

Cabinet Secretary for Constitution, External Affairs and Culture

Angus Robertson MSP

A b c d

T: 0300 244 4000

E: [scottish.ministers@gov.scot](mailto:scottish.ministers@gov.scot)

Clare Adamson MSP

Convener

Constitution, Europe, External Affairs and Culture Committee

The Scottish Parliament

Edinburgh

EH99 1SP

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Dear Clare

Thank you again for your letter of 25 May and the questions for your inquiry *How is devolution changing outside the EU?* Further to my letter of 14 June, I am pleased to attach the Scottish Government's answers to your questions, and I look forward to giving evidence to the Committee on 29 June.

Yours aye

**ANGUS ROBERTSON**

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## Constitution, Europe, External Affairs and Culture Committee Inquiry – How Is Devolution Changing Post-EU?

### Intergovernmental Relations

***The Committee would welcome your views on whether there have been negative relations at an inter-governmental level and whether this could be addressed to some extent through legislation.***

The Scottish Government has set out in detail how the actions of the UK Government since the Brexit referendum have eroded the devolution settlement and responsibilities and powers of the Scottish Parliament and Government<sup>1</sup>.

This has been accompanied by a difficulties in relations between the UK Government and the devolved governments as its approach, as well as its actions, have failed to adhere to agreed ways of working.

For example, the Scottish Government was following the agreed and published process to obtain an exclusion to the Internal Market Act (IMA) for the Deposit Return Scheme when UK Ministers intervened and created new procedural steps that are not part of that process, disregarding the agreed approach for assessing possible exclusions<sup>2</sup> and the work undertaken by the relevant Common Framework to support that process.

Similarly, the Memorandum of Understanding sets out very clearly that the powers under section 35 of the Scotland Act should only be used as a last resort, and only following discussions between the UK and Scottish Governments to resolve any problems<sup>3</sup>. Again, the UK Government did not follow that agreed process in considering its use of section 35 for the Gender Recognition Reform Bill, which is all the more notable as it was the first use of the power.

Finally, concerns about the UK Government's meaningful commitment to the Sewel Convention, and its respect for the Scottish Parliament, were reinforced by the very short period (around a working day) between seeking legislative consent for measures in the Retained EU Law (Revocation and Reform) Bill, and its announcement of an intention to proceed without such agreement<sup>4</sup>. The UK Government's own Devolution Guidance Note 10<sup>5</sup>, which covers the Sewel Convention, makes clear that there should be proper engagement on UK legislation to resolve issues.

In each of these examples there are agreed processes and guidance which, if followed in good faith, could have avoided, or at least provided the opportunity to avoid, the difficulties that have ensued.

While the Scottish Government has acknowledged the UK Government's IGR review introduced some improvements into the machinery for IGR, these examples illustrate that the 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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<sup>1</sup> [Devolution since the Brexit Referendum - gov.scot \(www.gov.scot\)](https://www.gov.scot)

<sup>2</sup> [Internal Market Act: correspondence - gov.scot \(www.gov.scot\)](https://www.gov.scot)

<sup>3</sup> See paragraph 27: [MoU between the UK and the Devolved Administrations.pdf \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

<sup>4</sup> [Cabinet Secretary for Constitution External Affairs and Culture \(parliament.scot\)](https://parliament.scot) and [Retained EU Law Bill "risk to devolution" - gov.scot \(www.gov.scot\)](https://www.gov.scot)

<sup>5</sup> [Post-Devolution Primary Legislation affecting Scotland \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

Legislation would only improve this situation if it contained effective enforcement mechanisms and real sanctions. It does not seem likely that the UK Government would support or promote legislation that would impact its own freedom of action in such a way. In any case, the real improvement needed is genuine commitment to operating IGR processes as intended, with integrity and good faith, and respect for all participants.

