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Intergovernmental relations: 25 years since the Scotland Act 1998



Introduction

The Royal Society of Edinburgh (RSE), Scotland's National Academy, welcomes the opportunity to respond to the Scottish Affairs Committee's inquiry into intergovernmental relations. The RSE has previously published policy advice in this area, including responses to consultations on the 'Future Governance of the UK' (2021),¹ the 'UK Internal Market Whitepaper' (2020),² 'Scotland and the UK Internal Market' (2020),³ and 'Common UK Frameworks' (2018).⁴ The working group who prepared this paper comprised Fellows of the RSE with significant knowledge of the UK's constitutional arrangements and who occupy various roles across academia, policy, and other sectors.

General Comments

1. The RSE has highlighted in previous advice papers that the system for intergovernmental relations (IGR) in the UK was not effective and urgently needed to be reviewed and reformed.⁵ The RSE therefore welcomed the conclusion of the review of intergovernmental relations in 2022, leading to the creation of a new framework and set of structures for managing IGR, superseding the Joint Ministerial Committee system that had been established in 1999.⁶ These reforms have been positive, with meetings taking place at all levels of the three-tier committee structure for formal multilateral engagement, including a meeting of the newly formed Prime Minister and Heads of Devolved Government Council.⁷ However, by looking at the outcomes for IGR more broadly, there is little evidence to suggest that relations have improved at the political level. In assessing the effectiveness of the new framework, it will be important to tease out the differences between process and machinery, wider constitutional developments, and politics, all of which can impact IGR.

¹ The Royal Society of Edinburgh (2021). *Future Governance of the UK*. Available here: <https://rse.org.uk/wp-content/uploads/2022/04/RSE-AP-Future-Governance-of-UK-2021.pdf>

² The Royal Society of Edinburgh (2020). *UK Internal Market Whitepaper*. Available here: <https://rse.org.uk/expert-advice/uk-internal-market-white-paper>

³ The Royal Society of Edinburgh (2020). *Scotland and the UK Internal Market*. Available here: <https://rse.org.uk/expert-advice/scotland-and-the-uk-internal-market>

⁴ The Royal Society of Edinburgh (2018). Scottish Parliament Finance and Constitution Committee: Common UK Frameworks

⁵ See for example The Royal Society of Edinburgh (2021). *Future Governance of the UK*. Available here: <https://rse.org.uk/wp-content/uploads/2022/04/RSE-AP-Future-Governance-of-UK-2021.pdf>

⁶ UK Government (2022). *Review of Intergovernmental Relations*. Available here: <https://www.gov.uk/government/publications/the-review-of-intergovernmental-relations>

⁷ Institute For Government (2022). *Intergovernmental Relations*. Available here: <https://www.instituteforgovernment.org.uk/explainer/intergovernmental-relations>

2. Despite devolution to Scotland, Wales, and Northern Ireland, the UK remains one of the most centralised advanced democracies because England is still substantially run from London. This asymmetry makes IGR between the UK Government and the devolved administrations challenging, and since 1999, relations have tended to be ad hoc. Further devolution of powers over taxation and welfare, and the establishment of common frameworks for the UK post-Brexit, mean that decision-making has become increasingly interdependent across the UK, and the need for effective IGR has increased. Ironically, the post-Brexit UK, as a union of nations, has adopted key features of the EU model of IGR, including interministerial committees, frameworks seeking to resolve issues at a technical level, and an internal market provision. Yet it lacks key elements of the EU model and the safeguards built into that system, notably the principles of subsidiarity and proportionality.⁸ Consequently, the UK system operates in the 'shadow of hierarchy' with the UK Government always able to prevail, even though it does not in practice always impose its will unilaterally.

⁸ The European Parliament (2023). *The principle of subsidiarity*. Available here: <https://www.europarl.europa.eu/factsheets/en/sheet/7/the-principle-of-subsidiarity>

How did the 1998 Scotland Act and subsequent intergovernmental bodies envisage the operational relationship between the UK Government and Scottish Executive?

3. The Scotland Act 1998 appears to have been based on the assumption that political and administrative relations and relationships could be consensual. There was a reasonably clear division of competences and Joint Ministerial Committees (JMC) were designed to coordinate IGR and facilitate information-sharing and dispute resolution.⁹ The JMCs' terms of reference were set out in a Memorandum of Understanding agreed between the governments of the UK, Scotland, Wales, and Northern Ireland, and amended on several occasions. However, the formal IGR machinery was less important than informal mechanisms, especially in the early years of devolution when policy agendas were broadly aligned with a Labour-led coalition in Scotland and a UK Labour Government.
4. The formal machinery of IGR atrophied. The overarching JMC ceased to meet, though practical cooperation continued in the JMC (Europe), and the UK Government shared its legislative programmes with the devolved administrations to facilitate the operation of the Sewel convention.¹⁰ However, less formal communications led to a lack of transparency. In 2007, with the arrival of an SNP administration in Edinburgh, there was a revival of the JMC after a six-year gap, but there has been growing concern that the machinery of IGR is insufficiently robust to deal with relations between governments led by competing political parties, especially in the build-up to the independence referendum in 2014.
5. Further devolution in the Scotland Acts of 2012 and 2016 led to more shared and overlapping competences between the UK and Scottish parliaments and governments. The repatriation of competences after Brexit has increased them further.

