



House of Commons  
Justice Committee

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# **Devolution: A Decade On**

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**Fifth Report of Session 2008–09**

*Volume I*





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*Volume I*

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The Justice Committee is appointed by the House of Commons to examine the expenditure, administration and policy of the Ministry of Justice and its associated public bodies (including the work of staff provided for the administrative work of courts and tribunals, but excluding consideration of individual cases and appointments, and excluding the work of the Scotland and Wales Offices and of the Advocate General for Scotland); and administration and expenditure of the Attorney General's Office, the Treasury Solicitor's Department, the Crown Prosecution Service and the Serious Fraud Office (but excluding individual cases and appointments and advice given within government by Law Officers).

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## Summary

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Devolution was a major component of the Government's package of proposed constitutional reform for the United Kingdom post 1997. The central purpose of devolution was to bring government closer to the people than had previously been the case under the centralised UK state. In doing so, not only has devolution fundamentally transformed politics within the devolved territories, but, alongside the other components in the programme of constitutional reform, it has also had a significant impact on the make-up and the constitution of the United Kingdom. Fundamental changes in the way Scotland, Wales and Northern Ireland are governed have not been followed by major changes in the way England is governed, except for the creation of the London Mayor and Assembly. Matters which are the responsibility of devolved Parliaments in the rest of the UK, are, in England, determined by the United Kingdom Government and Parliament.

Ten years on from the official opening of the Scottish Parliament and the National Assembly for Wales, we thought it necessary to undertake a review of devolution in order to consider its impact on the United Kingdom and the development of devolution policy since 1999. This report identifies several changes required to improve the current infrastructure and the procedures and practices of governance in the UK after devolution, in order to facilitate the effective and efficient functioning of the asymmetric system of devolution.

Departmental responsibility for overseeing the working of the UK's system of government has been divided and unsettled, and we recommend that a lead department responsible for devolution strategy be identified. Whitehall was not ready for devolution, and, while we welcome the positive steps that have been taken in order to establish and disseminate knowledge, understanding of devolution issues and best practice in dealing with the devolved institutions, performance is still patchy. Identifying a lead department in this way will in no way reduce the need for each Department of State to understand each of the different devolution settlements and to work with the grain of the new arrangements. This will take leadership from the Permanent Secretary in each Department and, while we welcome recent evidence that the Secretary to the Cabinet has taken a lead in developing a more joined-up approach across Whitehall, there are Departments (or silos within Departments) in which devolved issues appear to be completely overlooked.

The political and economic context has changed significantly during the past decade, and we welcome the re-convening of the Joint Ministerial Committee as the most appropriate mechanism for inter-governmental relations. However, there is still more to be done in order to achieve a robust framework for inter-governmental relations. We conclude that this framework, supported by a streamlined centre responsible for devolution policy and strategy across Whitehall, would equip the United Kingdom with a more efficient and effective system for territorial management in the UK post-devolution.

In the second half of the report we identify two significant constitutional and political issues which have been brought into sharp focus since the onset of devolution in 1999: first, the fact that England remains highly centralised under the authority of the UK Government and Parliament, resulting in the "English Question", a phrase which

encapsulates a range of different questions in relation to the governance of England, and, secondly, the increasing concern about the efficacy and application of the Barnett Formula as the means for the allocation of increases and decreases in public funds.

Just as there are many different English questions, there are many potential solutions, each addressing a different dimension of the question, and each has its own problems and limitations. We review these solutions, and conclude that these are major political as well as constitutional questions which are for Parliament as a whole to consider. It is our judgment that Parliament will come under pressure to consider these questions as devolved government develops in profile and substance.

Finally, we conclude that the Barnett Formula is no longer fit for purpose and that reform is overdue. We urge the Government to publish its position as a matter of some urgency and to proceed to devise a new formula which is needs based, takes into account regional disparities in England as well as in Scotland and Wales, is transparent and is sufficiently robust to enable long-term planning.

# 1 Introduction

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## Background

1. Prior to devolution, the United Kingdom was probably the most centralised state in Western Europe, and after devolution England continues to have a high degree of centralisation in its form of government. The constitutional doctrine of the sovereignty of Parliament and the absence of a written constitution has helped to maintain this characteristic, which was vividly illustrated by Parliament's ability to abolish the previous devolved Parliament and Government of Northern Ireland in a matter of days in 1972, in the abolition of the Greater London Council in 1986<sup>1</sup> and in the ability of central government similarly to direct the policies pursued by local authorities.

2. Some have seen a centralised unitary structure as having benefits in a geographically small state, and fear that devolution of power risks breaking up the United Kingdom. Others believe that centralised government is inefficient, unable to respond to Scottish and Welsh senses of national identity or to other differences within the United Kingdom and unable to attract ownership and legitimacy for particular decisions and in the system as a whole. Devolution to Scotland and Wales has changed that system in a way which few now think is reversible; devolution to Northern Ireland and in London is extending the change.

3. This has two very important consequences: first, **the way the United Kingdom is governed has changed and will continue to change because its component parts are now governed by different administrations and in ways which are not uniform: secondly, the system of government for England, which remains relatively centralised under the management of the United Kingdom Government and the legislative authority of the United Kingdom Parliament, is at least called into question, and, in the view of a significant proportion of our witnesses, in need of fundamental change. There is no consensus on what change should be made to the system of government for England, but every major political party has put forward or is considering change in this area, with hardly anyone arguing for no change at all.**

4. In summary, the system of government of the United Kingdom as a whole has changed irreversibly from that of an undifferentiated unitary state, and will continue to adapt to the changes already made; and the way in which England is currently governed may be unsustainable in this changed system.

## Our inquiry

5. It was not the purpose of our inquiry to consider the effectiveness or otherwise of the devolved institutions. Ten years on from the creation of those institutions in Scotland and Wales, we thought it necessary to undertake a review of devolution in order to consider its impact on the United Kingdom and the development of devolution policy since 1999. In this sense, devolution policy is divisible into two strands: a) the over-arching strategic vision for the future of the United Kingdom's constitution and the development of the

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<sup>1</sup> Metropolitan counties were also abolished at this time.

devolution settlements, and b) the functioning of the existing legislative and administrative framework for the territorial management of the UK.

6. There is some consensus amongst commentators that the key achievement in terms of devolution, from the UK Government's point of view as set out in the 1997 Labour manifesto, has perhaps been accomplished: devolution delivered in Scotland, Wales and now in Northern Ireland. While those settlements continue to evolve, the UK Government appears to have little (if any) strategic vision for the future of the UK as a whole, and such vision is conspicuous by its absence from the *Governance of Britain* green paper.<sup>2</sup> Debates about common British rights and values seem to be an attempt to "hold the UK together", and most debates start from the premise that the Kingdom should remain united.<sup>3</sup> Indeed this is a point of principle and the starting point for debate for many supporters of devolution. This principle, which has not usually been accompanied by an explicit vision for the future of the United Kingdom's constitution after devolution, has a wide range of consequences and implications for any discussion of the impact of devolution on the United Kingdom. Not least of these is the Government's seemingly ad hoc, and often reactive, approach to the necessary administrative, legislative and structural arrangements for the UK post-devolution.

7. It seems perfectly valid to devolve specific powers and responsibilities to different jurisdictions and leave them to get on with it. This is the purpose of devolution. The risk is that subsequent developments will take unforeseen turns and throw up problems and difficulties from a UK perspective. Any strategic vision must be based on mutual respect of devolved authority, national sensitivities and an understanding of cross border issues,<sup>4</sup> but there is also a need for a forum or process for open and transparent debate and agreement on the direction and means of travel if not on a fixed destination.

8. Given the Government's approach to devolution, we identified outstanding issues that remain to be addressed in order to provide a coherent set of arrangements for the governance of the United Kingdom. In doing so, our inquiry focused on two key questions:

a) what changes (if any) are required to improve the current infrastructure and the procedures and practices of governance in the UK post-devolution. We examined the mechanisms, structures and frameworks that have been put in place at a UK level in order to facilitate the effective and efficient functioning of the asymmetric system of devolution that was introduced to the United Kingdom in 1999, for example, the co-ordination of relationships between administrations and the smooth running of the legislative process.

b) what outstanding constitutional and political issues have arisen after 1999 as a result of devolution, which have an impact or a potential impact on the governance of the UK as a

2 Ministry of Justice, *Governance of Britain*, Cm 7170, July 2007

3 Professor Vernon Bogdanor, *In Search of British Values*, Prospect Magazine, Issue 139, October 2007. See also Robert Hazell, *Towards a New Constitutional Settlement: An Agenda for Gordon Brown's First 100 Days and Beyond*, June 2007, p.10

4 The nature and sensitivity of such issues have, for example, been illustrated by the work of the Welsh Affairs Select Committee on the provision of cross-border services for Wales. To date the Committee has reported on The Provision of cross-border health services for Wales (Sixth Report, Session 2007-08, HC 870, and Fifth Report, Session 2008-09, HC 56) and Cross-border provision of public services for Wales: Further and higher education (First Report, Session 2008-09, HC 57). The Committee is also currently conducting an inquiry into Cross-border provision of public services for Wales: Transport.

whole. We identified two major issues: the “English Question” (or the England outside London question), described by Rt Hon Sir Malcolm Rifkind MP as “the unfinished business of devolution,”<sup>5</sup> and the issue of public finance and the continued use of the Barnett Formula as the basis for the allocation of public finance in the UK post-devolution, which excites particular interest in some of the English regions as well as in Wales and Scotland. Professor James Mitchell, Head of the Department of Government, University of Strathclyde, told us that while devolution resolved “one problem of legitimacy” in Scotland and Wales, it “has created a series of others, the English Question, the West Lothian Question, the question of Barnett and finance ... in a sense we have shifted the problem around within the UK”.<sup>6</sup>

9. We took oral evidence over an extended period between November 2007 and July 2008. Apart from those sessions that took place in Westminster, we also travelled to Edinburgh, Cardiff and Newcastle for formal oral evidence sessions. We are grateful to all those who gave oral and written evidence to our inquiry for their contributions.

## Asymmetric devolution in the UK

10. The UK has an asymmetric model of devolution, a model which in the words of the Ministry of Justice “catered for specific demands for new democratic institutions in those parts of the UK (Scotland, Wales and Northern Ireland), while maintaining the sovereignty of the UK Parliament in Westminster”.<sup>7</sup> The differing settlements not only reflect the differences in the historical and institutional background of Scotland, Wales and Northern Ireland, but have also had a key impact in the way in which devolution and devolved politics had developed in each of those places.<sup>8</sup>

11. On 11 September 1997, 74.3% of voters in Scotland voted in a referendum in favour of the Government’s proposals for a Scottish Parliament.<sup>9</sup> A week later, the people of Wales also endorsed Government proposals for the creation of a National Assembly for Wales, but by a majority of only 6,721 votes. In part, these different results reflected historical and institutional differences in the two countries prior to 1997, for example:

- Since the Act of Union in 1707, Scotland retained a separate legal, educational and institutional identity.
- In 1979, the majority of Scots who voted in the devolution referendum had voted in favour (it was not put into effect because of the 40% threshold, which essentially meant that not voting counted as a no vote). In the Welsh devolution referendum of 1979, devolution was rejected by a majority of 4-1 against the Government’s proposals.

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5 Rt Hon Sir Malcolm Rifkind MP, Speech to the Centre for Policy Studies in London on 23 April 2008, *The Unfinished Business of Devolution: answering the West Lothian Question*, [www.cps.org.uk](http://www.cps.org.uk)

6 Q 261

7 Ev 223

8 See Annex A for a more detailed chronology of the key developments in the history of devolution between 1997 and 2008.

9 *An Introduction to devolution in the UK*, Research Paper 03/84, House of Commons Library, November 2003

- During the 1980s the momentum for devolution grew in Scotland, and a Constitutional Convention involving political parties, religious leaders and the organizations of civil society was established. There had been no comparable process or Constitutional Convention in Wales.<sup>10</sup>

Thus, while the then leader of the Labour party, John Smith, described devolution as the “settled will” of the Scottish people,<sup>11</sup> this was not the case in Wales.

12. The Scotland Act 1998 established a Scottish Parliament with primary legislative powers over all aspects of Scottish life and society other than those reserved for the UK Parliament: primarily defence and foreign policy, the pension and benefit systems and economic policy. The Act gave the Scottish Parliament the right to vary income tax by up to three pence in the pound although, to date, no Scottish Government has sought to make use of this right.

13. The Wales Act 1998 created a sixty-member corporate body (National Assembly for Wales) with secondary law-making powers in areas of Welsh life and society specifically prescribed in the Act and in the Transfer of Functions Order. The shortcomings of the initial arrangements in which the Assembly, including the Administration, constituted as a single body corporate, were widely acknowledged, most notably in the Richard Commission Report published in 2004.<sup>12</sup> In 2006, a second measure was passed, the Government of Wales Act 2006, which reformed the corporate body and established the more executive style of devolution i.e. a Cabinet (now described as the Welsh Assembly Government) and an Assembly in statute. The Act increased the law-making powers of the National Assembly for Wales by giving the Assembly framework powers and the right to pass Assembly measures. The Act also made provision for the possibility of a future referendum on full law-making powers (subject to the approval of both Houses of Parliament).<sup>13</sup>

14. To date, no major Party has proposed an English Parliament equivalent to the devolved institutions in the other UK nations. However, there were some expectations reflected in some political party manifestos that devolution to Wales would be closely followed by devolution to the English regions.<sup>14</sup> The Government’s plans for England in 1997 created the opportunity for each region of England to vote in a referendum for the creation of an elected regional assembly for that region. This led to the first and only referendum on regional devolution in the North East in 2004 when the proposition was rejected decisively. The only devolved institution introduced in England has been the Greater London Authority (GLA).<sup>15</sup> On 8 May 1998 a referendum was held on proposals for a form of devolved government in London. 72% of those who voted in the referendum voted in

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10 For more information see: Paterson, Lindsay and Wyn Jones, Richard (1999), ‘Does Civil Society Drive Constitutional Change?’ in Taylor, Bridget and Thomson, Katarina (eds.), *Scotland and Wales: Nations Again*, (Cardiff: University of Wales Press), pp. 169-198

11 See [news.bbc.co.uk/1/hi/uk\\_politics/341284.stm](http://news.bbc.co.uk/1/hi/uk_politics/341284.stm)

12 *An Introduction to devolution in the UK*, Research Paper 03/84, House of Commons Library, November 2003

13 Government of Wales Act 2006

14 Available at [www.bbc.co.uk/election97/background/manlab/labman.html](http://www.bbc.co.uk/election97/background/manlab/labman.html) and [www.libparty.demon.co.uk/ge97/contside.htm](http://www.libparty.demon.co.uk/ge97/contside.htm)

15 Economic and Social Research Council, *Devolution and Constitutional Change Programme: Final Report*, March 2006, [www.devolution.ac.uk/final\\_report.htm](http://www.devolution.ac.uk/final_report.htm)

favour of the creation of the Greater London Authority, with a Mayor for London and a 25 member Assembly.<sup>16</sup> This is significant because London's population at 7.45 million people is well in excess of the population of Scotland (5.2 million) and Wales (2.98 million).<sup>17</sup>

## London

15. The Greater London Authority (GLA) is a unique form of strategic citywide government for London. It is made up of a directly elected Mayor (who has an executive role) and a separately elected Assembly (which has a scrutiny role). The Mayor leads the preparation of statutory strategies on: transport, spatial development, economic development and the environment. Furthermore, the Mayor sets the budgets for: the Greater London Authority, Transport for London, the London Development Agency, the Metropolitan Police and London's fire services. The total budget amounted to £4.7 billion in 2002/03. This had increased to over £10 billion by 2007/08.

16. The Assembly scrutinises the Mayor's activities, questioning the Mayor about his decisions. Based on a two-thirds majority of Assembly Members they are also able to amend the Mayor's budgets. The Assembly is also able to investigate other issues, including transport, policing, fire and emergency planning, economic development, planning, culture, the environment and health. It publishes its findings and recommendations, and makes proposals to the Mayor.<sup>18</sup>

17. On 23 October 2007 the Greater London Authority (GLA) Act received Royal Assent and came into law.<sup>19</sup> The Act gave the Mayor and the London Assembly considerable additional powers, in particular, it gave the Mayor new lead roles in housing and tackling climate change, strengthened powers over planning and waste, and enhanced powers in health and culture. Martin Burch, Alan Harding and James Rees (Constitution Unit, UCL) concluded that:

“Overall the Act greatly strengthens the power of the Mayor and significantly extends the leading role in elected ‘regional’ governance that London institutions, alone among the English regions, have been granted since 2000. It strengthens the ability of the London region to order its own affairs and to lobby more effectively in key national policy making processes. If lobbying and influence are matters of proximity, which to some extent they are, then London is doubly favoured since the key policy networks are located in the metropolis. Some argue that the GLA is no more than a glorified local council. Yet clearly it is far more than that. It covers a large population, the Mayor controls a budget of £10.6bn (up from £3.8bn in 2001/2002) and the mayoralty is the biggest and most important directly elected sub-national office in the UK.”<sup>20</sup>

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16 Turnout was 34%, [http://news.bbc.co.uk/1/hi/special\\_report/1998/london\\_referendum/89327.stm](http://news.bbc.co.uk/1/hi/special_report/1998/london_referendum/89327.stm)

17 [www.london.gov.uk/gla/publications/factsandfigures/DMAG-briefing2009-02-round-projections.pdf](http://www.london.gov.uk/gla/publications/factsandfigures/DMAG-briefing2009-02-round-projections.pdf), [news.bbc.co.uk/1/hi/scotland/8022277.stm](http://news.bbc.co.uk/1/hi/scotland/8022277.stm) [wales.gov.uk/topics/statistics/headlines/pop2009/hdw200903262/?lang=en](http://wales.gov.uk/topics/statistics/headlines/pop2009/hdw200903262/?lang=en)

18 Greater London Authority Act 1999 and Explanatory Notes

19 Office of Public Sector Information, Greater London Authority Act 2007, [www.opsi.gov.uk/acts/acts2007/ukpga\\_20070024\\_en\\_1](http://www.opsi.gov.uk/acts/acts2007/ukpga_20070024_en_1)

20 The Constitution Unit, *Devolution Monitoring Report for the English Regions*, January 2008

## Northern Ireland

18. While devolution to Northern Ireland is part of the asymmetric devolution arrangement for the United Kingdom, the process of devolution in Northern Ireland is inextricably bound up with the peace process, and problems with this have led to the Assembly and Executive being suspended four times, most recently in October 2002.<sup>21</sup> The Northern Ireland Assembly was re-convened in 2007.

19. When functioning, the Northern Ireland Assembly can pass primary and delegated legislation in those areas which are transferred. The UK Parliament legislates in “excepted” and “reserved” areas. “Excepted” subjects will remain with the UK Parliament unless the Northern Ireland Act 1998 is amended. “Reserved” subjects could be transferred by Order at a later date if there is cross-community consent. This triple division of areas is unique to Northern Ireland devolution.<sup>22</sup> While there are lessons that can be learnt from the experience of devolution in Northern Ireland when considering the broader impact of devolution on the UK, the specific circumstances in Northern Ireland add a level of complexity to this analysis. For this reason, while many of our conclusions extend to Northern Ireland, for example, relating to the Joint Ministerial Committee and public finance, we did not consider the specific arrangements for devolution in Northern Ireland during our inquiry.

## The changing context

20. While constitutionally devolution in Scotland and Wales could be reversed by the UK Parliament, it is now accepted by all of the major political parties and by the majority of the public across the United Kingdom. Devolution therefore represents a permanent change to the way the UK is governed. However, devolution is a dynamic process, and ten years on, the institutional and political context within the devolved territories and throughout the UK has changed. Most notably, since the elections to the Scottish Parliament and National Assembly for Wales held in May 2007, there are Governments of different political compositions in London, Edinburgh and Cardiff. (An SNP minority administration was formed in Scotland following the May 2007 elections, while in Wales the Labour Party formed an Executive in coalition with Plaid Cymru).

21. Furthermore, at the time of writing, reviews were being undertaken in both Scotland and Wales to consider the possible devolution of further powers to the Scottish Parliament and to the National Assembly for Wales respectively. Professor Robert Hazell, Director, Constitution Unit, University College London, has argued that the establishment of a SNP government in Edinburgh has opened the question of amendments to the Scottish devolution settlement.<sup>23</sup> The Scottish Government sees that the further development of the constitutional settlement, whether to move to independence or to further devolution to the Scottish Parliament, as an issue that needed to be addressed.<sup>24</sup>

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21 [www.niassembly.gov.uk/io/summary/new\\_summary.htm](http://www.niassembly.gov.uk/io/summary/new_summary.htm)

22 *An Introduction to devolution in the UK*, Research Paper 03/84, House of Commons Library, November 2003, p 3

23 Robert Haxell, *Towards a New Constitutional Settlement: An Agenda for Gordon Brown's First 100 Days and Beyond*, (Constitution Unit, UCL), June 2007, page 26

24 Ev 232

22. Following a debate in the Scottish Parliament on 6 December 2007, Wendy Alexander MSP, the then leader of the Labour party in Scotland, launched the *Commission on Scottish Devolution*. The United Kingdom Government signalled its support for the Commission on 25 March 2008 when it was formally announced by the then Secretary of State for Scotland, Rt Hon Des Browne MP.<sup>25</sup> The primary aims of the Commission are:

- To ensure that any proposals for constitutional developments that affect Scotland are fully debated and decided in Scotland;
- To examine how the proposals of the Power Inquiry<sup>26</sup> for more participative governance could be implemented in Scotland;
- To clarify the constitutional implications of various forms of relationship with the other countries of the UK; and,
- To prepare the broad outline of a draft Constitution for Scotland.<sup>27</sup>

23. On 17 February 2008 the Prime Minister, Rt Hon Gordon Brown MP, said there was a “very strong case” for a review after ten years of devolution and that one of the questions to be addressed would be the Scottish Parliament’s use of tax raising powers. However, he also said that the review was not a “one way street” and some powers could be returned to Westminster.<sup>28</sup> Sir Kenneth Calman was appointed to chair the *Commission on Scottish Devolution* on 25 March 2008.<sup>29</sup>

24. The SNP did not sign up to the Commission, as they had already published a consultation *Choosing Scotland’s Future: A National Conversation: Independence and Responsibility in the Modern World* on 14 August 2007.<sup>30</sup> In that paper, it outlined what they described as three “realistic choices” for Scotland’s future. These are described as:

“First, retention of the devolution scheme defined by the Scotland Act 1998, with the possibility of further evolution in powers, extending these individually as occasion arises. Second, redesigning devolution by adopting a specific range of extensions to the current powers of the Scottish Parliament and Scottish Government, possibly involving fiscal autonomy, but short of progress to full independence. Third, which the Scottish Government favours, extending the powers of the Scottish Parliament and Scottish Government to the point of independence”.<sup>31</sup>

25. The Scottish Government argued that the structure of the Scotland Act 1998, and the history of the development of the settlement by the devolved Scottish administration and the United Kingdom Government since devolution, “clearly shows that the boundaries of

25 HC Deb, 25 March 2008, cc 7-8 WS

26 The Power Inquiry was set up in 2004 to explore how political participation and involvement can be increased and deepened in Britain. For more information see <http://www.powerinquiry.org>

27 [www.constitutionalcommission.org](http://www.constitutionalcommission.org)

28 [newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/1/hi/scotland/7249002](http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/1/hi/scotland/7249002)

29 [www.commissiononscottishdevolution.org.uk/about/index.php](http://www.commissiononscottishdevolution.org.uk/about/index.php)

30 [www.scotland.gov.uk/Publications/2007/08/13103747/0](http://www.scotland.gov.uk/Publications/2007/08/13103747/0)

31 [www.scotland.gov.uk/Publications/2007/0813103747/2](http://www.scotland.gov.uk/Publications/2007/0813103747/2)

current devolved responsibilities are matters which the Scottish Government and Parliament can and should consider”.<sup>32</sup> Furthermore, it suggested that “Scottish independence and, to some extent perhaps, full fiscal autonomy could, in practice, address many of the concerns that have been expressed” in relation to the English question and the governance of England.<sup>33</sup>

26. In Wales, devolution has been regarded by many as “a process, not an event”.<sup>34</sup> Indeed, as outlined above, less than 9 years after the Government of Wales Act 1998, a second measure was passed: the Government of Wales Act 2006. This brought about a process by which law-making powers can be transferred without primary legislation.<sup>35</sup> The current Labour / Plaid Cymru Government in Cardiff is committed to conducting a referendum on full law-making powers by 2011. They said:

“There will be a joint commitment to use the Government of Wales Act 2006 provisions to the full under Part III and to proceed to a successful outcome of a referendum for full law-making powers under Part IV as soon as practicable, at or before the end of the Assembly term”.<sup>36</sup>

27. An All-Wales Convention was launched by the Welsh Assembly Government on 6 May 2008. An interim report was published on 24 March 2009,<sup>37</sup> with a final report on the likelihood of getting full law-making powers for the National Assembly for Wales expected to be completed by the end of 2009.<sup>38</sup>

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32 Ev 235

33 Ev 232

34 Ron Davies, *Devolution: A Process Not an Event*, The Gregynog Papers, 2 (2), Cardiff: Institute of Welsh Affairs, (1990) pp.9-12

35 For more information on changing the Assembly's legislative competence by 'framework' provisions in Parliamentary Bills see [www.justice.gov.uk/guidance/docs/dgn09.pdf](http://www.justice.gov.uk/guidance/docs/dgn09.pdf)

36 *One Wales—A progressive agenda for the government of Wales: An agreement between the Labour and Plaid Cymru Groups in the National Assembly 27th June 2007*

37 [www.devolutionwales.com/news/news/10487.html](http://www.devolutionwales.com/news/news/10487.html)

38 [www.devolutionwales.com/news/news/10487.html](http://www.devolutionwales.com/news/news/10487.html)

## 2 Devolution and the Centre

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28. The creation of new devolved administrations in Scotland, Wales and Northern Ireland transformed the governance of those parts of the United Kingdom. However, the changes also had a significant impact on the UK Government in Whitehall. Whitehall's response to devolution has two dimensions:

- Changes in existing Whitehall departments in terms of the re-alignment of policy functions;
- Changes at the very centre of government in terms of the territorial management of the United Kingdom.

29. Immediately after 1999, the machinery of government in Whitehall remained largely the same, and overall responsibility for devolution strategy, and for the co-ordination of business relating to it, initially rested with the Cabinet Office.<sup>39</sup> However, on 12 June 2003 the then Prime Minister announced a number of machinery of government changes. These included the merger of the Scotland Office, together with the Lord Chancellor's Department and the Wales Office, into a new Department for Constitutional Affairs. Following the creation of the new department, the resources and other assets of the Scotland Office and Wales Office formally transferred to the new department, although accountability is still to the territorial Secretary of State. The Scotland and Wales Offices enjoy a high degree of autonomy despite coming under the Ministry of Justice for "pay and rations".<sup>40</sup> Responsibility for devolution strategy (which had, in 2002 been moved to the Office of the Deputy Prime Minister) was also transferred.<sup>41</sup> Dr Jim Gallagher was appointed as Director General for devolution in September 2007.

