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Brexit: Devolution and legislative consent

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Summary

Legislative consent is a fundamental part of the territorial constitutional arrangements of the United Kingdom. The self-denying ordinance of the UK Parliament that it will normally only legislate with regard to devolved matters with the consent of the devolved legislature is a non-legal constitutional constraint. It helps to protect and preserve autonomous spheres of constitutional authority with regard to devolved legislatures and their related institutions.

The withdrawal of the UK from the European Union poses significant challenges to the existing devolution settlements in Scotland, Wales and Northern Ireland. Several key pieces of legislation, deemed necessary by the UK Government to deliver its policy of withdrawing the UK from the EU, have significant implications for the powers of the devolved legislatures and executive bodies.

The first such piece of legislation was the *European Union (Notification of Withdrawal Act) 2017*, which was necessary to commence the Article 50 withdrawal process. The litigation that gave rise to the requirement for that Act also clarified the role of legislative consent in the UK constitution. In particular, it highlighted its limitations as a mechanism by which devolved legislatures could influence the Brexit process.

Several Brexit framework Bills will, among other things, make significant modifications to the powers of the devolved legislatures and executive bodies. Those Bills, especially the *European Union (Withdrawal) Bill 2017-19 (EUW Bill)*, the *Trade Bill 2017-19*, and the anticipated *European Union (Withdrawal Agreement and Implementation) Bill*, are understood to include, or be very likely to include, provisions that engage the legislative consent procedures of the respective devolved legislatures.

Both the Scottish and Welsh Governments have indicated that they will withhold legislative consent for the *EUW Bill* and the *Trade Bill*. They are concerned that the provisions in those Bills would diminish the existing competencies of the devolved legislatures and executives.

The Scottish and Welsh Governments have introduced "Continuity" Bills before their respective legislatures. These Bills seek pre-emptively to protect devolved institutions against the changes that the *EUW Bill* in particular, would make to the *Scotland Act 1998* and the *Government of Wales Act 2006*. Whether these Bills themselves fall within the legislative competence of the devolved Parliaments is itself a contentious constitutional question.

Were legislative consent to be withheld in relation to one or more of the relevant Brexit framework Bills, the UK Government would not be prevented, legally, from presenting the legislation for Royal Assent. To do so, however, would be a constitutionally unprecedented course of action, the Government having explicitly acknowledged that the convention applies to those Bills.

1. What is legislative consent?

Summary

Legislative consent is a constitutional convention which restrains the law-making powers of the UK Parliament. Where a devolved legislature has the power to make laws, this does not diminish the law-making power of the UK Parliament in those areas. However, the UK Parliament has developed a self-denying ordinance, supported by the working practices of the UK Government. Parliament undertakes that, normally, it will only legislate with regard to devolved matters when it has the consent of the devolved legislature.

1.1 A self-denying ordinance of the UK Parliament

Under the three principal devolution statutes, devolved legislatures and executives have areas for which they are constitutionally and routinely responsible.[1] However, the UK Parliament retains the power to legislate in devolved areas. To respect the devolved institutions' constitutional spheres of responsibility, the UK Parliament developed a self-denying ordinance.

The UK Parliament will not normally legislate with regard to devolved matters without the prior agreement of the devolved legislatures in whose constitutional space they are legislating. The act of agreeing to an Act of the UK Parliament that contains provisions having regard to devolved matters is known as giving "legislative consent".

Parliament's self-denying ordinance, known as the "Sewel Convention" or the "legislative consent convention" has the status of a constitutional convention and is not legally enforceable in the courts.[2] The terms of this self-denying ordinance were first articulated by Lord Sewel, the Minister responsible for steering the *Scotland Bill 1997-98* through the House of Lords. He said:

> 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.[3]

A devolved legislature signifies its legislative consent to a Bill of the UK Parliament by passing a "legislative consent motion" (LCM). This happens in accordance with its own Standing Orders and after the relevant devolved administration has expressed its view on the legislation by way of a legislative consent "memorandum".

Lord Sewel, HL Deb 21 July 1998 Vol 592 c791

"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."

1 *Scotland Act 1998* (the *Scotland Act* or *SA*), *Government of Wales Act 2006* (*GoWA*) and *Northern Ireland Act 1998* (*NIA*)

2 For the purposes of this paper, the terms "Sewel Convention" and "legislative consent convention" are used interchangeably. The former is, technically, only concerned with the legislative consent arrangements relating to Scotland, but its colloquial use beyond that is more widespread.

3 HL Deb 21 July 1998 Vol 592 c791

1.2 How did the legislative consent convention emerge?

Following the creation of the three devolution settlements, a Memorandum of Understanding (MoU) was agreed between the UK Government and devolved administrations.[4] It serves as a political commitment to honour the constitutional rule proposed by Lord Sewel and states that:

> 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 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 Cabinet Office subsequently produced several Devolution Guidance Notes (DGNs) to support civil servants giving effect to the working arrangements envisaged by the MoU. Of those, five address the current arrangements for how legislative consent should work in practice.[6]

1.3 A constitutional convention recognised in statute?

The most recently amended versions of the *Scotland Act* and the *Government of Wales Act* put Lord Sewel's words "on a statutory footing". The *Scotland Act 2016 and Wales Act 2017* amended the original acts to include provisions that stated:

> But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the [devolved legislature].[7]

The decision of Parliament to include these legislative provisions in relation to Scotland and Wales had no legal effect on the relationship between the UK Parliament and their respective devolved institutions. The UK Supreme Court confirmed in *R (Miller) v Secretary of State for Exiting the European Union* that Parliament's decision to put Lord Sewel's words into statute did not convert the Convention into a judicially enforceable rule.[8] The purpose

Section 2 Scotland Act 2016

But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.

4 The Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, Scottish Ministers and the Cabinet of the National Assembly for Wales (originally Cm 4444, 1 October 1999) has been revised six times since it was first introduced. The most recent version was published in October 2013.

5 MoU para 14

6 DGN 8 concerns Northern Ireland, DGN 9 and DGN 17 concern Wales and DGN 10 and DGN 14 concern Scotland. DGN 16 (now superseded) addressed the operation of legislative competence orders (LCOs) before the National Assembly for Wales acquired the power to make Acts rather than Measures.

7 Section 2 *Scotland Act 2016*, section 2 *Wales Act 2017*

8 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, para 148

of the legislative provision was simply to "recognise" the importance of the Sewel Convention as a core part of the devolution settlement.

No equivalent statutory provision exists in the *Northern Ireland Act 1998*.

1.4 What if consent is not given?

The principle of the sovereignty of Parliament means that it can, as Dicey put it, "make or unmake any law whatsoever".[9] Neither the absence nor the deliberate withholding of legislative consent presents a legal barrier to the UK Parliament presenting a Bill for Royal Assent.

The consequences of (and remedies for) disregarding the Sewel Convention are therefore, as with any constitutional convention, ultimately political. The absence of judicial enforcement has not prevented the Convention from conditioning the behaviour of UK institutions. As the House of Commons Political and Constitutional Reform Committee put it in 2015, "Lord Sewel's words have been treated as a solemn and binding undertaking".[10]

This paper's Annex identifies the cases where legislative consent has been withheld (in whole or in part) for a UK Parliamentary Bill, and provides a narrative as to what happened to those Bills. Legislative consent has only been actively withheld on 9 occasions across the three devolution settlements: 7 times in Wales and once each in Scotland and Northern Ireland.

A UK Parliamentary Bill that proposed materially to modify devolved competence has never been put forward for Royal Assent in defiance of a devolved legislature that has deliberately withheld its consent.

9 A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*, 8th edition, 1996, p38

10 Political and Constitutional Reform Committee, Constitutional implications of the Government's draft Scotland clauses, 22 March 2015, HC 1022 2014-15, para 45

2. Why do we have legislative consent?

Summary

In other (typically federal) states, like Canada, the constitutional sphere of authority of sub-state institutions is protected by a codified constitution. Legal constraints are imposed on the powers of the central or federal legislature to make laws in certain areas. Moreover, significant changes to the powers of a sub-state legislature require a constitutional amendment. This may in turn require formal input of sub-state institutions or even a form of sub-state "veto" over those changes. Courts then police these legal boundaries.

This approach to protecting sub-state constitutional spheres of authority is not possible in the UK. It is incompatible with the overriding principle of the UK constitutional order, that Parliament is sovereign and may make or unmake any law whatsoever. The legislative consent convention recognises that legal constraints on the behaviour of Parliament are impossible, but uses non-legal constraints to condition the behaviours of the UK Parliament and Government.

2.1 Protecting "constitutional spheres of authority"

The devolution settlements confer on devolved legislatures the power to legislate on certain matters without ceding it for the UK Parliament. These legislative powers are therefore concurrent. Were the UK Parliament frequently to legislate with regard to devolved matters, however, this could cut across the political autonomy that devolution was intended to deliver to Scotland, Wales and Northern Ireland. As Mark Elliott, Professor of Public Law at the University of Cambridge, put it:

> Devolution's technically "top-down" nature notwithstanding, the modern territorial Constitution is premised upon constitutional actors' mutual respect for each other's constitutional spheres of authority.[11]

There are two distinct ways that legislation made by the UK Parliament could cut across the devolved institutions' political autonomy:

- the UK Parliament could legislate unilaterally on the subject matters themselves that have been devolved;[12] or
- the UK Parliament could legislate unilaterally to change the competencies of the devolved legislatures themselves in a way that either relaxes or restricts devolved competence.[13]

11 M. Elliott 'The Supreme Court's judgment in Miller: in search of constitutional principle' *C.L.J.* 2017, 76(2), 257-288, p277

12 E.g. if the UK Parliament legislated to require Scottish schools to use the GCSE system of examinations.

13 E.g. if the UK Parliament legislated to make secondary education a reserved matter or to remove the requirement that the Scottish Parliament does not modify the *Human Rights Act 1998*.

The need for a constitutional convention of legislative consent arises because of unique features of the United Kingdom's constitutional arrangements. It is possible to use legal constraints on devolved institutions to create an "exclusive" legal domain for the UK Parliament. This is achieved by the devolution statutes, which prohibit devolved legislatures from passing certain laws.

What it is not possible to do under the UK's current constitutional arrangements is to create an "exclusive" legal domain for devolved institutions. To attempt to do so would be incompatible with the principle of Parliamentary sovereignty. Absent legal constraints, Parliament can only be constrained politically: by constitutional conventions and inter-governmental working arrangements. These constraints aim to protect, in practice if not in law, institutional autonomy for the devolved legislatures.

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Legislative consent provides non-legal protection of devolved competence by allowing devolved legislatures a process and platform:

- to scrutinise why the UK Parliament is legislating in devolved areas or to modify the law relating to the powers of devolved institutions; and
- to seek changes to primary legislation if it believes the UK Parliament is proposing to use powers in a way that would be detrimental to the devolution settlement(s).

2.2 Protecting central competencies

Under the current devolution settlements, the UK Parliament is exclusively responsible for certain aspects of law-making. The devolution statutes restrict legislative competence in three distinct but related ways:

- Firstly, they create what are called "reserved matters".[14] Devolved legislatures cannot pass laws that "relate to" those areas of policy.[15]
- Secondly, they make it unlawful for devolved legislatures to "modify" certain UK legislation. Most of these protected enactments are of a constitutional nature.[16]
- Thirdly, they make it unlawful for devolved legislatures to legislate incompatibly with international obligations, or with UK-wide schemes designed to ensure compliance with international obligations.[17]

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14 See Schedule 5 of the *Scotland Act 1998* (*Scotland Act* or *SA*) and Schedule 7A of the *Government of Wales Act 2006* (*GoWA*) (inserted by Schedule 1 of the *Wales Act 2017*). The *Northern Ireland Act 1998* (*NIA*) calls these restrictions "excepted matters". What it calls "reserved matters" are powers that can only be exercised by the Assembly with the consent of the Secretary of State for Northern Ireland.

15 Immigration, for instance, is a reserved matter. See Schedule 5, Part II, Section B6 *SA*, Schedule 7A, Part II, Section B2 *GoWA* and Schedule 2, paragraph 8 *NIA*.

16 Under Schedule 4 of the *SA* the Scottish Parliament cannot vary the *Human Rights Act 1998*. Human rights law generally, however, is not a reserved matter: the Scottish Parliament could "supplement" that support. See A. McHarg, Will devolution scupper Conservative plans for a "British" Bill of Rights?, *UK Human Rights Blog*, 2 October 2014

17 Acts of devolved legislatures must be compatible with EU law and with Convention rights

These statutory restrictions preserve for the UK Parliament an exclusive domain in the areas in which devolved legislatures are prohibited from legislating. In that respect, the devolution statutes function similarly to the constitutions of other countries. They also place legal limits on the powers of sub-state Parliaments or legislative assemblies.[18]

2.3 Protecting sub-state competencies

The approach of other countries

Other countries, including Canada, use their codified constitutions to limit the powers of central or federal legislatures to make laws in certain matters or subject areas. The effect of those limits is to create a legally exclusive domain over which only sub-state institutions can legislate.

