



Findings from the Economic and Research Council's
Research Programme on *Devolution and Constitutional Change*

Devolution Briefings

Central Government's Responses to Devolution

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Key Points

- Relations between central and devolved governments reveal minimal change from pre-devolution arrangements for dealing with Scottish, Welsh and Northern Irish matters, relying on bilateral and informal links largely among officials not ministers
- There are few meetings between UK and devolved ministers outside of liaison between UK territorial Secretaries of State and devolved administrations, and special arrangements in some policy fields like agriculture and EU matters
- The Treasury retains considerable powers over devolved finance, though lacks levers like public service agreements it can use on Whitehall departments
- The apparatus for dealing with devolution at the centre of government is small and has a limited brief, and Whitehall departments have done little to differentiate between their England-only, England-and-Wales, and UK functions
- Neither Westminster nor Whitehall has sought to adapt the legislative process to create different categories of legislation according to which territories and functions it affects
- The pattern of minimal change has made a major constitutional change a straightforward administrative and legal process, but one vulnerable to disputes created by future changes of government

One of the big questions raised by devolution was how UK central government would respond to it. The UK Government has traditionally been very fragmented internally, with individual Whitehall departments enjoying considerable autonomy but co-ordinated and integrated through networks of ministerial committees and their civil service counterparts, with the Cabinet and the doctrine of collective responsibility as the 'glue' holding the whole together.

While the Scottish Office (and to a lesser degree the Welsh Office) had substantial autonomy to develop and implement distinctive policies, that autonomy was limited by the fact that they were territorial departments in a single UK Government. Devolution means that their functions (or many of them) are exercised by executives accountable to

devolved elected institutions; in administrative terms, if not legal ones, the writ of the UK Government does not run in Scotland or Wales.

That might be expected to trigger a significant internal reorganisation of UK Government, and has been the subject of a number of projects within the Devolution and Constitutional Change programme. This briefing note will summarise the findings of those projects for the two key challenges raised by devolution for the centre of government: how it should seek to organise intergovernmental relations, and how its internal structure should be adapted following devolution.

Arrangements for intergovernmental relations

The sort of intergovernmental relations created by devolution were new in British constitutional experience. Nonetheless, they show a minimal degree of change from the pre-devolution arrangements.

The *Memorandum of Understanding*, first published in 1999, and bilateral concordats between particular Whitehall departments and devolved administrations are an attempt to preserve, so far as possible, the sorts of ways of working that operated within a single government. Their foundation is the unwritten maxim “no surprises”: no administration should do anything that affects (or might affect) the others in way that caught them unawares.

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Relations were intended to be primarily bilateral and informal. Governments and ministers would deal directly with each other whenever possible, and only use more formal channels or procedures when issues could not be resolved otherwise. Following this, the Memorandum of Understanding also committed the UK Governments and devolved administrations to the “4 Cs” of communication, consultation, confidentiality and co-operation; the four governments should respect each other’s confidences, consult each other about policy developments and proposals, and continue to exchange information as needed. All this eased the process of adapting to devolution for UK Government, as it meant that the devolved administrations could be treated in substantially the same way as other Whitehall departments.

The Memorandum of Understanding created more formal channels for intergovernmental relations too, notably the Joint Ministerial Committee (JMC). Such machinery has been used for a number of different situations: the relationship between services provided by devolved administrations in Scotland or Wales and by the UK Government in England, and also for the interface between devolved and non-devolved functions. That includes EU matters and domestic ones, such as the relationship between the social security system and personal social services or the health service. However, these have declined in importance or use since devolution (with the partial exception of the JMC (Europe)).

Instead, the emphasis has been on case-by-case approaches, principally dealt with by officials, usually in the line departments concerned, with involvement from ministers varying but often being very limited. Matters are seldom referred to the JMC, even when they are contentious, but are resolved bilaterally between ministers.

In few cases are there regular high-level meetings between ministers or officials of different administrations, except for the contacts between the devolved First Ministers and the Secretaries of State for Scotland or Wales. Even those contacts are more about political liaison and party issues than relations between distinct governments, however.

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Agriculture is one case where regular ministerial meetings do take place, outside the JMC framework (and to respond to the developing EU policy agenda), but health, education or home affairs ministers have little contact with one another, and none on a routine basis. Another is EU business generally, where the Scottish Executive and Welsh Assembly Government are closely integrated into the UK Government’s decision-making processes, attending UK planning meetings alongside their counterparts from Whitehall departments and being treated very much like Whitehall departments. In this sense the “4 Cs” have proved an adequate replacement for the administrative glue provided by Cabinet collective responsibility.

