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BRIEFING PAPER

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Devolution: The Sewel Convention

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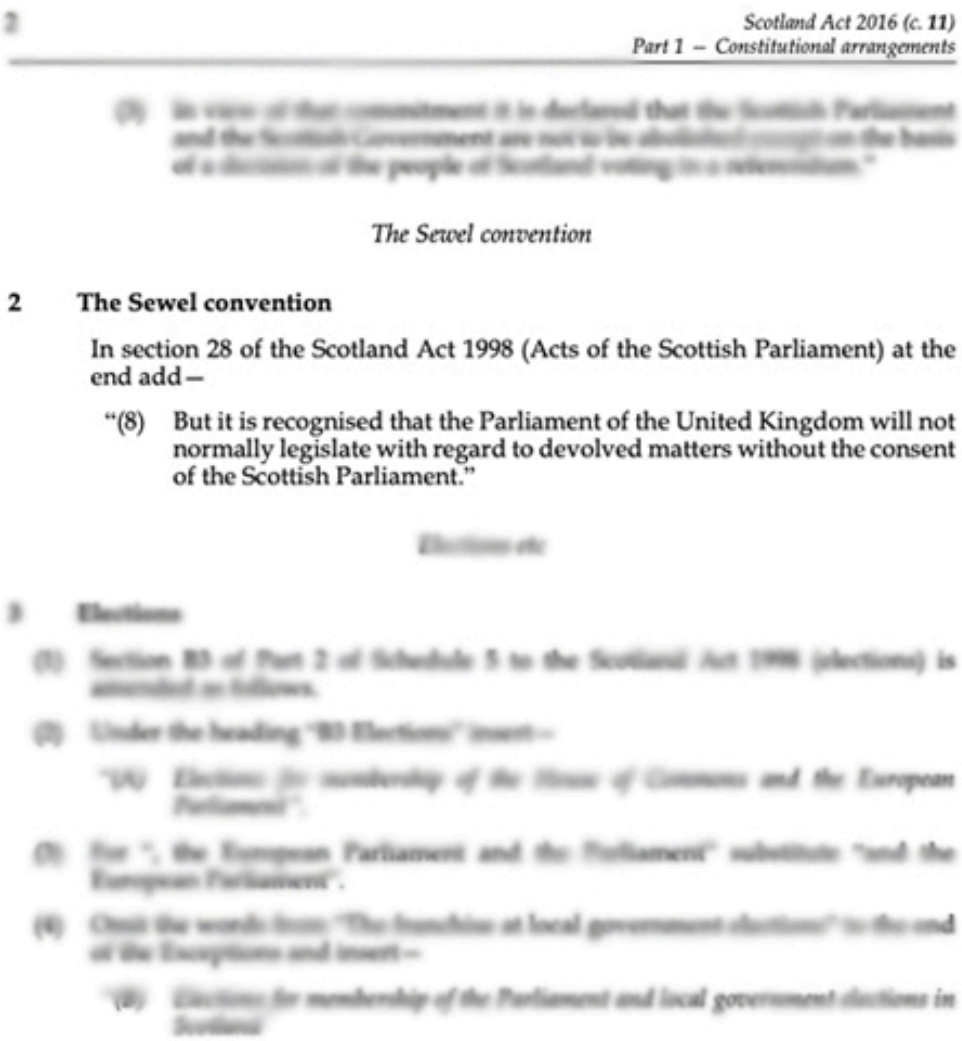

2 Scotland Act 2016 (c. 11)
Part 1 — Constitutional arrangements

(3) In view of that commitment it is declared that the Scottish Parliament and the Scottish Government are not to be abolished except on the basis of a decision of the people of Scotland voting in a referendum."

The Sewel convention

2 The Sewel convention

In section 28 of the Scotland Act 1998 (Acts of the Scottish Parliament) at the end add—

"(8) 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."

Elections etc

3 Elections

(1) Section B3 of Part 2 of Schedule 5 to the Scotland Act 1998 (elections) is amended as follows.