These limits are imposed in the same way as constitutional limits imposed on the competence of sub-state legislatures. Since these are legal constraints, they are enforced by the courts. Primary legislation from a central or federal legislature can be annulled if its provisions fall within the exclusive domain of sub-state institutions.

Box 1: Case Study – how Canada protects the law-making powers of its provinces

Canada's Constitution limits on the legislative powers of both the federal Parliament and the legislatures of provinces:

- Article 91 of Canada's *Constitution Act 1867* lists "matters coming within the classes of subjects" with respect to which the federal Parliament, exclusively, has the power to make laws.
- Article 92 of Canada's *Constitution Act 1867* lists "matters coming within the classes of subjects" with respect to which provincial legislatures, exclusively, have the power to make laws.

This is possible because Canada does not have an overriding principle of Parliamentary sovereignty as part of its constitutional arrangements. Under Article 52(1) of the *Constitution Act 1982*:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Federal and provincial courts will annul any law, including any federal law, that breaches limits imposed by the Constitution. If the federal Parliament wanted to be able to legislate about a provincial matter, it would have to seek a constitutional amendment to Article 92.

A constitutional amendment would itself have to conform to the requirements set out in Article 38 of the *Constitution Act 1982*. This requires the support of:

- the Senate;
- the House of Commons; and
- two-thirds of the provincial legislatures, representing at least half of the population of Canada.

By contrast, changes to the devolved competences of a sub-state legislature in the UK only require an ordinary Act of Parliament. This provides no special thresholds or protections that would otherwise give greater influence to sub-state political communities or institutions.

[18] Lord Bingham referred to the *Northern Ireland Act 1998* as "in effect a constitution" in *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, para 11

Why the UK approach is different

The approach taken by countries like Canada would be impossible under the UK's present constitutional arrangements. To impose legal limits on the law-making powers of the UK Parliament would be incompatible with the constitutional principle that it is "sovereign" or "legislatively supreme". This principle was set out by Dicey, who maintained that the UK Parliament can:

> make or unmake any law whatever; and, further… no person or body [has] a right to override or set aside the legislation of Parliament.[19]

All three of the original devolution statutes tacitly acknowledge this principle. They state that the granting of legislative powers to devolved legislatures in no way diminishes the power of the UK Parliament to pass legislation regarding Scotland, Wales or Northern Ireland.[20] Legislative power has been delegated, rather than ceded or divided.

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19 A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*, 8th edition, 1996, p38

20 Section 28(7) *Scotland Act 1998*, section 107(5) *Government of Wales Act 2006* and section 5(6) *Northern Ireland Act 1998*

3. What is the scope of legislative consent?

Summary

Although legislative consent has developed significantly since 1999, two key areas of contention have persisted:

- the range of potential Bills that should be covered by the legislative consent process; and
- the circumstances in which it would be consistent with the Sewel Convention for the UK Parliament to legislate in the absence of devolved consent.

Disagreement on these issues has already had, and will likely continue to have, a significant impact on the relationship between the UK Government and the devolved authorities. In the context of key Brexit legislation, both of these questions are relevant, as two devolved legislatures intend, as things stand, to withhold legislative consent from at least two key Brexit Bills (the *European Union (Withdrawal) Bill (2017-19)* and the *Trade Bill (2017-19)*). Whether consent is required, and for what provisions it is required, could prove important should consensus not be reached and consent is not given.

3.1 The original convention and the Devolution Guidance Notes

Lord Sewel's original words provide relatively little guidance as to how broadly his proposed constitutional convention would apply. He stated:

> Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish parliament.[21]

This statement can be interpreted narrowly, so as only to be concerned with situations where an Act of the UK Parliament proposes to include legislative provisions a devolved legislature could itself have made.[22]

However, the Devolution Guidance Notes, which the Cabinet Office has drafted to assist civil servants in dealing with devolution matters, assume that legislative consent will be sought for a broader range of cases. The Notes applicable to Scotland and Northern Ireland provide that legislative consent will also be sought where an Act of Parliament would:

> …alter the legislative competence of the [devolved legislature] or the executive functions of [the devolved authority].[23]

DGN 17 similarly articulates a procedural expectation in the Welsh devolution context. It states that, where provisions of an Act of Parliament would "modify the Assembly's legislative competence":

> The UK Government and the Welsh Government have agreed that the Welsh Ministers should seek the consent of the Assembly when such provisions are included in Bills.[24]

Devolution Guidance Note 10 Post – Devolution Primary Legislation affecting Scotland

A Bill which: "contains provisions applying to Scotland and which are for devolved purposes, or which alter the legislative competence of the Parliament or the executive competence of the Scottish Ministers… are subject to the convention requiring the consent of the Scottish Parliament."

21 HL Deb 21 July 1998 Vol 592 c791
22 E.g. provision in relation to the curriculum in Scottish schools.
23 DGN 8, para 4 and DGN 10, para 4
24 DGN 17, para 13

The process of seeking legislative consent is governed by the Standing Orders of the devolved legislatures. Those internal rules of the devolved Parliament and Assemblies expect, in all three cases, that legislative consent will be sought for any UK Bill that would seek to modify devolved competencies or functions. In that respect, they reflect the broader interpretation of the Convention rather than the narrower one.

There are two respects, however, in which a broader scope for the legislative consent convention has been criticised or contested.

Modification of devolved ministerial functions

During a Holyrood review into the functioning of the Sewel Convention (in 2005), Lord Sewel criticised what he saw as an undue widening of the Convention by the constitutional practice of the Scottish devolved institutions. He took the view that, since "a proposal to give Scottish ministers powers in relation to a reserved matter is itself a reserved decision", the original rationale for legislative consent did not apply:

> The use of Sewel motions in relation to modifying the powers of Scottish ministers is both constitutionally questionable and confusing. The Convention is being used for a purpose for which it was not originally intended. If, as is reasonable, the view of the Scottish Parliament is sought on such a matter, a different mechanism should be found.[25]

Lord Sewel, October 2005:

"A proposal to give Scottish ministers powers in relation to reserved matters is itself a reserved decision."

Ministerial functions can be transferred or modified by way of an Order in Council under section 63 of the *Scotland Act 1998*.[26] Given that the Order in Council procedure legally requires the Scottish Parliament's consent to a draft instrument, it might be thought that not to seek legislative consent to an Act of Parliament doing the same thing would frustrate what were otherwise regarded as constitutional consent requirements for changes to ministerial powers.

Modification of devolved legislative competence

A related contention has been made about the original convention and its scope: that it does not encompass Acts of the Westminster Parliament that modify what is a reserved or devolved matter. The logic of Lord Sewel's remarks in 2005 implies that modifying devolved legislative competence also ought not to fall under the constitutional convention bearing his name. A proposal to alter the law-making powers of the Scottish Parliament would also be "itself a reserved decision".

UK Government's interpretation

It became apparent, during the passage of the *Scotland Bill 2015-16*, that the UK and Scottish Governments did not agree what the scope of the Convention was in relation to Bills that modify the Scottish Parliament's

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25 Submission of Lord Sewel, Scottish Parliament Procedures Committee, 7th report 2005, *The Sewel Convention*, SP Paper 428, Annex C, 5 October 2005, paras 9-10

26 See below section 5.2

competence. Lord Keen of Elie, the Advocate General for Scotland, insisted that the practice of seeking consent for Bills that modify legislative competence was not a part of the Sewel Convention itself. Instead, for him, it reflected "working arrangements which may alter from time to time":[27]

> [DGN 10 is] not a document that was ever approved by any House of this Parliament but was developed by the Civil Service for the application and operation of what was understood by the Civil Service and everyone else to be the Sewel convention.[28]

It was open to a future UK Government to issue different guidance to civil servants, based on other considerations. Lord Keen's argument was therefore that the DGNs could not be relied upon to establish the scope of a convention that binds the UK Parliament, which is institutionally separate from the Government of the day.

Lord Keen of Elie

HL Deb 8 December 2015 Vol 767 c1501

"There has been *Devolution Guidance Note 10* with regard to how from time to time the convention may operate, but those are working arrangements which may alter from time to time and should not be enshrined in statute."

Scottish Government's interpretation

This position is not shared by the Scottish Government.[29] It argues that DGN 10 articulates the full terms of the Convention and that the UK Government has previously accepted this is the case and should be bound by its terms. The Scottish Government relies upon, among other things, a statement made in the UK Government's White Paper of January 2015, which stated:

> It is expected that the practice developed under Devolution Guidance Note 10 (DGN10) will continue. DGN10 has no legal effect but sets out how the UK Government departments legislating in Scotland will meet the terms of the Convention.[30]

Interpretation of others

Lord Keen's predecessor as Advocate General for Scotland, Lord Wallace of Tankerness, also disagreed with his view as to the scope of the Convention. He argued that, even if the words originally used by Lord Sewel did not intend to cover modifications to devolved competence, the "working arrangements" adhered to, and set out in the DGNs have the status of a constitutional convention in their own right:

> It is arguable that we have a two-tier legislative consent Motion convention. There are the Sewel words… and [then there are] the provisions that have triggered legislative consent Motions since the outset of the Scottish Parliament, and are found in Devolution Guidance Note 10.[31]

Iain Jamieson, a former government lawyer involved in the drafting of the *Scotland Act 1998*, framed this dispute in the context of Ivor Jennings' test for establishing whether a constitutional convention exists. It asks:

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27 HL Deb 8 December 2015 Vol 767 c1501
28 HL Deb 24 February 2016 Vol 769 c305
29 Scottish Government, Supplementary Legislative Consent Memorandum - Scotland Bill, 1 March 2016, p6
30 Scotland Office, Scotland in the United Kingdom: An enduring settlement, Cm 8990, January 2015, p16
31 HL Deb 31 March 2016 Vol 769 c2073

> First[ly], what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule?[32]

The obstacle Jamieson identified concerns the second part of the test. Unless the UK Government accepts it is bound by the wider reading of the constitutional rule, it is not met. Jamieson has argued, however, that even if the it maintains DGN 10's wider scope is a mere "working arrangement", it will still be "politically very difficult" to ignore a legislative consent process if undertaken by the Scottish Parliament under its Standing Orders.[33]

Implications of disagreement

Even if a broader working arrangement is technically not part of the Convention, it still has significant implications for future major constitutional changes. In the context of the UK's withdrawal from the EU, several UK Government Bills would modify the competencies of the devolved legislatures and executives. This means the devolved legislatures may notionally "be asked" (several times) for legislative consent by their executives. Since the devolved legislatures and executives embrace a wider interpretation of the convention, consent will be sought on that basis even if a UK Government does not believe certain provisions require consent.

If a devolved legislature actively withheld consent for a Bill provision the UK Government had accepted engages the convention, any decision to present that Bill for Royal Assent would be, constitutionally, without precedent.[34]

Does a constitutional convention exist?

"First[ly], what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule?"

Ivor Jennings, *The Law and the Constitution*, 5th edition, 1959, p136

3.2 *Scotland Act 2016* and *Wales Act 2017*

The *Scotland Act 2016* and *Wales Act 2017* both include a provision stating:

> But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the [devolved legislature].[35]

The Scottish provision intended to give effect to a UK Government commitment from the Smith Commission. It stated "[t]he Sewel Convention will be put on a statutory footing".[36] The UK Government's White Paper said that the *Scotland Bill 2015-16*'s clause 2 "maintains the current position whilst placing the convention on a statutory footing."[37]

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32 I. Jennings, *The Law and the Constitution*, 5th edition, 1959, p136

33 I. Jamieson, Putting the Sewel Convention on a Statutory Footing, *Scottish Constitutional Futures Forum*, April 2016

34 Accidental Convention breaches include where legislation was repealed without the UK Parliament realising it extended to devolved areas. See R. Edwards, Scottish councils robbed of powers to deal with litter...by Westminster, *Sunday Herald*, 20 March 2016

35 Section 2 Scotland Act 2016 and section 2 Wales Act 2017

36 Report of the Smith Commission for further devolution of powers to the Scottish Parliament, 24 November 2016, p13

37 Scotland Office, Scotland in the United Kingdom: An enduring settlement, Cm 8990, January 2015, p16

It was not clear what the intended effect was of putting the (verbatim) formulation of Lord Sewel from 1998 into statute. Three elements of this "statutory recognition" were contentious:

- the words originally used by Lord Sewel were narrower than what many believed the Convention to have evolved to include;
- the notion of "recognising" a convention in statute does not necessarily give it any legal effect; and
- stipulating that the UK Parliament "normally" will not do something suffers from ambiguity. It does not clarify what counts as an exceptional circumstance in which it will do something.

How broad a convention do the statutes recognise?

The first of these concerns is related to the wider question of the scope of the Sewel Convention. One of the criticisms made of clause 2 of the *Scotland Bill 2015-16* was that it appeared not to acknowledge the Convention in its broadest sense.[38] Lord Keen of Elie's distinction between Lord Sewel's words and the "working arrangements" of DGN 10 was criticised by those who believed it unduly excluded the full extent of the Convention from statutory recognition. As Lord Norton of Louth put it:

> There is a Sewel convention, as we have heard, but it is different from what Lord Sewel enunciated in 1998. Putting the words of Lord Sewel on the face of the Bill does not put the Sewel convention in statute. Indeed, the clause as it stands narrows and undermines the convention. It narrows it by omitting a practice that has developed and been pursued on a continuous basis, and it undermines it by removing the essential feature that established it as a convention.
>
> … the clause does not encompass measures that alter the legislative competence of the Scottish Parliament or the executive competence of Scottish Ministers. The Sewel convention does encompass such measures.[39]

Lord Norton of Louth, HL Deb 24 February 2016 Vol 769 c294

"Putting the words of Lord Sewel on the face of the Bill does not put the Sewel convention in statute. Indeed, the clause as it stands narrows and undermines the convention."

