



University
of Glasgow



Centre for
Public Policy

COMMISSIONED REPORT

The Scottish Government- Scottish Parliament Written Agreement on Intergovernmental Relations: Still Fit for Purpose?

December 2024

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1. Introduction

1.1. Context

In December 2016, the Scottish Parliament and the Scottish Government reached a formal Written Agreement on the provision of information relating to inter-governmental relations.¹ This Written Agreement had been recommended in a report by the Devolution (Further Powers) Committee, in anticipation of the additional complexity foreseen in what would become the Scotland Act (2016).

At the time of its introduction, the Written Agreement represented a significant breakthrough that made Scotland a leader in the UK with respect to the transparency and scrutiny of intergovernmental relations (IGR). In the meantime, other administrations have caught up with and arguably surpassed the Written Agreement's commitments. Senedd Cymru and the Welsh Government reached an Inter-Institutional Relations Agreement in 2019, which they revised in 2021. The original version was similar in scope and wording to the Scottish agreement, with some revisions added to the 2021 version to adapt to developments in devolution.² The UK Government has also significantly increased its reporting of IGR, including quarterly and annual Transparency reports, with a repository of communiques and MoUs agreed between the administrations.³

Seven years on, we were invited by the Scottish Parliament and the Scottish Government to review the implementation of the Written Agreement. Those seven years have witnessed many changes and challenges, from Brexit to Covid, that have brought additional complexity and new interdependencies to the practice of devolution. As a result, intergovernmental relations have become even more important than was envisaged either by the Smith Commission or the Devolution (Further Powers) Committee. The governments recognised that the UK's intergovernmental machinery was inadequate to the task of managing that complexity. A 'joint review', which lasted almost four years, led to an overhaul of IGR structures and processes, replacing the Joint Ministerial Committee with a new three tier structure of interministerial forums that was still in the process of implementation at the end of the last Westminster parliamentary term.⁴ All of these developments have impacted on the Scottish Government-Scottish Parliament Written Agreement, and point to the value of reconsidering its scope and terms.

We recognise and welcome the cooperation between the Scottish Government and the Scottish Parliament to adapt to the post-Brexit landscape, including the work of the Scottish Parliament-Scottish government Officials' Joint Working Group on Post-Brexit Scrutiny Issues. In practice, this has led to commitments in the original Agreement being supplemented and enhanced by new, less formal, working arrangements and protocols between the Scottish Government and relevant parliamentary committees, including:

- Protocol on scrutiny by the Scottish Parliament of consent by Scottish Ministers to UK secondary legislation in devolved areas arising from EU Exit;
- Working arrangements with the Constitution, Europe, External Affairs, and Culture (CEEAC) Committee on Scrutiny of the UK EU Trade and Cooperation Agreement and REUL Act updates
- Provision of information from the Scottish Government to Parliament on the impact of its default commitment to align with EU law, as it applies to primary and secondary legislation.

Alongside considering our recommendations for reform in this Report, the Scottish Government and Parliament may wish to consider whether these and any other new working arrangements should be formalised and incorporated into or annexed to a revised Written Agreement.

1.2 Project Outline

Our project considered: (i) whether and how the principles and commitments set out in the Written Agreement have been met in its implementation; and (ii) whether, in light of experience and change, those principles and commitments remain fit for purpose.

In undertaking this review, we carried out documentary analysis to identify the frequency and quality of the Scottish Government's communications on IGR to Scottish Parliament committees. To do so, we collated meetings from the Scottish Parliament Information Centre Intergovernmental Activity Hub, which tallies multilateral meetings within the auspices of Interministerial Groups, with the UK Government's Annual and Quarterly Reports, which take a more expansive definition of intergovernmental relations, incorporating a much larger set of meetings.⁵ We would like to extend a special thank you to Annie Bosse in the Scottish Parliament Information Centre, who has tirelessly maintained an invaluable record of the Scottish Government's intergovernmental engagements.

We also conducted 22 interviews with MSPs, committee clerks and officials in the Scottish Government to get a better understanding of their experiences of scrutinising, or reporting on, IGR. This helped us to identify, and to understand, gaps in the implementation of the Written Agreement and to explore options for practical and useful reforms. We are indebted to all of those who gave up their time to support our research. An earlier draft of this report was shared with MSPs from the Constitution, Europe, External Affairs and Culture Committee, as well as officials from Scottish Parliament and Scottish Government. We are grateful for their feedback, which has also helped shape our recommendations.

1.3 Summary of Recommendations

As the governments look to reset their relationships with each other, we suggest it is time, too, to reset the agreement between the Scottish Parliament and the Scottish Government.

As a result of implementation gaps and a failure to keep pace with changes to the post-Brexit landscape, what once looked like an innovation that put Scottish devolution at the vanguard with respect to parliamentary oversight of IGR (in the UK at least) risks leaving Scotland falling behind the other administrations.

Our recommendations continue to be guided by the three founding principles of the original agreement – transparency, accountability and respect for confidentiality. In our view, the gaps in implementation suggest that respect for confidentiality has weighed more heavily than the other principles.

Accountability is one of the founding principles of devolution; the Scottish Parliament must be able to hold the Scottish Government to account for its decisions, just as the Parliament must be accountable to the people.

But our recommendations are also informed by the recognition that some of the commitments in the original Agreement were not practical given the way that IGR operates in the UK. We recognise, too, that the intergovernmental landscape has changed significantly, and that an Agreement that captures only what takes place in formal intergovernmental structures misses much of the critical decision making between administrations that affects the operation of devolution.

There is of course a need to ensure that ministers and officials have a protected safe space to discuss ideas, issues and disputes. A running commentary on engagements is not helpful to anyone. Our recommendations seek to strike the balance between the need for confidentiality with the need for sufficient transparency to enable the Scottish Parliament to scrutinise the Scottish Government's approach to, and engagement, in intergovernmental relations.

Recommendation 1: We propose replacing the requirement for advance notice of individual meetings with a more flexible intention to notify committees of upcoming meetings at the earliest opportunity. We hope that the new secretariat will assume responsibility for providing advanced notice of meetings as part of its duties, in which case the Agreement should be updated to remove this obligation from the Scottish Government, as meeting notifications would already be in the public domain and accessible to committees.

Recommendation 2: Reporting requirements should cover all formal bilateral and multilateral ministerial engagement, as originally intended, rather than be limited to the new Interministerial Groups or Interministerial Standing Committees, as has been current practice.

Recommendation 3: The Written Agreement should be revised to include an explicit commitment to provide a written summary, in the form of ministerial correspondence, outlining the positions and priorities that the Scottish Government took to interministerial meetings. These should refer back to the issues and priorities raised under recommendation 6 below. Where appropriate, this reporting may be in person rather than in writing.

Recommendation 4: We recommend that the Written Agreement be revised to include the breadth of agreements that fall within its scope, with sufficient flexibility to accommodate new forms of agreement that may emerge. The text of the Written Agreement should also be expanded to include a default commitment to keep the relevant committee informed during the process of negotiating Agreements, unless there is strong evidence to suggest doing so would undermine negotiating objectives.

Recommendation 5: The commitment to Annual Reporting should be removed from the Written Agreement. However, we suggest that the Scottish Government consider establishing an intergovernmental hub on its website, where intergovernmental agreements, IGR-related ministerial correspondence and meeting summaries can be uploaded on an ongoing basis. Such a repository would be an additional aid to transparency and, as one small added step to existing routines of producing, publishing and sharing materials by portfolio-based teams, it should avoid an onerous trawl through activities by the Constitution and UK Relations team.

Recommendation 6: We recommend a meeting at the start of each term between relevant Cabinet Secretaries and relevant committees to provide a forward look at the priorities and ambitions for their intergovernmental engagement during the coming term. This should include key issues on the Scottish Government's intergovernmental agenda to enable committees to track issues when undertaking scrutiny.

Recommendation 7: We also recommend supplementing the yearly Programme for Government with an assessment of the elements of that programme that interact with, or may be affected by, Common Frameworks, the United Kingdom Internal Market Act, EU alignment, or other executive, legislative, fiscal or constitutional factors that will necessitate cooperation between governments.

Recommendation 8: The Scottish Government should commit to enhanced reporting to relevant committees during the process of seeking an exclusion from the market access principles of the UK Internal Market Act, in recognition of its significant impact on Parliament's law-making function. At a minimum, this should include: (i) an explicit statement within Policy Memoranda accompanying Government Bills as to whether the proposed legislation interacts with the IMA (or other post-Brexit complexities), alongside a copy of the published BRIA; (ii) notification when an exclusion request is initiated or first discussed, the scope of the request, and the relevant Common Framework and IMG that are discussing the request; (iii) notification of when the

intergovernmental phase of the exclusion process has been concluded, with an update on progress; and (iv) the outcome of the process, following the UK Government's decision. This commitment should not be contingent on reform of the IMA or the Exclusion process.

