

Public Administration and Constitutional Affairs Committee

Oral evidence: Devolution and Exiting the EU, HC 484

Tuesday 28 November 2017

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

Questions 69-121

Witnesses

I: Professor Nicola McEwen, Professor of Politics, University of Edinburgh and Michael Carpenter, former Speaker's Counsel.

Written evidence from witnesses:

- [Michael Carpenter](#)
- [Professor Nicola McEwen](#)

Examination of witnesses

Witnesses: Professor Nicola McEwen and Michael Carpenter.

Q69 Chair: Can I thank our two witnesses for coming to the Committee today to discuss the devolution settlement in the context of leaving the European Union, and particularly clause 11 of the European Union (Withdrawal) Bill? Can I first ask you to identify yourselves for the record?

Professor McEwen: I am Professor Nicola McEwen. I am Professor of Territorial Politics at the University of Edinburgh, Associate Director of the Centre on Constitutional Change and a research leader for the UK in a Changing Europe, and I have to acknowledge all of those, sorry.



Michael Carpenter: Michael Carpenter. I was Speaker's Counsel for eight years until last year, when I retired, and I held posts in the European Commission and in Government service and indeed the House service before that.

Q70 **Chair:** Thank you for being with us. We will ask fairly robust and short questions. If you could keep your answers relatively crisp as well that would be very helpful, and I might pull people up if they are going on a bit long.

In the Sixth Report of the 2016-17 Session we produced a report called "The Future of the Union, part two: Inter-institutional relations in the UK". We concluded that the existing inter-institutional mechanism and arrangements are not sufficiently robust or effective and now, with these powers coming back from the EU, which effectively create overlapping competences between the Westminster Parliament and each of the devolved Parliaments, what in your view needs to change to make intergovernmental and inter-parliamentary relations effective?

Professor McEwen: I think there are issues around process and there are issues around practice. With respect to process, it should give us some cause for concern that the one forum of the Joint Ministerial Committee that has been considered to work reasonably well, to the satisfaction of all parties, is the JMC (Europe). That is the one that will soon become redundant, so that begs the question as to what will then replace it. There are a number of process innovations that can be made. One of the reasons why the Joint Ministerial Committee (Europe) worked was partly because the timetable was dictated by the timetable of the European Council, but also because of the external factors having that influence on the overlapping competences, as you mentioned, Mr Chairman, so it necessitated a degree of communication and co-operation between the different levels. We can think, post-Brexit, of similar things that may necessitate that type of co-operation. One is other external relations, in particular trade. Another is the internal domestic sphere around the operation of what we are coming to term the UK single market or internal market. Those are two separate forums that I can see do not exist at the moment but may be particularly useful in a post-Brexit scenario. That is just process. Culture, I think, also matters.

Michael Carpenter: Shall I comment on the culture? My experience is getting a bit old now. As a lawyer, one grows up with the idea of close co-operation with Northern Ireland, Scotland and to an extent Wales, because they have separate legal systems. That is unique in the European Union. This is what you grow up with and certainly, during my time in the Lord Chancellor's Department and in the Attorney General's Office, close co-operation—particularly with the Scottish Court Administration, as it then was—was the order of the day.

When I was taking part in negotiations on international agreements, particularly for enforcement of judgments in the civil jurisdiction, I would sometimes speak for Scotland and Scotland would sometimes speak for



us, and we worked hand-in-glove. There is a very strong culture of co-operation.

This may be unwelcome but I think, whenever you introduce legislation, the culture of co-operation gets damaged because then people look to their rights, and it does not strike me as working quite so well. As far as inter-parliamentary co-operation is concerned, I would say on the legal side that is rather good. We have a regular conference of parliamentary legal advisers of all the parts of the United Kingdom and the Republic of Ireland. We meet every year and there is a lot of interchange during the year. There is an informal network where we help each other out with particular problems, iron out any difficulties, so that culture is alive and thriving as far as that is concerned. I do think the culture side is very important.

Q71 Chair: How is the culture adapted to the fact that there are now very visible political differences representing different elected Governments and different elected parliamentarians in different parts of the United Kingdom? What you are talking about, Mr Carpenter, is very below the political radar. We are now dealing with open political conflict, which is very visible, where people are seen to win and lose and want to be seen to win and do not want to be seen to lose. We don't seem to have any institutional frameworks for dealing with that.

Michael Carpenter: That is a fair point, but it is probably a bit beyond my pay grade as a former civil servant to resolve.

Chair: Professor McEwen was nodding.

Professor McEwen: For a political scientist, maybe. What we see from looking beyond the UK to where intergovernmental processes are more commonly practised is that sometimes you can take the heat out of situations when you have a purpose and a focus, and often a sectional focus, to intergovernmental proceedings. If they are task-orientated then that can help to ease some of those more politically contentious battles. You also cannot get away from them, so part of the reason why we had devolution in the first place is because there was a concession to different preferences, perhaps different interests, and there are different mandates. Part of the culture that I was referring to is perhaps about having some empathy and respect for the different mandates the Governments—and I am not just talking about the devolved Governments here, I think it works both ways—are operating to.

If I could add one final point on culture, which is not just about the politics of this—I think there are some procedural things that matter too. A lot of the frustration I have found when speaking to officials within the devolved Governments is around the organisational culture of intergovernmental relations: the late circulation of papers, not giving them enough time to consult with the variety of different Departments across their Administrations that may be implicated. That seems to me to



be a relatively apolitical and easy fix that can at least help to facilitate good communication and co-operation.

- Q72 **Chair:** How do you promote that institutionally? The JMC have met formally about three or four times over the period since the referendum, and very sporadically. What do we learn from other devolved systems of Government, and indeed from the EU itself, about how to handle shared competences and disagreements between the centre and the constituent parts?

Professor McEwen: One thing we may learn is that schedules can be useful. Ministers in the UK Government and the devolved Governments seem to be unwilling to stick to a set schedule just in case perhaps they are meeting without anything clearly to discuss. A schedule can help to organise minds. It can help to organise activity. In the EU context it is dictated by a pre-existing schedule anyway. Maybe that would make sense within the context of negotiating trade agreements, for example.

Early engagement between the UK Government and the devolved Governments can also help to avoid difficulties arising in the future. The example I am thinking of here is when the EU and Canada were engaged in the lengthy negotiations over CETA. The provinces were involved in those negotiations too, in part to ensure that whatever was agreed with the EU could be implemented within the Canadian federation. We don't have a federation, of course, but there may be issues that could be addressed early on in the process that might also take the heat out of things.