Lord Wallace of Tankerness also believed the clause in the Bill fell short of giving full effect to the Convention:

> I note [that] the noble and learned Lord, Lord Keen, … said that the exercise of the legislative consent Motion will continue exactly as before, but ... by using the words in the statute, which were used by Lord Sewel in 1998, the implication must be that that is all that is covered by the statute in fulfilment of the Smith commission recommendation. In fact, the Government seem to be trying to take this as narrowly as they can.[40]

38 I.e. to require that modifications to devolved competence would also receive legislative consent, as stipulated in the Devolution Guidance Notes.

39 HL Deb 24 February 2016 Vol 769 c294

40 HL Deb 31 March 2016 Vol 769 c2072

Parliament "recognises" convention in statute?

When the Smith Commission recommended that the Sewel Convention should be "put on a statutory footing" this left open scope for ambiguity. It was not clear whether this should mean that the Sewel Convention would become a legal rule, enforceable by the courts, placing a constraint on Parliamentary sovereignty.

The UK Government interpreted this commitment as meaning that the words of Lord Sewel would be written into the *Scotland Act 1998*. The statutory provision would acknowledge that the Convention exists, but it would not have the effect of converting the convention into a legal rule on which litigants could rely in court. As Lord Keen argued:

> The intention is not that Clause 2 should give rise to any justiciable issue. It is a political expression of the convention in statutory form.[41]

Given that was the Government's intention, however, there were concerns as to whether the clause had its intended effect. As Lord Hope of Craighead put it:

> Someone seeing [the Sewel Convention] written into statute is going to say, "Here is something which I can use to challenge a piece of legislation that is apparently being passed without the Sewel convention being observed according to its current usage". With great respect, it does not do for a Minister to say to the court, "This is just a political matter", because the judges will say, "It's a matter for us". The judge may look at the normal rules to see what the legislation was designed to do, and with a bit of research they will find that it was designed to give effect to the Sewel convention to put it on a statutory footing. The judge will then say, "Well, it's a matter for me to construe what this means". I am not at all impressed by the Minister saying that it is all a political matter, because it is now in the hands of the court to adjudicate upon.[42]

The effect of the provision was indeed to become the subject of litigation. In *R (Miller) v Secretary of State for Exiting the European Union*, the UK Supreme Court unanimously ruled in favour of the UK Government's interpretation of the effect of "recognising" Lord Sewel's words in statute. It took the view that Parliament was simply "recognising the convention" as "a political convention" and "declaring" it to be a "permanent feature" of the devolution settlements.[43]

***R (Miller) v Secretary of State for Exiting the European Union*, [2017] UKSC 5, para 148**

"the UK Parliament is not seeking to convert the Sewel Convention into a rule which can be interpreted, let alone enforced, by the courts; rather, it is recognising the convention for what it is, namely a political convention, and is effectively declaring that it is a permanent feature of the relevant devolution settlement."

Parliament will not "normally" do something?

One of the additional difficulties with section 2 of the *Scotland Act 2016* was the inclusion of the word "normally". The House of Commons Political and Constitutional Reform Committee expressed concerns during the passage of the *Scotland Bill 2015-16* as to the ambiguity this word causes:

41 HL Deb 8 December 2015 Vol 767 c1502
42 HL Deb 8 December 2015 Vol 767 c1502-3
43 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, para 148

> The Scotland Office insists that, because the Convention has always been adhered to, "there has been no need to unpack the words 'not normally'". However, it is hard to see how any clear statutory prescription (as distinct from a parliamentary convention) could be made to rest on such an imprecise term. Retention of the word "normally" sits ill with the Government's stated intention to "formalise" the Convention.[44]

It suggested two possible ways the Bill could have provided greater clarity:

> One way to address this would be to elaborate the circumstances in which the UK Parliament would be allowed to legislate on a devolved matter without the consent of the Scottish Parliament.[45]
>
> … Alternatively … the UK Government [might be required] to state why it sought to legislate on a matter covered by the Convention without the consent of the Scottish Parliament. A Minister could, for example, be required to make a statement to the UK Parliament regarding the consent of the Scottish Parliament to a Bill (along the lines of section 19 of the Human Rights Act 1998). Any government wishing to proceed with legislation without the consent of the Scottish Parliament would still be able to do so, but at a political cost.[46]

Neither of these recommendations were reflected in the final Act. In the event, the Supreme Court, in *ex parte Miller*, understood the inclusion of the word "normally" as evidence that Parliament intended not to create a legally enforceable rule:

> We would have expected UK Parliament to have used other words if it were seeking to convert a convention into a legal rule justiciable by the courts.[47]

What constitutes circumstances that are not "normal" is therefore understood not to be a justiciable question (emphasis added):

> The Sewel Convention has an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures. **But the policing of its scope and the manner of its operation does not lie within the constitutional remit of the judiciary**, which is to protect the rule of law.[48]

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44 Political and Constitutional Reform Committee, Constitutional implications of the Government's draft Scotland clauses, 22 March 2015, HC 1022 2014-15, para 63

45 para 65

46 para 66

47 [2017] UKSC 5, para 148

48 [2017] UKSC 5, para 151

4. How do devolved legislatures give or withhold legislative consent?

Summary

The original devolution statutes did not acknowledge the Sewel Convention, or make reference to legislative consent. To honour the terms of the Memorandum of Understanding and Devolution Guidance Notes, a set of working arrangements had to be developed between the UK Government and the devolved bodies. This process has since become more formalised, being incorporated into the Standing Orders of the devolved legislatures.

There are three key stages to the legislative consent process for most relevant Bills:

- a memorandum is lodged by the devolved government;
- consideration of the memorandum by one of the devolved legislature's committees; and
- a vote on a motion in plenary to consent to the UK Parliament legislating in the way it proposes.

This is an internal process of the devolved legislatures; there are no formal mechanisms for legislative consent that affect the proceedings of the House of Commons or House of Lords.

4.1 Scotland

Pre-November 2005

Until November 2005, the Scottish Parliament dealt with legislative consent in an ad hoc manner. The (then) Scottish Executive assumed responsibility for seeking the consent of the Scottish Parliament whenever a Bill was introduced by the UK Parliament that concerned devolved matters or which would modify the competence of the Scottish Parliament or Scottish Ministers.

Under those arrangements, the Scottish Executive would produce a memorandum on a relevant UK Parliamentary Bill. This memorandum would give an assessment of the Bill's provisions as they relate to or modify devolved matters or functions. That memorandum would be scrutinised by the relevant Holyrood Committee, which could then debate the observations and recommendations of the memorandum. A motion would then be tabled before the Scottish Parliament in plenary. The Parliament could debate the motion and signify its agreement or otherwise to the legislation by voting on the motion.

Post-November 2005

Following a Scottish Parliamentary review into the Sewel Convention, steps were taken to formalise the legislature's handling of legislative consent issues. Rule 9B of the Standing Orders of the Scottish Parliament sets out the circumstances in which a legislative consent memorandum must be produced, and the timeframe within which that must happen. Rule 9B explicitly covers legislative consent for the range of cases envisaged by DGN

10 and a wider conception of the Sewel Convention than is apparent on the face of section 2 *Scotland Act 2016*.[49]

The Rules require the Scottish Government to submit a memorandum within 2 weeks of a relevant Bill being introduced in the UK Parliament.[50] The memorandum must explain the Bill's effects and policy basis. It must also identify the respects in which the Bill:

- relates to a purpose falling within the Parliament's legislative competence; or
- modifies the competence of the Parliament or Scottish Ministers

A memorandum must include a draft legislative consent motion, or (in the event that the Scottish Government does not intend to table one) it must explain why it has not done so. If a non-Scottish Government MSP wishes to lodge a legislative consent motion, they must also lodge a legislative consent memorandum first. There is an expectation that they will not lodge a memorandum until the Scottish Government has submitted its own.[51]

Box 2: Case Study – Non-government members and legislative consent memoranda

Rule 9B.3(2) of the Standing Orders of the Scottish Parliament provides:

> Any member (other than a member of the Scottish Government) who intends to lodge a legislative consent motion in relation to a relevant Bill shall first lodge with the Clerk a legislative consent memorandum, but shall not normally do so until after a member of the Scottish Government has lodged a legislative consent memorandum in respect of that Bill.

Before the 2011 Scottish Parliamentary elections, Iain Gray (then leader of the Scottish Labour Party) lodged a legislative consent memorandum for the *Scotland Bill 2010-12*. Given the Scottish National Party then formed a minority administration, this would have allowed the opposition parties at Holyrood to table (and then to pass) a legislative consent motion even if the Scottish Government declined to table one.

This example stresses the importance of legislative consent being a question, in Scotland at least, for the devolved legislature, rather than the devolved executive, to decide.

After being published in the Parliamentary Business Bulletin, the memorandum is then allocated to a "lead committee" to scrutinise. Normally a legislative consent motion will not be tabled and debated by the Parliament until the lead committee has had the opportunity to express a view on the memorandum.

Legislative consent motions themselves are, procedurally, no different from other motions of the Parliament. They can, in principle, be amended under Holyrood's Standing Orders.[52] There may be circumstances in which the Parliament wishes to amend a motion to narrow or widen the extent of

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49 Rule 9B.1 provides that a "relevant bill" includes any bill which "appl[ies] to Scotland for any purpose within the legislative competence of the Parliament, or which alters that legislative competence or the executive competence of the Scottish Ministers."

50 Or, if a Bill (further) affected/modified devolved matters as a result of subsequent amendments, within 2 weeks of those amendments being made. For Private Members Bills the 2 week period runs from the point it passes its first amending stage.

51 Rule 9B.3(2)

52 Rule 8.4.1 Standing Orders of the Scottish Parliament

consent given, where the only other alternative would be to withhold consent completely.[53]

Where the Parliament objects to certain relevant provisions in a Bill, it may choose to withhold its consent until amendments have been made to that Bill. Nothing in the Standing Orders of the Scottish Parliament requires that a legislative consent motion should be tabled at or by any point in the process.

4.2 Wales

Bills legislating in devolved areas or modifying legislative competence

Prior to 2011, the National Assembly for Wales did not have the competence to make legislative Acts. Its Standing Orders now set out its process for legislative consent, along very similar lines to those of the Scottish Parliament.[54] Standing Order 29, like its Scottish counterpart, applies to Bills containing relevant provisions that would either legislate in areas of devolved competence, or which would modify the competence of the legislative assembly. The Welsh Government must lay a memorandum for any relevant UK Government Bill, which is then referred to the appropriate committee or committees by the Business Committee. [55] The responsible committee then reports on the Government memorandum's recommendations.

A memorandum must be lodged within 2 weeks of a Government Bill's introduction, along the same lines as one brought before the Scottish Parliament. Supplementary motions can be lodged giving an updated view on whether legislative consent should be given if circumstances require it.

The option, as with the Scottish Parliament, is also there for a non-Government member to lodge a legislative consent motion (if they have first lodged a memorandum of their own).[56]

The Welsh Standing Orders directly address the circumstances in which a legislative consent motion must be and cannot be debated. Any competent motion must be debated but no motion can be tabled until the relevant committee has reported or the deadline for them to report has passed.[57]

Bills modifying Ministerial functions

One key difference is that the National Assembly's Standing Orders treat separately the consent process for Acts of Parliament which would modify the functions of the Welsh Ministers. This mirrors the difference in the

53 Procedural Committee, Sewel Motions – Procedural and Practical Issues, PR/02/9/3 (Annex B), 9 June 2002, para 6
54 Standing Orders of the National Assembly of Wales, October 2017
55 The Presiding Officer must do so for relevant Private Members Bills.
56 SO 29.2 and 29.3
57 SO 29.8

requirements for an Order in Council that proposes to modify the functions of the Welsh Ministers. Under that procedure, it is the consent of the Welsh Ministers, not the Assembly, that is sought.[58] Standing Order 30 requires the Welsh Ministers to give a written statement to the Assembly along similar lines to a legislative consent memorandum, as to the impact of the relevant Bill and to explain whether it is considered appropriate for those provisions to be made.

4.3 Northern Ireland

Standing Order 42A of the Northern Ireland Assembly addresses legislative consent motions in relation to the Northern Ireland.[59] Its process is substantively the same as that adopted by the Scottish Parliament. The legislative consent process applies to any "devolution matter". This includes anything under a transferred matter or which would modify legislative competence, the executive functions of any Northern Ireland Minister, or the functions of any Northern Ireland Department.

Northern Ireland's parties were unable to form a power-sharing Executive following the Assembly elections in March 2017. The Assembly therefore cannot currently use its legislative consent provisions to scrutinise UK Bills that would modify key aspects of the devolution settlement.