2. Devolution and Intergovernmental Relations

2.1 Why Intergovernmental Relations matter

Intergovernmental relations are an essential feature of any political system with multiple orders of government. The processes and institutions of IGR enable those governments to share information, pool or distribute resources, and ‘negotiate and implement cooperative arrangements that determine who does – or should – do what’.⁶

The policy challenges faced by all governments today – for example, tackling poverty, mitigating climate change, sustaining economic growth and public services in the face of demographic change – rarely map neatly on to the constitutional division of powers. But the more complex the system, the more likely it is that the decisions made by one order of government – especially central government – will have an effect on the responsibilities of the others.

Political systems where the allocation of powers between orders of government is more complex, overlapping and interdependent rely more heavily upon effective IGR to function. But even in countries where there is a clearer division of powers and responsibilities, many things that can affect the exercise of those powers, including fiscal capacity, new regulations, policy decisions, election outcomes, and court rulings, still require effective relationships between governments to ‘make autonomy real’.⁷

IGR are therefore vital to the effective functioning of the system of devolution upon which the Scottish Parliament was founded. That fact has often been overlooked in Scottish political debate. The Parliament was the result of a decades-long campaign for ‘home rule’. The emphasis was, and has remained, on the powers that the Parliament can exercise on Scotland’s behalf. But those powers have limits, set out in the Scotland Act. The ability to exercise those powers is shaped by the constitutional competences, decisions and actions of others, in particular the UK Parliament and Government. Managing the intersection between devolved and reserved powers is both essential to the exercise of home rule, can open up opportunities for cooperative working across administrations, and help to avoid and resolve intergovernmental disputes.

2.2 The 2016 Settlement

Prior to 2016, there had been a relatively clear split in the legislative competences of the UK and devolved parliaments. In the wake of 2016, the boundaries between reserved and devolved powers became much more ragged. The transfer of some additional tax and social security competences, in particular, increased the interdependencies with those aspects of tax and social security that remain reserved.

The anticipation of this complexity prompted the Smith Commission to call for an urgent 'scaling up' of IGR. A new Fiscal Framework Agreement was negotiated to manage the interdependencies in revenue-raising and spending, with bilateral intergovernmental fora – the Joint Exchequer Committee and the Joint Ministerial Working Group on Welfare - tasked principally with facilitating the transfer of tax and social security powers.

This more complex constitutional and intergovernmental landscape generated concerns from within the Scottish Parliament about its ability to scrutinise effectively the activities and interactions between the administrations that would now surround the exercise of devolved competence.

The [Devolution \(Further Powers\) Committee](#) called for the reformed system of IGR to be:

- transparent, ensuring information about policy objectives and decision making were put in the public domain; and that
- accountability be built into the system to ensure agreements reached between governments could be subject to scrutiny.⁸

These principles, together with respect for the confidentiality of discussions between governments, formed the basis of the Written Agreement on IGR.

2.3 The Brexit Challenge to Devolution

Since 2016, the complexities of the devolution settlement have become even more pronounced, especially in the wake of Brexit and some of the legislative, executive and Supreme Court rulings that followed. These include:

- **New UK legislation:** In particular, the United Kingdom Internal Market Act (2020) has brought further complexities and challenges to devolved law-making. Where proposed laws fall within the scope of the IMA's 'market access principles', they cannot be enforced upon products or services that originate in, are imported into, and already regulated in another part of the UK, unless the Scottish Government has first secured, and the Secretary of State has introduced into law, an exclusion from those principles. The timing, lack of transparency and unpredictability surrounding that exclusion process has brought considerable uncertainty to the devolved legislative process, leading to delays and disruptions to Scottish Parliament legislation.⁹
- **Common Frameworks:** Following the EU (Withdrawal) Act 2018, an intergovernmental process was initiated to explore which of those devolved policy areas previously subject to EU law should be part of a UK or GB 'common framework', and what form such frameworks should take. The Frameworks Analysis identified 101 broad policy areas where EU law

overlapped with Scottish devolved competence. Of these, just three have led to new legal frameworks, and 23 have thus far generated intergovernmental frameworks, mostly in areas related to agriculture, the environment, food and transport standards and safety. In most of the remaining 75 areas, the governments agreed that no framework was required. Intergovernmental Common Frameworks have established new ways of working between the administrations, largely led by officials.¹⁰

- **Delegated Powers:** The EU (Withdrawal) Act created a new category of domestic law - Retained EU law – to provide legal continuity and certainty. The Retained EU Law (Revocation and Reform) Act 2023 revoked, in full or in part, a specified list of EU laws, as well as the legal principles, supremacy and rights associated with the remaining retained EU law. This still substantial body of law is now known as ‘assimilated law’. Most notably for our purposes, the REUL Act also conferred considerable power on UK and devolved ministers to act alone or jointly to restate, revoke or replace REUL/assimilated law. Delegated powers were also included in other post-Brexit ‘framework’ legislation, opening up the prospect of UK and Scottish ministers reforming devolved law without the scrutiny or consent of the Scottish Parliament.

As the Constitution, Europe, External Affairs and Culture Committee noted in its Report into post-Brexit devolution, these changes have generated a complex landscape of constitutional arrangements and intergovernmental mechanisms, marked by ‘a lack of clarity and consistency with regards to how each of these mechanisms work together’.¹¹

2.4 Reforms to Intergovernmental Machinery

In the wake of the Brexit referendum, all four administrations recognised that the little-used machinery of intergovernmental relations introduced alongside devolution – centred on the Joint Ministerial Committee, which had met mostly sporadically in a variety of formats – was no longer fit for purpose. Its inadequacy was further exposed during Covid-19 and the intergovernmental challenges that arose in the governments’ pandemic response.¹²

The UK and devolved governments collectively initiated a ‘joint review’ of IGR in March 2018. The resulting report, almost four years later, paved the way for an overhaul of multilateral intergovernmental machinery, with a more robust system of dispute resolution and a standing secretariat.

The reforms saw the Joint Ministerial Committee replaced by a new three tier structure (see Figure 2.1). Much of the routine business of ministerial engagement was to take place in the third tier in regular meetings of policy or portfolio-focused interministerial groups (IMGs). The middle tier was represented by an Interministerial

Standing Committee (IMSC), intended to meet monthly and have more cross-cutting and strategic oversight, alongside a bespoke Finance: Interministerial Standing Committee (F:ISC). All committees in the second and third tier were to have rotating chairs, with each administration taking an opportunity to convene meetings, and each administration having the right to request meetings or to raise disputes. The top tier Prime Minister and Devolved Heads of Government Council (the Council) would be chaired by the Prime Minister.

Figure 2.1 Three Tiers of Intergovernmental Relations



A standing secretariat, made up of officials from each administration but operating independently, was to be set up to support these new forums and processes. It was to be:

- accountable at all times to the Council rather than to individual governments;
- serve all governments equally and act impartially;
- respond to any request by any government to exercise its right to submit an item, supported by any relevant background papers, for a meeting in accordance with the agreed terms of reference (ToRs);
- promote transparency and accountability wherever possible.

This new machinery was still evolving by the time of the general election. A secretariat has been established, but there is no transparency over its operation or staffing, and it does not have a presence or identity online to match its commitment to promote transparency and accountability. A more established secretariat may get up

and running in the coming months. The Council to whom it is 'accountable at all times' had met briefly only once in 2022, prior to the meeting in Edinburgh in October 2024 chaired by the new Prime Minister. Meetings of the F:ISC and IMSC have been more regular, if not monthly. At portfolio level, 13 IMGs have been established thus far. Some Whitehall departments and policy fields where UK and devolved government policies intersect do not have a corresponding IMG, including social security.

It is not yet clear how this new structure will sit alongside the Labour Government's flagship Council of the Nations and Regions.

3. The Written Agreement on Intergovernmental Relations

The *Inter-Governmental Relations: Written Agreement Between the Scottish Parliament and the Scottish Government* was signed in December 2016, in anticipation of the increased complexity of devolution following the 2016 settlement. In this section, we outline the principles, scope, and central commitments made in the Agreement.

3.1 Principles

The principles underpinning the Agreement were **transparency, accountability, and respect for the confidentiality between governments.**

The principles of transparency and accountability came from the report recommendations of the Devolution (Further Powers) committee. The inclusion of confidentiality originated with the Scottish Government. In negotiating the Written Agreement, there was an attempt to balance two competing needs – the need for a private forum in which discussions between governments could take place and the need to ensure that sufficient information about these intergovernmental interactions was available to allow the Scottish Parliament to perform its scrutiny function and to hold the Scottish Government to account.

