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Legislative consent motions

This briefing paper presents an overview of the latest discussions and developments around the Sewel Convention and legislative consent.

This information is provided to Members of the Legislative Assembly (MLAs) in support of their duties, and is not intended to address the specific circumstances of any particular individual. It should not be relied upon as professional legal advice, or as a substitute for it.

1 Introduction

This briefing paper has been prepared following a request from the Committee on Procedures. The committee asked RaISe to:

provide an updated position on whether, since the publication of the LCM (Legislative Consent Motion) Inquiry Report, there has been any procedural enhancement, improved communication and transparency between the UK Parliament and the Scottish Parliament and Senedd.

The LCM inquiry report, published in February 2022, made a number of recommendations regarding the LCM process in the Northern Ireland Assembly. Recommendation six stated:

The Committee notes with concern the practice of the UK Government legislating on devolved matters either when the Assembly has not been made aware of the Bill and/or has not given its consent. The Committee has corresponded with Parliament seeking procedural enhancements and improved communication and transparency in relation to Bills where LCMs are needed.¹

RaISe paper [NIAR 87-2020](#) provides detailed information on the operation of legislative consent in the Scottish Parliament, Senedd and Northern Ireland Assembly.

The structure of this paper is as follows:

- **Section 1** provides a brief introduction and overview of the relevant Standing Orders in the Scottish Parliament and Senedd
- **Section 2** sets out the current status of the Sewel Convention
- **Section 3** looks at consideration of legislative consent motions in Welsh context
- **Section 4** examines the most recent discussions in the Scottish Parliament on the issue

¹ Northern Ireland Assembly Committee on Procedures, [Inquiry into Legislative Consent Motions](#), February 2022

- **Section 5** provides an overview of the House of Lords views on how improvements could be made to the operation of legislative consent
- **Section 6** concludes the paper.

This paper draws on information published by parliamentary committees, the findings of an independent commission and relevant research.

For the purposes of this paper, comparison was made with the Standing Orders of the Scottish Parliament² and Senedd³ as referenced in NIAR 87-2020 and the latest published Standing Orders, to determine any procedural changes.

No changes were identified in either set of Standing Orders as they relate to legislative consent.

2 The Sewel Convention

The Sewel Convention underpins the concept of legislative consent in relation to the UK Parliament and the devolved administrations. It is named for Lord Sewel who stated during the passage of the Scotland Bill 1997-98 that:

...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.⁴

The subsequent Memorandum of Understanding between the UK Government and the three devolved administrations committed the four governments to the convention envisaged by Lord Sewel:

The United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power. However, the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the

² Standing Orders of the Scottish Parliament, December 2023

³ Standing Orders of the Senedd, January 2024

⁴ House of Lords 21 July 1998 HL vol592

devolved legislature. The devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government.⁵

The Scotland Act 2016 and Wales Act 2017 inserted a form of words reflecting the Sewel Convention into the original Scotland and Wales Acts. However, this did not make these insertions judicially enforceable, as confirmed by the Supreme Court in [R \(Miller\) v Secretary of State for Exiting the European Union](#).

3 Developments relating to legislative consent in the Senedd

The general view of the Senedd is one of dissatisfaction with the operation of the Sewel Convention since the decision of the UK to withdraw from the European Union. The reasons for this are discussed below.

3.1 The Independent Commission on the Constitutional Future of Wales - 2024

The Independent Commission on the Constitutional Future of Wales was established with two broad objectives:

- to consider and develop options for fundamental reform of the constitutional structures of the United Kingdom, in which Wales remains an integral part;
- to consider and develop all progressive principal options to strengthen Welsh democracy and deliver improvements for the people of Wales.

In its report, published in January 2024, the Commission addressed the operation of the Sewel Convention and how it could potentially be improved.

The Commission noted that:

⁵ [Memorandum of Understanding](#) and Supplementary Agreements Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee

The value of the Sewel convention in protecting the powers of the devolved institutions is in doubt, because the UK Government and Parliament have overridden it on numerous occasions since 2016, as discussed above. Many of these related to legislation directly or indirectly connected to Brexit, such as the EU Withdrawal Acts and the Internal Market Act 2020. The UK Government took the view that it is consistent with the Sewel convention for Westminster to legislate without consent in some circumstances, and that the legislation to implement Brexit was exceptional.

