Agenda – Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol

Lleoliad:
Ystafell Bwyllgora 2 – y Senedd
Dyddiad: Dydd Llun, 19 Hydref 2015
Amser: 14.45

I gael rhagor o wybodaeth cysylltwch a:
Naomi Stocks
Clerc y Pwyllgor
0300 200 6565
SeneddMCD@Cynulliad.Cymru

1 Cyflwyniad, ymddiheuriadau, dirprwyon a datgan buddiannau

2 Offerynnau nad ydynt yn cynnwys materion i gyflwyno adroddiad arnynt o dan Reol Sefydlog 21.2 neu 21.3

(Tudalennau 1 – 2)

CLA(4)-26-15 – Papur 1 – Offerynnau Statudol sydd ag Adroddiadau Clir

CLA586 – Cod Ymarfer Landlordiaid ac Asiantau sydd wedi'u trwyddedu dan Ran 1 Deddf Tai (Cymru) 2014
Y weithdrefn gadarnhaol; Fe'i gwnaed ar: dyddiad heb ei nodi; Fe'i gosodwyd ar: 6 Hydref 2015; Yn dod i rym ar: dyddiad heb ei nodi

CLA588 – Rheoliadau Plant (Perfformiadau a Gweithgareddau) (Cymru) 2015
Y weithdrefn negyddol; Fe'u gwnaed ar: 7 Hydref 2015; Fe'u gosodwyd ar: 9 Hydref 2015; Yn dod i rym ar: 30 Hydref 2015

CLA589 – Rheoliadau Ardrethu Annomestig (Darpariaethau Amrywiol) (Diwygio) (Cymru) 2015

Y weithdrefn negyddol; Fe'u gwnaed ar: 8 Hydref 2015; Fe'u gosodwyd ar: 9 Hydref 2015; Yn dod i rym ar: 31 Hydref 2015

CLA590 - Gorchymyn Twbercwlosis (Cymru) (Diwygio) 2015
Y weithdrefn negyddol; Fe'i gwnaed ar: 6 Hydref 2015; Fe'i gosodwyd ar: 12 Hydref 2015; Yn dod i rym ar: 2 Tachwedd 2015

3 Offerynnau sy'n cynnwys materion i gyflwyno adroddiad arnynt i'r Cynulliad o dan Reol Sefydlog 21.2 neu 21.3

Offerynnau'r Weithdrefn Penderfyniad Negyddol

CLA587 – The Environmental Permitting (England and Wales)(Amendment) (No. 3) Regulations 2015 (Saesneg yn unig)

(Tudalennau 3 - 15)

CLA(4)-26-15 Papur 2 – Adroddiad
CLA(4)-26-15 Papur 3 – Rheoliadau
CLA(4)-26-15 Papur 3 – Memorandwm Esboniadol

Y weithdrefn negyddol; Fe'u gwnaed ar: 6 Hydref 2015; Fe'u gosodwyd ar: 9 Hydref 2015; Yn dod i rym ar: 30 Hydref 2015

4 Papur(au) i'w nodi:

(Tudalennau 16 - 70)

CLA(4)-26-15 Papur 5 – Llythyr gan y Gweinidog Cyllid a Busnes y Llywodraeth ynghylch Bil Casglu a Rheoli Trethi (Cymru).

CLA(4)-26-15 Papur 6 – Llythyr gan Bruce Crawford MSP, Cynullydd Pwyllgor Datganoli (Pwerau Pellach) Senedd yr Alban - Goruchwyliaeth Seneddol ac adrodd ar gysylltiadau rhynglywodraethol o dan y darpariaethau newydd ym Mil yr Alban

CLA(4)-26-15 Papur 6A – Adroddiad y Pwyllgor Datganoli (Pwerau Pellach) ar Newid mewn Perthynas: Craffu Seneddol ar Gysylltiadau Rhynglywodraethol.

CLA(4)-26-15 Papur 6B – Llythyr gan Bruce Crawford MSP, Cynullydd Pwyllgor Datganoli (Pwerau Pellach) Senedd yr Alban – Goruchwyliaeth Seneddol ac adrodd ar gysylltiadau rhynglywodraethol o dan y darpariaethau newydd ym Mil yr Alban a Bil Drafft Cymru.

CLA(4)-26-15 Papur 7 – Tystiolaeth y Prif Weinidog i Ymchwiliad Pwyllgor Cyfansoddiad Tŷ'r Arglwyddi, "The Union and Devolution".

5 Cynnig o dan Reol Sefydlog 17.42 i benderfynu gwahardd y cyhoedd o'r cyfarfod ar gyfer y busnes canlynol:

(vi) lle mae'r pwyllgor yn cyd-drafod cynnwys, casgliadau neu argymhellion adroddiad y mae'n bwriadu ei gyhoeddi; neu'n ymbaratoi i gael tystiolaeth gan unrhyw berson;

Cynulliad Cenedlaethol Cymru
Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol

Offerynnau Statudol gydag Adroddiadau Clir
19 Hydref 2015

CLA586 - Cod Ymarfer Landlordiaid ac Asiantau sydd wedi'u trwyddedu dan Ran 1 Deddf Tai (Cymru) 2014

Gweithdrefn: Cadarnhaol

Mae'r Memorandwm Esboniadol yn nodi fel a ganlyn: Dyma God Ymarfer Landlordiaid ac Asiantau sydd wedi'u trwyddedu dan Ran 1 Deddf Tai (Cymru) 2014. Rhaid i unrhyw un sydd â thrwydded lynu wrth y gofynion statudol fel y'u nodir yn y Cod. Gall methu â gwneud hyn arwain at golli trwydded.

CLA588 - Rheoliadau Plant (Perfformiadau a Gweithgareddau) (Cymru) 2015

Gweithdrefn: Negyddol

Mae'r Rheoliadau hyn yn nodi'r gofynion mewn perthynas â cheisiadau a wneir i awdurdodau lleol yng Nghymru ar gyfer trwyddedau am berfformiadau a gweithgareddau a roddir o dan adran 37 o Ddeddf Plant a Phobl Ifanc 1963, a'r amodau sy'n gymwys i'r trwyddedau hynny, yn ogystal â'r gofynion sy'n gymwys i berfformiadau lle nad oes angen trwydded yn rhinwedd adran 37(3) (a) o'r un Ddeddf.

Mae'r Rheoliadau hyn hefyd yn dirymu Rheoliadau Plant (Perfformiadau) 1968 (OS 1968/1727) a'r Rheoliadau diwygio dilynol:

- Rheoliadau Plant (Perfformiadau) (Diwygiadau Amrywiol) 1998 (OS 1998/1678)
- Rheoliadau Plant (Perfformiadau) (Diwygio) 2007 (OS 2007/736)

CLA589 - Rheoliadau Ardrethu Annomestig (Darpariaethau Amrywiol) (Diwygio) (Cymru) 2015

Gweithdrefn: Negyddol

Mae'r Rheoliadau hyn yn diwygio'r cyfraddau datgyfalafu a ragnodwyd gan reoliad 2 o Reoliadau Ardrethu Annomestig (Darpariaethau Amrywiol) (Rhif 2) 1989 (OS 1989/2303) ar gyfer rhestrau ardrethu annomestig a luniwyd ar 1 Ebrill 2017 neu wedi hynny. Mae'r Rheoliadau hyn yn pennu cyfraddau datgyfalafu is o 2.1 y cant ar gyfer eiddo addysgol, iechyd, amddiffyn a chyfleustra cyhoeddus a chyfradd safonol o 3.8 y cant ar gyfer pob math arall o eiddo.

CLA590 - Gorchymyn Twbercwlosis (Cymru) (Diwygio) 2015

Gweithdrefn: Negyddol

Mae'r Gorchymyn hwn yn diwygio Gorchymyn Twbercwlosis (Cymru) 2010 (OS 2010/1379 (W.122)). Mae'n galluogi Gweinidogion Cymru i gyhoeddi manylion am leoliad safleoedd lle mae'r fuches wedi colli neu adennill ei statws o fod yn rhydd o dwbercwlosis yn unol â Chyfarwyddeb Cyngor 64/432/EEC ar broblemau iechyd anifeiliaid sy'n effeithio ar fasnachu o fewn cymunedau mewn anifeiliaid buchol a moch (OJ No P 121, 29.7.1964, p 1977).

Cynulliad Cenedlaethol Cymru
Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol

CLA587 - The Environmental Permitting (England and Wales) (Amendment) (No.3) Regulations 2015 (Saesneg yn unig)

Gweithdrefn

Negyddol

Cefndir

Mae'r offeryn hwn yn diwygio Rheoliadau Trwyddedu Amgylcheddol (Cymru a Lloegr) 2010 (O.S. 2010/675) ("Rheoliadau 2010") yn bennaf er mwyn atgyfnerthu pwerau presennol Cyfoeth Naturiol Cymru i fynd i'r afael â throseddau gwastraff a safleoedd sy'n perfformio'n wael yn y diwydiant gwastraff a diwydiannau eraill o fewn y gyfundrefn Trwyddedu Amgylcheddol. Mae'r un pwerau'n ymestyn hefyd i awdurdodau lleol yng Nghymru mewn perthynas â chyfleusterau a reoleiddir y maent yn eu rheoleiddio.

Craffu Technegol

Nodir y pwyntiau a ganlyn i gyflwyno adroddiad arnynt o dan Reol Sefydlog 21.2.

Ni chafodd y Rheoliadau hyn eu gwneud yn ddwyieithog. Mae paragraff 2 o'r Memorandwm Esboniadol yn datgan nad oedd yn bosibl i'r Rheoliadau gael eu gwneud yn ddwyieithog gan eu bod yn rheoliadau cyfansawdd sy'n berthnasol i Gymru a Lloegr. Mae'r Rheoliadau yn ddarostyngedig i gymeradwyaeth gan Gynulliad Cenedlaethol Cymru a Senedd y DU ac, felly, dywed Llywodraeth Cymru nad yw wedi bod yn bosibl eu gwneud yn ddwyieithog.

Craffu ar rinweddau

Ni nodwyd unrhyw bwyntiau i gyflwyno adroddiad arnynt o dan Reol Sefydlog 21.3 mewn perthynas â'r offeryn hwn. Os oes pwyntiau, dylid dilyn y drefn uchod.

Cynghorwyr Cyfreithiol
Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol
13 Hydref 2015

STATUTORY INSTRUMENTS

2015 No. 1756

ENVIRONMENTAL PROTECTION, ENGLAND AND WALES

The Environmental Permitting (England and Wales) (Amendment) (No. 3) Regulations 2015

Made - - - -	*6th October 2015*
Laid before Parliament	*9th October 2015*
Laid before the National Assembly for Wales	*9th October 2015*
Coming into force - -	*30th October 2015*

The Secretary of State and the Welsh Ministers make these Regulations in exercise of the powers conferred by sections 2 and 7(9)(a) of, and Schedule 1 to, the Pollution Prevention and Control Act 1999(**a**).

The Secretary of State and the Welsh Ministers have, in accordance with section 2(4) of the Pollution Prevention and Control Act 1999, consulted—

(a) the Environment Agency;

(b) the Natural Resources Body for Wales;

(c) such bodies or persons appearing to them to be representative of the interests of local government, industry, agriculture and small businesses as they consider appropriate; and

(d) such other bodies or persons as they consider appropriate.

Citation and commencement

1. These Regulations may be cited as the Environmental Permitting (England and Wales) (Amendment) (No. 3) Regulations 2015 and come into force on 30th October 2015.

Amendment of the Environmental Permitting (England and Wales) Regulations 2010

2. The Environmental Permitting (England and Wales) Regulations 2010(**b**) are amended in accordance with regulations 3 to 5.

(**a**) 1999 c. 24. Section 2 was amended by the Water Act 2014 (c. 21), section 62(13) and by S.I. 2013/755. Functions of the Secretary of State under or in relation to section 2, so far as exercisable in relation to Wales, were transferred to the National Assembly for Wales, except in relation to offshore oil and gas exploration and exploitation, by the National Assembly for Wales (Transfer of Functions) Order 2005 (S.I. 2005/1958), article 3(1). Functions of the National Assembly for Wales were transferred to the Welsh Ministers by the Government of Wales Act 2006 (c. 32), Schedule 11, paragraph 30. Schedule 1 was amended by the Waste and Emissions Trading Act 2003 (c. 33), section 38, the Clean Neighbourhoods and Environment Act 2005 (c. 16), section 105(1) and S.I. 2005/925, 2011/1043, 2012/2788 and 2015/664.

(**b**) S.I. 2010/675, to which there are amendments not relevant to these Regulations.

Amendment of regulation 37

3. In regulation 37 (suspension notices)—

(a) after paragraph (3) insert—

"(3A) If the regulator considers that the manner of operating a regulated facility contravenes an environmental permit condition, and that such contravention involves a risk of pollution, it may serve a suspension notice on the operator.";

(b) in paragraph (4)—

(i) after "paragraph (2)" insert "or (3A)";

(ii) for sub-paragraph (a)(i) to (iii) substitute—

"(i) the risk mentioned in paragraph (2) or (3A);

(ii) the steps that must be taken to remove that risk;

(iii) in a case where paragraph (3A) applies, the matters constituting the contravention mentioned in that paragraph;

(iv) in a case where paragraph (3A) applies, the steps that must be taken to remedy that contravention; and

(v) the period within which the steps mentioned in paragraph (ii) or (iv) must be taken;"; and

(c) after paragraph (7) insert—

"(7A) Where a suspension notice has the effect of preventing waste of a specified description being accepted at a regulated facility, the notice may require the operator of that facility to display appropriate signs at such places as may be specified in the notice, informing the public that no further waste of a specified description may be accepted at that facility.".

Amendment of regulation 42

4. For regulation 42 (enforcement by the High Court), substitute—

"**42.** The regulator may take proceedings in the High Court for the purpose of securing compliance with an enforcement notice, suspension notice, prohibition notice, landfill closure notice or mining waste facility closure notice (whether or not it has taken other steps for that purpose).".