Scope

The Agreement applies to the Scottish Government’s participation in formal structures of intergovernmental relations involving government ministers. It named such forums that existed at the time of its signing (the Joint Ministerial Committee, Finance Ministers Quadrilateral, the Joint Exchequer Committee, the Joint Ministerial Group on Welfare), and included “other standing or ad hoc multilateral and bilateral inter-ministerial forums of similar standing as may be established”. Informal contacts between governments, carried out by ministers, as well as any preparatory meetings carried out by officials in advance of intergovernmental meetings or agreements, were outwith the scope of the Written Agreement.

It is important to emphasise that the Agreement requires the Scottish Government to report on its **own** activities in interministerial forums. Its commitments and obligations apply only to the activities of the Scottish government, as set out in paragraph 10:

This Agreement is intended to support the Scottish Parliament’s capacity to scrutinise Scottish Government activity and to hold Scottish Ministers to account in the intergovernmental arena only.

The emphasis on Scottish Government activity was deliberate. It was underlined that the Agreement “in no way places obligations on other administrations and legislatures”. Any information shared that included contributions from other

administrations would be subject to their consent, respecting the confidentiality of intergovernmental discussions. The focus on Scottish Government activity in IGR also reflected the role of the Scottish Parliament according to one of its founding principles:

the Scottish Government should be accountable to the Scottish Parliament and the Parliament and Government should be accountable to the people of Scotland.

3.2 Commitments

The Agreement committed the Scottish Government to provide information about its intergovernmental engagement both before and after interministerial meetings, as well as reporting on an annual basis.

Per the terms of the Agreement, the Scottish Government was to provide the relevant committees:

Advanced Notice (Paragraph 11)

“as far as practicable, advance written notice at least one month prior to scheduled relevant meetings, or in the case of meetings with less than one month’s notice, as soon as possible after meetings are scheduled... Advance written notice will include agenda items and a broad outline of key issues to be discussed”.

Meeting Reporting (Paragraph 12)

“a written summary of the issues discussed at the meeting as soon as practicable and, if possible, within two weeks. Such a summary will include any joint statement released after the meeting, information pertaining to who attended the meeting, when the meeting took place, and where appropriate, subject to the need to respect confidentiality, an indication of key issues and of the content of discussions and an outline of the positions advanced by the Scottish Government”

Intergovernmental Agreements (Paragraph 13-15)

“the text of any multilateral or bilateral inter-governmental agreements, memorandums of understanding or other resolutions within the scope of the agreement” as well as advanced notice of its intention to establish a new intergovernmental agreement.

“The Scottish Government also agrees to maintain a record of all relevant formal intergovernmental agreements, concordats, resolutions and memorandums that the Scottish Government has entered into and to make these accessible on the Scottish Government website.”

Annual Reporting (Paragraph 16)

“The Scottish Government will prepare an Annual Report on inter-governmental relations and submit this to the relevant committee of the Scottish Parliament. This report will summarise the key outputs from activity that is subject to the provisions of this agreement, including any reports issued by relevant inter-governmental forums. It will also comment upon the range of broader inter-governmental relations work undertaken during the year, including dispute resolution”.

The Written Agreement thus committed the Scottish Government to report on a range of intergovernmental activities, meetings and agreements to enhance the transparency of its own engagement with the other administrations and enable the Scottish Parliament to scrutinise that engagement. In the next section, we review whether the commitments set out in the Written Agreement have been delivered. In so doing, we have assumed that the new machinery of intergovernmental relations falls within its scope.

4. Evaluating the Implementation of the Agreement

4.1 The Intergovernmental Landscape

Brexit and post-Brexit governance have given rise to an even greater expansion of IGR than was envisaged when the Agreement was reached. To aid evaluation of the extent to which the Scottish Government has reported its activities in interministerial meetings to the Scottish Parliament, we first provide an overview of this expanded landscape.

This is not as easy a task as it ought to be, as there is no single source that collates all interministerial meetings. Despite a lack of consistency in what is reported, the Transparency Reports initiated by the previous UK Government probably come closest to capturing the extent of IGR. These highlight a general increase in the volume of IGR. Before 2016, the Joint Ministerial Committee met regularly only in its European format, to coincide with EU Council meetings, and barely at all in its other formats, though JMC meetings ramped up considerably after the Brexit referendum. The reformed machinery of interministerial groups (IMGs) and interministerial standing committees have generated many more meetings than in the pre-2016 period.

The Transparency Reports also indicate that most formal interministerial meetings take place outside of the three-tier structure outlined above. For example:

- Of the 50 interministerial meetings that took place in the third quarter of 2022, only four were in the format of IMGs.
- Of the 210 interministerial meetings that took place in 2023, just 35 of these were in the format of IMGs.

Clearly, then, if reporting commitments focused only or mainly on interministerial engagement that takes place within IMGs and ISCs, it would only represent a fraction of the formal interministerial engagement.

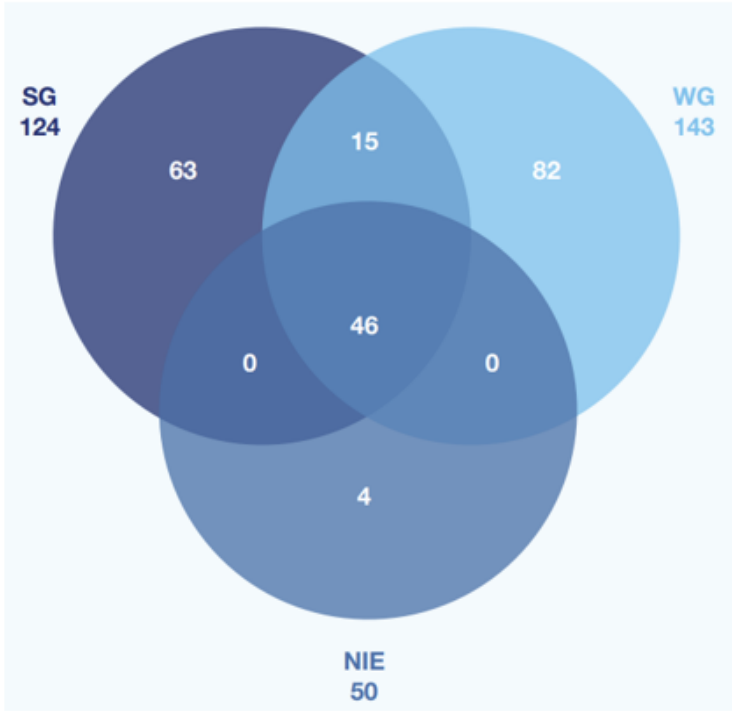
4.2 A Snapshot of Interministerial Meetings in 2023

We have zoomed in on one year of intergovernmental meetings to get a fuller picture of the Scottish Government's engagement in formal interministerial meetings. This helps to evaluate the extent to which the reporting commitments of the Written Agreement have been implemented. We chose 2023 as the first full year following the reform of IGR and the introduction of the new three tier structure of interministerial meetings. It is also the year in which the UK Government's reporting of IGR is most consistent and detailed.

Figure 4.1 indicates that, of the 210 interministerial meetings that took place in 2023, 124 of these involved the Scottish Government, including:

- 46 quadrilaterals involving all four administrations;
- 15 trilaterals involving the Scottish, Welsh and UK Governments;
- 63 bilaterals between the Scottish and UK Governments

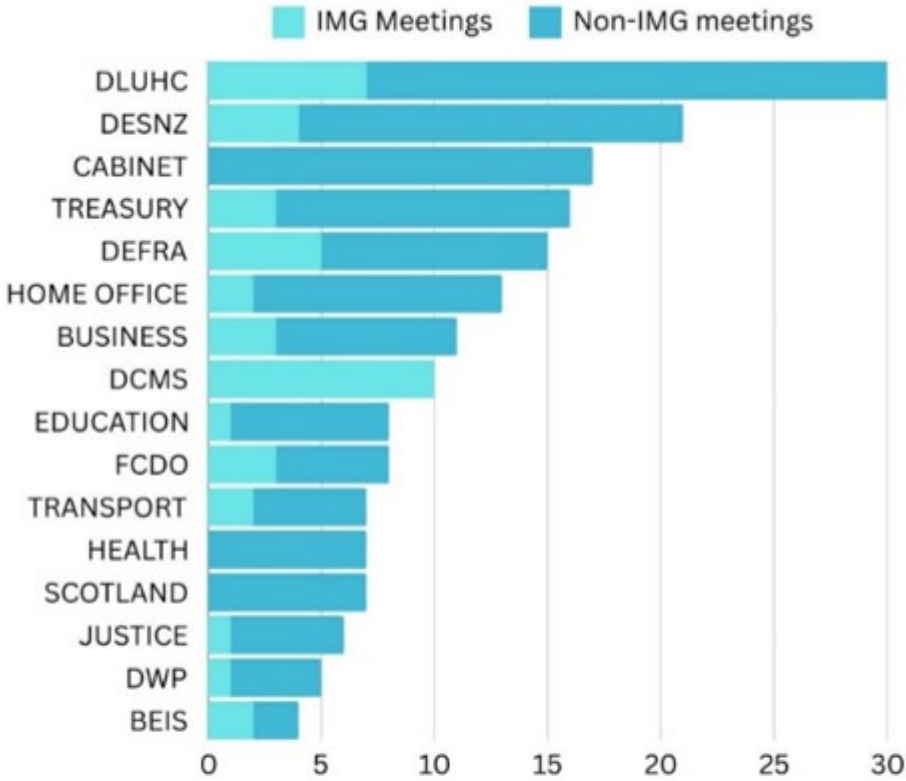
Figure 4.1 Interministerial Meetings Across the UK



