Then, if at the end of the day there are sticking points and we cannot come to agreements on particular things, it is at that point that UK Ministers should be thinking parliamentary sovereignty and that, yes, we may have to come back to Parliament, let's say, in a particular area. We must have a pan-UK framework. We have not been able to agree one. We will have to establish one.

I suppose what we are both saying is that clause 11 has it the wrong way round. Essentially, you go through negotiation, discussion, you explore the potential for agreement and, frankly, you will get agreement on a large number of these items for the reason that Alan has explained, mutual interest. Then, if you get a sticking point, you can think about parliamentary sovereignty, but don't do it first up through clause 11 because what is bound to happen is that they will simply refuse legislative consent for understandable reasons. There will be a lack of co-operation, a lack of trust, and that is to nobody's advantage.

Q34 Mr Jones: Just pursuing the last point, I take it from what you have just said that you do not entirely rule out overriding the Sewel Convention if there should be sticking points that cannot be overcome by negotiation?

Professor Rawlings: Yes. Personally, I think it is the absurd example, the hypothetical example, but if at the end of the day we got to a situation that an agreement could not be come to, then clearly, as Alan said, it would be open for UK Ministers to come to Westminster and say, "It is vital from the perspective of the United Kingdom that we have a common framework in this situation. We have done our best. Agreement has proved impossible." In the terms of the Sewel convention—and I think you pointed this out, Mr Jones—this would be the abnormal situation in which you would come along. That seems to mean that then what you are saying is that parliamentary sovereignty, in this circumstance, is a reserved power rather than a first-up power as it is being used in clause 11. Then, of course, it would be a matter of public debate and the Minister would come to Westminster and explain why this was necessary and important, and that seems to me to be the appropriate way forward.

Q35 Mr Jones: Yes. I take it from your answer that in both constitutional and legal terms it would be entirely proper for that to happen. However, would there not be political consequences of that?

Professor Rawlings: In legal terms I think Professor Page has answered in terms of Miller that, yes, the UK Ministers could do that. This would be open and transparent. It would have to be justified in Westminster as to why this would happen, and in the Scottish Parliament or the National Assembly for Wales or wherever it was, the First Ministers would have to be explaining why they were objecting to having a common framework in this particular situation. At that point it becomes a political debate. As I say, I don't think we will get to that situation but clearly it is a correct



question to answer. At that point it is very transparent. It is very open. If UK Ministers have a good case for a common framework, well, that is the situation.

- Q36 **Mr Jones:** You made a very important point a while ago about the issue of end users because, ultimately, we are not discussing this in a vacuum. These are issues that have a practical effect upon practical people, most conspicuously in terms of agriculture, which I think is the area that is most affected. Both NFU Cumbria and the Farmers Union of Wales have acknowledged the need for overarching UK-wide frameworks, so should not both the Welsh Administration and the United Kingdom Government be consulting far more closely with these end users when they determine policy and the issue of where, as you put it, the balance of competences should lie?

Professor Rawlings: Yes, this is one of my criticisms, Mr Jones, about the process so far. I think we should be much further on in this process than we are. This is not an inter-governmental thing. I would have liked to have seen, first, clearly we had to have the list of intersections and then, secondly, we had to have an idea of—this is what Mr Mundell is now working on—where we think we need common frameworks. Where is it clear we don't need common frameworks and what are the areas where there is a genuine discussion to be had? That is where we are now. I think we should have been there six months ago. Then, thirdly, we begin to sketch out what those common frameworks might look like. It is at that point—and I think we should already be here—where, yes, you should be talking. If you are in agriculture you should be talking to the farming associations. This common framework isn't just an agreement signed off between the Governments. The commercial interests themselves have to be directly consulted with what these common frameworks look like and how they are crafted. We are behind the curve here and we should have been out to consultation already, frankly.

- Q37 **Mr Jones:** If it is any comfort to you I can tell you that those discussions have been taking place.

Professor Rawlings: Yes, I know, but, if I may say so, those consultations have been happening but not in an open, public way because, of course, there are lots of stakeholders involved and it does seem to me that we should have had more transparency around that.