Amendment of regulation 57

5. In regulation 57 (power of the regulator to prevent or remedy pollution)—

(a) for paragraph (1) substitute—

"(1) If the regulator considers that a risk of serious pollution exists as a result of the operation of a regulated facility or an exempt facility, it may arrange for steps to be taken to remove that risk.";

(b) in paragraphs (4), (5)(a) and (5)(b), for "the operator" substitute "the relevant person"; and

(c) after paragraph (5) insert—

"(6) In this regulation, "the relevant person" means—

(a) an operator;

(b) an establishment or undertaking carrying on an exempt waste operation; or

(c) a person carrying on a water discharge activity or groundwater activity.".

Rory Stewart
Parliamentary Under Secretary of State
5th October 2015 Department for Environment, Food and Rural Affairs

Carl Sargeant
Minister for Natural Resources
6th October 2015 One of the Welsh Ministers

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the Environmental Permitting (England and Wales) Regulations 2010 (S.I. 2010/675) ("the 2010 Regulations").

Regulation 3 amends regulation 37 of the 2010 Regulations to allow the regulator (the Environment Agency in relation to England, the Natural Resources Body for Wales in relation to Wales and local authorities in both countries) to serve a suspension notice where it considers that there has been a contravention of an environmental permit condition and such contravention involves a risk of pollution. It also allows the regulator to require the operator to put up a sign to make clear to the public that no further waste of a specified description may be accepted at that facility.

Regulation 4 amends regulation 42 of the 2010 Regulations to make clear that the regulator may make an application to the High Court whether or not it has taken other steps to secure compliance with an enforcement notice or other specified type of notice.

Regulation 5 amends regulation 57 of the 2010 Regulations to allow the regulator to arrange for steps to be taken to remove the risk of serious pollution which arises as a result of the operation of a regulated facility or an exempt facility.

An impact assessment in relation to England has not been produced for this instrument as no, or no significant, impact on the private or voluntary sectors is foreseen. The Welsh Ministers' Code of Practice on the carrying out of regulatory impact assessments for subordinate legislation was considered in relation to these Regulations. As a result, a regulatory impact assessment in relation to Wales has been prepared as to the likely costs and benefits of complying with these Regulations. A copy can be obtained from Welsh Government, Cathays Park, Cardiff CF10 3NQ and is published on www.gov.wales.

Explanatory Memorandum to The Environmental Permitting (England and Wales) (Amendment) (No. 3) Regulations 2015.

This Explanatory Memorandum has been prepared by Environment and Sustainable Development Directorate and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of The Environmental Permitting (England and Wales) (Amendment) (No. 3) Regulations 2015.

Carl Sargeant AM
Minister for Natural Resources
6 October 2015

1. Description

This instrument amends The Environmental Permitting (England and Wales) Regulations 2010 (S.I. 2010/675) ("the 2010 Regulations") primarily to strengthen existing powers for Natural Resources Wales to tackle waste crime and poor performing sites in the waste and other industries within the Environmental Permitting regime. The same powers also extend to local authorities in Wales in relation to regulated facilities for which they are the regulator. It amends existing powers to make the following changes:

- enable the regulator to suspend a permit where an operator has breached a condition of their permit and there is a risk of pollution; this provision will enable the regulator to specify, in a suspension notice, the steps that must be taken by the operator to remedy the breach of the permit and to remove the risk of pollution;
- enable the regulator to require the operator to display a sign which informs the public that no further waste can be brought onto the facility in cases where a permit is suspended and there is a need to prevent more waste entering a site;
- enable the regulators to take steps to remove a risk of serious pollution;
- make it less onerous for the regulator to make an application to the High Court for an injunction to enforce compliance with an enforcement or suspension notice by removing certain preconditions.

2. Matters of special interest to the Constitutional and Legislative Affairs Committee

This instrument makes amendments to existing England and Wales Regulations and is being made on a composite basis (by the Welsh Ministers in relation to Wales and by the Secretary of State in relation to England). As this composite SI is subject to approval by the National Assembly for Wales and by UK Parliament, it is not considered reasonably practicable for this instrument to be made or laid bilingually.

There is no difference in policy on these proposals and the Regulations will be used by industry operating across borders in Wales and in England.

3. Legislative background

The Welsh Ministers will make the changes to the 2010 Regulations using the enabling powers in the Pollution Prevention and Control Act 1999 ("the PPCA") (in particular section 2 and Schedule 1) which confer wide powers on the Welsh Ministers to make provision, in relation to Wales, for the regulation of polluting activities. The 2010 Regulations were made using these powers. These powers were transferred to the National Assembly of Wales by article 3 of the National Assembly for Wales (Transfer of Functions) Order 2005/1958.

Those functions of the Assembly were transferred to the Welsh Ministers pursuant to section 162 of, and paragraph 30 of Schedule 11 to, the Government of Wales Act 2006.

This Instrument follows the negative procedure and is subject to annulment in pursuance of a resolution of the National Assembly for Wales.

4. Purpose & intended effect of the legislation

Illegal operators in the waste management industry pollute the environment, endanger human health and show disregard for the neighbouring community. Their flouting of the Regulations ranges from unsightly, often dangerous fly-tipping to mountains of rubbish sometimes containing tens of thousands of tons of waste that can catch fire, pollute water, provide a breeding ground for rats and flies and give off smells that make life unpleasant for those living nearby. Those responsible can leave authorities and landowners / landlords to clear up the mess and deal with the consequences.

Pollution incidents from persistent poor performing waste operations and inadequate site management impact on the quality of air, water and land. The Welsh Government has seen a number of major waste fire incidents at permitted waste sites in Wales, impacting on air quality and other aspects of the environment and on human health from the large amounts of smoke and fumes emitted from these sites.

The reputable waste management industry provides a key service to the UK economy. The Welsh Government recognise that tackling waste crime and persistent poor performance is important to legitimate businesses, which are often undercut by criminals, which can undermine their confidence to invest. The reputable industry estimates the cost of waste crime to the UK economy at £568 million a year, however it is not possible to estimate the proportion in Wales based on available data. The companies in the waste industry that operate to the highest standards need support from government and responses to the consultation on these amendments were strongly in favour of them. It is, therefore, considered essential to take effective action against the small minority of rogue operators who are undermining and undercutting the law-abiding majority.

The Welsh Government and Defra are working with NRW and the Environment Agency to take tougher and speedier action against illegal operators and persistent poor performing permitted sites using existing powers. We want to strengthen the regulators' powers to enforce effectively and provide them with more flexibility to take the most immediate and appropriate action to tackle waste crime and persistent poor performers. The amendments contained in this instrument are intended to support this objective.

Although the focus of Welsh Government is on the regulation of waste operations, the amendments to legislation in this instrument apply to other activities regulated under the environmental permitting regime. It would not

make sense to subject waste operations to a different enforcement regime from other industries regulated under the same system and legislation.

5. Consultation

The proposed amendments to the 2010 Regulations were the subject of public consultation for 10 weeks between 26 February and 6 May 2015.

There were 89 responses to Part 1 of the consultation document which sought views on the proposed regulatory amendments set out in this instrument. There were 26 responses from local authorities; 21 from individual companies; 15 from trade associations; 8 from organisations categorised as "Other Public Bodies" (this includes various fire and rescue services and local authority representative organisations); and 6 from private individuals, 5 from professional bodies, 5 from consultancies and 3 from non-governmental organisations (NGOs).

Of the 89 responses received, 78 were from organisations and individuals based in England and 11 were from organisations and individuals based in Wales.

Around 83% of respondents supported the proposal to widen the power of suspension. Around 90% of respondents supported the proposal to enable the regulators to specify steps to remedy the cause of pollution and require operators to erect signage indicating waste that cannot be accepted at the site. In addition, 95% of respondents supported the proposal to widen the power of the regulators to remove the risk of serious pollution and 89% of respondents supported the proposal to enable the regulators to make an application to the High Court more easily by removing the current precondition.

The summary of responses to the consultation and the Government response is available at: https://www.gov.uk/government/consultations/waste-crime-improving-enforcement-powers-to-reduce-persistent-non-compliance-at-waste-handling-sites

6. Regulatory Impact Assessment (RIA)

The powers provided by these Regulations will be available, in relation to Wales, to Natural Resources Wales ("NRW") and Welsh local authorities who are the regulators for Wales under the 2010 Regulations. As NRW regulate the majority of environmental permitted sites relating to waste operations, the data on costs associated with enforcement action has focussed on NRW. The proposals will not result in any costs to legitimate businesses. The new powers will benefit businesses as the regulators will have more effective powers to enforce against illegal waste operators who often unfairly undercut compliant waste operators. There are no expected impacts on those businesses, charities or voluntary bodies that are in compliance with their environmental permits. The direct impact of this SI by the proposed changes to the power of suspension and the power to make an application to the High

Court would be on those businesses who fail to comply with the conditions of their permit or who operate illegally. The regulators will continue to consider the requirements of the Regulators Code and their internal delegation and enforcement procedures so it is likely (though not necessary) that warnings will have been given to an operator prior to exercise of these powers. The proposed change to the power, regulation 57 of the 2010 Regulations, to remove a risk of serious pollution is also linked to the commission of an offence.

The amendments in the instrument are targeted primarily at waste operators who persistently breach the conditions of their environmental permits and those who are operating illegally. These poor performing operators of these regulated facilities represent 5% of environmental permitted operations in Wales. NRW is aware of 87 illegal waste sites (for the reporting period of April – November 2014) operating outside the environmental permitting regime.

The Welsh Government does expect to see an increase in the need for the regulators to exercise the wider power of suspension or the wider power to remedy pollution. The majority of enforcement action by NRW can be taken using the existing powers; however, these proposals will help NRW to take quicker and tougher enforcement action in a limited number of serious cases. This will help to reduce the need for the public purse having to bear some of the costs from clearing pollution and remediating sites. The number of cases where action is required is expected to be quite low as it is only around 5% of the industry who are poor performers. Since its inception in April 2013, NRW have made no applications to the High Court for an injunction and therefore no custodial sentences or fines have arisen as a result of a failure to comply with such an injunction. The proposed change to the power will make it less onerous for NRW to make an application to the High Court for an injunction and the Welsh Government expects a small increase in the number of proceedings which NRW commence in the High Court.

The impact on the public sector is that NRW will have their powers made more robust and flexible, allowing them to consider the appropriate response in all the circumstances of each case. In the short term, any increased costs incurred by NRW as a result of these changes will be recovered through their fees and charges scheme, their proposals as set out in their recent consultation[1] to increase charges to cover the cost of regulating poor performers will support their regulatory efforts in this area.

These powers will assist the regulators in taking speedier and tougher enforcement action and it is anticipated that the number of cases where the public sector incurs substantial costs from the clearance of polluting sites should reduce. An impact of the costs to Wales is attached at Annex A. An impact of the costs to the Justice system has been jointly prepared with Defra and is available on request. This impact assessment concluded that the very small number of cases expected to reach the High Court (2 for Wales and 5

[1] Link to NRW consultation as follows:- http://naturalresources.wales/about-us/consultations/our-own-consultations/consultation-on-our-charging-scheme-for-2016-17/?lang=en

for England) would amount to a minimal impact to the Ministry of Justice. In the very rare case that non-compliance with an injunction leads to a custodial sentence, the costs could be passed on to the Welsh Government. However, this is a remote possibility given the very small number of cases reaching the High Court and also that the majority of those cases would likely result in a fine rather than a custodial sentence. It is not possible, therefore, to estimate the possible scale of any such costs.

This legislation has no impact on the statutory duties under sections 77-79 Government of Wales Act 2006 (“GOWA 2006”) or statutory partners under sections 72-75 GOWA 2006 other than those stated above.

Annex A

Costs and Benefits

This section sets out the costs and benefits that might arise as a result of the proposed amendments to the legislation. As there are no costs to legitimate operators, a full impact assessment has not been carried out to accompany the consultation on proposals to enhance NRW's enforcement powers.

Who will be affected by these proposals?
While the proposals will apply to all operators of regulated facilities under the 2010 Regulations, the key groups that will be most affected are illegal/ non-compliant operators who act in breach of their environmental permit or exemption conditions. The proposals will also affect:

- NRW and on some aspects, local authorities who will be able to exercise discretion in the use of the enhanced powers once the legislation is amended;
- The High Court which will hear any cases brought before it in relation to injunctions and;
- The Planning Inspectorate (PINS) which manages the appeals procedure under the 2010 Regulations.

The proposed amendments are principally aimed at tackling illegal operators and persistent non-compliant operations under the environmental permitting regime. Legitimate businesses located in the vicinity of a non-compliant site may benefit from a reduction in the pollution or loss of amenity caused by a non-compliant site. Legitimate waste businesses should also benefit as these proposals should help reduce the frequency of undercutting by illegal waste operators. The enhanced powers will help create a level playing field to ensure that those businesses which breach their permit or operate without a permit are brought into compliance or face enforcement to protect human health and the environment.

Costs and benefits for business

Businesses that carry out activities in accordance with their permit or the conditions of their registered exemption are not expected to experience costs as a result of these proposals.

Businesses that carry out their activities illegally (for example those that engage in waste activities for which they do not have a permit or which are in breach of a permit or registered exemption) may experience costs as a result of these proposals. The costs for businesses that carry out illegal waste management activities have not been included in the assessment.

Businesses that operate in breach of the conditions of their permits are more likely to have their permits suspended or revoked and therefore are likely to lose their market share, leaving responsible contractors to compete effectively on price and quality of service. These proposals will make responsible waste

management a more attractive proposition, as well as benefitting the environment and local communities.

There could be some additional costs to landowners who become responsible for clearing increased amounts of abandoned waste. However, this will be rare and limited to occasions where an operator is not in a position to have enforcement action taken against them. Comments were sought during the consultation on the extent of any additional cost and ways of increasing awareness amongst landowners of their potential liabilities. The Welsh Government, jointly with Defra, will consider further with the regulators and the industry on what more can be done to improve the awareness of landowners and landlords to help prevent the abandonment of waste sites and minimise the consequences on the neighbouring community.