(2) Under the heading "B3 Elections" insert—

"(A) *Elections for membership of the House of Commons and the European Parliament*".

(3) For ", the European Parliament and the Parliament" substitute "and the European Parliament".

(4) Omit the words from "The franchise at local government elections" to the end of the Exceptions and insert—

"(B) *Elections for membership of the Parliament and local government elections in Scotland*

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Summary

Legislative consent is a fundamental part of the United Kingdom's territorial constitutional arrangements. The self-denying ordinance of the UK Parliament that it will "not normally" legislate with regard to devolved matters without the consent of the relevant devolved legislature is a non-legal constitutional constraint.

This "Sewel Convention" applies when the UK Parliament wants to legislate with regard to the powers of the devolved legislatures or executives of Scotland, Wales and Northern Ireland. Under the terms of the Convention, the UK Parliament will not normally do so without the relevant devolved legislature having passed a legislative consent motion.

Although the Convention originally arose in relation to devolution for Scotland in the late 1990s (it was named after the then Scottish Office Minister Lord Sewel, who first described it), the rule and principle it embodied was neither new nor confined to the relationship between the Scottish Parliament and Westminster. In Northern Ireland between 1921-72, a similar convention was in place, which later applied to the Northern Ireland Assembly after 1999, as it did to the then National Assembly for Wales.

The Sewel Convention is precisely that, a convention. Although a statement of that Convention was included in the *Scotland Act 2016* and the *Wales Act 2017*, it is not considered to be legally binding, something confirmed by the Supreme Court in its *Miller* judgement. Until recently, the Convention was relatively uncontroversial, but following the 2016 Brexit vote it became more contested. The Scottish Parliament withheld consent for the *European Union (Withdrawal) Act 2018*, and all three devolved legislatures withheld consent for the *European Union (Withdrawal Agreement) Act 2020*. Both were nevertheless passed by the UK Parliament.

The Convention has, therefore, attracted a measure of criticism, mostly from the Scottish and Welsh Governments, who argue that the UK Government has breached both its letter and spirit. This briefing paper explores the origins of the Sewel Convention, its development under the three devolution settlements, its application to Brexit legislation and proposals for reform.

1. What is the Sewel Convention?

Summary

The Sewel Convention, otherwise known as legislative consent, is a constitutional convention regarding UK Parliament legislation on matters devolved or transferred to the Scottish Parliament, Senedd Cymru/Welsh Parliament or the Northern Ireland Assembly. On these, the UK Parliament has developed a self-denying ordinance, supported by the working practices of the UK Government. Parliament undertakes that it will "not normally" legislate with regard to devolved matters unless it has the consent of the relevant devolved legislature.

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. In order to respect the devolved institutions' constitutional spheres of responsibility, the UK Parliament has 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 which contains provisions having regard to devolved matters is known as giving "legislative consent".

Parliament's self-denying ordinance 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, on 21 July 1998:

> Clause 27 makes it clear that the devolution of legislative competence to the Scottish parliament does not affect the ability of Westminster to legislate for Scotland even in relation to devolved matters. Indeed, as paragraph 4.4 of the White Paper explained, we envisage that there could be instances where it would be more convenient for legislation on devolved matters to be passed by the United Kingdom Parliament. However […] 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]

Lord Sewel, HL Deb 21 July 1998 Vol 592 c791

"[W]e 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."

Following the creation of the three devolution settlements in 1998-99, a Memorandum of Understanding (MoU) was agreed between the UK Government and devolved administrations.[4] It served as a political commitment to honour the constitutional rule proposed by Lord Sewel and states that:

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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" 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 Jul 1998 Vol 592 c791

4 Devolution: Memorandum of Understanding and Supplementary Agreements (originally Cmd 4444, 1 October 1999) has been revised six times since it was first introduced. The most recent version was published in October 2013.

> 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]

The Sewel Convention applies when UK legislation:

- changes the law in a devolved area of competence;
- alters the legislative competence of a devolved legislature;
- alters the executive competence of devolved ministers.[7]

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".

1.1 A 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].[8]

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."