- Q38 **Mrs Gillan:** I think we all agree that JMCEN should have met. It met four times and then there was this huge hiatus before it met. I cannot understand what went wrong with the machinery of government that would have allowed that gap.

This is a question you may not be able to answer. I wondered whether you had done a deep dive into the lists of intersecting areas. You have done a risk analysis as to which areas would be more at risk for non-agreement than agreement. I presume agriculture is obviously right at the top of the list.



Professor Page: I have not done a deep dive, but I think I did identify the prime candidates in the work that I did before, so we are talking—

Q39 **Mrs Cheryl Gillan:** Would you like to share those with us?

Professor Page: Yes. It is reasonably straightforward and we have already mentioned some of them at least. We are talking about—these are devolved powers at the moment—powers to control the movement of food, animals, animal products, plants, plant products, animal feeding stocks, fertilisers, pesticides. We are talking about product standards, animal health and welfare, food safety, food labelling, food composition, and then a slightly different set of areas: financial assistance to industry, including the agricultural industry, public procurement and fishing. I am not saying that is comprehensive, but these are the ones that came out from the work that I did. The lists that have been circulated as a result—the Secretary of State talks about a deep dive—yes, they include absolutely everything but, realistically, I think we are talking about a relatively limited number of areas. That is why I think this clause 11 business is in danger of getting out of all proportion and obscuring the real need, which is to work out what these common frameworks are.

Professor Rawlings: Could I put on the record, first, a comment about the lists? I know the Committee will be visiting Cardiff and Edinburgh. That is my understanding. Two items struck me when I looked at the lists, and I think, Mrs Gillan, you will immediately see the significance of both of these items because they have a particular Welsh dimension. The first one that struck me is that on the list there is no reference to regional economic development and structural funds. That does not appear on the list. Of course, one explanation for that would be what appears in the Conservative party manifesto about a UK prosperity fund but, as a witness, I have to put it on the record that I did find it remarkable that a list of intersections, which is what it claims to be, does not include structural funding because, of course, when one has one's Welsh hat on, what are we talking about—£370 million annually to Wales? Shall we say that list is an interesting mapping exercise? Mapping used to capture in bits of the world that you did not know about. This one seems to be a reverse. Something has gone missing from this map, which I think is quite interesting to think about. The second one that struck me—

Q40 **Chair:** Sorry, can I challenge you on that in the Government's defence? The EU's regional and structural funds, they just disappear. They cease to exist as EU regional and structural funds. The question is, what do the Government replace them with? It is an exclusive competence. It is not a shared competence.

Professor Rawlings: Structural funding, no. Structural funding involves the devolved Administrations in a lot of implementation, a lot of financial management.

Q41 **Chair:** Yes, but in terms of legislative competence, EU regional and structural funds are an exclusive competence, not a shared competence



for something like agriculture, for example.

Professor Rawlings: One would have to look, then, more closely at quite how that map is described because the way in which I read that map was the intersections of EU competence with devolution. If one looks at it in that perspective, one of the biggest areas of intersection would be structural funding.

The second one that struck me was the appearance of agricultural support in the Scottish list but the non-appearance of agricultural support in the Welsh list. That seems to me to be very striking given that—and I looked the figures up—something like £275 million annually goes in direct subsidies to Welsh farmers under the CAP. What does the non-appearance of agricultural support for Wales in that list portend? Does it portend anything or is it a typo? If it is a typo, it is a remarkable typo since it is £275 million a year.

Chair: Would either of the former Secretaries of State want to answer that question?

Mrs Gillan: It would be right up there in my list.

Professor Rawlings: I thought I should place that on the record because I thought that the Committee might like to inquire further into that in its legislation points.

Mrs Gillan: Outwith structural funds as well.

Chair: I love challenging evidence. Thank you.

Q42 **Mrs Gillan:** The interesting thing about structural funds anyway is the whole debate around structural funds. Why are countries in the UK still in receipt of structural funds when structural funds are supposed to build up the economies in the area? Clearly, they perhaps have not been the most successful of areas, but both of those should have been on the list, in my view. Don't you agree?