58 Section 58 *GoWA*
59 Northern Ireland Assembly Standing Orders, October 2016

5. How does Parliament modify devolved competence and functions?

Summary

The devolution statutes allow for certain changes to be made to devolved competence and functions otherwise than by Act of Parliament. Since these other legal instruments do not enjoy the supreme legislative status of an Act of Parliament, it is possible to place legal safeguards against their unwarranted use. Those safeguards include statutory requirements for devolved consent.

This provides greater opportunity for devolved institutions to protect themselves against actions by UK institutions to make changes to their powers with which they do not agree. These mechanisms are important in the context of Brexit because many of the future changes to the devolution statutes are proposed to take place otherwise than by way of a fresh Act of Parliament.

5.1 Two legislative avenues

The most obvious way that the UK Parliament could modify the competencies or functions of devolved institutions is by an Act of Parliament. In that context, legislative consent is an important if political safeguard against changes that could undermine a devolution settlement.

However, the Sewel Convention is not the only way by which the United Kingdom seeks to minimise the risk of UK Parliamentary action undermining devolution. Another approach has been to seek to reduce the frequency with which the UK Parliament resorts to Acts of Parliament to modify the competencies of devolved legislatures and their associated executive bodies. This is achieved by creating alternative avenues by which those changes can be made.

A special procedure exists for the Scottish and Welsh devolution settlements, which allows devolved competencies and functions to be changed. Orders in Council can amend the devolution statutes to confer new powers on the Scottish Parliament or National Assembly for Wales, or to take existing powers away. Unlike an Act of Parliament, these legislative instruments legally cannot take effect unless a devolved institution has explicitly approved a draft of it.[60]

The UK Parliament can still choose to modify devolved competence or functions by way of an Act of Parliament. Nevertheless, these provisions strengthen the constitutional expectation that changes to the competencies and functions of devolved institutions should normally happen only with their consent.

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60 See Type A procedure under Schedule 7 *SA* and section 109(4)(b) *GoWA*

5.2 Scotland and Wales – Orders in Council

Under section 30(2) *Scotland Act 1998* or section 109 *Government of Wales Act 2006*, an Order in Council can modify their parent Act's lists of:

- reserved matters;[61] or
- enactments protected from modification.[62]

For such an Order in Council to be made, a draft must be approved by the Houses of Commons and Lords and the relevant devolved legislature.

The most high-profile use of an Order in Council temporarily empowered the Holyrood to legislate for an independence referendum between 2013 and 2014.[63] However, section 30 has also been used for other purposes.[64]

The existence of a power to make Orders in Council does not displace the power to modify devolved competencies by Act of Parliament. In the Welsh context, DGN 17 strongly suggests a presumptive preference for Orders in Council to be used instead of Acts of Parliament wherever possible:

> [A Parliamentary Act] does not however provide for a formal role for the Assembly to approve the changes being made to its legislative competence. Departments should therefore presume in favour of a Section 109 Order whenever feasible, rather than provisions in parliamentary Acts, when the Assembly's legislative competence is to be modified.[65]

It is unclear how far that presumption holds in practice. No presumption appears at all in DGN 14 (concerned with s30 Orders under the *Scotland Act*). Evidence supporting the presumption is strongest in Wales. From 2007 to 2010, devolved competence for Measures grew incrementally by subject matter.[66] 16 legislative competence orders (LCOs) were made in that time. In Scotland, only 10 section 30 Orders were made from 1999 to 2012.[67]

Orders in Council can also be used to alter the functions of the Scottish or Welsh Ministers. One important difference between the Scottish and Welsh provisions is that consent is sought from the Scottish Parliament (i.e. the

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61 Schedule 5 *SA*, Schedule 7A *GoWA* (as amended by *Wales Act 2017*)

62 Schedule 4 *SA*, Schedule 7B *GoWA* (as amended by *Wales Act 2017*)

63 *The Scotland Act 1998 (Modification of Schedule 5) Order 2013* was made following the Edinburgh Agreement in October 2012.

64 *The Scotland Act 1998 (Modification of Schedules 4 and 5 and Transfer of Functions to the Scottish Ministers etc.) Order 2015* was used as an interim solution to allow the *Scottish Elections (Reduction of Voting Age) Act 2015* to be passed in time for the 2016 Holyrood Elections. The *Scotland Bill 2015-16* would not have received Royal Assent quickly enough to enable Holyrood to legislate for 16 and 17 year olds to vote.

65 DGN 17, para 12

66 LCOs under section 95 *GoWA* amended Schedule 5 *GoWA*. It previously conferred competencies to pass Assembly Measures. Only three Orders in Council have amended Schedule 7 (concerned with Assembly Acts). The first two were made in 2007 and 2010. They sought to ensure continuity of competence in devolved areas as and when the Assembly gained the power to make Acts instead of Measures.

67 Between the 2012 Act and the Scotland Act 2016 there were 6 further section 30 Orders.

legislature) for a "section 63 Order", but from the Welsh Ministers (i.e. the executive) for a "section 58 Order".[68]

5.3 Scotland and Wales – Acts of Parliament

In both Scotland and Wales, the most significant and long-term changes to legislative competence have been made by Acts of Parliament, rather than by Orders in Council. Modifications to competence are often proposed as part of a wider package of reforms (agreed to on a multi-party or cross-party basis) to the devolution settlement.[69]

Some of these changes could not be achieved using Order in Council powers under those Acts. The schemes of taxation powers possessed by the Scottish and Welsh legislatures, for example, could not have been delivered by simply modifying the content of the Schedules stipulating what are and are not devolved matters.[70] Neither could an Order in Council achieve the change made in the *Wales Act 2017* of moving the Welsh devolution settlement to a reserved powers model. It may be thought appropriate in any case, however, that the Westminster Parliament should have a greater opportunity to scrutinise, through the Public Bill process, any major proposals to change devolution.

If an Act of Parliament is used, the devolved legislature's legal "veto" (available for an Order in Council) no longer applies. The absence of a legal requirement for consent, however, does not remove the constitutional importance of a devolved legislature's approval for reforms to its powers.

The Scottish Government sought several changes to the *Scotland Bill 2011-12* before eventually recommending consent should be given to it by the Scottish Parliament and tabling a legislative consent motion.[71] The *Scotland Bill 2015-16* faced similar challenges. The Scottish Government refused to recommend that legislative consent should be given until an agreement was reached over the Bill's connected fiscal framework.[72]

Although it would have been legally permissible to seek Royal Assent for the *Scotland Bills* without Holyrood's legislative consent, it would have been seen as an exceptional course of action in both cases and would not have been consistent with the practice articulated in DGN 10 or DGN 17. A

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68 section 63 *SA* and section 58 *GoWA*.

69 The *Scotland Acts 2012* and *2016* implemented recommendations made by the Calman Commission and Smith Commission respectively, whereas the *Wales Acts 2014 and 2017* implemented the recommendations of Part I and Part II of the Silk Commission.

70 The *Scotland Acts 2012* and *2016* and *Wales Acts 2014* and *2017* made significant alterations the arrangements for various taxes levied in Scotland and Wales. This has necessitated a framework for the creation of Revenue Scotland and the Welsh Revenue Authority.

71 BBC News, Could Alex Salmond scupper the Scotland Bill?, 19 May 2011

72 BBC News, Fiscal framework: Scottish and UK Governments agree a deal, 23 February 2016

motion specifically granting legislative consent has been given in all four cases of an Act to reform the devolution statutes since 2012.[73]

5.4 Northern Ireland

There is no directly equivalent provision to the "section 30 Order" in the *Northern Ireland Act*.[74] An Order in Council can make "transferred" matters "reserved" matters and vice versa, but there is no provision to modify "excepted" matters.[75] The consent requirements for Orders in Council vary depending upon the subject matter, but those that do require the Assembly's consent typically require cross-community support.[76]

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73 Scotland Bills: see S4M-02625 (agreed to 18 April 2012) and S4M-15941 (agreed to 16 March 2016); Wales Bills: see NDM5501 (agreed to 1 July 2014) and NDM6203 (agreed to 17 January 2017)

74 An Order in Council made under section 86B *NIA* can modify section 7 *NIA*, which lists "entrenched enactments". Section 7 serves a partly analogous function to Schedule 4 *SA* or Schedule 7B *GoWA*. Unlike with the Order in Council provisions in the *SA* and *GoWA*, however, this process does not require the devolved legislature to approve the draft instrument before the Order is made.

75 A "reserved matter" under the *NIA* is one in respect of which the Secretary of State has a veto over Assembly legislation. It is not a "reserved matter" in the same sense meant by the Scottish or Welsh settlements. The *NIA* calls those "excepted matters".

76 See sections 4(2A) and (3) *NIA*.

6. Deciding to leave – no devolved role

Summary

Foreign affairs is a reserved matter in the context of all three of the devolution settlements. The UK constitution does not provide a formal, legal, role for the devolved nations in deciding the treaty-based organisations of which the UK should be a member. The EU referendum took place on the premise that the United Kingdom as a whole, rather than any constituent parts, was choosing whether it wished to remain a part of, or to leave, the EU.

Article 50 of the *Treaty on European Union* (TEU) provides that a Member State may withdraw from the EU "in accordance with" its "constitutional requirements". In the aftermath of the referendum result it was disputed whether there was a "constitutional requirement" for primary legislation before the UK could decide to leave the European Union and for it then to notify the European Council of its intention. It was contested whether a notification required primary legislation to authorise it, and whether that primary legislation would engage a "constitutional requirement" for legislative consent. Both issues were eventually settled in the UK Supreme Court in *R (Miller) v Secretary of State for Exiting the European Union*.

The Supreme Court concluded that primary legislation was required to notify the EU of the UK's intention to leave under Article 50 TEU. However, it declined to say whether such legislation would engage the conventional requirements for legislative consent of the devolved authorities. The Court maintained that the enforcement of the convention fell outside of its responsibilities connected with upholding the rule of law. The Sewel Convention, in short, is enforced by political, and not judicial, actors. Legislative consent was not sought for the *European Union (Notification of Withdrawal) Act 2017*.

Context of the referendum

The UK Government legislated for the referendum on withdrawal from the European Union with the *European Union Referendum Act 2015*. At the time, the Scottish National Party unsuccessfully argued that the UK should only leave the European Union if a majority voted in favour of doing so in each of the four nations of the United Kingdom.[77] An amendment that would have imposed this restriction was rejected in the commons on 16 June 2015. David Lidington, the Minister for Europe, said at the time:

> The Government take the view that, in respect of EU membership, we are one United Kingdom. The referendum will be on the subject of the United Kingdom's membership of the [EU] and it is therefore right that there should be one referendum and one result.[78]

Article 50 – decision and notification

The actual withdrawal of a Member State from the EU is undertaken through the process set out in Article 50 of the *Treaty on European Union*. It provides that:

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
2. A Member State which decides to withdraw shall notify the European Council of its intention.[79]

77 BBC News, SNP bid for 'quadruple lock' on EU referendum vote rejected, 16 June 2015
78 HC Deb 16 June 2015 Vol 597 cc231
79 Article 50 *Treaty on European Union*

It was disputed, following the referendum, what were the appropriate "constitutional requirements" for the UK to "decide" to withdraw from the EU, and what legal authority was required to "notify" that decision.

The Supreme Court and "constitutional requirements"

The UK Government argued that it had the power, under the Royal Prerogative, to make a notification and that no legislation was required. This was challenged in *R (Miller) v Secretary of State for Exiting the European Union*. The Scottish and Welsh Government's law officers intervened in the Supreme Court appeal to argue that, to the extent it could be shown that primary legislation was needed to authorise a notification to the European Council, the Sewel Convention would require that the legislation be passed with the consent of the devolved legislatures.

The Lord Advocate argued that the "constitutional requirements" of the UK to decide to withdraw from the EU included not just an Act of Parliament authorising withdrawal, but also that the legislative consent convention be respected in relation to such an Act. He argued that the effect of a notification to withdraw from the European Union would be to:

> (i) change the legislative competence of the Scottish Parliament and the executive and legislative competence of the Scottish Government;
>
> (ii) disapply or disable laws which currently apply within Scotland, namely the corpus of directly effective EU law, including directly effective EU law in policy fields which are not reserved to the UK; and
>
> (iii) disapply or disable domestic laws (including laws within the legislative competence of the Scottish Parliament) which depend for their effect on membership of the EU.[80]

All three of these effects would engage the Convention. He argued that to "fulfil its proper function" the Supreme Court should "identify the constitutional requirements for the purposes of Article 50(1)".[81]

In the event, the UK Supreme Court concluded primary legislation was required, but declined to say whether the Sewel Convention would, necessarily or potentially, apply to any Bill authorising a UK Government Minister to make an Article 50 notification. The Supreme Court concluded, unanimously, that it was not within the remit of the judiciary to "polic[e] the scope [or] manner of operation of" the convention.[82]

The *European Union (Notification of Withdrawal) Act 2016* was narrowly drafted, expressly authorising the Prime Minister to notify the European Council of a decision taken by the UK to leave the EU. None of the devolved authorities brought forward a legislative consent memorandum for the Bill.