Source: UK Government Annual Transparency Report

The UK Government’s Transparency Report also gives an indication of which Whitehall departments assumed the lead role in bilateral, trilateral or multilateral ministerial meetings. Although the Report does not detail which of these involved the Scottish Government, it gives a flavour of the focus and intensity of inter-governmental meetings across Whitehall departments. As indicated in Figure 4.2, the most intergovernmental facing portfolio department in Whitehall in 2023 was the Department for Levelling Up, Housing and Communities, then led by Michael Gove. DLUHC’s engagement with the devolved governments covered topics such as investment zones, freeports, the Levelling-Up and Regeneration Act, the Homes for Ukraine programme, and Afghan Resettlement. The Departments for Energy Security & Net Zero and Environment, Food & Rural Affairs also held frequent interministerial meetings, with ministers in the more cross-cutting Cabinet Office and Treasury also engaging regularly with their devolved counterparts.

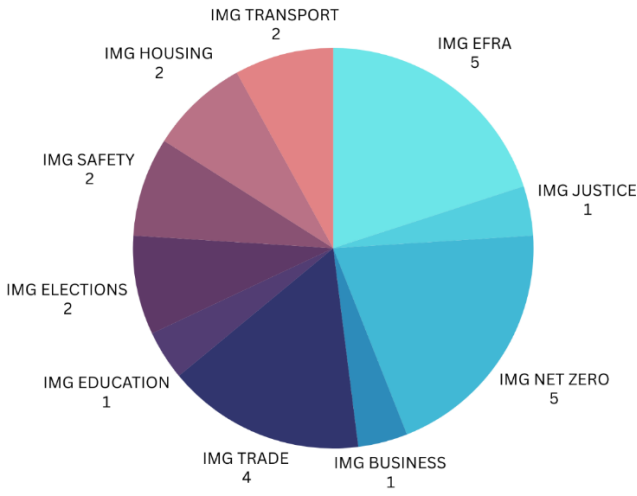
Figure 4.2: 2023 Intergovernmental Meetings by UK Government Department



Source: UK Government Intergovernmental Relations Annual Report 2023

Figure 4.2 also reveals that most interministerial meetings take place outside of the new IMGs. This matters because, as we set out below, most reporting of interministerial meetings in accordance with the Written Agreement has centred primarily on that three-tier structure, and in particular, the portfolio level IMGs and the F:ISC. Consequently, a large majority of interministerial meetings are not reported to Parliament at all.

Figure 4.3: Interministerial Groups 2023



Source: SPICe Intergovernmental Activity Hub

SPICe recorded 31 interministerial meetings in 2023 held using the new IGR machinery. These included three meetings of the Interministerial Standing Committee (ISC), three meetings of the Finance: Interministerial Standing Committee (F:ISC) and 25 IMGs (see Figure 4.3). In addition, there were 3 meetings of the IMG UK-EU Relations noted in the UK Government annual reporting, although these were not represented in the IGR hub or captured by SPICe. Together, these represent a quarter of interministerial meetings involving Scottish and UK Government ministers included within the UK Transparency Reports.

4.3 Advanced reporting

The Written Agreement committed the Scottish Government to provide relevant committees with advanced notice of intergovernmental meetings, including the agenda and key issues to be discussed at least one month prior to meetings being held, or failing that, as soon as possible after meetings are scheduled.

This aspect of the Agreement is clearly not being met. In a review of more than 1700 committee correspondence published from January to December 2023, we found only one instance of a committee receiving written notification of an upcoming interministerial meeting – from the Cabinet Secretary NHS Recovery, Health and Social Care. This practice continued into 2024 after a change of minister.¹³

Some correspondence reporting on meetings already held (see below) indicated when upcoming meetings were expected, but this was not accompanied by notification of agenda items. Likewise, ministers giving oral evidence would sometimes refer to upcoming meetings.

Some officials we interviewed reported sharing information regarding upcoming meetings in their informal engagement with committee clerks. However, most MSPs and clerks we interviewed could not recall ever receiving or seeing advanced written notice of meetings and reported little or no opportunity to discuss agendas ahead of meetings taking place:

- One clerk reflecting on their experience across two committees reported having “never received any advance information relating to an interministerial meeting. I’ve never seen one, neither in this role nor in my previous role”.
- Another clerk, acknowledging that upcoming meetings might be notified by email or mentioned by a minister during committee evidence session, noted that when information is provided, it as “formulaic... very, very limited”, with no opportunity to discuss issues.
- Similarly, a Deputy Committee Convenor we interviewed could not recall ever having seen advanced notice of upcoming interministerial meetings appearing as an agenda item at committee meetings.

One obvious explanation for why this commitment has not been met is because of the ad hoc nature of interministerial meetings. Far from having schedules and agendas set a month in advance, meetings continue to be sporadic, with agendas set in the days or even hours leading up to the event. This leaves little time to report to relevant committees in advance of meetings being held. The establishment of the secretariat, following the Joint Review, has not generated a more institutionalised process thus far, though we anticipate developments here now that more staff have been appointed to the secretariat. One official involved in supporting an Interministerial Group told us that the late organisation of meetings and agendas meant:

“we’re often just getting an agenda and trying to advise our ministers on latest issues and developments on those agenda items. There’s practically zero opportunity, I think, to then have dialogue with the Committee on specific agendas.”

Other aspects of the practice and culture of intergovernmental relations may also pose a challenge to reporting on upcoming meetings. The letters from the Cabinet Secretary for NHS Recovery, Health and Social Care include the stock phrase: “In keeping with protocol for these meetings and respecting confidentiality, I am unable to provide a detailed agenda”. But in each case, the Cabinet Secretary went on to outline what he expected to discuss, thus providing a workaround that we consider satisfies the commitment in the Written Agreement. But this was the only instance we could identify of that commitment being met.

Notwithstanding the practical and cultural barriers to providing advance notice of meetings, we also detected a lack of awareness among officials working at portfolio level of the commitments in the Written Agreement, especially to alert committees to upcoming meetings and the broad issues to be discussed. This could reflect the

siloed nature of civil service work; officials we interviewed could speak to their own responsibilities, but not to those of the institution, their directorates or wider teams. But it could also suggest that the principles of transparency and accountability that underpinned the Written Agreement have, during its operationalisation, not carried as much weight as the principle of confidentiality.

4.4 Post-meeting reporting

The Written Agreement committed the Scottish Government to provide Parliament with written summaries of issues discussed in interministerial meetings, “as soon as practicable and, if possible, within two weeks.”

In our 2023 benchmarking exercise, we reviewed all documents published by committees to identify:

- (i) whether formal reporting of known interministerial meetings was made
- (ii) whether that reporting was delivered within the timeframe set out in the Written Agreement; and
- (iii) whether the content and quality of the information provided met the terms of the Written Agreement.

We examine each of these questions below.

i. Are interministerial meetings being reported?

We identified nine instances of ministerial correspondence where the outcomes of intergovernmental meetings were shared. As noted above, there were (at least) 124 ministerial meetings held between the Scottish Government and the UK Government in 2023, suggesting that 93% of interministerial meetings were not reported to Parliamentary committees, at least not in the way expected, through formal ministerial correspondence.

We detected a tendency both from the documentary analysis and from interviews with Scottish Government officials for the reporting commitments of the Written Agreement to be regarded as principally applying to the formal three-tier structure of interministerial meetings (the IMGs, the IMSC/F:ISC and the Council). By contrast, UK Government Transparency reports cover all (or most) interministerial meetings. **We see no reason why the Written Agreement should not apply more broadly, as these meetings – supported by officials – appear to be formal interministerial engagements rather than casual and informal interactions.**

Focusing on meetings held under the new machinery, SPICe recorded 31 such meetings in 2023 (see Table 4.1). Less than a third of these meetings were followed by ministerial correspondence to the relevant parliamentary committee, with summaries in accordance with the commitment made in the Written Agreement. As the Table makes clear, ministerial correspondence was routine only after the IMG EFRA and the F:ISC.