- Q73 **Chair:** To what extent should the scheduling of institutional meetings be laid down in statute or expressed somewhere in statute so that these meetings happen?

Professor McEwen: I have been asked this quite a few times and I don't have a very strong view one way or the other. I am instinctively wary of laying down procedural things in statute—although I will probably contradict myself later on—in part because these are processes that are evolving, that need to evolve and need to adapt to what are very uncertain circumstances that we will find ourselves in as the UK exits the European Union. I suppose it will depend on what was said in statutes. You would not want it to be prescriptive because you would want the processes to be able to adapt to experiences and lessons learned by all of the parties.

Certainly, from the perspective of the devolved Governments, what may help to facilitate and necessitate intergovernmental co-operation is if their consent for certain issues is written down in statute. That is not anything about the processes themselves but it necessitates that process to take place.

- Q74 **Paul Flynn:** We appreciate that we are asking you questions to which there are no answers. Could I ask you—and I will try to make the



question neutral—what opportunities and dangers the UK's possible departure from the EU presents for the potential reform and degradation of intergovernmental relations within the UK? Is it going to make the four nations come closer together, or is it going to make them more divided, or both?

Michael Carpenter: It is an impossible question. I am just hopeful. We have had a union for hundreds of years that has withstood considerable shocks before, so I am confident that we can pull together. That is all I can say, and my opinion is worth no more than anybody else's.

Professor McEwen: The UK is a plurinational state and we have a situation where, to some extent, the different nations are pulling in different directions on the issue of Brexit. I think Brexit creates opportunities in that, because of the repatriation of competences, and whatever model of Brexit we turn out to have there will be new interdependencies, new jagged edges between what is reserved and what is devolved. That will necessitate closer co-operation between the Governments if this thing is going to work. That also requires commitment, willingness to engage and compromise on different sides. I think that willingness is there but the different Governments are responding to different political pressures that can sometimes pull them in different directions, so there are lots of challenges with Brexit but some opportunities too.

Q75 **Paul Flynn:** The process of devolution from the British Government has been one that is seen as grudgingly given because, like most bodies, the British Government are power-retentive. Could you see that the process that we have at the moment is treated with great suspicion by the devolved bodies because they see it as a power grab, because in the legislation there are guarantees that power will be taken away—possibly for a short time—but there are no guarantees that power will be increased or retained?

Professor McEwen: I think that is certainly their concern. I am not privy to the motivations underpinning those particular provisions within the Bill. As you suggested, it may be about seeking to retain authority. If it is, I think it is also about having an eye to being able to negotiate first an agreement with the European Union but then the other trade agreements that will come afterwards—but that is certainly their concern. Of course they are working together more closely now. Within the resurrected Joint Ministerial Committee (EU negotiations) they are exploring more deeply the intersection between EU competence and devolved competence and exploring the issue of common frameworks. I am sure we will come to talk about those.

I think there are concerns. They are right to have some concerns, and I think there is an opportunity for the UK Government to make a gesture that could help to inspire trust in the process and in the commitments that they have made verbally to devolve further powers later on.



Q76 Paul Flynn: Do you think that the Welsh Government would have trust in the central Government after the experience of, I believe it was, five Bills being passed by the Welsh Government that were then challenged by the Attorney General in the High Court? Effectively, Welsh law was not governed by democratically elected representatives. It was governed by judges. On the basis of that and every other obstacle that has been placed in the way of devolution, which took three referendums—we hope Brexit will take at least three referendums before it is settled—but on the basis of the bad blood of the past, don't you think that the devolved Assemblies and Governments are right to be suspicious in their belief of national Governments that bear gifts?

Professor McEwen: In a sense, it is a matter of political judgment. I think they have valid concerns, in light of some of the experiences that you referred to. While I think the UK Government are sincere in their efforts to negotiate common frameworks, one of the problems with clause 11 as it stands is that it does not give the devolved Governments much leverage in the negotiation of those frameworks, because it leaves a situation where if there is no agreement, if there is stalemate or a failure to agree, then clause 11 as it stands would result in the retention of authority by this Parliament.

Q77 Paul Flynn: A brief final point: do you think that the only chance of these matters being resolved is by horse trading between the national Government and the devolved Assemblies, rather than recommendations from Select Committees? There is a huge amount of work on Select Committees now. I sit on three and they are all totally obsessed with Brexit, and there are others whose job is to be involved only with Brexit. Do you see this excessive amount of attention being given to something that may not happen to be a blind alley and that the ultimate deal must be done directly between the Government and the devolved bodies?

Professor McEwen: I hope it is not a blind alley and I don't think it is excessive. I think it is appropriate that Select Committees, in this Parliament and in the devolved legislatures, are engaging with this issue. They are talking to those with the expertise and to the stakeholders who would be affected by this. I think that is absolutely the appropriate way to address this, by giving the topic scrutiny. It is unfortunate that intergovernmental processes on this occasion, and in all others, lack the kind of transparency that would enable us to engage more directly and to know the nature of the discussions that are taking place. There is a space for private discussion between Governments and a space for negotiation between Governments. I did a study a couple of years ago, looking at parliamentary scrutiny and oversight of intergovernmental relations in lots of different countries and, while it was certainly the case that the executive arm of Government dominated the processes and there was a lack of transparency everywhere, nowhere was that as evident as it is in the United Kingdom.

Paul Flynn: Your answer is a very interesting one but it does throw up another question. We have just learned today that the Government deny



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transparency in the reports that they have published and we are told they are heavily redacting them. Isn't it true that we cannot have an open discussion? It is part of the answer.

Chair: You said that was your last question, Mr Flynn.

Paul Flynn: Yes I did but—

Chair: Other people must be given a chance.

Paul Flynn: I recall that the Chairman, of course, has a very partial position in this and was an enthusiastic campaigner for Brexit at the time, which should be borne in mind.

Chair: Order. Order.

Q78 **Mr Fysh:** What involvement have the devolved Administrations had in helping develop EU common policies up to this point, and has that been done via the UK's input into the EU or separately?

Professor McEwen: Primarily via the UK's input. The JMC (Europe), which I mentioned previously, is the primary forum through which the devolved Governments have had the opportunity to shape the UK's negotiating position prior to issues being discussed, debated and negotiated within the council. Of course they will have relations with parliamentarians as well. The European Parliament has become increasingly important in the policy-making process in the EU, but I think primarily it is an indirect route. How effective that has been is difficult to evaluate, in part because of the transparency issues that we have just been discussing but also because within that process—and here is one of the frustrations, which is why I said there was relative satisfaction—there has been the lack of a feedback loop. There is a lot of input but, unless the devolved Governments are present in the room as the negotiations are going on, they don't necessarily know whether their input is having an effect and how much influence they have been able to have with that process.