Costs and benefits for the regulator (Natural Resources Wales)

NRW may incur some additional costs from additional regulatory effort in issuing and enforcing suspension notices; no estimates are currently available on the anticipated extra regulation and costs of issuing/enforcing suspension/revocation notices. They would also incur some occasional additional costs in supervising the compliance associated with the suspension of the permit. However, the number of cases where notices are expected to be required each year is low and NRW will only do this where it believes that failing to take this action would result in a high risk of pollution or public amenity loss.

It is anticipated that these enhanced powers will lead to a reduction in the number of sites that pose a high risk to the environment, which over time will mean a reduction in clean-up, enforcement and regulatory costs as sites move into compliance. Similarly costs borne by local authorities, including the fire services, to tackle waste fires should begin to reduce. The cost of disposing of waste from fires at waste sites has been estimated by NRW to be in excess of £2 million. This does not include the costs of haulage, remediation, supervision etc. A fire at one illegal waste site resulted in a total cost of over £1.5 million to all the agencies involved.

In addition, current and past cases indicate that clean-up costs of abandoned waste sites on private land can cost anywhere between £250k and £5million. Nine sites have been abandoned in Wales since April 2013. NRW is monitoring these sites as well as other sites which were abandoned prior to this time. Increased powers should benefit landowners as it will enable NRW to act earlier to reduce the incidence of sites with significant quantities of abandoned waste.

The most notable benefit for NRW will be the reduction in costs associated with emergency preventative action to avoid pollution and amenity loss and any associated clearance costs, although this has to be balanced against any additional enforcement costs.

Poor performance waste sites in Wales

There are 656 permitted waste facilities in Wales which are operational, accepting and handling waste on site. Around 5% of these sites are persistent poor performers who fail to adequately comply with the conditions of their permits, of which more than half of these sites continue to fail for more than two years.

Poor performers are considered to pose a greater risk of pollution and nuisance such as fire, odour and dust. Dealing with these problems can take significant amounts of time and resource to resolve which means substantial costs for both the NRW and the tax payer.

In their annual review of performance across the waste sector in Wales, NRW reviewed the compliance assessment plans for poor performing sites and estimated that each poor performer on average takes 43 days of regulatory effort. This equates to 1,462 days of effort required in total and the cost to the regulator is estimated at £324k. For one site, this could equate to £9.5k of regulatory effort some of which could be partly recovered through their fees and charges scheme but not all.

For example, for an end of life vehicle dismantling site with an annual throughput less than 2,500 tonnes, the flat subsistence charge recovered through NRW's fees and charges scheme for 2015/16 is £779. If this site had a compliance banding of a poor performance site, the charge would be 150% of the flat subsistence rate, or £1,169. This would fund around 6 days of regulatory effort. Whereas on a typical poor performing site of this type, NRW is likely to spend around 27 days' worth of regulatory effort, equivalent to a subsistence charge of £5,400.

Similarly for a non-hazardous household, commercial and industrial waste transfer station with an annual throughput of less than 25,000 tonnes, the flat subsistence charge recovered through NRW's fees and charges scheme for 2015/16 is £2,347. With a poor performing compliance band, the charge is increased to £3,506 which funds around 17.5 days regulatory effort. A typical poor performing site of this type may take closer to 44 days' regulatory effort in a year, equivalent to a subsistence charge of £8,800.

The proposed changes will enhance the current regime by enabling the regulators to take swift enforcement action before a situation posing significant risk develops. The proposals may also remove a small burden on HM Courts and Tribunals Service by providing alternative enforcement options for NRW.

Benefits will also be felt by the general public and local businesses in areas near poor performing waste sites, from a reduction in harm to local communities and disruption to their lives. Reducing non-compliance in the industry is also likely to have a benefit for the Welsh Government in protecting revenues from Landfill Disposals Tax once it is devolved in 2018.

Eitem 4

Jane Hutt AC / AM
Y Gweinidog Cyllid a Busnes y Llywodraeth
Minister for Finance and Government Business

Llywodraeth Cymru
Welsh Government

David Melding AC
Cadeirydd
Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol
Cynulliad Cenedlaethol Cymru
Bae Caerdydd
CF99 1NA

14 Hydref 2015

Annwyl David,

Yn sesiwn dystiolaeth y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol mewn perthynas â Bil Casglu a Rheoli Trethi (Cymru), addewais ddarparu gwybodaeth bellach mewn perthynas ag adran 186, sef y pŵer i wneud darpariaeth ganlyniadol.

Ni ellir defnyddio'r pŵer hwn ond i wneud newidiadau i ddeddfwriaeth y mae eu hangen o ganlyniad i ddarpariaethau'r Bil hwn. Darpariaeth ddeddfwriaethol gyffredin iawn yw hon ac mae'n arfer drafftio da cynnwys y ddarpariaeth hon yn y Bil gan ei fod yn galluogi'r llyfr statud i gael ei gadw mewn trefn.

Ni ellir defnyddio'r pŵer i wneud darpariaeth newydd, sylweddol nad yw'n gysylltiedig â'r Bil, ond yn hytrach darpariaeth y mae ei hangen er mwyn sicrhau bod darpariaethau'r Bil yn gweithio'n iawn. Ymhellach, ni ellir ei ddefnyddio i wneud newidiadau sylfaenol i ddeddfwriaeth arall neu i ymestyn cwmpas y Bil hwn.

O gofio cwmpas cyfyngedig a natur y pŵer, na ellir ei ddefnyddio ond mewn cysylltiad â Bil y mae'r Cynulliad yn craffu arno, rwyf o'r farn y dylai rheoliadau o dan adran 186 fod yn destun y weithdrefn negyddol.

Gofynnwyd imi hefyd paham yr oeddwn wedi dewis y fersiwn arbennig honno o eiriau ar gyfer y ddarpariaeth yn hytrach na fersiynau eraill a ddefnyddir ym Miliau eraill Llywodraeth Cymru. Yn wahanol i bwerau cyfatebol mewn deddfwriaeth arall (megis Bil yr Amgylchedd (Cymru), nid yw adran 186 yn caniatáu i ddarpariaeth *drosiannol* neu *arbed* gael ei gwneud. Nid oes angen y ddarpariaeth honno yn yr amgylchiadau hyn, gan fod y Bil yn sefydlu fframwaith cyfreithiol gyfan gwbl newydd: ni fydd unrhyw drosi o fframwaith cyfreithiol cyfatebol y DU (na fydd yn gymwys mewn perthynas â threthi datganoledig) a dim darpariaethau y mae angen eu harbed.

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Yn ystod y sesiwn dystiolaeth bu i chi godi pryder ehangach ynghylch pwynt o egwyddor a nodi'ch barn y dylid defnyddio'r weithdrefn gadarnhaol bob amser, os ydych yn diwygio deddfwriaeth sylfaenol trwy reoliadau. Caf ar ddeall eich bod yn bwriadu ysgrifennu at y Prif Weinidog am hyn ac felly ni chyflwynaf sylwadau ar wahân.

Yn olaf, o edrych ar adran 186 ymhellach rydym wedi sylweddoli bod y Memorandwm Esboniadol yn cynnwys rhai anghysondebau ynghylch y pŵer i wneud rheoliadau, gan ei fod yn datgan yn anghywir bod gweithdrefn y Cynulliad yn gadarnhaol o dan rai amgylchiadau ac yn datgan yn anghywir y caiff y rheoliadau wneud darpariaethau "trosiannol" neu "arbed". Nid yw hyn yn wir. Rwyf yn ymddiheuro am y gwall hwn. Byddaf yn sicrhau bod y Memorandwm Esboniadol yn cael ei ddiwygio ar ôl Cam 2.

Rwyf yn anfon copi o'r llythyr hwn at Gadeirydd y Pwyllgor Cyllid.

Jane Hutt AC / AM
Y Gweinidog Cyllid a Busnes y Llywodraeth
Minister for Finance and Government Business

The Scottish Parliament
Pàrlamaid na h-Alba

Devolution (Further Powers) Committee

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6 October, 2015

Dear Mr Melding,

Re. Parliamentary oversight and reporting of intergovernmental relations under the new provisions in the Scotland Bill

Further to my letter of 7 September, I am pleased to attach a copy of the Committee's report on the above-mentioned subject that has been published today.

As outlined in your response of 5 October, I should be pleased to continue the cross-committee dialogue on these important matters. I'll also give consideration to your other point on the Scottish experience of devolution and get back to you.

In the meantime, I'd be delighted to receive any thoughts you may have on our Report.

Yours sincerely,

Bruce Crawford MSP
Convener

The Scottish Parliament
Pàrlamaid na h-Alba

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Web

Devolution (Further Powers) Committee

Changing Relationships: Parliamentary Scrutiny of Intergovernmental Relations

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Devolution (Further Powers) Committee

To consider matters relating to The Scotland Act 1998 (Modification of Schedule 5) Order 2013, the Scottish Independence Referendum Act 2013, its implementation and any associated legislation. Furthermore, (i) until the end of November 2014 or when the final report of the Scotland Devolution Commission has been published, to facilitate engagement of stakeholders with the Scotland Devolution Commission and to engage in an agreed programme of work with the commission as it develops its proposals; and (ii) thereafter, to consider the work of the Scotland Devolution Commission, the proposals it makes for further devolution to the Scottish Parliament, other such proposals for further devolution and any legislation to implement such proposals that may be introduced in the UK Parliament or Scottish Parliament after the commission has published its final report.

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Introduction

1. Inter-governmental relations (IGR) refer to the processes by which different governments seek to communicate and cooperate to address issues where their policy responsibilities overlap, where there are common policy challenges, and to prevent or resolve areas of dispute. As the Committee has noted previously, in its Interim Report 'New Powers for Scotland', inter-governmental relations in the UK are mainly informal and underpinned by the need for good communication, goodwill and mutual trust. Nevertheless, the focus of this report is on the formal structures and processes which currently govern IGR in the UK and the implications of the current proposals for further devolution may have upon these structures and relationships.

2. In particular, this report considers the role of the Scottish Parliament, as well as Parliaments more generally, in scrutinising intergovernmental relations. In doing so, the report considers the practices in parliamentary scrutiny of IGR in other jurisdictions in order to seek examples and experiences which may help inform the on-going evolution of UK IGR and the role of legislatures in overseeing it.

Executive Summary

3. The formal structures of inter-governmental relations between the UK Government and the devolved administrations have undergone a process of evolution and expansion since 1999. However, the operation of these structures has been subject to considerable criticism. Lord Smith in his foreword to the Smith Commission report emphasised the need for a more productive, robust, visible and transparent set of relationships. The recommendations of the Smith Commission could result in a greater degree of devolved and shared powers between the Scottish and UK Governments that will increase the importance of, and necessity for, inter-governmental relations within the UK. As a result, the Smith Commission recommended the development of a new Memorandum of Understanding between the UK Government and the devolved administrations.

4. The process of agreeing a new Memorandum of Understanding is currently underway. The Devolution (Further Powers) Committee has considered the issue of inter-governmental relations with regard to the transparency of these relationships and specifically the role of legislatures in scrutinising inter-governmental relations. In doing so, the Committee has sought to learn from the experience of legislatures in federal and quasi-federal systems.

5. This report makes a range of recommendations on the guiding principles that will improve parliamentary scrutiny of inter-governmental relations and whether the principles and processes that will underpin such scrutiny should be placed on a statutory footing. The information that legislatures will require from governments in order to undertake effective scrutiny is also considered. The Committee recognises that improved scrutiny will not just result from actions by governments but rather requires reform of legislative structures. To this end, the Committee makes a number of recommendations with regard to the scrutiny structures of the Scottish Parliament.

6. The negotiations with regard to a reformed structure of inter-governmental relations are currently underway and the Committee is not party to the detail of discussions. However, the role of legislatures in scrutinising these relationships will be critical to public understanding of the proposals for further devolution. The Committee therefore expects that recommendations in this report will inform, and be taken account of, in the on-going discussions and negotiations that are currently taking place. Specifically with regard to the current negotiations, the Committee reiterates its view that adequate time be allowed for parliamentary scrutiny of the revised Memorandum of Understanding. The Committee also expects that the fiscal framework - part of the Scotland Bill process – is considered by this Committee and the Parliament before consideration can be given to any Legislative Consent Memorandum.

Current formal structures of IGR in the UK – an overview

7. The formal structure of IGR in the United Kingdom is set out in the 'Memorandum of Understanding, and Supplementary Agreements between United Kingdom Government, Scottish Ministers, Welsh Ministers and the Northern Ireland Executive Committee'. This Memorandum of Understanding (MoU) was first agreed in 1999 by the UK Government, Scottish Ministers, Welsh Ministers and the Northern Ireland Executive Committee and has subsequently been subject to redrafts in July 2000, December 2001, March 2010, September 2012 and October 2013. The MoU was formally presented to the UK Parliament and the devolved legislatures. The Scottish Government provided a summary of the content and history relating to the redrafting of the Memorandum of Understanding and this is reproduced at **Annexe** A of this report.

8. The purpose of the MoU[1] was to outline the procedures for communication, consultation and cooperation between the UK Government and the Devolved Administrations. The MoU also sets out arrangements for the exchange of information, statistics and research as well as setting out confidentiality arrangements in relation to the information which Governments provide to each other. The MoU was a non-binding agreement between the signatories and does not have a legal effect. The nature of the Memorandum is summarised within the documents as being—

> a statement of political intent, and should not be interpreted as a binding agreement. It does not create legal obligations between the parties[2].

9. The MoU establishes a formal structure, termed the 'Joint Ministerial Committee' (JMC) which provides "some central co-ordination of the overall relationship"[3] between the four administrations that are signatories to the MoU. The terms of reference of the JMC are—

> to consider non-devolved matters which impinge on devolved responsibilities, and devolved matters which impinge on non-devolved responsibilities;

> where the UK Government and the devolved administrations so agree, to consider devolved matters if it is beneficial to discuss their respective treatment in the different parts of the United Kingdom;

> to keep the arrangements for liaison between the UK Government and the devolved administrations under review; and

> to consider disputes between the administrations[4].

10. The JMC is required, under the terms of the MoU, to hold plenary meetings at least once a year. Plenary meetings are attended by the UK Prime Minister (or a representative for the Prime Minister) who chairs the meeting, the Scottish and Welsh First Ministers along with one of their Ministerial colleagues, the Northern Ireland First Minister and deputy First Minister as well as the Secretaries of State for Scotland, Wales and Northern Ireland.