Table 4.1: Interministerial Meetings under reformed IGR machinery, 2023

IMG and Committees	Meetings	Reporting	Reporting Rate
IMG Environment, Food and Rural Affairs	5	5	100%
IMG Net Zero, Energy and Climate Change	5	0	0%
IMG Trade	4	0	0%
Interministerial Standing Committee	3	0	0%
Finance: Interministerial Standing Committee	3	3	100%
IMG Elections and Registration	2	0	0%
IMG Safety, Security and Migration	2	0	0%
IMG Housing, Communities and Local Government	2	0	0%
IMG Transport	2	1	50%
IMG Business and Industry	1	0	0%
IMG Education	1	0	0%
IMG Justice	1	0	0%

Most interministerial meetings from formal groups result in publications of communiques agreed by all governments. These are published by the UK Government on its intergovernmental relations website, and therefore available to those seeking them. The Scottish Government posts some of these on its own website but does not always send them directly to the relevant committee.

For example, detailed minutes of the Joint Ministerial Group on Welfare (JMWWG) - a bilateral forum between the UK and Scottish Government and not part of the three-tier structure - are published on the UK Government and Scottish Government websites, but they are not shared directly with the committee. The JMWWG was set up principally to facilitate the transfer of social security powers in the 2016 Act. This necessarily involves managing the interface between devolved and reserved social security, especially in the absence of a Social Security IMG. But the Social Justice and Social Security Committee report not having received any formal correspondence from the Scottish Government in relation to meetings of the JMWWG during this session.¹⁴

The Scottish Government therefore appears to rarely report formally on its activity in any interministerial meetings, including IMGs. Some meetings are reported in ministerial evidence or may be communicated more informally. It may also be the case that committees do receive correspondence that they choose not to post on their websites. One clerk told us that their committee received and circulated IMG communiques to members but ‘there’s never been any interest in doing anything beyond that’ and they weren’t published.

ii. Are reports on interministerial meetings timely?

For the most part, Committees that received reports of interministerial meetings did so broadly within the timeframes set out in the Written Agreement: within two weeks of the meetings being held or as soon as practicable thereafter (see Table 4.2).

Table 4.2: Timeliness of Reporting on Interministerial Meetings

<i>Meeting</i>	<i>Meeting Date</i>	<i>Reporting completed</i>
IMG EFRA ¹⁵	23 January 2023	21 days
F:ISC ¹⁶	9 February 2023	15 days
IMG EFRA ¹⁷	6 March 2023	15 days
IMG EFRA ¹⁸	17 April 2023	30 days
IMG EFRA ¹⁹	22 May 2023	35 days
F:ISC ²⁰	22 June 2023	1 day
IMG Transport ²¹	13 September 2023	68 days
IMG EFRA ²²	13 September 2023	28 days
F:ISC ²³	20 September 2023	9 days

The consistent wording within ministerial correspondence in those that report regularly, especially those following meetings of the IMG EFRA and the F:ISC, suggest that officials serving those meetings embed transparency reports to Parliament as part of the routine business of IGR. Some of the communiques that are published but not sent to committees take longer to produce. Communiques from the last three meetings of the JMWG were published two to three months after interministerial meetings, thus further limiting their utility.

iii. Do meeting summaries match commitments?

The Written Agreement included a commitment on the part of the Scottish Government to provide a summary of meetings that would include:

“any joint statement released after the meeting, information pertaining to who attended the meeting, when the meeting took place, and where appropriate, subject to the need to respect confidentiality, an indication of key issues and of the content of discussions and an outline of the positions advanced by the Scottish Government”.

Evidently, this commitment cannot be met when there is no report at all. Where meeting summaries were shared, they mainly included the joint communiques agreed by all participating governments.

These can be useful in alerting committees that intergovernmental meetings having been held and the main topics of discussion. However, reliance on jointly-produced communiques is sub-optimal to parliamentary scrutiny, for two key reasons.

- First, joint communiques do not generally give much insight into the substance of the discussions and their quality can vary significantly between IMGs. For example, the IMG EFRA typically provides relatively detailed feedback of the topics under discussion, whereas the Interministerial Group for Net Zero, Energy and Climate Change provides one or two very brief sentences (which may be one reasons why it is not usually shared with committee).
- Second, joint communiques do not give any insight into the priorities, strategies and asks that the Scottish Government took to interministerial meetings. As a result, they are not especially helpful to the primary purpose of the Written Agreement: “to support the Scottish Parliament’s capacity to scrutinise **Scottish Government activity** and **to hold Scottish Ministers to account** in the intergovernmental arena.”

One interviewee described the communiques as “so generic and so broad that they’re frankly not very helpful” with “no meat” to engage with. Others described them as “perfunctory” and “discursive” rather than focused on specific actions. In most cases, interministerial meetings are about sharing information rather than negotiating or reaching decisions. As a result “it doesn’t feel there’s a huge amount to scrutinise.”

This was recognised by Scottish Government officials; one could not recall any substantial decision coming out of the IMG they served. Meetings tend instead to include presentations by different administrations or discussions on a topic, but they don’t typically result in decisions or action points. When decisions are taken, they are not typically taken in these formal interministerial forums, leaving little of substance to report.

Notwithstanding their often generic tone, several officials noted that reaching agreed text for communiques can be a slow and “often painful” process. One noted that producing a communique can involve “quite a fight over particular words”. Were Scottish Government to subsequently relay a more detailed account to committees, it could be seen as a departure from agreed understandings, with a detrimental impact on intergovernmental trust.

Not all intergovernmental engagement is perfunctory. Some engagement is crucial to the work of the Scottish Parliament, including its budget scrutiny and the process of legislation. One official expressed concern that reporting each step to Parliament as a commentary on delicate negotiations could negatively prejudice outcomes.

4.4 Intergovernmental Agreements

The Written Agreement committed the Scottish Government to keep the Parliament apprised of “formal intergovernmental agreements, concordats, resolutions and memorandums”, as well as maintaining a formal record.

Since the Written Agreement was reached, intergovernmental agreements appear to have become more important and voluminous. This includes:

- Agency and Service Level Agreements to give effect to new devolved social security and tax powers and policies
- New MoUs and Concordats between the Scottish Government and Whitehall departments on joint working arrangements
- Common Frameworks and Common Framework Agreements, i.e. agreements reached within the operational process of established frameworks
- The Fiscal Framework and associated agreements.

The more complex legislative environment post-Brexit has also given rise to an increase in intergovernmental engagement to seek legislative consent for Westminster legislation in devolved areas. There were 57 legislative consent motions between 2019-2024, significantly higher than in any other session²⁴. Brexit has also generated increased use of delegated legislation, including by UK ministers in devolved policy areas.

Committee interviewees reported having been kept informed of agency and service-level agreements. Most of these are between the Scottish Government and the Department for Work and Pensions (DWP) and its associated agencies. An extensive set of such agreements have been published on the Scottish Government website, alongside a 2022 Concordat between the Scottish Government and DWP²⁵ followed by a 2023 Memorandum of Understanding between Scottish Ministers and the Secretary of State for Work and Pensions on joint working arrangements.²⁶ It is not clear whether all of these have been reported under the terms of the Written Agreement as they do not appear on committee websites and there is no central repository of agreements.