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.[9] The purpose of the legislative provision was

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 then National Assembly for Wales acquired the power to make Acts rather than Measures.
7 The latter two variations may also be done through Orders in Council, in which case different procedures apply. See "Memorandum by the UK Government", in Scottish Parliament Procedures Committee, 7th report 2005, The Sewel Convention, SP Paper 428, Annexe C, 5 October 2005, and "Note by the Clerk on Orders in Council", Annexe E to the same report.
8 section 2 *Scotland Act 2016*; section 2 *Wales Act 2017*
9 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, para 148.

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*.

1.2 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".[10] 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".[11]

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 before they became Acts. Legislative consent has only been actively withheld 13 times by a devolved legislature: eight times in Wales, three times in Scotland and twice in Northern Ireland.

The passage of the *EU (Withdrawal) Act 2018* was the first time that:

- a UK Government acknowledged the legislative consent convention applied to a Bill; and
- legislative consent was then withheld; but
- the UK Parliament proceeded to legislate regardless.

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

11 Political and Constitutional Reform Committee, Constitutional implications of the Government's draft Scotland clauses, 22 March 2015, HC1022 2014-15, para 45.

2. Why do we have legislative consent?

Summary

In other (typically federal) states such as 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 over-riding 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 upon 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.[12]

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;[13] 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.[14]

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.

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

13 If, for example, the UK Parliament legislated to require Scottish schools to use the GCSE system of examinations.

14 If, for example, 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*.

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.

What 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.

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".[15] Devolved legislatures cannot pass laws that "relate to" those areas of policy;[16]
- Secondly, they make it unlawful for devolved legislatures to "modify" certain UK legislation. Most of these protected enactments are of a constitutional nature;[17]
- 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.[18]

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

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15 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.

16 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*.

17 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.

18 Acts of devolved legislatures must be compatible with EU law and with Convention rights until the end of the UK's post-Brexit transition period.

the constitutions of other countries. They also place legal limits on the powers of sub-state Parliaments or legislative assemblies.[19]

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.

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

[19] 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.

"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.[20]

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.[21] Legislative power has been delegated, rather than ceded or divided.

2.4 Precedents

The principle of legislative consent was not new in the late 1990s. Lord Sewel prefaced his remarks in 1998 by saying he expected a legislative consent convention to be established "as happened in Northern Ireland earlier in the century".[22]

Northern Ireland

Between 1921 and 1972 there existed a devolved Parliament of Northern Ireland, which possessed legislative and executive authority in certain areas. As the 1972 Government White Paper, *The future of Northern Ireland*, explained (with added emphasis):

> Section 75 of the [Government of Ireland] Act of 1920 saved the sovereign authority of the United Kingdom Parliament over all matters in Northern Ireland. In practice, however, this reserve of power came to be used only in the most limited way. In general the view prevailed that, having established responsible if subordinate institutions in Northern Ireland with certain powers, the United Kingdom Parliament and Government should not lightly supersede or override those powers. *Thus there developed a convention that the United Kingdom Parliament would legislate within the field of Northern Ireland's 'transferred' powers only by invitation.* This convention merely reflected the general view of the sovereign Parliament as to the prudent exercise of its powers; it did not, and could not, override the clear and unambiguous wording of the Statute.[23]

As Adam Evans has concluded, in form and in principle, "the idea of a legislative consent convention is as old as devolution itself in the United Kingdom".[24]

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

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

22 HL Deb 21 Jul 1998 Vol 592 c791

23 Northern Ireland Office, *The future of Northern Ireland: A paper for discussion*, Belfast: HMSO, October 1972.

24 See Adam Evans, "A Tale as Old as (Devolved) Time? Sewel, Stormont and the Legislative Consent Convention", *Political Quarterly* 91:1, January-March 2020, pp165-72.

The Crown Dependencies

UK primary legislation does not ordinarily apply to the Crown Dependencies, that is Guernsey, Jersey and the Isle of Man. Following prior consultation and consent, legislation can, however, be extended if:

- UK Government departments consider that primary UK legislation in whole or in part needs to have effect in any of the Crown Dependencies; or
- UK Government departments have received a request from a Crown Dependency seeking to extend provisions of a UK Act (with or without modifications) to their jurisdiction by activation of a **permissive extent clause** (PEC).

