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In 2014 Scotland Welcomes the World

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LEGACY 2014
XX COMMONWEALTH GAMES
SCOTLAND



23 March 2015

John Swinney

Thank you for your letter of 13 March in which you raised a number of issues which the Committee did not have time to cover when I gave evidence on 12 March. I have addressed these issues in the order of your letter.

Super-majorities

Clause 4 applies the super-majority requirements to certain legislation passed by the Scottish Parliament and has no application to Westminster legislation. The Scottish Government would be content with any move to attach super-majority requirements to future Westminster legislation that sought to remove powers from the Scottish Parliament or to dissolve the Scottish Parliament. However we note that the prevailing Westminster doctrine of parliamentary sovereignty might make this hard to achieve in practice if a super-majority requirement at Westminster could itself be amended or repealed by a simple majority.

The existing position is that any move at Westminster to remove powers from the competence of the Scottish Parliament would trigger the Sewel Convention and require a Legislative Consent Motion to be passed by the Scottish Parliament. This is clearly a significant protection for the powers of the Parliament and this would be one of the aspects of the Sewel convention the Scottish Government believes should be codified in Clause 2 of the proposed Scotland Bill.

Socio-economic inequality

Draft Clause 24 would provide the Scottish Parliament with the power to legislate in relation to those aspects of socio-economic inequalities which fall within the subject matter of Part 1 of the Equality Act 2010. You asked for our understanding of what powers this would provide to a future Scottish Government.



The Scottish Parliament already has the competence to legislate in relation to socio-economic rights in devolved areas, as was confirmed in the Smith Report. As I said to the Committee on 12 March, we are considering the drafting and interpretation of clause 24 very carefully. It remains unclear to us what more the clause will enable us to do and we are having discussion with the UK Government on this.

The Committee will recall that Part One of the Equality Act 2010 was extended to Scotland following a Legislative Consent Motion, which was considered on 28 January 2010. Further information can be found on the Scottish Parliament's website at: <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/16053.aspx>

The Programme for Government includes has a key theme around building a Fairer Scotland and tackling inequality. It sets out a range of cross-portfolio policies in areas such as fair work, school attainment and childcare. It also describes the Scottish Government's commitments to empower communities and to "poverty proof" new policies and legislation.

Definition of disability and carers

You asked for further details on the view we take of paragraph 49 of the Smith Commission report. As I outlined in my evidence some aspects of the Clauses appear to broadly meet the intention of the Smith Commission report. At a more detailed level, however, there are aspects that give cause for concern, as has been highlighted by a number of stakeholders.

The sections on disability, industrial injuries and carer's benefits, devolve aspects of those benefits as they currently operate. However, I agree with the evidence your Committee has heard that these aspects of Clause 16 as currently drafted will significantly restrict the ability of the Scottish Parliament to exercise complete autonomy over the benefits it inherits, as paragraph 51 of the Smith Commission report called for.

For example, it is clear to me that Clause 16, by setting out the criteria to whom disability benefits may be paid, restricts the ability of the Scottish Parliament to be able to determine eligibility for any replacement benefit. Additionally, and equally restrictive, the Clause defines a 'relevant carer' as someone who is over 16, is not in full-time education, and is not gainfully employed. The result is that the Scottish Parliament will not have the power to determine the structure and value of these benefits as envisaged by the paragraph 51 of the Smith Commission report.

We have similar concerns over some of the restrictions imposed by the clause in our ability to top up DHPs. Discussions with the UK Government on these aspects of the clauses are underway.

Welfare Administration

On welfare administration, you will appreciate that this is very early in the process for discussing options. We recognise the skills and expertise that different sectors and organisations can bring to the table in delivering the new social security benefits.

We will wish to consider a range of delivery options carefully and in consultation with all interested parties. I am happy to keep the Committee apprised of our work in this area.

Employment Support

We strongly agree with the concerns about employment raised in evidence to the Committee. The main effect of Clause 22 of the draft Scotland Bill suggested by UK Government is that it would devolve Work Programme and Work Choice only. We believe that devolution of employment support on this basis is inconsistent with both the letter and spirit of paragraph 57 of the Smith Commission report, which states that the Scottish Parliament will have all powers over support for unemployed people through the employment programmes currently contracted by the UK Department for Work and Pensions.