***The Committee notes that the dispute resolution process, including in relation to the process for considering UKIMA exclusions in Common Framework areas, does not appear to have been used despite a number of inter-governmental disagreements. It would be helpful to understand why the process has not been triggered.***

The review of Intergovernmental Relations<sup>6</sup> introduced a new process for resolving intergovernmental disputes. Its focus is on resolving issues at the lowest possible level, but if this is not possible it outlines a three-stage process, facilitated by an impartial secretariat, with options for third-party advice, and increased scrutiny by respective legislatures. This process has not yet been tested but remains an option available to us.

With the Deposit Return Scheme, the Common Frameworks dispute resolution process<sup>7</sup> was not triggered as there was agreement by all parties that divergence could only be managed – and the Scottish regulations could only have their desired effect – with an IMA exclusion.

Robust dispute resolution processes are a key part of the effective intergovernmental arrangements, but there will be uncertainty on how these non-binding mechanisms can have a meaningful effects in a situation without genuine, good faith commitment to respect inter-government processes.

***The Committee would also welcome an update on progress at an inter-governmental level in delivering appropriate levels of transparency around the operation of common frameworks including the process for considering UKIMA exclusions.***

After the Deposit Return Scheme there is a need to look again at ensuring the Common Frameworks process, including the IMA exclusion process, operates as agreed, and is represented accurately - which is essential to ensure proper transparency, functioning of Common Frameworks and respect for devolution. The Scottish Government is engaging with the UK Government and the other devolved governments on how to achieve this.

The Scottish Government is also in discussion with the Parliament to consider how best to operate in new scrutiny landscape following developments since the Brexit referendum, including timely and accurate updates on the operation of common frameworks and related exclusions processes, and the impact of the IMA on legislation at both the Scottish Parliament and Westminster.

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<sup>6</sup> [Microsoft Word - The Review of Intergovernmental Relations - OFFSEN.docx \(publishing.service.gov.uk\)](#)

<sup>7</sup> See pages 18-20: [Resources and Waste Common Framework \(publishing.service.gov.uk\)](#)

## Parliamentary sovereignty

***The Committee would welcome your views on whether you agree that the doctrine of parliamentary sovereignty might constrain the constitutional change which may be necessary to ensure that devolution works effectively outside of the EU. And if so, what can be done?***

As the Scottish Government has set out<sup>8</sup>, the doctrine of Westminster's unlimited Parliamentary sovereignty remains a barrier to guaranteed and secure self-government for Scotland within the UK.

This was true before the events following the Brexit referendum, which have served to illustrate clearly this central feature of the UK's constitutional system.

No UK government of either of the two main UK political parties has shown any appetite for fundamental reform of the doctrine of Westminster sovereignty. Indeed, it was embedded in the devolution statutes in 1998.

While the doctrine persists, no legislation passed by Westminster can guarantee the powers or indeed existence of the Scottish Parliament<sup>9</sup>, nor any system of intergovernmental relations, nor any codification of constitutional conventions, nor any legislative constraints on Westminster itself. All of these, however apparently robust the legislative safeguards, can be overturned by a majority in both houses at Westminster.

The UK constitutional system is therefore dependent on Westminster exercising self-restraint in the use of its powers, and the actors in the system, especially the UK Government, following the conventions on proper constitutional behaviour. Events since the Brexit referendum have illustrated that these are insufficient to protect devolved institutions, especially at times of political differences, when such protection is most required.

Although the doctrine of Westminster sovereignty means its own legislation cannot guarantee the devolution settlement, such legal provision can offer more protection than conventions, at least in making clear how the UK Government should behave, and possibly providing legal recourse should it fail to meet these standards. This remains the most security that the UK constitution can offer Scotland's democracy, in the absence of proposals to reform and modernise its fundamentals.

