



Law Society
of Scotland

Consultation Response

Public Administration and Constitution Affairs
Committee: Inquiry into Devolution Capability in
Whitehall

September 2023



- c. A single Permanent Secretary would lead the three offices of the Secretaries of State for Scotland, Wales and Northern Ireland as well as the relevant Cabinet Office teams, supporting the new Secretary of State and the three existing Secretaries.
- d. Intergovernmental relations should be recalibrated, and the Joint Ministerial Council replaced by a UK Intergovernmental Council (UKIC) with a number of sub-committees. This should include a number of subcommittees, a standing independent secretariat and a clear dispute handling process. The Prime Minister should host a summit at least twice a year based around a meeting of the UKIC with the heads of each administration. The new UKIC should look to take on a decision-making role via co-decision by consensus. DIT and other UK Government departments should build on wider examples of technical engagement and explore establishing inter-ministerial groups.

The Secretary of State for Intergovernmental and Constitutional Affairs should oversee the appointments process to ensure that public bodies with a UK-wide remit are representative of the UK as a whole.

- e. A shared policy function for the Wales, Scotland and Northern Ireland Offices, based in the Cabinet Office. This would build on what the report saw as the success of the [UK Governance Group](#), a pool of civil service expertise on constitutional reform and devolution.
- f. Reforms to the civil service, including devolution teams within government departments located at the “heart” of policy development, more opportunities for loans and secondments between the four administrations and nominated departmental board members to lead on union strategy and devolution capability.
- g. HM Treasury should set up a fund to support UK-wide projects. Part of the fund would be used to incentivise and support projects that strengthen the union. A second part would help to fund projects set up by the UK and devolved governments working in cooperation.
- h. An audit of public bodies should take place to ensure those with a UK-wide remit are representative of the UK as a whole.
- i. A government communications strategy should be developed for Scotland, Wales and Northern Ireland, backed up by data about UK government spending and activities in the devolved nations. UK Government departments should consult the Secretaries of State for Scotland, Wales, Northern Ireland, and Intergovernmental and Constitutional Affairs before making major announcements in respect of policies which apply in Scotland, Wales or Northern Ireland. The UK Government’s activities in Scotland, Wales and Northern Ireland should be clearly marked with UK Government branding. The Secretary of State for Intergovernmental and Constitutional Affairs should have oversight of all ministerial visits to Scotland, Wales and Northern Ireland, and all ministerial visits should be subject to an overall UK communications strategy. The UK Government should revise, update and adapt for contemporary circumstances the Scotland analysis programme documents it published in 2014 prior to the Scottish independence referendum. There should be similar programmes for Wales and Northern Ireland.

The UK Government’s response

Rt. Hon. Michael Gove MP, then Chancellor for the Duchy of Lancaster and Minister for the Cabinet Office, responded on 21 March 2021 behalf of the UK Government: [L_Dunlop_Letter.pdf](#) ([publishing.service.gov.uk](#)).

Mr Gove then outlined that in response to Lord Dunlop’s work, the Government have been:

- i. *Working with the devolved administrations to establish new structures that maintain regular, meaningful and effective cooperation between the UK Government and the devolved administrations;*

ii. Establishing and regularly convening the Union Strategy Committee, chaired by the Prime Minister which is supported by a Union Policy Implementation sub-committee.

Our comment: The latest list of Cabinet Committees does not include a Union Strategy Committee but does include the Domestic and Economic Affairs (Union) which has a remit to consider matters relating to the Union of the United Kingdom.: [List of Cabinet Committees and their membership - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/collections/cabinet-committees). To that extent the letter of the proposal has not been fully implemented although it may have been in spirit.

iii. Creating a new GOV.UK page to report on the significant amount of joint working and cooperation between the UK Government and devolved administrations. This, alongside commitments to report regularly to the UK Parliament on IGR activity, is improving the transparency and accountability of IGR and promoting effective work between administrations;

Our comment: The website [Intergovernmental relations - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/collections/intergovernmental-relations) contains details about the review of intergovernmental relations and various intergovernmental meetings including the Prime Minister and Heads of Devolved Governments Council (which met on 10 November 2022, its predecessor the Joint Ministerial Committee last met in January 2021), the Interministerial Standing Committee (which had its fourth meeting on 17 May 2023 and brings together ministers from the UK and devolved governments with responsibility for intergovernmental relations), and 9 interministerial groups covering a variety of policy areas. Some of the groups have met recently such as Finance (July 2023), Trade, Transport and Education (all June 2023) others much longer ago such as Tourism (December 2021) or Net Zero, Energy, Climate Change (December 2022). We take the view that this recommendation has been implemented.