Mr Jones: Well, I think you should take it up with the current Secretary of State for Wales.

Kelvin Hopkins: I have said a number of times publicly that the logical thing to do is simply replace, in the first instance, all EU spending with Treasury spending in all spheres automatically, and then after that to discuss how we go forward. But to have one devolved Administration treated differently from another in these matters seems to me extraordinary. It strikes me as being a mistake.

Chair: Is that a question? You do not have to answer it. It wasn't a question.

Q43 **Mr Fysh:** I was going to ask about the intersections a bit later on but I will jump in with my question now. In terms of the proportion of the intersections that you think there might need to be some further discussion, as you were saying, of the common framework, you have identified some of the areas but could you give us a feel for how much of



the intersections that that would cover? It sounds like, apart from the structural funds that you are talking about, most of those other things are, in fact, trade related. They are very much about the essential competence of the UK to be able to pursue a trade deal of one kind or another with different parts of the world. What percentage is that of the total number of intersections, do you think?

Professor Page: One of the big differences between the Scottish and Welsh list, of course, is that the Scottish list includes a lot of justice and home affairs matters, reflecting the fact that Scotland has its own legal system—its own judicial system—whereas Wales, for the moment at least, does not. Whether realistically there is a need for common frameworks in justice and home affairs, I am a little bit sceptical about that. It may be that there is, it makes sense, but I don't see it as a matter of absolute necessity in the same way, perhaps, as the trade-related areas that you are drawing attention to.

That again inclines me to the conclusion that we are talking about. If we come down from 111 to 64, take out justice and home affairs, we are talking about a relatively small number of areas in which common frameworks would indeed be required.

Professor Rawlings: Two points, Mr Fysh. The first one that we would clearly have to sign up would be the environment. There is a lot on the list in terms of environment, and we would all understand about externalities and environmental protection. It should not stop at borders inside the UK and so on and so forth. So, there is that area we should think about.

Secondly, I am going to resist answering your question because it seems to me that some of these items are far more significant than others. Just doing the numerical count is not very helpful because we might, for example, have voting rights and candidacy rules for EU citizens in local government elections. That would be item 1. Then another item would be state aid. Just doing a numerical count on that does not seem to me to get us very far.

Professor Page: I suppose the only other point I would add is that we should resist the temptation, which is I think created by lists of this kind, to treat this as an invitation to rewrite the devolution settlement so that we end up just focusing down on these individual powers and saying, "Where does this belong? Where does this belong?" which I think would be to miss the bigger picture.

Q44 **Mr Fysh:** Can I ask one follow up? You mentioned that it would be good to all get together and try to decide on some of these common frameworks, but in the timeframe available for making those sorts of decision, is it realistic that we could get there, given that we are effectively in the middle of a major trade negotiation right now with our EU friends and allies and that that will impact what we are able to do in trade around the rest of the world? Is it practical for us to be doing a



constitutional convention as affects these trade areas now?

Professor Page: That is the purpose of my proposed standstill agreement—that we do nothing until we work this out, which will involve no change for the time being and ought not, therefore, to imperil existing arrangements.

Professor Rawlings: We are talking here about internal developments. We can buy ourselves time in a way by having that kind of standstill agreement, if that is seen to be a problem.

I think the answer to your question is that some will prove easier than others. Some of them we can replicate very quickly. For example, there is one here about the ability to move to the European Union for health treatments if you cannot get it suitably quickly on the NHS. Presumably, that just goes and so we don't have to deal with that or, indeed, if we were going to have an analogy to that, we could probably agree that very quickly by concordat within the different parts of the NHS around the United Kingdom. One would not have to legislate on that.

Q45 **Chair:** Looking at clause 11 as it is, what would happen if at the top of clause 11 there was a positive duty to devolve where possible, an obligation on the Government?

Professor Rawlings: How would that be expressed?

Chair: I don't know.

Professor Page: How would it be enforced?