The Commission recognised that in the face of a no-deal Brexit, the UK Government and Parliament believed that it had to legislate without consent, but that in the Commission's view "this does not justify the unilateral process followed, including cutting the devolved governments out of the successor to EU structural funds, and making trade agreements detrimental to devolved interests."⁶

The Commission recommended a number of provisions to strengthen the devolution settlement (see Figure 1):

Figure 1: Extract from the report of the Independent Commission on the Constitutional Future of Wales

Legislative provisions to protect devolution:

- Putting into statute and making justiciable some key principles of inter-governmental relations and structures.
- Putting into statute that the consent of the devolved institutions is required as a matter of law for any of the following:
 - Any change of the scope of devolved legislative or executive powers
 - Any other change to the devolution settlement

⁶ The Independent Commission on the Constitutional Future of Wales, [Final Report January 2024](#)

- Any exercise of legislative power by the UK Parliament within devolved competence, other than changes strictly required to fulfil the UK's international obligations, maintain its defence or national security, or its macroeconomic policy
- Any exercise of executive power by UK government ministers within devolved competence.
- Structuring the legislation enacting this in such a way that it could not readily be repealed or amended by a simple majority of the House of Commons without, at a minimum, significant reputational damage.

The Commission was of the opinion that, while essential for Wales, these provisions should apply to all three devolution settlements, if supported by the other legislatures.

In its response, published in March 2024, the Welsh Government stated:

The principle of legislative consent lies at the heart of the current devolution settlements and we have long argued that the Sewel Convention is in need of strengthening. The arguments for reform have been reinforced by the UK government's repeated breaches of the convention in recent years, with 7 breaches in the last session of Parliament alone. Statutory underpinning and protection as recommended by the commission would provide important safeguards for devolution and we agree that a legal requirement to seek consent should be structured so that it cannot be easily repealed or amended. We will seek to discuss options to achieve this with the Scottish Government, the Northern Ireland Executive and the UK government.⁷

3.2 Welsh Government report on inter-governmental relations – July 2023

⁷ The Independent Commission on the Constitutional Future of Wales, Final Report January 2024

In July 2023 the Welsh Government published its report *Inter-Institutional relations agreement between the Senedd and the Welsh Government: report on intergovernmental relations covering the period 2021 to 2023*. This report covers the prior inter-institutional relations agreement between the Senedd and the Welsh Government, but also recognises the January 2022 Review of Intergovernmental Relations (which is discussed at Appendix 1).

On the issue of legislative consent, the report notes:

12. The content of the UK government's legislative programme and their engagement with the Sewel convention have brought particular strains during this period. On some UK government Bills, work between the governments has been timely and constructive. Such collaborative working has, in some instances, allowed the Welsh Government to recommend that the Senedd consent to UK legislation in some devolved areas, in line with Welsh Government principles.

13. However, the wider picture on UK Legislation is not positive. Late engagement from Bill teams in UK government, alongside unwillingness to share information and drafting, are symptoms of a disregard for the legitimate interest the Welsh Government and Senedd have in UK legislation which touches on devolved issues. As a result, of the UK Bills introduced during 2022 the Senedd refused consent to the Northern Ireland Protocol Bill; the Genetic Technology (Precision Breeding) Bill; the Trade (Australia and New Zealand) Bill; the Procurement Bill (in part) and the Retained EU Law Bill. The UK government has proceeded to ignore the Senedd's clear refusal of consent in breach of the Sewel convention – the Precision Breeding and Trade Bills are now law.

The Counsel General and Minister for the Constitution, Mick Antoniw MS, released a statement following the fourth meeting of the Inter-Ministerial Standing Committee (IMSC) on 17 May 2023. In it, he presented his perspective on the issue of legislative consent:

On the Sewel Convention, I raised that the UK Government potentially breaching the Sewel Convention multiple times in the current year alone illustrates the fundamentally disrespectful and destructive approach of the

UKG to the Sewel Convention, to devolution, and to the Union. There is simply no justification for this and absolutely no way this could be described as ‘not normally’ legislating without consent. Where the Senedd does not consent to a UK Government Bill, the UK Government needs to rediscover its respect for devolution and reverse the position whereby breaches of the Sewel Convention have become the default.⁸

Annex D of the Review of intergovernmental relations, published in January 2022, sets out the Dispute Avoidance and Resolution Process, although the Legislation, Justice and Constitution Committee of the Senedd has stated that the Welsh Government has appeared reluctant to use this mechanism.⁹

An overview of the Review of intergovernmental relations is available at Appendix 1.