Our concerns are concentrated in two key areas. Firstly, the clauses restrict the transfer of powers to the Scottish Parliament to 'those at risk of long term unemployment'. Secondly, the UK Government's stipulation that our future devolved services must operate for at least one year restricts scope for innovation and flexibility in designing new programmes. Neither of these restrictions that appear in Clause 22 reflect paragraph 57 of the Smith Commission report, the intention of which is clearly to devolve all employment support programmes.

These are fundamental points which would restrict our ability to develop existing and future support programmes for the unemployed and to fully integrate future services in Scotland. We have expressed our dissatisfaction to UKG, and continue to press them on this. At the last Joint Ministerial Group on Welfare on 11th March, Scottish Ministers offered to revise the draft clause to be more in line with the Smith Commission report.

In respect of Access to Work, we have asked the UK Government to clarify whether Access to Work will be devolved under clause 22 and they have made clear their expectation that as this programme is a JobCentre Plus service to customers and not a contracted employment programme it will remain reserved.

It is the view of Scottish Ministers that creating a fairer society is not just a desirable goal in itself, but it is essential to the sustained, long-term prosperity of the Scottish economy. For those with a disability, health or mental health condition, an integrated and person-centred employment service is essential, and without devolution of the full range of employability powers and supports the Scottish Government cannot achieve its full aspirations in this area.

Intergovernmental Meetings

You asked for details of all intergovernmental meetings that have taken place in relation to the Smith Commission / draft clauses. Following the publication of the Smith Report, Scottish and UK Government officials discussed the recommendations for legislative change to consider their scope and interpretation in order to inform the drafting of the clauses by the UK Government. The Scottish Government received the draft clauses prior to publication (although in some areas only just) and provided comments to the Scotland Office.

Contact between officials has continued since the publication of the clauses and we have again provided comments on the drafting and the scope of the published clauses. Some of this consideration has taken place as part of the usual routine contact between the Scottish Government and UK counterparts, but I attach a list of specific meetings convened to discuss Smith-related issues.

Analysis

You also requested details of the analytical work commissioned from the civil service regarding the Smith Commission proposals, including on how VAT could be assigned.

Scottish Government officials are currently liaising with their counterparts in HM Treasury and HM Revenue and Customs to identify the key analytical tasks, identify existing datasets which may be helpful to this work, and agree a programme of work. I will undertake to provide the Committee with further updates on this analytical work as it progresses and to share relevant products of that work with the Committee as agreement is reached on key issues, noting that my ability to share certain outputs will be subject to the views of the UK Government.

Quadrilateral Meetings

You asked for further information on all the quadrilateral meetings that have taken place between officials from the UK Government and the devolved governments, including the meetings referred to by the Deputy Convener that are mentioned in the Institute of Government report.

As I explained previously, the Scottish Government is participating in that exercise, as are the other devolved Administrations. Much of the existing inter-governmental machinery is quadrilateral in nature so it is of course important for us to work together on this. The other administrations have agreed that I may share the following information from the official level meeting in February with you.

“Ministers of all four administrations reaffirmed the importance they each attached to effective inter-governmental relations at the meeting of the Joint Ministerial Committee in December, and tasked officials with working on any necessary revisions to the Memorandum of Understanding.

An initial meeting on intergovernmental workings took place in Edinburgh on 27 February 2015, involving officials from all four administrations.

The meeting was the beginning of a process at official level to develop recommendations that can be provided to Ministers at a future Joint Ministerial Committee.

Officials had a very constructive discussion about intergovernmental working practices and agreed to undertake further official level work in a number of areas to clarify understanding and draw out themes ahead of the next officials meeting. In particular:

- work is underway on an EU state of play analysis, consolidating mutual understanding of the existing system and how it can be made more effective; and
- parallel work is being undertaken on the domestic side to similarly consider existing practice."

A further full official level meeting is expected to take place in April. Officials will report back to Ministers at the next JMC Plenary meeting after the UK General Election."

You also asked about the position the Scottish Government takes into that working group with regard to the principles that need to be established and reform that needs to take place.