A separate agreement is intended to support the scrutiny of UK delegated legislation that includes devolved matters: the Protocol on Scrutiny by the Scottish Parliament of Consent by Scottish Ministers to UK secondary legislation in devolved areas arising from EU Exit.²⁷ We recognise the detailed commitments set out in the Protocol that enable the Scottish Parliament to scrutinise within scope secondary legislation and, in the case of Type 1 procedures, grant or withhold its consent. Although beyond the scope of this report, some of our interviewees raised concerns about the operation and limitations of this protocol. These included the limited opportunities for scrutiny it presents, the lack of detail included within notifications of draft regulations, and the lack of clarity on the strategic choices that determine whether Scottish Ministers are content to allow the UK Government to legislate for Scotland or opt to exercise their own delegated powers. In addition, the scope of the Protocol is limited to secondary legislation made by the UK Government that includes provisions that are within devolved competence and relate to matters that were within the competence of the EU prior to Brexit. There have, however, been instances when the UK Government has exercised secondary legislation that affects devolved matters and that is derived from UK legislation that does not relate to EU competences, for example, the Levelling-up and Regeneration Act 2023. **We recognise that this Protocol is a live document to be updated as new relevant legislation is enacted, and suggest its scope be similarly kept under review.**

Scrutiny of Common Frameworks is baked into their development phase, albeit not until phase four of a five phase process. Committees have been consulted, via ministerial correspondence, on provisional frameworks that fall within their remit. The latest UK Government annual report on intergovernmental relations noted that, by the end of 2023, 30 out of 32 Common Frameworks were operational and “Parliamentary scrutiny of the majority of Frameworks is complete”.²⁸

But that scrutiny relates only to the development of frameworks, not to their operation. Yet, Common Frameworks have altered the process of policymaking, especially in agriculture, fisheries and the environment, to which half of all frameworks pertain. Associated ‘Common Framework Agreements’ might set out common approaches to particular policy challenges, or they might represent agreements to diverge, including as part of the Exclusion process associated with the UK Internal Market Act.²⁹

Because the Frameworks process is largely carried out by officials, it is, as one of our parliamentary interviewees put it, “completely opaque” to committee members, despite the centrality of frameworks to committee work. Following a recommendation of the House of Lords Common Frameworks Scrutiny Committee, the Interministerial Standing Committee in February 2023 noted:

“Ministers agreed the importance of reporting to both the IMSC and legislatures on the operation of Common Frameworks, once they are fully implemented and that officials should carry out an assessment, including on the impact of emerging issues on the programme.”³⁰

It is not clear how far this assessment has reached; only one Common Framework can be considered to be “fully implemented” though most are operational, and the issue has yet to reappear on the IMSC agenda.

But within the narrow terms of the Written Agreement, committees have been informed of at least some intergovernmental agreements once they are reached.

However, the breadth of intergovernmental agreements has left a much more complex environment than in 2016. It would be a stretch to conclude that the commitment had been met to “maintain a record... accessible on the Scottish Government website”; even for experienced researchers, finding these agreements took patience!

Several of our parliamentary interviewees expressed a preference for more regular reporting of both agreements and the intention to enter into agreements, especially in light of the complex post-Brexit landscape.

The Fiscal Framework Agreement and the Joint Exchequer Committee

The Fiscal Framework is one of the most significant agreements of recent years. A central component of the transfer and implementation of new tax powers in 2016, the Agreement on the Fiscal Framework sets out principles, funding arrangements, borrowing limits and mechanisms for adjusting the block grant to account for tax and spending decisions, with its terms subject to periodic review.

That review was completed in August 2023. Several of our parliamentary interviewees voiced frustration at the lack of parliamentary oversight of the process between summer 2022 and the review's conclusion, which was said to come "completely out of the blue". This was in contrast to the period that led to the original Fiscal Framework. In 2015-16, amid tense negotiations, the relevant committee was kept informed of discussions within the JEC in regular engagement with the then Finance Secretary, John Swinney, sometimes in private sessions.

The Finance and Public Administration Committee had been kept informed during the lead up to the review, including regular ministerial correspondence during 2021-22. This included notification of and references to meetings of the JEC. But, in contrast to its previous iteration, there was no formal reporting of meetings during the review itself, nor does there appear to have been any private sessions with ministers. It is not clear whether negotiations were taking place within the JEC, as this committee does not have a regular schedule despite its Terms of Reference suggesting it should meet at least twice per year. Nor has the JEC explicitly featured in the UK Government's Annual Transparency reports. The correspondence and debate that followed publication of the revised Fiscal Framework suggested there may not have been much intergovernmental negotiation to report on; the Cabinet Secretary indicated only limited changes were on the table.

Nonetheless, the Committee and Parliament more broadly were excluded from a process on the renewal of an agreement that has a significant bearing on the Scottish Government's budget. Without transparency and engagement, there was no formal opportunity for the Committee to ask questions, understand what each government's position was, or raise issues or concerns during the review, as there had been during the original Fiscal Framework negotiations. Scrutiny could take place only after the review was a done deal. As one member noted,

"we expected there to be a process. And that process did not happen... And we ended up having to scrutinise the fiscal framework after it was all done and dusted, which is not really how you want to do it."

4.5 Annual Reporting

Two annual reports have been published by the Scottish Government since the Written Agreement was concluded. The first covered the period following the Agreement to mid-2017³¹, while the second covered the 2017-2018 parliamentary year³². The annual reports included a listing of formal engagements, with a short paragraph summarising the meeting (and the Scottish Government perspective), and links to joint communiques and news releases where relevant. Informal engagements by portfolio were also very briefly summarised with the date, attendance, and a few words of description.

No annual reports have been published since.

The process that led to the production of these earlier reports was exceptionally resource-intensive for officials, with little evidence that it became a useful resource.

As one official noted, the process “wasn’t helpful for anybody”. Indeed, committee convenors and clerks suggested that the annual report is not central to supporting their scrutiny functions – a function of both the general nature of the reporting and the timing, released long after meetings are held and decisions made. One interviewee described such reports as “history” with others noting that they lacked substance.

In summary, it is clear from our evaluation that there have been considerable implementation gaps with respect to the 2016 Written Agreement. There has been little advanced reporting of interministerial meetings, and post-meeting summaries are provided only in a fraction of cases. When summaries are shared with committees, it has become common practice to share the joint communique agreed by the four administrations, rather than give an account of the Scottish Government’s own engagement in IGR. The annual report has fallen away, and the sharing of agreements has been patchy at best.

In the next section, we consider what improvements could be made to the Written Agreement to recapture the spirit of the original agreement and also to take account of the new more complex constitutional landscape.

5. Is the Agreement Fit for Purpose?

The design and conduct of intergovernmental relations in the UK have undoubtedly had an impact on the implementation of the Written Agreement. Despite the intensification of inter-governmental engagement since 2016, and the reforms to intergovernmental machinery since 2022, IGR remains weakly institutionalised. Only a few forums follow a regular meeting schedule, and some hardly meet at all. There is little advanced notice given to participating administrations, let alone their respective parliaments. As one official put it,

“a well-functioning, predictable reporting machine comes at the end of a well-functioning, transparent system overall... It’s much more difficult to bolt on a rigorous reporting mechanism to something that feels very opaque and difficult to understand.”

It is too early to tell whether the new UK Government’s commitment to resetting intergovernmental relations will lead to a less ad hoc and more organised system, and much too early to know whether such a system would be more transparent.

But, in our very strong view, even if the nature of IGR makes it difficult to stick to the letter of the 2016 Written Agreement, there is much that the Scottish Government can do to recapture the spirit of the Agreement. The Written Agreement was, after all, about the Scottish Government being accountable to the Scottish Parliament for its own approach to engagement with the other administrations.

In this final section of our report, we take each element of the original Agreement and make specific recommendations on how these may be adapted in light of experience to enhance transparency in ways that are both manageable for government and helpful to parliamentary scrutiny.

But in our view, **even if the Written Agreement was to be fully implemented in its current form - if every meeting was reported in advance, every meeting summarised, and every agreement shared - this would no longer be sufficient. And some of these earlier commitments may no longer be necessary.**

To be fit for purpose, the transparency arrangements with respect to the Scottish Government’s intergovernmental engagement must keep pace with constitutional and intergovernmental developments and recognise and adapt to a new more complex landscape.

Central to that complexity is when intergovernmental relations run parallel to – and can determine the direction and scope of – Scottish Parliament legislation. As one of our parliamentary interviewees noted, there is now a range of intergovernmental processes that “shadow our legislative function”. Reporting only on high-level interministerial meetings would not capture the interdependence between these parallel legislative and intergovernmental processes.

We therefore offer some additional recommendations on strengthening the Written Agreement to take account of these changes, as well as some suggestions for

practices that could facilitate more effective delivery of its principles and commitments. In so doing, our starting point remains the principles that underpinned the original Agreement: transparency; accountability; and respect for confidentiality between governments.

5.1 Revisiting the Written Agreement

The original Written Agreement is not working. Evolving practices have narrowed the scope of its application, and at the same time exposed its impracticalities and inadequacies. In this section, we focus on the four reporting requirements contained within the original Agreement: advanced notice of meetings, post-meeting reporting, reporting on agreements, and annual reporting.

Pre-meeting reporting

The current nature of intergovernmental relations, which is ad hoc, with meetings and agendas agreed at very short notice, does not always support formal notification of meetings or opportunities for input by parliamentary committees on relevant subject areas. The new secretariat, alongside greater inclination on the part of the governments to engage, may lead to more routine intergovernmental meetings that would facilitate advanced notice. The new secretariat may also assume responsibility for issuing advanced notice of meetings, which would relieve the need for the Scottish Government to reproduce this information.

Even when advanced notice is provided, those we interviewed didn't consider this particularly useful without an accompanying opportunity to discuss substantive points and insight into the Scottish Government's strategy ahead of any negotiations. Some of our recommendations in section 5.2 are intended to create such opportunities.

