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Pete Wishart MP  
Chair  
Scottish Affairs Committee  
House of Commons  
Westminster  
London  
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20 September 2023

Dear Pete

Further to the letter sent by the First Minister on 1 August 2023, please find attached as an annex the Scottish Government's response to the Scottish Affairs Committee's inquiry: *'Intergovernmental relations – 25 years since the Scotland Act 1998'*.

You might also find helpful some material previously published by the Scottish Government. On 14 June 2023 we set out in detail how the actions of the UK Government in recent years have eroded the devolution settlement and responsibilities and powers of the Scottish Parliament and Government: [Devolution since the Brexit referendum](#). This builds on an earlier publication which sets out how devolution has benefitted Scotland, allowing decisions that matter to people in Scotland to be taken here, and how developments since the 2016 EU Exit vote have put this at risk: [After Brexit: The UK Internal Market Act & Devolution](#).

The Scottish Parliament's Constitution, Europe, External Affairs and Culture (CEEAC) Committee have also been undertaking their own inquiry into devolution post EU Exit and my written evidence to that Inquiry can be found here: [How is Devolution Changing Outside the EU](#).

The current position is best summarised by my remarks to the CEEAC's evidence session on 29 June 2023:

*"At the heart of things, there needs to be an understanding that devolution is about being able to make different policy choices. It is about divergence. That does not need to be a bad thing. That was possible in the European Union, but it is now increasingly not possible in the United Kingdom."*<sup>[1]</sup>

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<sup>[1]</sup> [Angus Robertson evidence session to CEEAC on 29 June 2023](#)

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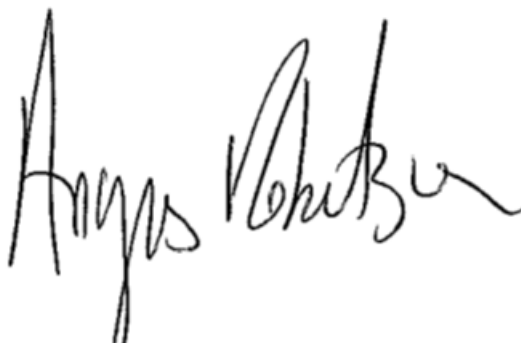
The CEEAC Committee's Inquiry follows their report published in September 2022, [The Impact of Brexit on Devolution](#), which concluded that there are fundamental concerns that need to be addressed in relation to how devolution works outside the EU.

I share those concerns. The UK Government's continued attempts to undermine devolution since 2016 and its continued disrespect as evidenced in the papers referred to above, both for the Scottish Government and for the Scottish Parliament, presents an existential risk to the concept of self-government which was supported by an overwhelming majority of the people of Scotland in the 1997 referendum.

Developments since 2016 have also illustrated that fundamental features of the UK's constitutional system – particularly the doctrine of Westminster supremacy – mean that Scottish democratic self-government will always remain at risk. In [Renewing Democracy Through Independence](#), the second paper of the *Building a New Scotland* series, the Scottish Government sets out its view, and the evidence supporting it, that independence is the only realistic way to renew Scotland's democratic institutions, respect the voice of the people of Scotland, and secure Scotland's democratic future. Paper 4 in the series – [Creating a Modern Constitution for an Independent Scotland](#) - sets out the Scottish Government's vision for a modern constitution in an independent Scotland that would put rights and equality at the heart of Scotland's democracy-and ensure that the people of Scotland decide who governs their nation and how.

I hope this is of assistance to the Committee.

Yours aye



**ANGUS ROBERTSON**

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## **Annex – Scottish Government’s response to the Scottish Affairs Committee’s inquiry: *Intergovernmental relations – 25 years since the Scotland Act 1998***

Public administration in Scotland has long been distinctive, with many institutions being, or remaining, independently run from those in the rest of the United Kingdom, for example, health, education and justice.