The Intergovernmental Relations Annual Report 2022 was published in March 2023 and confirms that there were 277 intergovernmental ministerial meetings in 2022 in addition to meetings between civil servants. In addition, the first meeting of the Islands Forum took place in 2022. There are issues with effective intergovernmental co-operation. The number of occasions on which the devolved legislatures are refusing consent to UK legislation on devolved matters has increased very significantly over the past few years, and both the Scottish and Welsh Governments regularly complain about lack of timely consultation. Separately, on policy initiatives of the Scottish Government, high profile disputes have been evident between it and the UK Government, indicating that, one way or another, the administrations have not worked well together - eg the Deposit Return Scheme and the Gender Recognition Reform (Scotland) Bill.

iv. Making significant progress towards concluding the joint review on intergovernmental relations.

Our comment: The final conclusions of the review of intergovernmental relations was published in January 2022: [Review of intergovernmental relations - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/collections/review-of-intergovernmental-relations)

The House of Lords Library Paper comments that the Review set out new working arrangements that all four administrations had agreed. The review confirmed that intergovernmental decisions would “continue to work on the basis of agreement by consensus”. It also set out a “clear and agreed” process for resolving disputes. It said the new structures and processes would be kept under review.

The new intergovernmental relations structure is made up of three tiers:

- Lowest tier: Interministerial groups (IMGs) on specific policy areas.
- Middle tier: the Interministerial Standing Committee (IMSC) which considers cross-cutting issues; the Finance Interministerial Standing Committee (FISC); and additional time-limited committees to be established by consensus if particular issues are identified as needing in-depth and focused consideration by ministers.
- Top tier: the Prime Minister and Heads of Devolved Governments Council (the council)

The UK government described the IGR review as a “landmark agreement” that would “create a more equal, transparent and accountable system”. John Swinney MSP the then deputy first minister of Scotland warned that a change in approach from the UK government was needed if there was to be “a genuine improvement in intergovernmental relations”. A spokesperson from the Welsh government said the “test” would be whether the UK government “follows the spirit of the review, based on respect, so that this new approach serves all governments equally”.

The UK government publishes quarterly transparency reports on intergovernmental relations but it is not clear how these new structures are working.

The House of Lords Constitution Committee

The House of Lords Constitution Committee examined the government’s response to the Dunlop review as part of its inquiry into the future governance of the UK. The committee published a report, [‘Respect and co-operation: Building a stronger union for the 21st century’](#), in January 2022.

The report included [a table showing the Dunlop review recommendations on intergovernmental relations and the outcome of the intergovernmental relations review side by side](#).

This table analysed the Dunlop recommendations and shows the extent to which they were accepted:

- a. the Prime Minister should hold a summit twice a year, based around meetings of the successor body to the JMC. However, the Intergovernmental Relations Review (the Review) concluded that the new council would meet at least annually but could meet more frequently.
- b. The new UKIC should look to take on a decision-making role via co-decision by consensus. However, the Review concluded that intergovernmental decisions will continue to be based on agreement by consensus. It continues to be case that a joint approach will not be taken in the absence of such consensus.
- c. The UKIC should be supported by an independent secretariat. However, the Council will be supported by a standing IGR Secretariat, consisting of officials from all governments. The Secretariat will be accountable to the Council rather than the sponsoring governments.
- d. UK Government ministers should make a statement to Parliament following each UKIC meeting. However, the Government has committed to making regular statements to Parliament on intergovernmental relations.

v. Making knowledge of the Union and devolution issues a focus of the revamped civil service training programme; and boosting devolution learning and development opportunities for new and senior civil service leaders in all administrations;

Our comment: We have no comments to make.

vi. Creating a dedicated Union non-executive board member within departments;

Our comment: We have no comments to make.

vii. Increasing civil service reach across the UK by committing to moving 22,000 roles out of London and the South East by 2030, including to UK Government hubs in Scotland, Wales and Northern Ireland.

Our comment: We have no comments to make although we are aware that there has been movement of civil services jobs from London. Queen Elizabeth House in Edinburgh was designed to accommodate nearly 3,000 UK Government civil servants from a range of UK Government departments.