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80 Written case of Lord Advocate in *R (Miller) v Secretary of State for Exiting the European Union*, UKSC 2016/0196, p4

81 Written case of Lord Advocate, p49

82 *R (Miller) v Secretary of State for Exiting the European Union*, para 151

7. *European Union (Withdrawal) Bill (2017-19)*

Summary

As introduced, the *European Union (Withdrawal) Bill (EUW Bill)* makes changes that affect devolution.[83] Several provisions affect the powers of devolved institutions and confer powers in ways that would allow further changes to be made to the devolution settlements under delegated, rather than primary, legislation.

All Governments agree the Bill engages the legislative consent processes. They disagree, however, which provisions of the Bill are covered by the conventional requirement for consent. The Scottish and Welsh Governments, which have lodged legislative consent memoranda with their legislatures, believe a wider range of provisions require consent than is implied by the UK Government's Explanatory Notes to the Bill.

Both of the legislative consent memoranda of the devolved governments recommend that consent should not be given to the *EUW Bill* in its current form. They outline several fundamental objections to the Bill.

Clause 11 and its associated Schedules remove the requirement that devolved institutions must not legislate incompatibly with EU law. They replace that requirement with one not to modify retained EU law, subject to certain exceptions. They replace an international constraint with a domestic one. The Scottish and Welsh Governments want this competence restriction removed from the Bill, opposing it in principle.

The Scottish and Welsh Governments also oppose aspects of **clauses 7-9** and **Schedule 2** of the Bill. These provisions confer delegated powers on UK and devolved ministers to:

- correct deficiencies arising from EU withdrawal;
- prevent or remedy breaches of international obligations arising from EU withdrawal; and
- implement any withdrawal agreement reached between the UK and the EU.

The two devolved governments argue these provisions lack sufficient safeguards against UK Ministers legislating in devolved areas, and place too onerous constraints on powers granted to devolved ministers.

Should the devolved legislatures withhold legislative consent, the UK Parliament would be entitled, legally, to seek Royal Assent for the relevant Bills regardless. However, there has never been a case where:

- the UK Government has accepted there is a requirement of legislative consent for provisions of a Bill;
- a devolved legislature has deliberately withheld consent for those provisions; and
- the UK Parliament has sought Royal Assent for the Bill regardless.

7.1 Current relationship between devolved authorities and EU law

The devolution settlements of the late 1990s were designed on the assumption that the UK was, and would continue to be, a member of the EU. This is most obviously reflected in the respective devolution statutes' requirements that devolved legislatures and executive bodies cannot

83 On which see The European Union (Withdrawal) Bill: Devolution, Commons Library Research Paper 17/8154, 24 November 2017 and European Union (Withdrawal) Bill, Commons Library Research Paper 17/8079, 1 September 2017

legislate or act "incompatibly" with EU law.[84] The devolution statutes also enabled devolved executive bodies to take steps to observe and implement EU law, including by way of delegated legislation, in devolved areas. In doing so, those bodies exercised powers on the same basis as UK Ministers under section 2(2) *European Communities Act 1972* (*ECA*).

A range of policy areas, devolved under the devolution statutes, are significantly constrained by EU law. For instance, agriculture and fisheries are devolved matters in all three devolved nations. The executives of Scotland, Wales and Northern Ireland, however, must abide by, and take steps to implement, the EU's Common Agricultural and Fisheries Policies. The devolution statutes grant devolved ministers the power, but also impose the obligation, to give effect to EU policies in those areas.

The implementation of EU law in devolved policy areas is, first and foremost, a responsibility of the devolved institutions.

This means that the UK Government and Parliament will not (normally) need to introduce specific measures in devolved areas to ensure that the UK adheres to a common source of its international obligations. The implementation of EU law in devolved policy areas is, first and foremost, a responsibility of the devolved institutions.

Where EU law is silent, or grants discretion, in policy areas like agriculture or fisheries devolved authorities can develop policy priorities and diverge from the rest of the UK. This happened, for instance, when the UK's governments implemented EU Directives concerning Genetically Modified crops. The Scottish and Welsh Governments diverged from UK Government policy, and banned the growing of certain crops that EU law permitted.[85]

7.2 What the *EUW Bill* changes

The *EUW Bill*, broadly conceived, has three headline effects. It:

- repeals the *ECA 1972* (and related enactments);
- retains part of the body of EU law by converting it into a form of domestic legislation; and
- delegates power to Ministers for specified purposes in connection with the UK's withdrawal from the EU.

Repeal of the Communities Act

The repeal of the *ECA* eliminates devolved authorities' powers to introduce secondary legislation to implement obligations arising from EU law. Unless, and to the extent that, a withdrawal agreement provides otherwise, there will in any case cease to be obligations arising from EU law following exit day for domestic authorities to implement. The requirement to act compatibly with EU law, contained in the devolution statutes, would

84 Sections 29(2)(d) and 57(2) *SA*, sections 94(6)(c) and 80(7) *GoWA*, sections 6(2)(d) and 24(1)(b) *NIA*

85 See The Trade Bill, Commons Library Research Paper 18/8073, 7 March 2018, p64

therefore become anachronistic.[86] Anticipating this scenario, the Bill removes, on exit day, the requirement for devolved legislatures not to "legislate incompatibly with" EU law.

Retention of EU law as domestic legislation

The *EUW Bill* proposes to retain some, but not all, of EU law as domestic legal instruments. This new category of law, "retained EU law", includes:

- EU-derived domestic legislation (i.e. domestic regulations to implement, mainly, EU directives);[87]
- direct EU legislation (EU regulations, decisions or tertiary legislation);[88] and
- rights, powers, liabilities, obligations, restrictions and remedies which, immediately before exit day were recognised in domestic law (including certain directly effective Treaty rights).[89]

An Act of a devolved legislature amending transposed instruments would not be beyond competence for "incompatibility with EU law". The source of obligations would be wholly domestic; not derivative of EU Treaties.

Replacement restrictions on devolved competence

The UK Government has taken the view that there is a need to prevent the devolved legislatures from amending or repealing some, but not all, aspects of EU law that the *EUW Bill* repatriates into domestic law. The Bill, as introduced, achieves this by imposing a new restriction on the legislative competence of Holyrood, the Senedd, and Stormont. **Clause 11**, in addition to removing the requirement to "legislate compatibly with" EU law, requires the devolved legislatures "not to modify" retained EU law.

This new obligation is imposed subject to two exceptions. Firstly, if it would have been within the competence of the Scottish Parliament to modify one of these instruments before exit day (e.g. a set of domestic regulations implementing an EU directive) then it will still be able to modify that instrument after exit day.

Additionally, a new power has been created to "release" areas of retained EU law by Order in Council from the prohibition on modification. In all three cases, such an Order could only be made on the approval of a draft instrument before both UK Houses of Parliament and the relevant devolved legislature. Those provisions therefore mirror those in the *Scotland Act 1998* and *Government of Wales Act 2006* that allow for modifications to be made to the Schedules that govern devolved and reserved competencies.

The UK Government has taken the view that there is a need to prevent the devolved legislatures from amending or repealing some, but not all, aspects of EU law that the *EUW Bill* repatriates into domestic law.

The Bill, as introduced, achieves this by imposing a new restriction on the legislative competence of Holyrood, the Senedd, and Stormont. Clause 11 requires the devolved legislatures "not to modify" retained EU law.

86 This (or an equivalent) restriction *may* have a continuing importance if the UK and EU's agreed transition requires the force and effect of all or part of the acquis communautaire, See discussion of *European Union (Withdrawal Agreement and Implementation) Bill* below at section 8.5.

87 Clause 2

88 Clause 3

89 Clause 4

The Bill replaces a restriction concerned with compliance with international obligations with one that is wholly domestic in character. The UK Government conceives of this restriction as a transposition of constraints that already restrict the legislative competence of devolved legislatures to acknowledge a new situation. The devolved authorities conceive of this as a new restriction of a fundamentally different nature than the one it replaces.

Delegated powers of UK Government ministers

Three key powers that would be granted by the *EUW Bill* to UK Government Ministers to modify domestic law are those:

- to correct deficiencies arising from the UK's withdrawal from the EU;[90]
- to prevent breaches of the UK's international obligations as a result of withdrawal from the EU;[91] and
- to implement any withdrawal agreement with the EU.[92]

These powers are time-limited by sunset clauses in the Bill. They could be used to modify domestic primary legislation, including the *Scotland Act*, the *Government of Wales Act*, and the *Northern Ireland Act*.[93] This is important because the Sewel Convention only addresses the need for legislative consent for primary legislation.

The Sewel Convention does not contemplate situations where secondary legislation relates to or modifies devolved competence or functions. The Standing Orders of the devolved legislatures do not include a process for scrutinising secondary legislation that would relate to devolved matters or modify devolved competencies or functions.

If the UK Government were to use the *EUW Bill*'s delegated powers to modify the legislative or executive competence of a devolved body, it would circumvent Sewel Convention. Those provisions would have been subject to the devolved legislature's consent process if they were contained in an Act of Parliament.

This approach would also circumvent the processes included in the devolution statutes that otherwise allow competence or functions to be modified. Unlike those Order in Council procedures in the devolution statutes, the 'Henry VIII' powers in the *EUW Bill* do not require the consent of the devolved institutions to which a proposed modification relates. As Lord Hope of Craighead observed, there is not even a requirement on the face of the Bill to consult the devolved institutions before making such a change by way of delegated legislation.[94]

[The *EUW Bill*'s delegated powers] could be used [by UK Ministers] to modify domestic primary legislation, including the *Scotland Act*, the *Government of Wales Act*, and the *Northern Ireland Act*.

The Sewel convention does not contemplate situations where secondary legislation relates to or modifies devolved competencies or functions.

The delegated powers of UK Government Ministers in the *EUW Bill* omit any requirement for devolved consent or consultation.

90 Clause 7
91 Clause 8
92 Clause 9
93 The correcting power in clause 7 cannot be used to amend or repeal the *Northern Ireland Act 1998*, save for specific exceptions specified in clause 7(7)(f) of the *EUW Bill*.
94 HL Deb 12 March 2018 Vol 789 c1408

The delegated powers of UK Government Ministers in the *EUW Bill* omit any requirement for devolved consent or consultation. They would also allow the competence and functions of the devolved institutions to be changed with less UK Parliamentary scrutiny than if those changes were contained in an Act of Parliament. Some instruments could make changes by negative resolution procedure, and so would not necessarily have been debated or voted upon by either House of Parliament before coming into effect.

Delegated powers of devolved authorities

The three types of delegated power that are conferred on UK Government Ministers by **clauses 7-9** of the *EUW Bill* are also conferred on devolved authorities under **Schedule 2**. UK Ministers' powers in **clauses 7-9** can still be used in devolved areas. The reverse is not true in reserved areas with regard to **Schedule 2** powers. There are other critical differences between the delegated powers of Ministers of the Crown and those of devolved authorities. They differ most notably in that devolved delegated legislation under the Bill:

- must fall wholly within devolved competence;[95]
- cannot modify direct retained EU-legislation or any part of EU law retained by clause 4 (unless it has been released by an Order in Council);[96]
- must be made jointly with UK Ministers in certain circumstances;[97]
- must be made only after consulting the Secretary of State in certain circumstances;[98] and
- must be made only with the consent of the Secretary of State in certain circumstances.[99]

7.3 Provisions to which the legislative consent convention applies

The legislative consent convention is concerned with "provisions" of primary legislation that could be introduced by devolved legislatures or which would otherwise modify devolved competencies or functions, and not necessarily a Bill as a whole. One of the challenges the Sewel Convention faces is that there is not always agreement between the UK Government and a devolved authority or legislature as to which provisions of a Bill engage it.[100]

One of the challenges the Sewel Convention faces is that there is not always agreement between the UK Government and a devolved authority or legislature as to which provisions of a Bill engage it.

95 Schedule 2, paras 2, 14 and 22
96 Schedule 2, paras 3, 15 and 23
97 Schedule 2, paras 7, 17, 26
98 Schedule 2, paras 5, 8, 17, 26
99 Schedule 2, paras 6, 16, 17, 25, 26
100 See Annex on: the *Enterprise and Regulatory Reform Bill* (2012-13), the *Anti-social Behaviour, Crime and Policing Bill* (2013-14), *Medical Innovations Bill* (2014-15), *Housing and Planning Bill* (2015-16) and the *Trade Union Bill* (2015-16)

The Scottish and Welsh Governments do not appear to agree with the UK Government about the extent to which the *EUW Bill* engages the legislative consent conventions. There is a clear discrepancy between the list of provisions identified in their legislative consent memoranda as requiring consent and the position articulated by the UK Government's Explanatory Notes to the *EUW Bill*. The difference of view is shown in below:

Legislative consent by clause

Is legislative consent required? Views of the respective governments

Clause	UK Government	Scottish and Welsh Governments
1	Yes	Yes
2 & Schedule 1	Yes	Yes
3	Yes	Yes
4	Yes	Yes
5	No	Yes
6	No	Yes
7	No	Yes
8	Yes	Yes
9	No	Yes
10 & Schedule 2	Yes	Yes
11 & Schedule 3	Yes	Yes
12 & Schedule 4	Yes	Yes
13 & Schedule 5	No	Yes
14 & Schedule 6	No	No
15	No	No
16 & Schedule 7	Yes	Yes
17 & Schedules 8-9	No	Yes
18	No	No
19	No	No

Source: Adapted from Annex A of the UK Government Explanatory Notes to the Bill, Annex B of the Scottish Government Legislative Consent Memorandum – EU (Withdrawal) Bill and Annex A of the Welsh Government Legislative Consent Memorandum – EU (Withdrawal) Bill

The main areas of disagreement about whether the legislative consent convention applies, therefore, concern clauses 5, 6, 7, 9, 13 and 17.