So have the provisions of the UK Internal Market Act (UKIMA) allowing UK ministers to spend in devolved fields and the UK shared prosperity fund, which directly finances projects in Scotland. City and region deals have been rolled out in Scotland, with the UK Government spending along with the Scottish and local governments. The same is true of freeports. Yet there is no standard format for these partnerships, such as that provided in Germany by the joint task framework.¹¹

How effectively have processes for managing intergovernmental relations evolved to respond to various political developments since 1999, for example:

a. 2014 Scottish independence referendum

6. The process of securing a referendum on Scottish independence was significant in itself and was an example of effective IGR. The two governments, while radically opposed on the issue of independence, were able to agree on the principles of a referendum, including the question and the timing. It is not surprising, however, that the referendum campaign strained the trust required for any system of IGR to work well, although at the administrative level much work carried on as normal. Revisions to the Scottish devolution settlement in the wake of the referendum, which included new powers in otherwise reserved areas of tax and social security, discussed in paragraph 9, were nevertheless agreed after the referendum but brought new challenges for IGR. Consequently, the cross-party Smith commission that had led the review of devolution called for the machinery of IGR to be reformed 'as a matter of urgency and scaled up significantly.'¹²

b. Changes in governing party in both Westminster and Edinburgh

7. The processes for managing IGR have survived despite changes in governing power in both Westminster and Holyrood, albeit with a large

⁹ Institute For Government (2022). *Devolution: Joint Ministerial Committee*. Available here: <https://www.instituteforgovernment.org.uk/article/explainer/devolution-joint-ministerial-committee>

¹⁰ Institute for Government (2018). *Sewel convention*. Available here: <https://www.instituteforgovernment.org.uk/explainer/sewel-convention>

¹¹ For example, German Joint Policy Task Framework. Available here: https://www.oecd.org/cfe/_Germany.pdf

¹² The Smith Commission (2014). *Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament*. Available here: https://webarchive.nationalarchives.gov.uk/20151202171029/http://www.smith-commission.scot/wp-content/uploads/2014/11/The_Smith_Commission_Report-1.pdf

variation in the use of formal structures. One effect of the change in government in Scotland in 2007 was a revival of the joint ministerial committee system.

8. Recent changes in the UK have, however, changed the way that the UK operates as a union. Since the Brexit vote, the governing party in Westminster has become increasingly occupied by the issue of translating it into a workable policy. Given that the Scottish Government was opposed to Brexit, and that all the devolved nations to some degree were opposed to significant aspects of the approach taken by UK administrations to implementing it, significant conflict was always likely. In order to push through Brexit legislation, the UK Parliament several times legislated in devolved fields without the consent provided for in the Sewel convention. The Supreme Court in turn concluded that Sewel was merely a 'political' device rather than a binding convention. The current Prime Minister, Rishi Sunak, has recommitted to intergovernmental relations by chairing the first meeting of the intergovernmental council.

c. The devolution of further power to the Scottish Government

9. The scope and depth of devolved powers has grown substantially, with the 2012 and 2016 Scotland Acts. These increases in 'self rule' in Scotland, as well as Wales and Northern Ireland, were not accompanied by equivalent increases in the 'shared rule' often seen in other countries. Without formalised processes for IGR, the devolution of further powers represented a devolve and forget attitude at the heart of government. The areas of shared competence following devolution, such as in welfare and taxation, are opportunities for effective IGR, currently being missed. So, for example, the Scottish Government has used its new welfare powers to create a Scottish child payment, but rather than seek an agreement from the UK to administer that through the Department for Work and Pensions, it has set up a separate administrative and information technology structure.¹³

d. UK's exit from the EU

10. In the wake of the Brexit referendum of 2016, there was an increase in IGR work in the UK as powers were returned from Brussels to the UK and the UK sought new trade deals both with the EU and

with third countries. Modern trade deals usually go beyond the free movement of goods and include measures around labour and product standards, the environment, and state aid, some of which are devolved to Scotland. New forums emerged to discuss the implications of Brexit, for example, mechanisms for consultation on the implications of new trade deals.