Our Recommendations on the Review

Many aspects of the Dunlop proposals were and are matters of political controversy on which the Law Society has no view. We note that no appointment has been made to the proposed Secretary of State for Intergovernmental and Constitutional Affairs. Advancement to Cabinet level is a matter which is in the gift of the Prime Minister which could be exercised or withdrawn at any time – but also does not need any statutory provision.

We recommend that new inter-governmental structures could include new sub-committees in areas where new common frameworks are created.

We recommend that the Prime Minister and Heads of Devolved Governments Council as the replacement for the JMC is put on a statutory footing, that it is given a defined structure and that its Sub-Committees are reformed in such a way as to be clearer and better understood by those who have contact with them. Placing these arrangements in statute would ensure that they would be applied and respected. A statute would ensure that reporting arrangements would be complied with and that lines of accountability would be clear.

We note that there has been no announcement about a shared policy function for the Wales, Scotland and Northern Ireland Offices, based in the Cabinet Office.

No matter what formal structures are put in place or what they are called, their effectiveness depends on matters of substance such as mutual trust, transparency and respect being in place too. Those aspects are beyond legislation.

We recommend that the new arrangements will require revision of the Memorandum of Understanding between the UK Government and the devolved administrations which in turn will require revision of the Devolution Guidance Notes. In our view such a revision is necessary in the light of the UK's withdrawal from the EU.

It is clear that one significant improvement to governance in the UK is a need for more systematic intergovernmental dialogue and also for increased inter-parliamentary contact. Parliamentary scrutiny (in all the legislatures in the UK) of the activities of the Prime Minister and Heads of Devolved Governments Council will be essential if the actions of all the Governments throughout the UK are to be fully accountable.

Inter-parliamentary cooperation has been increased between the UK Parliament and the other legislatures in the UK, the Scottish Parliament, the Senedd and the Northern Ireland Assembly: [Launch of the Interparliamentary Forum - UK Parliament](#). Such cooperation could become a fruitful source of new ideas which could give all the legislatures and administrations models for future development.

2. What steps is the UK Government taking at Ministerial and Official level to build knowledge and embed consideration of devolution in Whitehall? Where does responsibility for devolution capability formally sit within the machinery of the UK Government?

1. The Union Strategy Committee and the Union Policy Implementation Sub-Committee disappeared from the [list of cabinet committees under Liz Truss's premiership](#) in September 2022. [Ms Truss appointed Nadhim Zahawi as minister for intergovernmental relations](#); he also concurrently held the posts of chancellor of the duchy of Lancaster and minister for equalities. [Responsibility for union and devolution policy moved from the DLUHC to the Cabinet Office](#) under Mr Zahawi on 11 October 2022: [Implementing the Dunlop review into the UK's union capability - House of Lords Library \(parliament.uk\)](#).
2. When Rishi Sunak became prime minister, he reappointed Michael Gove as Secretary of State for levelling up, housing and communities and minister for intergovernmental relations. Mr Sunak said this meant [day to day responsibility for the union and devolution policy would remain in DLUHC](#). Mr Sunak also said the Union and Constitution Group would maintain a presence in the Cabinet Office to support him in his role as minister for the union (a title held by Boris Johnson and subsequent prime ministers). Mr Sunak said that "strengthening the union and delivering for all people and communities across the UK" was a priority for all of UK government. [Rishi Sunak's cabinet committee structure includes a Domestic and Economic Affairs \(Union\) Committee](#), which he chairs. Its terms of reference are to consider matters relating to the union of the United Kingdom.
3. Mr Gove said in a [letter to the Constitution Committee in January 2023](#) that he was leading coordination with the devolved administrations and working closely with the Scotland, Wales and Northern Ireland Offices. He said the post of minister for intergovernmental relations had been created in response to the Dunlop review recommendation for a new cabinet post, and he believed that future prime ministers would "see virtue" in it, as the three most recent prime ministers had done. He also emphasised that implementing the Dunlop recommendations was "just one of the many steps" the government was taking to "ensure its institutions are working effectively to deliver for citizens across the UK and to realise the benefits of working together as one United Kingdom".
4. The Secretary of State for Scotland, Rt. Hon. Alister Jack MP is the UK Government Cabinet Minister representing Scotland. Gov.UK describes the role of the Secretary of State as the custodian of the Scottish devolution settlement, who represents Scottish interests within the UK Government, and advocates for the UK Government's policies in Scotland [Secretary of State for Scotland - GOV.UK \(www.gov.uk\)](#).