Q46 **Chair:** I don't know. What would happen, also, if there was a qualification attached to clause 1(b) in how 4(a)—referring to the Act of the Scottish Parliament—if it was qualified in some way, such that at the end of that it said, for example, "which would substantially affect trade or the conditions of competition", so that it was clear that it was only intended for a certain purpose but that that restriction existed on the Scottish Parliament?

Professor Page: Yes, it is an interesting question. We were talking about this before we came in. The Bill as drafted is a mechanical application of EU law as it stands at the moment, or a replication of EU law as it stands at the moment, without consideration or little regard or understanding of the devolution settlements. Therefore, I would be wary of simply tinkering with it with the wording of the clauses or possible amendments, as opposed to saying, "Do we really need this?" I would flank my JMC common frameworks, with whatever format we choose in order to work out these common frameworks, with a JMC on EU law revision. What changes do we need to make to the statute book to ensure that it functions properly? Who is going to make these changes? Are they going to be made by the UK Government on a UK-wide or GB-wide basis or are they going to be made by the devolved Administrations?



Q47 Chair: That could happen anyway and then clause 11 just becomes a backstop.

Professor Page: Yes.

Professor Rawlings: My answer to that, Chair, is that clause 11 is a poor choice of model and that the way you deal with this is essentially by seeing parliamentary sovereignty as not a first-up exercise but as a reserve power in the background to require common frameworks if, at the end of the day, after a mature discussion between colleagues across the United Kingdom you cannot create the relevant common frameworks that colleagues agree that you require. From my perspective, it is not an answer to create tinkering amendments to what I regard as a poor choice of model in the first place.

Q48 Mr Jones: One very brief point. You mentioned mature conversation, to revert to Mr Fysh's point. We do not have a huge amount of time for mature conversation.

Professor Rawlings: Well, several answers to that. Clearly, we are in a sea of uncertainty. We don't know quite what the times are. I would remind colleagues that I said that we should have started this six months ago. I would be very suspicious of UK Ministers who came along and said, "Oh, well, having done very little on this for six months we've now not enough time to do it." Yes, they have enough time. Whitehall has the capacity. The devolved Administrations are ready and they are willing to go. We already have an agreement between all the Administrations that there will be another meeting of JMCEN before Christmas. My sense is that the First Secretary of State, Damian Green, has now injected real urgency into this process. From what Mr Green is saying and from what Mr Mundell is saying, my sense is that they think this can be done and let's crack on with it.

Ronnie Cowan: We put the clocks back an hour on Sunday morning. We would have to put them back two years to have enough time to finish this debate.

Chair: I will take that as an intervention and not a question.

Q49 Paul Flynn: To go back nearly two years, the choice that the voters had on 23 June 2016 was between Operation Fear and Operation Lies. In the belief that second well-informed thoughts are always superior to first ill-informed thoughts, don't you think the confusion and panic that we have at the moment—the Foreign Secretary has promised 150% of the money we will have back to the health service and Mr Gove has promised 40% to the farming industry—mean that we are in a state of such confusion and chaos that it is the duty of the House to turn down this settlement and offer the electorate a second thought on what is a choice that has transformed from what they originally voted on?

Chair: You have no need to answer that question if you do not wish to. It is outside the scope of this inquiry.



Professor Rawlings: Mr Flynn asked me the same question in the Welsh Affairs Committee a week ago and I took the view that you have just expressed, Chair.

Q50 **Mr Fysh:** To follow up on this idea of a standstill and the time that we have to make some of these decisions, to what degree should the UK Government be worried about the policy divergences that can emerge and to what extent do you see your idea of a standstill potentially going into the concept of a transition or an implementation period, which has been discussed in terms of our dealings with the EU?

Professor Page: I think the standstill agreement covers both of these because clause 11 is drafted on the assumption—and I think we can accept that it is correct for the moment—that EU law, as it applies presently, secures these common frameworks. As I have indicated in my evidence, looking to the future, this is not the right way to go about establishing or working out the frameworks that we require in the future but, for the time being at least, if we have a standstill agreement then all of that stays. We won't change it, which is why I looked slightly askance at the suggestion, "Oh, we have to get on with this and we don't really have the time". So long as we are agreed that we are not going to do anything that will threaten the integrity of the UK single market, then I do not see that pressure of time. We can get this right, as Professor Rawlings has said.