30. Rt Hon Des Browne MP, then Secretary of State for Scotland, told the Committee that "the MOJ has overall responsibility for constitutional matters and constitutional reform and that is just a logical place for devolved administrations to be".<sup>42</sup> However, Alan Trench, Honorary Senior Research Fellow, the Constitution Unit, University College London, said that while this arrangement was "working well," the machinery of government changes of 2003 were "a missed opportunity for ensuring better overall co-ordination within the UK Government".<sup>43</sup>

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39 Ev 146

40 The costs of both Offices as well as the provision for the expenditure for the devolved authorities in Scotland and Wales form a separate, ring fenced, element of the MoJ estimate. Policy responsibility for payment of the grant to the Scottish and Welsh administrations remains with the Secretary of State for Scotland and Secretary of State for Wales respectively. A range of corporate services, for example staffing, finance and office services are provided as part of the Ministry of Justice. This change does not affect the separate accountability of the Offices to their respective Ministers. The Head of the Scotland Office and the Head of the Wales Office were appointed in 2003 by HM Treasury as Additional Accounting Officers. Details of the role and responsibilities as Additional Accounting Officer have been set out in a Memorandum of Understanding agreed with the Principal Accounting Officer for the Ministry of Justice.

41 Ev 147; Following further machinery of government changes, the DCA became the Ministry of Justice on 9 May 2007.

42 Q 55

43 Ev 181; The arrangements for the co-ordination of inter-governmental relations, and the machinery of inter-governmental relations remained the responsibility of the Cabinet Office.

31. Across central government as a whole, responsibility for different aspects of what could be considered as devolution issues is currently located in five separate government departments: the Ministry of Justice, the Scotland and Wales Offices, the Cabinet Office and the Department for Communities and Local Government.<sup>44</sup> The Ministry of Justice explained: “responsibility for devolution strategy now sits in the Ministry of Justice, which works closely with the Scotland, Wales and Northern Ireland Offices and the Cabinet Office, which has a co-ordinating role”.<sup>45</sup> While Sir Gus O’Donnell, Cabinet Secretary and Head of the Home Civil Service, described a “strengthening of capacity in parts of Whitehall dealing with devolution”,<sup>46</sup> several academics believe that this distribution of responsibility for different aspects of devolution policy has resulted in a “missing centre”<sup>47</sup> or a “hollow centre” at the heart of government when it comes to strategic aspects of devolution.<sup>48</sup>

32. Immediately after devolution in 1999, most Government departments had made arrangements for the management of devolution matters, including setting up devolution or constitution desks or teams. These sought to co-ordinate the department's actions in matters involving devolved administrations, help prepare bilateral or departmental concordats, and generally to provide internal advice.<sup>49</sup> These teams were generally dismantled after 2001 (they survive in the Foreign and Commonwealth Office and Ministry of Defence). While a network of departmental devolution contacts remains, the initial focus on devolution matters no longer exists in Whitehall. In principle, devolution is considered to have been mainstreamed across departments,<sup>50</sup> but it is highly questionable whether that has happened in practice.

33. The response to devolution, both from within government departments and from the centre of government has therefore been described as “limited and low key”.<sup>51</sup> In this chapter we examine the arrangements at the centre of government for the territorial management of the UK post-devolution. We also consider Whitehall’s response to devolution.

## Devolution in Whitehall

34. Dr Gallagher, Director General of Devolution, Ministry of Justice, indicated that there were three aspects to the work of central government in relation to devolution and to the devolved administrations:

- first, responsibility for devolution policy and strategy, which is primarily the work of the Ministry of Justice;

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44 If regional policy in England is included.

45 Ev 226

46 Ev 148

47 Ev 220

48 Ev 182

49 Ev 180

50 Ev 180

51 Ev 180

- second, the co-ordination of government business on devolution and the management of business between the administrations (including the arrangements for inter-governmental relations);
- third the management of the individual settlements, for which the lead responsibility lies with the territorial Secretary of State and his or her Department.<sup>52</sup>

### **The Ministry of Justice**

35. Dr Gallagher described the UK Government's first area of responsibility for devolution as "the strategy in relation to devolution which is pretty closely linked into the Government's approach to the Constitution as a whole". The Secretary of State for Justice and Lord Chancellor is responsible for constitutional policy and devolution strategy.<sup>53</sup> Rt Hon Jack Straw MP, Secretary of State for Justice and Lord Chancellor, told the Committee that he was involved in "issues about overall policy in respect of devolution".<sup>54</sup> He has also chaired the over arching Joint Ministerial Committee, and added that while he had "a lot to do day by day with the territorial Secretaries of State" he did not "look for work in this area" any more than he looked "for work in other areas".<sup>55</sup>

36. Beyond the above description, the precise role of the Ministry of Justice in developing "strategy in relation to devolution" remains unclear. For example, on 3 July 2007 the Government published a Green Paper entitled *The Governance of Britain*.<sup>56</sup> In his statement to the House of Commons on the same day, the Prime Minister, Rt Hon Gordon Brown MP, introduced these proposals as addressing the need for a "new constitutional settlement that entrusts more power to Parliament and the British people".<sup>57</sup> However, this major statement outlining the Government's new constitutional settlement made no mention of a strategic direction in relation to devolution. Professor Robert Hazell has argued that "it has been difficult for it (the Ministry of Justice) to carve out a meaningful role, alongside the territorial departments with their operational responsibilities".<sup>58</sup>

37. There has also been criticism of the Ministry of Justice for not ensuring that its own legislative team and agencies fully understand the devolution arrangements. This led to Wales being omitted from a provision in England and Wales legislation as a result of a failure to fully consult the Wales Office and the Secretary of State for Wales. The Government had to introduce a last-minute amendment at a late stage in the House of Lords after the issue was raised by members of both Houses.<sup>59</sup> The Welsh Affairs Select

52 Q 648. The first two areas of responsibility are discussed immediately below, while the roles of the Secretaries of State are outlined in paras 42-67.

53 Q 648

54 Q 650

55 Q 650

56 Ministry of Justice, *Governance of Britain*, Cm 7170, July 2007

57 HC Deb, 3 July 2007, col 815

58 Robert Hazell, *Towards a New Constitutional Settlement: An Agenda for Gordon Brown's First 100 Days and Beyond* (Constitution Unit: UCL)

59 The Criminal Justice and Immigration Bill 2008 contained provisions designed to protect NHS staff and Ministry officials appear to have become confused. While the management of the NHS is devolved, criminal justice issues are not, and so provision for Wales had to be made within the Bill.

Committee published a report criticising the Legal Services Commission's failures in a similar regard. Lord Bach, Parliamentary under Secretary of State, Ministry of Justice, acknowledged the failings in the process and required the Commission to re-visit the issues.<sup>60</sup> These examples illustrate the fact that a full understanding of the devolution settlement has not yet become part of the DNA of the Department that has overall responsibility for devolution policy, let alone Departments that have less contact with the issues.

### **The Cabinet Office**

38. The second area of responsibility was described as “the co-ordination of government business and indeed the co-ordination of business in relation to each of the devolved administrations and all of them together and that is what the Cabinet Office does; it both co-ordinates inter-departmental work inside the Government and it is also responsible for servicing the joint ministerial committees with the devolved administrations”.<sup>61</sup>

39. The Cabinet Office lost its role in relation to devolution when its Constitution Secretariat was formally wound up in 2001. Some of the officials involved in the Constitution Secretariat continued to provide overall co-ordination (and acted as secretariat for the Joint Ministerial Committee), first within the Office of the Deputy Prime Minister and later within the Department for Constitutional Affairs, but that role has shrunk so that it now takes relatively little time and gets relatively little official or ministerial attention. (In May 2006, the Ministerial Committee on Devolution Policy was wound up, and its functions subsumed within the broader Constitutional Affairs Committee.)<sup>62</sup> However, in more recent months, the role of the Cabinet Office has changed again.

### **Creating the 'missing' centre?**

40. Professor Robert Hazell described the arrangements for the co-ordination of government business relating to devolution and for devolution policy and strategy at the centre of government as being “not yet ideal”.<sup>63</sup> Professor Michael Keating, Head of Department of Political and Social Science, European University Institute Florence and Professor of Scottish Politics, University of Aberdeen, explained that “at both ministerial level and in terms of bureaucratic organisation ... no-one is able to take a view of the territorial make-up of the UK as a whole and of the constitutional and policy issues that affect it. Instead, territorial issues are approached in a fragmented way that focuses on bilateral concerns and issues (Scotland-UK, Wales-UK, Northern Ireland-UK), not UK-wide matters. This fits with a more general approach to devolution as a set of ad hoc pragmatic responses, lacking any broader focus on territorial management”.<sup>64</sup> Rt Hon Jack McConnell MSP, former First Minister (2001–2007), Scottish Government, identified “the

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60 Welsh Affairs Select Committee, Seventh Report of Session 2008-09, *Legal Services Commission's Cardiff Office*, HC 374

61 Q 648 and Ev 148

62 Ev 181

63 Q 31

64 Ev 182

most serious issue for the UK ... is the response of wider UK institutions ... including government and the civil service ... to the way in which the UK has changed. The UK has changed dramatically and that change has not been reflected in the way in which UK institutions carry out their duties”.<sup>65</sup>

41. In order to provide this broader focus, the House of Lords Constitution Committee, in its 2003 Report *Devolution: Inter-Institutional Relations*, recommended the creation of a “department of the nations and regions” to embrace relations with Scotland and Wales, the English regional agenda, and perhaps eventually Northern Ireland matters too”.<sup>66</sup> Alan Trench wrote that this recommendation appeared to “confer significant advantages, and will provide the capacity for greater co-ordination”.<sup>67</sup>

## The Secretaries of State

42. Professor Robert Hazell, has also suggested that responsibility for devolution should rest within a single department.<sup>68</sup> This department would also include a “merger of the three territorial departments,” which, in his view, “would create stronger capacity to look ahead, to understand the dynamics of devolution, the read-across from one devolution settlement to the rest, and the implications of devolution for the rest of the constitutional reform programme”.<sup>69</sup> He told the Committee:

“I would like there no longer to be three separate territorial Secretaries of State. They are part of the pre-devolution structure and post-devolution I do not think Scotland, Wales or Northern Ireland need any longer to have a privileged position in Cabinet through having designated Secretaries of State to represent their voice and interests because that voice and interests is now strongly represented through the devolved institutions. So over time I would like to see the merger of those Secretaries of State ... To the extent that these interests do need to be represented, I think they should be represented in the Cabinet Office as a part of the central secretariat supporting the inter-governmental machinery”.<sup>70</sup>

43. Rt Hon Lord Steel of Aikwood, former Presiding Officer of the Scottish Parliament, said that he thought it would have been a “tidy arrangement” to have a Cabinet minister for the UK with a junior minister under him for each of: Scotland, Wales and Northern Ireland.<sup>71</sup> He described this as the “logical consequences of creating devolution all round”.<sup>72</sup> Rt Hon Jack McConnell MSP said that before May 2007 he had thought that “such an

65 Q 504

66 House of Lords Select Committee on the Constitution, Second Report of Session 2002-03, *Devolution: Inter Institutional Relations in United Kingdom*, HL 28, para. 67

67 Ev 182

68 Robert Hazell, *Towards a New Constitutional Settlement: An Agenda for Gordon Brown's First 100 Days and Beyond* (Constitution Unit: UCL), p.27

69 Robert Hazell, *Towards a New constitutional Settlement: An Agenda for Gordon Brown's First 100 Days and Beyond* (Constitution Unit: UCL), p.19

70 Q32 and Q33

71 Q 458

72 Q 458

arrangement was inevitable”.<sup>73</sup> However, given that the change had not been made he thought that it made sense to “continue the discussions that have begun about how best to get the right level of co-ordination between the administrations before anybody makes dramatic changes to the Cabinet structure”.<sup>74</sup> While machinery of government changes involving the Cabinet Office and the Ministry of Justice in relation to devolution policy and the co-ordination of business in relation to devolution would be relatively uncontroversial, any proposed merger of the Secretaries of State raises broader political and functional issues.

44. Central to these proposals for reform to the machinery of government are the suggestion that the separate territorial Secretaries of State should be merged or abolished. The third area of central Government responsibilities in relation to devolution is to carry out functions in relation to the individual devolved administrations. This role is undertaken by the Secretaries of State for Scotland, Wales and Northern Ireland, each of whom has other UK Ministerial responsibilities and is therefore “part-time”. While some commentators see this as a sign that the positions are no longer significant, others see considerable benefits in retaining a dedicated Cabinet-level champion for each nation, a role which they can exercise in addition to their other responsibilities.

### **Scotland**

45. The Scotland Office is the Department which manages the UK Government’s role in the Scottish Devolution Settlement and undertakes a number of statutory and other functions under that settlement.

#### ***Scotland Office: Aims and Objectives 2007/08***

- to ensure that Scotland’s interests in relation to reserved areas are known and represented within the UK Government.
- to fulfil all requirements in relation to UK Government and Parliament activities concerning Scotland and in relation to constitutional functions under the Scotland Act.
- to handle all financial matters timeously and with propriety – including payments to the Scottish Consolidated Fund.

46. The function of the Scotland Office is not set out in the Scotland Act or the Memorandum of Understanding, but is explained in the Devolution Guidance Note 3, *The Role of the Secretary of State for Scotland*:

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73 Q 509

74 Q 508

“The Scotland Office ... advises on all reserved matters of home, social, industrial and economic policy for its actual or potential impact on Scotland. It is also responsible for the executive role exercised by the Secretary of State on elections to the Scottish Parliament and the operation of the Boundary Commission for Scotland in its work on reviewing Parliamentary constituency boundaries. The interests of parliamentary and constitutional division include the operation of the devolution settlement, the UK legislative programme, relations with committees of the UK Parliament and the Office’s interest in civil contingency planning. The office also has a finance and administration division. The Scotland Office works closely with the office of the Solicitor to the Advocate General, which provides legal services relating to Scotland to the Government”.<sup>75</sup>

Dr Gallagher noted that, in addition, the Scotland Office has a task to do in the management of the settlement itself. He explained “they have orders to make and they have constitutional machinery to maintain”.<sup>76</sup>

47. Rt Hon Des Browne MP, the then Secretary of State for Scotland, reiterated that the role of the Secretary of State “is fundamentally to promote the devolution settlement and act as the guardian of it here in Westminster”.<sup>77</sup> However, Nicola Sturgeon MSP, Deputy First Minister (SNP), Scottish Government, argued that “almost ten years on, I think it is time to look again at the role of the Scotland Office and the Secretary of State. A critical examination would probably lead everybody to the view that its time has been and gone”.<sup>78</sup> She continued, “I think the Secretary of State for Scotland and, indeed, the Scotland Office is of a past era. Perhaps in 1999 the role was more obvious and more necessary. I do not think there is a case for retaining the Scotland Office and the Secretary of State for Scotland as separate entities”.<sup>79</sup>

48. A number of witnesses outlined the changing, and in many ways, declining role of the Secretary of State for Scotland during the past ten years. This was particularly noted in the context of the development and maturing bilateral relationships between the Scottish and UK governments. In oral evidence to the Scottish Affairs Committee on 4 July 2006, the then Secretary of State for Scotland, Rt Hon Douglas Alexander MP, stated that “increasingly, under my predecessor as well, there is very effective co-ordination bilaterally between Whitehall departments and the Scottish Executive ...”.<sup>80</sup> Similarly, in oral evidence to the Scottish Affairs Committee on 17 July 2007, the then Secretary of State for Scotland, Rt Hon Des Browne MP, said that communication between Scottish Government ministers and UK ministers had “grown up over the eight years that we have had devolution” and that “bilateral and multilateral communication was regular”.<sup>81</sup> Rt Hon Jack

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75 [www.justice.gov.uk/guidance/devolutionguidancenotes.htm](http://www.justice.gov.uk/guidance/devolutionguidancenotes.htm)

76 Q 652

77 Q 47

78 Q 288

79 Q 288

80 Oral evidence taken before the Scottish Affairs Committee on 4 July 2006, HC (2005-06) 1440-i, Q 55 [Rt Hon Douglas Alexander MP]

81 Oral evidence taken before the Scottish Affairs Committee on 17 July 2007, HC (2006-07) 943-i, Q 3 [Rt Hon Des Browne MP]

McConnell MSP, former First Minister of the Scottish Government, described those bilateral relationships as “far more important” and “far more productive” than they would have been if we they had to “deal with everything simply through a Secretary of State for Scotland”.<sup>82</sup> We agree that the quality of bilateral relationships is crucial but were unable to judge whether the quality of such relationships would be as positive without the ‘back-stop’ of the Secretary of State.

49. Nicola Sturgeon MSP, said that this maturing bilateral communication was also having an impact on policy issues. She argued that Scotland’s voice would be best served by the Scottish Government working directly in devolved areas and reserved areas.<sup>83</sup> Furthermore, in terms of legislation, Bruce Crawford MSP, Minister for Parliamentary Business, (SNP), Scottish Government, argued that the UK Cabinet’s Legislation Committee would be a more appropriate place “for me to be engaged and a lot more effectively in terms of discharging business ... It would remove a bit of the communication line that exists and allow a lot more discussion directly to the heart of Government”.<sup>84</sup>

50. Sir John Elvidge KCB, Permanent Secretary, Scottish Government, indicated that “as the strength of bilateral contacts has grown, and ... as I have been able to re-establish the strength and frequency of contact at permanent secretary level, gradually the role of the Scotland Office has moved to different territory. I do not think of them as the key interlocutors in making contact work”. However, he added that “they do play a part ... in helping avoid that problem of oversight by Whitehall colleagues”.<sup>85</sup> Bruce Crawford MSP, concluded that this strengthening of bilateral relations at both the political and official level meant that “the need for the Scotland Office is fast disappearing over the horizon”.<sup>86</sup>

51. Rt Hon Des Browne MP disagreed. He stated that “this is part of the way in which this settlement which has led the United Kingdom is preserved, it is part of its history and I am very much in favour of it. Our exclusive province is not to represent Westminster policy to the Scottish Executive or to the people of Scotland ... Scotland is still part of the United Kingdom and the United Kingdom and the United Kingdom’s ministers’ powers still run in Scotland in the reserved areas unencumbered and in some of the devolved areas there is shared responsibility”.<sup>87</sup>

## **Wales**

52. From 1 July 1999 most of the functions of the Secretary of State for Wales transferred to the National Assembly for Wales. The Secretary of State for Wales retained responsibility to act “as guardian of the devolution settlement in Wales; ensure that the interests of Wales are fully taken into account by the UK Government in making decisions which will have effect in Wales; represents the UK Government in Wales; and (to) oversee the progress

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82 Q 505

83 Q 289

84 Q 232

85 Q 226

86 Q 240

87 Q 59

through Parliament of primary legislation making separate provision for Wales”.<sup>88</sup> Given the different nature of the devolution settlements, the role of the three Secretaries of State is also different. In particular, the Secretary of State for Wales has specific functions, outlined in the Government of Wales Act 2006, in relation to Welsh legislation.<sup>89</sup>

### *Wales Office: Aims and Objectives*

#### Aim

To support the Secretary of State in representing Wales in the UK Government, representing the UK Government in Wales, and ensuring that the new constitutional settlement for Wales operates smoothly and effectively.

#### Objectives

- to maintain and improve the devolution settlement.
- to maintain effective working relationships with the National Assembly for Wales and Welsh Assembly Government.
- to represent Welsh interests in the wider world.
- to secure, develop and manage effectively and efficiently the resources needed to deliver previous objectives.<sup>90</sup>

53. Devolution Guidance Note 4, *The Role of the Secretary of State for Wales*, states that:

“This does not mean that the Secretary of State is a sole channel of communication between the UK Government and the Assembly. Normally Departments should deal with the Assembly direct, on the advice of the Secretary of State. The Secretary of State and his Department will: give advice on the handling of business in the light of devolution; act as honest broker should there be any dispute between the Assembly and Whitehall or Westminster; explain the nature and consequences of devolution to the Assembly on behalf of the UK Government”.<sup>91</sup>

54. Rt Hon Paul Murphy MP, Secretary of State for Wales, described his office as part of the package of devolution measures approved by the people of Wales in the 1997 referendum. He described it as an “integral part of the devolution settlement ... which included the position of the Secretary of State for Wales, enshrined as it, as few others are,

88 Wales Office Annual Report 2007, Cm 7110, 10 May 2007

89 See also para 54 and para 143

90 Wales Office Annual Report 2007, Cm 7110, 10 May 2007, pp 26-27

91 Devolution Guidance Note 4. Updated November 2005, [www.justice.gov.uk/guidance/devolutionguidancenotes.htm](http://www.justice.gov.uk/guidance/devolutionguidancenotes.htm)

in legislation by name”.<sup>92</sup> He continued: “I am convinced that the job is part of the settlement and is an important part of it”.<sup>93</sup>

55. Mr Murphy MP defined this role as “a personal one, it is about relationships ... as smooth as it possibly could be between Cardiff and London”. He continued “it is representing Welsh interests within the Cabinet of the United Kingdom, it is representing Wales and its interests throughout all the Whitehall departments, but it is also representing the United Kingdom Government in Wales too”.<sup>94</sup> He particularly emphasised his role in relation to legislating for Wales, which had changed as a result of the Government of Wales Act 2006.<sup>95</sup>

56. Rt Hon Rhodri Morgan AM, First Minister, Welsh Assembly Government, agreed that the Secretary of State clearly has “got a function on the legislative side ... he has a clear function on the funding side as well ... there is a constitutional duty on the Secretary of State for Wales to get involved in the funding process as well as the legislative process”.<sup>96</sup> However, he said that the role was “much more open when it involves the bilateral contact on, say, Welfare to Work ... where you might want the assistance of the Prime Minister where you would not go through the Secretary of State for Wales”.<sup>97</sup>

57. While some of the functions of the Secretary of State for Wales have been criticised, the continuation of the role of the Secretary of State for Wales has not been questioned to the same extent as that of his Scottish counterpart.<sup>98</sup> However it is clear that the role of the Wales Office and the role of the Secretary of State for Wales – as well as the work of the Welsh Assembly Government and the Members, committees and officials of the Assembly – need to be better understood at every level within every Department of Government and its agencies. Making sure that happens is primarily a responsibility of each Permanent Secretary and of the Agency Chief Executives.

### *The merger of the Secretaries of State?*

58. Rt Hon Des Browne MP told the Committee that the Secretaries of State had a wider function than acting as a point of communication and administering the respective devolution settlements. He said, “I think it is being seen to be important for the people of Scotland, Wales and Northern Ireland and that they are represented at the UK level by a Secretary of State”.<sup>99</sup> Professor Charlie Jeffery, Director, ESRC Devolution and Constitutional Change Programme 2001–06, agreed that “there may be a sense of loss of voice for Wales or Scotland or Northern Ireland through the loss of a Secretary of State”.<sup>100</sup>

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92 Q 86

93 Q 86

94 Q 86

95 Q 87 See also para 54

96 Q 633

97 Q 633

98 See para 47

99 Q 62

100 Q 36

59. However, he continued that this reform could be considered as a broader package of changes: “if we move to a more systematic pattern of inter-governmental relations, including meetings of the Joint Ministerial Committee at Prime Minister/First Minister level, there is going to be a different route, and arguably a route more fitting for the current circumstances, for representing Welsh, Scottish and Northern Irish interests at the centre. I think one goes with the other. It is a balancing effect”.<sup>101</sup> Bruce Crawford MSP agreed that there was no doubt that Scotland “needs a voice at the centre of government in terms of the way it discharges business,” but also agreed that said this was an issue that needed to be looked at “in the whole” as to whether there were other mechanisms by which Scotland could be better represented at the heart of Government.<sup>102</sup>

60. Rt Hon Paul Murphy MP concluded that there was a very important need to “monitor issues around the machinery of government in relation to the way in which devolution policy and strategy, the administration of business and the functions of the Secretaries of State are dealt with within central Government”.<sup>103</sup> While Rt Hon Jack Straw MP, Secretary of State for Justice and Lord Chancellor, emphasised that machinery of government changes are for the Prime Minister, he added that “there have been suggestions around that [the merger of the Secretaries of State] could happen and it may or may not be the case that such an arrangement will be decided on in the future”.<sup>104</sup>

61. Professor Michael Keating, however, warned that any machinery of Government changes to improve co-ordination within Whitehall could result in a move to build or strengthen the missing centre, which would most likely result in some form of re-centralisation and the imposition of limits on policy divergence. He said:

“This does not, however, imply stronger mechanisms for policy co-ordination. Nor does it imply building up the missing centre or imposing limits to divergence. Given the disparity in size, power and resources between Whitehall and the devolved territories, any such effort could only mean re-centralisation and Whitehall dominance. The ‘centre’ would in fact be formed by English departments and policy co-ordination would be on their terms. Devolution is about allowing policy divergence and a healthy competition among governments to innovate and respond to challenges. Experience from other countries shows that co-ordination mechanisms or framework laws defining the limits of divergence are used as a mechanism for re-centralisation. Devolved systems of policy making are still in their infancy and need room to develop freely. Incorporating them back into UK-wide policy systems would undermine the dynamic of devolution. Other federal and devolved systems have recently tended to reform by disentangling responsibilities and encouraging policy autonomy”.<sup>105</sup>

62. Instead, he identified a need for two things: first, a system to highlight when decisions taken in one jurisdiction impinge on the responsibilities of another. Examples might be

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101 Q 36

102 Q 238

103 Q 99

104 Q 651

105 Ev 220

decisions on tuition fees, or the consequences for attendance allowances of the decision on free personal care for the elderly in Scotland. In these cases, a forum should exist for resolving the resulting conflicts. Second, a system for diffusing ideas about innovation from one territory to another. This does not need to be formalized and could operate at various levels: the political, the administrative and the academic.<sup>106</sup>

63. During the ten years experience of devolved government, departmental responsibility for overseeing the working of the system has been divided and unsettled. It has involved the Cabinet Office, 10 Downing Street, the Ministry of Justice, the former Department for Constitutional Affairs, the former Office of the Deputy Prime Minister, and the Scotland, Wales and Northern Ireland Offices, the first two of which are nominally attached to the Ministry of Justice. It is a normal feature of devolution that it will be the individual functional departments which have relationships with their counterpart departments in devolved administrations. What is lacking is any one department which is clearly charged with taking a holistic view of the infrastructure of government across the United Kingdom and the constitutional and policy issues involved. This role basically belongs to the department with lead responsibility for the constitution, which is the Ministry of Justice, and we recommend that the lead responsibility should be clearly recognised and developed.

64. The object of clarifying where responsibility for the system of devolution lies is to maintain the coherence of the system as a whole and deal with the constitutional issues which arise, not to inhibit or replace bilateral relationships between Whitehall departments and devolved administrations, and not to recentralise UK Government in contravention of the purpose of devolution.