Recommendation 1: We propose replacing the requirement for advance notice of individual meetings with a more flexible intention to notify committees of upcoming meetings at the earliest opportunity. We hope that the new secretariat will assume responsibility for providing advanced notice of meetings as part of its duties, in which case the Agreement should be updated to remove this obligation from the Scottish Government, as meeting notifications would already be in the public domain and accessible to committees.

While acknowledging a need for flexibility, in light of the nature of the UK's IGR system, we note that a more routinised schedule of intergovernmental meetings, supported by a more established transparent secretariat, could produce many benefits both for relationship-building across administrations, and the transparency of those relationships, including mitigating some of the barriers to advanced reporting.

Post-meeting reporting

Reporting after meetings has been intermittent, and the requirement has been, to date, interpreted narrowly to encompass meetings taking place within the new inter-governmental structure. Even within this narrow scope of meetings, we found that

only a third of the IMGs were reported in 2023. This practice excludes reporting many meetings, including bilateral meetings between the Scottish and UK Governments.

Recommendation 2: Reporting should include all formal bilateral and multilateral ministerial engagement, as originally intended, rather than be limited to the new Interministerial Groups or Interministerial Standing Committees.

What form such reporting takes should be open to reconsideration. When meeting summaries are reported, practice has relied upon the joint communiques agreed between the participating governments. These are of limited value to MSPs and clerks, especially when they have limited context. Many lack detail; some do little more than reiterate the agenda. They are often published weeks and sometimes months after meetings. And all include the agreed outcome, not the individual contributions. These communiques are published on the UK Government's website, a practice we anticipate continuing or being transferred to the new secretariat. SPICe also maintains a record on its intergovernmental activity hub of interministerial meetings involving the Scottish Government under the new structures.

Our review suggests that there has been a broad failure to report the Scottish Government's own activity in interministerial meetings – the primary purpose of the original Agreement. We therefore recommend that the Written Agreement be revised to give primary focus to this aspect of the reporting. Moreover, reporting of interministerial engagement should focus less on the fact that meetings have taken place and more on the issues that were raised and discussed by the Scottish Government.

Recommendation 3: The Written Agreement should be revised to include an explicit commitment to provide a written summary, in the form of ministerial correspondence, outlining the positions and priorities that the Scottish Government took to interministerial meetings. These should refer back to the issues and priorities raised under recommendation 6 below. Where appropriate, this reporting may be in person rather than in writing.

The other information set out within the original agreement - joint statements, meeting attendees, and key issues discussed - would be published as part of the Joint Communique, the publication of which we expect to be taken on by the new secretariat. These should be notified to clerks as a courtesy. Separating out and sticking to reporting of Scottish Government activity only should have the advantage of not having to wait on other governments to agree the text of joint communiques that represent the shared position and outcomes of all participating administrations.

We recognise that this recommendation may generate some discomfort among officials whose experience of negotiating communiques has at times been "painful". We recognise, too, the importance of fostering trusted relationships in the intergovernmental space, at both official and ministerial level. As one official noted, "we need to make sure that we can have good open frank conversations with our colleagues without them being concerned that we're going to go to Parliament and essentially leak all the detail of that conversation". Our recommendation would protect that space and respect the need for an intergovernmental process to agree

the content of discussions and outcomes of meetings as part of the current practice of producing joint communiqués.

However, **there should be no requirement for the Scottish Government to seek clearance from other administrations when setting out its own position to the parliament to whom it is accountable.** Focusing solely on communicating the Scottish Government position supports transparency and accountability, whilst respecting the confidentiality of other governments' contributions. Indeed, earlier communications were more fulsome in sharing the Scottish Government position and the Welsh Government at times goes beyond the joint communiqués in its reporting. Members and clerks noted that ministerial correspondence, provided it included sufficient detail, does not by itself enhance scrutiny, but can serve as a "starting point" when it provides "enough information for [members] to then use it to ask questions".

We recognise that commentary on delicate negotiations with uncertain outcomes while they are underway carries risks that could compromise the Scottish Government's ability to secure its preferred outcome. It may on occasion be appropriate for reporting to be done in private or more informally. However, we also recognise that Parliament has a legitimate interest in being looped into intergovernmental negotiating processes, especially when they pertain to its legislative function.

Intergovernmental Agreements

The Written Agreement requires notification of: an intention to enter into agreements; when agreements are reached; and the maintenance of a repository of all agreements. These requirements have only been partially met. Not all agreements appear to be communicated to Parliament and there is no accessible repository. In any case, in light of the increasing number of agreements that have emerged as a result of new complexities in the devolution settlement, we consider the commitment in the Written Agreement to be insufficient.

A revised commitment may specify the kinds of agreements that fall within scope, including Common Frameworks and associated Agreements, Fiscal Framework Agreements, Agency and Service Level Agreements, MoUs and Concordats.

We welcome the commitment within the IMSC to report on the operation of Common Frameworks. Agreements are, by their nature, co-owned. Any reporting on the operation of Common Frameworks is therefore likely to conform to a joint template with jointly agreed text. Of more relevance to transparency and accountability is the process leading to agreements being reached (or revised). The experience of the Fiscal Framework review may have preserved the confidentiality of intergovernmental negotiations, but it fell short in meeting the principles of transparency and accountability.

Recommendation 4: We recommend that the Written Agreement be revised to include the breadth of agreements that fall within its scope, with sufficient flexibility to accommodate new forms of agreement that may emerge. The text of the Written Agreement should also be expanded to include a default

commitment to keep the relevant committee informed during the process of negotiating Agreements, unless there is strong evidence to suggest doing so would undermine negotiating objectives.

The original Written Agreement included a requirement to maintain a repository of intergovernmental agreements on its website. The Government should recommit to this requirement in the interests of transparency, perhaps as part of an intergovernmental relations hub.

Processes leading to Agreements, including within Common Frameworks, are largely undertaken by officials rather than ministers. The issues and compromises that formed part of the Fiscal Framework review would also have been navigated principally by the JEC (O), the committee of officials that acts as sherpa to the interministerial Joint Exchequer Committee. Ministers are typically only brought in a) when the bulk of negotiations are concluded or b) when a conflict can't be resolved.

Intergovernmental meetings between officials are beyond the scope of the Written Agreement. We recognise and support the need for officials to build trusted relationships with their counterparts in other administrations. We recognise, too, that these relationships now have a significant impact on Parliament's primary law-making function. Our recommendations in the next section may help to alleviate some of the concerns expressed by parliamentarians at being kept in the dark, while protecting the space for informal engagement between officials.

Annual Reporting

The Annual Report proved to be a very resource-intensive exercise for officials, of limited use to parliamentarians, and has largely been abandoned. We see no reason to resurrect it. It has also been supplanted, at least in part, by the UK Government's Transparency Reports. The addition of Joint Communiqués from meetings held after the general election suggest that this reporting will continue under the Labour Government.

Recommendation 5: The commitment to Annual Reporting should be removed from the Written Agreement. However, we suggest that the Scottish Government consider establishing an intergovernmental hub on its website, where intergovernmental agreements, IGR-related ministerial correspondence and meeting summaries can be uploaded on an ongoing basis. Such a repository would be an additional aid to transparency and, as one small added step to existing routines of producing, publishing and sharing materials by portfolio-based teams, it should avoid an onerous trawl through activities by the Constitution and UK Relations team.

The UK Transparency Reports provide data on the number of meetings taking place, and the form these took. Members suggested such quantitative data was not especially useful for effective scrutiny, and that qualitative reports would be more useful. We note that the Welsh Government's annual report provided a qualitative overview of its intergovernmental engagement, though we remain unconvinced that a similar backward-looking annual report would be useful or used by MSPs. A forward look, coupled with regular engagement, may be more beneficial.

5.2 Sharing a Strategic Vision in a Complex Environment

At its origins, the Written Agreement sought to support a greater level of transparency around intergovernmental relations, long regarded as a black box. The intention was to support the Scottish Parliament's scrutiny of Scottish Government participation in the intergovernmental sphere. But the commitment to report on each instance of upcoming or recently held meetings, or of agreements, has proved unworkable and is in any case no longer sufficient.

Key areas of devolved legislation are shaped by the policies, laws and actions of the UK Government and Parliament, at times cooperatively and at others competitively. This necessitates a big picture insight into the extent to which devolved legislation interacts with these new features surrounding the devolution settlement, and an understanding of the approach adopted by the Scottish Government in its engagement with other governments across the United Kingdom.

We heard repeatedly from MSPs and clerks that they lacked insight into the Scottish Government's strategic approach to intergovernmental relations. As one convenor put it, in relation to intergovernmental meetings:

“we don't have a clue what is going to happen... we don't know what (the meetings) are, what their intention is. What we might get from the Scottish Government is ‘we had a meeting. XYZ happened’... but we don't really know what they were calling for in the first place.... we don't really get what both sides were hoping to get out of it prior to the meeting so you can see, well, did they have a genuine negotiation and discussion?”