Q79 **Mr Fysh:** I asked the question because I thought that you made an interesting point about the opportunity for us as we go forward to develop new ways—to make an offer of some kind—to make the devolved Administrations more involved in the thoughts about what common policies should be. My own point of view is that it is fairly clear that the deference to EU law arose from the commitments that the UK was making to the EU in that instance, and, as it comes back into retained EU law, it is entirely reasonable that it should be under UK control, because it is the UK that will then need to make a deal with the EU or any other party. On a practical level, what do you think can be done to involve more devolved Administrations in that process of setting those UK common policies?

Professor McEwen: Before I answer that, I want to take issue slightly with one thing. The UK is the member state, not the UK Government. The UK Government have the responsibility to represent the whole of the UK



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but the UK is a multi-level state. Recognition of that in the internal processes would be helpful and constructive here.

The UK is also extremely unusual in the extent to which the distribution of power is asymmetric. The absence of devolution within England is a barrier to developing the processes of co-decision that you sometimes see in federal states or more uniformly decentralised states. Nonetheless there is still an opportunity to engage with the devolved Governments, at the point not just of coming to implement an agreement but of negotiating and formulating an agreement, to make it what the Prime Minister said initially after she was appointed—that she wanted a genuinely UK approach to Brexit. She raised expectations that that is what the JMC (EN) would achieve. It did not do that, so, having had those expectations raised, the devolved Governments were left rather frustrated and disappointed by it.

The process that we are in now seems to be going some way towards that. At the moment, there is within the JMC (EN) an active process to try to work collaboratively to develop, first of all, a process for agreeing common frameworks and then later what the content of those frameworks may be, so we will see.

Q80 Mrs Gillan: To go over what you have said, we know the JMC is not a particularly well-loved organisation and certainly does not provide the mechanism for correct dialogue between the devolveds and the UK Government. When I had some influence on these matters, I was quite keen on trying to get a forum where we had MPs and AMs or MSPs together to look at certain specific policy areas together—that was the natural sequitur to the Cabinet sub-committee that I set up, which then withered on the vine because the Liberal Democrats in coalition did not want it—and whereby we had a Minister in each Department that was responsible for looking at devolved matters and areas within those Departments. Do you think it would be worth looking at what mechanisms and what we could set up whereby, say, AMs and MPs sit together looking at home affairs issues or looking at agricultural issues together and, likewise, with Scotland and Northern Ireland? We don't have any formal contact between MPs and AMs and MSPs and it seems to me, if you are trying to engender trust and good working, you must have the forum in which you can do it and we just don't have it. The JMC do not even have a Scottish or a Welsh grand committee. Do we sit with AMs or MSPs?

Professor McEwen: As we move forward, there is certainly scope for trying to model something like that as a supplement to the activities that are already there, so long as you can build in—similar to the executive level—the appreciation and the respect for the different mandates, the different interests and perspectives. If we can move forward towards a more organised system of intergovernmental relations and forums then it may make sense to help enhance the scrutiny of those processes, to have something at the parliamentary level as well. I know that there have



been informal links between the Committees, particularly those examining Brexit, but there is certainly a case to have a more formal, more organised kind of arrangement, as a supplement to what is going on.

- Q81 **Mr Jones:** Professor McEwen, in the first of your two papers, “Still Better Together?” you noted that “The plurinational character of the state, especially within the current context of competitive nation-building and contested constitutional politics, shapes the motivations and trust of the actors involved”. Could you expand on what you mean by “competitive nation building and contested constitutional politics”, please?

Professor McEwen: Yes. That was looking at the UK in the context of comparing it with other systems. I think what we see in the UK we also see in Canada and Spain to some extent, in other states that are plurinational, where sometimes the solidarity and commitment to living together in one country and one state cannot be taken for granted, particularly when you have Governments that wish to see a different outcome, that consider that they are representing a distinctive nation, that they would rather like to have greater authority, better self-government, and, in the case of the SNP Government, ultimately independence. That influences the assertiveness and the approach within the intergovernmental arena.

For example, in the case of the Brexit referendum, legally of course it was a UK-wide referendum. The mandate was the mandate of the UK as a whole. But when you have the context of a nation within the United Kingdom having voted a different way, if you look quite closely at the response of the First Minister, Nicola Sturgeon, to that fact, she was seeing that as a different national preference and she in some ways wanted to— and also felt compelled to—advance a distinctive interest within that process.

Because the multinational character of the UK has broadly been recognised by successive Governments over the years, in ways that have not necessarily been the case in Spain or in Canada, then we can sometimes get away from the sort of nationalist competition that you have sometimes seen in intergovernmental relations elsewhere. My concern is that, in a sense, we have two different self-determination projects. The language of self-determination has been used by the Prime Minister in the context of Brexit—including in the Article 50 letter, for example, and in the Brexit White Paper—to talk about Brexit as the self-determination as we see it of the people of this country. Well, that rather depends on how you characterise the people in it. That obscures the plurinational character of the state and all of its divergences.

- Q82 **Mr Jones:** Are these tensions inevitable in the case of devolution settlements that are founded upon plurinational considerations? You mentioned earlier on the CETA arrangement. I remember waiting for a very long time at a conference in Luxembourg for a telephone call from Wallonia that never arrived. Of course, as you know, in that particular



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case the entire treaty was very nearly thwarted as a consequence of the refusal of the Walloons to consent. Is this an inevitability or can these problems be overcome?

Professor McEwen: Differences are inevitable at some point. It does not mean that if you have different Governments with different mandates you will always have different policy positions. That is not the case obviously, but sometimes it will be. The point of a multilevel system is that we can all respect those differences and the different interests and mandates at play. I would not necessarily see the need for securing consent from a regional Government within a multilevel state as a problem or as a sign of tension. It is a sign of a need for compromise, and that may have been avoided if there had been more engagement with the regional Government earlier on. Of course Belgium is somewhat unique in the extent to which regional Governments are sovereign for external relations in their areas of jurisdiction. We don't have that in this country.

Q83 **Mr Jones:** You mentioned respect. Does respect have to move in both directions?

Professor McEwen: Absolutely it does, yes.

Q84 **Mr Jones:** In the case of a UK-wide referendum, should the Scottish Government have respected the decision of the United Kingdom?

Professor McEwen: I think they have. They have said that Brexit will happen, and that they respect that is the outcome, but that does not mean that they ignore the decision that was made in Scotland.