65. Many have questioned whether it is justified for those parts of the United Kingdom which have devolved government, and only those parts, to have individual Secretaries of State in the Cabinet. As relationships between the administrations mature, the role of the Secretary of State for Scotland has clearly decreased, and the question of the continued separate existence of that office must be raised. However, the Government of Wales Act 2006 gave the Secretary of State for Wales a role in legislating for Wales. This process is still relatively new and bedding down, and any proposals for fundamental change to the role of the Secretary of State would have to take this into consideration.

66. Nevertheless, the fact that the Scottish and Welsh Secretaries are now “part time”, combining the post with UK departmental responsibilities, illustrates that the reality of change has been accepted, and it is significant that many of the arguments in favour of retaining the positions are essentially political, focusing on either perceived advantages in a territory of having a “champion” in the Cabinet, or the potential political disadvantages of abolishing the position. It is clear that the role of the territorial Secretaries of State has changed beyond recognition and that it is not likely to remain central to the functioning of devolved government or to seem consistent with the logic of devolution. The direction of travel may well be towards a single Constitutional Minister with lead responsibility for the functioning of the system of devolved

**government, building on the work currently exercised by the Secretary of State for Wales who chairs the revived Joint Ministerial Committee on devolution.**

67. A belief in the importance of having a ‘ministerial champion’ had led the Government to create a system of part-time regional ministers to act as champions of each English region within the UK Government. This shows that there are alternative ways which can be considered for incorporating a role of “champion” for areas of the country within the UK government structures. Unlike the territorial Secretaries of State, the regional ministers are not all in the Cabinet, although Rt Hon Nick Brown MP is currently the Government Chief Whip and the Regional Minister for the North East of England. It is too early to judge the effectiveness or otherwise of these arrangements. If this innovation is continued it is one which may provide a replacement model for the champion role of the territorial Secretaries of State.

## **The Civil Service**

### ***Whitehall***

68. The response to devolution within Whitehall departments was mixed. Rt Hon Paul Murphy MP, Secretary of State for Wales, told us that “in the late 1990s Whitehall was not really ready for devolution in the way that it should have been and there was sometimes a constant battle with Whitehall departments to get them to understand the significance of what was happening in Cardiff and Edinburgh ... to understand and appreciate that sometimes, even in the same party, that they might be going down different roads”.<sup>107</sup> Mike German AM, then Leader of the Liberal Democrats in the National Assembly for Wales, agreed and questioned “the preparedness of the Whitehall civil service to accept the role that government has to play here in Wales and the role that the Assembly plays ... there are questions to be asked about the way in which the civil service recognised what devolution has provided here in Wales for us”.<sup>108</sup>

69. Professor Jeffery identified “waves of sensitivity” in both the awareness and handling of devolution within different Whitehall departments.<sup>109</sup> Professor Hazell said that in the early days of devolution “different Whitehall departments were more sensitised to devolution in different ways ... there were some that were notoriously insensitive ... the DTI was one and the DETR, as was, was another. Those were both pretty hostile to devolution in Whitehall ...”.<sup>110</sup> John Osmond, Director of the Institute of Welsh Affairs, echoed this sentiment, and suggested that there were still issues to be addressed in terms of Whitehall’s handling of devolution: “The experience so far is that different Whitehall Ministries have met the need to deal with Wales related matters in variable ways, to some extent dependent on whether their functions are capable of being devolved to Wales or not. So for example, the Department of Education has been relatively relaxed about the transfer of framework

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107 Q 99

108 Q 614

109 Q 37

110 Q 37

powers to the Assembly. On the other hand, the Home Office, before its division, tended not to involve the Assembly readily in Welsh matters that arose in non-devolved fields”.<sup>111</sup>

70. Professor Hazell argued that this situation was made possible because “there was no strong centre that could tell the Whitehall departments how to come to terms with devolution”.<sup>112</sup> Professor Jeffery argued that the problem lies at the civil service training level, in a failure to “mainstream devolution sensitivities right from the outset for all civil servants”.<sup>113</sup> While we have concluded that there is a need for a single strategic lead department we are equally convinced that devolution cannot be separated off into a single silo of government or into a simple set of ‘devolution issues’. Understanding of devolution is vital in the work of every Whitehall Department to a greater or lesser extent.<sup>114</sup>

71. Sir Gus O’Donnell, Cabinet Secretary and Head of the Home Civil Service, outlined continuing efforts to raise awareness of devolution issues throughout Whitehall:

- First, there had been a strengthening of capacity in parts of Whitehall dealing with devolution, the Scotland and Wales Office, the part of the Ministry of Justice dealing with devolution and the Cabinet Office, as outlined previously.
- Second, a new emphasis had also been given to the efforts that have continued over the years to remind the civil service of the implications of devolution for their work, and the sensitivities associated with it. For example, there had been a road show touring departments to increase awareness and capability.
- Third, had been a renewed emphasis on the dissemination of key messages to civil servants to maintain the fullest contact and cooperation. Sir Gus O’Donnell acknowledged that “ensuring that happens sensitively and promptly will be a key challenge for the Cabinet Office and all in central government”.<sup>115</sup>

72. However, while Rt Hon Des Browne MP, identified a “heightened awareness across Government ... they have to take into account the possibility that the fact that some powers are devolved to Scotland may be of relevance to the development of that policy”,<sup>116</sup> Sir John Elvidge KCB, Permanent Secretary to the Scottish Government, identified that there was a “risk that Scotland, Wales and Northern Ireland will be overlooked” by officials in Whitehall when developing policy. He continued “I am frequently the boy at the back of the class putting up his hand and saying “please sir, there is another dimension to this”.<sup>117</sup> Law Reform agreed “there may be some issues about maintaining the Scottish profile in some Whitehall departments”.<sup>118</sup> MPs have reflected similar experiences with Whitehall departments.

111 Ev 200

112 Q 37

113 Q 37

114 This has been highlighted by the Welsh Affairs Select Committee’s reports on the provision of cross-border services for Wales. For full list see reference number 4.

115 Ev 148

116 Q 57

117 Q 255

118 Ev 201

73. This problem has been highlighted by the Welsh Affairs Select Committee<sup>119</sup> and several organizations noted similar concerns. The Welsh Consumer Council cited “evidence of Whitehall departments failing to appreciate the realities of devolution and the continued need to consult with organizations in Wales over policies that had UK-wide implications”.<sup>120</sup> While acknowledging that “the situation had improved” it claimed that there were “parts of Whitehall who still regularly forget”.<sup>121</sup> Public Affairs Cymru cited the example of the Government White Paper *Trust, Assurance and Safety: The Regulation of Health Professionals in the 21st Century*. They explained that the paper “applies to regulation in all parts of the UK but was written by the Chief Medical Officer for England and it is widely accepted that the way the suggestions for future regulation could be applied in Wales, Northern Ireland and Scotland were very much an afterthought”.<sup>122</sup> The Wales Council for Voluntary Action went further and suggested that in some cases it is apparent that officials in Whitehall departments “simply do not know whether their policies apply to devolved areas or not”.<sup>123</sup>

74. Public Affairs Cymru argued that there needs to be “closer working between departments with partially devolved / shared remits in order to ensure that the voices of the Welsh public are heard ... this would also help ensure that policy development, developed in Whitehall, applicable to the whole UK is fit for purpose in the three devolved administrations”.<sup>124</sup> The Wales Council for Voluntary Action suggested that each Whitehall department with non-devolved functions should establish a statutory committee for Wales in order to “keep the interface with devolved policy arrangements under review”.<sup>125</sup> Tom Jones, former member of the Richard Commission, suggested that “there has to be a form on Wales proofing similar to the rural proofing that new government policies are expected to undertake”.<sup>126</sup>

**75. While it is clear that the awareness of devolution in Whitehall has improved since the onset of devolution in 1999, there is no doubt that there is still a considerable way to go in achieving consistent and effective practices in dealing with devolution issues across all Whitehall departments. This should not only involve a full and comprehensive understanding of the policy areas that have been devolved to Scotland and Wales, but also full appreciation and consultation so that Welsh and Scottish interests are taken into account in policy making in reserved or non-devolved areas which will have an impact on the UK as a whole.**

**76. We agree that best practice should be mainstreamed across Whitehall, and devolution awareness should form a core part of the training for all senior civil servants. While this is crucially important in relation to senior civil servants it is also important that a good understanding of the constitutional settlement(s) should reach**

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119 For example see para 37

120 Ev 244

121 Ev 244

122 Ev 229

123 Ev 243, see also para 37

124 Ev 229

125 Ev 243-244

126 Ev 238

**the front line of every department and agency of government. It is an issue for those engaged in delivery as well as those concerned with policy. We acknowledge the improvements that have been made in this area, but recognise that the performance remains patchy and that both good and bad practice remain.**

### ***The future of the home Civil Service***

77. On 25 March 2008 the Government published a White Paper entitled *The Governance of Britain—Constitutional Renewal*.<sup>127</sup> It included recommendations to put the Civil Service Commission on a statutory footing.<sup>128</sup> Paragraphs 179 and 181 outlined the arrangements for consultation and communication with the First Ministers in Scotland and Wales, who would be expected to lay copies of the Civil Service Commission Annual Report before the Scottish Parliament and National Assembly for Wales respectively. Most notably, the accompanying draft Constitutional Renewal Bill requires the Minister for the Civil Service to publish separate codes of conduct for civil servants who serve the Scottish Government or the Welsh Assembly Government.<sup>129</sup>

78. Dr Hugh Rawlings, Director, Constitutional Affairs, Equality and Communication, Welsh Assembly Government, explained that the Bill “set out in statutory form that which is already provided for under prerogative powers.” He continued “we already have a separate Welsh code under prerogative powers ... it reminds [civil servants] that their accountability in the first instance is to Ministers of the Welsh Assembly Government and not to the UK Government. In terms of the substance ... civil service values and that sort of thing...they are exactly the same”.<sup>130</sup> Dr Gallagher concurred: “the Code is single and the same in content at present ... the suggestion was that there might be the capacity to make different Codes which made it explicit that their loyalties were owed to different ministers, but that the content of these codes would be uniform”.<sup>131</sup> Rt Hon Jack Straw MP, was relaxed about the existence of the separate codes and asked whether changing the number of Codes to one would be “worth a candle, particularly where you would not produce any substantive change and it might arouse sensitivities”.<sup>132</sup>

79. Northern Ireland is unique among the devolved administrations in having a separate civil service. Sir John Elvidge explained that the current Scottish Government’s policy is that there should be “the development of a separate and distinct Scottish Civil Service”.<sup>133</sup> Rt Hon Des Browne MP disagreed with this policy and argued that “we have a unified civil service that goes all the way into Scotland and that is an enormous advantage because officials talk to each other all the time”.<sup>134</sup> Sir John explained that whether or not there was a unified or separate civil service in Scotland, there would continue to be “strong channels

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127 Ministry of Justice, *The Governance of Britain—Constitutional Renewal*, Cm 7342-I, March 2008

128 Ibid, Para 175

129 Ibid, Para 187

130 Q 640

131 Q 654

132 Q 655

133 Q 220

134 Q 57

of mutual learning between the different administrations”.<sup>135</sup> In practice, it is not at all clear that being part of the unified civil service has led to greater interchange between civil servants in the Scottish administration and Whitehall departments.

### **Secondments and shared learning**

80. Sir John Elvidge argued in favour of “strong links”<sup>136</sup> between the three administrations. While he identified a “step change in the use of secondments since devolution”,<sup>137</sup> most of these were with local authorities, organizations like the NHS and third sector organizations within Scotland. He could not “off the top of his head” think of secondments with the UK Government or with the other two devolved administrations, and identified a “practical reason for that”—for example, geographical distance.<sup>138</sup> Rt Hon Jack McConnell MSP identified “less of that interchange taking place” over the past eight years.<sup>139</sup> Sir John was keen to emphasise that this did not imply that there was not “cross-fertilization,”<sup>140</sup> but acknowledged that the civil service had not been very good at getting “shared learning working between the devolved administrations and the UK Government.” He suggested that he, Sir Gus and other permanent secretary colleagues were “committed in principle to making that happen”.<sup>141</sup>

81. As a practical means of delivering this, Rt Hon Jack McConnell MSP suggested that “young, ambitious, able civil servants should get experience of Whitehall departments, if they want to work in Scotland at a high level...young, ambitious, able civil servants in Whitehall should be made to go to work for one of the devolved administrations for a short time to understand the complexity of the modern United Kingdom”.<sup>142</sup>

### **Civil Service capacity in Wales**

82. Cymru Yfory (*Tomorrow's Wales*) identified a disparity between Whitehall and Cathays Park. They explained:

“Wales’s civil service remains very small and is often unable to pick up the level of policy development on a complex issue. This is particularly true of late, with examples of research on an issue and stakeholder engagement primarily focusing on England and the legislation simply having enabling clauses for Wales. There is no capacity in Wales for the detailed research or discussion that has taken place for England and the timetables for implementation are increasingly behind in Wales. It is anticipated that the situation will likely deteriorate due to the parallel and increased devolution of powers via Acts of Parliament and an increasingly heavy legislative programme at Cardiff Bay”.

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135 Q 220

136 Q 220

137 Q 206

138 Q 216

139 Q 511

140 Qq 216-217

141 Q 220

142 Q 511

They concluded that this “resource deficit leads to legislative deficit”. They continued:

“If Acts appear in Westminster with Welsh enabling clauses yet the capacity does not exist within the Welsh civil service to exercise these devolved powers previous Acts are repealed without provision already having been made in Wales. Often this leaves Wales in the unsatisfactory position of providing delayed and hasty legislation at best, or at worst, providing nothing at all”.<sup>143</sup>

83. Rt Hon Rhodri Morgan AM, First Minister, Welsh Assembly Government, said that since 1999, there had been “a huge increase in the policy-development capability and the preparation of legislation ... If there were such a thing as a University Challenge or an Olympics in capacity of the civil service to serve the needs of ministers in terms of legislation, I would be quite happy to put our team in, relative to the size of Whitehall because you have to make the adjustment that way”.<sup>144</sup>

84. However, Mike German AM, shared some of the concerns expressed around the capacity of the civil service in Wales: “in terms of skills, that is an area that I worry about greatly. I think the idea of having a greater form of exchange between civil servants from both other forms of parts of the public service here in Wales and other parts of the public service in London, is one that should be promoted and extended”.<sup>145</sup> Nick Bourne AM, Leader of the Opposition, Conservative Party, National Assembly for Wales, agreed and identified that a “proper exchange and secondments between the civil service in Wales...and Whitehall”, would help to develop a “first class civil service in Wales”.<sup>146</sup>

**85. Whether there remains a unitary civil service or not within Great Britain, there is an overwhelming case for a more systematic programme of secondments between Whitehall, Cardiff and Edinburgh. This would have several benefits: not only helping to raise awareness of devolution in Whitehall, but also in promoting best practice and shared learning and experiences across all three administrations. Furthermore, it would help to address some of the capacity issues identified in relation to the civil service in Wales.**

**86. We recommend that the Government institute a programme of secondments throughout the United Kingdom, and that fast stream entrants to the civil service should be given the opportunity to spend time working both in Whitehall, and in one or more of the devolved administrations, early in their careers.**

**87. In essence, the same civil service code applies in all jurisdictions with differing specific references to accountability. While there need to be provisions reflecting accountability to different administrations and the need for sensitivity in Whitehall to the different settlements, we believe that it is right that a common Civil Service code should be accepted and observed by all the administrations of Great Britain. The code should be one of the means by which the details and implications of the devolution**

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143 Ev 185

144 Q 643

145 Q 618

146 Q 601

settlements are experienced and promulgated, together with the fundamental principles of public service which are a shared inheritance of the whole of the United Kingdom.

### 3 Inter-governmental Relations

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88. The devolution of responsibilities from UK central Government to new devolved institutions with their own electoral mandates transformed the territorial politics of the UK from a set of relationships between departments of a single UK Government into a set of relationships between different governments. The Memorandum of Understanding and its underpinning Concordats are the basis of inter-governmental relations in the UK following devolution.

89. During our inquiry, we identified a broad consensus that these arrangements were no longer necessarily fit for purpose given the current political and economic climate within the United Kingdom. Bruce Crawford MSP, Minister for Parliamentary Business, Scottish Government, suggested that after almost a decade of devolution, it was necessary to “undertake a review of the Memorandum of Understanding and Concordats”. He continued “the whole thing needs to be done as a package to look at everything properly”.<sup>147</sup> Professor Jeffery described the arrangements as “unfit for purpose”, while Rt Hon Paul Murphy MP agreed that the “machinery constantly needs looking at” because the landscape was “changing all the time”.<sup>148</sup>

#### The framework for inter-governmental relations

90. The *Memorandum of Understanding* set out high-level principles for inter-governmental relations, largely designed to preserve ways of working that had grown up before devolution.<sup>149</sup> It also provided for the Joint Ministerial Committee, an over-arching body to include ministers of the UK Government and ministers of each of the devolved administrations.<sup>150</sup> It is described as “a statement of political intent, and should not be interpreted as a binding agreement ... it does not create legal obligations ... it is intended to be binding in honour only”.<sup>151</sup> It was based on principles of “communication and consultation, co-operation ... exchange of information, statistics and research and confidentiality”.<sup>152</sup>

91. The Memorandum of Understanding also provided for the four administrations to “prepare concordats ... to deal with the handling of procedural, practical or policy matters between them”.<sup>153</sup> Those Concordats were intended to “govern the detailed administrative

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147 Q 239

148 Q 99

149 *Memorandum of Understanding and supplementary agreements between the United Kingdom Government, Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee*, Cm 5240 (London: The Stationery Office, 2001).

150 See also paras 107-117 for a discussion of the role of the Joint Ministerial Committee.

151 Memorandum of Understanding, page 5, available at [www.justice.gov.uk/guidance/mou.htm](http://www.justice.gov.uk/guidance/mou.htm)

152 Ibid, Page 6-7

153 Ibid, Page 5

relationship ... on matters of mutual interest and where the parties have executive functions which overlap or bear on each other”,<sup>154</sup> and largely repeat the principles set out in the Memorandum of Understanding.

92. The Ministry of Justice indicated that neither the Memorandum of Understanding nor the Concordats had been changed significantly since they were established in 1999:<sup>155</sup> “The broad principles set out in departmental Concordats and the Memorandum of Understanding between the UK Government and the devolved administrations have remained consistent, with a strong emphasis on communication and early information sharing”.<sup>156</sup> It added that these structures have been successful: “Over the last eight years the Concordats and the Memorandum of Understanding, and the processes behind these agreements, have been shown to work. These documents act as a useful reference tool to guide departmental interactions with the devolved administrations and continue to provide an important expression of the principles which underpin inter-governmental relations. Those inter-governmental relations remain strong”.<sup>157</sup>

93. Rt Hon Des Browne MP told the Committee: “there is plenty of structure there and, frankly, it works. It is tested on occasions ... it has stood the test of the involvement of different parties in Government here and it works”.<sup>158</sup> Professor James Mitchell, Head of Department of Government, University of Strathclyde, agreed that “inter-governmental relations work very well in the UK between Scotland and London”.<sup>159</sup> Alan Trench described “relations between the UK Government and the devolved administrations as being “remarkably harmonious since 1999”. He explained that there had been no inter-governmental litigation before the Judicial Committee of the Privy Council (and few cases initiated by third parties involving devolution issues), no disputes have been referred to the Joint Ministerial Committee, and that “even behind the scenes there have been relatively few spats”.<sup>160</sup>

### Fit for purpose?

94. There was some disagreement as to how well the structures of inter-governmental relations have worked. While emphasising that his was an external view, Nick Bourne AM, described them as “a bit ad hoc and sometimes ex post facto”. He added that relations could be a “little more cohesive”.<sup>161</sup> Some witnesses also criticised the underpinning documents and the non-transparent nature of relations and the non-statutory nature of the framework for inter-governmental relations.

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154 <http://new.wales.gov.uk/about/concordats/>

155 Although see Q 635 and paras 95-96

156 Ev 225-226

157 Ev 225-226

158 Q 60

159 Q 266

160 Economic and Social Research Council: *Devolution and Constitutional Change Programme: Final Report*, March 2006, [www.devolution.ac.uk/final\\_report.htm](http://www.devolution.ac.uk/final_report.htm)

161 Q 586

### *Out of date?*

95. When asked whether the Concordats worked, Sir John Elvidge responded that it depended what was meant by “worked”. He explained that they had “worked in that almost no-one refers to them as documents. They set a climate of expectation ... they have worked in the sense that they have set the right set of expectations about the standards that the relationship should reach. They do not stop things going wrong ...”<sup>162</sup> Dr Rawlings concurred that “they [the Concordats] are very rarely referred to—certainly not on a daily basis for the conduct of relations”.<sup>163</sup> While Alan Trench claimed that the drafting of the Concordats was a useful exercise between 1998 and 2000, for making Whitehall departments think about how devolution would work and what it would mean for them, he said that since then “they have largely gathered dust”.<sup>164</sup> Sir John Elvidge concurred that “it is an observable fact that there are cobwebs on some of them”.<sup>165</sup> Dr Rawlings told us that in Wales, the Concordats were being updated in light of the 2006 Government of Wales Act.<sup>166</sup>

**96. We welcome the fact that the Concordats between relevant Whitehall Departments and the Welsh Assembly Government are being revised in order to reflect the changes brought about by the Government of Wales Act 2006.**

### *Non-statutory*

97. The informal, non-binding, non-statutory nature of inter-governmental relations has been brought into focus by changes in both the political and economic climate within the UK. Sir John Elvidge reminded the Committee that “we have to reflect on the fact that they were written and tested in one era of political relationships and it is an open question whether they will prove as robust in a changing era of political relationships”.<sup>167</sup> Alan Trench noted that while the arrangements appeared to have survived the differences between governments so far “this would appear to be due more to a combination of particularly favourable circumstances rather than because a robust and effective structure is already in place”.<sup>168</sup>

98. Alan Trench explained that comparative experience suggests that we can expect many more disputes between the UK’s various governments to arise in due course. He explained that the practice of multi-level government in countries such as Spain or Canada typically involves regular and routine differences between governments, “which manifest themselves in political disputes and arguments, large inter-governmental conferences, protracted constitutional debates, and litigation before the highest courts. The absence of many of

162 Q 227

163 Q 635

164 Ev 181

165 Q 228. The exception to this is the British Irish Council which continued to meet regularly in both its plenary and specialist formats, despite the suspension of devolution in Northern Ireland. It was described by Alan Trench as a useful talking shop, belonging more to the “ornamental than the functional part of the constitutional arrangements for the British Isles”. Ev 180

166 Q 635

167 Q 227

168 Ev 180

these features is highly unusual, and the reasons why they have not materialised yet are unlikely to persist for long”.<sup>169</sup> He subsequently thought that it was hard to resist the conclusion that the Memorandum of Understanding was no longer fit for purpose, and that “neither it nor the existing bilateral concordats will be effective instruments when real differences between governments emerge”.<sup>170</sup>

99. Professor Charlie Jeffery agreed. He explained that “the UK’s arrangements for reconciling different territorial interests, inherited from the pre-devolution era and attuned to co-ordination within a single central government, appear unfit for purpose now that they connect governments led by different political parties”.<sup>171</sup> Professor Jeffery claimed that the implications of this new set of inter-governmental relationships were disguised between 1999 and 2007 when the Labour Party led governments at the UK level and in Scotland and Wales (and in which devolution in Northern Ireland was suspended or unstable). There was, it should be noted, significant policy differences between devolved administrations and the UK Government, for example on student tuition fees and free personal care for the elderly. Since the round of devolved elections in Spring 2007 these implications have become clear, especially in “a number of public disputes between the UK and the Scottish Governments”.<sup>172</sup> Rt Hon Lord Steel of Aikwood commented that “we always said the test of devolution would come when there were political differences between the Government at Westminster and the Government in Scotland and that, of course, has now happened”.<sup>173</sup>

100. These mechanisms have not yet been fully tested by the presence of different political administrations, and they have also, until recently, operated within a context of record levels of public expenditure within the United Kingdom. Current economic realities may sharpen different territorial interests, and this has the potential to increase the levels of tension and dispute between governments.<sup>174</sup> Professor Jeffery argued that “arrangements for expressing and reconciling different territorial interests were largely projected forward from the pre-devolution era: collegial problem-solving by civil servants (though these are now responsible to different governments), supplemented where necessary by brokerage by ministers (though these are now members of different governments)”.<sup>175</sup> In these circumstances, the Calman Commission interim report concluded that “we do not think that the lack of use of formal mechanisms for discussion and dispute resolution is sustainable over the years ahead as new challenges emerge”.<sup>176</sup>

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169 Economic and Social Research Council: *Devolution and Constitutional Change Programme: Final Report*, March 2006, [www.devolution.ac.uk/final\\_report.htm](http://www.devolution.ac.uk/final_report.htm)

170 Ev 81

171 Ev 178

172 Ev 178

173 Q 465

174 For example, see recent dispute reported in the media about cutting the size of the budget to the Scottish Parliament and the National Assembly for Wales.

175 Ev 178

176 Commission on Scottish Devolution, *The Future of Scottish Devolution within the Union: A First Report*, December 2008, para 24

### **Non-transparent**

101. Professor Jeffery said that one of the consequences of the lack of a formal structure or mechanisms was “the lack of transparency.” He said: “We really ought to know what positions were brought in to discussions, where the differences lay, because differences are legitimate, and what was done to address them. We just do not know what is happening in our name”.<sup>177</sup> He suggested that this was indicative of a “problematic attitude towards differences of opinion”, which were a “natural condition” of decentralised politics.<sup>178</sup>

102. Rt Hon Des Browne MP acknowledged there was “creative tension” inside the Government at Westminster, but that there was a “convention that we do not surface that disagreement because people concentrate on that”.<sup>179</sup> He added “it does not seem to me necessarily that governance would be improved by having all of this out in the public domain”.<sup>180</sup> However, the point is that these structures facilitate relationships between governments, who may have different legitimate positions, different political mandates, and who are accountable to different parts of the electorate. They are not conversations within a single government, but between separate governments. Rt Hon Jack McConnell MSP identified the need for a “culture change” in Whitehall so that it may “welcome that diversity rather than be threatened by it”.<sup>181</sup>

103. As a result of the problems outlined above, the Scottish Government identified the absence of a proper constitutional structure to allow co-ordination of action in areas of joint interest and an effective means of dealing with the consequential effects of decisions taken in the respective jurisdictions as “one of the major weaknesses of the current devolution arrangement”.<sup>182</sup> They concluded that the time was now right “to review the terms of this framework to ensure they provide a sound footing for formal engagement between the four governments in future”.<sup>183</sup>

**104. We recognise that the structures for the co-ordination of inter-governmental relations designed between 1997 and 1999 grew out of relationships between departments of the same government, rather than between different governments of different party political complexions.**

**105. The system of devolved government, including governments of different political complexions, requires a set of arrangements which provide opportunity for the expression of legitimate political and territorial differences, negotiation, dialogue and dispute resolution. These arrangements also need to facilitate the co-ordination of action in areas of joint interest, the promotion of common interests and good relations and an effective means of dealing with the consequential effects of decisions taken in**

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177 Q 28

178 Ev 178

179 Q 68

180 Q 69

181 Q 516

182 Ev 232

183 Ev 232

the respective jurisdictions. The absence of such a structure is one of the weaknesses of the current devolution settlement.