Areas of common ground as to the need for consent

It is accepted by the UK Government and the Scottish and Welsh Governments that legislative consent is required for certain provisions.

- **Clauses 1-4 and Schedule 1** require consent because among other reasons, they modify the powers of the devolved legislatures and executives by repealing the *ECA* and retaining certain laws that would continue to have effect in devolved areas.
- **Clause 8** is accepted as requiring an LCM because the power to make provision to implement international obligations in devolved areas is one that falls within the functions of devolved authorities.

- **Clauses 10-11** and **Schedules 2-3** require a LCM because they modify the restrictions on the competence of the devolved legislatures and confer new powers on the devolved authorities**.**
- **Clause 12** and **Schedule 4** require legislative consent because they confer ministerial powers in relation to public authorities charging fees, including in devolved areas of responsibility.
- **Clause 16** and **Schedule 7** require consent because they relate to the manner in which the power to make regulations, including those powers of devolved authorities, are to be exercised.

In addition to this, however, there are further areas where the devolved governments believe that legislative consent is required.

Areas where the need for consent is contested

Clause 5 (exceptions from retention of EU law)

The devolved legislatures believe that clause 5 engages the LCM requirements because it, among other things, excludes the European Charter of Fundamental Rights from what constitutes retained EU law. They believe that the devolved legislatures have the authority to determine the status of the Charter post EU exit insofar as devolved areas of responsibility are concerned.[101]

Clause 6 (interpretation of EU law post exit)

Similarly, the Scottish and Welsh Governments take the view that their legislatures have the competence to enact EU-derived rules into domestic law at the point of exit and to define how they are interpreted insofar as they relate to devolved matters.[102] They therefore believe that clause 6 concerns devolved matters and requires legislative consent.

Clauses 7 and 9 (the correcting and withdrawal implementation powers)

The devolved governments believe that the delegated powers of Ministers of the Crown under clauses 7 and 9 require consent for two reasons. Firstly, UK Government Ministers can unilaterally make legislation in areas of devolved responsibility using these powers, including areas where the Scottish and Welsh Ministers exercise functions. This would mean that the scrutiny and approval of delegated legislation would be undertaken by the UK Parliament rather than the devolved legislatures.

Secondly, they note, these powers can be used to modify the *Scotland Act* or *Government of Wales Act*, again without scrutiny or approval from the devolved legislature.[103]

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101 Scottish Government, Legislative Consent Memorandum – European Union (Withdrawal) Bill (LCM – EUW Bill), para 13

102 Welsh Government, Legislative Consent Memorandum – European Union (Withdrawal) Bill (LCM – EUW Bill), para 11

103 Welsh Government, LCM – EUW Bill, paras 12-13; Scottish Government, LCM – EUW Bill, para 10

Clause 13 (publication and rules of evidence)

The devolved governments also believe that making provision for the publication of retained EU law and how it is to be interpreted insofar as its content relates to devolved matters is within the devolved competence of their respective legislatures.[104]

Clause 17 (consequential provision)

The devolved governments believe that, since this provision gives broad powers to Ministers to (potentially) modify the legislative competence of the devolved legislatures without a further need for consent, clause 17 should also be subject to a LCM.[105]

7.4 Objections of the devolved administrations

Changes to devolved competence

The Scottish and Welsh Governments' main complaints about the *EUW Bill* relate to **clause 11** and **Schedule 2**.

As introduced, these provisions in the Bill restrict the legislative and executive competence of the devolved legislatures with respect to retained EU law. This means that the UK Parliament, and UK Government ministers, would have exclusive competence for what should happen to elements of EU law retained by clauses 3 and 4 of the *EUW Bill*. This would be the case even where those retained elements address or affect areas otherwise falling within devolved competence. These constraints could only be relaxed if the UK Government were to make an Order in Council, approved in draft by both Houses and the devolved legislature, "releasing" elements of retained law from this restriction on devolved competence.

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The retention of these restrictions is a policy decision of the UK Government. It takes the view that, if these restrictions are not put in place, there is a risk of regulatory divergence that would undermine the functioning of the internal market of the United Kingdom. This, they believe, would also make it more difficult for the UK to enter into trade agreements with other countries in the future. The UK Government argues that some of these restrictions cannot be released until "common frameworks" are put in place to ensure consistency throughout the UK in areas previously controlled by common frameworks at an EU level.

The UK Government also points out that the instruments the devolved authorities cannot amend under this legislation are the transposed versions of instruments that they could not, in any case, modify while the UK is a Member State of the EU. Therefore, they argue, any "release" of restrictions would represent new and expanded powers for the devolved legislatures, not the return of powers taken away from them.[106]

104 Welsh Government, LCM – EUW Bill, para 18
105 Welsh Government, LCM – EUW Bill, para 9
106 Cabinet Office, UK government publishes analysis on returning EU powers, 9 March 2018

From the perspective of the devolved governments, however, **clause 11**, as introduced, amounts to a "power grab" by the UK Government.[107] The Scottish and Welsh Governments take the view that the restrictions on their competence imposed by the *EUW Bill* are restrictions of a different nature and scope than those ceasing to apply when the UK is no longer an EU Member State. They impose, on this view, a new constraint rather than a true direct replacement for the requirement to act compatibly with EU law. As Mark Drakeford AM, Welsh Government Cabinet Secretary for Finance and Local Government, argued in a recent statement following the JMC(EN) meeting in March 2018:

> Language around devolving "significant brand new powers" is misleading and unhelpful. These powers are not being handed to the National Assembly, they are already here. We should instead be focusing on establishing new systems to take these areas forward together. It is only through cooperation and jointly designed approaches that we can ensure stability and a functioning internal market once we leave the European Union.[108]

The reason the devolved legislatures believe that the new restriction is qualitatively different is because of how retained EU law can be amended. For as long as the *ECA* has effect, neither the UK Government nor the UK Parliament can purport to modify direct EU legislation, fundamental principles of EU law or the EU treaties. They are instruments about which the EU institutions determine the content, meaning and effect. Many of these elements of EU law will be transposed on exit day into domestic laws. Parliament will then be able to amend these transposed instruments in the absence of the *ECA*. Perhaps more importantly, the UK Government will be able to amend them because of the delegated powers in the *EUW Bill*.

This is relevant to one of the concerns raised by the Scottish Government's legislative consent memorandum. It rejects the suggestion that retained EU law only preserves existing limits on devolved competence. It maintains that, even if retained EU law *by default* imposes no new restraints on the powers of devolved bodies, this will not necessarily remain true when further modifications are made under the delegated powers in **clauses 7-9**. This explains why the Scottish Government described this constraint as "artificial" and maintains it "will become increasingly unsuitable for determining legislative competence".[109]

Although the devolved authorities agree that the exercise of some of these powers should be governed by UK common frameworks, they take the view that those powers should only be pooled with the explicit and case-by-case agreement of the devolved legislatures.

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107 Scottish Government, Minister for UK Negotiations on Scotland's Place in Europe, Brexit talks update, 8 March 2018

108 Welsh Government, Written statement - UK Government's analysis of where they consider EU law to intersect with devolved competence, 14 March 2018

109 Scottish Government, LCM – EUW Bill, para 22

By protecting certain elements of retained EU law from modification, the *EUW Bill* brings them outside of the competence of the devolved legislatures. This could mean that an Act of Parliament proposing the creation of a common framework is treated as relating to reserved matters, and would not therefore engage the legislative consent convention. The Scottish Government's position is that this therefore does not "require" common frameworks to be brought about "by agreement".[110]

By protecting certain elements of retained EU law from modification, the *EUW Bill* brings them outside of the competence of the devolved legislatures.

This could mean that an Act of Parliament proposing the creation of a common framework is treated as relating to reserved matters, and would not therefore engage the legislative consent convention.

Safeguards and restrictions on delegated powers

The Scottish and Welsh Governments also have a two-pronged complaint about the way the Bill proposes to treat delegated powers: both those of Ministers of the Crown and of devolved authorities.[111] They believe that:

- there are insufficient safeguards against the unwarranted use of delegated powers (predominantly under **clauses 7-9**) by UK Government Ministers in devolved areas; and
- the restrictions on the delegated powers of devolved authorities (under **Schedule 2**) are too stringent.

They also object to the absence of consent requirements in relation to regulations made by Ministers of the Crown under the Bill that would:

- make regulations in relation to devolved areas (i.e. regulations that devolved authorities could have made); or
- modify the devolution statutes.

In relation to the powers of devolved authorities to make regulations under the *EUW Bill*, the devolved authorities oppose:

- the requirement that Scottish and Welsh Ministers cannot modify retained EU law; and
- certain requirements that a UK Government Minister must give their consent before a devolved authority can make regulations under the Bill.

7.5 What happens if consent is withheld?

Under the Standing Orders of the Scottish Parliament and National Assembly for Wales, any major changes to the *EUW Bill* could prompt the Governments to lodge supplementary legislative consent memoranda giving an updated view on whether legislative consent should be granted.

If the Governments cannot agree a package of changes to the *EUW Bill*, the expectation remains that legislative consent will be withheld by the Scottish Parliament and National Assembly for Wales. In both legislatures, this might be achieved in one of two ways. Either the Governments will:

110 John Swinney MSP, Deputy First Minister for Scotland, SP OR 13 March 2018, c30

111 Scottish Government, LCM – EUW Bill, paras 26-28; Welsh Government, LCM – EUW Bill, paras 26-27

- not table a legislative consent motion at all; or
- table a legislative consent motion, but urge the legislature in question to defeat the motion.

If this happens, the UK Government will have a choice either to:

- seek to agree further changes to secure legislative consent before presenting the Bill for Royal Assent; or
- present the Bill for Royal Assent regardless.

The absence of legislative consent is not a legal bar to Parliament seeking Royal Assent for the *EUW Bill*. Having acknowledged the Sewel Convention applies to, among other provisions, clause 11, it would nevertheless be unprecedented for the UK Government to ask Parliament to pass the Act without devolved consent. It is likely that the UK Government would be accused of "breaching" the Sewel Convention.

The Scottish and Welsh Parliaments have completed the legislative stages for two "Continuity Bills". These are direct legislative responses to the *EUW Bill*.[112] The Continuity Bills attempt to make separate provision for legal continuity in devolved areas before the provisions of the *EUW Bill* can come into effect. For a detailed discussion on these, see the Commons Library Paper on Legislative Consent and the *European Union (Withdrawal) Bill (2017-19)*.[113]

[112] *Law Derived from the European Union (Wales) Bill* (*Welsh Continuity Bill*); *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* (*Scottish Continuity Bill*)

[113] Legislative Consent and the *European Union (Withdrawal) Bill (2017-19)*: the Joint Ministerial Committee, proposed amendments and the "Continuity Bills", Commons Library Research Paper, 18/08275, 29 March 2018

8. Other "Brexit Bills"

Summary

Several other Bills work closely with the *EUW Bill* to create the necessary legal framework for the UK's withdrawal from the EU. Some, but not all, of those Bills, have or will have, an impact on devolution, whether by legislating in devolved areas, modifying the powers of devolved institutions, or authorising future changes in devolved areas under delegated legislation.

The most notable of these Bills so far is the *Trade Bill*, about which the Scottish and Welsh Governments raise similar concerns as they have the *EUW Bill*, in separate legislative consent memoranda. The *Trade Bill* would create an extra category of delegated powers for UK and devolved Ministers, which fit alongside those created by clauses 7-9 of the *EUW Bill*. These powers concern the implementation of legacy procurement and trade agreements. The devolved authorities want tougher safeguards (mainly by way of consent provisions) on the exercise of powers by UK Government Ministers in devolved areas. They also want some of the restrictions on the powers of devolved authorities removed or relaxed.

Neither the *Taxation (Cross-Border Trade) Bill 2017-19* nor the *Sanctions and Anti-Money Laundering Bill 2017-19* requires legislative consent. They relate to wholly reserved matters and do not (currently) modify the devolution settlements in terms that would give rise to legislative consent processes.

It is very likely that the *European Union (Withdrawal Agreement and Implementation) Bill*, which has not yet been introduced, will include provisions that engage the legislative consent convention. Until the precise terms of a withdrawal agreement between the UK and the EU are known is not possible to assess what those provisions will say or whether the devolved legislatures will agree to them. Given the likely timetable of such a Bill, the opportunity for devolved scrutiny of any legislative consent memoranda may be limited.