Devolution in Scotland has its basis in the Scotland Act 1998, as amended (most extensively by the Scotland Acts 2012 and 2016). The Act followed a referendum in 1997, in which devolution was endorsed with overwhelming support by the people of Scotland. The Scottish Parliament was established in 1999, and addressed a “democratic deficit”: governments at Westminster without popular support from the electorate in Scotland making decisions for Scotland. The Scottish Parliament better reflects the views of the people of Scotland in making choices on key issues such as health, education, justice and the environment.

The devolution settlement preserved the sovereignty of the Westminster Parliament over the Scottish Parliament, but it did not create a parallel hierarchy of governments. In 1999 governmental functions and funding in devolved areas transferred to the Scottish Government, which has the experience, knowledge and responsibility for developing policy and allocating funding for devolved matters. The Scottish Government is accountable to the Scottish Parliament and people for these functions, not to the UK Government or Westminster Parliament. The UK Government had no continuing role or powers over devolved matters (with some limited exceptions).

Principles for relations between the governments were set out in 1999 in an agreement known as the Memorandum of Understanding (or MOU). The MOU contained arrangements for intergovernmental relations (IGR) to be conducted through the Joint Ministerial Committee (JMC) and related structures. However, these protections were not legally binding and depended on adherence to agreements and conventions, conducted in good faith. The most significant was the Sewel Convention: that the UK Parliament will “not normally legislate with regard to devolved matters without the consent” of the devolved legislatures.

The UK Government also published a series of Devolution Guidance Notes to “set out advice on working arrangements between the UK government and the devolved administrations” and provide an “introduction to the main principles involved in the managing of the devolution settlements, bilateral relations, correspondence, parliamentary business, legislation and concordats.”

The JMC Plenary was supposed to meet at least once every year, but no meetings occurred at all between 2002 and 2008. It has been suggested that since in the early years of devolution, the same party, Labour, was in government in Westminster, Cardiff Bay and Holyrood that “this meant that intergovernmental communication was conducted through informal channels and there was little perceived need for formal summits between the four governments.”<sup>1</sup>

The election of the first minority SNP Scottish Government in 2007, and the subsequent election of the coalition UK Government in 2010, brought the liaison between the UK

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<sup>1</sup> [Devolution: Joint Ministerial Committee – Institute for Government](#)

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Government and Scottish Government back into the channels created by the MOU. In this period the mechanisms envisaged in the MOU were maintained and worked up to a point, though effective IGR relied then, and since, on informal bilateral contact.

The IGR arrangements and relationships were able to deal effectively with significant political, legislative and administrative challenges. These included reaching the Edinburgh Agreement of 2012 following a strong electoral mandate for an SNP government in Scotland in 2011, which paved the way for the referendum on independence in 2014, and successfully negotiated the Scotland Acts of 2012 and 2016 and their accompanying fiscal arrangements, enabling the Scottish Parliament to give its legislative consent to those bills.

The effective conduct of IGR in this period was underpinned by common understandings, for example UK governments generally leaving devolved matters to devolved institutions, as well as the common framework of EU structures and law in areas of EU competence.

However, the position has deteriorated from 2016, as a consequence of Brexit and the opportunity the UK Government clearly believed it presented to pursue what has been called “muscular Unionism”, its increasing intervention in devolved policy matters, and the erosion of the protections provided to devolved institutions, especially the Sewel Convention.<sup>2</sup>

This approach was not an inevitable consequence of Brexit. The Common Frameworks programme shows that there is an entirely practicable way for the governments to manage policy divergence in devolved matters on the basis of agreement. Indeed, Common Frameworks are an example of new intergovernmental mechanisms which could help embed better ways of working between the four governments, as they are underpinned by principles including respect for devolution, observing the Sewel Convention and acknowledging the legitimacy of policy divergence. However, the Common Frameworks programme has been put under strain by the unilateral - and wholly unnecessary - imposition of the Internal Market Act in 2020, and then by UK Ministers’ failure to honour assurances offered in both Houses of Parliament to follow agreed processes, and allow policy divergence agreed through a Common Framework to be excluded from the Act’s effects.<sup>3</sup>