106. Such arrangements would not in any way detract from the importance of ensuring that there is a need for a proper understanding of the devolution settlement(s) to permeate every aspect of the work of Whitehall departments and their agencies and an equivalent need for understanding and sensitivity within each of the devolved administrations and their agencies.

### Joint Ministerial Committee

107. While the Memorandum of Understanding provided for a Joint Ministerial Committee (JMC), this Committee did not meet in plenary form between 2002 and 2008.<sup>184</sup> Professor Jeffery argued, that as a result “legitimate devolved interests have not been considered adequately by the UK Government because there are no regularised forums of communication which would make the UK Government aware of those concerns”.<sup>185</sup> Professor Hazell called on the Government to “to adopt a more structured approach to inter-governmental communication, in order to defuse disagreements before they deteriorate into open political conflict; to co-ordinate legislative, executive and other action where necessary; and to demonstrate a commitment to building a constructive relationship with all administrations in the UK no matter what parties they comprise”. He identified a pressing need to revive the full JMC machinery (summit meetings, and functional meetings of specialist ministers), and for it to become more transparent and accountable”.<sup>186</sup>

108. Rt Hon Jack McConnell MSP explained that the JMC machinery “did not just wither on the vine; a conscious decision was made to stop the JMCs meeting in order to facilitate and encourage a much stronger bilateral relationship”.<sup>187</sup> However, he recognised that there would be a purpose in some kind of mechanism that allows discussion between all four in a formal committee-type session: “I would not be against the re-establishment of some JMC type format”.<sup>188</sup>

109. The Scottish Government argued that “there is a strong case to reconvene the Joint Ministerial Committee ... not only to review how inter-governmental relations are conducted, but in the context of specific issues of mutual concern”. They suggested therefore that it was “desirable to have a forum to discuss occasions when an administration considers the obligations of the Memorandum or Concordats have been overlooked. The Joint Ministerial Committee, once reconvened, could, as one of its roles, monitor the implementation of the Memorandum of Understanding and Concordats”.<sup>189</sup>

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184 [Cabinetoffice.gov.uk/newsroom](http://Cabinetoffice.gov.uk/newsroom) CAB/065/08

185 Q 26

186 Robert Hazell, *Towards a New constitutional Settlement: An Agenda for Gordon Brown's First 100 Days and Beyond* (Constitution Unit: UCL), p.27. Note that JMC Europe continued to meet frequently during this period.

187 Q 506

188 Q 506

189 Ev 23, para 18-20

110. Rt Hon Alex Salmond MP, MSP, First Minister, Scottish Government, speaking at Westminster on 25 July 2007 said:

“Those joint ministerial committees, certainly in plenary session, have not met since 2002. In terms of the sub-committees, which are part of that process, only one strand of four sub-committees has met over the past five years, and that is the sub-committee on Europe. An arrangement that was brought into being—presumably, because it envisaged a situation in which the same party would not be in government in Westminster as was in government in Scotland or Wales—has fallen into total disrepair. It is important that that instrument, or something like it, is brought back into being very quickly”.<sup>190</sup>

111. The First Minister wrote to the Prime Minister to request formally the reconvening of the Joint Ministerial Committee and made the same proposal to the Secretary of State for Scotland. The Government agreed to reconvene the Joint Ministerial Committee under the chairmanship of Rt Hon Paul Murphy MP, Secretary of State for Wales.<sup>191</sup> A full plenary of the Joint Ministerial Committee was convened on 25 June 2008.

112. The newly re-convened Joint Ministerial Committee has already achieved some success. On 27 November 2008, it was announced that following a plenary meeting of the JMC and further negotiations, an agreement had been reached on a UK wide approach to marine planning. The agreement was based on the further devolution of powers to Scottish and Welsh ministers, which would enable the delivery of a UK Marine and Coastal Access Bill.<sup>192</sup> Ministers from the UK Government welcomed this agreement. Rt Hon Paul Murphy MP said that this “shows that good work can be achieved through the vehicle of the Joint Ministerial Committee”, while Richard Lochhead MSP, Scottish Cabinet Secretary for Rural Affairs and the Environment, said “this is a clear demonstration that the JMC process is working”. Jane Davidson AM, Housing Minister for Wales, wanted to see this “close dialogue continue” and Peter Robinson MP, MLA, First Minister in the Northern Ireland Executive welcomed “the role that the JMC played in reaching this agreement”.<sup>193</sup> The Joint Ministerial Committee (domestic) has since met on 11 March 2009, and the finance ministers of the devolved administrations and the Chief Secretary to the Treasury took part in a quadrilateral meeting on 12 March 2009.<sup>194</sup>

**113. We welcome the re-convening of the Joint Ministerial Committee and note that its usefulness has been demonstrated in securing agreement between the territorial jurisdictions on the UK Marine and Coastal Access Bill. We recommend that the Joint Ministerial Committee continues to meet on a regular basis.**

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190 Ev 232

191 [icwales.icnetwork.co.uk/news/politics-news/2008/03/06/devolution-forum-revived-as-rows-grow-91466-20564948/](http://icwales.icnetwork.co.uk/news/politics-news/2008/03/06/devolution-forum-revived-as-rows-grow-91466-20564948/)

192 For further detail see Cabinet Office news release CAB/113/08 27 November 2008. Available at [http://www.cabinetoffice.gov.uk/newsroom/news\\_releases/2008/081127\\_jmc.aspx](http://www.cabinetoffice.gov.uk/newsroom/news_releases/2008/081127_jmc.aspx)

193 Ibid

194 [www.cabinetoffice.gov.uk/devolution/news.aspx](http://www.cabinetoffice.gov.uk/devolution/news.aspx)

### *A new role for the Joint Ministerial Committee?*

114. The newly re-convened joint Ministerial Committee's terms of reference are as follows:

- i. to consider non-devolved matters which impinge on devolved responsibilities and devolved matters which impinge on non-devolved responsibilities;
- ii. where the UK Government and the Devolved Administrations so agree, to consider devolved matters if it is beneficial to discuss their respective treatment in the different parts of the United Kingdom;
- iii. to keep the arrangements for liaison between the UK Government and the Devolved Administrations under review; and
- iv. to consider disputes between the administrations.<sup>195</sup>

115. Rt Hon Rhodri Morgan AM, welcomed its rejuvenation and identified its role as being one of “dispute resolution, best practice sharing, generally keeping the United Kingdom together regardless of the fact that different parties now have an involvement in the government everywhere in the Celtic parts of the United Kingdom”.<sup>196</sup> He added, “we have got to give it a full airing and testing”.<sup>197</sup> The Scottish Government said that the Joint Ministerial Committee “could ensure that the Memorandum of Understanding and bilateral Concordats provide a sound framework for joint working within the United Kingdom”.<sup>198</sup>

116. Sir Gus O'Donnell wrote to us saying that during the plenary meeting on 25 June 2008, it had been agreed that “good government across the UK could be improved by still closer working”.<sup>199</sup> The Joint Ministerial Committee also reaffirmed that it should have a role “as set out in the MOU, in helping resolve differences between administrations ... [and] asked officials to look at the updating of the Memorandum of Understanding, which has not been done since 2001”.<sup>200</sup>

117. Professor Hazell also said that there should be “some brief account, be it through formal minutes or issuing a communiqué, as to the main subjects that have been discussed and what has been decided”. He noted that for a time, in the early years of the Joint Ministerial Committee, such communiqués were posted on the DCA website but that this was no longer the case; he cited this as an example of the requirement on all government departments in publishing information under the Freedom of Information Act as taking “a step backwards rather than forwards”.<sup>201</sup>

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195 For further detail see Cabinet Office news release CAB/113/08 27 November 2008. Available at [http://www.cabinetoffice.gov.uk/newsroom/news\\_releases/2008/081127\\_jmc.aspx](http://www.cabinetoffice.gov.uk/newsroom/news_releases/2008/081127_jmc.aspx)

196 Q 634

197 Q 634

198 Ev 233

199 Ev 233

200 Ev 233

201 Q 30

118. We welcome a more active and systematic role for the Joint Ministerial Committee as the central apparatus for inter-governmental relations within the United Kingdom. We welcome the new terms of reference, which emphasise its role in promoting dialogue and negotiation and also in dispute resolution.

119. We welcome the fact that the Joint Ministerial Committee has invited officials to review the Memorandum of Understanding. However, ten years on, we believe that a broad review is necessary: not only of the machinery for co-ordinating inter-governmental relations in the United Kingdom, but of the broader role of central Government in its strategic overview of the United Kingdom post-devolution.

120. We believe that a robust framework for inter-governmental relations, supported by a streamlined centre responsible for devolution policy and strategy across Whitehall, would equip the United Kingdom with a more efficient and effective system for territorial management in the UK post-devolution.

### Inter-parliamentary relations

121. In addition to inter-governmental relations, inter-parliamentary relations could also promote the sharing of best practice, and raise awareness of pertinent issues across all the members of legislative Parliaments or Assemblies throughout the UK. The only body that formally allows that to happen is the British-Irish Parliamentary Assembly.<sup>202</sup> Members also convene at a range of conferences and events organized by the Commonwealth Parliamentary Association. Mr Alex Fergusson MSP, Presiding Officer, Scottish Parliament, mentioned periodic meetings between Speaker of the House of Commons and the Presiding Officers of the devolved Parliament/Assemblies.<sup>203</sup> It seems strange that there is no forum for Members of the UK Parliament and the devolved Parliaments and Assemblies formally to convene, other than in the British-Irish Parliamentary Assembly, which also includes representatives of the Republic of Ireland and the Crown Dependencies.

122. Mike German AM identified “a great degree of sharing between the Assembly and the Scottish Parliament”,<sup>204</sup> and, (from the Liberal Democrat point of view) “a good relationship with our members in Westminster”. He said that Members of Parliament and Members of the Welsh Assembly were not necessarily “getting that level of structural interchange that might be necessary to make a smoother passage”.<sup>205</sup> He argued that it “would be very useful to have a body or organization which allows the sharing of best practice”.<sup>206</sup> We agree.

123. Indeed, if the Joint Ministerial Committee is to undertake the more active and systematic role that we recommend in this report, its work, deliberations and decisions should be transparent. While individual ministers would be accountable to their respective

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202 Q 622

203 Q 197

204 Q 619

205 Q 619

206 Q 622

Parliaments or Assemblies, there is a strong case to be made that the Committee should work alongside a new body, consisting of elected representatives from the Parliaments and Assemblies within the United Kingdom. This would not only provide an opportunity for the development of relationships based on mutual respect and the sharing of best practice on an informal level, but would also provide the opportunity for discussion, co-operation and joint working on issues of common interest.

**124. One way of securing a greater interchange and understanding would be to develop a format similar to the British-Irish Parliamentary Assembly, bringing together Members of Parliament and of the devolved Parliaments and Assemblies, to hold to account the Joint Ministerial Committee and to share experience and best practice. There needs to be reasonable confidence in the value which could be added by such a body for the idea to be developed, but we consider that it deserves debate.**

## 4 The Legislative Process

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125. The creation of the devolved administrations brought about significant changes to the role and practices of Westminster in legislating for Scotland and Wales. Rt Hon Lord Elis-Thomas AM told us that “co-legislating between legislatures, wherever it happens, is complex”.<sup>207</sup> In this chapter we consider the procedures and practices which have developed for legislating for Scotland and Wales post-devolution. Wales is dealt with in greater detail because the processes are newer and perceived to be more complex, as Westminster retains some responsibilities for primary legislation for Wales.

### Scotland

126. While the Scottish Parliament has primary law-making powers in most areas of domestic policy,<sup>208</sup> on occasion—for example if there is a common policy aim—it is considered appropriate, with the authority of the Scottish Parliament, for Westminster to legislate on devolved matters. The convention that the UK Parliament will not legislate on devolved matters unless authorised is known as the Sewel Convention (Legislative Consent Motion). This was named after the then government minister, Lord Sewel, who set out the terms of the policy in the House of Lords during the passage of the Scotland Act 1997–98 on 21 July 1998.<sup>209</sup>

“Clause 27 makes it clear that the devolution of legislative competence to the Scottish Parliament does not affect the ability of Westminster to legislate for Scotland even in relation to devolved matters. Indeed, as paragraph 4.4 of the White Paper explained, we envisage that there could be instances where it would be more convenient for legislation on devolved matters to be passed by the United Kingdom Parliament. However, as happened in Northern Ireland earlier in the century, we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament”.<sup>210</sup>

127. The Scottish Government explained that in practice, “Legislative Consent Motions seeking the consent of the Scottish Parliament under the Convention have generally been used for minor provision in Westminster Bills. Substantive legislation for Scotland in devolved areas has mainly been contained in Acts of the Scottish Parliament. The Scottish Affairs Committee have recommended a series of changes in Westminster’s procedures in dealing with Sewel motions, including “the introduction of a formal process”.<sup>211</sup> Their first recommendation stated:

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207 Q 545

208 See *An Introduction to devolution in the UK*, Research Paper 03/84, House of Commons Library, November 2003 p.21 for a full list.

209 *An Introduction to devolution in the UK*, Research Paper 03/84, House of Commons Library, November 2003, p. 14. Sewel Motions, by which the Scottish parliament gives its consent, have since been formally re-named Legislative Consent Motions.

210 HL Deb, 21 July 1998, col 791

211 Scottish Affairs Committee, Fourth Report of Session 2005-06, *The Sewel Convention: the Westminster Perspective*, HC 983, p 16

“We recommend the introduction of a formal process whereby the Scottish Parliament notifies Westminster when a Sewel motion has been passed. Although we cannot, of course, insist on how the Scottish Parliament communicates its decisions to us, we trust that the Presiding Officer and the Clerk of the Scottish Parliament will note our view that the better way of letting the House of Commons and the House of Lords know that Holyrood had passed a Sewel motion would be for the Clerk of the Scottish Parliament to advise the Clerk of the House and the Clerk of the Parliaments that such a motion had been passed, rather than for the Presiding Officer to contact the Speaker and the Lord Chancellor”.<sup>212</sup>

The Government responded: “While this recommendation is for the UK Parliament and the Scottish Parliament, the Government welcomes the introduction of a formal process of notification between the Parliament, which, combined with the recommendation to tag relevant Bills, should serve to increase the awareness at Westminster of those Bills that include provisions that trigger the Sewel Convention and therefore require the consent of the Scottish Parliament”.<sup>213</sup>

128. The Scottish Government explained that Legislative Consent Motions (LCMs) are subject to the express agreement of the whole Scottish Parliament, after detailed scrutiny by the relevant Parliamentary Committee. The process is regulated by the Scottish Parliament’s Standing Orders.<sup>214</sup> Mr Ken Hughes, Acting Director of Clerking and Reporting, Scottish Parliament explained that, in 2005, the Scottish Parliament agreed a new set of Standing Orders which applied to Scottish Parliamentary scrutiny of Legislative Consent Motions. The Parliament introduced rules in relation to the expectations of the timescales of when LCMs would be introduced to the Parliament. That also included a formal exchange of letters between the Clerk of the Scottish Parliament and the Clerk of the House of Commons confirming that the Scottish Parliament had indeed just passed a Legislative Competence Motion.<sup>215</sup> He explained that this was “future-proofed” in terms of looking forward to a situation whereby governments would be different north and south of the border. He said that these procedures “still seem to be working well”.<sup>216</sup>

129. While these procedures have satisfied the recommendation of the Scottish Affairs Committee, Professor Hazell suggested that additional steps need to be taken in order to clarify the use of Legislative Consent Orders by the UK Government. He said: “the procedures need clarifying and tightening up ... there is a need for a clear set of principles setting out when and why the British Government will invoke the convention”.<sup>217</sup> The Scottish Government agreed that the Sewel Convention would remain “a key part of the current constitutional arrangements,” and identified that continuing respect for the

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212 Scottish Affairs Committee, Fourth Report of Session 2005-06, *The Sewel Convention: the Westminster Perspective*, HC 983, para 17

213 Scottish Affairs Committee, *The Sewel Convention: the Westminster Perspective: Government’s Response to the Committee’s Fourth Report of session 2005-06*, HC 1634

214 Ev 231

215 Q 195

216 Q 177

217 Robert Hazell, *Towards a New Constitutional Settlement: An Agenda for Gordon Brown’s First 100 Days and Beyond* (Constitution Unit: UCL), p 28

fundamental principle of the Convention was crucial to the proper working of these constitutional arrangements”.<sup>218</sup>

**130. We welcome the procedures and mechanisms which have been put in place by the Scottish Parliament for the effective scrutiny of Legislative Consent Motions, and the effective system of communication with the Westminster Parliament, which appears to be working satisfactorily.**

**131. We recommend that the UK and Scottish Governments set out and publicise their agreed understanding of the principles which should govern the use of Legislative Consent Motions.**

## Wales

132. The process of legislating for Wales is somewhat more complex than in Scotland, as Westminster retains primary law-making powers for Wales. Until May 2007 (when the new arrangements under the Government of Wales Act 2006 came into force), this was primarily achieved through Wales-only Bills and Wales-only clauses in legislation for England and Wales. The 2006 Act brought about a new process for legislating for Wales,<sup>219</sup> described by the Welsh Affairs Committee as “a new mechanism for enhancing the legislative powers of the National Assembly for Wales on a case-by-case basis and with parliamentary consent”.<sup>220</sup> The Welsh Affairs Committee explained:

“The Act conferred on the Assembly the power to initiate Legislative Competence Orders in Council (LCOs), which, if approved in draft by both Houses of Parliament, insert specified “Matters” into Schedule 5 to the Government of Wales Act 2006, relating to one or more of the 20 “Fields” listed there. These Matters specify areas in which the Assembly can pass legislation, known as Assembly Measures”.<sup>221</sup>

133. It was envisaged by some that this would be a “transitory”<sup>222</sup> arrangement, before, the National Assembly for Wales was given full law-making powers, subject to a referendum.<sup>223</sup> Rt Hon Rhodri Morgan AM, First Minister, Welsh Assembly Government, described the legislative process for Wales as “different to what you would find in most other devolved settlements around the world”. He said “it has been devised specifically for Welsh circumstances”.<sup>224</sup>

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218 Ev 231

219 In addition to the Legislative Competence Orders in Council described in this report, the Government of Wales Act 2006 also made provision for Parliament to change the Assembly’s legislative competence by ‘framework’ provisions in Parliamentary Bills. See paragraph 15 of *Devolution Guidance Note 9: Post-Devolution Primary Legislation Affecting Wales* available at [www.justice.gov.uk/guidance/docs/dgn09.pdf](http://www.justice.gov.uk/guidance/docs/dgn09.pdf)

220 Welsh Affairs Committee, Second Report of Session 2006-07, *Legislative Competence Orders in Council*, p. 5

221 Welsh Affairs Committee, Second Report of Session 2006-07, *Legislative Competence Orders in Council*, p. 5

222 Q 574

223 As outlined in the Government of Wales Act 2006.

224 Q 625

### **Assembly Measures**

134. Unlike the Scotland Act 1998 which gave the Scottish Parliament legislative powers in all areas other than those specifically reserved, the Wales Act 1998 defined the areas in which the National Assembly for Wales has legislative competence.<sup>225</sup> The Government of Wales Act 2006 lists devolved ‘fields’ and ‘matters’. Part 3 of the Government of Wales Act 2006 gives the Assembly power to pass legislation (Assembly Measures) on matters in relation to which the Assembly has legislative competence. The 2006 Act also set out a procedure by which Parliament can increase the matters on which the Assembly has legislative competence by amending Schedule 5. This can be achieved through clauses in Parliamentary legislation or by a Legislative Competence Order (see below).

135. Provided it complies with the limits set by Section 95 and Schedule 5, an Assembly Measure can have the same effect as an Act of Parliament. In other words it can modify existing Acts of Parliament or other enactments and it can make new provision not covered by existing statutes. However, the ultimate right of Parliament to legislate in relation to Wales, even on a matter over which legislative competence has been conferred on the Assembly, is preserved.<sup>226</sup>

### **Legislative Competence Orders (LCOs)**

136. Legislative Competence Orders are a new kind of Order in Council. Orders in Council are a type of secondary legislation which are issued by the Monarch with the advice of the Privy Council and made under powers given in a parent Act. They are most frequently used when the use of an ordinary Statutory Instrument would be inappropriate, such as the transfer of responsibilities between Government Departments or in relation to the Constitution. Orders in Council were used to transfer powers from Ministers of the UK Government to those of the National Assembly for Wales in 1999 through the National Assembly for Wales (Transfer of Functions) Order 1999.<sup>227</sup>

137. Legislative Competence Orders are Orders in Council made specifically in relation to the legislative competence of the National Assembly for Wales under provisions in the Government of Wales Act 2006. A proposal for draft Orders may be triggered by the Welsh Assembly Government, by committees of the National Assembly for Wales, or by individual Assembly Members.<sup>228</sup> The Presiding Officer holds two monthly private members’ ballots, and as of 29 April 2009, eight such ballots had been held.

### **Scrutiny at Westminster**

138. Any Legislative Competence Order has to go through pre-legislative scrutiny both at the Assembly and at Westminster. Initially it was expected that this scrutiny would take place in parallel, in the same time frame. However, during the first year of this process, the

225 These are set out in Schedule 5 and section 95 of the 2006 Act, by listing all “devolved Matters” within a series of “Fields”.

226 Government of Wales Act, s.97, 98. For further detail see [www.assemblywales.org/assemblymeasures.pdf](http://www.assemblywales.org/assemblymeasures.pdf).

227 HC Factsheet, Statutory Instruments, L7, January 2007

228 Welsh Affairs Committee, Seventh Report of Session 2007-08, *The proposed draft National Assembly for Wales (Legislative Competence) (Housing) Order 2008*, HC 812, para 3

Welsh Affairs Select Committee identified that it is often possible to work more quickly and more effectively if the Assembly process is completed—and if the draft Order is then amended by the Welsh Assembly Government to take account of the Assembly Committee’s comments—so that Westminster scrutiny relates to the considered view of the Assembly.

139. As of 29 April 2009, the Welsh Affairs Committee had published reports on six Legislative Competence Orders.<sup>229</sup> The Committee made a series of recommendations as to how these measures should be scrutinised and managed both on the floor of the House, and through scrutiny by the Welsh Affairs Committee. The Committee welcomed the opportunity for joint working and exchanges of views with the relevant committees of the National Assembly for Wales. The Select Committee said that this was subject to the co-ordination of timetables, the right of the Committee to retain control of its own programme of work and that the annual number of Legislative Competence Orders was manageable.<sup>230</sup>

140. There has been criticism of the process for the scrutiny of draft Legislative Competence Orders from the Presiding Officer of the National Assembly for Wales. Rt Hon Lord Elis-Thomas AM questioned whether the Welsh Affairs Committee was the most appropriate Committee at Westminster to scrutinize the draft Orders.<sup>231</sup> The Welsh Affairs Committee has argued that the scrutiny of LCOs is a crucial part of its role, but emphasised the need for fewer, higher quality LCOs. In their submission to the *Review by the Secretary of State of the procedure for Legislative Competence Orders in Council*, the Committee identified that the larger number of LCOs that they had received, compared to the four or five that they had expected, risked “bringing the LCO process into disrepute”.<sup>232</sup> In oral evidence to the Welsh Affairs Committee, Mr Huw Irranca-Davies MP, the then Parliamentary Under-Secretary of State for Wales, was optimistic that the process was likely to improve in the next year with “improved synchronisation and in effect a project management of bringing these LCOs forward”.<sup>233</sup> Mr Mike German AM said that it would be useful to overcome “timetable problems” and do things more jointly on this matter as this would “help to build levels of expertise ... in both determinations”.<sup>234</sup>

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229 The Welsh Affairs Committee has reported on the following draft Proposed Legislative Competence Orders: Additional learning needs (Second Report, Session 2007-08, HC 44), The field of social welfare (Fourth Report, Session 2007-08, HC 257), Social welfare and other fields (Fifth Report, Session 2007-08, HC 576), Housing (Seventh Report, Session 2007-08, HC 812), Agriculture and Rural Development (Third Report, Session 2008-09, HC 5), and Social Welfare (Sixth Report, Session 2008-09, HC 306). The Committee is also currently considering the draft Orders on Welsh Language and the Environment.

230 Welsh Affairs Committee, Second Report of session 2006-07, *Legislative Competence Orders in Council*, Recc 11. In practice the Welsh Affairs Select Committee has changed its own practices in order to create additional time for dealing with LCOs and keep pace with developments. The Committee has found benefit from coming to an LCO after the Assembly Committee has come to its conclusions and the Welsh Assembly Government has amended the draft. This means that the Westminster scrutiny is applied to a more considered proposal.