11. The JMC is currently supported by two formal sub-committees. These are firstly, a Joint Ministerial Committee dealing with 'domestic' policy issues termed JMC(D), set up in the wake of devolved elections in 2007 and secondly, a Joint Ministerial Committee dealing with European Union. Only the latter holds regular, scheduled meetings according to a timetable set by European Union Council meetings and is termed JMC(E). In addition, although not formally a body governed by the terms of the Memorandum, a further forum of Finance Ministers - the Finance Ministers Quadrilateral (FMQ) also convenes periodically to consider financial issues.

12. During the period between October 2002 and May 2007, when the Northern Ireland Assembly was suspended, no JMC meetings took place with the exception of meetings of the JMC(E). Since 2008, the JMC has met in plenary form (usually annually) and in its domestic format (once or twice a year). Finance Ministers' Quadrilaterals tend to be less regular with the last meeting having taken place in November 2013.

13. In addition to formal quadrilateral structures, two bi-lateral structures have been established recently to manage relations between the Scottish and UK Governments, with a particular emphasis on managing the transfer of new devolved powers. A UK – Scotland 'Joint Exchequer Committee' (JEC) was established in 2011 to facilitate the transfer of tax and borrowing powers contained in what became the Scotland Act 2012. Secondly, as a consequence of the current proposals for devolution of aspects of welfare policy, contained within the current Scotland Bill, a Joint Ministerial Working Group on Welfare was established in 2015 to discuss arrangements for transferring social security powers and managing shared responsibilities in this sphere.

Views on the current arrangements

14. Despite the focus on formal structures, it is important to re-emphasise that most inter-governmental relations in the UK take place informally between officials on a bilateral basis and ultimately in ad hoc meetings or communications between ministers. This perspective on the reality of IGR in the UK and the efficacy of existing formal structures was commented upon by the Deputy First Minister, in considering the issue of block grant adjustment in relation to the devolution of Land and Buildings Transactions Tax, as follows—

> My view is that such issues are, ultimately, only ever sorted out at political level between ministers—we can have whatever "mechanism" we want. I will illustrate what I am saying using the block grant adjustment. When

> Bruce Crawford was in the Government, he and I started off the joint exchequer committee so that we could discuss the block grant adjustment. We had processes, all the means of resolving issues and all the evidence work and research that was done by our officials: ultimately, however, the resolution came down to a 15-minute conversation between the Chief Secretary to the Treasury and me. Such questions will be resolved politically by ministers, as long as there is willingness to do that[5].

15. Similarly, Ken Thomson, Director General for Strategy and External Affairs, Scottish Government, also stressed the importance of informal contacts when commenting that—

> A great deal of what we call IGR in this context actually happens below the waterline, in day-to-day contacts between ministers and officials. That is where a lot of the co-operation happens. As is the case within a Government, most issues between Governments can be dealt with in that space. Other things will come to the surface and be escalated to ministerial or intergovernmental level[6].

16. Nevertheless, the formal structures underpinning inter-governmental relations in the UK have clearly been undergoing a process of evolution and expansion as the nature of the devolution settlement has changed. However, these formal structures have also been subject to considerable criticism. This was a concern that was reflected in Lord Smith's four personal recommendations contained in the foreword to the Commission's report where Lord Smith comments—

> Throughout the course of the Commission, the issue of weak inter-governmental working was repeatedly raised as a problem. That current situation coupled with what will be a stronger Scottish Parliament and more complex devolution settlement means the problem needs to be fixed. Both Governments need to work together to create a more productive, robust, visible and transparent relationship[7].

17. Recently, the House of Lords Constitution Committee was also critical of existing inter-governmental structures commenting that—

> It is clear that, while some parts of the JMC structure work better than others, in the eyes of the devolved administrations at least the way the JMC system works at present is not satisfactory. The Domestic sub-committee, in particular, does not appear to serve a useful purpose[8].

18. In evidence to the Finance Committee, the Deputy First Minister commented on formal IGR structures and the bilateral relationships that exist between the Scottish and UK governments in the following terms—

> One of my criticisms of the intergovernmental mechanisms is that they have been rather rigid and scripted and not particularly relevant. I hope that

> we can improve them. For completeness, I should also say that, although the formal mechanisms of intergovernmental working—in my experience over the past eight years—have not been particularly valuable, a lot of good bilateral intergovernmental working is taking place in sorting out particular issues and policy questions, which is beneficial to us all[9].

19. With regard to parliamentary scrutiny of IGR by legislatures in the UK, the Committee has received a range of evidence which considers that this has been a particular area of weakness in the structure of IGR within the UK. For example, Professor McHarg of Strathclyde University commented—

> …parliamentary scrutiny has been one of the areas in which the current system has not worked. Neither the Scottish Parliament nor the UK Parliament has taken any consistent interest in scrutiny of intergovernmental relations. There have been some ad hoc inquiries, but that is all[10].

20. In a similar vein, the Committee has received evidence indicating that the culture of confidentiality around IGR in the UK is particularly entrenched. For example, Professor Michael Keating observed—

> Whenever there is intergovernmental working, things disappear into rather opaque arenas. That is really not necessary. It is a peculiarly British habit that we like to have our arguments in private before presenting things to the public, and Governments will sometimes exploit that in order to stay away from the public gaze. …The point about parliamentary scrutiny is absolutely right. We have very poor parliamentary scrutiny of intergovernmental relations[11].

Impact of the proposals for further devolution on IGR

Recommendations of the Smith Commission

21. The Smith Commission recommendations for further devolution will necessarily result in a greater degree of shared powers existing between the Scottish and UK Governments than has been the case under the devolution settlement to date. Accordingly, the Commission considered that substantial reform of the current inter-governmental structures were required if the proposals for further devolution were to be delivered effectively. The Commission commented that—

> The parties believe that the current inter-governmental machinery between the Scottish and UK Governments, including the Joint Ministerial Committee (JMC) structures, must be reformed as a matter of urgency and scaled up significantly to reflect the scope of the agreement arrived at by the parties. The views of the other devolved administrations will need to be taken fully into account in the design of the quadrilateral elements of that revised machinery[12].

22. The Commission's report went on to recommend the development of a new Memorandum of Understanding between the UK Government and the devolved administrations which would include details of new bilateral governance arrangements to deal with implementation and operation of the proposed devolution of tax and welfare powers. The Commission also proposed the creation of a range of new JMC sub-committees which could include, but not necessarily be limited to, policy areas including home affairs, rural policy, agriculture and fisheries and/or social security/welfare issues.

23. The Smith Commission also made recommendations with regard to the role of legislatures within this 'scaled up' structure of inter-governmental machinery. The Commission recommended that in parallel to this revised IGR machinery that—

> formal processes should be developed for the Scottish Parliament and UK Parliament to collaborate more regularly in areas of joint interest in holding respective Governments to account[13].

24. The Commission's report then went on to make specific recommendations as to how the revised inter-governmental machinery could be underpinned by stronger and more transparent parliamentary scrutiny. Specifically, the Commission recommended that this should include—

> (a) the laying of reports before respective Parliaments on the implementation and effective operation of the revised MoU.

> (b) the pro-active reporting to respective Parliaments of, for example, the conclusions of Joint Ministerial Committee, Joint Exchequer Committee and other inter-administration bilateral meetings established under the terms of this agreement[14].

25. The UK Government and the four devolved administrations have agreed to review the MoU and the structures associated with the MoU. Phillip Rycroft, the lead civil servant within the UK Government responsible for reviewing the MoU, summarised the context for the review in the following terms—

> We have had a system of intergovernmental relations in place since devolution in 1999, with JMC machinery supported by the MOU. In fact, there is a complex set of concordats and MOUs that cover a number of different parts of business.

> That system has served its purpose—very well, in the view of some—over the years, but we are coming to a major juncture in the devolution settlements. There are proposals currently before the Westminster Parliament for further devolution for Scotland, and a commitment from the UK Government for further devolution to Wales and a significant change in the Welsh settlement, and—following the Stormont House agreement—changes in the Northern Ireland settlement. The devolution settlements are changing. The JMC plenary that met last year, chaired by the Prime Minister, with the Welsh and Scottish First Ministers and the Northern Irish Deputy First Minister in attendance, agreed—by consensus, as always—that it was an appropriate moment to review the machinery of the JMC and the associated MOU[15].

The Committee's perspective

26. The Devolution (Further Powers) Committee has previously taken evidence and made a range of conclusions and recommendations, in its Interim Report 'New Powers for Scotland'[16], with regard to parliamentary oversight of IGR. These conclusions and recommendations are worth re-iterating here. Firstly, the Committee recognised that ensuring that the Scottish and UK parliaments, and other devolved assemblies, can effectively scrutinise IGR represented a significant challenge. The Committee agreed with the Smith Commission view that the current IGR machinery would not be fit for purpose to cope with the new structure of shared powers proposed by the Smith Commission. Secondly, the Committee recognised that for IGR to operate effectively there has to be space for discussions to take place in confidence. However, the Committee went on to recommend that—

> "any future bill should place the general principles underpinning the operation of inter-governmental relations in statute. The Committee also considers that the general principles underpinning the structures which will be put in place for dispute resolution should also be placed in statute.

> Such a bill should also include the general principles which will enable Parliamentary scrutiny of this process to take place. The Committee considers that the detail of the process for conducting inter-governmental relations should then be placed in a Memorandum of Understanding agreed between the governments. During this process, the Committee expects the Scottish Government to report to the Parliament and its committees on the progress of discussion and specifically before any final agreement is reached"[17].

27. Specifically, the Committee highlighted that issues associated with inter-governmental relations would be most acute in the policy areas of European Union representation, taxation, welfare and employment support. Accordingly, the Committee considered that a scaled-up IGR framework would require both bi-lateral structures to be established between the Scottish and UK Government as well as multi-lateral structures between the UK Government and the devolved administrations, with a formal role for the UK's parliaments to scrutinise these interactions as appropriate if that was a role they envisaged for these institutions.

Views of the two governments on IGR

28. The Scottish Government responded to the Committee's recommendations with regard to inter-governmental relations in the following terms—

> The Scottish Government recognises that the intergovernmental machinery requires overhaul.....We remain open-minded about the need for statutory underpinning of inter-governmental principles and dispute resolution. While this might help to encourage administrations act in line with the sound principles set out in the MOU, it could prove cumbersome and the mechanism by which it would be enforced is not clear[18].

29. The Scottish Government's response went on to agree with the Committee's recommendation that bi-lateral and multi-lateral structures would be required to reflect the new areas of overlap and shared policy competence set out in the Scotland Act 2012 and the Scotland Bill 2015. The Scottish Government summarised their approach to considering the role of parliaments in scrutinising inter-governmental relations in the following terms—

> Our aim is to be as open as possible while respecting the need for a degree of confidence while negotiations with other administrations are on-going. There will also need to be clear rules for sharing of data produced by the UK Government[19].

30. In oral evidence to the Committee, the Scottish Government's Director General for Strategy & External Affairs, Ken Thomson commented on this issue that—

> Past practice is probably not the best guide to future practice in this space, and that applies to the changes in the devolution settlement. I will take the

> two most salient examples. If and when further powers over tax and welfare are devolved to the Scottish Parliament and the Scottish Government, that will intensify the requirement for close working between the UK Government and the Scottish Government. Past practice in this context is not a good guide as to what practice should look like in the future in terms of the visibility and understanding of how those relationships operate, how they deliver value and how the operators in this space are held to account by their respective Parliaments[20].

31. The Secretary of State for Scotland, in his response to the Committee's Interim Report, did not comment specifically on the issue of parliamentary scrutiny of IGR. However, the Secretary of State commented generally on IGR that—

> All four administrations should work more closely to deliver for the people of the UK. The Government is committed to doing so. A joint process between the UK and Scottish Government is already up and running to ensure the arrangements we have in place make for effective working relationships. We are committed to exploring jointly a range of options for enhancing intergovernmental relations with the Devolved Administrations and will work together to make collective improvements[21].

32. In later correspondence to the Committee, the Secretary of State for Scotland commented that the intergovernmental structures required to deliver the Smith Commission agreement "may largely depend on what the Scottish Government choose to do with the powers"[22]. More generally, the Secretary of State noted that a process had been put in place to revise the MoU between the UK Government and the devolved administrations. In oral evidence to the Committee Phillip Rycroft, Second Permanent Secretary, Head of UK Governance Group, of the UK Government Cabinet Office, observed that—

> It is probably true to say that parliamentary scrutiny across the piece has been relatively light over the past few years. I suspect—certainly from my perspective, working in the Whitehall context—that that will change. There is a lot of interest in this work from the House of Lords Constitution Committee and the Political and Constitutional Reform Committee in the House of Commons, so I anticipate that we will face increased scrutiny on intergovernmental relations in the months and years ahead.

> …we need to think about the fact that, in order for effective scrutiny to take place, Parliaments and the wider public need to understand what is happening in the intergovernmental space[23].

Parliamentary scrutiny of IGR in other jurisdictions

33. **At present, systematic and sustained parliamentary scrutiny of inter-governmental relations by legislatures in the United Kingdom is notable by its absence**. In the view of the House of Lords Constitution Committee such scrutiny is "sporadic and ineffective"[24]. Since this Committee was established, the issue of the lack of parliamentary scrutiny of inter-governmental relations has been a recurring theme. Related to this has been the suggestion from a variety of witnesses that the Committee should consider how such scrutiny is conducted in other jurisdictions. For example, Mr Ken Thomson of the Scottish Government commented—

> There is a lot to learn from how from how intergovernmental relations are handled in systems that have a more federal or quasi-federal structure, although I am not advocating that structure. I am thinking of places where the process works according to a different model, such as Australia, Canada and, in a slightly different way, Spain. To pick up an earlier point, Britain has been through a more evolutionary and incremental process, so we can learn from looking at experience overseas[25].