The 1973 Royal Commission on the Constitution observed that, by convention, the UK Parliament did "not legislate for the Islands without their consent in matters of taxation or other matters of purely domestic concern".

As with Sewel, this is a convention rather than a matter of law. The Royal Commission also concluded "that in the eyes of the courts [the UK] Parliament has a paramount power to legislate for the Islands in any circumstances".[25]

In 2014, Lady Hale, the then president of the Supreme Court, noted the Royal Commission's view but added that it was "the practice to consult the Islands before any United Kingdom legislation is extended to them".[26]

When, for example, the European Convention on Human Rights was incorporated into UK law through the *Human Rights Act 1998*, there was discussion as to whether that Act should be extended to the Crown Dependencies. In the end, it was decided they would pass their own human rights legislation. This precedent was followed with legislation arising from Brexit.

25 Royal Commission on the Constitution, para 1473.
26 See Jowell et al, "The Barclay Cases: Beyond Kilbrandon", Jersey Legal Information Board, 2018.

3. What is the scope of legislative consent?

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 was intended to apply. He stated that:

> Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish parliament.[27]

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.[28]

However, the Devolution Guidance Notes, which the Cabinet Office 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].[29]

DGN 17 similarly articulates a procedural expectation for Welsh devolution. 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.[30]

The process of seeking legislative consent is governed by the Standing Orders of the devolved legislatures. Those internal rules of the devolved Parliaments and Assembly 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.

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."

27 HL Deb 21 July 1998 Vol 592 c791
28 Provision, for example, in relation to the curriculum in Scottish schools.
29 DGN 8, para 4 and DGN 10, para 4.
30 DGN 17, para 13.

Modification of devolved ministerial functions

During a Scottish Parliament committee 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.[31]

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*.[32] 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 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":[33]

> [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.[34]

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."

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31 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.
32 See below, section 5.2.
33 HL Deb 8 December 2015 Vol 767 c1501
34 HL Deb 24 February 2016 Vol 769 c305

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.

Scottish Government's interpretation

This position is not shared by the Scottish Government.[35] 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.[36]

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.[37]

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:

> 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?[38]

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.[39]

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35 Scottish Government, Supplementary Legislative Consent Memorandum – Scotland Bill, 1 March 2016, p6.

36 Scotland Office, *Scotland in the United Kingdom: An enduring settlement*, Cmd 8990, January 2015, p16.

37 HL Deb 31 March 2016 Vol 769 c2073

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

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

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 European Union, several UK Government Bills were to modify the competencies of the devolved legislatures and executives. This meant the devolved legislatures might notionally "be asked" (several times) for legislative consent by their executives. Since the devolved legislatures and executives embraced a wider interpretation of the convention, consent was to 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.[40]

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].[41]

The Scottish provision intended to give effect to a UK Government commitment from the cross-party Smith Commission. It stated "[t]he Sewel Convention will be put on a statutory footing".[42] 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."[43]

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 will not "normally" do something is ambiguous. It does not clarify what counts as an exceptional circumstance.

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

41 Section 2 *Scotland Act 2016* and section 2 *Wales Act 2017*

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

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

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.[44] 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.[45]

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.[46]

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 existed but 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.[47]

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44 In other words, to require that modifications to devolved competence would also receive legislative consent, as stipulated in the Devolution Guidance Notes.

45 HL Deb 24 February 2016 Vol 769 c294

46 HL Deb 31 March 2016 Vol 769 c2072

47 HL Deb 8 December 2015 Vol 767 c1502

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.[48]

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.[49]

***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 might cause:

> 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.[50]

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.[51]
>
> […] 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

48 HL Deb 8 December 2015 Vol 767 cc1502-03
49 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, para 148.
50 Political and Constitutional Reform Committee, *Constitutional implications of the Government's draft Scotland clauses*, 22 March 2015, HC 1022 2014-15, para 63.
51 Ibid., para 65.

