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Evaluating the New Structures of Intergovernmental Relations (IGR)

1. The 2022 Review of Intergovernmental Relations introduced substantive changes to the structures facilitating intergovernmental interaction between the UK and devolved governments. Notable features include envisaged regular interaction, the creation of an independent secretariat and reform of the dispute resolution mechanism. Further, the commitment to rotating chairs and locations is a welcome advance which serves to check the dominance of one government in these forums as well as enable engagement in a non-hierarchical manner, thus cementing a sense of joint ownership in the arrangements.
2. While largely still in their infancy, and with progress somewhat stalled due to the absence of a political executive in Northern Ireland, there has been fairly regular interaction between the new IGR bodies. Since 2023, the middle tier forums - the Interministerial Standing Committee (IMSC) and Finance Interministerial Standing Committee (F:ISC) - have met on a regular basis, as have numerous IMGs. Those IMGs which meet most frequently (e.g. Environment, Food and Rural Affairs) relate to departments with long-standing collaboration predating the 2022 reforms.
3. Despite some progress, problems remain. Between June 2022 and February 2023, there were no meetings at the middle tier level, with several meetings postponed by the UK government. In addition, while the Prime Minister and Heads of Devolved Governments Council is supposed to convene once a year, it has not met since its inaugural meeting in November 2022. The changes in structures have not, it seems, engendered a substantive shift in the spirit undergirding intergovernmental interaction to ensure regular interaction. While there needs to be a significant investment and commitment by all governments to willingly engage in IGR, there is a particular responsibility on the UK government to make IGR work. The fact that ministerial IGR was effectively suspended because of political turmoil within the UK Government in 2022 highlights the important position of the UK government in facilitating IGR.
4. Much progress has been made in reforming IGR structures, but much more remains to be done to create a more cooperative and collaborative working relationship between ministers across all governments to enhance the efficacy of intergovernmental interaction. The success and failure of IGR often rests on the willingness of those involved to make arrangements work. Reforming structures are certainly a step in the right direction, but these also require a shift in attitude and political culture towards more constructive engagement.
5. **IGR and Consultation:** There is no evidence that the new structures have served so far as a vehicle for the UK Government to consult with the devolved governments vis-à-vis legislation. Since the publication of the

Review, we have had several high-profile disputes between the Scottish and UK governments over the former's Deposit Return Scheme and gender recognition legislation. In lieu of using intergovernmental fora to address these issues, at least as a first resort, the UK Government effectively blocked this legislation, provoking the ire of Scottish ministers and making it more difficult to reach agreement. This represents a missed opportunity to have used the new IGR machinery to address both UK and Scottish government concerns and priorities.

6. **Promoting Collaboration and Avoiding Disagreements:** Following on from the above, it is clear that beyond the rhetoric of promoting collaboration, the actions of the UK Government have not reflected its warm words. This illuminates the importance of not just reforming the structures of IGR but also overhauling the approach and thinking of the ministers involved. This is not unique to the UK and is a crucial feature of all multi-level systems. Missing in the UK is a political culture between the UK and devolved governments predicated on cooperation, compromise, mutual respect and trust. Within Whitehall, as ongoing parliamentary inquiries show, there are issues around 'devolution capability' and a lack of knowledge about how devolution works. This has resulted in the preponderance of a unitary and hierarchical mindset which colours the thinking of ministers and civil servants in Whitehall and consequently impedes more effective IGR.ⁱ
7. The Covid pandemic was rather illuminating in this regard when the UK Government, and specifically the then Prime Minister Boris Johnson, was unable, or indeed unwilling, to differentiate between UK-wide and England-specific guidance and restrictions, creating confusion across the UK. Indeed, in his evidence to the Covid Inquiry, Mr Johnson argued it was 'optically wrong' to meet regularly with devolved first ministers.ⁱⁱ This not only speaks to a more unitary, hierarchical understanding of the UK state, notwithstanding 25 years of devolution, but lends credence to a common critique from devolved ministers that there is a lack of knowledge about devolution in Whitehall.
8. More recently, we have seen a willingness to use IGR structures to resolve disputes. In response to the recent disagreement between the UK and Scottish governments over banning sales of glue traps for rodents, the Deputy First Minister, Shona Robison, while vehemently opposing the position of the UK Government, noted that the issue would be raised in both IMSC and IMG structures.ⁱⁱⁱ While this is an ongoing dispute and it is therefore too early to examine the efficacy of using intergovernmental meetings to discuss disagreements, it is a welcome development to see ministers advocating the use of IGR structures as forums to resolve disputes.
9. **Common Frameworks:** Common frameworks are generally considered to be a good model to facilitate joint-working between the UK and devolved governments. For devolved ministers this has related to the perception that frameworks are mutually negotiated and agreed between governments, rather than imposed by the UK Government. That said, as the Committee will be aware, the Internal Market Bill introduced by the