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However, the overall context has been highly consensual. The dominance of all the British governments by Labour means that there is little incentive for governments to fall out. Few serious intergovernmental disagreements have arisen, and none have turned into disputes needing formal resolution whether by the JMC or by the courts.

A small number of court cases have arisen, but have generally involved issues raised by third parties about actions of the Scottish Executive, often concerning criminal procedure and whether it complies with the European Convention on Human Rights. In circumstances where governments have many incentives to prevent disputes arising or to resolve them quietly behind the scenes, the framework established has proved adequate to the job.

Financial arrangements

Key to any structure of intergovernmental relations in devolved, decentralised or federal systems is finance. That too shows very limited change, the result of a conscious decision taken in the Treasury very shortly after the 1997 election.

The principle used to allocate funds to the Scottish, Welsh and Northern Ireland Offices before 1999 – block grants, uprated according to changes in spending on ‘equivalent services’ in England, calculated in proportion to the population of the territory involved compared with that of England (the Barnett formula), has been maintained. It has the advantages of being simple to calculate and administer and of producing predictable funding allocations.

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As the devolved administrations can move money within that block as they see fit, they have considerable freedom to allocate spending within the overall block grant paid to them. The calculation of the block bears, however, little relationship to need and the devolved administrations have little scope to increase their resources beyond the Barnett block (the Scottish tax-varying power would raise only a modest amount of extra funding even if it were used).

The Treasury therefore retains extensive powers over devolved finance, including an interest in their accounting and financial systems, although it lacks some of the policy levers such as public service agreements it can use with UK Government departments. It also has wide discretion about payments that are made outside the Barnett block, such as whether to allow claims on the UK Reserve. Preserving the previous arrangements meant that devolution involved minimum disruption to the existing administrative arrangements within the UK, as well as meaning it did not add to the overall burden on the Exchequer or the taxpayer.

The UK Government’s internal arrangements

After an initial flurry of change, it has become clear that the internal organisation of UK Government has altered little as a result of devolution. Initial changes included setting up devolution or constitution desks in individual departments, to act as centres of information and expertise and to co-ordinate departmental responses either to devolution or to the Government’s constitutional change programme generally.

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At the centre of government, a core of expertise was created within the Constitution Secretariat in the Cabinet Office, while relations with Scotland and Wales were handled by the renamed and much smaller Scotland and Wales (instead of Scottish and Welsh)

Offices, which had minimal programme responsibilities. Similarly the Northern Ireland Office had responsibility for relations with the devolved Executive and Assembly, the progress of the peace process and for law and order functions, but not for policy matters.

These changes were put in place in 1997-8 but have proved short-lived. By 2001 they had largely been dismantled. Departmental devolution units were the first to go, deemed unnecessary once the transition to devolution had been managed and expertise in devolution ‘mainstreamed’ across departments. The Constitution Secretariat was wound up, its devolution team ending up in 2003 in the Department for Constitutional Affairs after a spell in the Office of the Deputy Prime Minister. The Scotland and Wales Offices similarly became part of the DCA, but retain their autonomy and Secretaries of State, though those posts are now part-time not full-time.

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The apparatus for dealing with devolution at the centre of government remains small in size and concerned with a limited brief involving mainly trouble-shooting and internal policy and handling advice, with some co-ordination and secretariat work. Beyond that, liaison networks of Whitehall officials remain in being but are of questionable effectiveness, while the patchy record of consultation by the UK Government about policy developments suggests that ‘mainstreaming’ of devolution expertise has not been uniformly effective, at least on the policy side.

The network of government legal contacts for devolution appears more effective, operating as a parallel network (and helped by the smaller number of people involved), but limited in its scope because by no means all policy issues are also legal ones.

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At the fundamental level, Whitehall has not reconsidered how it works in the light of devolution. Neither Departments nor the centre of government have sought to distinguish their functions for all of the UK (or Great Britain) from those that relate only to England or to England and Wales. There is no such thing as a Whitehall department which only deals with English matters – even departments like Health or Education and Skills have some UK-wide or Great Britain-wide functions, although their main functions relate only to England.

Departments concerned with matters retained at UK level, like defence or foreign affairs, still have plenty of dealings with the devolved administrations; the MoD owns much land in Scotland, so is affected by Scots land law, while many international treaties relate to devolved matters so will fall to the Scottish Parliament and Executive to implement in

Scotland. (The MoD and FCO are two of the few departments still to have devolution desks.) There are not even organisational charts to illustrate which of a department's functions are devolved in one or more territories, and which concern the whole of Great Britain or the UK. Whitehall not only avoided any major change, but is not really aware of how its environment has changed.