The Internal Market Act 2020 embodies many of the wider challenges we face in establishing more equitable and sustainable IGR: it was developed internally by the UK Government without the involvement of devolved governments; it was imposed after the Scottish Parliament and Welsh Senedd had explicitly refused legislative consent, in breach of the Sewel Convention; it undermined preceding collaborative efforts to establish agreed ways of working through common frameworks; and it has been deployed by UK Ministers to undermine agreed processes, as with the Deposit Return Scheme.

There has been some recent examples of practical and constructive engagement and joint working between the Scottish and UK Governments, for example on Covid, supporting displaced Ukrainians and the agreement reached to update the Fiscal Framework. In her letter to the Finance and Public Administration Committee<sup>4</sup>, the Deputy First Minister wrote: “The updated agreement (Fiscal Framework 2023) recognises changed circumstances since 2016 and contains greater budget flexibility and borrowing powers for Scotland. These

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<sup>2</sup> The Scottish Government has set out the detail of UK Government actions in [Devolution since the Brexit Referendum](#) (June 2023).

<sup>3</sup> [United Kingdom Internal Market Bill – Volume 686 Debated 16 December 2020](#)

<sup>4</sup> [Letter to the Finance and Public Administration Committee](#)

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outcomes are the result of collaborative working between the Scottish and UK Governments and a willingness to compromise on both sides.”

Whilst these are some examples of what can be achieved when parties adhere to the principles set out in the IGR Review, overall the Scottish Government is very concerned by developments since 2016. These concerns are also shared by the Welsh Government: for example Jeremy Miles MS has told the Senedd: “the tone of inter-governmental relations has deteriorated due largely to a series of aggressive intrusions by the UK Government into areas of devolved competence.”<sup>5</sup>

The effect of the UK Government’s actions is to constrain the powers and responsibilities of the Scottish Government and Parliament, imposing decisions of the UK Government in devolved areas, and undermining some of the protections provided to the Scottish Parliament. Ultimately these developments frustrate the purpose of devolution and risk making the settlement practically unworkable. Previous experience demonstrates this does not have to be the case, even under the UK’s current constitutional system, which relies on expected standards of behaviour rather than enforceable legal rules. Both reforms and cultural changes are necessary to rebuild trust and confidence in the IGR system.

### **The Review of Intergovernmental Relations (IGR review)**

As noted above, the JMC was established in 1999 as the formal machinery for how IGR would operate in the UK and was intended to provide central coordination of the overall relationship between the UK Government and devolved governments.

The IGR review was commissioned in March 2018 when Heads of Government agreed that officials should review and report on the existing intergovernmental structures, to ensure they were fit for purpose in light of the UK’s exit from the EU. It was published in January 2022 by the UK Government, with all three devolved governments agreeing to use this as the basis for engagement, provided it was kept under review. The principles set out in the IGR Review lay the foundations for good intergovernmental working in the same way that the principles did in the original MoU. These are:

- maintaining positive and constructive relations, based on mutual respect for the responsibilities of the governments and their shared role in the governance of the UK;
- building and maintaining trust, based on effective communication;
- sharing information and respecting confidentiality;
- promoting understanding of, and accountability for, their intergovernmental activity;
- resolving disputes according to a clear and agreed process.

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

- a fairer dispute resolution process – which includes, for the first time, the principle that no government can be both party to, and arbiter of a dispute; and recourse to independent advice;

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<sup>5</sup> [Written Statement: Review of Intergovernmental Relations \(24 March 2021\) | GOV.WALES](#)

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

To date there has been one meeting of the Prime Minister and Heads of Devolved Governments Council (November 2022, in the margins of the British Irish Council Summit). This meeting discussed the economic outlook and cost of living, including rising inflation, and shared challenges in supporting the NHS. There have also been four meetings of the Interministerial Standing Committee (IMSC) where agendas covered topics such as the Sewel Convention, Ukraine, the UK legislative programme, Common Frameworks, the cost of living, and Investment Zones. There have also been five meetings of the Finance: Interministerial Standing Committee (F:ISC) which has provided an opportunity to discuss issues around cost of living support, energy security and net zero, budget flexibility and replacement EU funding.