UK Government in 2020 made no reference to common frameworks and was only changed after amendments proposed by the House of Lords. While ultimately rectified, this episode once again illustrated the unitary impulse of the centre and little concern to develop more collaborative IGR within the UK's territorial constitution.

10. **Dispute Resolution:** As noted above and we have argued elsewhere, reform of the dispute resolution mechanism is a notable development in the reformed structures.^{iv} Under the JMC, the UK Government served the roles of judge, jury, and executioner, engendering little confidence among the devolved governments that disputes could be handled impartially. Hitherto, the dispute resolution process remains untested. It has been reported that the Northern Ireland Executive raised a dispute with the Treasury, but there has been no published outcome so far, and it was reported in the House of Lords in January 2024 that in light of the Executive being in abeyance the dispute was 'on pause'.^v Now the Executive is back up and running, more details on this are likely to be forthcoming.
11. It is worth noting that the F:ISC has its own dispute procedure. While this follows much of the same process as other disputes, grounds for raising a dispute in the F:ISC are more restricted. The Forum's terms of reference state 'all parties acknowledge that policy decisions on funding are strictly reserved to Treasury ministers, with engagement with the devolved administrations as appropriate. As outlined in the Statement of Funding Policy, funding disputes may only be raised where there is reason to believe a principle of the Statement of Funding Policy may have been breached.' In essence, and much like previous JMC structures, the UK Government/Treasury remains the dominant partner. The limited grounds for raising a dispute hint at the overbearing role the Treasury has in fiscal IGR. To ensure more collegial and cooperative IGR this will require greater effort on the part of the Treasury to meaningfully engage with the devolved governments prior to, for example, changes to the Statement of Funding Policy.
12. **Northern Ireland:** The restoration of the Northern Ireland Executive is a welcome development. During its abeyance, Northern Irish officials attended IGR meetings in an observation capacity only. Since the Executive's restoration, ministers have once again begun attending meetings.

The Territorial Departments

13. The territorial departments, and their respective Secretaries of State, are intended as the custodians of the devolution settlement, representing the devolved nation in Cabinet (and across the UK Government more widely), and the UK Government within their respective territories. In recent years, significant investment has been made to ensure that the territorial departments are more visible in the UK's capital cities.
14. Since 1999, it has become clear that most interaction between the devolved and UK governments does not proceed through the territorial

department and instead is conducted on a bilateral, department-to-department basis. There has then been an identifiable diminishment in the status of the territorial departments and at times it appears they have lost their way. In the cases of Scotland and Wales this was perhaps most clear in 2007 and 2010 respectively in light of party incongruence which has undoubtedly impacted intergovernmental relations. Akin to IGR forums, the approach and personality of ministers involved likewise colours relations. This was spotlighted during the UK Covid-19 Inquiry's focus on Scotland which highlighted the tense and somewhat combative relationship between the Scotland Office and Secretary of State for Scotland and the Scottish Government.^{vi}

15. In consonance with the UK's status as a plurinational state, we believe the territorial departments play an important symbolic role in representing the nations at the heart of government. In addition, we believe the territorial departments still have considerable value, specifically with regards to expertise in Scottish/Welsh/Northern Irish issues which is missing from the rest of Whitehall. How much use is made of this expertise within Whitehall is perhaps something for the committee to explore.