Q51 **David Morris:** In leaving the EU, what challenges do you think we are going to face in establishing a UK common framework from the existing European common frameworks? How are we going to transition the powers over? What would it look like? What would that framework be? How quick would that be, in your consideration?

Professor Page: The JMC on European Negotiations has gone some way towards answering these questions with the principles that were established a week past Monday. But the questions as I see it are: first, where do we need common frameworks; secondly, what will they consist of?

The principles established at that JMCEN meeting established a variety of mechanisms and mores that these frameworks might take. Do they need to be on a statutory basis and, if so, are we talking about a UK-wide statutory basis or a mixed basis involving UK legislation and legislation by the devolved legislatures or Executives and crucially—and this goes back to the point where we began about the suspicion or fear on the part of the devolved Administrations that this is about stripping powers from them—how are these frameworks going to be managed and how are they going to be changed in future? Because they are not going to be fixed for all time, so we are talking about frameworks that will need to be adapted, adjusted, and who is involved in those discussions, and this goes back to what has been said about it.

Q52 **David Morris:** Do you think that what we are going to be seeing is much



the same as what is already in existence, other than legislation changing—some primary aspects of it, like the judiciary, for instance?

Professor Page: If you take my earlier answer that your starting point is what is already reserved, then I think, yes, we are looking at pretty much what we have at the moment. I don't see substantial changes.

Professor Rawlings: My answer to that would be that one has to think in terms not of a common framework but common frameworks, and that the conclusions one reaches in different sectors may be different.

One point I would like to emphasise to the Committee is we have to be aware of the kneejerk reaction that because there was a common framework at EU level we necessarily need a common framework at the UK level. Why there are common frameworks in the EU, of course, reflects a particular set of dynamics in the EU: historical, political, ever greater union and all of that. That may or may not be appropriate when we come back to the UK simply in terms of the closeness of the UK and shared administrative cultures. I think this is particularly important when it comes to governance requirements. Governance requirements that one may have been imposing across 28 member states with very different administrative traditions, and shall we say in some cases very difficult challenges governmentally, we may take the view inside the United Kingdom that perhaps we don't need to go there, that we have a more shared administrative culture, we have particular standards that colleagues across the UK will be expected to adhere to, and the very closeness of the United Kingdom.

It seems to me that, in a sense, part of the logic of Brexit would be that one would explore, over time, whether one could develop common standards that were more tailored to inside the UK than perhaps they are at the present time, given that they have to be tailored for 28 member states.

Q53 **David Morris:** Do you see a situation occurring, when we do come out in a few years' time, where we could possibly have a better working relationship with Europe based on the frameworks that we are putting or adapting in place from the existing European frameworks that we are adopting at this moment in time? In layman's terms, do you think we will evolve it from where Europe are imposing their legislative measures on us, we can take what we want to do and, therefore, interface with Europe on other bases?

Professor Rawlings: Well, from what I heard of that question with the Division bell going, I am going to resist that question, too; first, because I do think it is somewhat outside the terms of this inquiry but, secondly, because you are asking us there to project so far ahead and, of course, so much will depend on the withdrawal agreement and what our future relationship is, so I will pass on that.

David Morris: Thank you very much.



Q54 Mrs Gillan: I want to take you both on to inter-institutional relations because this Committee wrote a report back in 2016 about those institutional relationships, which was in fact quite critical because we felt that the JMC was not fit for purpose. I don't know whether I speak for my colleague, but, having been a member of the JMC, I would agree and, indeed, had done a lot of work about this before I came into Government because I felt that the level of communication between the devolved Administrations and the UK Government was very poor, and also between Departments and officials, and this needed bolstering. I have a series of questions here about it, but I notice in your report, Professor Rawlings, that you suggest a JMC DSM—domestic single market—and a JMC international trade. You refer to the JMCEN again not having met, but also the JMC has been used for dispute resolution, thinking of the Olympic Games and the transport element, whether it was “Barnettised” or not. Do you really think that it is fit for purpose, the JMC as a body, and do you have any suggestions as to how it might change or evolve? I have just been reading on here the response of the Government to the report. I still do not think that it has gone far enough down the road to make sure that those communications are serious, in-depth, effective and regular as well. I would love to hear both your views on that.