11. The European Union (Withdrawal) Act 2018 was passed without the consent of the Scottish Parliament.¹⁴ Common frameworks have been agreed to manage devolved competences repatriated from the EU. In practice, most of these provide mechanisms for managing divergence but so far have mainly involved technical matters. The Scottish Government has taken powers to maintain dynamic alignment with the EU in devolved matters including agriculture and the environment, although so far there is little evidence of it using them. The trade and cooperation agreement does not commit the UK to align with the EU but there are provisions against regressing from existing standards. It is possible that, in the future, there could be substantial divergence between Scotland and England (not to mention Wales and Northern Ireland). This could trigger conflict over the UK Internal Market Act (UKIMA), which has already been a point of friction.
12. UKIMA serves to replace the EU internal market, which previously secured the internal market of the United Kingdom itself. UKIMA stipulates that goods approved for sale under the regulation of one of the UK nations can be marketed in the others and that there should be no discrimination. Exceptions are made for existing regulations and for a limited range of health and social matters. This is more restrictive than the corresponding exceptions in the EU internal market. can be made for public policy concerns, but only by the UK Government and Parliament. Unlike its European equivalent, the UK internal market provisions make no allowance for subsidiarity and proportionality to restrict the extent of their impingement on devolved governments. While UKIMA does not remove competence from the devolved authorities, it does circumscribe their exercise. There are provisions for the list of exceptions to be extended but this has proved

¹³ For example, HMRC runs the different Scottish income tax perfectly smoothly and the Scottish Government might have agreed the DWP could run the Scottish benefits.

¹⁴ House of Commons Library (2018). *Legislative Consent and the European Union (Withdrawal) Bill (2017-19)*. Available here: <https://commonslibrary.parliament.uk/research-briefings/cbp-8275>

difficult. In another echo of EU provisions, much of the responsibility for applying the UKIMA will fall to the courts, responding to claims by individuals or businesses. Hitherto the courts have played a minor role in policing the boundaries of devolution.

13. The shared prosperity fund has replaced the EU structural funds. While the Scottish Government was the managing authority for the Structural Funds, the shared prosperity fund is managed by the UK Government alone.

e. Covid – RSE Addition

14. The Covid-19 pandemic should be added to the list of significant political developments since 1999. As the pandemic hit, there was a brief period of wary cooperation between all four governments within the UK. The pandemic exposed the case not only for better working relationships between the different nations of the UK, but amongst all the different governments within it. However, formal mechanisms for IGR, such as the JMC, were sidelined. Instead, the First Ministers of Scotland, Wales, and Northern Ireland sat alongside the Prime Minister on Cabinet Office Briefing Rooms (COBRA), the national emergencies committee. As Welsh First Minister, Mark Drakeford, observed, the ad hoc arrangements meant that *“we’ve made our way through the coronavirus crisis patching together arrangements as we go along... rather than have a set of routine arrangements that we are all used to.”*¹⁵ As the pandemic progressed however there were increasing tensions between administrations on balancing the need for economic recovery with protecting public health, leading to diverging lockdown rules. Minor differences in rules and guidelines were often exaggerated by political incentives to compare the devolved administrations’ more cautious approach to the UK Government’s.
15. That said, COBRA and its associated arrangements are an operational rather than a policy committee, and in fact a good argument can be made for using it rather than the joint ministerial committees to drive operational and administrative changes needed in an emergency. There are certainly previous precedents for this and UK IGR, such as the fire service strike more than 20 years ago.

How effectively has the new intergovernmental relations framework operated since January 2022?

16. The new IGR framework has been effective in increasing the number of intergovernmental and interministerial engagements since January 2022. This is a relatively short time period to properly assess the effectiveness of the framework, but it is possible to see that the reforms are a work in progress. An example of positive engagement between the Scottish Government and the UK Government under the new system for IGR which has remained under the radar was the negotiation of the new fiscal framework for Scotland, which had the potential to cause disputes.¹⁶ A new deal was agreed, which included the Scottish Government’s capital borrowing powers rising in line with inflation and maintaining the indexation of the block grant adjustment, which takes account of the Scottish Government’s tax raising powers, in a form that is advantageous to Scotland.
17. It is difficult to argue that there has been any material improvement in IGR at the political level since the framework has become operational. There have been more court actions than ever before and there appear to be periods where communications between the Prime Minister and the First Minister of Scotland have ceased. Therefore, the RSE notes that even though the framework goes some way in formalising and forging more stable and closer intergovernmental relationships through regular interaction and, notably, attempts to establish a dispute resolution mechanism, this has not led to improved relations at the political level.¹⁷
18. In recent years the IGR forums and structures have been used by the UK Government to emphasise its role as the government of the whole UK and in particular to exercise the powers available to it under the Scotland Act to intervene in legislation of the Scottish Parliament. Whatever the merits of issues around the deposit return scheme and gender recognition reform (were, both were used to emphasise political differences because they suited