Legislation

The minimal scope of changes following devolution can also be seen in how legislation is made after devolution. While explanatory notes or memoranda now address devolution issues (particularly the impact on Wales), there is very widespread variation in how such issues are dealt with procedurally or resolved substantively. A general principle (particularly important for Wales) has emerged that the existing devolution arrangements should not be altered, so functions which relate to already-devolved ones should also be devolved.

For Scotland, the Sewel motion (which enables Westminster to legislate for devolved matters with the Scottish Parliament's consent) has been widely used, sometimes enabling Westminster to legislate wholesale for Scotland (as with the Proceeds of Crime Act 2002), sometimes meaning that a bill with only one or two clauses relating to Scotland can pass at Westminster not Holyrood.

However, because the Sewel motion mechanism is relatively easy to use, UK Departments have been fairly uninhibited about using it. This accounts for both the frequency of its use and the lack of any need for Westminster or Whitehall seriously to think about the legislative process and revise it to create different categories of legislation according to which territories and functions it affects.

The civil service

The structure of the civil service was little altered by devolution. The staff of the Scottish Executive and National Assembly for Wales remain part of the Home Civil Service, along with counterparts from Whitehall, but distinct from Northern Ireland Civil Service. Their loyalty is no longer to a single government, but to "the administration in which they serve" (according to the Civil Service Code), while the chain of responsibility for the civil service continues to run through the Cabinet Secretary to the UK Prime Minister, as Minister for the Civil Service.

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These arrangements mean that there remains a strong link between the devolved administrations and the UK Government, and that elected politicians in the devolved

administrations do not have any sort of control over the bodies of officials serving them. Many would expect such a situation to be a recipe for contention and conflict.

In fact, so far it has been rather the opposite. All government departments gained substantial control over their own staffing arrangements (at least over junior and middle-ranking officials) in the 1990s. This level of autonomy has enabled the devolved administrations to do much to adjust their own structures as they see fit, without being constrained by UK-wide staffing arrangements or procedures. They have been able to appoint staff to functions as needed, restructure their internal organisations, and adjust pay scales and grading arrangements without reference to London.

At the same time the Home Civil Service serves as a 'brand', ensuring that traditional standards of impartiality, and independence are maintained, and creating external as well as internal safeguards for those standards. That autonomy has been key for the organisational success of the devolved administrations, but is once again an instance where the devolved administrations are treated like a Whitehall department, not a distinct government.

Conclusion

The overall picture of how the UK central state has adapted to devolution is one of no overall or fundamental change, but of modest and incremental change, with minimal adaptations to cope with the demands devolution has created. For any general proposition or procedure about how the UK state worked before devolution, the same applies after it, but with a number of modifications, qualifications and exceptions (and often exceptions to the exceptions). This has taken relatively complicated arrangements and added yet more complexity, without altering the fundamental structure but obscuring its essential features even further. The architectural metaphor is that it has taken a baroque framework and made it rococo.

"The present calm depends on Labour's political dominance across Great Britain, and that will not last indefinitely"

This has made accommodating the major constitutional change of devolution a straightforward administrative and legal process, but means that the key questions raised by devolution have been avoided. It is unlikely that this will prove to be anything more than a deferral, however. The present calm depends on Labour's political dominance across Great Britain, and that will not last indefinitely. It remains unclear how the UK Government, or its relations with the devolved administrations, will work when there should be serious political differences between London and Cardiff or Edinburgh. So far, only half of the effects of devolution have actually happened.

This Devolution Briefing was written by Alan Trench, Senior Research Fellow, the Constitution Unit, University College London, specialist adviser to the House of Lords Select Committee on the Constitution for its inquiry into Devolution: Inter-institutional Relations in the United Kingdom, and formerly member of the research team for the ESRC project on the Law and Devolution Disputes. The briefing reports on findings from across several ESRC Devolution Programme projects: Devolution and the Centre (principal investigator: Prof. James Mitchell, University of Strathclyde); The Law and Devolution Disputes (Prof. Robert Hazell, University College London); Asymmetric devolution and EU policy-making (Prof. Martyn Burch, University of Manchester) and The Home Civil Service as an integrative force (Richard Parry, University of Edinburgh) – see www.devolution.ac.uk A number of other ESRC projects touch on the subject, as do several in the ‘Nations and Regions’ programme based at the Constitution Unit, University College London (www.ucl.ac.uk/constitution-unit/nations/)

The Devolution and Constitutional Change Programme was set up by ESRC in 2000 to explore the series of devolution reforms which have established new political institutions in Scotland, Wales, Northern Ireland, London and the other English regions since 1997. It has commissioned 35 projects around the UK to carry out top-class academic research and to contribute to the policy debates surrounding devolution.

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