231 Q 548

232 Para 22. See also [http://news.bbc.co.uk/go/pr/fr/-/1/hi/wales/wales\\_politics/7522838.stm](http://news.bbc.co.uk/go/pr/fr/-/1/hi/wales/wales_politics/7522838.stm)

233 Welsh Affairs Committee, Seventh Report of Session 2007-08, *The proposed draft National Assembly for Wales (Legislative Competence) (Housing) Order 2008*, HC 812, para 9

234 Q 619

### *An over-complex process?*

141. Rt Hon Rhodri Morgan AM, said that while it was “too early to give a verdict on how well the process works,” he said that “it creaks a little bit at the beginning”.<sup>235</sup> He suggested however, that this “creaking is caused by the newness, not by the fact of some defective piece of machinery”.<sup>236</sup> Rt Hon Paul Murphy MP, told us that he had “no doubt that the process will be one that people get used to and that it will be smooth”.<sup>237</sup>

142. While Mr Adrian Crompton, Director of Assembly Business, National Assembly for Wales, told the Committee that they had found working with the 2006 Act “adequately clear”,<sup>238</sup> Nick Bourne AM said that not even its “biggest fans could call it clear or crisp”.<sup>239</sup> He described the process as “unwieldy and convoluted long term”,<sup>240</sup> and said that having to justify every Legislative Competence Order was not a “sensible use of time”.<sup>241</sup> Mr Mike German AM agreed, and described this as a “cumbersome and transitory approach”.<sup>242</sup> He concluded, “the sooner we move on ... to a more effective and lasting form of devolution, the better off we would be”.<sup>243</sup>

143. Some witnesses also identified potential problems with the role of the Secretary of State for Wales in this process. Rt Hon Lord Elis-Thomas AM said that the role of the Secretary of State is “a delicate one”,<sup>244</sup> but described his constitutional relationship with the Secretary of State as “valuable”... as far as the process in concerned.<sup>245</sup> However, Mr Mike German AM expressed concern about the role of the Secretary of State in “determining whether or not he will lay a legislative competence order before both Houses of Parliament ... There are no ground rules. The Government of Wales Act does not specify when the Secretary of State should say yes and when the Secretary of State says no. I think there is a case for much clearer protocol on those matters”.<sup>246</sup>

144. While the previous Secretary of State for Wales, Rt Hon Peter Hain MP, gave a commitment that he would not refuse anything that was in order, Mr Mike German AM argued “that does not give you enough of a reason and a rationale”.<sup>247</sup> He cited a hypothetical example of a Legislative Consent Order “stuck in the system,” but that we do not know “why or how” because that is not a matter in the public domain.<sup>248</sup> Mr Mike German AM concluded that “the Government should set out a clear approach to

235 Q 625

236 Q 626

237 Q 95

238 Q 546

239 Q 571

240 Q 574

241 Q 574

242 Q 604

243 Q 574

244 Q 552

245 Q 552

246 Q 616

247 Q 616

248 Q 616

legislating for Wales, with a commitment to accepting Assembly requests for legislative competence in all but exceptional cases”.<sup>249</sup>

145. Mr Ieuan Wyn Jones AM, Deputy First Minister, (Plaid Cymru) Welsh Assembly Government, identified a further practical problem in terms of planning the legislative workload and programme of the National Assembly for Wales because the length of time it takes for a Legislative Competence Order to go through Westminster was “not entirely in our hands”.<sup>250</sup>

**146. We recognise that the process of enhancing the legislative competence of the National Assembly for Wales with the consent of Whitehall and Westminster is seen by some commentators as complex. It is a new process, and there were some initial fears that it would be difficult to achieve an efficient and streamlined process of scrutinizing and enacting Legislative Competence Orders.**

**147. We agree that there is a legitimate role for Westminster in scrutinizing draft Legislative Consent Orders to check whether they are in order, what their scope is, whether the drafting is clear and precise and whether the legislative competence can or should be devolved under the terms of the Act.**

**148. However, the process in Whitehall is less clear and we are also concerned about the lack of transparency of the role of the Secretary of State in determining whether or not he would lay a draft Order before both Houses of Parliament. We recommend that the Secretary of State produce a protocol outlining the principles that would inform such a decision, and the maximum timescales within which a decision should be made.**

### *A Welsh statute book?*

149. In his written evidence to the Committee, John Osmond, the Director of the Institute of Welsh Affairs, identified that one consequence of the new legislative arrangements is the emergence of a plethora of sources of the law that relates specifically to Wales:

- i. Acts of Parliament applying to England and Wales as a single jurisdiction.
- ii. Wales-only Acts of Parliament.
- iii. Provisions in Acts of Parliament that apply to Wales, including framework powers.
- iv. Orders in Council approved by Parliament, including Legislative Competence Orders.
- v. Measures made by the Assembly modifying or supplementing existing legislation (including Acts of Parliament) or making new provision.
- vi. Subordinate legislation made by Welsh Ministers implementing Community law under Designation Orders made under the European Communities Act 1972, s.2(2).

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<sup>249</sup> Robert Hazell, *Towards a New Constitutional Settlement: An Agenda for Gordon Brown’s First 100 Days and Beyond* (Constitution Unit: UCL), p.28

<sup>250</sup> Q 630

- vii. Subordinate legislation made by Whitehall for England and Wales as a single jurisdiction.
- viii. Subordinate legislation made by Whitehall specifically for Wales.
- ix. Subordinate legislation made by the Assembly under Acts of Parliament or, exceptionally, under Whitehall subordinate legislation, prior to 2007.
- x. Subordinate legislation made by the Assembly Government (or jointly with Whitehall) under provisions of Acts of Parliament.
- xi. Subordinate legislation made by the Assembly Government under powers delegated by Assembly Measures.

At first glance this list appears formidable but it is only marginally more complicated than the situation that has existed across England and Wales for many years.

150. Professor Hazell identified that while the Government of Wales Act 2006 identified the primary mechanism for conferring legislative power on the National Assembly for Wales to be Legislative Consent Orders, he said: “the UK Government does not seem inclined to follow that primary mechanism, although it is early days, but it certainly does still confer legislative powers by ordinary legislation and indeed by a variety of other means, and there too there is a need for much greater consistency”.<sup>251</sup> Rt Hon Lord Elis-Thomas AM disagreed; he said “it was always envisaged during the passage of the Government of Wales Act that powers would be derived from both Welsh clauses in Westminster legislation and orders in council. It does not make a difference how the powers come: the important thing is that they are here”.<sup>252</sup>

151. However, in their written evidence, Public Affairs Cymru said that as a result of the plethora of sources of legislation in relation to Wales, “it was difficult for both civil society and the Welsh political class to acquire a clear knowledge of the powers the Assembly has”.<sup>253</sup> John Osmond agreed, but argued that it was by no means “clear that the necessary steps are being taken to ensure that Assembly Members, the legal profession and civil society generally are able to have access to an up-to-date collation of these sources of the law, as it affects Wales as distinct from other parts of the United Kingdom”. He continued “... we are strongly of the view that early consideration must be given to the separate publication of a collation of current Welsh legislation, a resource that will become increasingly needed as distinct Welsh law is enacted”.<sup>254</sup> Rt Hon Rhodri Morgan AM said that the Welsh Assembly Government would be “sympathetic to the idea” but added “there are almost not enough laws in Wales to codify into a big statute book”.<sup>255</sup>

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251 Q 2

252 Q 550

253 Ev 229

254 Ev 119

255 Q 628

**152. We recognise that accessibility of the law relating to Wales is important for the development of healthy democracy. We encourage the Government to facilitate the work of the Welsh Assembly Government in seeking to achieve this objective.**

## 5 The English Question

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153. Over four-fifths of the population of the United Kingdom live in England, but while fundamental change has been taking place in the governance of Scotland, Wales and Northern Ireland, with consequent effect on the governance of the United Kingdom as a whole, no such change has taken place in the way England is governed. There have been some developments with mixed results: a form of devolution in London, endorsed in a referendum in 1998, the creation of various unelected regional structures in the rest of England, and a move in some areas towards having a single tier of local government. Legislation was put in place to allow any region to have an elected Assembly, subject to a local referendum. The first—and only— attempt to make use of these provisions was defeated in a referendum in the North East in 2004.

154. Government in England remains centralised under the authority and management of the United Kingdom Parliament and the United Kingdom Government. There is controversy arising from the fact that England is governed directly by the United Kingdom Government and Parliament and is therefore subject to Ministers and MPs who do not represent England and whose own constituents come under devolved governments. The governance of England is seen by many as the “unfinished business” of devolution, but this perception is not accompanied by any widespread agreement on what should be done.

### The West Lothian question

155. The English question has many dimensions and many forms. One of its most frequent expressions is what became known as the ‘West Lothian’ question, because it was frequently raised by Tam Dalyell MP during the debates leading up to the 1979 devolution referenda in Scotland and Wales.<sup>256</sup> He pointed to the anomaly of Scottish MPs being able to vote on legislation on, for example, health and education policy in England, when they could not vote on health and education laws affecting their own constituents in Scotland because these would be determined by the Scottish Parliament. He, as a Scottish MP, would decide on laws which apply in West Sussex but not on laws which apply in West Lothian. English MPs would have no vote on policies in Scotland towards which English taxes were contributing, while the votes of Scottish MPs might determine the outcome of the same issues in England. The question was first posed in the nineteenth century as part of the controversy over Home Rule for Ireland, and the phenomenon actually existed throughout the life of the Government and Parliament of Northern Ireland from 1921 until they were abolished in 1972. Northern Ireland MPs at Westminster, although reduced in number, were free to vote on legislation applying to Great Britain on a wide range of subjects which were devolved to the Northern Ireland Parliament.

156. The Question, in the wider sense of symbolising the territorial asymmetry of devolution, also encompasses related issues, such as the level of representation of devolved areas at Westminster, the appointment of Scottish MPs as ministers in departments dealing

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<sup>256</sup> Mr Dalyell’s constituency was West Lothian, but has since been re-named Linlithgow.

wholly or mainly with England and the practical and legal relationships between one or more devolved legislatures or assemblies and Westminster.<sup>257</sup> To date, the West Lothian question has not been such a “political hot potato” in Anglo-Welsh relations as it has been in Anglo-Scottish relations. There are fewer Welsh than Scottish MPs serving as ministers in the UK Government, and with fewer powers devolved to Wales than to Scotland, there are fewer policy areas where Welsh MPs cannot legitimately legislate. However, as more powers are devolved to Cardiff, Public Affairs Cymru argued that this situation may change, which could only lead to an intensification of the issues.<sup>258</sup> Professor Mitchell concluded that this could result in a “politics of grievance” on all sides.<sup>259</sup>

157. The West Lothian question's importance rests, in part, on the perception that it is actually or virtually insoluble. Some commentators, such as Ferdinand Mount, have argued that the question is neither insoluble nor a real problem, as it simply reflects the asymmetry common to British constitutional arrangements.<sup>260</sup> A number of other systems, including Canada's federal system, have a degree of asymmetry but the relative size of England (84% of the UK's population)<sup>261</sup> in comparison with the other constituent parts of the United Kingdom makes questions around the governance of England post-devolution particularly difficult. Peter Facey, Director, Unlock Democracy, said that “finding a way forward ... which fits within the nature of England is essential”.<sup>262</sup>

## The broader question

158. However, the English question is much broader than the West Lothian question, as it encompasses the wider issue of how England should be governed post-devolution. Professor Hazell described the English question as a “portmanteau heading for a whole series of questions about the government of England”.<sup>263</sup> He identified two questions: First, does England need to find its own separate political voice or voices to rebalance the louder political voice accorded to Scotland, Wales and Northern Ireland? Second, does England need internal devolution in order to break from the excessive domination of central government, as an alternative or as a supplement to all-England solutions?<sup>264</sup>

159. Professor Bogdanor identified two slightly different English questions, the first being the constitutional question of the imbalance that has arisen as a result of devolution. The second and more important question in his view, was the political question or the “sense of alienation on the part of many people in England”.<sup>265</sup> While he argued that the constitutional aspect could not be answered until England or regions of England “want

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257 *An Introduction to devolution in the UK*, Research Paper 03/84, House of Commons Library, November 2003, p. 11

258 Ev 228

259 Q 270

260 For more details see: *The West Lothian Question*, Research Paper 95/96, House of Commons Library, September 1995, and Library Standard note SN/PC/2586, the West Lothian Question, 22 August 2003.

261 Office for National Statistics; National Assembly for Wales; General Register Office for Scotland; Northern Ireland Statistics and Research Agency, January 2008.

262 Q 170

263 Robert Hazell “Introduction: what is the English Question” in R Hazell (ed) 2006, *The English Question* (Manchester University Press), p. 1.

264 *Ibid*, Page 3-5

265 Q 114

legislative devolution”, he said that the political aspects of the English question “can and should be answered”.<sup>266</sup>

160. This range of different English questions prompts a range of different answers. Some argued that the only way ahead is to have an English Parliament,<sup>267</sup> while Nicola Sturgeon MSP, told the Committee “it is ... too tempting for me not to say that independence (for Scotland) at a stroke would solve the English Question”.<sup>268</sup> Peter Facey, Director, Unlock Democracy, told us that “there are a number of proposed solutions to the English Questions including an English Parliament, territorial voting, an English Grand Committee and regional government. However just as there is not one English question it is likely that there will not be one answer, rather there will need to be a package of measures to address the different issues”.<sup>269</sup>

## Public opinion

161. Public opinion relating to the English question is also mixed. It is not clear to what extent the English question is perceived as a problem. Professor Curtice, Deputy Director, CREST, and Director, Social Statistics Laboratory, University of Strathclyde, told the Committee that, as far as public opinion has been measured in England to date, if there is seen to be an English problem, it is simply that it is not obvious why Scots and Welsh MPs should be voting on English legislation. Rt Hon Kenneth Clarke MP described this as a “niggle”,<sup>270</sup> which he further defined as the “mounting English resentment of this residual opportunity for governments to pass things against the English majority”.<sup>271</sup> Lord Tyler CBE identified a “continuing resentment in areas furthest away from London within England”.<sup>272</sup>

162. However, there is no clear strand of opinion as to how this small but possibly increasing resentment should be addressed. Professor Curtice found that a majority of people in England would prefer to stay with the status quo, and while devolutionists make up about 40% of the English population, they are split between an English Parliament and regional devolution.<sup>273</sup> He concluded that although national identities may be changing, it is not clear that even those who feel English necessarily feel that that Englishness needs to be reflected in distinctive political institutions.<sup>274</sup>

## Solutions

**163. Different types of solutions can be suggested for the many different questions which fall under the broad heading of the English question. First, there are those**

266 Q 116

267 *An Introduction to devolution in the UK*, Research Paper 03/84, House of Commons Library, November 2003, p. 11

268 Q 298

269 Ev 239

270 Q 127

271 Q 130

272 Q 119

273 Q 24

274 Q1

solutions which seek to address the constitutional imbalance seemingly brought about by devolution, for example, through the creation of an English Parliament. Second, there are those solutions which seek to amend the role, practice and status of Westminster as a means of addressing the West Lothian Question, for example, schemes of English votes for English laws. However, others consider that the West Lothian Question could be best addressed by a change in the party political balance at Westminster, for example, through reform of the electoral system or a reduction in the number of MPs from Scotland and Wales. These approaches could be described as all-England solutions. The final category of solutions are those which attempt to tackle the centralised nature and relative size of England through decentralisation or devolution within England. What is clear is that different solutions address different aspects of the question.

### *An English Parliament*

164. In oral evidence to the Committee, Professor Hazell, although not supporting an English Parliament, stated that the closest to a complete answer to the West Lothian question would be to have an English Parliament.<sup>275</sup> Not only would this immediately remove the possibility of Scottish and Welsh MPs voting on issues pertaining only to England, it would also give England the same national recognition as accorded to Scotland and Wales through the creation of their devolved Parliament and Assembly. Mr Michael Knowles, representing the Campaign for an English Parliament, claimed that such a Parliament would be the “salvation of the Union” as it would stop “all this resentment ... building up”.<sup>276</sup>

165. The aim of the Campaign for an English Parliament is to achieve an English Parliament and Executive with powers at least equivalent to those powers devolved to Scotland. This was intended to address the anomaly that Mr Michael Knowles identified, that “England alone of the three nations on this island has no political and constitutional existence”.<sup>277</sup> While accepting that any proposed constitutional arrangements would need the approval of the people of England, Mr Knowles said that his main concern was that “England is recognised both politically and constitutionally as having the same status within the Union as Scotland and Wales”.<sup>278</sup> However, no main political party has come out in support of an English Parliament, which is a marked contrast to the position in relation to devolution in Scotland and Wales ten or fifteen years ago<sup>279</sup> and the substantial evidence from Professor Curtice shows that there is no upsurge of consensus in England in support of an English Parliament.

166. As well as solving the constitutional dimension of the English question, supporters of an English Parliament claim that it would: “strengthen democratic control and make government more accountable to the people of England; enable the people of England to express their own priorities and direct spending to where it is most needed; better

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275 Q 17

276 Q 161

277 Q 146, Ev 150

278 Q 155

279 Q 17

enable the people of England to pursue policies, which help preserve England's identity and improve its environment; give England a voice (similar to that of Scotland) in the European Union and provide a partial realisation of the right to self-government to which the people of all countries aspire".<sup>280</sup>

167. Several witnesses identified problems with the creation of an English Parliament, particularly noting the difficulty of managing such asymmetry within the United Kingdom. Professor Jeffery explained that the existence of an English Parliament would create an unbalanced federation. He said that historically, it would be a "unique situation" to see an English Parliament with an equivalent set of powers to the Scottish Parliament, the Northern Ireland Assembly and the National Assembly for Wales forming a federation or something like it when one of the units has between 80% and 85% of the population.

168. The Campaign for an English Parliament disagreed. They argue that the UK is indeed unique, and that a "situation in which England did not dominate the Union would be ignoring England's population size and would therefore be undemocratic".<sup>281</sup> However, Professor Jeffery argued that in this type of political system there is a presumption that there is equality of units. He concluded that "entrenching a sense of equality across units ranging in size from less than two million to 50-plus million would be extremely difficult".<sup>282</sup>

169. The issues of asymmetrical size and numerical dominance also have particular implications for the executive role and for the whole political process. The First Minister of England and the English Government would command resources, political attention and media coverage on such a scale that he or she could rival the UK Prime Minister and Government for perceived significance in the mind of voters. The election of the English Parliament would be likely to focus on the issues which normally dominate a General Election, such as health, education, crime and public spending levels. The UK General Election would, in theory, be focused on defence, foreign policy, macro economic policy, national taxation and welfare benefit levels, but it is difficult to imagine that this would be what happened in practice.

170. Professor Hazell further pointed out that an English Parliament serving a population of 50 million people would "be perceived as being as remote and distant from their concerns as the Westminster Parliament is, so it would not necessarily be a solution in devolutionary terms".<sup>283</sup> Ken Livingstone, the former Mayor of London, described an English Parliament as being as "large and bureaucratic and unmanageable as our present structure of government",<sup>284</sup> while Professor Mawson, Director of the Local Government Centre, University of Warwick Business School, said that it would "not resolve the present asymmetric problem ... but would add a new and more serious problem to an already flawed devolution project".<sup>285</sup> Professor Curtice said that it is not obvious that the English

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280 Campaign for an English Parliament, *The Constitutional Case for an English Parliament*, p 8

281 Ev 156

282 Q 6

283 Q 17

284 Q 726

285 Ev 169

think there is a problem, and there is no public demand, at this moment, for an English Parliament.<sup>286</sup> Rt Hon Kenneth Clarke MP argued that “the average Englishman thinks they have got a Parliament, which is the Westminster Parliament”.<sup>287</sup>

171. Unlock Democracy agreed that an English Parliament would not solve the problem of centralisation within England, and the further devolution of power within England would still be necessary in order fully to address the English question. It therefore described an English Parliament as “an additional and unnecessary tier of governance”.<sup>288</sup> The Campaign for an English Parliament rejected this argument on the basis that the numbers of MPs in the UK Parliament would be reduced,<sup>289</sup> and that there would be “no more MPs dealing with English matters than there are at present in the House of Commons”.<sup>290</sup>

172. Several practical anomalies were also identified, for example, the role of the House of Lords in respect of English legislation following the creation of an English Parliament.<sup>291</sup> English legislation would come within the remit of the House of Lords yet Scottish legislation does not. Professor Curtice argued that if you are going to argue that England should be treated in the same way as Scotland, there should not be any anomalies. If this were to be the case, the creation of an English Parliament would require completely “re-writing the constitution for England”.<sup>292</sup> Professor Bogdanor concluded that an English Parliament was an “absurd solution”.<sup>293</sup>

**173. While an English Parliament could address one aspect of the English question in terms of giving England a similar constitutional status to Scotland within the United Kingdom, it presents issues of balance because of the sheer size of the English population and because it would require a Government and First Minister for England in addition to the United Kingdom Government and Prime Minister. We do not think that there is a need to consider so far-reaching a solution as an English Parliament, although it may become necessary to do so if the English questions are seen as increasingly significant and other solutions are rejected or fail.**

### ***English votes for English laws***

174. A second response to the English Question is to limit the right to vote on English-only matters, including health and education, to MPs with English seats. In 2007 the Conservative Party Democracy Taskforce considered the West Lothian question. Rt Hon Kenneth Clarke MP, Chairman of the Taskforce, expected the next Conservative Party manifesto to outline proposals that would “address the West Lothian question”.<sup>294</sup> A paper submitted to the taskforce by Rt Hon Sir Malcolm Rifkind MP on 28 October 2007

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286 Q 22

287 Q 127

288 Ev 239

289 Ev 157

290 Q 164

291 Q 24

292 Q 24

293 Q127

294 Q 130

proposed a scheme of English votes for English laws by delegating English legislation to an English Grand Committee. His proposed Grand Committee of English MPs is reported to be under consideration by the Conservative party leadership.<sup>295</sup>

175. Rt Hon Kenneth Clarke MP told the Committee that while his taskforce would not come up with the same answer as Sir Malcolm, that in principle, they were “heading in the same direction”.<sup>296</sup> In July 2008, the Task Force published their report which proposed a scheme of English votes for English laws outlined below.

176. First, Bills that are certified as ‘English’ would pass through the normal Commons processes as far as and including Second Reading. The whole House would vote on Second Reading. The Committee Stage, however, would be undertaken by English MPs only, in proportion to English party strengths. At Report Stage, the Bill would similarly be voted on by English Members only. At Third Reading the Bill would be voted on again by the whole House. Since no amendments are possible at this stage, the Government would have to accept any amendments made in Committee or at Report or have the Bill voted down and lost.<sup>297</sup> The Report concluded that:

“the current devolution settlement contains long-term risks to the Union. The Democracy Task Force recommends to David Cameron a modified version of ‘English Votes for English Laws’, incorporating English-only Committee and Report stages but a vote of all MPs at Second and Third Reading. We believe that this proposal can remove the main source of English grievance at the current devolution settlement without some of the risks to political stability that critics have seen in proposals for a completely English procedure”.<sup>298</sup>

177. This proposal can be presented as achieving some of the purpose of English votes for English laws without ultimately threatening the right of Government to use its majority in support of its legislative programme, unless a Bill has been so greatly amended in the Grand Committee or on Report that it no longer meets the Government’s purposes. It also reflects the often expressed wish of members not to have to sit in Committee on Bills that do not affect their constituents. However, it is not clear what would happen to the Bill in the House of Lords, particularly if it was argued that the spirit of the Salisbury Convention should allow the Government to get its Bill in broadly the terms set out in its manifesto. If the procedure is devised in a way which makes certain that only with a majority of English MPs can laws be passed which are limited to England, it would be a fundamental change in the constitution; a compromise on the lines proposed could be less significant but might not meet the expectation of those who find the present situation unacceptable.

178. The criticisms of English votes for English laws largely fall into three categories. First are the constitutional issues, and the point that these proposals would fundamentally change the nature of Westminster as a UK Parliament, and might ultimately pose a threat to the Union. Second, many procedural and technical difficulties have been raised, and

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295 <http://politics.guardian.co.uk/scotland/story/0,,2200804,00.html>

296 Q 129

297 Conservative Party, Democracy Taskforce Report, *Answering the question: devolution, the West Lothian Question and the future of the Union*, July 2008.

298 See also *The West Lothian Question*, Library Standard note SN/PC/02586.

doubts expressed as to whether, even if desirable, it would be practically possible to create a system of English votes for English laws within the Westminster Parliament. The third criticism is based on the argument that this is a disproportionate response to what is essentially a political problem, and therefore one that could be more adequately and appropriately addressed by political solutions.

179. The Government is opposed to any such scheme, based on a combination of the criticisms outlines above. Speaking in the Commons on 7 November 2008, Rt Hon Jack Straw MP, Secretary of State for Justice and Lord Chancellor, expressed the Government's opposition to 'English votes for English laws' in strong terms. He said:

“The phrase English votes for English laws sounds beguilingly simple, but more than cursory analysis reveals it to be completely unworkable. More than that, it would fatally undermine the Westminster Parliament and unravel the Union”.<sup>299</sup>

180. In its written evidence to the Committee, the Government outlined this position in more detail:

“Restricting the rights of Scottish, Welsh or Northern Ireland members to vote on English issues leads to constitutional instability. A UK Government elected on a UK mandate might find itself unable to deliver key policies on which it has been elected. United Kingdom Government Ministers might find themselves unable to vote in support of measures for which they have collective responsibility, or even to support measures for which their department is responsible. There would be a fundamental change to the nature of UK democracy.

The right place to legislate for England is at Westminster. England has over 80% of the British population, and of seats at Westminster. If they are so minded English MPs can wholly determine English matters, and of course taxation as well as the level of public expenditure in other parts of the UK. Almost all Bills brought before the House of Commons have financial implications or require money orders. Taxation is so fundamental to government and to the economy of all the UK that all MPs must be able to vote equally on all matters”.<sup>300</sup>

181. It is also argued that this would be a 'slippery slope' that poses a threat to the Union. Professor Bogdanor described the move towards English votes for English laws as being “profoundly dangerous to the future of the United Kingdom”.<sup>301</sup> Professor Hazell agreed, and expressed “no doubt that over time what was introduced as, seemingly, a modest procedural change could lead to a Parliament within a Parliament and no one should be in any doubt that this would be a very big change indeed with potentially very grave, long-term consequences”.<sup>302</sup> He concluded “... we would *de facto* have created an English Parliament”.<sup>303</sup> Rt Hon Des Browne MP said “if you generate an English Parliament inside

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299 HC Deb, 7 November 2007, col 1497

300 Ev 225

301 Q 130

302 Q 18

303 Q 25

the UK Parliament, then you would need to do that in the confident knowledge that eventually that would lead to the break-up of the UK”.<sup>304</sup>

182. Professor Bogdanor further pointed out that: “... 528 of the 645 MPs in the Commons represent English constituencies. On any issue that unites them, English votes will predominate. The English have no need to beat the drum or blow the bugle. If they do, they will strain the devolution settlement, which rests fundamentally, as the Union has always done, on a sense of restraint by the dominant nation in the UK”.<sup>305</sup>

183. While Peter Facey, Director, Unlock Democracy, said that on the face of it English votes for English laws was “appealing”, he conceded that it would be “very difficult to do in practice”.<sup>306</sup> An editorial in *The Economist* on the 1 November 2008 highlighted some of these difficulties:

“A government with a majority of British but not English seats might struggle to pass many of its manifesto pledges, and ministers from Scottish constituencies would be unable to vote on their own bills. This is not just a theoretical worry: the present cabinet is led by Scots, including the Prime Minister and his Chancellor of the Exchequer. Moreover, determining which bills are purely English is a fraught task, as William Gladstone, a Liberal Prime Minister, discovered in 1893 when he had to abandon a plan similar to Sir Malcolm's to deal with Irish MPs. Accommodating MPs from Wales and Northern Ireland, whose national legislatures have fewer powers than Scotland's, would complicate things further”.<sup>307</sup>

184. Lord Tyler CBE described proposals for an English Grand Committee as “absurd” resulting in “the opportunities for real political conflict and gridlock”.<sup>308</sup> He explained:

“... suppose legislation is taken to an English Grand Committee, but...as a result of some amendments during the process ... that there are elements which affect Scotland and Wales. What do you do? Do you take it out of Committee and create a new Committee? ... What about the Lords? Are we to have a unicameral system for England or bicameral? If it is to be bicameral, do Scottish peers get excluded from all the debates on that issue ... What happens if there are amendments in the Lords which seem to impinge on Wales in a way that it does not on Scotland ... What if there is some reference to transport which does not really seem to fall within the purview of that Committee as far as London is concerned, because London has specific transport?”<sup>309</sup>

185. One of the main disputes as to the workability of English votes for English laws is the question of the extent to which ‘England-only’ legislation can be clearly demarcated from the rest. Professor Jeffery said that the proposals were based on a presumption that “you can disentangle business for England from business for the other parts of the UK ... but

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304 Q 79

305 Available at [www.observer.guardian.co.uk/print/0,,331157098-102273](http://www.observer.guardian.co.uk/print/0,,331157098-102273)

306 Q 167

307 [www.economist.com/world/britain/PrinterFriendly.cfm?story\\_id=10064563](http://www.economist.com/world/britain/PrinterFriendly.cfm?story_id=10064563)

308 Q 130

309 Q 130

one of the issues is certainly that many of the Bills considered in this House are England and Wales Bills and not just England Bills and produce various consequences for Wales”.<sup>310</sup>

186. Since the creation of the Scottish Parliament and the National Assembly for Wales, there has been an improvement in the demarcation of the territorial extent of legislation. Following a recommendation by the Scottish Affairs Committee in its report *The Sewel Convention: the Westminster perspective 2005–06*<sup>311</sup> that improved explanatory notes to Bills should include a more comprehensive indication of territorial extent. In addition, a list indicating the territorial extent of Bills appeared in Hansard following the Queen’s Speech.<sup>312</sup> Furthermore, on 13 December 2006, the Secretary of State for Wales said that the Government would in future make an annual statement on the implications of its legislative programme for matters that fell within the enhanced legislative competence of the National Assembly for Wales.<sup>313</sup>

187. However, complexities remain in relation to both Scotland and Wales. For example, in legislating for Scotland, the use of the Legislative Consent Motion (Sewel Motion) convention, whereby the UK Parliament continues to legislate in devolved areas with the consent of the Scottish Parliament, adds further complications to proposals to certify bills as applying exclusively to individual parts of the UK.<sup>314</sup> There may be practical ways to overcome these technical difficulties, such as changing drafting practice, but this is likely to result in more Bills, more strictly defined as to territorial coverage.