4 Scottish Parliament - Constitution, Europe, External Affairs and Culture Committee

In October 2023 the Scottish Parliament’s Constitution, Europe, External Affairs and Culture Committee published its report *How Devolution is Changing Post-EU*. The committee noted that the Sewel Convention had generally worked well up until Brexit: “Between 1999 and 2015 the Sewel Convention had been engaged more than 140 times in Scotland but consent had been withheld only once and was followed by a compromise.”¹⁰

The committee suggested, however, that the Convention was under strain, and despite the Scotland Act 2016 giving it statutory recognition, it remained judicially unenforceable. It stated:

There continues to be considerable debate as to whether it should be strengthened in law and subject to judicial review or whether it can be

⁸ [Written Statement: Inter-Ministerial Standing Committee](#), Mick Antoniw MS, Counsel General and Minister for the Constitution, 20 June 2023

⁹ House of Commons Public Administration and Constitutional Affairs Committee Inquiry into Devolution Capability in Whitehall, [written evidence from the Senedd’s Legislation, Justice and Constitution Committee](#), September 2023

¹⁰ Scottish Parliament Constitution, Europe, External Affairs and Culture Committee, [How Devolution is Changing Post-EU](#), October 2023

strengthened on a non-statutory basis or whether no strengthening is required.

The Committee has heard that the former would primarily involve removing the reference to the UK Parliament not “normally” legislating without consent from section 28(8) of the Scotland Act 1998 and making it a binding legal rule. The latter would primarily involve the reform of parliamentary procedures at Westminster requiring greater Ministerial accountability and more detailed scrutiny of decisions to proceed without the consent of the devolved legislatures.¹¹

A number of academics contributed to the committee’s inquiry, and their views on the Sewel Convention are summarised as follows:

- Strengthening the Sewel Convention is fundamental, because, unless there is some protection for the devolved institutions against the unilateral exercise of Westminster sovereignty, there are no guarantees of anything
- The Sewel Convention would not have been considered as a mechanism if devolution had occurred when the UK was already outside the EU because nobody would have believed that something as inadequate, flexible or ambiguous as the Sewel convention would have been adequate for resolving the disputes that necessarily would arise in UK domestic policy outside the EU
- The Sewel Convention should be given full statutory force, so that no law can be made or have effect which alters devolved law or powers unless the consent of the devolved legislature has been secured.

The committee received evidence from the Chair of the Senedd’s Legislation, Justice and Constitution Committee who said that: “there is now a high degree of scepticism in the Senedd and in Wales about whether the Sewel convention is functioning properly.”¹²

¹¹ As above

¹² Scottish Parliament Constitution, Europe, External Affairs and Culture Committee, *How Devolution is Changing Post-EU*, October 2023

An alternative view was put by the Chair of the House of Commons Public Administration and Public Affairs Committee, who addressed the ‘not normally’ provision within the Sewel Convention:

...one has to question whether we have been living in normal political times. I contend that we have not. Whatever one’s view on the outcome of the referendum on the EU, it has been seismic, and its institutional implications are seismic. We must look at it in that context.

The Chair went on to say:

I suspect that practical working relationships were, on the whole, better than they might have been had the Administrations been headed by different political parties.¹³

In correspondence to the committee, the UK Minister for Levelling Up, Housing and Communities addressed the committee’s question on whether the Sewel Convention was under strain and if it could be strengthened on a statutory or non-statutory basis:

The Government is committed to the Sewel Convention and does not plan to alter its status. The UK Government will continue to seek legislative consent from the devolved legislatures when introducing Bills at Westminster that legislate within areas of devolved competence or alter devolved competence. It will always consider the impact on a devolved administration. UKG officials work closely with counterparts in the DAs to discuss Bills’ content and provisions, along with Bills’ devolution analysis...