Q85 **Mr Jones:** In terms of future intergovernmental relationships, what do you think could be done to improve matters?

Professor McEwen: I have already mentioned a few different things around the different types of processes that we might have and the practices and the culture. I would be a little bit wary of moving towards a more formal structure of co-decision. I don't think that fits very well with our political culture and it would not respect the sovereignty of Parliament. There may be scope for using intergovernmental processes to come to non-binding agreements that may be binding in honour, or to have a more task-orientated nature to intergovernmental processes. They have to be worthwhile for all of the Governments at play. That was the problem with the forum we haven't talked about yet, the Joint Ministerial Committee (Domestic), which I believe was set up after 2007. That was intended to look at the non-EU aspect of intergovernmental relations. It fell into abeyance because there wasn't really a purpose to it from the perspective of all the parties involved. There has to be a task or a set of tasks, or something they can work towards, that make it worth everybody's while.

Q86 **Mr Jones:** You acknowledge that co-decision making is probably not an option. Therefore how do you proceed in the case, for example, of our present discussion on clause 11? There is disagreement between the



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United Kingdom Government and at least two of the devolved Administrations. They are calling for things to be agreed, but if things cannot be agreed who makes the decision?

Professor McEwen: What I meant by co-decision was binding decisions within those forums. That does not mean that you cannot have agreement and accord, which I think is also what is being called for.

Q87 **Mr Jones:** Forgive me, if I can just interrupt at that point, if it proves impossible for agreement to be achieved how then do you move forward?

Professor McEwen: One of the biggest issues that we haven't confronted very well yet is what happens if there is no agreement. What is the process for dispute resolution? Within the JMC there is a dispute resolution process and prevention is a very important aspect of it. I would personally like to see not so much the role for independent arbitration that you get in some countries but a role for independent investigation, some sort of body that can look at the evidence and then put forward its thoughts on the nature of the dispute. Ultimately, these are matters of politics and disagreements will have political consequences that will ultimately be for Parliaments and electorates to determine.

If I could add one thing: I think part of the problem that we have is a lack of common understanding of the issues at stake. Going back to something that Mr Flynn said earlier, the UK Government think that they are respecting the devolution settlement with clause 11 and the devolved Governments don't think that they are respecting the devolution settlement. Therefore, we have here two different perspectives and understandings of what the devolution settlement is and, unless and until we have a deeper understanding of and common language around the issues we are talking about, then it may be difficult in practice to get that agreement.

Q88 **Mr Jones:** You mention in the same paper the constitutional hierarchy. Doesn't that hierarchy inevitably mean that, in the case of a dispute that is incapable of resolution that, ultimately, it will fall to the United Kingdom Government to decide what the outcome of that dispute should be? Isn't that the reality of politics?

Professor McEwen: Constitutionally, if you are talking about the outcome of this process and the possibility of a lack of consent given from the devolved legislatures, first and foremost it would be a matter for this Parliament to determine whether or not that mattered. Constitutionally, absolutely, you are right. There is a constitutional hierarchy in the nature of the relationship that, legally speaking, would mean it would be a matter for the UK Government and the UK Parliament to determine what happens next. Those determinations may have political consequences and that would be part of the strategic calculation, I guess.

Q89 **Mr Jones:** There would inevitably be resentment on the part of the devolved bodies.



Professor McEwen: If they are ignored or if their concerns are—

Mr Jones: If they feel that they have been ignored or if they feel that their concerns—

Professor McEwen: If they feel that they are being ignored, or if they feel that their concerns are not being recognised then I have no doubt that there would be resentment. The question is whether ultimately that would have any lasting repercussions among the public. I am less certain about that, given all the complexities and, certainly in Scotland, the constitutional fatigue that has set in.

Q90 **Ronnie Cowan:** Isn't that exactly what the problem is: the UK Government go into these negotiations knowing that, at the end of the day, they don't have to do anything because ultimately the power will fall to the UK Government?

Professor McEwen: I am not privy to the motivations of the different actors involved but I do think, so long as clause 11 remains as drafted, that it is a barrier to securing agreement to the mutual satisfaction of all the different parties.

Q91 **Ronnie Cowan:** It could be one of the explanations as to why things are moving so slowly. No one has lit a fire under the UK Government to say, "You have to make this work."

Professor McEwen: Part of the reason why it is moving slowly is because it is a huge task and that is part of the issue of why we are here in the first place. Whatever the broader political motivations, one of the motivations around the European Union (Withdrawal) Bill and the devolution aspects to it may have been about sequencing and ensuring flexibility. For me, it was almost as if there may have been a sense within Whitehall of, "Oh my God, Brexit is such an enormous task. We will deal with the devolution bits later", but politics does not really work like that and I think that they will have to go in tandem.

Q92 **Kelvin Hopkins:** My question is a very open question and you have touched on it already, but I would like to ask both of you: what more do you think is required in order to build and develop trust and mutual respect between the Governments and legislators within the United Kingdom?

Michael Carpenter: One idea that occurs to me is, as a young civil servant, the character of the Department was really determined by the Permanent Secretary. Certainly in my experience, that is why the reports to the Parliamentary Commission for Administration were absolutely of top importance. One possible thing is to have some sort of conference between Permanent Secretaries of the UK Government and of the devolved Governments, just regular meetings. I know they have their Wednesday morning meetings in the UK but this sort of thing to generate a climate of mutual respect. The Italians say "A fish rots from the head downwards", but I also think goodness can flow downwards from the



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head if there is leadership leading by—what Lord Butler once called—precept and example. That could certainly help and break down the tribalism that otherwise arises.

Professor McEwen: I agree with that. You can develop all the processes in the world but, ultimately, the personality of the Permanent Secretary but also of the Ministers involved will have a heavy influence on the dynamics of intergovernmental relations. We have seen that in the UK and we have seen that elsewhere too.

One of the things that can be done to instil trust is to accept some of the amendments that have been tabled jointly by the Welsh Government and the Scottish Government. Recognition of the extent of co-operation between Governments with different parties, different mandates, and different visions of the future, is a sign of the shared frustration that they feel. On some of the other things I have already mentioned around developing a shared understanding and a common language around issues—like the devolution settlement, like the common framework, like the internal market—people mean different things by these things when they are talking about them, I think. I was struck by that in reading the statement of principles that the JMC (EN) issued at its last meeting in October. That was a positive declaration of willingness to co-operate and work together, but it will only go so far if you have a list of principles that mean quite different things by the same terminology. I think first principles would be to develop that shared understanding.