8.1 Overview

There are other Bills relating to the UK's withdrawal from the EU. These are specifically designed to operate alongside the *EUW Bill*. Many of their provisions assume the *EUW Bill* has been passed and is in effect. This subsection focuses on three Bills that are already progressing through Parliament, and a fourth Bill that has been committed to but which will not be introduced until a withdrawal agreement has been reached.

8.2 *Trade Bill (2017-19)*

See also the *Trade Bill*'s dedicated Commons Library Briefing Paper.[114]

Context

At the moment, the devolved legislatures are responsible for implementing international agreements in areas of devolved competence. In the context of procurement and trade agreements, this currently means the implementation of agreements entered into by the EU. When the UK leaves the EU, it will cease to be covered by a number of agreements by which it was covered as a Member State of the EU.

[114] The Trade Bill, Commons Library Research Paper, 18/8073, 7 March 2018

The *Trade Bill*, among other things, confers powers on both UK Government Ministers and devolved authorities to implement in domestic law what is required to "roll-over" those international agreements, so that their effect is not disrupted by EU withdrawal. **Clause 1** of the Bill is concerned with the implementation of two specific World Trade Organisation agreements, to which the EU is a signatory, in relation to public sector procurement arrangements.[115] **Clause 2** is concerned with a potentially very large number of trade agreements signed by the EU and entered into with third countries before exit day.

Delegated powers and devolution

The UK Government has recognised that the two main clauses of this Bill, **clauses 1** and **2**, engage the legislative consent convention. They engage it because they have the effect of modifying the functions of the Scottish and Welsh Ministers. The *Trade Bill*'s delegated powers are intended to sit alongside those of the *EUW Bill* and might best be thought of as an additional category of implementation powers for purposes not fully covered by clause 7-9 and Schedule 2 of the *EUW Bill*.

Position of the devolved governments

Both the Scottish Government and the Welsh Government have published legislative consent memoranda in relation to the *Trade Bill*.[116] Those recognise in principle that UK primary legislation is necessary to address the arrangements for the agreements covered by the Bill. However, they also indicate opposition to the manner in which the Bill proposes to address implementation of the agreements in areas of devolved competence. The Governments have raised almost exactly the same objections to this Bill as those raised in relation to the delegated powers in the *EUW Bill*. In particular they oppose:

- the prohibition on devolved authorities modifying retained EU law;
- the requirement of devolved authorities to secure the consent of the UK Government before making certain regulations under the Bill; and
- the absence of a requirement that the UK Government should receive the consent of a devolved authority before making regulations that the devolved authority could itself have made.

No amendments were made to the *Trade Bill* during the Commons Committee stage, although SNP members of the Committee did table several amendments that sought to address those concerns.

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115 The Agreement on Public Procurement 1994 and the Revised Agreement on Public Procurement 2012

116 Scottish Government, Legislative Consent Memorandum – Trade Bill, 20 December 2017; Welsh Government, Legislative Consent Memorandum – Trade Bill, 7 December 2017

Scrutiny by committees of devolved legislatures

Two of the National Assembly for Wales' Committees have reported on the Welsh Government's legislative consent memorandum in relation to the *Trade Bill*. At the time of writing, the Finance and Constitution Committee of the Scottish Parliament has yet to report. The External Affairs and Additional Legislation Committee published its report on 9 March 2018, while the Constitution and Legislative Affairs Committee published its report on the 16 March 2018.

Both Committees raised two notable concerns that were not raised by the legislative consent memorandum. Firstly, they both recommended that the *Trade Bill*'s delegated powers for Welsh Ministers should be more narrowly drafted, to be used only where "necessary" rather than where "appropriate".[117] Secondly, they called for a requirement that the Assembly, rather than (just) the Welsh Ministers, give consent before a UK Minister can exercise delegated powers in devolved areas under the Bill.[118]

A veto over trade agreements or an implementation power?

There are two separate concerns raised by the devolved governments in relation to future trade agreements to which the UK would be a party. There is a broader political question about what role the devolved authorities and legislatures should have in setting or influencing the negotiating priorities of the UK Government, and whether they should have powers of approval, or a "veto" over deals that are agreed before they become binding international agreements.[119]

Those concerns, however, are separate from those with which the *Trade Bill* powers are directly concerned. The Bill's powers deal with situations where the UK Government has already exercised its (reserved) authority to sign treaties entering into international agreements with the EU and third countries and where Parliament has ratified them under the provisions of the *Constitutional Reform and Governance Act 2010*.[120] What the devolved delegated powers in the *Trade Bill* provide is the ability for devolved authorities to decide "how" to give effect to those obligations.

The amendments argued for by the SNP in Committee would have, among other things, imposed a consent requirement on UK Ministers seeking to

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117 External Affairs and Additional Legislation Committee, The Trade Bill: Report on legislative consent and associated issues, 9 March 2018, para 23; Constitution and Legislative Affairs Committee, Report on The Welsh Government's Legislative Consent Memorandum on the Trade Bill, 16 March 2018, para 41

118 External Affairs and Additional Legislation Committee, The Trade Bill: Report on legislative consent and associated issues, 9 March 2018, para 31; Constitution and Legislative Affairs Committee, Report on The Welsh Government's Legislative Consent Memorandum on the Trade Bill, 16 March 2018, para 40

119 The Trade Bill, Commons Library Research Paper, 18/8073, 7 March 2018, pp55-66

120 Parliament's role in ratifying treaties, Commons Library Research Paper, 17/5855, 17 February 2017, pp10-11

make regulations that would fall within a devolved authority's competence.[121] This does not mean that a devolved authority cannot be required to take steps to comply with an international obligation if UK law in devolved areas does not already do so. The devolution statutes include specific provisions whereby the Secretary of State can direct a devolved government to take all necessary steps within its competence to meet the requirements of any international obligation.[122]

A consent requirement, therefore, would not prevent UK Ministers from instructing a devolved authority "that" it must comply with an international obligation. What it would prevent is UK Ministers from instructing a devolved authority "how" it must comply with that obligation where the international agreement leaves open discretion as to how a common objective is to be achieved.

8.3 *Taxation (Cross-Border Trade) Bill (2017-19)*

For a more detailed overview of the *Taxation (Cross-Border Trade) Bill*, see the Bill's dedicated Commons Library Briefing Paper.[123]

The *Trade Bill* is concerned with implementation of international agreements insofar as they remove non-tariff barriers. Working alongside that Bill is the *Taxation (Cross-Border Trade) Bill* (the *Customs Bill*). It is concerned with setting-up a system of import and export tariffs as and when the UK leaves the EU's customs union.

Unlike the *Trade Bill*, there are no provisions that have a distinct impact on devolved matters. Subject to specific exceptions, taxation and excise duties are reserved matters under the devolution statutes.

This is why the devolved governments have not lodged legislative consent memoranda in relation to the *Customs Bill*.

8.4 *Sanctions and Anti-Money Laundering Bill (2017-19)*

For a more detailed overview of the *Sanctions and Anti-Money Laundering Bill*, see the Bill's dedicated Commons Library Briefing Paper.[124]

The law concerning sanctions regimes and cross-border anti-money laundering provision is reserved: it falls under the remit of international relations.[125] Legislative consent in relation to them is not required when the UK Parliament legislates. Neither of the functioning devolved authorities has lodged a legislative consent memorandum with respect to this Bill.

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121 The Trade Bill, Commons Library Research Paper, 18/8073, 7 March 2018, pp84-87

122 section 58 *SA*, section 82 *GoWA*, section 26 *NIA*

123 The Taxation (Cross-Border Trade) Bill, Commons Library Research Paper, 18/8126, 4 January 2018

124 The Sanctions and Anti-Money Laundering Bill, Commons Library Research Paper, 18/8232, 15 February 2018

125 Schedule 5, Part I, para 7 *SA*, Schedule 7A, Part I, para 10 *GoWA*, Schedule 2, para 3 *NIA*

However, concerns have been raised in both the Lords and Commons debates so far about the scope of the delegated powers contained in the Bill. **Sub-clause 48(2)** provides that regulations may make "supplemental, incidental, consequential, transitional or saving provision", including amending, repealing or revoking "enactments". **Sub-clause 48(6)** clarifies that "enactments" includes Acts of the devolved legislatures.

There are two reasons why the legislative consent convention would not apply to this situation. Firstly, the convention covers only primary legislation and not legislation made under delegated powers. Secondly, consent requirements do not apply to any provision that impinges only "incidentally to" or "consequentially upon" devolved matters.[126]

Nevertheless, amendments were tabled, first in the Lords by Baroness Northover and then in the Commons by Alison Thewliss MP, seeking to impose a consent requirement before regulations could be made under the Bill. In both cases, they sought clarification why Ministers believed it was necessary to include a power to amend devolved legislation if the Bill's powers were purely concerned with reserved matters. The Government rejected the calls to amend the Bill in both cases. Sir Alan Duncan, Minister of State for Europe and the Americas, said that the Commons amendment would "rewrite the devolution settlement" without consulting or seeking the consent of the devolved administrations:

> Any amendment to laws created by devolved Administrations would only arise as the consequence of the sanctions or money laundering measures under the Bill. Regulations cannot make free-standing changes to devolved legislation. Their primary purposes will always be a reserved matter. Such consequential amendments are entirely consistent with the constitutional settlement, and it would not be consistent with our devolution settlement to give the right of veto to devolved Administrations.[127]

Devolution Guidance Note 9: Parliamentary and Assembly Primary Legislation Affecting Wales, para 45:

"Departments should consult the Welsh Government if Bills include provisions within the Assembly's legislative competence which are purely supplementary, consequential, incidental, transitional or saving relating to provisions on non-devolved matters. The consent of the Assembly is not required in these cases."

8.5 *EU (Withdrawal Agreement and Implementation) Bill*

It is anticipated that the UK Government will bring forward a separate Bill following the conclusion of a withdrawal agreement with the European Union. Until the terms of that agreement are known, it is not possible to assess exactly what the devolution impact of the Bill itself will be.

It is very likely, however, that at least some of the provisions of such a Bill will need to address the relationship between the devolved institutions and (retained) EU law, particularly in relation to the transition period that is likely to form part of any such withdrawal agreement. During any transition period, there will need to be clarity as to the nature and status of the body of law restricting devolved competencies.

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126 DGN 8, para 1, DGN 9, para 45, DGN 10, para 1

127 PBC Deb (Bill 176) 6 March 2018 c112

Given that the final form of clause 11 of the *EUW Bill* is not yet known, it is also not clear to what extent it will be suitable for the purposes of transition. Steve Baker, the Parliamentary Under-Secretary of State for Exiting the European Union, has indicated, in any case, that the Government does not intend for the *EUW Bill* to address arrangements for transition.[128]

Even if those provisions turn out not to be contentious, there are implications for timetabling if this Bill contains provisions that are caught by the legislative consent conventions. When scrutinising the *EUW Bill*'s legislative consent memorandum, for example, the Holyrood Finance and Constitution Committee took 4 months to report its interim findings from the point it received the memorandum. The Senedd's Constitutional and Legislative Affairs Committee similarly took 3 months to report. The opportunity for scrutiny of relevant provisions, and if necessary to identify changes that need to be made to secure devolved consent, could be limited.

[128] House of Commons Exiting the EU Committee, Oral evidence: The European Union (Withdrawal) Bill, HC 373, Thursday 26 October 2017, q184

Annex – Legislative consent precedents

It is highly unusual for a legislative consent motion to be rejected. An Institute for Government study in January of 2018 examined the online records of all three devolved legislatures wherever a legislative consent motion was tabled since 1999. It identified only 9 occasions in which a legislative consent motion has been wholly or partially rejected by a devolved legislature (7 in Wales and once each in Scotland and Northern Ireland). By contrast, it noted that consent had been agreed to on no fewer than 166 occasions in Scotland, 79 times in Northern Ireland and 78 times in Wales.[129]

This Annex provides an outline of those 9 cases. It identifies the relevant Bills, from what provisions the devolved legislature withheld consent, and what the consequences were of those consents being withheld. It also considers the only known instance of a Presiding Officer ruling a legislative consent motion to be out of order, when the Scottish Parliament was prevented from voting on a motion concerning the *Trade Union Bill 2015-16*.

Scotland

Welfare Reform Bill (2011-12)

This Bill proposed significant changes to the UK welfare system, some of which would require cooperation as to implementation in devolved areas. This was particularly relevant in the context of implementing Universal Credit (UC) and Personal Independence Payments (PIP).[130] The Scottish Parliament withheld consent in relation to aspects of modifications to Scottish Ministerial powers concerning UC and PIP.[131]

The *Welfare Reform Act 2012* was presented for Royal Assent without the provisions from which Holyrood withheld consent. Instead, the Scottish Parliament passed the *Welfare Reform (Further Provision) (Scotland) Act 2012*, conferring, on Scottish Ministers, similar powers in devolved areas in relation to those new benefits.

