

PROTOCOL FOR AVOIDANCE AND RESOLUTION OF DISPUTES

The 2001 Memorandum of Understanding

1. The original 2001 MOU briefly covers dispute resolution and the role of the JMC. It states:

The UK Government and the devolved administrations believe that most contact between them should be carried out on a bilateral or multi-lateral basis, between departments which deal on a day-to-day basis with the issues at stake. Nonetheless, some central co-ordination of the overall relationship is needed. Therefore the administrations agree to participate in a Joint Ministerial Committee (JMC) consisting of UK Government, Scottish, Welsh and Northern Ireland Ministers.

Detailed arrangements for the JMC are set out in a separate agreement. Its terms of reference are:

- to consider non-devolved matters which impinge on devolved responsibilities, and devolved matters which impinge on non-devolved responsibilities;
- where the UK Government and the devolved administrations so agree, to consider devolved matters if it is beneficial to discuss their respective treatment in the different parts of the United Kingdom;
- to keep the arrangements for liaison between the UK Government and the devolved administrations under review; and
- to consider disputes between the administrations.

The UK Government and the devolved administrations commit themselves, wherever possible, to conduct business through normal administrative channels, either at official or Ministerial level. The Secretaries of State for Scotland, Wales and Northern Ireland, whose functions include the promotion of good relations between the UK Government and the respective devolved administrations, should be consulted in any significant case of disagreement.

Where a dispute cannot be resolved bilaterally or through the good offices of the relevant territorial Secretary of State the matter may formally be referred to the JMC Secretariat subject to the guidance on the Committee's remit in the agreement on the JMC. Where this appears likely, the JMC Secretariat should be consulted at an early stage in order to ensure a consistent interpretation of the devolution settlements, and to provide advice on handling of any differences of view.

Background: Protocol for avoidance and resolution of disputes

2. A draft revised version prepared in 2009 sought to build on the principles set out in the 2001 MOU but in a more expansive way by adding a

section specifically on dispute avoidance and resolution. This draft has been developed further for consideration by JMC(D) on 10 March. The changes are to bring out the role of the JMC(O) officials group in ensuring that differences are dealt with at the lowest possible level and to provide clarity about roles, the process, and the possible outcomes at each stage.

3. The new proposed text for this protocol, which could stand alone, or be integrated back into section A3 of the 2009 draft MoU is as follows:

Protocol for avoidance and resolution of disputes

Preamble and context

1. This agreement, between the UK Government and the devolved administrations, outlines procedures for avoiding and resolving disputes between administrations consistent with the general principles set out in the Memorandum of Understanding. In particular it builds on (but does not replace) the terms of reference of the Joint Ministerial Committee, which include 'to consider disputes between the administrations', as set out in paragraph 23 of the MoU; paragraphs 24 and 25; paragraphs A1.5 and A1.7 of the Supplementary agreement on the JMC; and paragraphs 12.1 and 12.2 of the UK Government's Statement of Funding Policy. A number of concordats include procedures on avoiding and resolving differences, and this agreement supplements but does not replace them. Like the MoU itself this agreement is a statement of intent, creating no legal obligations between the parties, and binding in honour only.

2. In order to reduce to the minimum the potential for disputes to arise, the parties recommit themselves to the principles of good communication and cooperation set out in the Memorandum of Understanding.

Invocation of procedures in this agreement

3. The parties undertake to follow these procedures in good faith and in a timely manner in order to resolve differences that occur in the operation of the current arrangements. (The procedures are not intended to deal with differences over possible change to the overall statutory framework governing devolution). When differences arise it is the obligation of all those involved to make determined efforts to resolve them, in accordance with the principles of the MoU, including those relating to confidentiality.

4. There may be circumstances, particularly those arising from differences in political outlook, where the UK Government and one or more of the devolved administrations are unlikely to be able to agree. In these cases the parties to this agreement recognise that the JMC machinery is unlikely to offer any prospect of resolution. They also recognise, consistently with the principle that the JMC is not a decision-making body, that the basis on which the procedures will operate is the facilitation of agreement between the parties in dispute, not the imposition of any solution.