5. The Secretary of State is also described as promoting partnership between the UK Government and the Scottish Government, as well as relations between the UK and Scottish Parliaments.
6. The functions of the territorial Secretaries are described in different ways on the Ministerial Pages of Gov.UK: [Secretary of State for Northern Ireland - GOV.UK \(www.gov.uk\)](http://www.gov.uk) and [Secretary of State for Wales - GOV.UK \(www.gov.uk\)](http://www.gov.uk) but only the Secretary of State for Scotland's role is related to devolution.

It is important that there is knowledge and experience of devolution in Whitehall Departments. How this is achieved is a matter for the Cabinet Secretary as Head of the Civil Service. Taking devolution into account at policy formulation stage and in the drafting of legislation has improved over the years but with the rotation and retiral of staff (especially following the pandemic) experience and expertise is likely to have been lost. As Government continues in the recovery both in Whitehall and within the devolved administrations this is an opportunity to build for the future and to embed intergovernmental relations in a way that works for all the Governments in the UK.

3. How does the relationship between the Cabinet Office as the lead for civil service capability and other Government departments with relevant policy responsibilities operate?

The relationship between Ministers and the Civil Service is set out in statute and the Civil Service and Ministerial Codes.

The statutory basis for the management of the Civil Service is set out in the [Constitutional Reform and Governance Act 2010](#) (the 2010 Act).

In terms of devolution the Scotland Act 1998, Schedule 5 section 8 (1) confirms: The Civil Service of the State is a reserved matter. Section 51 of the Scotland Act 1998 sets out the relationship between the Scottish Ministers and the Civil Service. Under section 51(1) "The Scottish Ministers may appoint persons to be members of the staff of the Scottish Administration.

Section 51 (2) clarifies that "Service as— (a) the holder of any office in the Scottish Administration which is not a ministerial office, or (b) a member of the staff of the Scottish Administration, shall be service in the civil service of the State."

The Civil Service code makes clear that the Civil Service is a key part of the UK government. It supports the government of the day in developing and implementing its policies, and in delivering public services. Civil servants are accountable to ministers, who in turn are accountable to Parliament: [The Civil Service code - GOV.UK \(www.gov.uk\)](#)

Scottish Ministers have a duty under paragraph 5.1 to ensure that "influence over Civil Service and public appointments is not abused for partisan purposes". Paragraph 5.2 states, "Civil Service appointments must be made in accordance with the requirements of the Constitutional Reform and Governance Act 2010 and the Civil Service Commissioners' Recruitment Principles: [Supporting documents - Scottish Ministerial Code: 2018 edition - gov.scot \(www.gov.scot\)](#)

In the section headed *Ministers and the Civil Service* paragraph 6.2 confirms "*Ministers have a duty to:*

(a) Give fair consideration and due weight to informed and impartial advice from civil servants, as well as to other considerations and advice in reaching policy decisions;

(b) Uphold the political impartiality of the Civil Service, and not to ask civil servants to act in any way which would conflict with the Civil Service Code;

(c) Ensure that influence over appointments is not abused for partisan purposes; and

(d) Observe the obligations of a good employer with regard to the terms and conditions of those who serve them.

6.3 Ministers should not ask civil servants to engage in activities likely to call into question their political impartiality or to give rise to the criticism that official resources are being used for party political purposes.”

This issue came up in discussion at the Scottish Affairs Committee in November 2022 where the Committee questioned Right Hon. Alister Jack MP, Secretary of State for Scotland, Scotland Office; John Lamont MP, Parliamentary Under-Secretary of State, Scotland Office; Lord Offord of Garvel, Parliamentary Under-Secretary of State, Scotland Office; and Laurence Rockey, Director, Scotland Office.

In particular Douglas Ross MP asked Mr Jack about money “being spent by the Scottish Government on civil servants working on their plans to break Scotland away from the rest of the United Kingdom”.

Mr Jack replied that “the permanent secretary to the Scottish Government stays in close contact with Simon Case, Sue Gray and the propriety and ethics team in the Cabinet Office on the role of the civil service in Scotland and the parameters that they can operate under. That has certainly been the case since 2014, when there was a review following the referendum of the role of the civil service in Scotland. Following this judgment [our notation [REFERENCE by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998 \(Expedited\) - The Supreme Court](#)], they are working again on what that means for the role of the civil service in Scotland, and we will have to see where that takes us. The Cabinet Office and the civil service, led by the Cabinet Secretary, are working on what the judgment means for the future role of the civil service in Scotland”:
committees.parliament.uk/oralevidence/11939/pdf/.