34. More generally, the Committee is aware of the public concern at the lack of scope there has been for consultation on, and public engagement with, the proposals for further devolution generally and the proposals which will emerge through the inter-governmental negotiations which are currently on-going, including the fiscal framework. Again, this has been a view that the Committee has received consistently in evidence. For example, Professor Aileen McHarg commented, in written evidence, with regard to recommendations made by the Committee in its interim report that—

> The Committee is right to be concerned that the appropriate mechanisms for IGR are in place and have been agreed to by the Parliament before the Bill is enacted. Whilst I understand that a process of reviewing the existing IGR machinery is on-going, it is unsatisfactory that this is – once again – being treated as a matter for negotiation between officials, rather than something in which there is a legitimate parliamentary and public concern[26].

35. The Committee has undertaken a range of work considering the parliamentary scrutiny of inter-governmental relations in a variety of federal and quasi-federal jurisdictions. This has included the commissioning of external research and evidence taking in formal and informal settings. The external research report commissioned by the Committee can be found at **Annexe B**.

36. The Committee has undertaken this work on this issue with the wider understanding that it was not expected that there would be a model or template from another country which could be applied to the UK system of devolution. However, the Committee has sought to learn from processes, procedures and principles that underpin such scrutiny in other jurisdictions in order to inform on-going negotiations within and between governments on the reform of the MoU and the operation of inter-governmental machinery.

37. **The evidence that the Committee has taken on international comparators has tended to confirm that legislatures in federal and quasi-federal systems face challenges in scrutinising inter-governmental relations**. Frequently, the non-statutory or non-binding character of inter-governmental agreements, for example in Canada, limits the formal means through which to scrutinise inter-governmental decision-making. In jurisdictions where statutory processes are in place, such as Belgium, parliaments can have a more formal role in consenting to intergovernmental agreements, usually with the capacity to either reject or accept agreements rather than amend them.

38. The Committee took evidence from a number of international academic experts with regard to inter-governmental relations and parliamentary scrutiny in a number of jurisdictions. This evidence reinforced the view that legislatures in federal and quasi-federal systems are at best weak actors in terms of their capacity to scrutinise inter-governmental relations. The quotes below provide an indication of the evidence that the Committee received. Professor Julie Simmons, of the University of Guelph, commented in relation to Canada that—

> The discussions between the central Government and the provincial Governments, to the extent to which they take place, are in extra-parliamentary forums, outside the legislatures at the central and the provincial levels, and they exclusively involve the executive branch of government[27].

39. In relation to the position in Germany, Professor Nathalie Behnke from the University of Konstanz, stated—

> I am not aware of any formal mechanism of parliamentary scrutiny on intergovernmental relations. … We have 18 ministerial councils in more or less every policy field, in which the Länder ministers meet regularly – between two and four times year. The federal ministers are involved in most of those conferences[28].

40. With regard to Switzerland, Dr Sean Muller of the University of Berne, summarised the position in the following terms—

> The Swiss cantonal, or regional, Parliaments are not at all effective in overseeing intergovernmental relations, because that is considered to be the Government's prerogative. It is considered that such relations fall

> under foreign affairs, even if they are with other cantons within Switzerland – another canton is like a different country in that sense[29].

41. Lastly, Professor Bart Maddens of the University of Leuven outlined a more nuanced situation and observed that—

> In Belgium, intergovernmental relations are largely based on co-operation agreements between the various authorities. Some of the agreements are executive; others are legislative and have to be agreed by Parliament. About half of the co-operation agreements, because they have implications that are legislative or budgetary or they generate rights or obligations for the citizens, have to be put before Parliament.

> In Parliament, the co-operation agreements are dealt with at the federal and the member states level in the same way as international treaties, which implies that they cannot be amended by Parliament. Parliament either agrees or disagrees. I do not know of any instances where Parliament has ever disagreed, yet the co-operation agreements are very important, because they limit the scope of legislative work afterwards, so the legislation has to be in conformity with the agreements. In Belgium, Parliament's involvement in bringing about and agreeing the co-operation agreements is very limited, which is generally considered to be a democratic deficit[30].

42. **To help us better understand this area, the Committee commissioned external research from Professor Nicola McEwen, Dr Bettina Petersohn and Coree Brown Swan of the Centre for Constitutional Change based at the University of Edinburgh. The Committee is grateful to these experts for their assistance in this Report through the provision of the external research.**

43. The external research considered legislative oversight of inter-governmental relations in Belgium, Canada, Germany, Spain, Switzerland, the United States of America and also scrutiny approaches of member state legislatures of European Union policy and legislation. The research reached two broad conclusions as follows—

> In every country, intergovernmental relations are dominated by executives, with relatively limited opportunities for parliaments and parliamentarians to engage in legislative oversight of processes, negotiations and agreements.

> In spite of this general constraint, in almost every country examined here, the role of parliaments in scrutinising IGR is greater than the role the UK's parliaments currently enjoy in the scrutiny of UK IGR[31].

44. The research concluded that there tended to be two main routes via which political actors could seek to gain knowledge of and influence over inter-governmental decision-making. Firstly, in countries where political parties are highly integrated in their organisations and are strong in central and sub-state governments and

parliaments across the country, such as in Germany and Switzerland, informal networks within political parties tend to provide a means of access into inter-governmental processes, information and decision making. A second common route was to seek to challenge inter-governmental decisions or agreements through recourse to the judicial system and in particular through appeal to a Constitutional Court.

45. Where legislatures have established specific structures, to scrutinise inter-governmental decision-making, these tended to take three forms. Firstly, through debates of the entire parliament with regard to agreements governments have reached. Secondly, through the establishment of a specific parliamentary committee to scrutinise inter-governmental relations. Thirdly, through mainstreaming scrutiny of inter-governmental relations across subject committees with individual committees considering inter-governmental relations within specific policy areas.

46. In some instances, even where institutional structures to facilitate scrutiny exist, these can be undermined by a lack of political incentives or will to undertake scrutiny of inter-governmental relations. For example, the trend in Belgian federalism for sub-state legislatures to seek to operate as separate entities with little incentive or motivation for joint-working tends to result in a lack of political will to scrutinise inter-governmental relations. The Committee also obtained evidence of inter-parliamentary co-operation being another legislative response in this field, notably in Switzerland.

47. Nevertheless the external research commissioned by the Committee did highlight the benefits which could accrue from legislatures having a greater role in the scrutiny of inter-governmental relations in terms of democratic accountability. Increased scrutiny of inter-governmental relations was considered as being beneficial in terms of raising general public awareness of, and debate regarding, inter-governmental decision-making. Such scrutiny could be facilitated by debates being held in either plenary meetings of parliaments or publicly held parliamentary committee meetings. Public scrutiny would as a minimum require the publication of information regarding the topics under discussion and decisions reached in inter-governmental forums.

48. In addition, parliamentary scrutiny of inter-governmental relations can act not only as a means of holding governments to account but also of supporting the actions of governments prior to inter-governmental negotiations. In this sense, legislatures require information regarding the position of government with regard to issues being discussed at forthcoming meetings in order to provide a mandate for the position of a particular government entering into inter-governmental negotiations.

49. Accordingly, the external research identified **five issues** for consideration arising from a comparative assessment of practice and procedures in other jurisdictions. These can be broadly summarised as follows—

I. **Timing and access to information**: That parliaments can be made more aware of formal, inter-governmental meetings through a record of proceedings, where available, being deposited with parliaments upon conclusion of such meetings. A record of significant informal meetings and working groups could also be reported to parliaments.

II. **A Committee on IGR:** The establishment of a dedicated, permanent committee to scrutinise IGR was an approach taken in most of the legislatures considered. Such a committee would deal with IGR alongside constitutional and other institutional matters. Such an approach did not prohibit subject-focussed committees from scrutinising IGR when this related to their policy remit.

III. **Hearings/Evidence sessions:** Obtaining formal evidence from governments on a regular basis, prior to and/or following formal intergovernmental meetings or following significant intergovernmental agreements. It may be appropriate for some of these meetings to be held in private. A Memorandum of Understanding between the Scottish Parliament and Scottish Government may be an appropriate mechanism to utilise to underpin executive – legislature relations in this area.

IV. **Consent:** In some countries, intergovernmental agreements are subject to the consent of parliaments. Given the increased significance of intergovernmental agreements, most notably relating to block grant adjustment and the fiscal framework, there may be a case for extending the Scottish Parliament's consent powers.

V. **Transparency and Public Engagement:** In addition to the mechanisms outlined above, transparency would be enhanced by a commitment on the part of governments to report on the outcome of intergovernmental meetings. These reports could then be the subject of debate within a committee or of plenary meetings of the Scottish Parliament. Any intergovernmental agreements should also be made available for parliamentary and public scrutiny.

50. The Committee considers that there is no ideal model to adopt from the internal comparators that we looked at with regard the parliamentary processes that should be adopted in order to facilitate parliamentary scrutiny of inter-governmental relations. However, the Committee agrees with the view of the House of Lords Constitution Committee that "effective scrutiny of inter-governmental relations requires both greater transparency than currently exists, and the necessary structures and desire in Parliament and the devolved legislatures to scrutinise those relationships"[32]. The Committee's consideration of practices in other jurisdictions has reaffirmed its view that there is a need for improved scrutiny in this area and for specific structures and processes to facilitate this be put in place.

51. In order to achieve this aim, the Committee considers that **two key principles** have been consistent throughout the evidence it has taken and in reviewing the operation of IGR in other jurisdictions with regard to the role of parliaments. Firstly, that the revised structure of inter-governmental relations must be **transparent**. This will involve ensuring that there is information about meetings, agendas, policy objectives and decision making in the public domain. This is essential in order to ensure that there is clarity around the basis for agreements reached between governments and decisions made. Secondly, **accountability** must be built into the revised structure of inter-governmental relations. The agreements reached between Governments must be subject to parliamentary scrutiny and therefore clear mechanisms require to be built into the revised MofU, currently being negotiated, to ensure that the role of parliamentary scrutiny is facilitated.

52. The remainder of this report considers what such structures and processes could look like within the context of the on-going negotiations that are taking place between governments in the United Kingdom to review the MoU and reform the inter-governmental apparatus.

Making IGR more transparent

A statutory basis for Parliamentary scrutiny?

53. The Committee's consideration of the approach taken in other countries with regard to inter-governmental relations has found that the extent to which such relations are placed on a statutory basis varies considerably. A statutory approach tends to be most common in federal systems such as Germany and Belgium where there is generally more recourse to the Courts to settle areas of jurisdictional competence.

54. There is a distinction to be drawn between, on the one hand, placing the procedures for intergovernmental relations on a statutory footing, and on the other hand, making the agreements generating intergovernmental negotiations legally binding and subject to formal parliamentary approval. In some case, the agreements themselves include formal procedures for parliamentary oversight and consent, as well as the steps to be taken to uphold or amend the agreement. Where parliamentary approval is required, it is often over agreements which affect the powers of the parliament or which have financial implications.

55. The Committee has taken evidence on a range of approaches which are taken in relation to scrutinising the position of governments within European Union decision-making structures. All European Affairs Committees in member state parliaments are sent documents on EU policies emerging from the European Commission, so aiding their capacity to keep abreast of policy developments and potential intergovernmental issues. The extent to which these parliaments can scrutinise their own government's intergovernmental engagements in the EU varies. A frequently cited example is that of the Danish Parliament's European Affairs Committee, which mandates the negotiating position of the Danish Government prior to EU negotiations. In part the role of this Committee has developed due to the frequency of minority governments in Denmark to ensure that subsequent agreements subscribed to by the Danish government will be ratified by the Danish parliament. Nevertheless, the opportunity to hear from ministers in advance of intergovernmental meetings could add value to executive-legislative negotiations in the UK. For example, Professor Michael Keating commented in relation to this Committee—

> With regard to the capacity of Parliaments to hold Governments to account in relation to European negotiations, the Nordic countries and particularly Denmark give an example of what can be done. Ministers have to come and explain their position to extremely specialised committees that know the dossiers, and those committees report back to the Parliaments. Something like that could be done here for intergovernmental relations. All the arguments about not showing your hand or about confidentiality are just

> special pleading by Governments that do not want to be held accountable[33].

56. A formal role for German legislatures at State and Federal levels also exists in relation to inter-State treaties where the relevant government is required to inform their parliament four weeks in advance of entering into a treaty. This then provides the relevant legislature with an opportunity to debate a proposed treaty and thereby a formal role in the process.

57. The Committee is also aware of a range of more informal procedures which operate in order to enable legislative scrutiny of EU decision-making. For example, European Scrutiny Committees in both houses of the UK Parliament have reached agreement with the UK Government on the types of documents that the UK Government is required to deposit in the UK Parliament for consideration and scrutiny by the respective European Scrutiny Committees. Such documents tend to include Communications and legislative proposals made by the European Commission.

58. The Committee also notes the procedure existing in the UK Parliament, known as the 'Ashton-Lidington undertakings', which requires the UK Government to follow particular processes with regard to the UK Parliament when the European Commission publishes a proposal which a UK 'opt-in' applies to. The House of Lords European Select Committee summarised the 'Ashton-Lidington undertaking' as requiring—

> Government departments to produce an EM [Explanatory Memorandum] within 10 working days of the publication of any proposal to which the UK opt-in decision applies, and to indicate the Government's preliminary views on whether they will opt in. The Government will not reach a final view on the matter for eight weeks following publication, and will take account of any views expressed within that time by the EU Select Committee or the European Scrutiny Committee of the House of Commons. A Resolution formalising the eight-week scrutiny reserve was adopted on 30 March 2010[34].

59. In order to entrench the role of parliaments in any 'scaled-up' structure of inter-governmental relations there are clearly a range of options available from providing a statutory basis for parliamentary scrutiny to more informal mechanisms. Throughout the process of considering the role of parliamentary scrutiny in inter-governmental relations the Committee has been consistent in recognising the challenge which this issue represents and also the importance of providing governments within sufficient space to be able to resolve issues through negotiation and discussion. Nevertheless, **the Committee considers that effective mechanisms to enable parliamentary scrutiny of IGR require to be codified and entrenched within the revised structure of IGR from the outset.**

60. In order to ensure that the interests of the Scottish Parliament are protected from the outset, the Committee recommends that the principles of transparency and accountability are placed in statute in the Scotland Bill.