188. In Wales, the Government of Wales Act 2006 is taking effect and the National Assembly for Wales is, through framework powers in UK Acts and Legislative Competence Orders, acquiring the competence to pass Measures which are quasi-primary legislation.<sup>315</sup> However, in general, England and Wales have a common statute book, therefore legislation designed to apply exclusively to Wales commonly also extends to England. Part of the rationale of this was to deal with cross border issues.<sup>316</sup> The question of separating legislation affecting England but not Wales is therefore quite complex and it is far from clear what this would achieve.

189. Professor Keating disagreed that these issues should necessarily be a problem for a system of English votes for English laws. He noted that that the territorial extent of Bills is already defined,<sup>317</sup> and that any Bills that are not clear in this sense are “bad practice”, making the statute book difficult to read. He argued that the Government should separate

310 Q 6

311 HC (2005-06) 983

312 For example see HC Deb, 16 November 2006, cc9-10WS, and HC Deb, 7 November 2007, cc11-3WS.

313 HC Deb, 13 December 2006, col 1059W. See also House of Commons Library Standard Note SN/PC/02586, 18 July 2008.

314 For further information on the operation of the Sewel Convention see Library Standard Note SN/PC/2084 *The Sewel Convention*. The Library’s territorial extent chart shows which UK Parliament bills had a Legislative Consent Motion (Sewel Motion) agreed in respect of them in the Scottish Parliament. See [http://www.parliament.uk/documents/upload/tc\\_bills.xls](http://www.parliament.uk/documents/upload/tc_bills.xls)

315 For further information see Library Research Paper 05/90 *The Government of Wales Bill*, Standard Note SN/PC/4407, *The Welsh Assembly elections 2007: the formation of the Welsh Assembly Government and recent developments in the Assembly*.

316 One example is the Children’s Commissioner for Wales Act 2001.

317 Ev 219

devolved and UK clauses better.<sup>318</sup> While Rt Hon Kenneth Clarke MP agreed, and said that he did not believe that it was “not possible to identify a comparatively small amount of legislation which is totally English in its consequence and content”,<sup>319</sup> Rt Hon Des Browne MP described this as “almost impossible to do”.<sup>320</sup> Rt Hon Lord Steel of Aikwood suggested that this was not an “insuperable problem”,<sup>321</sup> and Rt Hon Jack McConnell MSP said that if there is a “will to find a solution and to make regular judgements that are commonsensical and can work in practice, then I suspect the House of Commons is able to do that”.<sup>322</sup>

190. However, Lord Tyler CBE and Professor Hazell warned that this was potentially a “minefield” which would “draw the Speaker into some invidious decision-making”<sup>323</sup> and “into quite sensitive areas politically in giving rulings on what was and was not an English law when clauses in bills were being voted on”.<sup>324</sup>

**191. The question of whether England-only legislation can be more clearly demarcated from other legislation has to be resolved if any scheme of English votes for English laws is to work. While technical difficulties in relation to Legislative Consent (Sewel) Motions could be overcome by changes in drafting practice and by resorting to additional separate Bills, demarcating English and Welsh legislation is more complex.**

192. The financial allocations awarded to the devolved administrations are based on decisions on comparable spending programmes in England.<sup>325</sup> Professor Hazell said “if you try to establish a situation where only MPs representing English constituencies are voting on such matters which have such consequential effects for Scotland, Wales and Northern Ireland, there is a problem, there is a kind of disconnect between the structure and the effect which points to the fundamental problem and that is that decisions made for England, because of its size, inevitably impact outside of England”.<sup>326</sup> Professor Bogdanor said that “if Scotland had fiscal autonomy, the argument against English votes for English laws would be weaker”.<sup>327</sup>

193. However, Professor Keating argued that this objection “makes a matter of principle out of a flawed and much criticized system of financial allocation [the Barnett Formula], which does not even have a statutory footing”.<sup>328</sup> He continued, “the UK needs to move to a better system of territorial financing ... which would remove this objection”.<sup>329</sup>

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318 Ev 219

319 Q 130

320 Q 78

321 Q 499

322 Q 518

323 Q 130

324 Q 18

325 See text box on page 72

326 Q 6

327 Q 135

328 Ev 219

329 Ev 219

194. Even if legislation could be more clearly distinguished, the current system of territorial financing in the UK post-devolution means that the levels of public finance decided for England determine levels of resource allocation to Scotland and Wales. While we agree that the system could be changed in order to remove this effect, such a change would be a necessary pre-requisite to any system of English votes for English laws.

195. In the taskforce report, Rt Hon Kenneth Clarke MP makes it clear that the proposals are to address the West Lothian question.<sup>330</sup> He described the proposals for English votes for English laws as a parliamentary problem which needs to be addressed in Parliament before “a niggle gets worse”.<sup>331</sup> Rt Hon Jack Straw MP argued that the rationale behind this was “the implicit idea of a huge party imbalance between the Conservatives, who, it is thought, always dominated England, and the Labour party who can only form a government because of their disproportionate representation in Scotland and Wales”.<sup>332</sup> Professor Bogdanor argued that “I think it would be wrong to have a complete upheaval of the British constitution to meet that particular political problem”,<sup>333</sup> while Rt Hon Jack McConnell MSP warned to be careful not to end up “inside the House of Commons losing that common UK identity ... rather than just simply to deal with what is perhaps an immediate political tension”.<sup>334</sup>

196. Two main political solutions have been proposed to address this political problem. The first was to change the electoral system at Westminster so that it more accurately reflects the votes cast than is the case with the current first past the post system. Professor Curtice argued that “there is an even bigger English Question than why is it that it is possible for an English majority to be overturned by the Scots and Welsh, and that is that the English plurality in the last election was overturned by the electoral system within England. The Conservative Party has the most votes, the Labour Party has a majority of seats. That strikes me as a pretty big English Question”.<sup>335</sup> Professor Hazell responded that at least a partial response to the West Lothian question would be to “introduce a more proportional system of representation for this House”.<sup>336</sup> Professor Bogdanor argued that “if you had a proportional system, the West Lothian question would not be as acute as it is, to put it mildly”.<sup>337</sup>

197. A second response would be to “harmonise the electoral quotas of the four UK territories, ending English under-representation, or even to reduce the representation of Scotland, Wales and Northern Ireland to two-thirds that of England”.<sup>338</sup> The latter

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330 Conservative Party, Democracy Taskforce Report, *Answering the question: devolution, the West Lothian Question and the future of the Union*, July 2008, p 2

331 Q117

332 Q 664

333 Q 130

334 Q 517

335 Q 24

336 Q 15

337 Q 131

338 Robert Hazell, *Towards a New Constitutional Settlement: An Agenda for Gordon Brown's First 100 Days and Beyond* (Constitution Unit: UCL), p 28

approach was taken when the 1922 Parliament of Northern Ireland was created, and Northern Ireland MPs were reduced to twelve. In 2005 the number of Scottish MPs was reduced from 72 to 59.

198. While some proposals for English votes for English laws can be presented as limited procedural change, any thorough application of the principle would have broader implications for Parliament and for the position of the UK Government.

199. Proposals for English votes for English laws seek to make procedural adjustments to Westminster in order to remove the anomaly of Scottish MPs voting on matters in England which are devolved matters in Scotland. At present, such a scheme would be difficult to apply other than in limited form given both the current procedures for legislating for the UK and its constituent parts following devolution, and the current system of territorial finance.

200. While these obstacles could be overcome, some fear that the full application of English votes for English laws could result in a Parliament within a Parliament, which could be unworkable and might pose as great a threat to the Union as the resentment it seeks to address.

201. English votes for English laws seeks to deal with what is as much a political problem as a constitutional problem, represented by the traditional dominance of different parties in different nations and regions—an issue which, some suggest, could be addressed, in part, by reform of the electoral system which could reduce the risk of an English majority being overturned by Scottish and Welsh MPs. Others suggest that a further reduction in the number of Scottish seats at Westminster, and a possible reduction in Welsh seats following the devolution of greater powers, could also, to some extent reduce the same risk. Neither of these measures would, however, address the issue of principle about the voting rights of MPs representing nations with devolved governments and both of them give rise to controversy between parties because of the effect they have on party strengths at Westminster.

### ***Devolution within England***

202. A third response to the English question is devolution or decentralisation within England. Peter Facey, Director, Unlock Democracy, argued that the broader English question around the governance of England post-devolution cannot be addressed “without dealing with decentralisation”.<sup>339</sup> In his submission to the Committee, Lord Tyler CBE, author of the Liberal Democrats policy paper, *For the people, by the people*, argued that the Government should return to the question of devolution within England, “radically decentralising power to the English regions”.<sup>340</sup>

203. Unlock Democracy also supports devolution within England. It said: “devolution in England should take the form of directly elected regional government. It is difficult to see what powers there are that would only apply to England, which could not be devolved to a regional level. However, this would have to involve significant devolution of power from

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339 Q 170

340 Ev 223

Westminster and not just the regional administration proposed for the North East. Nor would it have to mean devolution to existing governmental regions. There is a strong case for devolving power in some areas down to the local area as some local authorities in southern England are larger than member states of the European Union”.<sup>341</sup> Sarah Ayres, University of Bristol, concluded that “if you want to really address the English question ... elected regional assemblies seem the only option”.<sup>342</sup>

204. The proponents of elected regional assemblies regard them not primarily as a solution to the ‘West Lothian’ question, but as reversal of the centralising tendency of government in England, as a means of providing democratic accountability to the wider range of regional decision making bodies set up under successive governments, and as a means of enabling regions with problems as significant as those of Scotland and Wales to adopt measures and promote solutions which can deal with them. Elected regional assemblies would be only a partial answer to the West Lothian question for two reasons: first, unless all regions had elected assemblies, at least part of England would continue to have matters which are devolved elsewhere governed from Whitehall and Westminster. Secondly, it is generally accepted that English regions would not have or need the same range of powers as the Scottish Parliament—for example, no-one assumes that a region of England should have a separate criminal law. The United Kingdom Government and Parliament would therefore retain in England and, to a significant extent, in Wales, powers which were devolved in Scotland.

205. Regional devolution was what the Government had intended for England post-devolution. Following the creation of the devolved Parliament and Assemblies (and the London Mayor and Greater London Authority), in 2002 the Government published its White Paper, *Your Region, Your Choice: Revitalising the English Regions*, which outlined its proposals for elected regional assemblies in England. Following consultation by the Office of the Deputy Prime Minister, an announcement was made in June 2003 that referendums would be held in the North East, North West, and Yorkshire and the Humber regions.<sup>343</sup>

206. In July 2004 the Office of the Deputy Prime Minister further announced that only the North East would move forward to a referendum. Citing concern over reports of irregularities in the all-postal voting process during the June 2004 local and European Parliament elections in the North West and Yorkshire and the Humber, the then Local Government Minister Rt Hon Nick Raynsford MP said that the North East had “consistently welcomed” all-postal ballots and had shown “clear expectation and overwhelming support for a referendum”.

207. The Government abandoned its plans for regional assemblies for England in 2004 following the rejection of a regional assembly in the north of England by a majority of four to one.<sup>344</sup> Several reasons have been identified for the referendum result, particularly the fact that very limited powers were offered to the Regional Assembly leading to a very

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341 Ev 192

342 Q 347

343 Professors Colin Rallings and Michael Thrasher, *Why the North East said ‘No’: The 2004 Referendum on an Elected Regional Assembly*, Briefing no 19, February 2005.

344 696,519 votes were cast against the Government’s proposals, compared to 197,310 votes in favour.

strong perception in the public attitudes data that this was going to be an expensive talking shop which would not make any difference because it had no serious powers.<sup>345</sup> Councillor Faulkner, Newcastle City Council, told the Committee that “there was not enough on offer for people to feel it would make a difference”.<sup>346</sup> Professors Rallings and Thrasher also identified “dissatisfaction with government policy and a distrust of politicians in general” as a partial explanation for the outcome of the referendum vote.<sup>347</sup>

208. In particular the referendum was linked to controversial changes to the local government structure which were subsequently implemented in spite of the ‘No’ vote.<sup>348</sup> The referendum took place at a time when the Government itself was a great deal more unpopular than it was at the time of the London referendum in 1998, which had approved the creation of an Assembly and Mayor. It had been assumed that the North East was the area most likely to support a regional assembly, and the defeat meant that no further referendums were held.

209. However, witnesses identified two key points in relation to the Government’s regional policy and any consideration of the future of regional government in England. First, regional assemblies were “the tip of the regional iceberg” and since 2004 there has been a steady growth and development in both regional infrastructure and policy. The second and related point is the question of whether there is likely to be demand for the democratization of those structures. Professor Hazell has identified what he describes as “a form of creeping regionalism” over the years which was likely to continue and might lead to the re-emergence of the demand to democratise regional structures.<sup>349</sup> Councillor Faulkner told the Committee “there is a common view emerging ... there will come a time when people want to do it again”.<sup>350</sup> Unlock Democracy told us that they were currently “toying with the idea of an English devolution enabling act”.<sup>351</sup>

210. Mark Sandford, formerly of the Constitution Unit, UCL, commented that:

“English regional government ... has been a bigger and more complex story than elected regional assemblies for a long time. The proposals in the 2002 White Paper, *Your Region, Your Choice*, were only the tip of the regional iceberg. Even if the North-East had voted in favour of an elected assembly, the changes to regional governance that would have been wrought as a result would have been less significant than what has already happened in the spheres of administration, planning and economic management. Unelected regionalisation of government

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345 Detailed public attitudes research into the North East referendum showed that, whilst people were absolutely unconvinced of the model put to them, the people of the North East were, in a clear majority, convinced that they were politically marginalised, that they not only did not have a voice at the centre in Westminster and Whitehall, but also that they were economically marginalised vis-à-vis other parts of the UK, and the lack of political voice and the sense of economic disadvantage were clearly very important issues.

346 Q 332

347 *Why the North East said ‘No’: the 2004 Referendum on an Elected Regional Assembly*, Brief no. 19, February 2005. See also *The Referendum Campaign: Issues and Turning Points in the North East*, Briefing no. 20, February 2005, for an analysis of the impact of the campaigns on the referendum result.

348 In both Scotland and Wales local government re-organisation took place prior to the devolution referendum.

349 Q 18

350 Q 330

351 Q 173

functions is proceeding apace, quite separately from the headline-grabbing elected assembly agenda”.<sup>352</sup>

211. Sub-national government and regional government within England are not the responsibility of the Ministry of Justice. This is indicative of the Government’s approach to devolution and is a potential example of the impact of the missing centre identified earlier in the report.<sup>353</sup> What follows is therefore a review of regional structures and key developments in regional policy following the failed referendum in the North East as an attempt to look at regional and other forms of devolution within England as a potential solution to the centralisation of power and accountability within the UK.

212. In 2002 the Government published its White Paper *Your Region, Your Choice: Revitalising the English Regions*. It asserted that administrative decentralisation “will make the delivery of programmes and policies more efficient and ultimately lead to better outcomes in all regions”.<sup>354</sup> Regional reforms were targeted in three key areas. First, as a step towards regional democracy, voluntary Regional Chambers (subsequently restyled ‘Assemblies’) comprising local authority leaders and representatives of other regional economic and social interests were established to perform strategic co-ordination and democratic oversight. Second, Regional Development Agencies (RDAs) were appointed to co-ordinate regional economic development and regeneration initiatives and promote the regions’ competitiveness. Government Offices in each region had been set up by the previous Conservative Government, and their roles were extended to provide central government with a more coherent presence in the regions. In addition to extending democracy, therefore, the Government’s reforms were motivated by a desire for gains in efficiency and policy effectiveness.<sup>355</sup> Administrative devolution within England—to the Government Office in each region, to the Regional Development Agency and to other bodies such as the police—has also been reflected in the voluntary moves to co-terminosity an the Government Office boundaries of business organisations, local government groupings and voluntary sector bodies.

213. The Government’s *Review of sub-national economic development and regeneration* (SNR), has been the subject of ongoing consultation. The Government published its response to this consultation in November 2008.<sup>356</sup> The review proposed abolishing Regional Assemblies by 2010 and expanding the remit and powers of Regional Development Agencies by giving them strategic oversight of transport, planning and housing matters currently dealt with by the Regional Assemblies. Under the proposals in the Sub National Review, local authorities will be encouraged to establish effective scrutiny of regional matters, in particular the work of their Regional Development Agencies, and parliamentary accountability will be strengthened (the document states that the Government will “work with Parliament” to determine how this might be achieved).<sup>357</sup>

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352 Mark Sandford, *Devolution is a process not a policy: the new governance of the English regions*. Briefing no.18, February 2005.

353 See paras 31 and 40-41

354 Cabinet Office and DTLR, 2002: 3.14.

355 Ev 190

356 [www.communities.gov.uk/publications/citiesandregions/govresponseprosperousplaces](http://www.communities.gov.uk/publications/citiesandregions/govresponseprosperousplaces)

357 See Prof John Mawson, *Regional Governance in England and Future Challenges for Local Government*, p 14

214. Alongside this developing infrastructure, the Government have made plans for strengthening regional accountability. These were set out in *The Governance of Britain*, and include the establishment of regional select committees, one for each of the nine English regions. It has been suggested that these select committees would examine the work and activities of regional bodies, in particular the Regional Development Agencies, and call ministers, including the relevant regional Minister, to account. Rt Hon Kenneth Clarke MP described these as “a gimmick and public relations”.<sup>358</sup>

215. The Communities and Local Government Select Committee Report, *Is there a future for Regional Government?*, proposed the establishment of a select committee for each region “which might meet a limited number of times (perhaps in conjunction with the relevant Assembly) in order to examine the work of key regional bodies and call Ministers to account for their performance”.<sup>359</sup>

216. On 12 November 2008 the House of Commons agreed to establish eight regional select committees. The Standing Order stated that the regional select committees shall be appointed to “examine regional strategies and the work of regional bodies” for the eight English regions, excluding London. The Government’s intention was that the committees would look at the “development or implementation of policies where there is a regional aspect to decision-taking and delivery, and would not be focused on the purely local impact of nationally set policies”.<sup>360</sup> The Standing Order establishing these Committees took effect from 1 January 2009, and the Committees met for the first time during March 2009.<sup>361</sup> However, only Labour members have been appointed to the Committees because the Conservative Party was opposed in principle to the Committees and the Liberal Democrats objected to the fact that the Committees’ composition would not reflect the balance of MPs in the region, but were in accordance with the UK balance of seats in the House of Commons. As a result, neither opposition party chose to put forward nominations.

217. Ministerial posts for the regions were created. *The Governance of Britain* defines the role of Regional Ministers as to:

- “advise the Secretary of State for Business, Enterprise and Regulatory Reform on the approval of regional strategies and appointment of RDA Chairs and Boards;
- represent regional interests in the formulation of central government policy relevant to economic growth and sustainable development in areas that have not been devolved to the RDAs;
- facilitate a joined up approach across government departments and agencies to enable the effective delivery of the single regional strategy;
- champion the region at high level events and with regard to high profile projects (including through a programme of regional visits); and

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358 Q 125

359 Communities and Local Government Committee, Fourth Report of Session 2006-07, *Is There a Future for Regional Government?*, HC 352-I.

360 Explanatory Memorandum on the Motions in the Name of the Leader of the House, debated in the House on 12 November 2008.

361 Provision was also made for Regional Grand Committees.

- represent the Government with regard to central government policy at regional select committee hearings and at parliamentary debates focused specifically on the region”.<sup>362</sup>

218. Ministers designated as a regional minister do this work in addition to their responsibilities as Ministers in a variety of departments. The Government has also introduced Regional Boards for local authority leaders in order to address issues of regional accountability. However, Lord Tyler CBE argued that these new structures of regional accountability were “no substitute for holding to account the government office for that region and the development agency for that region ... it ... has proved to be an inadequate answer to a very real question of real devolution, real decentralisation within England”.<sup>363</sup>

219. While Councillor Faulkner said: “... what is on offer through sub-national review ... gives us more of a chance than we have had for decades”,<sup>364</sup> Phil Davis, Campaign for the English Regions said that the West Lothian question would “only be resolved by creating an accountable structure ... in each of the English Regions”,<sup>365</sup> and as Professor Mawson argued, this would “give the English regions the maximum amount of flexibility to shape the structures of government to the context within each of the regions”.<sup>366</sup> Phil Davies concluded that “... it may be possible to improve the present process ... and there are aspects of the sub-national review which could do that, but it is not an answer to the fundamental constitutional question of balancing the new UK devolved constitution”.<sup>367</sup>

220. The Government has acknowledged the need for greater devolution within England as part of their response to the English question. Thus while Rt Hon Jack Straw MP saw “no good case for having a separate Parliament for England,” he identified that “the bigger issue within England is to see a degree of further devolution, as we have achieved in London, to local government units”.<sup>368</sup> However, the debate is ongoing as to the form which that devolution should take. Rt Hon Kenneth Clarke MP said that “regional government is pretty dead in England now”.<sup>369</sup> Rt Hon Jack Straw MP agreed to an extent and said that while “nothing is closed for ever and a day ... I think ... people have moved on from there and they are more interested in ideas of strengthening the existing local government units and the development of ... city regions”.<sup>370</sup>

221. Sarah Ayres, University of Bristol, said that since 2004 the Government had attempted to tackle the English question “under administrative decentralisation ... putting down more functions and powers to the existing administrative tier”.<sup>371</sup> She identified that these developments had focused on the “technocratic argument ... efficiency, effectiveness and

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362 Ministry of Justice, *The Governance of Britain*, Cm 7170, para118.

363 Q 126

364 Q 330

365 Q 363

366 Q 373

367 Q 363

368 Q 679

369 Q 120

370 Q 680

371 Q 336

economic productivity, which perhaps is the sub-national review remit”, and that this was how the English question was being dealt with by the Government.<sup>372</sup>

### **Local Government and the English question**

222. Some have suggested that a partial answer to the West Lothian question lies in greatly strengthening the local government system in England and devolving to local authorities many of the powers which were suggested for regional assemblies. It is argued that this would be preferred in many parts of the country over the attempt to create a structure of governance based on more or less artificial regional boundaries.

223. Insofar as there is concern about the centralised nature of government in England—and the fact that UK institutions are responsible for most English policies—the further development of local government clearly has the potential to be a significant part of an answer. However, this would require a willingness to devolve further powers and remove Whitehall financial controls and influence to an extent which has not been a conspicuous characteristic of the policies of recent governments. Such an approach is undermined by the desire of ministers to make a visible impact in areas of policy for which local government is formally responsible, such as education. The public, and the media, often expect ministers to take responsibility and action in cases of high profile service failure within individual authorities.

224. There has also been a marked tendency on the part of government to promote alternative structures to elected authorities such as ‘quangos’ and partnerships through which greater resources are channelled than are available to local authorities. Despite the existence of local government, successive administrations have also considered it necessary to maintain regional tiers for many of their own operations and have taken the view that there are matters, trunk road transport amongst them, which transcend local authority boundaries.

225. We note that the Communities and Local Government Committee is conducting an inquiry entitled *The balance of power: central and local government* in England and the evidence so far made available indicates that the issues under consideration have great resonance with the aspects of devolution policy that we have been considering; including the scope of administrative competence, decision-making and financial freedom for local authorities. We also note the progress of the *Local Democracy, Economic Development and Construction Bill* which includes provisions on increasing opportunities for public involvement in local decision-making and scrutiny; new forms of joint working between local authorities; and on the establishment of single regional development strategies produced jointly between regional development agencies and local authorities.

**226. We have not examined regional and local governance issues in depth during this inquiry but clearly, in developing a clear and coherent strategy for devolution, the Ministry of Justice, needs to take policy developments in both areas into account and establish cross-departmental working mechanisms with the Department for**

Communities and Local Government and the Department for Business, Enterprise and Regulatory Reform to do so.

227. However, it does not appear likely that the powers which future governments will be prepared to devolve to local government, will be sufficient to meet the concerns of those who want an English solution to the West Lothian question or those who believe that power will continue to be exercised at regional level and wish to see those powers made accountable and increased.

## Conclusion

228. There is no consensus about solutions to the “English question”, or the range of questions which arise under that heading. Each suggested answer has its own problems and limitations, and while some attempt to address issues around centralisation, others attempt to address the West Lothian question. Those which deal to any major extent with the West Lothian question, like an English Parliament and English votes for English laws, raise significant problems in a state where one of its constituent territories has 84% of the population.

229. The implications of having an English Government and First Minister as well as a United Kingdom Government and Prime Minister have not been the subject of much public discussion and are politically significant. Approaches which make the UK Parliament into a federal Parliament or treat English laws differently at Westminster raise questions about the nature and role of the Second Chamber which need to be considered as part of the discussion of Lords reform: clarification would be needed about whether, and if not why, the Second Chamber should consider “English” laws when it did not consider the laws of Scotland.

230. These are major political as well as constitutional questions which are for Parliament as a whole to consider. It is our belief that as devolved government in Scotland, Wales and Northern Ireland develops in profile and substance, Parliament will come under pressure to consider these questions.