> 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.[52]

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.[53]

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.[54]

[52] Ibid., para 66.
[53] [2017] UKSC 5, para 148.
[54] [2017] UKSC 5, para 151.

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

Summary

The original devolution statutes neither acknowledge the Sewel Convention nor 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*.[55]

The Rules require the Scottish Government to submit a memorandum within two weeks of a relevant Bill being introduced in the UK Parliament.[56] 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.[57]

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 (the 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.[58] There may be circumstances in which the Parliament wishes to amend a motion to

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55 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".

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

57 Rule 9B.3(2), Standing Orders of the Scottish Parliament.

58 Rule 8.4.1, Standing Orders of the Scottish Parliament.

narrow or widen the extent of consent given, where the only other alternative would be to withhold consent completely.[59]

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 then 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.[60] 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 Senedd Cymru/Welsh Parliament. 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. [61] The responsible committee then reports on the Government memorandum's recommendations.

A memorandum must be lodged within two 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-Welsh Government member to lodge a legislative consent motion (if they have first lodged a memorandum of their own).[62]

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.[63]

Bills modifying Ministerial functions

One key difference is that the Welsh Parliament'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 requirements for an Order in Council that proposes to modify the functions of the Welsh Ministers. Under that procedure, it is the consent

59 Procedural Committee, Sewel Motions – Procedural and Practical Issues, PR/02/9/3 (Annex B), 9 June 2002, para 6.
60 Standing Orders of the Welsh Parliament, October 2017.
61 The Presiding Officer must do so for relevant Private Members Bills.
62 SO 29.2 and 29.3.
63 SO 29.8.

of the Welsh Ministers, not the Welsh Parliament, that is sought.[64] Standing Order 30 requires the Welsh Ministers to give a written statement to the Welsh Parliament 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.[65] 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 Assembly elections in March 2017. The Assembly therefore could not use its legislative consent provisions to scrutinise UK Bills modifying aspects of the devolution settlement until an Executive was formed in January 2020.

64 Section 58 *GoWA*
65 Northern Ireland Assembly Standing Orders, October 2016.

5. How does the UK 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 can 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 or Welsh Parliaments, 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.[66]

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.

[66] 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;[67] or
- enactments protected from modification.[68]

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.[69] However, section 30 has also been used for other purposes.[70]

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 [Welsh Parliament] 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.[71]

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.[72] Sixteen legislative competence orders (LCOs) were made in that time. In Scotland, only 10 section 30 Orders were made from 1999 to 2012.[73]

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

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

69 See Commons Library Briefing Paper CBP-8738, *Scottish Devolution: Section 30 Orders*, 16 December 2019.

70 *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.

71 See DGN 17, para 12.

72 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 then 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 then Assembly gained the power to make Acts instead of Measures.

73 Between the 2012 Act and the *Scotland Act 2016* there were six further section 30 Orders.

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 legislature) for a "section 63 Order", but from the Welsh Ministers (i.e. the executive) for a "section 58 Order".[74]

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.[75]

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.[76] 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.[77] 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.[78]

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 motion specifically granting legislative consent has been

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74 section 63 *SA* and section 58 *GoWA*

75 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.

76 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.

77 BBC News online, "Could Alex Salmond scupper the Scotland Bill?", 19 May 2011.

78 BBC News online, "Fiscal framework: Scottish and UK Governments agree a deal", 23 February 2016.

given in all four cases of an Act to reform the devolution statutes since 2012.[79]

5.4 Northern Ireland

There is no directly equivalent provision to the "section 30 Order" in the *Northern Ireland Act*.[80] An Order in Council can make "transferred" matters "reserved" matters and vice versa, but there is no provision to modify "excepted" matters.[81] 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.[82]

[79] 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).

[80] 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.

[81] 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".

[82] See sections 4(2A) and (3) *NIA*

6. Legislative consent and Brexit

The withdrawal of the UK from the European Union (EU) posed significant challenges for 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, had significant implications for the powers of the devolved legislatures and executive bodies.