Members noted their desire to understand the position adopted by the Scottish Government. It was noted that they might get statements that the Government was disappointed with the outcome, but rarely had a sense of what their “opening gambit” was. One MSP noted “It would be useful, I think, to try and understand better the positions the government has taken within those negotiations or has set out prior to being involved in them.”

Parliamentarians also expressed more interest in transparency ahead of meetings, to give committees an opportunity to make contributions “rather than have to spend endless hours discussing stuff that's already been decided”.

We have therefore made a series of recommendations to expand the Transparency arrangements to take account of these concerns.

Our interviews suggested that committees who have more regular interactions with their respective Cabinet Secretaries and their officials have a greater sense of the Government's priorities in intergovernmental relations, and insight into the issues likely to emerge. A yearly meeting with the Cabinet Secretary, with intergovernmental relations as the primary agenda item, could help support Committees' understanding of IGR, and provide a benchmark for future scrutiny.

Recommendation 6: We recommend a meeting at the start of each term between relevant Cabinet Secretaries and relevant committees to provide a forward look at the priorities and ambitions for their intergovernmental engagement during the coming term. This should include key issues on the Scottish Government’s intergovernmental agenda, to enable committees to track issues when undertaking scrutiny.

Recommendation 7: We also recommend supplementing the yearly Programme for Government with an assessment of the elements of that programme that interact with, or may potentially be shaped by, Common Frameworks, the United Kingdom Internal Market Act, EU alignment, or other executive, legislative, fiscal or constitutional factors that will necessitate cooperation between governments.

The UK Internal Market Act and Scottish Parliament Legislation

The interaction between the Internal Market Act (IMA) and Scottish Parliament legislation has created particular challenges, especially when the Scottish Government has sought an exclusion from the Act’s market access principles. Members and clerks felt they were not looped into intergovernmental processes and negotiations that were running in parallel to the legislative process.³³ We heard a consistent call for more information sharing at an earlier point of the process, not least to give more confidence to affected businesses and other stakeholders.

We are cognisant of the inadequacies of the IMA exclusion process and the broader limitations that this Act has imposed on devolution. Despite intending to provide assurances to stakeholders of market access across the domestic market, the legislation and its interaction with both devolution and common frameworks have created considerable uncertainties, with evident potential to disrupt Scottish Parliament legislation. We made a series of legislative and procedural recommendations in our recent report on Reforming the UK Internal Market.³⁴ As an Act of the UK Parliament, any legislative reforms would be principally a matter for the UK Government and Parliament, although procedural reforms may feature as part of the reset of intergovernmental relations.

Irrespective of whether any reforms are made, new transparency arrangements agreed between the Scottish Government and Scottish Parliament should recognise the connectedness between the IMA and devolved law-making. This includes finding a way to inform the lead committee at the earliest opportunity when a Scottish Parliament Bill may fall within the scope of the IMA’s market access principles, where an exclusion from those principles is sought, and the process and likely timing of such an exclusion.

Considerations of the potential impact of the IMA on new policies are already part of the Scottish Government’s policy-making process, including as part of Business and Regulatory Impact Assessments (BRIAs). We recognise that, under the current process, exclusion decisions are ultimately taken by the UK Secretary of State, following a decision of the UK Cabinet, and the Scottish Government does not control, or even have oversight of, the timing of exclusion decisions. But the Scottish

Government is involved in the intergovernmental negotiations that take place, first between officials under the Common Frameworks process, and then among ministers within the relevant Interministerial Group. It is when that process concludes that proposed exclusions are taken into the Whitehall machinery for consideration and a final decision. We believe that these stages of the exclusion process prior to cross-Whitehall/Cabinet consideration offer opportunities for greater transparency within the spirit of the Written Agreement.

Recommendation 8: The Scottish Government should commit to enhanced reporting to relevant committees during the process of seeking an exclusion from the market access principles of the UK Internal Market Act, in recognition of its significant impact on Parliament’s law-making function. At a minimum, this should include: (i) an explicit statement within Policy Memoranda accompanying Government Bills as to whether the legislation interacts with the IMA market access principles (or other post-Brexit complexities), alongside a copy of the published BRIA;³⁵ (ii) notification when an exclusion request is initiated or first discussed, the scope of the request, and the relevant Common Framework and IMG that are discussing the request; (iii) notification of when the intergovernmental phase of the exclusion process has been concluded, with an update on progress; and (iv) the outcome of the process, following the UK Government’s decision. This commitment should not be contingent on reform of the IMA or the Exclusion process.

We believe that these commitments would not amount to a running commentary that could jeopardise difficult negotiations, as they still provide sufficient private space for negotiations to take their course. Greater transparency may also help the process of negotiating exclusions, avoiding competing claims that have been associated with recent episodes, such as the Deposit Return Scheme exclusion request. We recognise, however, that recommendation 8(iii) above involves more than the Scottish Government and may have to be subject to the agreement of other administrations and communicated privately, unless a more transparent exclusion process is introduced.

5.3: Embedding Good Practice in Parliament Scrutiny of IGR

While the focus of this research sought to understand the ways in which the Written Agreement should be adapted in light of the more complex intergovernmental landscape, other relevant issues emerged.

Our research suggested significant variation in knowledge of the Written Agreement and reporting requirements more broadly within both Parliament and Government. Those whose roles carry responsibility for cross-cutting issue areas, or issues that require a greater intensity of IGR, demonstrated more awareness. Some officials within government seemed “attuned” to the need for reporting, while others were less confident in their awareness of the responsibilities and obligations of the Written Agreement.

This was evident in assumptions expressed by officials, which focused on more limited reporting requirements – ie. limited to the IMGs rather than interministerial meetings more broadly, as defined in the agreement, and an assumption that passing along the communiques alongside a very brief covering letter was sufficient according to the terms of the agreement. Our interviews suggested that IGR represented a small portion of officials' roles, and the transparency commitments associated with the Written Agreement were not a dominant feature of these roles. There was no clear sense of ownership or oversight of transparency arrangements within government, and there does not appear to be consistent guidelines or templates for officials to follow to ensure obligations are being met. Understanding of reporting requirements and the impact of IGR on the functions of Parliament varied significantly among those we interviewed.

While the internal organisation and training of officials is entirely a matter for the Scottish Government, more detailed written guidance, training sessions, and pro formas for use by officials with responsibility for intergovernmental relations may ensure that reporting on IGR becomes part of normal processes and procedures.

Within Parliament too, we see variation between committees on engagement with IGR, depending on a) intensity of IGR in the policy space and b) previous interactions. Committees with high intensity, or those used to reporting around EU or fiscal negotiations, seemed more attuned to the intergovernmental dimension of devolved policy. Some officials and MSPs acknowledged that understanding of intergovernmental processes and pressures, and their effect on devolution, was less than it could be. Facilitated sessions within and between committees on intergovernmental relations may raise awareness of these issues among members.

Finally, the importance of nurturing relationships cannot be overstated. **The best Agreement in the world will only succeed if those who implement it invest in building relationships of trust that foster empathy and can support communication and sharing even during tricky negotiating periods.** This is as true in the relationship between government officials and clerks – and ministers and committee conveners - as it is true in the intergovernmental arena.

Where these relationships are strong, committees have had greater insight into the rhythm of intergovernmental engagement, and the issues and priorities of the Scottish Government, even if formal notification doesn't always happen on the terms set in the Agreement. Cooperative relationships might be encouraged through workshops, away days, secondments, and other forms of positive interactions.

5.4 Conclusion

Enhancing transparency arrangements could make a positive difference to Parliament's ability both to scrutinise the intergovernmental activity of the Scottish Government and exercise its own legislative function.

The lack of transparency in intergovernmental relations has long been one of its weakest features. At the time of its introduction, the Written Agreement on

Intergovernmental Relations was a significant step forward in enhancing transparency and thereby enhancing the ability of the Scottish Parliament to scrutinise IGR. That Agreement saw the Scottish Government set the pace in this regard, prompting reforms to the reporting commitments and practice of the UK and Welsh Governments.

The recommendations and suggestions in this report provide an opportunity to be innovative once again. Ultimately, it is for the Scottish Parliament and Scottish Government to agree a new approach. We hope our recommendations can usefully support those discussions.

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McEwen and Brown Swan, together with Dr Bettina Petersohn (now at Swansea University), undertook the research commissioned by the Devolution (Further Powers) Committee in 2015, which would inform its recommendations on the scrutiny of intergovernmental relations, paving the way for the original Written Agreement.

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