Q93 **Kelvin Hopkins:** Professor McEwen, in your written evidence to the Committee, you recommend or seem to support Professor Alan Page's approach as a way forward. We might examine that later on, but would you recommend that and suggest that we do move forward along those lines?

Professor McEwen: Yes. I would certainly like to see that explored. I absolutely acknowledge Professor Page's contribution here. Since talking with him about it and looking at some of the evidence, thinking a little bit more about it, I think it would be more usefully applied if it were on the face of a Bill rather than in a memorandum of understanding, so with some sort of standstill provision within the Bill perhaps as a replacement for clause 11 as it is there now. In a way, that would be a gesture not just from the UK Government but from the devolved Governments, too, of a commitment and a reassurance to not rush into creating divergences that would erect some of the bad areas of trade and mobility that seemed to be part of the concern underpinning clause 11 in the first place.

Q94 **Kelvin Hopkins:** Isn't a major problem that you cannot please all the people all the time? Within all these divisions of Brexit, devolution, and independence for Scotland, there have been substantial minorities who take a different view. Unionism is still quite strong in Scotland. The Welsh devolution decision was taken by a very small majority, and so on. Trying to satisfy everybody is quite difficult.



Professor McEwen: That is true but my impression is that there is quite a depth of feeling, certainly within Scotland. When I spoke to the parliamentary committees within the National Assembly for Wales, I also got this impression that this is not just a concern that is held by the Governments of the day. There is a broader feeling that the process of Brexit does create some challenges for the devolution settlements. It is perhaps recognising that this is not just a purely partisan issue. Yes, you cannot please all of the people all of the time, but you can please some of them some of the time. There is certainly scope for compromise here.

Q95 **Kelvin Hopkins:** My last question is: what has been the impact of the UK Government's handling of the European Union (Withdrawal) Bill on those relationships so far? Speak your mind.

Professor McEwen: I will let you answer that one first.

Michael Carpenter: I don't really have a view on the politics of it all. My whole career is trying to fix things and I think this is a fixable problem. It has been blown up to a much more important question than it really is. If you look at the Professor Page analysis, with which I respectfully agree, the problem is very, very small. It relates to agriculture, fisheries and environment. You can take the view to just let it rip, don't do anything at all—that would please Scotland and Wales; you would be less happy in the UK—or you can have the existing provision, which is a restatement of the restrictions imposed by EU law. Somewhere in between, there is room for a middle position that does not do too much harm, where, let's say, both sides are equally unhappy. If you have that, you have a deal.

Professor McEwen: The situation that we are in just now is quite positive. There is time within Parliament to debate all of these issues at Committee stage. There is now engagement with the devolved Governments over common frameworks and, as far as I am aware, over the amendments, too. That is all very positive.

To answer your question directly, it is unfortunate that that depth of engagement was not evident earlier on in the process, both in the run-up to the triggering of Article 50 where there was engagement but there was not frank discussion and common understanding, and in the drafting of the Bill and the White Paper that preceded it. That was then. We are in a different situation now, so I think there is opportunity to make that right.

Q96 **Kelvin Hopkins:** Just a brief comment at the end of my questions. Early on in our discussion this morning you talked about early engagement. Should the Government and all sides have seen some of these problems coming before they happened?

Professor McEwen: Yes.

Q97 **Chair:** Can I just press Mr Carpenter? You mentioned agriculture, fisheries and the environment. What about the regional and structural funds? The Government have been talking about replacing them with a UK prosperity fund. To what extent is this also something that is



amenable to a common framework approach, from a legal point of view?

Michael Carpenter: I am sure it is. On the narrow legal question, it is not a matter with which clause 11 engages because you are not talking about retained EU law as restraints on competence there. If there is no EU regional policy operating, there is nothing left. There is no link in the competence. Of course, assistance to industries or firms or whatever in the devolved Administrations could conceivably alter the conditions of competition within the UK. It could do. A bit like state aid, and you might want to have an eye on that. I think that is rather exaggerated, isn't it? The likelihood that Scotland or Northern Ireland or Wales would give such a massive subvention to domestic industries in such a way that it damages the internal market of the UK—

Q98 **Chair:** But state aid is a reserved matter anyway, so that is not in question.

Michael Carpenter: Quite.

Q99 **Chair:** Professor McEwen, we already have City Deals that effectively are Westminster or Whitehall programmes affecting cities in devolved polities. How do you imagine that the replacement of the regional and structural funds from the European Union should be handled? What is the expectation?

Professor McEwen: With respect to City Deals, obviously the devolved Governments are involved there, too, and finance those initiatives as well. A good question; I don't have a full answer for you just now. Whatever it is, that is absolutely one area where I think that there should be co-operation and discussion between the devolved Governments and the UK Government. Finance, whether it is in structural funds or the bigger issue around agriculture, is obviously going to be extremely important. It is the one area that can be sure to create some intergovernmental tensions if you don't get it right.

I think it is a bit more than agriculture, fisheries and environment. Obviously, in relation to Scotland, we have the 111 powers that were listed. If you read through those, it is a bit of a mishmash of laws, regulations and programmes. I think there was even one database listed there. I hope that the deep-dive exercise that the Governments are engaging in now will shed a bit more light on exactly where we are with the intersection of EU and devolved competence.

The one thing I would add, though, is I think there also needs to be closer intergovernmental co-operation and communication on the new reserved matters that will impinge upon devolved competence. State aid you mentioned already, but there is a whole host of repatriated powers that, under the existing settlements, will be reserved matters, many, many more of those than will be devolved whatever happens to clause 11. They will impinge upon other areas of devolved competence. Whether it is things around employment law or the economy or markets or competition, all will have a direct impact on matters that are under the



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jurisdiction of the devolved Governments and Parliaments. I think there is very much a need for greater co-operation on those issues as well.

Q100 **Sandy Martin:** You have already mentioned the stumbling block of clause 11 to the relationship between the UK Government and the devolved Administrations. Can you briefly outline what you think the main strengths and weaknesses are in the actual Bill for the reparation of powers, obviously with reference to clauses 10 and 11 but any other clauses as well if you want?

Professor McEwen: The main strength for the devolved Governments and Parliaments is the main strength for the UK Government and Parliament, too, in that the main thrust of the Bill is to ensure a degree of certainty and continuity by converting the *acquis* into domestic context, or the bits of it that are relevant. That assurance of continuity is a positive that goes across the board. The question is: do you need clause 11 for that? I don't think you do. I think the continuity on exit day is secured by the other parts of the Bill and clause 11 is about what comes next.