Following the June 2016 referendum, the UK Government argued that it had the power, under the Royal Prerogative, to make a notification to leave the European Union and that this did not require legislation.

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 also 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.[83]

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)".[84]

In the event, the UK Supreme Court concluded that 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.[85]

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83 Written case of Lord Advocate in *R (Miller) v Secretary of State for Exiting the European Union*, UKSC 2016/0196, p4.
84 Written case of Lord Advocate, p49.
85 *R (Miller) v Secretary of State for Exiting the European Union*, para 151.

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.

6.1 Subsequent EU withdrawal legislation

EU Withdrawal Act 2018

The *European Union (Withdrawal) Bill 2017-19* was the first piece of Brexit legislation recognised by the UK Government to fall within the scope of the Sewel Convention.

The UK Government's Explanatory Notes to the Bill acknowledged that the vast majority of the Bill engaged the Sewel Convention, and indicated that consent would be sought for those provisions. The Scottish and Welsh Governments argued that other parts of the Bill also engaged the Convention, and both opposed the Bill in its original form, publishing legislative consent memorandums to that effect.

Following negotiations between the governments, the UK Government proposed a number of amendments to meet the Scottish and Welsh objections. Legislative consent motions (LCMs) were voted on in the Scottish Parliament and the then National Assembly for Wales on 15 May 2018.

The then Assembly voted to provide consent, following agreement between the Welsh and UK Governments on the bill. The Scottish Government, however, remained opposed to the bill, and in particular to the provisions of what became section 12, which enabled UK Ministers temporarily to restrict the ability of devolved institutions to modify retained EU law.

The Scottish Parliament, including all parties except the Scottish Conservatives, voted to withhold consent from the *EU (Withdrawal) Bill*, but the UK Parliament passed it anyway. The UK Government argued that these circumstances were not "normal" and so Westminster was entitled to pass the legislation without consent, an argument it would repeat for the *EU (Withdrawal Agreement) Bill*.

The passage of the *EU (Withdrawal) Act 2018* was the first time that:

- a UK Government acknowledged the legislative consent convention applied to a Bill; and
- legislative consent was then withheld; but
- the UK Parliament proceeded to legislate regardless.

In response, in June 2018 the Scottish Government announced that it would not seek consent from the Scottish Parliament for any other Brexit bills, a so-called "Sewel strike".[86] In the 2017–19 session of Parliament, the Scottish Government declined to lodge a legislative consent motion for bills including the *Fisheries Bill*, *Trade Bill*, and

[86] The Institute for Government and several media reports use this term.

Immigration and Social Security Co-ordination Bill, all of which were recognised by the UK Government as having implications for devolution. The Scottish Government also took the view that the *Agriculture Bill* required Holyrood's legislative consent, although the UK Government maintained that it would not.[87]

EU (Withdrawal Agreement) Act 2020

The UK Government recognised that parts of the *European Union (Withdrawal Agreement) Bill 2019-20*, in particular the sections which conferred powers on devolved ministers and on UK ministers in devolved areas, would require legislative consent. It implemented the Government's Withdrawal Agreement with the EU and had to be passed before the deal could be ratified.

In a legislative consent memorandum published on 20 December 2019, the Scottish Government recommended that the Scottish Parliament *should not* grant consent to the Bill. On 8 January 2020, the Scottish Parliament voted on a legislative consent motion, withholding consent by 92 votes to 29.

On 6 January 2020, the Welsh Government also laid a legislative consent memorandum which recommended that the then Welsh Assembly *should not* give consent to the Bill. The Assembly voted on a legislative consent motion on 21 January, withholding consent with a majority of 35 votes to 15.

On 20 January 2020, the Northern Ireland Assembly unanimously adopted motion to indicating that it would not grant consent to the Bill. As the power-sharing executive in Northern Ireland had only been re-established on 10 January, there was not sufficient time to lay a legislative consent memorandum for the EU (Withdrawal Agreement) Bill prior to the debate.