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<sup>8</sup> [Renewing democracy through independence - gov.scot \(www.gov.scot\)](http://www.gov.scot)

<sup>9</sup> See, for example, paragraph 1.1: [Scotland Bill 2015-16 \(Bill 3\) \(parliament.uk\)](http://parliament.uk)

## Sewel convention

***The Committee would welcome your views on whether you agree that the Sewel Convention is under strain and whether, and how, it could be strengthened in law and be subject to judicial review or whether, and how, it could be strengthened on a non-statutory basis.***

The Scottish Government agrees that the actions of the UK Government have undermined the Sewel Convention. The Scottish Government's view is that a convention which can be observed or not by the UK Government, as it chooses, cannot provide any security to the Scottish Parliament that its responsibilities or views will be respected.

The Scottish Government also notes that the convention has been set aside in areas where there are disagreements between the Scottish and UK Governments, and the powers and responsibilities of the Scottish Parliament are being adversely affected (notably the IMA): that is, precisely the circumstances in which the convention was intended to protect devolution.

The Scottish Government has set out how the Sewel Convention could be properly put on a legislative footing as recommended by the Smith Commission in 2016<sup>10</sup>. The Government remains of the view that enacting those provisions would be the optimum approach available to restore confidence in the convention (acknowledging the limits of legislation that affects Westminster's sovereignty under the UK's constitutional arrangements).

However, the Scottish Government believes that it is very unlikely that this UK Government will legislate or take any other steps to limit its freedom of action, now that it has set aside the convention on a number of occasions. It is important to note that, despite the misgivings of the Scottish Parliament, and committees of both the Commons and Lords<sup>11</sup>, the UK Government considers the Sewel Convention is operating properly and has not indicated any interest in reform<sup>12</sup>. This attitude makes any reform very unlikely and indicates that the UK Government will continue to set aside the convention in the future.

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<sup>10</sup> See page 26: [Deputy First Minister and Cabinet Secretary for Infrastructure, Investment and Cities.dot \(parliament.scot\)](#)

<sup>11</sup> See, for example, the CEEAC report of Sep 2022: [The Impact of Brexit on Devolution | Scottish Parliament](#); Lords Constitution Committee report of Jan 2022: [Respect and Co-operation: Building a Stronger Union for the 21st century \(parliament.uk\)](#); Commons PACAC report of July 2018: [Devolution and Exiting the EU: reconciling differences and building strong relationships - Public Administration and Constitutional Affairs Committee - House of Commons \(parliament.uk\)](#)

<sup>12</sup> See the UK Government report to PACAC: [Government Response to the Committee's Eighth Report: Devolution and Exiting the EU: reconciling differences and building strong relationships - Public Administration and Constitutional Affairs - House of Commons \(parliament.uk\)](#)

## Delegated powers for UK Ministers to legislate within devolved competence

***The Committee would welcome your view on the impact on devolution of the increasing conferral of powers on UK Ministers to make legislation within devolved competence including the impact on effective parliamentary scrutiny.***

The Scottish Government agrees with the Committee that the increasing conferral of powers for UK Ministers to act in devolved areas is an important constitutional development which requires careful consideration, particularly to ensure that the responsibilities of the Scottish parliament are properly respected.

Previously both UK and Scottish Ministers had powers to implement EU legal measures in devolved areas (under section 57(1) of the Scotland Act, now repealed). The Scottish Parliament can decide to give other powers to make secondary legislation to UK Ministers, either directly in Acts of the Scottish Parliament, or through consenting to Westminster legislation. However, prior to the Brexit referendum this happened rarely, as there is no equivalent of the Sewel Convention for secondary legislation, so the effect is that the Scottish Parliament loses its ability to formally scrutinise and agree to legislative action within its areas of competence.

The Scottish Government recognises that there can be pragmatic arguments for powers to provide an option for a UK wide approach to secondary legislation where that is justified, for example when a mix of reserved and devolved matters is involved, provided there are adequate safeguards for devolved interests. The Scottish Government has supported such powers, notably in the immediate post-Brexit legislation when considerable amounts of retained EU law required to be re-enacted through secondary legislation in a very short timescale.