61. Furthermore, the Committee recommends that the processes which will be followed to facilitate Scottish Parliament scrutiny of IGR should be agreed between the Scottish Parliament and Scottish Government with an obligation on the Scottish Government to provide information and agreements from IGR meetings (see paragraph 65 below).

62. Finally, more widely in relation to the current revision of the MoU, we recommend that a specific section on Parliamentary oversight be included.

Provision of information to Parliament to enable effective scrutiny

63. The effectiveness of Parliamentary scrutiny of IGR will depend in part on its ability to be informed of the subject matter and timetable of the discussions between governments. The Deputy First Minister recently wrote to the Convener of the Finance Committee providing an update on discussions that took place at the meeting of the Joint Exchequer Committee in July 2015. This approach provides a platform to build upon. The Committee therefore makes a series of recommendations to improve upon current processes.

64. The Committee considers that a new **Written Agreement on Parliamentary Oversight of IGR** between the Scottish Government and the Scottish Parliament with regard to the provision of information and how the views of the Scottish Parliament will be incorporated with regard to IGR agreements is an appropriate approach to adopt in order to aid transparency in this area. Other legislatures in the UK may wish to consider similar arrangements that best suit their procedures.

65. The Committee considers that the information provided by governments must enable parliamentary scrutiny of formal, inter-ministerial meetings before and after such meetings. Such information must include, as a minimum, a 'forward look' calendar of IGR meetings and the agendas for these meetings. Subsequently, detailed minutes of meetings held and the text of any agreements reached must also be made available to legislatures in a timely manner.

Role of the Scottish Parliament

66. The lack of effective scrutiny of IGR by parliaments to date, including the Scottish Parliament, has been another recurring theme running through the evidence that the Committee has taken in this area. The Committee recognises the validity of this criticism and recognises the need to ensure that parliamentary scrutiny of IGR is 'scaled up' to take account of the increased importance of IGR as a consequence of the structure of shared powers contained within the Scotland Bill is essential.

67. In recognising the importance of improving scrutiny of IGR, the Committee recognises that legislatures internationally, at both state and sub-state level, find it problematic to scrutinise IGR. Legislatures generally are weak actors within this sphere for a range of reasons including the imbalance of resources between executive and legislatures and that IGR agreements are frequently non-binding and therefore not subject directly to parliamentary scrutiny. Nevertheless, the Committee's consideration of the approaches taken in other legislatures within multi-level states has identified two common mechanisms via which legislatures seek to maintain oversight of inter-governmental relations.

68. Firstly, legislatures frequently establish specific committees which are tasked to scrutinise inter-governmental relations. For example, this approach is common amongst Canadian provincial legislatures and Belgian regions and communities. The external research report, commissioned by the Committee, commented on parliamentary scrutiny of IGR in Catalonia in the following terms—

> Intergovernmental activities are coordinated in Catalonia by the Office of Institutional Relations and Promotion of Democratic Quality. This department is tasked with facilitating the promotion of partnerships between Catalonia, the Spanish Government and other regions, and is charged with supporting the work of the government in the Bilateral Commission and other joint bodies. It also has a monitoring role with respect to agreements signed between Catalonia and the central Ministry of Defence.

> The Catalan Statute of Autonomy stipulates that conventions signed by the Catalan Government and the central government are to be published in the official gazette. Conventions signed with other autonomous communities must also be published. In compliance with this, the department publishes a searchable database of all agreements and MOUs signed by the Catalan government, including with institutions, the central state, other autonomous communities and local areas, and international partners. They are also published in the official gazette.

> Within the Catalan Parliament, intergovernmental relations falls within the remit of the Institutional Affairs Committee which also has responsibility for the Statute of Autonomy, administration, local government, religious affairs

and sport (amongst other competences). Officials within the ministry are also charged with coordinating relations between the parliament and the government.

> Approval of conventions and agreements by parliament is required only in cases where the legislative powers of parliament are affected. If this is not the case, the Government is obliged to inform parliament of the convention or agreement within one month of its signature[35].

69. Secondly, co-operation between legislatures within a jurisdiction was another common response by legislatures responding to inter-governmental structures and agreements. Legislatives responses varied from the establishment of formal parliamentary co-operation mechanisms, for example inter-cantonal structures in Switzerland, to informal networks between legislatures. The external research report, commissioned by the Committee, commented on inter-parliamentary cooperation that—

> In some of the countries we examined, cooperation across parliaments within the multi-level system was regarded as a means of enhancing the scrutiny of IGR[36].

70. The Committee recommends that the Scottish Parliament should give careful consideration to establishing a specific parliamentary committee or by providing a role or revised remit for an existing Committee which would be tasked to scrutinise inter-governmental relations and constitutional matters more generally in the next session of the Scottish Parliament. This should be a matter considered by a new Parliamentary Bureau shortly after the next Scottish Parliamentary election.

71. The Committee also recommends that the view of the Scottish Parliament should be taken account of before any inter-governmental agreement is entered into by the Scottish Government. The proposed parliamentary committee should scrutinise and report to the Scottish Parliament on any such inter-governmental agreement prior to debate in plenary session. Such a committee should also be tasked with obtaining evidence from the Scottish Government prior to and following formal, bilateral and quadrilateral, inter-governmental meetings.

72. The Committee also considers that greater inter-parliamentary cooperation in scrutinising inter-governmental relations would be beneficial. The Committee considers that such co-operation should begin on an informal basis but that the Scottish Parliament should give consideration to how such co-operation can be best facilitated and engage in a dialogue with other legislatures in this regard. This Committee has begun the process of discussing such matters with relevant committees in other legislatures across the UK.

Progress of the Scotland Bill

73. The negotiations regarding revising the MoU between the UK Government and the devolved legislatures and assemblies in the UK are currently on-going. The Committee notes that the revised MoU is due to be considered at a meeting of the JMC Plenary before the end of 2015. The Committee also notes that bi-lateral negotiations regarding the 'fiscal framework' are also currently taking place and agreement on a fiscal framework are expected to be concluded before the end of 2015.

74. The Committee reiterates the view, that it expressed in its interim report, that bi-lateral agreements will be most critical in the areas of taxation, welfare, employment support and European Union representation. In relation to these on-going discussions and negotiations the Deputy First Minister recently commented, in evidence to the Finance Committee, that—

> I continue to be clear that effective parliamentary scrutiny of the framework is important, and I recognise that the Scottish Parliament will want to be assured that a robust and coherent fiscal framework is in place before it gives legislative consent to the Scotland Bill.

> The fiscal framework needs to be fair and it needs to be workable. It is important that both Governments and Parliaments have a detailed and shared understanding of how the various elements of the fiscal framework should work, and what the clear implications may be.

> There must be transparency and openness, and I strongly believe that there is a need for accountability and parliamentary scrutiny. Moving forward, the structures and working relations between the Scottish and United Kingdom Governments need to be reformed and made more effective. We need to look at how we work together to reach agreement, as well as how we work together to ensure the successful on-going operation of the new funding arrangements[37].

75. Lastly, Phillip Rycroft, from the UK Government Cabinet Office, noted that—

> The whole parliamentary nexus is something that we have to consider. Points on that have been raised by this committee, Smith and numerous others. How we manage the relationship between the processes of intergovernmental relations and parliamentary procedures is very much within our purview. On the question of formal involvement, my guess is that Parliaments are able to propose formal amendments to procedures where those procedures are bound into statute. Those two things would be hooked together. If we do not end up in a statutory space, a rather different relationship regarding input from the Parliaments would be required[38].

76. The Committee reaffirms its view and agrees with the Deputy First Minister that it is essential that the fiscal framework is robust, coherent and subject to parliamentary scrutiny before any Legislative Consent Memorandum can be considered. To this end, the Committee signals its intention to undertake scrutiny of the fiscal framework later this year. The Committee emphasises that adequate time must be available for parliamentary scrutiny of the fiscal framework which the Committee considers is integral to the proposed operation of the powers proposed for devolution.

77. With regard to the revision of the MoU, the Committee also considers that it is essential that adequate time is also available for parliamentary scrutiny of the revised MoU. Moreover, the Committee considers that any bi-lateral agreements reached with regard to the operation of shared powers should also be subject to parliamentary scrutiny.

78. The Committee reiterates its view that adequate time is allowed for parliamentary scrutiny of the revised MoU, and in particular the fiscal framework, before consideration can be given to a Legislative Consent Memorandum. With regard to the fiscal framework, the Committee considers that this framework is critical to the operation of the powers proposed for devolution. Accordingly, the Committee expects to be consulted on the fiscal framework before it is formally agreed.

79. The Committee states that it is essential that these agreements are placed within a structure that is transparent and accountable. To this end, the Committee expects that the recommendations in this report inform, and are taken account of, in the on-going discussions and negotiations that are currently taking place.

Conclusions and recommendations

80. Since its establishment in 1999, the then Scottish Executive and now Scottish Government have taken on responsibility for an increasing share of revenue-raising and now, for the first time, are set to be responsible for a share of welfare powers.

81. The devolution arrangements between Scotland and the rest of the UK are becoming ever more complex, requiring increased dialogue and agreements between the two governments, and sometimes more widely, in order to operate effectively.

82. The existing structure that underpins this intergovernmental dialogue – the MoU between the two administrations and the apparatus of joint ministerial committees – has been described by Lord Smith of Kelvin in his Commission's final report as problematic; we agree.

83. He called for both governments to work together to create a more productive, robust, visible and transparent relationship. The last of these principles – greater transparency – is critical.

84. Despite the importance of the intergovernmental arrangements, the Scottish Parliament has not been an active player in agreeing how the Scottish Government should deal with other governments in the UK and how it is best held accountable for this. The original MoU and successive updates have received little if any scrutiny and, between times, the on-going relationship between the administrations and the agreements they reach across a whole range of policy matters are rarely questioned. This must change.

85. This Parliament is not alone in its weaknesses. Our research on international comparators has shown that other legislatures in federal and quasi-federal systems also tend to be at best weak actors in terms of a scrutiny role in relation to inter-governmental relations.

86. To help improve the situation, we set out a series of recommendations below.

Guiding principles

87. **Recommendation One:** The Committee recommends that two guiding principles will improve scrutiny in this sphere. Firstly, that the revised structure of inter-governmental relations must be **transparent**. This will involve ensuring that there is information about policy objectives and decision making in the public domain. This is essential in order to ensure that there is clarity around the basis for agreements reached between governments and decisions made. Secondly, **accountability** must be built into the revised structure of inter-governmental relations. The agreements reached between Governments must be subject to scrutiny and therefore clear mechanisms require to be built into the revised MoU, currently being negotiated, to ensure that the role of parliamentary scrutiny is facilitated.

A statutory underpinning

88. **Recommendation Two:** In order to ensure that the interests of the Scottish Parliament are protected from the outset, the Committee recommends that the principles of transparency and accountability are placed in statute in the Scotland Bill.

89. Furthermore, the Committee recommends that the processes which will be followed to facilitate Scottish Parliament scrutiny of IGR should be agreed between the Scottish Parliament and Scottish Government with an obligation on the Scottish Government to provide information and agreements from IGR meetings (see recommendation three below).

90. Finally, more widely in relation to the current revision of the MoU, we recommend that a specific section on Parliamentary oversight be included.

Information provision

91. Relying on governments to decide if and how much they inform the legislature about their dealings and agreements with other administrations will prejudice the ability of a Parliament to hold its executive to account. Whilst governments must be given time and space to discuss matters amongst themselves and seek to reach agreements away from the glare of publicity, there still needs to be a degree of knowledge of, and accountability for, those final agreements.

92. **Recommendation Three:** The Committee considers that a new **Written Agreement on Parliamentary Oversight of IGR** between the Scottish Government and the Scottish Parliament with regard to the provision of information and how the views of the Scottish Parliament will be incorporated with regard to IGR agreements is an appropriate approach to adopt in order to aid transparency in this area. Other legislatures in the UK may wish to consider similar arrangements that best suit their procedures.

93. The Committee considers that the information provided by governments must enable parliamentary scrutiny of formal, inter-ministerial meetings before and after such meetings. Such information must include, as a minimum, a 'forward look' calendar of IGR meetings and the agendas for these meetings. Subsequently, detailed minutes of meetings held and the text of any agreements reached must also be made available to legislatures in a timely manner

Reforming the structure of the Scottish Parliament to make scrutiny of IGR more effective

94. **Recommendation Four:** The Committee recommends that the Scottish Parliament should give careful consideration to establishing a specific parliamentary committee or by providing a role or revised remit for an existing Committee which would be tasked to scrutinise inter-governmental relations and constitutional matters more generally in the next session of the Scottish Parliament. This should be a matter considered by a new Parliamentary Bureau shortly after the next Scottish Parliamentary election.

95. **Recommendation Five:** The Committee also recommends that the view of the Scottish Parliament should be taken account of before any inter-governmental agreement is entered into by the Scottish Government. The proposed parliamentary committee should scrutinise and report to the Scottish Parliament on any such inter-governmental agreement prior to debate in plenary session. Such a committee should also be tasked with obtaining evidence from the Scottish Government prior to and following formal, bilateral and quadrilateral, inter-governmental meetings.

96. **Recommendation Six:** The Committee also considers that greater inter-parliamentary cooperation in scrutinising inter-governmental relations would be beneficial. The Committee considers that such co-operation should begin on an informal basis but that the Scottish Parliament should give consideration to how such co-operation can be best facilitated and engage in a dialogue with other legislatures in this regard. This Committee has begun the process of discussing such matters with relevant committees in other legislatures across the UK.

Revising the arrangements for IGR in the UK

97. The IGR agreement in the UK – the Memorandum of Understanding and associated concordats – and structure of joint ministerial committees is currently being reviewed by the UK Cabinet office and the three devolved administrations. The objective is to lead to an agreed new arrangement between ministers in these governments. To date, there has been little parliamentary scrutiny of these discussions or on the shape of the final arrangements.

98. **Recommendation Seven:** The Committee reaffirms its view and agrees with the Deputy First Minister that it is essential that the fiscal framework is robust, coherent and subject to parliamentary scrutiny before any Legislative Consent Memorandum can be considered. To this end, the Committee signals its intention to undertake scrutiny of the fiscal framework later this year. The Committee emphasises that adequate time must be available for parliamentary scrutiny of the fiscal framework which the Committee considers is integral to the proposed operation of the powers proposed for devolution.