As Fiona Hyslop, Cabinet Secretary for Culture, Europe and External Affairs explained in her letter of 16 March 2015 to the House of Lords' Constitution Committee, our overarching principle is that the purpose of inter-governmental relations should be to facilitate the smooth operation of government for the benefit of the people in each part of the UK.

Good inter-governmental machinery should therefore be effective whatever the political make up of the 4 member administrations and should not depend on the goodwill (or otherwise) of individuals. This means that it must be based on 'parity of esteem', and mutual respect and trust. The UK Government and devolved administrations are equals in their areas of competence, and this should be recognised in the level of respect between them. Good inter-governmental relations should also enable us to be proactive (or at the very least, prompt) in identifying and addressing issues of joint interest or potential difference at the earliest possible stage. This should include involvement in policy development in reserved areas which will impact on devolved areas, whether directly or indirectly, including through changes to budgets. Early involvement would potentially allow the Scottish Government, using its greater knowledge of Scottish circumstances, to flag any unintended consequences of UK policy at a stage where it could be taken into account. It should therefore result in more workable and effective policy. Finally, better inter-governmental relations should also facilitate the development of greater flexibility in policy implementation since there is no reason why reserved policy could not vary in different parts of the UK to take account of local circumstances, or conversely why devolved administrations could not implement similar policies where this is in the interests of the people affected..

Ms Hyslop's (copy enclosed) letter sets out more detail of our thinking on these issues and I understand you took evidence on IGR from Ken Thomson, DG Strategy and External Affairs on 19 March.

I hope that this information is helpful to the Committee and I am glad to repeat my commitment to keep the Committee updated on the progress and content of discussions between the Scottish and UK Government with regard to the implementation of the Smith Commission recommendations.

JOHN SWINNEY

UKG/SG VC Meetings

	Subject	Scottish Government Lead	UK Government Lead
03-Mar-15	Employment Tribunals	Tribunals Policy	MoJ
03-Mar-15	Elections	Elections and Constitution	Elections Team
26-Feb-15	Equalities	Equality, Human Rights and Third Sector	DCMS
25-Feb-15	Transport	Transport Scotland	DfT
24-Feb-15	Energy Efficiency Fuel Poverty Renewable Incentives OFGEM	Housing and Energy	DECC
23-Feb-15	Welfare and Employment	Welfare	DWP
19-Feb-15	Consumers and Competition Policy	Business Directorate	BIS
18-Feb-15	Onshore and Gas Extraction	Oil and Gas	DECC
17-Feb-15	Constitution	Cabinet, Parliament and Governance	Cabinet Office SO
05-Feb-15	Energy Efficiency and Fuel Poverty	Housing and Energy	DECC
19-Jan-15	Welfare - follow up meeting on detail of clauses	Welfare	DWP
19-Jan-15	Fiscal Framework - follow up meeting on Heads of Agreement text	Fiscal Responsibility	HMT
16-Jan-15	Crown Estate - follow up meeting on Heads of Agreement text	Marine Scotland	HMT
16-Jan-15	Taxation - follow up meeting on Heads of Agreement text	Financial Strategy	HMT

13-Jan-15	Food Levies	Sea Fisheries; Food and Drink	DEFRA
12-Jan-15	Employment	Welfare	DWP
08-Jan-15	Business	Business Directorate	BIS
08-Jan-15	Culture	Culture and Historic Environment	DCMS
23-Dec-14	Tribunals	Tribunals Policy	MoJ
19-Dec-14	Taxation	Financial Strategy	HMT
18-Dec-14	Fiscal Framework	Fiscal Responsibility	HMT
18-Dec-14	Welfare	Welfare	DWP
18-Dec-14	Energy	Energy Markets Unit	DECC
17-Dec-14	Crown Estate	Marine Scotland	HMT
17-Dec-14	Equalities	Equality, Human Rights and Third Sector	Government Equalities Office
16-Dec-14	Transport	Transport Scotland	DfT
16-Dec-14	Constitution	Elections and Constitution	Cabinet Office
15-Dec-14	Elections	Elections and Constitution	Elections Team

Non Legislative Discussions

25 Mar tbc	Medicines pricing, supply and regulation	Pharmacy and Medicines	HO
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13-Mar-15	Follow up teleconference to 23 Jan v/c.	Migration Strategy	HO
12-Feb-15	Abortion Embryology Surrogacy Genetics Xenotransplantation	Public Health	DH
30-Jan-15	Health and Safety	Public Health	
23-Jan-15	Post Study Work Human Trafficking Asylum	Migration Strategy	HO

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LEGACY 2014
XX COMMONWEALTH GAMES
GLASGOW 2014

16th February 2015

Dear Mr Willott

INTER-GOVERNMENTAL RELATIONS IN THE UNITED KINGDOM

Thank you for the opportunity to speak to the House of Lords Constitution Committee by video-conference on Wednesday 28 January.