However, the Scottish Government shares the concerns expressed by the Scottish Parliament (and the Welsh Government and the Senedd) about an apparent tendency for the UK Government to routinely propose to take such powers, and without proper safeguards for devolved interests, such as a statutory requirement for consent from Scottish Ministers. The UK Government has also been also prepared to breach the Sewel Convention specifically to confer powers on UK Ministers to act in devolved areas against the explicit views of the Scottish Parliament, compounding the disregard of the devolution settlement<sup>13</sup>.

The Scottish Government believes the normal preference should be that Scottish Ministers have powers to act in devolved areas, and that any concurrent powers should require the consent of Scottish Ministers for which they can be scrutinised by the Scottish Parliament. Any exceptions, for example that UK Ministers can exercise such powers after consulting Scottish Ministers, should be carefully justified to the Scottish Parliament, and the UK Government should include a requirement for statutory consent if the Scottish Parliament does not agree to its proposals.

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<sup>13</sup> See pages 7-8: [Devolution since the Brexit Referendum - gov.scot \(www.gov.scot\)](http://www.gov.scot)

## UK Internal Market

***The Committee would welcome your views on whether there is a need for more clarity on the extent to which UKIMA may act as a practical constraint on regulatory divergence, the reasons for this, and the impact on the ability of the devolved governments to develop policy and legislation tailored to meet local needs and circumstances.***

The IMA has major flaws both as a mechanism for managing the UK's internal market and in its interaction with the devolution settlement<sup>14</sup>.

Before Brexit, the shared framework of EU law applied symmetrically to all parts of the UK. Recognising the argument for an alternative mechanism to coordinate between different parts of the UK following Brexit, the principles for Common Frameworks were agreed between the governments across the UK in 2017<sup>15</sup>.

Common Frameworks offer an agreed means to manage regulatory divergence in a post-EU context: an intergovernmental mechanism based on collaboration and mutual respect. This is a model for a properly functioning internal market, where the relationship between a well-functioning market and the power to act autonomously in different territories – the founding purpose of devolution – is managed in a proportionate and balanced manner, recognising the importance of other devolved policy objectives such as health and the environment.

By contrast, the IMA imposes a rigid statutory model based solely on the market access provisions, with very limited exceptions, and without the key features of effective internal markets, such as proportionality and subsidiarity. Decisions on changes to this model are solely for the UK Government, rather than joint decision, even for devolved policy objectives. This remains the case even if the UK Government is considering exclusions arising from its own policy decisions in its role as the regulator for England. The IMA is therefore asymmetric, and inflexible, with all powers resting with the UK Government.

The IMA is also flawed in its interaction with the devolution settlement. The Scotland Act is a reserved powers model of devolution, with all matters devolved except those specifically reserved in the Act. This model provides the Scottish Parliament with clear and robust legislative competence.

The IMA changes the competence of the Scottish Parliament, not by reserving matters in Schedule 5 of the Scotland Act in a clear and accessible manner coherent with that Act, but by providing that provisions of Acts of the Scottish Parliament, or Scottish Statutory Instruments, “do not apply” or have “no effect” if the market access principles apply. This is in effect a new, wide-ranging constraint on devolved competence, cutting across the reserved powers model, that potentially goes further than existing constraints on legislative or executive competence in the Scotland Act 1998, and is unclear and unpredictable in effects<sup>16</sup>.

The Scottish Government is strongly of the view that the IMA should be repealed as a whole given these fundamental flaws in its design and its damaging effect on the devolution settlement.

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<sup>14</sup> For more detail see: [After Brexit: The UK Internal Market Act & Devolution \(www.gov.scot\)](http://www.gov.scot)

<sup>15</sup> [Microsoft Word - Joint Ministerial Committee communique.docx \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

<sup>16</sup> See [SPLCM-S05-47.pdf \(parliament.scot\)](https://parliament.scot)