The Sewel Convention

16. In recent years, respect for the Sewel Convention has markedly eroded. Until 2016, the Convention largely operated without controversy with legislative consent being held by the devolved legislatures on only a few occasions. The process of exiting the European Union was the main catalyst for the erosion of the Sewel Convention. Despite consent being withheld by the devolved legislatures either individually or collectively relating to numerous pieces of legislation (e.g. the European Union (Withdrawal) Act or the Internal Market Act), the legislation proceeded. This has had the extraordinary effect of, in some cases, unilaterally altering the devolved settlements notwithstanding their opposition.

17. In addition, the Supreme Court's judgement in the case of *R (Miller) V Secretary of State for Exiting the European Union* in which it held the Sewel Convention was a political rather than legal rule had the effect of undermining the Convention. While the justices concluded that the Convention played 'an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures', they passed on the opportunity to explore what this might entail in the aftermath of the Convention being placed on a statutory footing in the Scotland and Wales Acts 2016 and 2017 respectively.

18. In recent years, therefore, we have witnessed an acceleration of legislation being passed by the UK Parliament notwithstanding the absence of legislative consent from the devolved legislatures. In this vein, the Sewel Convention can no longer be considered a viable self-denying ordinance, and instead appears to be increasingly viewed by the UK Government as merely optional.

19. This was particularly profound with the passage of the UK Internal Market Act, which was passed despite significant objections, and without the

consent of the devolved legislatures. The implications of UKIMA have a long-tail in intergovernmental relations, with a lack of clarity on the grounds in which exclusions to the market access principles can be agreed, and the timing under which this would take place. In the years since UKIMA's passage, leading to conflict over exclusions, most notably over Scotland's Deposit Return Scheme and more recently, a Scottish ban on the sale, possession and use of glue traps. It was only after the passage of the Wildlife Management and Muirburn (Scotland) Bill, with cross-party support in the Scottish Parliament, that the UK Government notified the relevant committee of the refusal of an exclusion to prohibit the sale of the traps.

Strengthening Sewel

20. There is an urgent need to reform the Sewel Convention. While, as we posit below, tangible changes are required to strengthen the process of obtaining legislative consent, much like IGR in general, a change in mindset and tone on the part of the UK Government in this process is likewise required. Proceeding without legislative consent should not be a decision taken lightly. This thus requires more effort on the part of the UK Government to enter into good-faith negotiations with the devolved governments in the spirit of compromise, cooperation and collaboration.
21. There is an ongoing debate about whether the Convention would be strengthened by placing it on a statutory footing. While we believe there is merit in exploring this further, particularly in light of the way the Convention has been so easily disregarded on certain occasions, the sacrosanct principle of parliamentary sovereignty renders this a difficult (though not impossible) task. So long as Westminster is sovereign and supreme, any attempts to strengthen the Sewel Convention could be repealed by any future amendment.
22. One potential way to strengthen the amendment would be clarify the meaning of 'not normally' referred to in the Convention. In the 25 years since the Convention has been in operation, the abnormal circumstances in which consent need not be sought, or indeed sought but ignored, have not been determined – it is in the gift of the UK Parliament to decide what these circumstances are.^{vii} In the spirit of the joint review to reforming IGR, a joint review of the Sewel Convention could take place to identify the limited instances in which legislation can proceed in the absence of devolved consent.
23. Another avenue for reform worth exploring relates to parliamentary procedures for the engagement of the convention. In this sense, when legislative consent is required, the UK Government must detail in Parliament the steps it has taken to work with the devolved government(s) in seeking consent. This would have the added benefit of ensuring that ministers consider the implications of legislation for the devolved institutions in the early stages of law-making rather than an inconvenient add on, as well as offer an early opportunity to address any concerns and head off potential disputes. When consent is withheld, we