...It is sometimes necessary for the UK Government to act in its role as the government for the whole of the UK and introduce legislation that works to ensure coherence across the UK. This is consistent with the Sewel Convention and indeed the overarching devolution settlements. The instances where the Government has proceeded without legislative consent have been limited...They have generally related to EU Exit (about

¹³ As above

which there was and is a fundamental disagreement between the Government and DAs) and international policy...¹⁴

The Constitution, Europe, External Affairs and Culture Committee made the following observations in relation to the operation of the Sewel Convention:

The Committee notes that there is clearly a fundamental difference of viewpoint between the UK Government and all the devolved governments with regards to how the Sewel Convention has been operating since EU-exit. It is also clear that this has led to a deterioration in relations between the UK Government and all the devolved Governments.

The Committee's view is that this level of disagreement on a fundamental constitutional matter is not sustainable particularly within the context of an increasing shared space at an intergovernmental level.¹⁵

At the time of writing, it appears likely that the debate around the applicability of the Sewel Convention is set to continue.

5 House of Lords committees

In March 2023 the House of Lords Procedure and Privileges Committee published its Fourth Report of Session 2022-23. It addressed the issue of how to best indicate when consent had been contested by a devolved administration or was pending. The Committee:

...agreed that all consent decisions should be notified both on the order paper and in the list of bills in progress in House of Lords Business. In instances when consent has not been sought by the UK Government but has nevertheless been granted or withheld by a devolved legislature, this will be notified by referring to the 'correspondence published' from the relevant devolved legislature. The fact that consent from a devolved legislature is pending will also be notified in the list of bills in progress.

¹⁴ As cited at footnote 14

¹⁵ As above

In March 2024 the House of Lords Constitution Committee took evidence as part of its inquiry *The governance of the union: co-operation, consultation and legislative consent*. The committee heard from Professor Derek Birrell (Ulster University) and Dr. Lisa Claire Whitten (Queen's University Belfast) on the issue of legislative consent. Professor Birrell highlighted what in his view were some of the current issues with the operation of legislative consent:

The argument for the Sewel convention, at least originally and maybe until fairly recently, was that it was more a matter of convenience. It saved legislative procedures. There was no great controversy about it. They were often technical matters.

One of the arguments or problems with the Sewel convention was the lack of exchange of information, timeliness and consideration, and so on. One of the other main criticisms was around what happens if there is no consent. Of course, that has happened more frequently only recently, because there appears to be no procedure in the House of Commons for dealing with no consent, other than it perhaps being recorded in a note; there is no pathway for dealing with no consent. There is a pathway in that either the law goes through without consent and that is it, or the House of Commons reverts to primary legislation, but that would not be popular and takes up so much time...

One solution might be to exclude from legislative consent Motions issues that have some constitutional importance. It is not always easy to determine what is of constitutional significance, but that would be one possible way of disallowing legislative consent Motions that deal with what may seem constitutional issues, although that may lead to legal challenges.¹⁶

¹⁶ House of Lords Constitution Committee, [Uncorrected oral evidence: The governance of the union: co-operation, consultation and legislative consent](#), 13 March 2024

6 Conclusion

The Senedd and Scottish Parliament continue to have concerns over the applicability and operation of the Sewel Convention since the decision of the UK to leave the European Union. Brexit has brought to the fore intergovernmental tensions and these have been subject to debate and discussion, in particular between the devolved administrations in Scotland and Cardiff, and the UK Government.

In the absence of further refinement of the Convention, whether on a statutory or non-statutory basis, the potential for further disagreement remains high.

Appendix 1

Review of intergovernmental relations – January 2022

The Review of intergovernmental relations was published in January 2022. The review, which emerged from the Covid-19 pandemic, was undertaken by the UK and devolved governments. It noted that “strong intergovernmental relations is essential to support and enhance the important work of all governments.”

It set out the following principles for intergovernmental working:

- a. Maintaining positive and constructive relations, based on mutual respect for the responsibilities of the governments and their shared role in the governance of the UK;
- b. Building and maintaining trust, based on effective communication;
- c. Sharing information and respecting confidentiality;
- d. Promoting understanding of, and accountability for, their intergovernmental activity;
- e. Resolving disputes according to a clear and agreed process

A number of engagement structures would ensure regular and effective engagement and communication between the four governments.

Intergovernmental forums would be encouraged to produce communiqués on their meetings and activities and publish these online.