5. There may at times be disputes between administrations on the interpretation of legal provisions relating to devolution. Without prejudice to the powers to place these before the courts, the administrations will generally seek first to resolve them in line with this protocol.

Resolution of differences at working level

6. All efforts should be made to resolve differences informally and at working level if possible. Where this fails, the issue should be brought to the attention of more senior officials, including, if other steps are unsuccessful, members of the JMC officials' framework i.e. JMC(O) or senior officials supporting the JMC(D) or JMC(E) as appropriate. All should fully commit themselves to achieving agreement if possible. If no agreement is reached at official level, Ministers should make every effort to resolve the problem without the need formally to invoke the JMC process. These steps should proceed in a timely manner.

7. The MoU recognises the key responsibility of the relevant territorial Secretary of State for promoting effective working relations and helping resolve disputes [paragraph 24, A1.7]. The relevant territorial Secretary of State or his/ her officials should always be made aware of any dispute that threatens to be incapable of informal resolution, and involved in relevant discussions. Where discussions involving the parties do not achieve agreement, the relevant territorial Secretary of State or officials may by agreement convene further talks between the parties at ministerial or official level.

8. The Statement of Funding Policy sets out the UK Government's rules for resolving financial issues. Before the JMC process set out in the Statement of Funding Policy is invoked for differences about financial issues including the interpretation of the Statement of Funding Policy, these should generally be first discussed bilaterally between the Treasury and the relevant devolved administrations or if appropriate at a timely Finance Quadrilateral meeting bringing together Treasury ministers and finance ministers of the devolved administrations.

References to JMC Secretariat

9. Where the preceding steps have not resolved a difference, any of the parties may formally refer it to the JMC secretariat, so that steps can be taken to resolve it through the JMC process. A difference so referred is known as a disagreement.

10. When it is notified of a disagreement, the Secretariat will normally convene a meeting of officials from the administrations involved (including representatives of the relevant territorial Secretaries of State). Through this process, the Secretariat will seek agreement on the facts, provide an opportunity for the parties to set out their positions and facilitate discussion of shared interests, options for resolving the disagreement and criteria for an agreed outcome.. It will also inform the other administrations. This will be

done within one month of the referral being received, or another period by agreement. Where a meeting of JMC (Official) is due to take place it may also consider the issue and involve officials from the policy area concerned.

11. The outcome of this meeting will be one of: a proposal put to the relevant Ministers for their agreement; a report to the relevant Ministers seeking their agreement for a further round of the process at official level; or, exceptionally, a referral to the JMC. A disagreement so referred is known as a dispute.

JMC meetings to deal with disputes

12. Where a dispute has been referred to JMC, the Secretariat will schedule a meeting in accordance with paragraph A1.5 of the Agreement on the JMC to consider the dispute. This will be done within one month of the referral being received, or another period by agreement. Attendance would include ministers from the UK departments and the devolved administrations involved in the dispute, along with the relevant territorial Secretaries of State or their representatives. The senior UK Minister chairing will as far as possible be someone without a direct departmental interest in the issue in dispute. The meeting might take place on the same date as a regular JMC meeting but would be separate from that meeting.

13. With the support of the Secretariat, the Minister chairing will provide a further opportunity for the parties to set out their positions and will facilitate discussion of shared interests, options for resolving the dispute and criteria for an agreed outcome. The Minister chairing may in advance of the meeting wish to make informal efforts to resolve matters.

14. The outcome of this meeting will be one of: an agreement resolving the dispute; agreement to a further round of the process at Ministerial level; or, exceptionally, agreement to notify JMC Plenary that the dispute remains unresolved.

15. The Secretariat will provide for JMC Plenary at least annually a record of disagreements and disputes and the outcome or current stage each has reached.