This represented the first occasion on which all three devolved legislatures had denied consent for the same Bill of the UK Parliament.

Defending the decision to proceed without the consent of any of the devolved legislatures, the Chancellor of the Duchy of Lancaster, Michael Gove, acknowledged that it was:

> a significant decision and it is one that we have not taken lightly. However, it is in line with the Sewel convention […] The Sewel convention — to which the government remain committed — states that the UK Parliament 'will not normally legislate with regard to devolved matters without the consent' of the relevant devolved legislatures. The circumstances of our departure from the EU, following the 2016 referendum, are not normal; they are unique.

[87] The Scottish Government made two exceptions to its "Sewel strike", recommending consent for the *Healthcare (International Arrangements) Bill* as well as the *Direct Payments to Farmers (Legislative Continuity) Bill*.

7. Coronavirus and the Sewel Convention

The *Coronavirus Act 2020*, which passed through both Houses of Parliament on 23 and 24 March 2020, contained a number of provisions relating to the operation of the criminal justice systems and public health powers in Scotland and Northern Ireland.

As a result, many of the provisions in the Act were subject to the Sewel Convention. This applied, for instance, to changes that the Act made to the *Investigatory Powers Act 2016*, and to the inquest process where the suspected cause of death is Covid-19. Consent was given by all three devolved legislatures on 24 March 2020.

The *Coronavirus Act* also included provisions aimed at supporting the continued operation of criminal courts and expanding the use of video links in trials (though all jury trials are temporarily suspended). These provisions were specifically extended to courts in Northern Ireland, but not to courts in Scotland. The Scottish Government instead brought forward its own legislation, the *Coronavirus (Scotland) Act 2020*.

8. Annex – Legislative consent precedents

Analysis by the Institute for Government in January 2020 suggested that at least 202 Acts of Parliament had been subject to a legislative consent motion (LCM) since 1999 in at least one of the devolved legislatures. Most of these were uncontroversial, with any disagreements resolved amicably. If consent was withheld, it represented an opportunity for the UK Parliament to reconsider aspects of how its primary legislation impacted upon devolved matters.

Until 2018, it was highly unusual for a LCM to be rejected. Another Institute for Government study in January 2018 identified only nine occasions on which a LCM had been wholly or partially rejected by a devolved legislature: seven in Wales and one each in Scotland and Northern Ireland).[88]

This Annex provides an outline of what are now 13 instances of withheld consent. It identifies the relevant Bills, from which provisions the devolved legislature withheld consent, and what the consequences were of that consent being withheld. It also considers the only known instance of a Presiding Officer ruling an LCM 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 co-operation as to implementation in devolved areas. This was particularly relevant in the context of implementing Universal Credit (UC) and Personal Independence Payments (PIP).[89] The Scottish Parliament withheld consent in relation to aspects of modifications to Scottish Ministerial powers concerning UC and PIP.[90]

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*.[91] 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

88 Institute for Government, "Brexit and the Sewel (legislative consent) Convention", 16 January 2018.
89 Scottish Government Memorandum (Welfare Reform Bill), 3 March 2011.
90 Motion S4M-01638, 22 December 2011.
91 Scottish Government, "Parliament asked to withhold Bill consent", 9 December 2015.

Bill related only to reserved matters and that legislative consent was not therefore required.[92]

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 granted 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.[93] However, the motion was not debated. Rule 9B was not changed following this incident.

European Union (Withdrawal) Bill 2017-19

In a legislative consent memorandum published on 17 September 2017, the Scottish Government recommended that consent be withheld from the *EU (Withdrawal) Bill*, particularly the section 12 provisions, which enabled UK Ministers temporarily to restrict the ability of devolved institutions to modify retained EU law. Following publication of a supplementary memorandum on 26 April 2018, the Scottish Parliament voted on a legislative consent motion on 15 May 2018, with all parties except the Scottish Conservatives agreeing that consent should be withheld.

European Union (Withdrawal Agreement) Bill 2019-20

In a legislative consent memorandum published on 20 December 2019, the Scottish Government recommended that the Scottish Parliament should not grant consent to the Bill.[94] On 8 January 2020, the Scottish Parliament voted on a legislative consent motion, refusing consent by 92 votes to 29.