Trade Union Bill (2015-16)

The Scottish Government submitted a legislative consent memorandum to the Scottish Parliament in relation to the *Trade Union Bill 2015-16*.[132] It believed that the Bill would impact upon the functions of Scottish Ministers. The Presiding Officer disagreed with this assessment. In doing so, she agreed with the UK Government's position, which was that the Bill related

129 Institute for Government, Brexit and the Sewel (legislative consent) Convention, 16 January 2018
130 Scottish Government Memorandum (Welfare Reform Bill), 3 March 2011
131 Motion S4M-01638, 22 December 2011
132 Scottish Government, Parliament asked to withhold Bill consent, 9 December 2015

only to reserved matters and that legislative consent was not therefore required.[133]

The Presiding Officer having ruled in that way, it was not competent for the Scottish Government to bring forward a legislative consent motion forward under the terms of Rule 9B of the Standing Orders of the Parliament. The Scottish Government published a Policy Memorandum on 11 December 2016 in which it called on the Parliament to disapprove of the *Trade Union Bill* and on the UK Government to disapply its provisions as it relates to Scotland. The Scottish Parliament passed a motion on 26 January 2016 disapproving of the *Trade Union Bill*, but this did not form part of the Scottish Parliament's legislative consent procedure. Royal Assent was given for the *Trade Union Act 2016* in May 2016.

Labour MSP Neil Findlay lodged a motion with the Scottish Parliament on 17 December 2016 calling for MSPs to consider changes to the Parliament's Standing Orders to enable the Scottish Government's legislative consent memorandum to be debated.[134] However, the motion was not debated. Rule 9B was not changed following this incident.

Northern Ireland

Enterprise Bill (2015-16)

One of the key provisions of the Enterprise Bill sought to place a cap on public sector exit payments at £95,000. The approach in devolved nations was to be that, in areas of devolved competence, devolved ministers would have the power to introduce regulations to decide what public bodies should be subject to the cap and how.

The Northern Ireland Department of Finance and Personnel lodged a legislative consent memorandum in October 2015. It recommended that legislative consent should be given to allow for this cap to be extended to the public sector in Northern Ireland, where compensation payments are, subject to specific exceptions, a transferred matter. The Northern Ireland Assembly voted down a legislative consent motion on the matter.

The *Enterprise Act 2016* contains an exception to the exit payments cap:

> Nothing in this section applies in relation to payments made by authorities who wholly or mainly exercise functions which could be conferred by provision included in an Act of the Northern Ireland Assembly made without the consent of the Secretary of State (see sections 6 to 8 of the Northern Ireland Act 1998).[135]

This means that Northern Ireland is treated differently from Scotland and Wales, where the respective devolved legislatures consented to this modification of devolved functions.

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133 BBC News, Attempt to block Trade Union Bill in Scotland rejected, 10 December 2015

134 Motion S4M-15231, 17 December 2016

135 section 153A(10) *Small Business, Enterprise and Employment Act 2015* (inserted by section 41 *Enterprise Act 2016*)

Wales

Police Reform and Social Responsibility Bill (2010-11)

This Bill sought to introduce Police and Crime Panels, which were originally described in the legislation as being committees of local authorities. Although policing itself is a reserved matter in Wales, local authority committees were an area already falling within the legislative competence of the Welsh Assembly. In February 2011, the Assembly voted to withhold legislative consent for those provisions.[136]

The response of the UK Government was to change the legislation so membership of these Panels in Wales was no longer based, at least directly, on local authorities. Instead the Home Secretary would appoint members directly, meaning the powers would not relate to devolved matters.

Enterprise and Regulatory Reform Bill (2012-13)

Part of this Bill proposed to abolish the Agricultural Wages Board for England and Wales. The Welsh Government opposed the abolition by way of an Act of Parliament, insofar as it related to Wales, as it would, in their view, circumvent the protections of the *Public Bodies Act 2011*.[137] It includes provisions that safeguard the interests of devolved bodies where cross-border public bodies are proposed for abolition. The Assembly withheld consent for these provisions of the Bill in January 2013.[138]

The UK Government maintained that the provisions in the Bill related not to agriculture (a devolved matter) but to employment and industrial relations (a reserved matter) and that therefore consent was not required. It pressed ahead with Royal Assent in April 2013 on that basis.

The Welsh Government decided that it would use an Act of the Assembly to create a replacement body for Wales only. The Assembly passed a Bill which would create an Agricultural Advisory Panel fulfilling similar functions to the entity the UK Act abolished.

Believing the *Agriculture Sector (Wales) Bill* to be outside of the competence of the National Assembly for Wales, the Attorney General for England and Wales referred it to the Supreme Court under the Government of Wales Act's reference procedure.[139] However, the Supreme Court agreed with the Welsh Government's interpretation of the Act, holding that the Bill related to agriculture, not to reserved matters, and therefore fell within devolved competence.[140]

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136 Motion NNDM4647, 8 February 2011; BBC News, Home Office anger as AMs vote down Welsh police changes, 9 February 2011

137 section 9 *Public Bodies Act 2011* imposes a consent requirement where a Minister proposes by order to abolish or modify the functions of a public body exercising devolved functions.

138 Motion NDM5138, 29 January 2013

139 section 112 *GoWA*

140 *Agriculture Sector (Wales) Bill – Reference by the Attorney General for England and Wales* [2014] UKSC 43, paras 64-69

The *Enterprise (etc.) Act 2013* was therefore the first instance of the UK Parliament legislating with regard to a devolved matter where legislative consent had been withheld. However, at the time the UK Government did not believe it was doing so. Moreover, once the Supreme Court held that the Assembly legislation was within competence (and that by necessary implication the UK Bill had in fact legislated with regard to devolved matters without consent) the UK Parliament did not then attempt to override the *Agriculture Sector (Wales) Act 2013* with further primary legislation.

Anti-social Behaviour, Crime and Policing Bill (2013-14)

The Home Secretary introduced an amendment to this Bill. It modified the legislative competence of the Assembly. Instead of excepting Anti-Social Behaviour Orders (ASBOs), from devolved competence it would except:

> "Orders to protect people from behaviour that causes or is likely to cause harassment, alarm or distress".

Norman Baker, the Minister of State for Crime Prevention, argued that this was a "purely consequential" amendment that would reflect the fact that Anti-Social Behaviour Orders had been abolished and replaced.[141] If an amendment is merely consequential, DGN 17 indicates that it does not fall within the scope of the legislative consent convention.[142]

The Welsh Ministers disagreed, arguing that the new provision excepted a far wider range of potential orders, including those that could previously have been made under devolved competence. Legislative consent was withheld on 26 November 2013 at the Welsh Ministers' urging.[143]

The UK Government pressed ahead with Royal Assent, maintaining that the provision was a consequential amendment not requiring legislative consent. However, it did provide clarifying guidance as to what it believed fell within the scope of the replacement exception. Lord Taylor of Holbeach, Parliamentary Under-Secretary of State, made a written statement expressing the view that "the exception should be interpreted narrowly" and that it merely "maintains the existing scope" of the ASBO exception.[144]

The Welsh Government was dissatisfied with this clarification, stating on 11 February 2018 that the scope of the exception should be made clear on the face of the Bill.

This was the first (and so far, only) instance of a devolved legislature's competence being modified after legislative consent has been refused, albeit the UK Government denied that consent was required in this case. Where a UK Act modifies devolved competence, rather than simply legislates with regard to devolved matters, it is not possible for a devolved legislature to reverse the effects of that Act using its own legislation. This

141 HC Deb 14 October 2013, Vol 568 c544
142 DGN 17, para 14
143 Motion NDM5342, 26 November 2013
144 HL Deb 11 February 2014, c WS47

distinguishes the *Anti-social Behaviour (etc.) Act 2014* dispute from the *Enterprise (etc.) Act 2013*[145] and the *Trade Union Act 2016*.[146]

Local Audit and Accountability Bill (2013-14)

This Bill proposed to abolish the Audit Commission and to replace its functions with a local audit and accountability regime. A list of public bodies to be subject to this new regime included Internal Drainage Boards (IDBs) that operated on a cross-border basis between England and Wales. The Welsh Government's memorandum indicated that it supported the view of the UK Government that cross-border IDBs should be addressed by the Bill.

The Assembly's Public Accounts Committee disagreed and recommended withholding legislative consent. The Assembly agreed with it.[147] In the debate, main argument was that, given two cross-border IDBs were in fact mostly operating in Wales, they should be audited in the same way as Welsh-only IDBs. As a result of this the UK Government agreed to amend the bill to remove cross-border IDBs from the English scheme of auditing. It received Royal Assent without the devolved provision from which consent was withheld.

Medical Innovations Bill (2014-15)

Lord Saatchi's Private Members Bill sought to:

> codify existing best practice in relation to decisions by medical practitioners to depart from standard practice and to administer innovative treatment.[148]

The main changes it proposed to make were to the law of negligence where medical practitioners pursued untested forms of treatment in a transparent way. The UK Government took the view that this Bill concerned only reserved matters as the law of tort is not devolved to Wales. The Welsh Government disagreed. Its legislative consent memorandum made clear it believed this related principally not to the law of tort generally but to areas of devolved responsibility. In particular it identified the following devolved matters to which it believed the Bill related:

> treatment and alleviation of disease, illness, injury, disability and mental disorder; provision of health services; clinical governance and standards of health care[149]

The Welsh Assembly withheld consent in February 2015 amid concerns about the impact of the changes this Bill would have on vulnerable patients.[150] In any case, the Bill did not progress because Parliament was prorogued ahead of the 2015 General Election.

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145 See above
146 See below
147 Motion NDM5259, 12 November 2013
148 House of Lords Explanatory Notes to the Medical Innovations Bill, 6 June 2014, para 3
149 Welsh Government, Legislative Consent Memorandum – Medical Innovations Bill, 10 December 2014, para 15
150 Motion NDM5680, 3 February 2015

The Welsh Government lodged a legislative consent memorandum expressing its opposition to a similar Private Members Bill in January 2016, the *Access to Medical Treatments (Innovation) Bill*. It did receive Royal Assent on 23 March 2016, but no legislative consent motion was ever tabled.

Housing and Planning Bill (2015-16)

This Bill proposed (among other things) to make changes to legislation concerning compulsory purchase orders in Wales. The Welsh Government took the view that compulsory purchase changes were concerned with devolved policy objectives, including those connected to transport, economic development, housing and planning, so submitted a memorandum. However, it initially indicated that it supported dealing with these changes at a UK level across England and Wales.[151]

Following the Assembly's Environment and Sustainability Committee's report into the provisions the Welsh Government changed its position. The Committee raised concerns that the Bill's consultation on the compulsory purchase provisions was England-only and did not engage with Welsh stakeholders.[152] Carl Sargeant, the Welsh Government Minister for Natural Resources, asked Brandon Lewis, the UK Government Minister for Housing and Planning, to amend the Bill. He wanted it to confer powers on the Welsh Ministers to apply, with modification, the Bill's compulsory purchase provisions as they relate to Wales. This request was refused because the UK Government believed the matters to fall within reserved competence.

The Assembly withheld consent for the Bill.[153] Royal Assent was given to it without changes to the relevant provisions, since the UK Government believed there were no devolved provisions requiring consent.

Trade Union Bill (2015-16)

Unlike the Scottish "reserved" model of devolution, the National Assembly for Wales' legislative competence is (until the *Wales Act 2017* takes effect) based on "conferred" competence. This meant that the question of whether the *Trade Union Bill*'s provisions concerned "devolved matters" would not necessarily be answered the same way in Wales as it was in Scotland or Northern Ireland. The Welsh Government argued in its legislative consent memorandum that the Bill's provisions related to a range of devolved matters. It objected to the 40% turnout threshold for strike ballots in the public sector where services were devolved. The Welsh Government made similar arguments about provisions relating to "facility time" and a prohibition on deductions of union subscriptions from wages.

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151 Welsh Government, Supplementary Legislative Consent Memorandum – Housing and Planning Bill: Compulsory Purchase etc., 22 January 2016

152 Environment and Sustainability Committee, Report to the National Assembly for Wales on the Housing and Planning Bill Supplementary Legislative Consent Memorandum relating to compulsory purchase, 3 March 2016, para 3.2

153 Motion NDM5995, 15 March 2016

The Assembly rejected a legislative consent motion in January 2016 at the urging of the Welsh Government, which believed the provisions of the Bill would undermine industrial relations in devolved areas.[154] Nick Boles, the UK Government's Minister of State for Skills, maintained that he was:

> absolutely confident that all the provisions in the Bill relate to reserved matters and therefore apply to everyone and every trade union in the United Kingdom.[155]

On that basis, the UK Government pressed ahead with Royal Assent notwithstanding the absence of legislative consent. In response, the Welsh Government decided, just as it did following the abolition of the Agricultural Wages Board in 2013, to seek to legislate to reverse changes made by the UK Government in devolved areas.[156] The *Trade Union (Wales) Act 2017* disapplies the provisions to which the Assembly objected in relation to areas of devolved competence. Unlike with the *Agriculture Sector (Wales) Bill*, however, the law officers of the UK Government decided against making a reference to the Supreme Court.[157]

154 Motion NDM5932, 26 January 2016
155 HC Deb 28 April 2016, Vol 608, c1548
156 Written Statement, Mark Drakeford AM, Cabinet Secretary for Finance and Local Government, 16 January 2017
157 Letter from Robert Buckland QC MP, Solicitor General to Manon Antoniazzi, Chief Executive and Clerk to the National Assembly for Wales, 10 August 2017

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