The House of Lords Constitution Committee has recently conducted an inquiry on *The appointment and dismissal of Permanent Secretaries and other senior civil servants* taking oral evidence on 18 July 2023 from Rt Hon Jeremy Quin MP, Paymaster General and Minister for the Cabinet Office; Simon Case CVO, Cabinet Secretary and Head of the Civil Service.

During this session, Lord Foulkes of Cumnock asked Mr Case, “*In the devolved Administrations, the Permanent Secretaries are members of the UK Civil Service and responsible to you administratively, but responsible to their devolved Administrations politically. Does this create particular problems?*”

Mr Case responded that “*There is a unique set of circumstances that go with it. For example, in the performance management that I do with the Permanent Secretaries in Scotland and Wales, rather than specifically judge, as I would with other Permanent Secretaries, whether they are delivering the political objectives set by the Government, I have to look much more at whether they have the systems and processes in place that allow them to deliver. Of course, as part of their performance process, I get feedback from their First Ministers, so they do input, like a Secretary of State would...*”

Lord Foulkes of Cumnock then asked a further question: *“Can I take a particular example of spending taxpayers’ money? Quite rightly, Ministers have said to me on a number of occasions that it is up to the devolved Administration how to spend their money on their devolved areas. When they come to spending money in reserved areas, should you not be doing something about it? Simon Case responded: Civil servants must abide by the Civil Service Code and the law, and that means that civil servants in Scotland and Wales can spend their money only on areas that are within their competence.*

Mr Case agreed with Lord Foulkes that the constitution is a reserved area.

Lord Foulkes then asked about civil service support for the Scottish Government’s Minister for Independence to which Mr Case made clear that he and his colleagues are considering whether the Cabinet Office need to issue further guidance and clarification to civil servants about what is and is not appropriate spending.

Lord Keen of Elie, the former Advocate General for Scotland who also asked a related question. Lord Keen noted that the Constitution Committee had received a recent letter from the Advocate General for Scotland, which stated, *“It is for the Scottish Government to decide how it spends money received from the block grant, and it is for the Civil Service to ensure compliance with the Civil Service Code”...*

Lord Keen went on to say that *“The Permanent Secretary has a responsibility for the implementation of policy in devolved areas. Over and above that, the Permanent Secretary has an obligation to ensure that the boundary with reserved matters is reserved, and that the integrity of that boundary is maintained. Politically, the Permanent Secretary in Scotland is answerable to the First Minister, not to No. 10. Just to take one example, if you had an instance in which the Attorney General, on behalf of the United Kingdom Government, stated that a matter was reserved, the Lord Advocate, as adviser to the Scottish Government, also reiterated that the matter was reserved, and the First Minister in Scotland then instructed the Permanent Secretary to pursue that policy, am I right in understanding that the Permanent Secretary, having regard to the Civil Service Code, would simply have to refuse that instruction?”* Mr Case agreed explaining that *“In such an instance, we would, of course, want to go through the specifics, et cetera, to be clear about the decision taken”.*

Lord Keen subsequently asked: *Why is it only now that we are addressing the question of further guidance for civil servants in Scotland?”* To which Mr Case replied, *“Because specific instances have arisen that need looking at. We thought that the guidance was clear, but we have had reason to look at various instances and uses of money, so we are looking at it now...It has been brought to my attention in a number of instances now, so I am now discussing with Ministers the propriety and ethics of it. Indeed, if necessary, I will consult with the Civil Service Commission about it, because, to come back to the rather important point that flows through all this, we all want to protect the integrity and impartiality of our Civil Service. That is why I want to make sure that civil servants operating in Scotland have very clear guidance about what they can and cannot do, because they deserve, and the whole Civil Service requires them to have, that protection and guidance”:* committees.parliament.uk/oralevidence/13551/pdf/

We await the issue of that guidance by the Cabinet Office.

4. How do the Territorial Offices work with the Cabinet Office and other Government departments at both Ministerial and Official level?

We have no comment to make.

5. What training and guidance is available for Ministers and Officials on devolution and is it effective?

We have no comment to make.

6. How do the devolved institutions view devolution capability in Whitehall and what approach do they take to building the equivalent knowledge and capability on the part of Ministers and Officials in their own administrations?

We have no comment to make.

7. How does “One Civil Service” for the UK, Scottish, and Welsh governments work in practice with the separate Northern Ireland Civil Service? Does this have any impact on knowledge sharing and cooperation between different administrations?

We have no comment to make.

8. Are there any examples of international best practice from which lessons can be learned?

We have no comment to make.

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