Michael Carpenter: I agree with what Professor McEwen has said about the strengths. We have to be realistic here. This is a massive operation. It seems to me that provisions to hold the ring are the only practical way forward, given all the other things that have to be done. Whether the ring has been placed at quite the right place in clause 11, I have said before it could be described as a bit of a steam hammer. Is that sort of block necessary and is there room for some attenuation of this to deal with the matters that really would cause damage to the UK's internal market? That seems to be the real concern and so many commentators have made that point: Professor Page and the Supreme Court and so on.

It seems to me one possible way forward is to amend clause 11, so that modifications can be made so far as they don't seriously affect trade within the United Kingdom or the conditions of competition within the UK so that you allow some leeway but not a complete blanket ban. That seems to me to be unnecessary.

There are two extreme positions. One is to get rid of clause 11 altogether, the particular restraints; or you have the existing clause. One is the big end and one is the little end, if I can quote Jonathan Swift. Somewhere in the middle there ought to be grounds for the two sides to meet to allow the effective exercise of these competences, unless they damage the UK's internal market. It seems to me that it ought to be based on some sort of compromise. Discussion of UK frameworks is obviously a good thing. The only thing is if you don't have something in the Bill you are going to be vulnerable to third party challenges to the exercise of competence, as happened with the Imperial Tobacco case and the recent Scotch Whisky Association case. That would argue in favour of some sort of amendment on the face of the clause.



Professor McEwen: Can I add one more thing? One of the criticisms of the Bill across the UK has been the scope of executive authority that it gives to the UK Government. That is not matched by the scope of executive authority that is given to the devolved Governments. Their authority is much more constrained. However, the issues of a lack of parliamentary oversight, which have been discussed in this House, are amplified even more in the devolved legislatures, because the Bill also extends the authority of UK Ministers to potentially amend, through secondary legislation, the founding statutes for the devolution systems, the devolved Parliaments, without the consent of Ministers or the consent of those legislatures involved. Yes, there are absolutely legitimate concerns about parliamentary scrutiny here but they are even more amplified, even greater, for the devolved legislatures as well.

Q101 **Sandy Martin:** Professor McEwen, you appeared to suggest earlier on—I may have misunderstood—that you thought that clause 11 could just be dropped altogether. Do you still believe that? Why do you believe that Mr Carpenter thinks that this will give an intro to third party challenges?

Professor McEwen: That is not my preference. Of all of the varieties of amendments and things that I have seen, the one I find most persuasive is Professor Page's recommendation of a standstill provision, similar to the standstill provisions that were within the Treaty of Rome originally. Obviously, they were in an entirely different context where you have this vision and a dream of creating an internal market, a common market. We are at a very different point where you have a great deal of market integration and you don't want to pull it apart. Nonetheless, you can have a provision that committed the Governments to not introducing anything that would jeopardise the arrangements that were in place until such time as agreement on common frameworks was secured, either until they agree that they do not need them at all, which is entirely possible in many of the areas, or until they agree on what the content of those common frameworks should be.

It is a holding measure. It does not resolve the issue. It does not resolve the issue of the need for common frameworks, but a standstill provision could provide some reassurance to all concerned that the devolveds are not going to rush off and dismantle the internal market and that the UK Government are not going to retain all of the power. Crucially, a standstill arrangement would allow, constitutionally speaking, the powers to fall where they lie. In other words, it would respect the devolution settlement as currently drafted within the founding statutes and schedule 5 of the Scotland Act and schedule 7—I think it is—of the Government of Wales Act.

Q102 **Sandy Martin:** Do you think that that would work, Mr Carpenter?

Michael Carpenter: I don't know how I would draft it, but then that probably would not be my problem. I am attracted by that idea. I think it is not bad, but I just wonder how practical it is and whether there would actually be agreement to that. If there isn't agreement on an all-party



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basis then it will not fly, because the drafting of this could add quite a bit to the Bill. One is always mindful of what Lord Thring said, "Bills are made to pass as razors are made to sell". You cannot practically add huge amounts on top of the Bill that is already the subject of considerable contention. That is why I suggested this amendment—a sort of sleight of hand amendment—to try to bring the two sides together, which is draftable and does not lead to lots of new institutions being created.

Professor McEwen: To be fair to Professor Page, his suggestion was not to put it in the Bill but to have an intergovernmental agreement, which would address that particular concern.

Q103 **Chair:** To that extent, the Government would argue clause 11 is a standstill provision. It simply maintains the notion that these powers were never de facto devolved. They were held by the European Union and they will now be held by the United Kingdom Government, pending whatever. It is the lack of "whatever" that is causing the discomfort.

Professor McEwen: With respect, I don't think so. That goes back to my point about a different interpretation of what the standstill would be and the situation that we are in now. If you start—as, I have to say, I have for the past two decades for which I have taught this to students—by trying to present an understanding of the devolution settlement as the way in which powers are set out as reserved matters in the devolution legislation, at least with respect to Scotland, and by default everything else being devolved, we have a good sense then of what is devolved. It does include these areas that, yes, in practice overlap with EU competence. In practice, there may not have been the same degree of scope to legislate within those areas because for the Scottish Parliament and the National Assembly for Wales, just like for the UK Parliament, you—

Q104 **Chair:** But the Scotland Act also contains section 56, I think it is, which reserves those powers.

Professor McEwen: Yes, absolutely, it does. Not reserves, no. The section that I think you are referring to is around the EU constraint.

Chair: The obligation to observe EU law.

Professor McEwen: An Act of the Scottish Parliament is not law if it is not compatible with EU law, which is a consequence of the UK's membership of the European Union.

Q105 **Chair:** But it feels different, doesn't it, from a reserved power?

Professor McEwen: It does. It very much feels different. I think that is right.

Chair: Yes, I understand that.

Q106 **Mr Fysh:** Is it not the case, though, that whether you are talking about a standstill until there is some agreement on these matters or whether one



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allows some modifications within the limits of potentially affecting things that are important to be common—to go back to your earlier point about the lack of common understanding between the parties that would be involved in making those decisions about what is important to these things and the politics of that—it is not practical to have those things and therefore clause 11, as written, is the only practical way forward?

Professor McEwen: I would respectfully disagree. If you genuinely want to see a scenario where there is agreement between the Governments, then I think clause 11 is a barrier to that. Already within the system there is an imbalance of power and authority, which is absolutely fine. That is the system that we have signed up to. That is the system as it stands. There is nothing within the devolution legislation that prevents the UK Parliament from passing legislation in areas that are devolved. Of course, by convention they don't do that without consent.