99. **Recommendation Eight:** With regard to the revision of the MoU, the Committee also considers that it is essential that adequate time is also available for parliamentary scrutiny of the revised MoU. Moreover, the Committee considers that any bi-lateral agreements reached with regard to the operation of shared powers should also be subject to parliamentary scrutiny.

100. **Recommendation Nine:** The Committee reiterates its view that adequate time is allowed for parliamentary scrutiny of the revised MoU, and in particular the fiscal framework, before consideration can be given to a Legislative Consent Memorandum. With regard to the fiscal framework, the Committee considers that this framework is critical to the operation of the powers proposed for devolution. Accordingly, the Committee expects to be consulted on the fiscal framework before it is formally agreed.

101. **Recommendation Ten:** The Committee states that it is essential that these agreements are placed within a structure that is transparent and accountable. To this end, the Committee expects that the recommendations in this report inform, and are taken account of, in the on-going discussions and negotiations that are currently taking place.

[1] Cabinet Office, Memorandum of Understanding and Supplementary Agreements, October 2013: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf
[2] Ibid, p.4
[3] Ibid, p.10
[4] Ibid, p.10
[5] Scottish Parliament Devolution (Further Powers) Committee. *Official Report,* 12 March 2015, Col.12.
[6] Scottish Parliament Devolution (Further Powers) Committee. *Official Report,* 19 March 2015, Col.4.
[7] The Smith Commission, Report of the Smith Commission for further devolution of powers to the Scottish Parliament, 27 November 2014, p.5.
[8] House of Lords Select Committee on the Constitution. Report on Inter-governmental relations in the United Kingdom, 27 March 2015, p.19.
[9] Scottish Parliament Finance Committee. *Official Report*, 2 September 2015, Col.6.
[10] Scottish Parliament Devolution (Further Powers) Committee. *Official Report,* 19 March 2015, Col. 10.
[11] Ibid, Col. 12.
[12] The Smith Commission. *Report of the Smith Commission for further devolution of powers to the Scottish Parliament*, 27 November 2014, para. 28.
[13] Ibid, para. 29.
[14]Ibid, para. 30.
[15] Scottish Parliament Devolution (Further Powers) Committee. Official Report, 17 September 2015, Col.22.
[16] Devolution (Further Powers) Committee. *New Powers for Scotland: An Interim Report on the Smith Commission and the UK Government's Proposals*, SP Paper 720, 3rd Report, Session 4.
[17] Devolution (Further Powers) Committee. Ibid, p.123.
[18] Scottish Government. *Scottish Government Response to the Interim Report from the Devolution (Further Powers) Committee on the Smith Commission and the UK Government's Proposals*, 7 June 2015, p.23.
[19] Ibid, p.23.
[20] Scottish Parliament Devolution (Further Powers) Committee. Official Report, 17 September 2015, Col.24.
[21] Scotland Office *UK Government response to the Interim Report from the Devolution (Further Powers) Committee*, 23 June 2015, p.7.
[22] Scotland Office *Letter from the Secretary of State for Scotland*, 26 August 2015, p.2.
[23] Scottish Parliament Devolution (Further Powers) Committee. Official Report, 17 September 2015, Col.23.
[24] House of Lords Select Committee on the Constitution. Report on Inter-governmental relations in the United Kingdom, 27 March 2015, p.47.
[25] Scottish Parliament Devolution (Further Powers) Committee. Official Report, 12 March 2015, Col.13.
[26] Professor Aileen McHarg. Written evidence submitted to the Committee, p. 2.
[27] Scottish Parliament Devolution (Further Powers) Committee. Official Report, 17 September 2015, Col.1.
[28] Ibid, Col.2.
[29] Ibid, Col.3.
[30] Ibid, Col.3.
[31] McEwen, Petersohn and Brown Swan, *Intergovernmental Relations and Parliamentary Scrutiny: A comparative overview*, September 2015, p.62.

[32] House of Lords Select Committee on the Constitution. Report on Inter-governmental relations in the United Kingdom, 27 March 2015, p.47.
[33] Scottish Parliament Devolution (Further Powers) Committee. Official Report, 11 December 2014, Col.20.
[34] House of Lords European Union Committee, Report on 2014-15, 23 June 2015, Appendix 3.
[35] McEwen, Petersohn and Brown Swan, Intergovernmental Relations and Parliamentary Scrutiny: A comparative overview', 2015, p.51.
[36] Ibid, p.67.
[37] Scottish Parliament Finance Committee. Official Report, 2 September 2015, Col.2.
[38] Scottish Parliament Devolution (Further Powers) Committee. Official Report, 17 September 2015, Col.37.

Annexe A - Scottish Government summary of the evolution of the Memorandum of Understanding (MoU)

The text below reproduces a note on the evolution of the MoU which was provided to the Committee by the Scottish Government on 7 May 2015.

**The Memorandum of Understanding and Supplementary Agreements between
United Kingdom Government, Scottish Ministers, Welsh Ministers and the Northern Ireland Executive Committee
A History.**

The Pre-Devolution Period:

The original Memorandum of Understanding and Supplementary Agreements (MoU), having been drafted in 1999 in preparation for the establishment of the Devolved Executives, predates devolution as we now understand it. At the time of the 1999 draft, the arrangements to establish the Northern Ireland Executive was absent from the first version.

The original MoU, as with all successive iterations, was extra-legal in nature, making non-binding provision for good communication, consultation and cooperation between the UK Government and the Devolved Administrations, through the adoption of agreed principles of engagement and the establishment of a new, non-executive, intergovernmental forum, the Joint Ministerial Committee (JMC). The JMC would be able to convene in Plenary and functional (subject-specific) formats.

The Supplementary Agreements, incorporated into the high level MoU, due to the primary importance of the subject matter at that time, were:

- Agreement on the Joint Ministerial Committee
- Concordat on Coordination of European Union Policy Issues
- Concordat on Financial Assistance to Industry
- Concordat on International Relations
- Concordat on Statistics

A number of bilateral and multilateral Departmental and subject specific Concordats and Service Level Agreements were also drawn up to supplement the MoU in specific policy areas although revision of these has varied from department to department.

Since then the MoU has transitioned through a further 5 redrafts.

The 1st Redraft – July 2000:

In July 2000 the Lord Chancellor presented a new MoU to the UK Parliament. This new version incorporated references to the Northern Ireland Executive, following the Executive Committee's agreement to adopt the principles of the MoU and their agreement to participate in future meetings of the JMC.

The 2nd Redraft – December 2001:

The MoU contained a commitment to review its provisions on an annual basis. There is no record of significant changes having been made in the 2001 review.

The Suspension of the Northern Ireland Assembly October 2002 – May 2007:

The suspension of the Northern Ireland Assembly from 2002 to 2007 precluded amendments to the MoU during that period, since quadrilateral agreement between Administrations on amended provisions was not possible.

During that time, all meetings of the JMC fell into an abeyance, except those dedicated to European Union policy. These JMC (Europe) meetings continued, with the Secretary of State for Northern Ireland representing the interests of Northern Ireland.

The 3rd Redraft – March 2010:

Following quadrilateral agreement at the reconvened Plenary Session of the JMC in June 2008, work commenced on reviewing the MoU. The review was substantial and involved prolonged negotiations between administrations.

The role and remit of the JMC Joint Secretariat was set down as an addition to the Supplementary Agreement on the JMC. Similarly a robust set of principles and procedures for inter-Administration dispute resolution was also included in that Agreement.

Both the Concordats on Coordination of European Union Policy and Financial Assistance to Industry were reviewed and brought up to date. The Concordat on Statistics was removed and would continue as a stand-alone agreement between those statistics agencies operating in the four Administrations.

The 4th Redraft – September 2012

Following agreements at both Domestic and European Sessions of the JMC in 2012, the MoU was again updated and the changes were endorsed by Ministers at the Plenary Session in September that year.

The amendments included revisions of the clauses relating to Confidentiality as well as further revisions to the dispute process, to include an element of independent analysis, and to both the Concordats on Coordination of European Union Policy and Financial Assistance to Industry.

The 5th Redraft – October 2013

The 5th and most recent revision of the MoU focused primarily on updating clauses in the Concordat on Coordination of European Union Policy, primarily with regard to Attendance and representation at Council of Ministers and related meetings.

Annexe B - External research report

A copy of the external research report produced by Professor Nicola McEwen, Dr Bettina Petersohn and Coree Brown Swan of the Centre for Constitutional Change based at the University of Edinburgh can be accessed at:

http://www.scottish.parliament.uk/2015.09.30_IGR_External_Research_Report_FINAL.pdf

Annexe C – Extracts from the minutes of the meetings of the Committee and links to the Official Reports

8th Meeting, 2015 (Session 4)

Thursday 12 March 2015

Present:

Bruce Crawford (Convener)
Linda Fabiani
Rob Gibson
Alex Johnstone
Alison Johnstone
Bill Kidd (Committee Substitute)
Lewis Macdonald
Stewart Maxwell
Stuart McMillan
Duncan McNeil (Deputy Convener)
Tavish Scott

Apologies were received from Mark McDonald.

In attendance: Christine O'Neill, Nicola McEwen and Heidi Poon, Committee Advisers

The meeting opened at 9.31 am.

1.Proposals to devolve further powers to Scotland and scrutiny of the UK Government's draft legislative clauses: The Committee took evidence from—

John Swinney, Deputy First Minister & Cabinet Secretary for Finance, Constitution and Economy, Donald McGillivray, Deputy Director, Elections and Constitution Division, Stephen Kerr, Head of Social Security Policy and Delivery Division, and Sean Neill, Acting Deputy Director, Finance and Fiscal Responsibility Division, Scottish Government.

9th Meeting, 2015 (Session 4)

Thursday 19 March 2015

Present:

Bruce Crawford (Convener)
Linda Fabiani
Rob Gibson
Alex Johnstone
Alison Johnstone
Bill Kidd (Committee Substitute)
Lewis Macdonald
Stewart Maxwell
Stuart McMillan
Duncan McNeil (Deputy Convener)
Tavish Scott

Apologies were received from Mark McDonald.

In attendance: Heidi Poon, Nicola McEwen and Christine O'Neill, Committee Advisers

The meeting opened at 9.34 am.

1.Evidence on Intergovernmental Relations: The Committee took evidence from—

Ken Thomson, Director General for Strategy & External Affairs, Scottish Government;
Professor Michael Keating, Director, ESRC Centre on Constitutional Change;
Professor Aileen McHarg, School of Law, University of Strathclyde.

22nd Meeting, 2015 (Session 4)

Thursday 17 September 2015

Present:

Malcolm Chisholm
Linda Fabiani
Rob Gibson
Alex Johnstone
Alison Johnstone
Bill Kidd (Committee Substitute)
Stewart Maxwell
Mark McDonald
Stuart McMillan
Duncan McNeil (Deputy Convener)
Tavish Scott

Apologies were received from Bruce Crawford (Convener).

In attendance: Nicola McEwen (Committee Adviser)

The meeting opened at 9.03 am.

1.Parliamentary oversight of inter-governmental relations - international examples: The Committee took evidence from—

Professor Julie Simmons, University of Guelph;
Professor Nathalie Behnke, University of Konstanz;
Dr Sean Mueller, University of Berne;
Professor Bart Maddens, University of Leuven.

2.Reform of inter-governmental relations in the UK: The Committee took evidence from—

Philip Rycroft, Second Permanent Secretary and Head of UK Governance Group, Cabinet Office;
Ken Thomson, Director General for Strategy & External Affairs, Scottish Government.

Written submissions of evidence (from Professor Simmons, Professor Behnke, Dr Mueller and Professor Maddens)

24th Meeting, 2015 (Session 4)

Thursday 1 October 2015

Present:

Malcolm Chisholm
Bruce Crawford (Convener)
Linda Fabiani
Rob Gibson
Alex Johnstone
Alison Johnstone
Stewart Maxwell
Mark McDonald
Stuart McMillan
Duncan McNeil (Deputy Convener)
Tavish Scott

In attendance: Nicola McEwen (Committee Adviser)

The meeting opened at 10.00 am.

1.Report on parliamentary oversight of inter-governmental relations (in private): The Committee considered a draft report. Various changes were agreed to, and the report was agreed for publication.

The Scottish Parliament
Pàrlamaid na h-Alba

Devolution (Further Powers) Committee

c/o Clerk to the Committee
Room T3.40
The Scottish Parliament
Edinburgh
EH99 1SP

Tel: 0131 348 5000
devolutioncommittee@scottish.parliament.uk

12 October 2015

Dear Mr Melding,

Re: Parliamentary oversight and reporting of intergovernmental relations under the new provisions in the Scotland Bill

Thank you for your letter dated 5 October 2015. I noted with interest that your Committee is currently scrutinising similar issues to the Devolution (Further Powers) Committee with regard to parliamentary oversight of intergovernmental relations. There does appear to be a complementary interest between our Committees in the area of scrutiny of inter-governmental relations. If you considered it appropriate I would be delighted to open an informal dialogue on this topic. The Clerk to the Devolution (Further Powers) Committee would be more than happy to facilitate arrangements in this regard.

In relation to your other point, my role as Convener of the Devolution (Further Powers) Committee place a degree of limitation upon my ability to provide evidence on wider constitutional matters. I would therefore suggest that it may perhaps be more appropriate for your Committee to receive evidence on this issue from Scottish Government Ministers. Again, the Clerk to the Devolution (Further Powers) Committee would be more than happy to facilitate an approach to the Scottish Government on this matter.