There have also been a series of meetings at portfolio level (Interministerial Groups – IMGs), including new IMGs that did not exist prior to the Review such as the Housing, Communities and Local Government IMG and Safety, Security and Migration IMG.

It should be noted that neither the new structures set out here in the IGR review, nor the JMC structure that preceded it, were intended to be the only conduits for intergovernmental working. On the contrary, the high-level formal structures have always been the complement to extensive bilateral and multilateral engagement and co-operation, formal and informal, between the Scottish and UK Governments.

Implementation of the proposals set out in the IGR Review have been disrupted by various events, such as the absence of Ministers in Northern Ireland since 2022, and reshuffles in the UK Government in summer and autumn 2022. More time is therefore needed to bed in the new machinery, including a more regular pattern of the Interministerial Standing Committee (IMSC) meetings. There has also not yet been a date secured for the second meeting of the Heads of Government Council, despite the Terms of Reference stipulating that the Council meets annually, though ad hoc meetings can be arranged according to need. There has also not yet been an opportunity to test the concept of time-limited Interministerial Committee (ICs) for looking at a specific topical issue.

There has been progress on the IGR Secretariat, with a Head of Secretariat taking up post in May 2023 and discussions are ongoing to bring the Secretariat to full complement. Duties for the logistics of IGR meetings are currently being handed over from the interim arrangement of IGR officials in the respective governments to the Head of Secretariat.

The new dispute resolution process has not yet been fully tested. Issues that have developed on the IGR landscape have so far been dealt with through the principle of dispute avoidance where possible and have gone through informal escalation channels, including official level engagement.

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Therefore, the efficacy of the new dispute resolution mechanism remains to be seen. However, there are some crucial elements which would constitute improvements over the previous process.

- a. A disagreement will be assessed by the secretariat against a set of standards, jointly agreed criteria to assess if it qualifies as a dispute. Once confirmed as a dispute, the relevant parties must engage with the process fully.
- b. The dispute will be chaired by an independent party – who is not involved in the dispute. This could be a representative of a government not party to the dispute or an independent representative, but in either case the chair must be agreed by all parties to the dispute.
- c. There is a presumption of third-party advice being taken unless there is unanimous agreement not to seek this. The scope and provision of advice will be jointly agreed, and the relevant criteria for appointment are set out in the IGR review.
- d. There is also a presumption of escalation to the next stage if resolution is not found, avoiding a deadlock, and allowing escalation all the way to Heads of Government level (which cannot be delegated). There are set timescales for each stage, which can only be extended by agreement from all parties to the dispute.
- e. The outcome of disputes will be reported to the respective legislatures, including any third-party advice received, thus increasing public scrutiny.

The IGR review aims to increase transparency and Parliamentary accountability through measures intended to complement, and not duplicate, arrangements that individual governments have with their respective legislatures. This includes encouraging publication of communiqués of IGR meetings, and the IGR Secretariat duties including an annual report of intergovernmental activity. Transparency and Parliamentary scrutiny is also mainstreamed into the dispute process, with governments party to a dispute being required to report on the outcome of formal disputes to their respective legislatures.

Although the IGR proposals deliver many elements of what we set out to achieve from the review and offer the prospect of improvements to current processes, these proposals alone will not deliver the step change in attitude and behaviour from the UK Government that is needed if there is to be a genuine improvement in intergovernmental relations. As highlighted above, the UK Government handling of Brexit, and imposition of the UK Internal Market Act 2020, despite explicit refusal of consent under the Sewel convention, show that procedural improvements alone are not enough to reset the relationship.

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

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