Professor Rawlings: Two points, Mrs Gillan. I wanted to put the idea of the domestic single market out there because, at the moment, we are focused on JMC European negotiations and, clearly, at some point those negotiations will stop. What I was trying to do was to project ahead as to the kind of machinery that we would want. It does seem to me—and again it seems to me to fit with the logic of Brexit here—we will have our own internal market and it seems to me that we really need a forum for constant review and supervision of that single market because, in the nature of things, conditions change and new developments happen. I really wanted colleagues to begin to think about life beyond EU negotiations, so that was point one.

Q55 Mrs Gillan: Should it be a JMC or should that be a new section in each of the relevant Departments—for example, in BIS or in Agriculture and so on? Should we have a completely new structure for talking from the Departments themselves on the domestic single market with the devolved institutions?

Professor Page: Yes, if I understand the basic thrust your question, one of the critical weaknesses of the existing machinery of intergovernmental relations is that too much is left to the unco-ordinated activities of individual Departments. There is an absence of central co-ordination and control. When we start to talk about Brexit and the implementation of Brexit and getting the post-Brexit statute book into shape, we are looking at that in spades because all these powers—7, 8, 9—are where the Minister considers that retained EU law is whatever, so we are replacing a very decentralised law-making process with different Departments taking different views.



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There is a genuine need to get a grip of all of this, to have effective central co-ordination and control that—going back to your original question, which was about the effectiveness of the machinery of intergovernmental relations—has to involve some sort of Department or intergovernmental relations Department of the regions and nations, however you want to put it, of the United Kingdom, rather than relying on the combination of—I don't want to emphasise their ineffectiveness—weak territorial Departments, three territorial Departments, and Departments doing their own thing with or without regard to their devolveds.

Q56 Mrs Gillan: I put some thought into this when I was in opposition and when we were in a coalition Government I persuaded my colleagues to start a Cabinet Sub-Committee, which had a Minister from each Department that was responsible for the devolveds and the policy, and to try to drag it together. It seems to me there needs to be a complementary structure in the UK Government that can talk and draw that together, rather than leaving the Departments out there in isolation. Sadly, our coalition partners disagreed and the Deputy Prime Minister decided to dispense with that, but it was a forerunner, before this, of trying to get that together. Do you think that we need a completely new structure to give us a working tool for the future? Because, at the moment, I personally do not see the JMC as being the best vehicle.

Professor Page: I don't know about an entirely new structure, but we do need a fresh start. If anything comes out of this, it is the recognition that intergovernmental relations is every bit as important a part of the devolution settlements as the powers possessed by the individual devolved Administrations. That cannot simply be left to happenstance, chance or the inclination and instinct of individual Administrations. Therefore, and I did argue this with the House of Lords Constitution Committee at the previous inquiry, the basic machinery has to be put on a statutory footing so that the Parliaments are making it clear, "This is our expectation as to the way these relations will be conducted," rather than leaving it to the discretion of individual Administrations.

Professor Rawlings: In my report, Mrs Gillan, I pushed down two lines institutionally. First, in terms of my idea of a domestic single market committee, I suggested that we should be thinking about a statutory base for it. I don't want to be too prescriptive, but it seems to me that it should be on a statutory base. There should be an independent secretariat and, if there is one thing that we have learned in the last year, there really should be entitlements for all the Administrations of the UK to say, "We want a meeting." It just cannot be in the gift of one Government to say, "Well, all right, when we feel like it." We should put this on record. The UK Government are in breach of the memorandum of understanding. The memorandum of understanding says that if a JMC meeting is requested by one of the Administrations it should happen within a month, and this did not happen, so we have to do something there.