It is unfortunate that technical difficulties meant the session had to be abandoned. However, as agreed with Lord Lang in our subsequent conversation, I am happy to provide this written submission, setting out on the attached pages, Scottish Ministers' views on the questions prepared in advance by the Committee.

I would also like to take this opportunity to confirm, as I mentioned at the time, that my officials have been working on a document showing examples where inter-governmental relations have worked well and not so well and I expect to be able to share that with the Committee before this enquiry is completed.

Kind regards
Fiona Hyslop

FIONA HYSLOP

INTER-GOVERNMENTAL RELATIONS IN THE UNITED KINGDOM

General

1. From your perspective, what is the purpose of inter-governmental relations in the UK?

The purpose of inter-governmental relations should be to facilitate the smooth operation of government for the benefit of the people in each part of the UK.

Good inter-governmental machinery should be effective whatever the political make up of the 4 member administrations and should not depend on the goodwill (or otherwise) of individuals. To be effective, it needs to be based on 'parity of esteem', and mutual respect and trust. The UK Government and devolved administrations are equals in their areas of competence, and this should be recognised in the level of respect between them.

Good inter-governmental relations should enable us to be proactive (or at the very least, prompt) in identifying and addressing issues of joint interest or potential difference at the earliest possible stage. This should include involvement in policy development in reserved areas which will impact on devolved areas, whether directly or indirectly (and there is a growing interdependence of reserved and devolved issues post-Smith), including through changes to budgets. Early involvement would potentially allow the Scottish Government, using its greater knowledge of Scottish circumstances, to flag any unintended consequences of UK policy at a stage where it could be taken into account. It should therefore result in more workable and effective policy.

Better inter-governmental relations should also facilitate the development of greater flexibility in policy implementation as envisaged by Lord the Smith. In his evidence to the Devolution (Further Powers) Committee of the Scottish Parliament on 2 December he said:

Where common cause is made—on Europe, or on energy policy in relation to fuel poverty or energy efficiency - we should say, "Hey, is Scotland a wee bit different in this area?" and listen to the Scottish voice instead of having a one-size-fits-all policy. You know which areas I am talking about - for example, there is a different type of fuel poverty in Scotland.¹

There is no reason why reserved policy could not vary in different parts of the UK to take account of local circumstances, or conversely why devolved administrations could not implement similar policies wherever appropriate. The advantages of this approach are discussed further in the Scottish Government's paper *More Powers for the Scottish Parliament* published on 10 October 2014 (see pages 6 -7).²

2. What would be the advantages and disadvantages of inter-governmental relations being put on a statutory basis?

The advantages are obvious. The MOU and overarching concordats set out a number of sound principles including on timely sharing of information, consultation, allowing devolved Ministers to speak in the Council of Europe and so on. However there is currently no mechanism to enforce this, so the UK Government (not exclusively, but mainly) can, and does, choose to ignore these principles when it decides. It is not unusual for SG to be given extremely short notice in which to consider draft UK legislation making it difficult for any response to be taken into account.

¹ <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=9663#.VH3ORdJSiz4>

² <http://www.scotland.gov.uk/Resource/0046/00460563.pdf>

Following the UK decision to veto EU treaty changes designed to save the euro in December 2011, the Scottish FM and the Welsh FM wrote jointly to the Prime Minister requesting a JMC Plenary be convened as set out in the MOU on the grounds of "mutual feeling regarding the exclusion of the devolved administrations from policy development and decision making" on European matters, many of which are devolved. The letter stated: *"As you know, given the potentially serious impact of using the UK veto, we remain deeply concerned that the UK government did so without consulting the devolved administrations"*. The meeting did not happen despite the fact that under the MOU the UK Government cannot refuse such a request and that the MOU sets out the timescales in which this should happen.