¹⁵ House of Commons Library (2020). *Intergovernmental relations in the age of coronavirus and Brexit*. Available here: <https://commonslibrary.parliament.uk/intergovernmental-relations-in-the-age-of-coronavirus-and-brexite>

¹⁶ Scottish Government (2023). *Fiscal framework: agreement between the Scottish and UK Governments*. Available here: <https://www.gov.scot/publications/fiscal-framework-agreement-between-scottish-uk-governments>

¹⁷ UK Government (2022). *Review of Intergovernmental Relations*. Available here: <https://www.gov.uk/government/publications/the-review-of-intergovernmental-relations>

both governments differently. Each of these actions is now subject to review in the courts, and it remains to be seen what the outcome would be. The RSE expresses no view on the merits of either argument, but it seems likely or at least quite possible that better and fuller intergovernmental discussion and cooperation before the legislation was passed might have avoided intervention and the need for judicial review.

19. There remains the option of giving the new IGR framework a statutory basis. As it stands the five principles for engagement and the formal structures that underpin them remain optional and a statutory requirement for each administration to meet the others regularly would signal the importance of intergovernmental relations at the top levels of UK politics and an independent secretariat with a statutory duty and powers to mediate disputes would challenge the existing decision-making power imbalance.

To what extent has the new intergovernmental relations framework been fully implemented?

20. The new IGR framework has not been fully implemented. The framework has improved transparency with more information available in terms of the number of meetings taking place and when they happen. There is not, however, much publicly available information on the substance of meetings. Although governments will claim the need for a safe and protected space for discussion and negotiation, there is still room for more information to enable parliament to scrutinise effectively. The RSE believes questions should be raised as to why three-quarters of meetings that take place do not take place within the IGR framework. Moreover, the RSE notes there are no interministerial groups (IMGs) operating in some major policy areas including health and justice (as of 2022).¹⁸

To what extent has the new intergovernmental relations framework been fully implemented?

21. Tensions such as those about Scotland's gender recognition legislation and deposit return scheme could have involved the newly created interministerial standing committee. Over a year after the reform, several of the new bodies have taken up their work, yet disputes are still not ending up in the designated place. The new independent secretariat is an improvement but the RSE previously suggested a wider role for such a body, arguing for an independent secretariat with statutory power, which would be made up of civil servants that come from all legislatures in the UK and would represent the UK interest.¹⁹ The body would have the power to conduct its own research, to help set agendas and solve disputes. The RSE believes that funding for the body should be ringfenced with each government contributing proportionally. Without a more powerful dispute resolution system, the new framework is unlikely to be successful in delivering its purpose.

How far does the new intergovernmental relations framework provide sufficient transparency and opportunity for parliamentary scrutiny, and how does this compare to previous arrangements?

22. IGR in many countries is notoriously a way of escaping parliamentary scrutiny. The RSE notes that there is a difference between transparency and scrutiny. There is marginally more transparency, as mentioned, around the number of meetings and when they happen. Yet that lack of information regarding the substance of these meetings makes it difficult for the public and stakeholders to know what is going on and for parliament to exercise scrutiny;

¹⁸ Institute For Government (2022). *Intergovernmental Relations*. Available here: <https://www.instituteforgovernment.org.uk/explainer/intergovernmental-relations>

¹⁹ The Royal Society of Edinburgh (2018) *Scottish Parliament Finance and Constitution Committee: Common UK Frameworks*

there is no reference to parliamentary oversight or a requirement to engage the parliaments. The new IMGs are only releasing the information they want to, which is better than nothing at all, but falls short of expectations. There remains considerable room for a more meaningful parliamentary role in IGR and there are missed opportunities for the two parliaments to cooperate over this.

Conclusion

23. The new IGR framework is a work in progress that has improved IGR at the technical administrative level, leading to an increase in intergovernmental and interministerial engagements and forums for discussion, alongside small improvements to transparency and setting out a basic structure for dispute resolution. However, the reality since January 2022 demonstrates that IGR remains a core issue at the heart of governing the UK. The return of the UK union to the frontline of political life is one of the most important repercussions of the political developments that have followed British politics since 1999. As governing the UK has become increasingly complex, accelerated by the UK's exit from the EU and the devolution of further powers, the need for effective IGR has buttressed. The new framework lacks the statutory basis to embed cooperation and collaboration in an increasingly interdependent union and enable effective dispute resolution. The RSE refers back to previous submissions advocating for the creation on these structures.²⁰

²⁰ See for example The Royal Society of Edinburgh (2018). *Scottish Parliament Finance and Constitution Committee: Common UK Frameworks*



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