Then, secondly, I did address the central co-ordinating point. I thought about doing it through the UK Cabinet Office. That to me would be the way through. But I absolutely agree with you that we have to have that with the devolveds. Inside Whitehall we need much firmer central co-ordination. I could not agree more.

Q57 Mrs Gillan: I am going to jump in with a question from the Chairman just to finish off my section here. Do you think putting it on a statutory basis would improve the trust and the understanding between the legislatures? Clearly, that is the message I am getting from you but what else destroys the trust between the legislatures because there seems to still be a lot of positioning? I don't want to put it more strongly than that.

Professor Page: We have a lot of ingredients or factors that might contribute to mistrust or distrust. Four parts of the United Kingdom did not vote in the same way. The Scottish Government's policy is one of independence, seeking an independence referendum, which is on hold for the moment. The UK Government do not speak with one voice in relation to Brexit, but I think the singular item that is missing on how you overcome this is dialogue, communication. Drafting a Bill in secret and then only showing it to the devolved Administrations two weeks before it is made public is guaranteed to create suspicion as to, "What are they up to here? What are they going to do?" Communication and dialogue—and I think communication is the first principle in the memorandum of understanding—has to be the beginning of an answer. It is not a complete answer but a way forward.

Q58 Mrs Gillan: There is a JMC called JMC Sherpas, which is officials. Do you think that meets frequently enough? Do you think that is effective enough?

Professor Page: I would assume not but I don't know.

Professor Rawlings: I think that UK Ministers were not particularly interested in having multilateral meetings of the JMC over a number of months. I should say—and I have said this in my report—I have a particular concern about this because if we are talking about common frameworks, it seems to me that the logic of common frameworks is multilateralism, because everybody has to be in the room and everybody has to be talking about common frameworks and what can work for them or what may be their sticking points, and so on and so forth. Of course, there will be bumps in the road. Colleagues will have different interests and they have different constituencies to represent, but if we don't get in the same room, if we don't go through that, then it seems to me all to be very difficult.

Q59 Mrs Gillan: The future architecture of government is something that concerns this Committee. Where is the Department for Brexit going to end up? What is going to be the shape of Government? Can I take you possibly a tiny bit further but related to this? Do you think that the architecture of Government should be looking at having one Cabinet



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Minister responsible for the devolved relationships, or do you still think that territorial Secretaries of State are a key part of the equation?

Professor Page: The conclusion I came to two years ago, whenever the House of Lords Constitution Committee conducted its inquiry, was that the case for a single Department, a single Minister responsible for these relations, was unarguable. I would favour that.

Q60 **Mrs Gillan:** It is in your evidence to the House of Lords of two years ago, is it?

Professor Page: Yes.

Q61 **Mrs Gillan:** Do you agree with that, Professor Rawlings?

Professor Rawlings: I generally do. I do note, for understandable reasons, that we have not mentioned Northern Ireland today. I am always a little hesitant on this one. I certainly would not claim to be an expert on Northern Ireland, but I am sure colleagues would want to look very carefully at that question through a Northern Ireland lens, because I am sure we are all agreed that we would not wish to do anything to make the situation in Northern Ireland more difficult than it is. I can see that, certainly at the present time, there is a particular issue there. We must bear that in mind.

Q62 **Mrs Gillan:** Yes, notwithstanding that. So, one territorial Department, perhaps, with a Secretary of State but then with Ministers of State for each of the three devolved Administrations would be something that would probably improve and focus that?

Professor Page: Exactly, yes.

Mrs Gillan: Okay. Thank you.

Q63 **Chair:** Just to challenge my colleague, how would it be perceived in, say, Scotland if the Minister in the UK Government was downgraded from Secretary of State to, say, Minister of State and no longer sat at the Cabinet table?