Yours sincerely,

Bruce Crawford MSP
Convener

Llywodraeth Cymru
Welsh Government

DATGANIAD YSGRIFENEDIG
GAN
LYWODRAETH CYMRU

TEITL **Tystiolaeth i Ymchwiliad Pwyllgor Cyfansoddiad Tŷ'r Arglwyddi, "Yr Undeb a Datganoli"**

DYDDIAD **2 Hydref 2015**

GAN **Y Gwir Anrh. Carwyn Jones AC, Prif Weinidog Cymru**

Mae Pwyllgor Cyfansoddiad Tŷ'r Arglwyddi, dan gadeiryddiaeth yr Arglwydd Lang o Monkton, wedi dechrau Ymchwiliad newydd, sy'n dwyn y teitl "Yr Undeb a Datganoli". Mae Llywodraeth Cymru wedi cyflwyno Memorandwm Tystiolaeth, ac atodaf gopi ohono er gwybodaeth i'r Aelodau. Rhagwelaf y bydd y Pwyllgor yn cynnal sesiynau tystiolaeth llafar maes o law.

HOUSE OF LORDS CONSTITUTION COMMITTEE: INQUIRY INTO "THE UNION AND DEVOLUTION"

WRITTEN EVIDENCE SUBMITTED BY THE WELSH GOVERNMENT

Introduction

1. The Welsh Government is pleased to submit this Written Evidence to the Committee in respect of this Inquiry. Our understanding is that you are concerned to investigate what binds the constituent parts of the Union together, and how it can be strengthened and reinforced.

2. The Welsh Government is strongly supportive of the Union, and we welcome the Inquiry as entirely appropriate now. In a speech to the Institute of Government on 15 October 2014, the First Minister said:

   "….devolution has already fundamentally changed the governance of the United Kingdom. This was clear before the Scottish referendum was even in prospect, and it has become blindingly obvious since then. Public support for the devolved Parliament and Assemblies has created a presumption of popular sovereignty in the different parts of the UK, which has fundamentally challenged assumptions about a centralized British state.

   So much so, that I believe we should stop talking about devolution, what powers can be handed down by a reluctant Whitehall, and start talking about the Union, and the issues we must share with each other".

3. He returned to this theme in more urgent terms in a speech at the British Academy on 5 June this year:

   "….in [a] longer-term perspective, I cannot be so sure that the Union will survive. There may come a time when Scots will again be asked what future they see for their country. And they may not be persuaded to stay with us without a clearer vision than they had in 2014 of what the UK can offer them in the future.

   I do not believe that that vision can be developed on a bilateral basis, and I continue to believe that we are all Better Together. So those who are committed to the Union need now to work together to develop a perspective for the UK which….. enables the unity of the UK while guaranteeing the diversity of its constituent parts."

4. From a Welsh perspective, the Inquiry is timely for another reason. As the Committee will be aware, a new Bill on Welsh devolution is in prospect. A key element of this will be the reconstruction of Welsh devolution on the basis of a model, similar in some respects to that already in operation for Scotland, whereby powers are reserved to the centre, with all remaining functions and competences becoming the responsibility of the devolved institutions. The Welsh Government supports this in principle, but of course the fundamental question is, what are to be the powers reserved to the centre? As the recent study, "Delivering a

Reserved Powers Model for Wales", published jointly by the Constitution Unit (CU) and the Wales Governance Centre (WGC), points out, the answer to this is not straightforward, but needs to be approached on the basis of principle:

> *"….the absence of any coherent principle for the division of functions between the devolved and UK/England tiers of government will leave the door open to further debate about these issues, and add to the innate instability of any arrangements that are put in place. They are unlikely to deliver a stable long-term settlement as is widely sought. Coherence and stability will only be achieved by adopting a longer term perspective."*

5. Perhaps the outcome of the Committee's Inquiry can contribute to the development of that longer-term perspective on the appropriate division of functions within the Union, and provide a template against which the provisions of the Wales Bill, once published, can be assessed.

The Nature of the Union

6. We set out below five propositions about the Union which underpin our approach to the questions raised by the Committee's Inquiry:

   (i) Whatever its historical origins, the United Kingdom is best seen now as a voluntary association of nations which share and redistribute resources and risks between us to our mutual benefit and to advance our common interests;

   (ii) Although we should be careful about the easy use of the term (because "devolution" is based on the assumption that our state is fundamentally a centralised one which may, if it wishes, give away some power; this starts our discussion in the wrong place), the principles underpinning devolution should be recognised as fundamental to the UK constitution, and the devolved institutions should be regarded as effectively permanent features of that constitution;

   (iii) Devolution is about how the UK is collectively governed, by four administrations which are not in a hierarchical relationship one to another. The relations of the four governments of the United Kingdom should therefore proceed on the basis of mutual respect and parity of esteem (and comment on the policies of other administrations should, within a culture of robust political debate, properly reflect that respect). Each of the administrations, including the UK Government in respect of England, has separate responsibilities and accountabilities, which should be recognised and respected by all the other partners, as part of the joint enterprise of the governance of the UK;

   (iv) The allocation of legislative and executive functions between central UK institutions and devolved institutions should be based on the concept of subsidiarity, acknowledging popular sovereignty in each part of the UK. (Parliamentary sovereignty as traditionally understood will need in the longer term to be recognised as incompatible with this evolving constitution); and

   (v) The presumption should therefore be that the devolved institutions will have responsibility for matters distinctively affecting their nations. Accordingly, the powers of the devolved institutions should be defined by the listing of those

matters which it is agreed should, for our mutual benefit, be for Westminster, all other matters being (in the case of Wales) the responsibility of the Assembly and/or the Welsh Government. (Given Wales' distinctive relationship and degree of socio-economic integration with England, the list of matters attributed to Westminster may, by agreement, include some which may more appropriately be dealt with on an England-and-Wales basis, as well as those dealt with on a UK or GB basis. There should therefore be no assumption that those matters for which Westminster is responsible in respect of Wales will be identical to those in respect of Scotland or Northern Ireland, although there will be very many common features in the lists).

7. The Committee's inquiry primarily raises issues under point (i) above: what are the matters which merit all-Union action to our mutual benefit? We address that question below, but it is worth stressing first the relevance of points (iv) and (v) to the forthcoming Wales Bill. In our discussions with the UK Government, we have argued that reservations to the Assembly's legislative competence should be drafted in accordance with the principle of subsidiarity, which we believe provides the "coherent principle" the CU/WGC Report calls for. In other words, we have said that responsibility for decisions should lie at the lowest possible level consistent with their effective implementation, or closest to where they will have their effect, and that the Wales Bill should be drafted accordingly. We will be examining the Wales Bill, once published, from that perspective.

8. Turning then to the Union itself, since the Report of the Calman Commission in 2009, this has generally been regarded as having three elements: economic union (including currency union and fiscal union); political union; and social union. Taking these in turn:

9. Our economic union implies that there should be no barriers to trade, business and employment for people and companies in different parts of the UK; ours is a "single market" (to an extent that the European Union is still some way from achieving). The devolution statutes reinforce this, by reserving to Westminster exclusive legislative competence in respect of such matters as company formation and dissolution; business regulatory powers; statutory employment rights, and so forth. We would expect the Wales Bill to reaffirm that, in respect of Wales, these matters should continue to be Westminster responsibilities; the Welsh Government has not argued to the contrary. Economic union also implies central responsibility for macro-economic and monetary policy, within the context of a common currency, and again the Welsh Government supports that. The more difficult question, however, is the extent to which economic and currency union requires full fiscal union; on this, the Welsh Government considers that there clearly is scope for devolution of some tax responsibilities, but our position differs in detail from those of both the UK Government and the Scottish Government.

10. So far as the UK Government's position is concerned, in 2013 it introduced a Wales Bill providing for a limited measure of devolution of responsibility for income tax rate-setting, but attached to this a "lockstep" restriction (subsequently removed by amendment in the House of Lords) on the Welsh Government's ability to propose movement of individual rates which in our view would have

resulted in no real freedom of action at all (and so we welcomed the amendment).

11. We differ from the Scottish Government in our policy on devolution of Corporation Tax (and other business-related taxes such as National Insurance). The First Minister has consistently argued that, leaving aside the special circumstances of Northern Ireland, devolution of Corporation Tax could only lead to damaging competition between different parts of the UK and a "race to the bottom" which would serve only to undermine the UK's overall tax base and business tax take; this would do nothing to reinforce the Union.

12. Our political union is principally manifested in the UK's external relationships and membership of the European Union and of international organisations, and by reserving the European Communities Act 1972, and Foreign Affairs and Defence to Westminster, the devolution statutes reaffirm that position. There is also obviously a domestic dimension to political union, based on our common commitment to democracy and the rule of law; this is principally manifested in the form of a House of Commons with Members, of equal status, drawn from all parts of the Union, and a Home Civil Service which shares with the Northern Ireland Civil Service common values, principles and professional standards. These currently are, and in the Welsh Government's view should remain, matters for which legislative competence should be reserved to Westminster. So far as the Civil Service is concerned, we welcome the fact that the Scottish Government did not argue a case to the Smith Commission for devolution of responsibility for civil servants supporting Scottish Ministers, and we strongly support the recent four-administration initiative, led by Sir Jeremy Heywood, to enhance civil service capability in relation to devolution.

13. The social union is multi-faceted, and of course includes extensive family and social relations amongst UK citizens, as well as a cultural heritage with strong common features across the Union. In our evidence to the Silk Commission in 2013, we drew attention to "The vital role that broadcasting institutions play in creating a common cultural citizenship for people across the UK (which) would not be strengthened by any attempt to divide responsibility for broadcasting institutions among its constituent parts". We did however "believe that this vital UK role can.be reinforced by measures aimed at strengthening the particular contribution which the broadcasters make in each of those constituent parts", and our approach to BBC Charter renewal, in which we will continue to take a close interest, will be based on this approach.

14. As Professor Gallagher argued in an essay published very shortly after the Scottish referendum, the political union and the social union are closely linked:

> *"..political union has internal significance as well….. People throughout the UK elect members of Parliament not just to deal with foreign affairs but taxation too. They expect the UK Government to manage the economy of the whole of the union. Political union also provides the legitimacy for sharing fiscal resources across the whole UK, most obviously and directly in social security. Pensions are paid to people wherever they are in the country, irrespective of local taxable capacity. Benefit payments in poor or depressed areas are*

funded by taxes transferred from better off ones. This applies not merely within Scotland or England, but across the nations of the UK".

15. Resource and risk sharing, in the interests of social protection for all UK citizens, are at the heart of the Welsh Government's understanding of the social union. The First Minister made the point in these terms in his Institute for Government speech previously referred to:

    "Our welfare state establishes a certain set of rights and entitlements for our citizens which apply wherever they live within the UK. I place a strong value on the fact that we all have an equal claim on the safety net that protects us – however imperfectly – from Beveridge's five famous 'giant evils'. So I see social security as one of the core components of our common citizenship – one of the great achievements of the UK. I would not want that safety net to fray as a result of ill-considered or rushed reforms".

16. The Welsh Government has concerns about the direction of policy on welfare devolution, particularly as seen in the Scotland Bill, under which the Scottish Government will have new powers to supplement provision currently provided on a GB-wide basis. In practice this could mean that Scottish residents in receipt of social security benefits could receive higher levels of support than citizens in identical circumstances but resident in Wales or England. It is hard to reconcile this with conceptions of common social citizenship across the Union. In a recent paper, Professor Gallagher has argued that

    "Social security has always been reserved, and entitlements the same throughout the United Kingdom…..this social union was one of the strongest arguments for Scotland's remaining in the United Kingdom. But an equally strong argument can be made for allowing Scotland, <u>if it wishes and is willing to pay for it,</u> to offer a more generous welfare package, including benefits as well as services". (Emphasis added)

17. In the Welsh Government's view, this is only an acceptable proposition if each administration within the UK is in broadly the same position in terms of resources so as to be able to make higher benefits payments to those it deems worthy of these; benefit levels for citizens in different parts of the Union should not depend on whether the particular administration in whose territory they are resident is well or poorly served by the Union's resource allocation mechanism.

<u>Financial Reform</u>

18. That last comment leads to our principal conclusion. For the health of the Union, reform is needed so that the distribution of resources across the UK takes account of the factors that influence the demand for public services in each part. And the case for financial reform is even stronger when it forms the central element of a funding model with devolved taxes. As outlined in our evidence to the House of Lords Select Committee on Economic Affairs for its inquiry into devolution of public finances within the UK, it is the Welsh Government's view that public spending should be determined by needs, and therefore a needs-based allocation formula is ultimately the most sensible way to deliver fairness across the UK. The inadequacies of the Barnett Formula in this respect are well-known, and do not require restatement here; but obvious unfairness in the allocation of resources across the UK can only do harm to the strength of the

Union. The principle should be that the different parts of the Union should be able to deliver an equivalent level and quality of public services for an equivalent tax effort. Each part of the UK should be able to make its own choices at the margin about tax rates and so determine the total of resources available for public services in its territory; but there should be a common core UK standard, with resources being redistributed from areas with a stronger tax base to those with a weaker tax base to ensure this. We would strongly oppose any suggestion that each part of the UK should retain the product of its tax base and only pool resources for common services.

19. The Welsh Government would also favour greater scrutiny and a more open and transparent approach to the calculation of funding for Wales (and the other devolved administrations). The operation of these resourcing arrangements, including determinations of devolved administrations' spending power and borrowing limits, and functions in respect of Revenue and Customs, should be the responsibility of public agencies accountable to all four administrations jointly. The Holtham Commission recommended the establishment of an independent advisory body. Alternatively, the Silk Commission suggested that the Office for Budget Responsibility or the National Audit Office could review and audit technical aspects of the funding regime. Either of these approaches would enable the Devolved Administrations to have more confidence in the framework.

20. Reform along these lines should sit alongside improved and strengthened structures for the management of inter-governmental relations, which need to work effectively if the Union is to remain strong. Following the Constitution Committee's valuable report earlier this year, work, in which the Welsh Government is participating, is ongoing to review the existing arrangements.

Conclusion

21. As noted above, the Welsh Government welcomes the Constitution Committee's initiative in establishing this timely and appropriate Inquiry, and we hope this Evidence is of assistance to the Committee. We will read with interest other Evidence submitted to the Committee, and will be particularly interested in that of the UK Government; we will want to test the provisions of the Wales Bill against the arguments the Government advances as to the nature of the Union and the principles which ought to be considered in the allocation of responsibilities between Westminster and the devolved legislatures. That may also be a fruitful area of inquiry for the Committee in due course.

Welsh Government
September 2015