There is already a lot of authority. There will be even more authority as a result of Brexit because a lot of the powers that concern the market, that concern the kinds of regulations that are necessary for external trade agreements or ensuring mobility, ensuring fair competition and all of these single market issues, are already going to be reserved matters anyway. There is a backstop within the current devolution settlements, which would enable the Secretaries of State to instruct the devolved Governments to make whatever changes were deemed necessary to ensure international obligations could be honoured and implemented. There is a lot there already. I think what clause 11 does is, in a sense, take away what modest leverage the devolved Governments have constitutionally from them. That is why I am saying I think it is a barrier to securing an agreement in good faith, and it is certainly a barrier to generating trust between the different levels of government.

Q107 **Chair:** Do you have something to add, Mr Carpenter?

Michael Carpenter: I think one is in danger of dancing on the head of a pin. As a matter of law, I don't think it is right to regard clause 11 as anything in the way of a power grab. You have to look at the Scotland Act as a whole to determine whether competence had been devolved or not. Indeed, there is an interesting remark by Lord Hope in the Imperial Tobacco case. He said, "The fact that section 29 provides a mechanism for determining whether a provision of an Act of the Scottish Parliament is outside, rather than inside, competence does not create a presumption in favour of competence". In other words, we look at the whole of the Act. I think it is right as a matter of law that these powers are not latent and subsisting in Scotland. They were never controlled in Scotland. The power grab language does not really help. I also think Professor Page has shown that this is quite a small problem because, in fact, so many areas are reserved in any event.

Chair: As you said before.



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Michael Carpenter: It is quite a small problem. As often with politics, things are more apparent than real and presentation is all.

Q108 **Mrs Gillan:** To take you on a bit, obviously what Professor Page said about clause 11 causing difficulty in identifying what devolved legislatures have competency over makes it extraordinarily difficult. How might this impact EVEL, English votes for English laws? What additional layer of complexity could be overlaid on the process?

Michael Carpenter: I used to do EVEL in my time. Whitehall is not allowed to talk about EVEL. It is not a term that must be used. It is English votes. Yes, of course, it would. It is quite difficult at the moment, but then we do it. In my former incarnation, I undertook to the Speaker that unless it was the clearest possible case, we would not advise them to certify a Bill. In that case, you would just fall back to the normal parliamentary procedure. It would add an extra layer of complexity, but the complexity would be dealt with by people, if I may say so, who know what they are doing. I would not elevate that aspect of it into a major issue. It will just be one of those things that one will have to deal with.

Q109 **Mrs Gillan:** It is quite manageable, in your view?

Michael Carpenter: I think it is manageable, yes. It is burdensome but we have managed it.

Q110 **Mrs Gillan:** Can you give any sort of practical experiences of what has happened previously from implementing the existing devolution and EVEL frameworks? Have there been any problems?

Michael Carpenter: In the area that I am most familiar with, which is legal areas and particularly the civil law, the Scotland Act did not really change very much because we already knew that since 1707 there was a Union with a separate system of law. As I said before, whenever international conventions are negotiated on choice of law, private and international law arrangements, recognition and enforcement of judgments, Scotland always is closely consulted. Sometimes, on the Rome Convention on a law applicable to contractual regulations, the UK team is led by the Scots. As I say, there was a hand-in-glove co-operation just based on shared respect and understanding of our two systems. If he is properly trained, every lawyer knows that there are significant differences in Scotland, less so in Northern Ireland, and you would have to go back to before the 16th century for Wales, but there are differences emerging.

Mrs Gillan: Do you have anything to add, Professor McEwen?

Professor McEwen: No.

Mrs Gillan: That is fine, thank you.

Q111 **Ronnie Cowan:** I was going to ask you about Professor Alan Page's standstill agreement, but we seem to have covered that quite eloquently so far. I will defer to Professor Rick Rawlings, who told us if the



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competences come back first to the UK Government, Whitehall Departments will find it convenient to hang on to these powers rather than to pass them on. How can we address that?

Professor McEwen: I have no way of knowing whether that is the case or not.

Chair: Assume it is for the purposes of the question.

Ronnie Cowan: We are.

Professor McEwen: Yes. To accept that the sequencing intentions, if that is what they were, will not hold, so to accept that this is something that has to be dealt with in tandem, the issue of where competences lie on exit day and in the immediate aftermath has to be considered alongside the broader issues.

If I can add something to what you were saying there with respect to English votes for English laws. There are, of course, similar difficulties and challenges that will face the presiding officers in the devolved legislatures if clause 11 stands as drafted from understanding what is, in fact, within their competence after Brexit. That is partly to do with the ambiguity around this body of law that we are calling retained EU law, and also the fact that that is not static, the retained EU law, because of the modification powers that are there. It is not clear to me what will happen in the future, whether that will gradually be replaced by primary legislation or not, but, because that is in any case an inherently ambiguous body of law in terms of the boundary of it, knowing when devolved legislation falls wholly within competence or may be in some parts beyond the competence will be extraordinarily difficult for the presiding officers.

Q112 **Ronnie Cowan:** Are there changes that we could make to the face of this Bill in order to achieve this?

Professor McEwen: Yes. There can be some clarity provided to retained EU law, in general, that might help improve the Bill for the whole of the UK. The point I was making specifically is that the complexities for the devolved legislative process are entirely bound up with clause 11 as it stands. I agree that it is a small problem, which also makes it one that should be relatively easy to address.

Michael Carpenter: It is fair to say that the problem for those advising presiding officers in Scotland, Wales and Northern Ireland is more difficult than the one we face under EVEL. They have to make a positive decision as to whether there is competence. Under EVEL, if I can put it this way, we don't give those advocating an England-only procedure the benefit of the doubt. If there is doubt about competence, then the Bill will not be certified, so it is easier.

As time goes by, this is one of the things that my former colleagues will certainly be discussing with their counterparts: how do we avoid too



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great a variation in how we interpret these things? Naturally, sooner or later, we are going to both be dealing with the same question, maybe not at the same time but at some time. It would make us look rather nonsensical if we were taking wildly different views as to the law.

Q113 Ronnie Cowan: As we are, we are 486 days from Brexit. Given what we can see coming in our direction, and a feel for what will be devolved back up to Scotland, do the UK Government and the devolved powers have the capacity to deal with these new powers?

Professor McEwen: You mean capacity within the Civil Service?

Ronnie Cowan: Yes.