Professor Page: I suppose the question is, who is the interlocutor? Is it the Secretary of State, Scotland's voice in the Cabinet, the Cabinet's voice in Scotland, or is it the Scottish Government? We are 20 years into devolution. We have to move on and I don't think—

Chair: It is what this Committee recommended in the 2010 Parliament when we were wondering how to reduce the number of Ministers.

Q64 **Mr Jones:** On that last point, surely the Scottish Government are only the interlocutor for Scotland in the devolved areas, whereas, of course, the Secretary of State for Scotland has a far wider role and similarly, of course, for Wales.

Professor Page: That then takes us on to a big issue that we have not really touched on in this session. That is what in federalism terms would be described as shared rule. We have spoken a lot about self-rule, the



powers of the devolved nations, the devolved Administrations. We can only go so far with that. Sooner or later we have to face up to the question of the voice of the devolved Administrations in relation to decisions taken in the reserved areas. I would not pretend that is an easy question but I think it is a question that has to be faced.

- Q65 **Chair:** Again, following on, give us a description of what you feel a successful dialogue between the UK Government and the devolved Governments would feel like and look like, and how would it happen from now?

Professor Page: A really successful one would be one in which all the participants came out feeling that their views had been expressed.

- Q66 **Chair:** Yes, but how would the actual process look and feel at the moment that it does not look and feel? What should be happening that would make you feel comfortable there was going to be a good outcome?

Professor Rawlings: This is where I think we get close back to your report, Chair, on intergovernmental relations. What I would like to see is a very active JMC on European Negotiations meeting regularly now, as I think the First Secretary has indicated will happen, then, under the umbrella of the JMC, individual work streams targeted on agriculture, targeted on environment, bringing the officials and the relevant Ministers together.

Of course, that is very much, Chair, what this Committee suggested in its report on inter-institutional relations. I was reading it again last night in preparation for today and it is interesting. You picked up things like agriculture and the environment, which we have been discussing today, as very much designated policy work streams that colleagues should be pursuing. I cannot help feeling that quite a bit of the answer to the question you have just raised is actually in the report from this Committee.

Chair: I am very encouraged by that. Professor Page?

Professor Page: Yes. I would agree with what Professor Rawlings has said, and I confess not having read your previous report in quite the same degree of detail. I did indeed look at it but, yes, it cannot simply be a series of ad hoc occasional meetings between Ministers. It has to be underpinned by joint working between the Administrations on a very different basis from that which takes place at present.

- Q67 **Chair:** If there were structural reforms or new institutional arrangements created, how much confidence would you have that that would fix the problem?

Professor Rawlings: That is why I think both of us would like to see a statutory underpinning. We think that that would be helpful in generating trust. I don't wish to put words in the Committee's mouth but, from what I have heard this morning, I get the sense that colleagues see the



importance of a fresh start and that what has happened over the last few months, we really have to do better than that.

Then, just to pick up on Mr Fysh's point, I think—it goes on from the question that was asked—I would want to see some draft common frameworks out there. Let's get on with it. We do not have to create common frameworks that are completely signed off. Let's have some common frameworks put out to stakeholders and then, as Mr Jones was commenting, we can have engagement with the key stakeholders as to whether a common framework works for them. That is the process that I would very much like to see: intense work now between Ministers and officials in the particular areas, and then getting the documents out into the public domain so that we can have an open engagement with key stakeholders.

Q68 **Chair:** You mentioned creating some statutory underpinning to these institutional arrangements. Is that something that would fit comfortably into the EU (Withdrawal) Bill?

Professor Page: I suspect not. It would be taking it off in a slightly different direction and that is not what the EU (Withdrawal) Bill is about. It is about the legal consequences of exit/Brexit, but I think it has to be firmly on the agenda as part of a reconstituted United Kingdom, which has the arrangements in place to address the wider consequences. These are the immediate consequences, but I think the burden of the session that we have had is that the questions go much broader than simply getting the statute book into shape or working out common frameworks.

Chair: I think you have been an absolutely wonderful pair of witnesses. You have challenged our thinking, expanded our imagination and you have been a really great help to this inquiry. Are there any other questions? Thank you very much indeed for being with us today.