In addition, some form of statutory underpinning of elements of the machinery or of the dispute protocol might be useful in preventing an administration from, for example, blocking attempts at dispute resolution through inactivity etc.

The disadvantages are also obvious. Given the breadth of engagement and potential overlap between the UK Government and the Scottish Government's areas of interest, and the asymmetrical nature of the devolution settlements in each of the devolved administrations, putting the inter-governmental machinery on a statutory basis could prove cumbersome, prescriptive and difficult (and potentially both costly and time-consuming) to enforce. Statutory underpinning in itself cannot provide the necessary approach and values which are essential to effective inter-governmental relations. These behaviours are more effectively instilled by good practice than statute.

It is not clear that there would be effective remedies for breaches of the statutory framework. We would not want to see regular recourse to the Supreme Court about inter-governmental relations in the way that the UK Government has repeatedly referred proposed draft Welsh Government legislation. The principles espoused in the current MOU and underpinning machinery allow for the application of a degree of common sense and good practice, rather than a legalistic approach.

Joint Ministerial Committee and bilateral relations

3. Is the Joint Ministerial Committee a useful forum for inter-governmental relations in the UK?

- Are you able to raise issues of concern?
- To what extent is the JMC a vehicle for co-operation, rather than dispute resolution or 'grandstanding'?

The current format means that the agendas for JMC Plenary and Domestic meetings are agreed by the JMC Joint Secretariat with each administration consulting its own Ministers on possible topics. The asymmetrical nature of the devolution settlements mean that some topics are not suitable for quadrilateral discussion and any one administration (again, not exclusively, but mainly the UK) can prevent discussion on a specific topic. The UK Government in recent years has sometimes chosen not to expose topics to discussion at JMC until their policy position – and often draft legislation – has been finalised. This of course means that the views of the DAs cannot readily be taken into account.

In theory, the 'current issues' section which remains a standing item on the agenda of meetings in both Plenary and Domestic format provides the opportunity for each administration to raise issues of concern. In practice, lack of time can make this opportunity less useful, since the UK Government is generally unwilling or unable to schedule more than 60-90 minutes for each meeting and there is often no time left for 'current issues'. Providing additional time might also provide the opportunity for proper discussion rather than simply statement of contrary positions.

The Scottish Government has certainly benefitted in the past from this opportunity for Ministers to raise issues directly with their UK counterparts without the issue being filtered through official government machinery (particularly since some Whitehall officials frequently lack an understanding of the position in Scotland). This has, on occasion, led to resolution of an issue.

4. What practical steps could be made to improve the JMC system, or should it be replaced by a different arrangement entirely?

- **Could the JMC Domestic committee, or sub-committees of it, be the vehicle for multilateral co-operation in domestic policy-making?**

The JMC Plenary meeting on 15 December 2014 instructed officials from the JMC Joint Secretariat to review the Memorandum of Understanding, and develop proposals for its improvement. This is now being taken forward, with the next step being a workshop involving officials from all 4 member administrations in Edinburgh on 27 February.

Given the differing devolution settlements, the level of possible multilateral co-operation will depend entirely on the issues being discussed, but this would be the same whatever the forum. Any new structure, such as JMC sub-committees should be flexible enough to allow bilateral, trilateral and quadrilateral formats, where appropriate. Section 30(1)(a) of the Smith report, which recommends new governance arrangements to oversee the implementation and operation of the tax and welfare powers to be devolved, reflects the need for strengthened bilateral mechanisms.

Practical improvements might also be made by rotating the chair and the location of the meeting in the way that the British-Irish Council does and by increasing the duration of the meeting where necessary.

5. Are there any specific changes you feel will be necessary following the devolution of the powers proposed by the Smith Commission?

- **Should the bilateral Joint Exchequer Committees be made a permanent fixture alongside the Finance Ministers' Quadrilateral meetings?**

The Smith report is clear at paragraph 95 that the Scottish and UK Governments should work via the Joint Exchequer Committee (JEC), which was established to oversee implementation of the Scotland Act 2012, to agree a revised fiscal and funding framework. However, Smith made clear that inter-governmental machinery required to be reformed and scaled up significantly to reflect the scope of the arrangements to be agreed between the two governments. These arrangements will need to include oversight of the financial implications arising from the devolution of the welfare powers as well as additional fiscal responsibilities. In this respect the relationship between JEC and the newly established Joint Ministerial Working Group on Welfare will need to be considered.