Professor McEwen: I think there will be capacity challenges for all Governments. We already see that there are capacity challenges in dealing with the Brexit process as it stands. They will have to deal with it, is the short answer. In a sense, because the competences of the UK Government will expand more considerably than the competences of the devolved Governments whatever happens to clause 11, then the problems may be more acute within Whitehall than within the devolveds. What I would say is that there is scope for engagement with outside expertise, an awful lot of opportunity to engage with the universities, for example, to help support policy development. A lot of that takes place anyway on a more informal and ad hoc basis, but there are more opportunities there.

Michael Carpenter: One must also remember that it is not simply a case of member state Governments leaving the Commission in the driving seat to get on with particular policies. They have their own capacity to monitor and contribute to discussions in the Council. It is not going to be a totally new subject that they are going to come on to.

I suppose the one area that has caused concern is the negotiation of international trading agreements. Because of exclusive external competence the European Commission is in the driving seat and the member states are merely observers. They are still contributing to the directives or the mandates that are given to the Commission negotiators, but they are not actually doing the negotiations themselves. To that extent, that will be new, but UK civil servants are doing negotiations all the time with third countries so it is not going to be totally new. There will be strains in certain areas, but I think the Service is pretty flexible in being able to reallocate people to deal with that. I can only speak for Whitehall and that rather imperfectly.

Q114 Ronnie Cowan: There is always a tremendous strain with HMRC and their job could change quite dramatically.

Michael Carpenter: Yes, on VAT and stuff like that; yes, it could.

Q115 Ronnie Cowan: They are talking about £250 million and 3,000 new jobs and that is just working towards the date. There is still development and



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training. Does that worry you? It worries me.

Michael Carpenter: Customs union stuff, I just don't know. My opinion is no better than anybody else's. It is not something I lie awake at night worrying about.

Q116 **Ronnie Cowan:** It worries me. Between the north and the south of the island we are going to build a wall now apparently. Does that bother you?

Michael Carpenter: Well, that is a—yes.

Ronnie Cowan: No, I am not going to continue with it.

Chair: I am giving you a little licence.

Ronnie Cowan: About time, too.

Q117 **Dr Huq:** I want to ask about reregulation. Stuff about this has been touched on, but it is quite a broad question. What are the main challenges for transferring or establishing UK common frameworks to replace EU common frameworks and to also respect Government systems in Scotland, Northern Ireland and Wales? It sounds like an essay question you would set your students.

Chair: Let's start with Professor McEwen and then Michael can pick up on legal points.

Professor McEwen: I don't want to rehash things that we have already said. My understanding is that at the moment—and the Secretary of State certainly confirmed this—what they are trying to do now is sort out the process for agreeing common frameworks. The content they anticipate will be dealt with further down the line.

Q118 **Dr Huq:** It would come out of the structure?

Professor McEwen: Yes, the process for reaching agreement. One of the biggest challenges around the process will be that issue of what happens when you cannot agree and what happens when disputes emerge? I don't have a ready-made answer to that. Perhaps we can look to some of the experiences that have worked, more or less, and try to learn from those. I am thinking specifically of the Joint Exchequer Committees, which were bilateral committees between the UK Government and the Scottish Government in the first instance. There will be different views as to whether or not that worked. It was certainly very intense and it got to an agreement in the end; perhaps a fudge but it got there. That has built within it its own process for dispute resolution should such a dispute emerge. We have not had one yet within the context of the JEC so we don't know how that would work in practice. The process of the JEC with respect to Wales was much smoother than it had been with Scotland because, in a sense, the Treasury learned how to engage bilaterally with devolved Governments. I think there was much more satisfaction all round with that particular process. That was a learning of culture and practice of engaging with different Governments.



Michael Carpenter: I don't have much to add. We don't have a clean slate here. We have the Act of Union with Scotland and Act of Union with England Acts, which set up an internal market. They did not use that language, but it was that sort of feeling. That was reflected in the Scotland Act. At the risk of repeating myself, a lot of these things will depend on cultures. As I say, in the legal area I do not see any difficulty at all because there never has been since 1700. Both sides readily accept the uniqueness and separateness of their systems and, to a lesser extent, that is true of Northern Ireland and Wales because it is just a given. As I say, I don't think my opinions are worth any more than anybody else's on that because who knows?

Q119 **Dr Huq:** The second one is a suggested framework structure. It has been suggested to us that the legal and technical complexity of sorting out where a returning power should rest should be considered by a standing commission. The model that has been given is the Kenneth Calman Commission to do with Scottish devolution set up by the last Labour Government. What are the pros and cons of taking such an approach?

Professor McEwen: If I may add one thing to your previous question around common frameworks, one of the things that would be very helpful is to recognise that, first, common frameworks will not always be necessary, and, secondly, when they are necessary they can take a variety of different forms. We already have a whole body of concordats and memorandums of understanding in particular areas—on a smaller scale perhaps—that seem to have worked quite well and can allow for divergence. Sometimes it may be necessary to have a legal underpinning, but it will not always be necessary to have that and to still maintain the degree of compatibility, or uniformity perhaps, that people may feel is required.

On the issue of a standing commission, I absolutely applaud the role of this Committee and the others for engaging with expertise and feeding into the process. That is where I think the best direction of travel is. This is the most appropriate forum for that sort of thing to take place because I don't think it is just a technical issue; I think it is a political one. A Calman Commission, or a Silk Commission or whatever, can engage with a variety of different stakeholders and it can engage with a variety of different expertise. It can make recommendations but, ultimately, these are matters of politics, trust and respect. I don't think a standing commission is going to resolve those particular issues.

Q120 **Chair:** Can I press you a bit on that? Clause 11 lacks any sense that there is a process to follow clause 11. A standing commission with the right remit could make it clear that there is going to be a process that leads to decisions being made. It cannot predetermine the outcome of those decisions, but how else would you ensure that there is a sense that clause 11 is not a resting place, it is the start of a process that is consultative and consensual?



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Professor McEwen: There is a process going on but it is one that is very much between the Executives. It is very difficult for the rest of us to know exactly how that is unfolding. What I would quite like to see is something to shadow that and perhaps feed into it and operate as a reference group for the different Governments, an evidence base to evaluate the competing claims that may be made.

Q121 **Chair:** It makes sense to you if this mechanism is somehow accountable, is that what you are saying?

Professor McEwen: I think so, yes. Sometimes in a sense we are looking to the future and none of us have a privileged insight into that, but we can lend expertise to that process and help to inform the deliberation that is taking place between the Governments. I think my preference is for Parliaments to be in control of that process rather than a separate committee of the great and the good.

Chair: Anybody else, any further comment? I am most grateful to our two witnesses. No doubt you will be watching the debates on days four and five with great interest. Thank you very much indeed.