## 6 Finance and the Barnett Formula

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231. The Barnett Formula is not a consequence of devolution: it dates from much earlier but it has been maintained under devolution and given added political significance because the use made of the funds allocated by it is wholly determined by the devolved administrations. Some type of formula for allocating funds between the countries of the Union can be traced back to arrangements introduced in the 1880s by the then Chancellor of the Exchequer, George Goschen. In 1888 he decided to use a formula to allocate probate duties in support of local government.<sup>373</sup> During the 1960s and early 1970s, public expenditure plans for Scotland, Wales and Northern Ireland were settled collectively and by negotiation within the wider public expenditure framework on much the same basis as other public spending programmes.<sup>374</sup>

232. However, in 1978 there was a return to a formula for determining public expenditure to Scotland. The formula was extended to Wales in 1980.<sup>375</sup> The specific origins of the formula are not well documented, and were described by Professor Mitchell as “quite murky”.<sup>376</sup> In an article written in 1980, Professor David Heald named this formula “the Barnett Formula ... after Joel Barnett MP, the then Chief Secretary of the Treasury with responsibility for public expenditure”.<sup>377</sup>

233. In his evidence to the Treasury Committee’s inquiry in 1997, Rt Hon Lord Barnett described the purpose of this formula. He said:

“Put simply, the Barnett Formula set percentages of changes in comparable expenditure in Great Britain. That is to say, it would be 85 per cent for England, 10 percent of expenditure for Scotland and 5 percent for Wales. That is exactly what the Barnett Formula is. It was set up for a variety of reasons. First of all, for the need to recognise the spending levels between the various parts of the UK—population sparsity in Scotland, transport needs, needs because of relative ill health, rural needs for education and so on and industrial needs—but above all ... with income per head ... I do not know what is happening today—I do not know who does but, as far as I am concerned, what happened then was that I first of all had to persuade Cabinet to agree a total level of public expenditure. Having got that agreement, to make life a trifle easier and have to handle only English departments, I then got Cabinet approval for what is now (not then) called a Barnett Formula—the way public expenditure should be allocated and the changes in public expenditure should be allocated between England, Scotland and Wales—and they agreed that. Then I had a much tougher job of persuading departmental ministers to accept their budgets as I had allocated them. It was a bit easier, I could play one off against the other by saying “You cannot have any more because it would mean taking it away from somebody

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373 *The Barnett Formula*, Research Paper 01/108, House of Commons Library, November 2001.

374 *Ibid*

375 Treasury Committee, Second Report of Session 1997-98, *The Barnett Formula*, HC 431, q 195

376 Q 276

377 David Heald, *Territorial Equity and Public Finances: Concepts and confusion*. University of Strathclyde Centre for the Study of Public Policy, Studies in Public Policy No.75

else”, and they could not say anything about the allocation to Scotland and Wales because they, in Cabinet, had agreed it. So all those factors were taken into account in deciding what should be the allocation of public expenditure”.<sup>378</sup>

234. Today, the non-statutory Barnett Formula is still a part of the mechanism used to determine the budgets of the devolved administrations. Expenditure by the Scottish Government, the Welsh Assembly Government and the Northern Ireland Executive is largely funded by block grant from the UK Government.<sup>379</sup> The Barnett Formula determines the change in these budgets rather than their absolute level. This mechanism allocates funding to Scotland, Wales and Northern Ireland at the *same* per capita levels as funding decisions for policy programmes in England.<sup>380</sup> The Formula is designed to apply automatically a proportionate share of any increase (or decrease) in comparable English spending programmes to the other constituent parts of the UK based upon population shares.<sup>381</sup>

235. These arrangements for funding devolution are well-established. Baseline funding levels for Scotland, Wales and Northern Ireland, the block grants, were set in the period 1979–82 at levels higher than per capita spending in England and have been adjusted incrementally since by the Barnett Formula and its variations. In its first report *The Future of Scottish Devolution within the Union*, the Commission on Scottish Devolution (the Calman Commission) point out that the size of the current block grant is exactly what it would have been had the Scotland Act never been enacted.

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378 Treasury Committee, Second Report of Session 1997-1998, *The Barnett Formula*, HC431, p 1

379 Scotland is different from Wales and Northern Ireland in that it has the power to vary the standard rate of income tax levied, thus raising additional or less income.

380 Economic and Social Research Council: *Devolution and Constitutional Change Programme: Final Report*, March 2006

381 For further information see the Lords Constitution Committee Report, Second Report of Session 2002-03, *Devolution: Inter-Institutional Relations in the United Kingdom*, HL 28.

### *The Barnett Formula*

The Formula dictates that for every extra £1 the Government distributes, 85p goes to England, 10p to Scotland and 5p to Wales.<sup>382</sup> Strict operation of the Barnett Formula could lead to slower percentage increases in public spending for Scotland, Wales and Northern Ireland compared with those for England. This has been called the “Barnett squeeze”. It is difficult to verify empirically whether this has occurred.<sup>383</sup>

The ESRC Devolution and Constitutional Change research team concluded that the allocation of increments on a simple per capita formula has had the effect, in principle and over time, of eroding the initial per capita spending bonus set in 1979–82 and bringing down per capita spending levels in Scotland, Wales and Northern Ireland towards the English level—the so-called ‘convergence effect’ of the Barnett Formula.

However, while the annual increase in Scotland's allocation is falling, the historical disparity created in 1978 and Scotland's increasing prosperity have meant the apparent generosity of the Treasury towards Scotland has persisted.<sup>384</sup> That has led to a situation where “identifiable spending” in Scotland on public services is £1,500 higher per person than in England, according to Treasury figures.<sup>385</sup>

236. The funding arrangements for Scotland and Wales did not change post-devolution. In the early years of devolution, the Formula was described as having “the merit of familiarity”, and therefore helped avoid serious dispute over territorial finance since devolution.<sup>386</sup> Simplicity and predictability do have advantages to financial planning. The Calman Commission interim report said that one of the merits of the Barnett Formula was that post-devolution the Scottish budget had been “stable and substantially predictable”,<sup>387</sup> getting the Scottish Parliament “off to a good start” because there had been “no wild fluctuations in financial provision”.<sup>388</sup> Rt Hon Des Browne MP said that the Formula had “served us well in those years ... it has been transparent. People understand it.”<sup>389</sup>

237. However, the Calman Commission said that despite the Formula’s simplicity, “it has not avoided all political concern about its application”.<sup>390</sup> Professor Mitchell said the Formula “provokes hostility both sides of the border”: at Scotland having more generous public policies but not having to pay for them;<sup>391</sup> and in Scotland and Wales about what is

382 [www.telegraph.co.uk/news/main.jhtml?xml=/news/2008/03/05/nscots205.xml](http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2008/03/05/nscots205.xml)

383 *Summary, The Barnett Formula*, Research Paper 07/91, House of Commons Library, December 2007

384 [www.telegraph.co.uk/news/main.jhtml?xml=/news/2008/03/05/nscots205.xml](http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2008/03/05/nscots205.xml). *With five million people, Scotland now has only 8.3% of the UK population*

385 [www.telegraph.co.uk/news/main.jhtml?xml=/news/2008/03/05/nscots205.xml](http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2008/03/05/nscots205.xml)

386 Economic and Social Research Council: *Devolution and Constitutional Change Programme: Final Report*, March 2006

387 Commission on Scottish Devolution, *The Future of Scottish Devolution within the Union: A First Report*, Para 6.12

388 Commission on Scottish Devolution, *The Future of Scottish Devolution within the Union: A First Report*, Para 6.15

389 Q 81

390 Commission on Scottish Devolution, *The Future of Scottish Devolution within the Union: A First Report*, Para 6.15

391 Q 279

included in the Barnett Formula and what is not. For example, the Calman Commission pointed to the “arbitrary decision” not to include Olympic spending and new spending on prisons in England within the calculations for the Barnett Formula.<sup>392</sup> Nicola Sturgeon MSP told the Committee that this had “caused great consternation on the part of all devolved administrations”,<sup>393</sup> while Rt Hon Rhodri Morgan AM identified this as a “major financial dispute”.<sup>394</sup> On the other hand, a decision to give free prescriptions to cancer patients in England generates an increase in funding for Scotland, where prescriptions are already free. The content of the Statement of Funding Policy,<sup>395</sup> and how it is applied, are matters for the UK Government, and there is no independent oversight of those decisions”.<sup>396</sup>

238. Rt Hon Ken Clarke MP identified the Barnett Formula “as the biggest single cause of resentment”,<sup>397</sup> while Rt Hon Lord Barnett himself said that the Formula provokes “hostility” in Scotland and England.<sup>398</sup> Lord Tyler CBE described it “as a very convenient place on which people hang all their problems of feeling aggrieved”.<sup>399</sup> Furthermore, Professor Bogdanor identified a lot of “misunderstanding” around the Formula<sup>400</sup> and Rt Hon Ken Clarke MP argued that “hardly anybody understands it”.<sup>401</sup> Rt Hon Lord Barnett said that when talking about the Formula, most people, including senior politicians “do not know what they are talking about”.<sup>402</sup>

239. Many of these issues were raised in the Lords Constitution Committee’s 2003 Report, *Devolution: Inter-Institutional Relations in the United Kingdom*, which reviewed the operation of the Formula and commented “that there are serious difficulties presented by the long-term continuation of the Barnett Formula. We do not think that it will be a sustainable basis for allocating funds to the devolved administrations in the long term. Many of those in Wales and Northern Ireland, as well as those in parts of England, consider that the Formula is unfair in its allocation of funds to them in comparison to its allocation of funds to other areas, and does not provide them with the resources they need. Even if it does provide those resources, it does not do so in a manner that convincingly demonstrates that. This is largely because so much control remains in the Treasury’s hands”.<sup>403</sup>

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392 Commission on Scottish Devolution, *The Future of Scottish Devolution within the Union: A First Report*

393 Q 303

394 Q 636

395 This sets out publicly how the Barnett formula works. See [hm-treasury.gov.uk/pbr\\_csr07\\_statement\\_of\\_funding\\_policy.htm](http://hm-treasury.gov.uk/pbr_csr07_statement_of_funding_policy.htm)

396 Commission on Scottish Devolution, *The Future of Scottish Devolution within the Union: A First Report*, Para 6:15

397 Q 138

398 Q 408

399 Q 140

400 Q 139

401 Q 137

402 Q 408

403 HL Deb, 27 January 2003, col 914. An in-depth analysis of the Barnett Formula is provided in *The Barnett Formula*, Research Paper 01/108, House of Commons Library, November 2001

## Review of the Barnett Formula

240. More recently, calls for a review of the Barnett Formula have come from a wide range of voices and perspectives, and from all parts of the United Kingdom. For example, in written evidence to the Committee, Sustrans Cymru, the sustainable transport charity, the British Medical Association (BMA Cymru Wales) and The National Association of Headteachers (NAHT Cymru) are demanding a fresh look at the workings of the Barnett Formula. They agreed that “too few people understand the way the Barnett Formula works. We need to clear the dense funding fog to see if Wales is being well served”.<sup>404</sup> A report in the Guardian newspaper on 27 March 2007 said:

“The Formula doesn't take into account the fact that Welsh income levels are among the lowest in Europe. Nor does it factor in the legacy of ill health left over from heavy industry. In short, the Formula takes no account of Welsh social and economic need. Indeed, experts reckon that Wales is losing out on between £300m and £800m a year. But the real point is that nobody knows”.<sup>405</sup>

241. Following the 2007 Assembly elections in Wales, the new Labour/Plaid Cymru administration issued the document, *One Wales: a progressive agenda for the government of Wales*. This document included a commitment to “an independent Commission to review Assembly Funding and Finance, to include a study of the Barnett Formula, of tax-varying powers including borrowing powers and the feasibility of corporation tax rebates in the Convergence Fund region, including the implications of recent European Court of Justice Rulings in this area”.<sup>406</sup>

242. On 8 July 2008, Gerald Holtham was appointed as Chair of the Commission on Funding and Finance, whose terms of reference were to look at the pros and cons of the present formula-based approach to the distribution of public expenditure resources to the Welsh Assembly Government; and to identify possible alternative funding mechanisms including the scope for the Welsh Assembly Government to have tax varying powers as well as greater powers to borrow.<sup>407</sup> The work is expected to take place in two phases, with the interim findings for phase one (which includes a review of the working of the Barnett Formula) due to be published in the summer of 2009.<sup>408</sup>

243. Similar calls for reform have also come from Scotland. Speaking in July 2007, Alistair Carmichael, MP for Orkney and Shetland and the Liberal Democrat Scottish spokesman, insisted the Barnett Formula had to go. He said: “there is an urgent need to reform the way in which Scotland's budget is set. A full constitutional convention to examine expanding the powers of the Scottish Parliament, including greater control over Scotland's finances, is urgently needed. It is clear this is far and away the most popular option with the people of

404 Ev 236. Press release 27 March 2007

405 *The Guardian*, 27 March 2007

406 Available at [news.bbc.co.uk/1/shared/bsp/hi/pdfs/27\\_06\\_07\\_owales.pdf](http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/27_06_07_owales.pdf), p 6

407 <http://new.wales.gov.uk/news/topic/officefirstminister/2008/2364708/?lang=en>

408 <http://wales.gov.uk/icffw/home/?lang=en>

Scotland. If Gordon Brown is serious about constitutional change and increasing democracy, he cannot fail to act".<sup>409</sup>

244. Lord Sewel, the former Scottish Office Minister, has also called for a review of the Formula. He said "Barnett served the UK well prior to devolution and was important in enabling a smooth transition to be made to devolved government. It has now outlived its usefulness. Its lack of transparency is, at least in part, the reason for it being perceived as a cause of grievance between England and Scotland".<sup>410</sup> The Calman Commission is currently considering the financial accountability of the Scottish Parliament, and while it has not made any firm recommendations yet, the first report considers options for the funding of the Scottish Parliament which could potentially replace the Barnett Formula. Professor Mitchell suggested that this could provide an opportunity to "square the circle" to give the Scottish Parliament the powers to raise its own revenue in some measure, alongside a reformed formula".<sup>411</sup>

245. Rt Hon Lord Barnett himself has called for reform of the Barnett Formula. He requested the creation of an ad hoc Select Committee in the House of Lords to re-examine the Formula in the light of changes in the economic and constitutional complexion of the United Kingdom since it was devised. He further suggested that although the issue was one of public spending it would benefit from the dispassionate and non-partisan approach of a Lords committee.<sup>412</sup>

246. Initially, the House of Lords Liaison Committee refused Rt Hon Lord Barnett's request. They explained:

"We have some sympathy with Rt Hon Lord Barnett on the case for a review of the Formula in principle. However we are not convinced that this is an appropriate subject for an ad hoc inquiry by a Lords committee. Although it was suggested to us that a large part of any such inquiry would be involved in simple collation of factual information, we have some doubts about the extent to which any review of the Barnett Formula could be limited or constrained, either from ranging over devolution issues or from assessing macroeconomic arrangements for government spending more generally. We think that in principle the subject matter falls within the area of scrutiny more obviously undertaken by the Commons, and we are doubtful about the extent to which any inquiry by a committee of this House would carry influence in decision-making. Accordingly, we do not recommend the establishment of an ad hoc committee on the Barnett Formula".<sup>413</sup>

Nevertheless, on 10 December 2008 the Lords agreed a motion to create an ad hoc Select Committee to consider the Barnett Formula. Its terms of reference are to "examine the purpose, methodology and application of the Barnett Formula as a means of determining

409 [http://200.115.171.174/htmlfiles/scotnews07/070711\\_scrap.html](http://200.115.171.174/htmlfiles/scotnews07/070711_scrap.html) Michael Settle, July 2007

410 Lord Sewel, *The Union and devolution – a fair relationship*, in Chris Bryant MP (ed) *Towards a New Constitutional Settlement*, The Smith Institute, p 78

411 Q 279

412 Liaison Committee, *First Report of Session 2007–08*, HL 33, 15 January 2008 available at [www.publications.parliament.uk/pa/ld200708/ldselect/ldliaisn/33/33.pdf](http://www.publications.parliament.uk/pa/ld200708/ldselect/ldliaisn/33/33.pdf)

413 Liaison Committee, *First Report of Session 2007–08*, HL 33, 15 January 2008 available at <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldliaisn/33/33.pdf>

funding for the devolved administrations of the United Kingdom, to assess the effectiveness of the calculation mechanism to meet its purpose, and to consider alternative mechanisms”.<sup>414</sup>

247. However, to date, the Government have refused to undertake a review of the Barnett Formula. On 6 March 2008, Rt Hon Alistair Darling MP, Chancellor of the Exchequer said that

“... the House will know, the Unionist parties in the Scottish Parliament—the Liberals, Conservatives and Labour—have agreed to review arrangements under the Scotland Act 1998. As part of that, the Government have said that they will publish the way in which the Barnett formula has operated over the past 30 years. We are not currently reviewing it, but it will inform debate. There will have to be a lot of discussion... It is important that we have that debate, and I shall publish something—probably in the summer—that will contribute to it ... I intend to publish the position on the Barnett formula, probably in the summer, but there ought to be a debate.”<sup>415</sup>

A factual paper on how the Barnett Formula works was submitted as evidence to the House of Lords ad hoc Select Committee on the Barnett Formula on 3 March 2009.<sup>416</sup> However, to date, the Government’s position on the Barnett Formula has not been published.

248. Following this debate, it was reported in the press on 6 March 2008 that Downing Street had issued “furious denials” of any plans to review or change the Barnett Formula.<sup>417</sup> Speaking in the House of Commons on 11 March 2009, Rt Hon Paul Murphy MP said that he understood that “the Treasury has no plans to review the funding arrangements”.<sup>418</sup> Rt Hon Lord Barnett told the Committee it was “crystal clear ... that the Treasury do not want to consider any change at all”.<sup>419</sup> However, Rt Hon Jack Straw MP told us that the Government would take into account the recommendations of both the Calman Commission’s Report and this report “before coming to a decision about whether there are any changes that need to be made”.<sup>420</sup>

249. Rt Hon Lord Barnett told us that the Barnett Formula was “one of those odd policies which seems to have very little support”. He said that the only reason that it continued to exist was because it had proved “very difficult to find an alternative”.<sup>421</sup> However, in the current political and economic environment, the formula is no longer sustainable. Professor Mitchell argued that any resolution had to be consensual, it had to involve all parts of the UK agreeing to any changes and has to involve cross party support.<sup>422</sup> While Rt

414 [www.parliament.uk/parliamentary\\_committees/hlbarnettformula.cfm](http://www.parliament.uk/parliamentary_committees/hlbarnettformula.cfm)

415 Treasury questions, HC Deb 6 March 2008 cc1908-09

416 [www.parliament.uk/parliamentary\\_committees/hlbarnettformula.cfm](http://www.parliament.uk/parliamentary_committees/hlbarnettformula.cfm)

417 See [www.journallive.co.uk/north-east-news/todays-news/2008/03/06/pm-denies-rethink-on-barnett-formula-61634-20564698/](http://www.journallive.co.uk/north-east-news/todays-news/2008/03/06/pm-denies-rethink-on-barnett-formula-61634-20564698/)

418 HC Deb, 11 March 2009, col 285

419 Q 449

420 Q 657

421 Q 276

422 Q 270

Hon Lord Barnett told us that he thought there would be widespread support for reform of the formula, he doubted that this support would extend to the political parties.<sup>423</sup>

250. We identified two key tenets upon which any revised formula should be based. First, was that the formula should be needs based. Despite recent confusion suggesting the contrary, Rt Hon Lord Barnett emphasised strongly that the current Formula was “not based on need, it is based on population”.<sup>424</sup> He added that he had not expected the original Formula to last for so long and said that he “would have hoped to have changed it to a policy that is truly based on need”.<sup>425</sup> There is no doubt that any assessment of need would be controversial and politically sensitive, as different people would define need in different ways. Professor Mitchell defined need as “a highly political thing ... we will all disagree on needs”.<sup>426</sup> However, Rt Hon Lord Barnett was convinced that a needs assessment could be achieved”.<sup>427</sup> Professor Mitchell said that despite the difficulties in defining the needs basis for a formula, at least “there will be a transparent formula in existence about which we can argue”.<sup>428</sup>

251. Rt Hon Lord Barnett also emphasised that a needs based formula should take into account the needs “of the regions and counties of England as well as Scotland, Wales and Northern Ireland”.<sup>429</sup> Mr Ieuan Wyn Jones AM, Deputy First Minister, National Assembly for Wales agreed that “needs to be looked at in the English context as well”,<sup>430</sup> and argued that this issue was particularly pertinent when “CSR settlements are tighter”.<sup>431</sup> Professor Bogdanor argued that “any revision of the Barnett Formula would have to confront the problem of the allocation of regional and local government spending in England”.<sup>432</sup>

252. Any formula will require periodic review and will need to address anomalies as they arise, and for this purpose there need to be an adjudicating body which can command the respect of the devolved administrations and representatives of the bodies governing England as well as of the UK government.

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423 Q 411

424 Q 400

425 Q 403

426 Q 279

427 Q 431

428 Q 279

429 Q 417

430 Q 638

431 Q 638

432 Q 139

### *The Lords Constitution Committee recommendations*

In their 2003 Report, *Devolution: Inter-Institutional Relations in the United Kingdom*, the Lords Constitution Committee envisaged that any alternative to the Barnett Formula would incorporate the following elements:

(a) an assessment of the needs of the devolved administrations, and the different regions of England, taking into account the nature of their responsibilities and the demographic characteristics of the relevant population;

(b) that needs assessment would not be repeated every year but only at periodic intervals. Adjustments to the funds available, whether annually or in year, would be made by means of a formula;

(c) however calculated, funds made available to the devolved administrations would remain in the form of a block grant which the administration could allocate as it wished;

(d) funds for the devolved administrations should be payable solely to them. The present arrangement by which the offices of the Secretaries of State are 'top-sliced' from the devolved administration's block grant should be ended and payments for those offices made separately and directly by the Treasury;

and

(e) the transition to a new arrangement should be phased over a number of years, to minimise the effects of it for those parts of the UK which lose out relatively in terms of funding.<sup>433</sup>

**253. The Barnett Formula is overdue for reform and lacks any basis in equity or logic. It creates controversy in all of the constituent parts of the UK. There is controversy in England that the Barnett Formula allows for higher levels of public spending in Scotland from the UK Exchequer and does not deal with different needs in different parts of England. There is concern in Wales that allocation of funds through the Barnett Formula does not adequately meet the higher structural costs of the delivery of some public services. We are concerned that the lack of adequate understanding of the Formula and how it operates has the potential to create tension and fuel disputes.**

**254. We are also concerned at the lack of transparency in the process of decision making by the UK Government as to what spending is included in the calculations for the Barnett Formula and the rationale for those decisions. This lack of transparency has already caused political disputes between the UK Government and the devolved administrations. These difficulties are only likely to intensify in the current economic climate.**

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<sup>433</sup> For further information see the Lords Constitution Committee, Second Report of Session 2002-03, *Devolution: Inter-Institutional Relations in the United Kingdom*, HL 28, p 32

255. We therefore recommend a two stage approach. First, we recommend that the Government publish, as a matter of urgency, the long promised detailed factual paper about how the Formula works. This should include the criteria for the inclusion or exclusion of spending in the Statement of Funding (i.e. for inclusion in the Barnett Formula). This overdue document is essential to remove misunderstanding about the operation of the Formula and to introduce an element of transparency and oversight into the Government's spending decisions.

256. This, however, is only a first step. We welcome the reviews of the operation of the Barnett Formula currently taking place in both Scotland and Wales. However, there is an urgent need for the Government to undertake a UK wide review of the Barnett Formula, and to put forward an alternative system for the allocation of funding between the nations and the regions of the UK and a generally accepted mechanism for reviewing its operation and adjudicating disputes which arise.

257. Any new system should be robust and long term – enabling Departments and Agencies of Government to have dependable indicative figures on which to plan and budget at least three years ahead. Any new system should be introduced with care, with at least a two-year period of transition built into the system for its introduction. It should not be adjusted on an annual basis—a five-year review should be the minimum review period.