Turning specifically to JEC, the Committee may be aware of the difficulties both governments faced in agreeing the block grant adjustment for the devolved taxes. As Smith noted in his report, it will be important that, going forward, there are mechanisms in place to resolve disputes in a timely and constructive fashion. The Exchequer Secretary to the Treasury is alternate chair of the JEC, but decisions have been taken to date between the Deputy First Minister and Cabinet Secretary for Finance, Constitution and Economy and the Chief Secretary of the Treasury. We would suggest that one way to improve the effectiveness of the JEC would be for UK membership to be sufficiently senior to ensure decisions can be taken in the course of the meeting.

More generally, we would want to avoid putting in place any formal arrangements which became mechanical in their operation. In relation to the Finance Ministers Quad, business tends to be transacted bilaterally between the devolved administrations and the UK Government, as an issue that affects the Scottish Government may not be a concern for the Northern Ireland Executive. However, these forums can serve a useful purpose where the devolved administrations are seeking a similar discussion or outcome from the UK Government in relation to a particular issue, for example, representations made by all 3 devolved administrations in relation to retaining the budget exchange mechanism.

6. Are bilateral or multilateral relations most effective in the UK?

- **What should be the balance between bilateral and multilateral relations?**

It depends on the issue – some issues have a common resonance across the DAs and are best tackled in a multi-lateral forum. Others are primarily bilateral in nature and should be treated as such. Again this is a product of the asymmetrical nature of devolution in the UK - the nature of which means that most issues require a degree of bilateral working.

- **Should bilateral relations be made more formal?**

Yes, there is a clear need for formal bilateral engagement, but this should be in addition to existing/improved informal relations - not in place of them.

Dealing with Whitehall

7. What has been the experience of your administration in dealing with Whitehall departments?

- **How does your administration seek to ensure that its dealings with UK Government departments are consistent and timely?**

The UK & Ireland Relations Team, which is part of our Directorate for Culture, Europe and External Affairs, encourages all Scottish Government policy officials to liaise with their counterparts and have regular discussions and provide a signposting service to assist in the identification of potential contacts. Its officials deliver presentations to staff on working with the UK Government.

It also operates a system of portfolio managers who liaise with devolution counterparts in Whitehall.

Dealing with Whitehall departments has suffered somewhat from the Cabinet Office decision to discontinue the Devolution Administrations Whitehall Contacts Group, which facilitated such discussions and encouraged a level of understanding of devolved issues in the UK Government.

It is probably fair to say that dealings with Whitehall vary between and sometimes within departments (in both UK and Scottish Governments). It can often come down to the relationships that have been established between policy officials.

8. What do you think the role of the Secretary of State for Scotland should be?

- **What changes would you make to the current role of the Secretary of State?**

The role of the Secretary of State for Scotland is - of course - a matter for the UK Government. However, the reality of inter-governmental relations is that formal mechanisms (including both the JMC and British Irish Council) are delivered effectively by the Cabinet Office. Most policy-specific engagement tends to take place directly between relevant Whitehall departments and their Scottish Government counterparts. In these circumstances, it is not wholly clear to what extent the Scotland Office adds any real value to inter-governmental relations. The risk is in fact that it becomes a bottleneck or constraint on exchanges between the UK and Scottish Governments.

9. **What would be the advantages and disadvantages of having a single UK Government department dealing with inter-governmental relations, with a single Secretary of State?**
- **How would a change to a single department and Secretary of State be perceived in Scotland?**

The Scottish Government's preference remains that we normally raise issues directly with relevant UK departments (where we have often established good working relationships) - and our experience suggests that most UK departments prefer coming direct to relevant parts of the Scottish Government. Where issues arise, the UK & Ireland Relations Team work through the devolution contact for individual departments (and if necessary, via the Cabinet Office).

A single Whitehall department leading on inter-governmental relations would dilute the degree of detailed knowledge and lessen the chances of successful resolution of an issue, increase the risk of creating a bottleneck in Whitehall and would be less effective than the current arrangements.