believe there needs to be a clear and transparent process within Parliament to debate whether proceeding without consent is the right thing to do. This could be the work of a committee in either house, or indeed a joint committee. Further, as recommended by the Welsh Government, we think there is merit in exploring the proposal that in an instance where legislative consent is withheld an additional legislative stage is added to allow the UK Parliament to further debate the respective bill and explore whether it should proceed.^{viii} This would involve a defence by the UK Government as well as an opportunity of rebuttal for the devolved governments.

24. As highlighted by the Labour Party's Report of the Commission on the UK's future, reforming the House of Lords into a territorially representative Senate would make this an ideal site to implement a fairer process in managing the Sewel Convention.^{ix} That said, in the absence of such full-scale reform, the suggestions we outline above could still be implemented.

25. In recent years, the willingness to disregard the Sewel Convention has led to increased constitutional disputes between the devolved and UK governments. It is crucial, therefore, that concrete steps are taken to strengthen the Convention. On the one hand, this would help to placate tensions between the devolved and UK governments, while on the other hand, would address, at least to a certain extent, growing concerns among the devolved institutions of their constitutional vulnerability in the wake of a UK Government willing to ride roughshod over political conventions in the pursuit of its own political agenda and policies. In the absence of reforming the Convention, the number of disputes between the devolved and UK governments will likely increase.

Delegated Legislation

26. In recent years, we have seen a significant increase in the use of delegated legislation to implement policy decisions. In general, delegated legislation is not subject to the same levels of debate or scrutiny as primary legislation and this can be problematic. With regards to devolved settlements, to put it plainly, using delegated legislation or Henry VIII powers to alter devolved competences or acts of the devolved legislatures without the consent of the respective institutions is a bad idea. Instead, any attempts to use delegated legislation/Henry VIII powers should be guided by a necessity to consult, negotiate and compromise and should be subject to consent. Proceeding to do so in the absence of agreement would be democratically questionable and would further stretch the already tenuous bonds of trust between the UK and devolved governments.

8 April 2024

ⁱ See, <https://committees.parliament.uk/work/7742/devolution-capability-in-whitehall/>

ⁱⁱ <https://covid19.public-inquiry.uk/wp-content/uploads/2023/12/07172527/INQ000255836.pdf>

(p45).

iii <https://www.gov.scot/publications/glue-traps-sales-ban-letter-uk-government/>

iv <https://www.parliament.scot/-/media/files/committees/constitution-europe-external-affairs-and-culture-committee/written-submission-from-dr-paul-anderson-and-dr-coree-brown-swan.pdf>

v Baroness Penn, Intergovernmental Relations within the United Kingdom. HL Deb, Vol. 835, Col, 563. <https://hansard.parliament.uk/Lords/2024-01-18/debates/EC6CEB7C-0864-4233-A71C-4B85E0D730C6/IntergovernmentalRelationsWithinTheUnitedKingdom?highlight=dispute%20pause#contribution-1A7D1AA4-2D82-4126-A559-50FFFE35B02F>

vi <https://ukandeu.ac.uk/the-pandemic-and-devolution-intergovernmental-relations-under-stress/>

vii See, A Paun and K Shuttleworth, 2020, *Legislating by Consent: How to revive the Sewel Convention*. Institute for Government. Welsh Government, 2021, *Reforming our Union: Shared Governance in the UK*.

viii Welsh Government, 2019, *Reforming our Union: Shared Governance in the UK*.

ix <https://labour.org.uk/wp-content/uploads/2022/12/Commission-on-the-UKs-Future.pdf>