# Conclusions and recommendations

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## Introduction

1. The way the United Kingdom is governed has changed and will continue to change because its component parts are now governed by different administrations and in ways which are not uniform. The system of government for England, which remains relatively centralised under the management of the United Kingdom Government and the legislative authority of the United Kingdom Parliament, is at least called into question, and, in the view of a significant proportion of our witnesses, in need of fundamental change. There is no consensus on what change should be made to the system of government for England, but every major political party has put forward or is considering change in this area, with hardly anyone arguing for no change at all. (Paragraph 3)

## Devolution and the Centre

2. During the ten years experience of devolved government, departmental responsibility for overseeing the working of the system has been divided and unsettled. It has involved the Cabinet Office, 10 Downing Street, the Ministry of Justice, the former Department for Constitutional Affairs, the former Office of the Deputy Prime Minister, and the Scotland, Wales and Northern Ireland Offices, the first two of which are nominally attached to the Ministry of Justice. It is a normal feature of devolution that it will be the individual functional departments which have relationships with their counterpart departments in devolved administrations. What is lacking is any one department which is clearly charged with taking a holistic view of the infrastructure of government across the United Kingdom and the constitutional and policy issues involved. This role basically belongs to the department with lead responsibility for the constitution, which is the Ministry of Justice, and we recommend that the lead responsibility should be clearly recognised and developed. (Paragraph 63)
3. The object of clarifying where responsibility for the system of devolution lies is to maintain the coherence of the system as a whole and deal with the constitutional issues which arise, not to inhibit or replace bilateral relationships between Whitehall departments and devolved administrations, and not to recentralise UK Government in contravention of the purpose of devolution. (Paragraph 64)
4. Many have questioned whether it is justified for those parts of the United Kingdom which have devolved government, and only those parts, to have individual Secretaries of State in the Cabinet. As relationships between the administrations mature, the role of the Secretary of State for Scotland has clearly decreased, and the question of the continued separate existence of that office must be raised. However, the Government of Wales Act 2006 gave the Secretary of State for Wales a role in legislating for Wales. This process is still relatively new and bedding down, and any

proposals for fundamental change to the role of the Secretary of State would have to take this into consideration. (Paragraph 65)

5. Nevertheless, the fact that the Scottish and Welsh Secretaries are now “part time”, combining the post with UK departmental responsibilities, illustrates that the reality of change has been accepted, and it is significant that many of the arguments in favour of retaining the positions are essentially political, focusing on either perceived advantages in a territory of having a “champion” in the Cabinet, or the potential political disadvantages of abolishing the position. It is clear that the role of the territorial Secretaries of State has changed beyond recognition and that it is not likely to remain central to the functioning of devolved government or to seem consistent with the logic of devolution. The direction of travel may well be towards a single Constitutional Minister with lead responsibility for the functioning of the system of devolved government, building on the work currently exercised by the Secretary of State for Wales who chairs the revived Joint Ministerial Committee on devolution. (Paragraph 66)

### ***The Civil Service***

6. While it is clear that the awareness of devolution in Whitehall has improved since the onset of devolution in 1999, there is no doubt that there is still a considerable way to go in achieving consistent and effective practices in dealing with devolution issues across all Whitehall departments. This should not only involve a full and comprehensive understanding of the policy areas that have been devolved to Scotland and Wales, but also full appreciation and consultation so that Welsh and Scottish interests are taken into account in policy making in reserved or non-devolved areas which will have an impact on the UK as a whole. (Paragraph 75)
7. We agree that best practice should be mainstreamed across Whitehall, and devolution awareness should form a core part of the training for all senior civil servants. While this is crucially important in relation to senior civil servants it is also important that a good understanding of the constitutional settlement(s) should reach the front line of every department and agency of government. It is an issue for those engaged in delivery as well as those concerned with policy. We acknowledge the improvements that have been made in this area, but recognise that the performance remains patchy and that both good and bad practice remain. (Paragraph 76)
8. Whether there remains a unitary civil service or not within Great Britain, there is an overwhelming case for a more systematic programme of secondments between Whitehall, Cardiff and Edinburgh. This would have several benefits: not only helping to raise awareness of devolution in Whitehall, but also in promoting best practice and shared learning and experiences across all three administrations. Furthermore, it would help to address some of the capacity issues identified in relation to the civil service in Wales. (Paragraph 85)
9. We recommend that the Government institute a programme of secondments throughout the United Kingdom, and that fast stream entrants to the civil service should be given the opportunity to spend time working both in Whitehall, and in one or more of the devolved administrations, early in their careers. (Paragraph 86)

10. In essence, the same civil service code applies in all jurisdictions with differing specific references to accountability. While there need to be provisions reflecting accountability to different administrations and the need for sensitivity in Whitehall to the different settlements, we believe that it is right that a common Civil Service code should be accepted and observed by all the administrations of Great Britain. The code should be one of the means by which the details and implications of the devolution settlements are experienced and promulgated, together with the fundamental principles of public service which are a shared inheritance of the whole of the United Kingdom. (Paragraph 87)

### **Inter-governmental Relations**

11. We welcome the fact that the Concordats between relevant Whitehall Departments and the Welsh Assembly Government are being revised in order to reflect the changes brought about by the Government of Wales Act 2006. (Paragraph 96)
12. We recognise that the structures for the co-ordination of inter-governmental relations designed between 1997 and 1999 grew out of relationships between departments of the same government, rather than between different governments of different party political complexions. (Paragraph 104)
13. The system of devolved government, including governments of different political complexions, requires a set of arrangements which provide opportunity for the expression of legitimate political and territorial differences, negotiation, dialogue and dispute resolution. These arrangements also need to facilitate the co-ordination of action in areas of joint interest, the promotion of common interests and good relations and an effective means of dealing with the consequential effects of decisions taken in the respective jurisdictions. The absence of such a structure is one of the weaknesses of the current devolution settlement. (Paragraph 105)
14. Such arrangements would not in any way detract from the importance of ensuring that there is a need for a proper understanding of the devolution settlement(s) to permeate every aspect of the work of Whitehall departments and their agencies and an equivalent need for understanding and sensitivity within each of the devolved administrations and their agencies. (Paragraph 106)

### **Joint Ministerial Committee**

15. We welcome the re-convening of the Joint Ministerial Committee and note that its usefulness has been demonstrated in securing agreement between the territorial jurisdictions on the UK Marine and Coastal Access Bill. We recommend that the Joint Ministerial Committee continues to meet on a regular basis. (Paragraph 113)
16. We welcome a more active and systematic role for the Joint Ministerial Committee as the central apparatus for inter-governmental relations within the United Kingdom. We welcome the new terms of reference, which emphasise its role in promoting dialogue and negotiation and also in dispute resolution. (Paragraph 118)

17. We welcome the fact that the Joint Ministerial Committee has invited officials to review the Memorandum of Understanding. However, ten years on, we believe that a broad review is necessary: not only of the machinery for co-ordinating inter-governmental relations in the United Kingdom, but of the broader role of central Government in its strategic overview of the United Kingdom post-devolution. (Paragraph 119)
18. We believe that a robust framework for inter-governmental relations, supported by a streamlined centre responsible for devolution policy and strategy across Whitehall, would equip the United Kingdom with a more efficient and effective system for territorial management in the UK post-devolution. (Paragraph 120)

### ***Inter-parliamentary relations***

19. One way of securing a greater interchange and understanding would be to develop a format similar to the British-Irish Parliamentary Assembly, bringing together Members of Parliament and of the devolved Parliaments and Assemblies, to hold to account the Joint Ministerial Committee and to share experience and best practice. There needs to be reasonable confidence in the value which could be added by such a body for the idea to be developed, but we consider that it deserves debate. (Paragraph 124)

## **The Legislative Process**

### ***Scotland***

20. We welcome the procedures and mechanisms which have been put in place by the Scottish Parliament for the effective scrutiny of Legislative Consent Motions, and the effective system of communication with the Westminster Parliament, which appears to be working satisfactorily. (Paragraph 130)
21. We recommend that the UK and Scottish Governments set out and publicise their agreed understanding of the principles which should govern the use of Legislative Consent Motions. (Paragraph 131)

### ***Wales***

22. We recognise that the process of enhancing the legislative competence of the National Assembly for Wales with the consent of Whitehall and Westminster is seen by some commentators as complex. It is a new process, and there were some initial fears that it would be difficult to achieve an efficient and streamlined process of scrutinizing and enacting Legislative Competence Orders. (Paragraph 146)
23. We agree that there is a legitimate role for Westminster in scrutinizing draft Legislative Consent Orders to check whether they are in order, what their scope is, whether the drafting is clear and precise and whether the legislative competence can or should be devolved under the terms of the Act. (Paragraph 147)

24. However, the process in Whitehall is less clear and we are also concerned about the lack of transparency of the role of the Secretary of State in determining whether or not he would lay a draft Order before both Houses of Parliament. We recommend that the Secretary of State produce a protocol outlining the principles that would inform such a decision, and the maximum timescales within which a decision should be made. (Paragraph 148)
25. We recognise that accessibility of the law relating to Wales is important for the development of healthy democracy. We encourage the Government to facilitate the work of the Welsh Assembly Government in seeking to achieve this objective. (Paragraph 152)

## The English Question

26. Over four-fifths of the population of the United Kingdom live in England, but while fundamental change has been taking place in the governance of Scotland, Wales and Northern Ireland, with consequent effect on the governance of the United Kingdom as a whole, no such change has taken place in the way England is governed. There have been some developments with mixed results: a form of devolution in London, endorsed in a referendum in 1998, the creation of various unelected regional structures in the rest of England, and a move in some areas towards having a single tier of local government. Legislation was put in place to allow any region to have an elected Assembly, subject to a local referendum. The first—and only— attempt to make use of these provisions was defeated in a referendum in the North East in 2004. (Paragraph 153)
27. Government in England remains centralised under the authority and management of the United Kingdom Parliament and the United Kingdom Government. There is controversy arising from the fact that England is governed directly by the United Kingdom Government and Parliament and is therefore subject to Ministers and MPs who do not represent England and whose own constituents come under devolved governments. The governance of England is seen by many as the “unfinished business” of devolution, but this perception is not accompanied by any widespread agreement on what should be done. (Paragraph 154)

## Solutions

28. Different types of solutions can be suggested for the many different questions which fall under the broad heading of the English question. First, there are those solutions which seek to address the constitutional imbalance seemingly brought about by devolution, for example, through the creation of an English Parliament. Second, there are those solutions which seek to amend the role, practice and status of Westminster as a means of addressing the West Lothian Question, for example, schemes of English votes for English laws. However, others consider that the West Lothian Question could be best addressed by a change in the party political balance at Westminster, for example, through reform of the electoral system or a reduction in the number of MPs from Scotland and Wales. These approaches could be described as all-England solutions. The final category of solutions are those which attempt to tackle the centralised nature and relative size of England through

decentralisation or devolution within England. What is clear is that different solutions address different aspects of the question. (Paragraph 163)

### ***An English Parliament***

29. While an English Parliament could address one aspect of the English question in terms of giving England a similar constitutional status to Scotland within the United Kingdom, it presents issues of balance because of the sheer size of the English population and because it would require a Government and First Minister for England in addition to the United Kingdom Government and Prime Minister. We do not think that there is a need to consider so far-reaching a solution as an English Parliament, although it may become necessary to do so if the English questions are seen as increasingly significant and other solutions are rejected or fail. (Paragraph 173)

### ***English votes for English laws***

30. The question of whether England-only legislation can be more clearly demarcated from other legislation has to be resolved if any scheme of English votes for English laws is to work. While technical difficulties in relation to Legislative Consent (Sewel) Motions could be overcome by changes in drafting practice and by resorting to additional separate Bills, demarcating English and Welsh legislation is more complex. (Paragraph 191)
31. Even if legislation could be more clearly distinguished, the current system of territorial financing in the UK post-devolution means that the levels of public finance decided for England determine levels of resource allocation to Scotland and Wales. While we agree that the system could be changed in order to remove this effect, such a change would be a necessary pre-requisite to any system of English votes for English laws. (Paragraph 194)
32. While some proposals for English votes for English laws can be presented as limited procedural change, any thorough application of the principle would have broader implications for Parliament and for the position of the UK Government. (Paragraph 198)
33. Proposals for English votes for English laws seek to make procedural adjustments to Westminster in order to remove the anomaly of Scottish MPs voting on matters in England which are devolved matters in Scotland. At present, such a scheme would be difficult to apply other than in limited form given both the current procedures for legislating for the UK and its constituent parts following devolution, and the current system of territorial finance. (Paragraph 199)
34. While these obstacles could be overcome, some fear that the full application of English votes for English laws could result in a Parliament within a Parliament, which could be unworkable and might pose as great a threat to the Union as the resentment it seeks to address. (Paragraph 200)

35. English votes for English laws seeks to deal with what is as much a political problem as a constitutional problem, represented by the traditional dominance of different parties in different nations and regions—an issue which, some suggest, could be addressed, in part, by reform of the electoral system which could reduce the risk of an English majority being overturned by Scottish and Welsh MPs. Others suggest that a further reduction in the number of Scottish seats at Westminster, and a possible reduction in Welsh seats following the devolution of greater powers, could also, to some extent reduce the same risk. Neither of these measures would, however, address the issue of principle about the voting rights of MPs representing nations with devolved governments and both of them give rise to controversy between parties because of the effect they have on party strengths at Westminster. (Paragraph 201)

### ***Devolution within England, Local Government and the English Question***

36. We have not examined regional and local governance issues in depth during this inquiry but clearly, in developing a clear and coherent strategy for devolution, the Ministry of Justice, needs to take policy developments in both areas into account and establish cross-departmental working mechanisms with the Department for Communities and Local Government and the Department for Business, Enterprise and Regulatory Reform to do so. (Paragraph 226)
37. However, it does not appear likely that the powers which future governments will be prepared to devolve to local government, will be sufficient to meet the concerns of those who want an English solution to the West Lothian question or those who believe that power will continue to be exercised at regional level and wish to see those powers made accountable and increased. (Paragraph 227)

### ***The English Question—Conclusion***

38. There is no consensus about solutions to the “English question”, or the range of questions which arise under that heading. Each suggested answer has its own problems and limitations, and while some attempt to address issues around centralisation, others attempt to address the West Lothian question. Those which deal to any major extent with the West Lothian question, like an English Parliament and English votes for English laws, raise significant problems in a state where one of its constituent territories has 84% of the population. (Paragraph 228)
39. The implications of having an English Government and First Minister as well as a United Kingdom Government and Prime Minister have not been the subject of much public discussion and are politically significant. Approaches which make the UK Parliament into a federal Parliament or treat English laws differently at Westminster raise questions about the nature and role of the Second Chamber which need to be considered as part of the discussion of Lords reform: clarification would be needed about whether, and if not why, the Second Chamber should consider “English” laws when it did not consider the laws of Scotland. (Paragraph 229)
40. These are major political as well as constitutional questions which are for Parliament as a whole to consider. It is our belief that as devolved government in Scotland,

Wales and Northern Ireland develops in profile and substance, Parliament will come under pressure to consider these questions. (Paragraph 230)

## Finance and the Barnett Formula

41. The Barnett Formula is overdue for reform and lacks any basis in equity or logic. It creates controversy in all of the constituent parts of the UK. There is controversy in England that the Barnett Formula allows for higher levels of public spending in Scotland from the UK Exchequer and does not deal with different needs in different parts of England. There is concern in Wales that allocation of funds through the Barnett Formula does not adequately meet the higher structural costs of the delivery of some public services. We are concerned that the lack of adequate understanding of the Formula and how it operates has the potential to create tension and fuel disputes. (Paragraph 253)
42. We are also concerned at the lack of transparency in the process of decision making by the UK Government as to what spending is included in the calculations for the Barnett Formula and the rationale for those decisions. This lack of transparency has already caused political disputes between the UK Government and the devolved administrations. These difficulties are only likely to intensify in the current economic climate. (Paragraph 254)
43. We therefore recommend a two stage approach. First, we recommend that the Government publish, as a matter of urgency, the long promised detailed factual paper about how the Formula works. This should include the criteria for the inclusion or exclusion of spending in the Statement of Funding (i.e. for inclusion in the Barnett Formula). This overdue document is essential to remove misunderstanding about the operation of the Formula and to introduce an element of transparency and oversight into the Government's spending decisions. (Paragraph 255)
44. This, however, is only a first step. We welcome the reviews of the operation of the Barnett Formula currently taking place in both Scotland and Wales. However, there is an urgent need for the Government to undertake a UK wide review of the Barnett Formula, and to put forward an alternative system for the allocation of funding between the nations and the regions of the UK and a generally accepted mechanism for reviewing its operation and adjudicating disputes which arise. (Paragraph 256)
45. Any new system should be robust and long term – enabling Departments and Agencies of Government to have dependable indicative figures on which to plan and budget at least three years ahead. Any new system should be introduced with care, with at least a two-year period of transition built into the system for its introduction. It should not be adjusted on an annual basis—a five-year review should be the minimum review period. (Paragraph 257)

## Annex A: Constitutional and Institutional Changes 1997–2008: timeline

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<b>1997</b>	
1 May	Election of Labour Government with a manifesto commitment to hold referendums on a Parliament for Scotland and an Assembly for Wales.
31 July	<i>Referendums (Scotland and Wales) Act 1997</i> passed.
11 September	Referendum in Scotland produced a clear majority in favour of the creation of a Scottish Parliament with tax-varying powers.
18 September	Referendum in Wales produced a narrow majority in favour of the creation of a National Assembly for Wales.
<b>1998</b>	
10 April	Belfast Agreement (the Good Friday Agreement) signed. This followed extended talks between the political parties in Northern Ireland and the governments of the United Kingdom and Ireland.
7 May	<i>Northern Ireland Elections Act 1998</i> passed. Provided for the establishment of the new Northern Ireland Assembly and for the election of its Members.
22 May	Referendum held in Northern Ireland. Belfast Agreement endorsed.
25 June	First elections to the New Northern Ireland Assembly.
1 July	New Northern Ireland Assembly first met in 'shadow' form, i.e. without powers of government, to prepare for government.
31 July	<i>Government of Wales Act 1998</i> passed. Established the National

	Assembly for Wales as a single corporate body, with secondary legislative powers and 60 Assembly Members (AMs).
19 November	<i>Scotland Act 1998</i> passed. Established the first Parliament in Scotland since 1707, with primary legislative powers and 129 Members of the Scottish Parliament (MSPs). The Parliament can also raise or lower the basic rate of income tax by up to three pence in the pound.
19 November	<i>Northern Ireland Act 1998</i> passed. Established a Northern Ireland Assembly with primary legislative powers and 108 Members of the Northern Ireland Assembly (MLAs).
2 December	The new Northern Ireland Assembly continued to operate in 'shadow' form until this date when powers of government were devolved to it by the UK Parliament (and the word 'new' was dropped from its title).
6 December	First meeting of the Northern Ireland Assembly with devolved powers.
<b>1999</b>	
6 May	First elections to the Scottish Parliament and the National Assembly for Wales.
12 May	First meetings of the Scottish Parliament and the National Assembly for Wales.
14 May	Labour-Liberal Democrat Partnership for Scotland signed.
17 May	Coalition Cabinet (Labour-Liberal Democrat) announced in Scotland.
26 May	National Assembly for Wales officially opened by the Queen and the Prince of Wales.
1 July	Scottish Parliament officially opened by the Queen.

11 November	<i>Greater London Authority Act</i> passed. Established the Greater London Authority consisting of the Mayor of London and the London Assembly.
<i>2000</i>	
11 February	Northern Ireland Assembly suspended.
15 February	Rt Hon Rhodri Morgan AM elected First Secretary of the National Assembly for Wales.
4 May	First elections for the Mayor of London and the London Assembly. Ken Livingstone (Independent) elected Mayor.
30 May	Northern Ireland Assembly restored.
1 September	First meeting of the Joint Ministerial Committee (ministers of the UK government and each of the devolved administrations) in plenary.
16 October	New Labour-Liberal Democrat Partnership Cabinet announced in Wales. Cabinet adopts term 'Minister' in place of 'Secretary'.
<i>2001</i>	
30 October	Second meeting of the Joint Ministerial Committee in plenary.
<i>2002</i>	
14 October	Northern Ireland Assembly suspended.
22 October	Third meeting of the Joint Ministerial Committee in plenary.

<b>2003</b>	
1 May	Elections to the Scottish Parliament and the National Assembly for Wales.
8 May	<i>Regional Assemblies (Preparations) Act</i> passed.
9 May	National Assembly for Wales Cabinet (Labour) appointed.
15 May	Labour forms a coalition government with the Liberal Democrats.
20 May	Coalition Cabinet (Labour-Liberal Democrat) announced in Scotland.
16 June	Announcement of elected Regional Assembly Referendums in England: in the North East, the North West, and Yorkshire and the Humber.
26 November	Elections to the Northern Ireland Assembly took place, the Assembly remaining suspended.
<b>2004</b>	
31 March	<i>Report of the Commission on the Powers and Electoral Arrangements of the National Assembly for Wales (the Richard Commission)</i> published.
10 June	Elections for the Mayor of London and the London Assembly. Ken Livingstone (Labour) re-elected Mayor.
4 November	Referendum on an elected regional assembly held in the North East of England-only. No majority for an assembly.
<b>2005</b>	
15 June	White paper <i>Better governance for Wales</i> published.

<b>2006</b>	
13 October	The St Andrews Agreement was reached, eventually leading to the restoration of devolution to Northern Ireland, suspended since 2002.
25 July	<i>Government of Wales Act 2006</i> passed. Provided for a formal legal separation between the National Assembly for Wales (the legislature) and the Welsh Assembly Government (the executive). Also provided a mechanism for the Assembly to acquire, on a case-by-case basis, more powers to make its own laws (Assembly Measures).
26 November	<i>Northern Ireland (St Andrews Agreement) Act 2006</i> passed.
<b>2007</b>	
27 March	<i>Northern Ireland (St Andrews Agreement) Act 2007</i> passed.
7 March	Elections to the Northern Ireland Assembly. Democratic Unionist Party and Sinn Fein win the most seats.
3 May	Elections to the Scottish Parliament and the National Assembly for Wales.
8 May	Northern Ireland Assembly restored. Ian Paisley (Democratic Unionist Party) appointed as First Minister and Martin McGuinness (Sinn Fein) Deputy First Minister.
16 May	Rt Hon Alex Salmond MSP (Scottish National Party) appointed First Minister in Scotland. New Cabinet (SNP) announced.
25 May	Rt Hon Rhodri Morgan AM appointed First Minister in Wales.
31 May	New Welsh Cabinet (Labour) appointed.
11 July	Ieuan Wyn Jones AM (Plaid Cymru) appointed Deputy First Minister in Wales.

19 July	New Welsh coalition Cabinet (Labour/Plaid Cymru) announced
23 October	<i>Greater London Authority Act</i> passed. Provided for increased powers for the Mayor of London.
<i>2008</i>	
25 March	Commission on Scottish Devolution under the chairmanship of Sir Kenneth Calman announced.
1 May	Elections for the Mayor of London and the London Assembly.
6 May	All-Wales Convention under the chairmanship of Sir Emyr Jones Parry announced.
9 June	New Cabinet announced in Northern Ireland.
25 June	Fourth meeting of the Joint Ministerial Committee in plenary.
2 December	First report of the Calman Commission on Scottish Devolution.
<i>2009</i>	
11 March	First meeting of the Joint Ministerial Committee (domestic).

## Formal Minutes

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**Tuesday 12 May 2009**

Members present:

Sir Alan Beith, in the Chair

David Heath  
Julie Morgan  
Alun Michael

Dr Alan Whitehead  
Andrew Turner

Draft Report (*Devolution: A Decade On*), proposed by the Chairman, brought up and read.

*Ordered*, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 257 read and agreed to.

Annex and Summary agreed to.

*Resolved*, That the Report be the Fifth Report of the Committee to the House.

*Ordered*, That the Chairman make the Report to the House.

*Ordered*, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

Written evidence was ordered to be reported to the House for printing with the Report.

[Adjourned till Tuesday 19 May at 4.00 pm]

## Witnesses (page numbers refer to Vol II)

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### Tuesday 13 November 2007

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**Professor Charlie Jeffery**, University of Edinburgh, and Director, Economic and Social Research Council's Research Programme on Devolution and Constitutional Change 2000-06; **Professor Robert Hazell**, Director, Constitution Unit (UCL); and **Professor John Curtice**, Deputy Director, CREST, and Director, Social Statistics Laboratory, University of Strathclyde

Ev 1

### Tuesday 29 January 2008

**Rt Hon Des Browne MP**, Secretary of State for Scotland, and **David Middleton**, Head of Department, Scotland Office

Ev 16

**Rt Hon Paul Murphy MP**, Secretary of State for Wales, and **Alan Cogbill**, Director, Wales Office

Ev 24

### Tuesday 19 February 2008

**Rt Hon Kenneth Clarke MP**, **Lord Tyler CBE CBE**, and **Professor Vernon Bogdanor**

Ev 30

**Michael Knowles**, Campaign for an English Parliament, and **Peter Facey**, Unlock Democracy

Ev 39

### Tuesday 26 February 2008

**Alex Fergusson**, MSP, Presiding Officer, and **Ken Hughes**, Acting Director of Clerking and Reporting, Scottish Parliament

Ev 46

**Sir John Elvidge KCB**, Permanent Secretary, Scottish Government

Ev 50

**Bruce Crawford**, MSP, Minister for Parliamentary Business, Scottish Government

Ev 54

**Professor James Mitchell**, Head of the Department of Government, University of Strathclyde

Ev 58

**Nicola Sturgeon**, MSP, Deputy First Minister, Scottish Government

Ev 64

### Thursday 13 March 2008

**Councillor David Faulkner**, Newcastle City Council, **Councillor Peter Mole**, Gateshead City Council, and **Councillor Paul Watson**, Sunderland City Council

Ev 70

**Graham Pearce**, Aston University and **Sarah Ayres**, University of Bristol

Ev 77

**Professor John Mawson**, Warwick Business School, and **Phil Davis**, **George Morran** and **Mary Southcott**, Campaign for the English Regions

Ev 82

**Tuesday 1 April 2008**

**Rt Hon Rt Hon Lord Barnett,** Ev 88

**Tuesday 22 April 2008**

**Rt Hon Lord Steel of Aikwood** Ev 95

**Rt Hon Jack McConnell, MSP** Ev 100

**Thursday 8 May 2008**

**Rt Hon Lord Elis-Thomas AM**, Presiding Officer, **Claire Clancy**, Clerk and Chief Executive, and **Adrian Crompton**, Director of Assembly Business, National Assembly for Wales Ev 106

**Professor Nicholas Bourne AM**, Leader of the Opposition, Conservative Party, National Assembly for Wales Ev 113

**Mr Michael German AM**, Leader, Welsh Liberal Democrats, National Assembly for Wales Ev 118

**Rt Hon Rhodri Morgan AM**, First Minister, **Ieuan Wyn Jones AM**, Deputy First Minister, and **Dr Hugh Rawlings**, Director, Constitutional Affairs, Equality and Communications, Welsh Assembly Government Ev 122

**Tuesday 13 May 2008**

**Rt Hon Jack Straw MP**, Secretary of State for Justice and Lord Chancellor, and **Jim Gallagher**, Head of Devolution, Ministry of Justice Ev 129

**Tuesday 8 July 2008**

**Ken Livingstone**, former Mayor of London Ev 137

**Tony Travers**, London School of Economics Ev 143

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3	Diana Benn	Ev 149
4	Campaign for an English Parliament	Ev 149: Ev 158: Ev 159: Ev 160
5	The Campaign for the English Regions	Ev 160: Ev 169: Ev 176
6	Professor Charlie Jeffery	Ev 177
7	Alan Trench	Ev 179
8	Cymru Yforu—Tomorrow's Wales	Ev 185
9	Denis Latimer	Ev 186
10	Electoral Reform Society	Ev 187
11	The English Democrats Party	Ev 188
12	Graham Pearce and Sarah Ayres	Ev 189
13	Grayling Political Strategy	Ev 193
14	Institute of Welsh Affairs	Ev 195
15	Professor James Mitchell	Ev 202
16	Law Reform	Ev 204
17	The Law Society, Wales	Ev 217
18	London School of Economics and Political Science	Ev 217
19	Professor Michael Keating	Ev 219
20	Lord Tyler CBE CBE DL	Ev 221
21	Ministry of Justice	Ev 223
22	Godfrey Nall	Ev 226
23	Northern Ireland Assembly	Ev 227
24	Norman Slater	Ev 227
25	Paul Catchside JP	Ev 227
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28	R G Dawson	Ev 230
29	Scottish Government	Ev 231
30	Sustrans Cymru, BMA Cymru and the NAHT Cymru	Ev 236
31	Tom Jones	Ev 237
32	Unlock Democracy	Ev 238
33	Wales Council for Voluntary Action	Ev 242
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# Reports from the Justice (previously Constitutional Affairs) Committee since Session 2006–07

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First Report	Crown Dependencies: evidence taken <i>Government response</i>	HC 67 HC 323
Second Report	Coroners and Justice Bill <i>Government response</i>	HC 185 HC 322
Third Report	The work of the Information Commissioner: appointment of a new Commissioner <i>Government response</i>	HC 146 HC 424
Fourth Report	Work of the Committee in 2007-08	HC 321

## Session 2007-08

First Report	Protection of Private Data <i>Government response</i>	HC 154 HC 406
Second Report	Work of the Committee in 2007	HC 358
Third Report	Counter Terrorism Bill <i>Government response</i>	HC 405 HC 758
Fourth Report	Draft Constitutional Renewal Bill (provisions relating to the Attorney General)	HC 698
Fifth Report	Towards Effective Sentencing <i>Government response</i>	HC 184 Cm 7476
Sixth Report	Public Appointments: Lord-Lieutenants and High Sheriffs <i>Government response</i>	HC 1001 Cm 7503
Seventh Report	Appointment of the Chair of the Office of Legal Complaints <i>Government response</i>	HC 1122 HC 342

## Session 2006–07

First Report	Party Funding <i>Government response</i>	HC 163 Cm 7123
Second Report	Work of the Committee 2005-06	HC 259
Third Report	Implementation of the Carter Review of Legal Aid <i>Government response</i>	HC 223 Cm 7158
Fourth Report	Freedom of Information: Government's proposals for reform <i>Government response</i>	HC 415 Cm 7187
Fifth Report	Constitutional Role of the Attorney General <i>Government responses</i>	HC 306 Cm 7355 and HC 242 (2007-08)
Sixth Report	The creation of the Ministry of Justice <i>Government response</i>	HC 466 HC 140 (2007-08)
First Special Report	Party Funding – Oral evidence from the Lord Chancellor on the role of the Attorney General	HC 222
Second Special Report	Scrutiny of Constitutional Reform	HC 907