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.

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92 BBC News online, "Attempt to block Trade Union Bill in Scotland rejected", 10 December 2015.

93 Motion S4M-15231, 17 December 2016.

94 On 22 October 2019, the Scottish Government had published a similar legislative consent memorandum on an earlier version of the *EU (Withdrawal Agreement) Bill*.

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).[95]

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

European Union (Withdrawal Agreement) Bill 2019-20

The Northern Ireland Assembly unanimously agreed a motion to deny consent to the EU (Withdrawal Agreement) Bill on 20 January 2020. As the power-sharing Northern Ireland Executive had only been re-established on 10 January, there was not sufficient time to lay a formal legislative consent memorandum. This therefore was not as such a legislative consent motion (in the terms provided in the Assembly's Standing Orders) but functionally served the same purpose.

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 then Assembly. In February 2011, the Assembly voted to withhold legislative consent for those provisions.[96]

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*

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

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

2011.[97] It includes provisions that safeguard the interests of devolved bodies where cross-border public bodies are proposed for abolition. The then Assembly withheld consent for these provisions of the Bill in January 2013.[98]

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.[99] 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.[100]

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 then 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 then 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.[101] If an amendment is merely consequential, DGN 17 indicates

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97 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.

98 Motion NDM5138, 29 January 2013.

99 section 112 *GoWA*

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

101 HC Deb 14 October 2013 Vol 568 c544

that it does not fall within the scope of the legislative consent convention.[102]

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.[103]

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.[104]

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 distinguishes the *Anti-social Behaviour (etc.) Act 2014* dispute from the *Enterprise (etc.) Act 2013*[105] and the *Trade Union Act 2016*.[106]

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 then Assembly's Public Accounts Committee disagreed and recommended withholding legislative consent. The Assembly agreed with it.[107] 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

102 DGN 17, para 14.
103 Motion NDM5342, 26 November 2013.
104 HL Deb 11 February 2014, c WS47
105 See above.
106 See below.
107 Motion NDM5259, 12 November 2013.

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.[108]

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[109]

The then Welsh Assembly withheld consent in February 2015 amid concerns about the impact of the changes this Bill would have on vulnerable patients.[110] In any case, the Bill did not progress because Parliament was prorogued ahead of the 2015 General Election.

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.[111]

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

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108 House of Lords Explanatory Notes to the Medical Innovations Bill, 6 June 2014, para 3.

109 Welsh Government, Legislative Consent Memorandum – Medical Innovations Bill, 10 December 2014, para 15.

110 Motion NDM5680, 3 February 2015.

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

with Welsh stakeholders.[112] Carl Sargeant, the then Welsh Government Minister for Natural Resources, asked Brandon Lewis, the then 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 then Assembly withheld consent for the Bill.[113] 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, until 2018 the then National Assembly for Wales' legislative competence was 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.

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.[114] Nick Boles, the then UK Government 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.[115]

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.[116] 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

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112 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.
113 Motion NDM5995, 15 March 2016.
114 Motion NDM5932, 26 January 2016.
115 HC Deb 28 April 2016 Vol 608 c1548
116 Written Statement, Mark Drakeford AM, Cabinet Secretary for Finance and Local Government, 16 January 2017.

Government decided against making a reference to the Supreme Court.[117]

European Union (Withdrawal) Bill 2017-19

The Welsh Government initially agreed with the Scottish Government that the *EU (Withdrawal) Bill* amounted to a "power grab" and had recommended against consent being granted for the Bill as introduced. Following negotiations between the Welsh and UK Governments, the latter proposed a number of amendments to seek to address or mitigate some of the concerns raised. A legislative consent motion was therefore debated and voted on in the then Welsh Assembly on 15 May 2018. A majority of Assembly Members voted to grant consent.

European Union (Withdrawal Agreement) Bill 2019-20

On 6 January 2020, the Welsh Government laid a legislative consent memorandum which recommended that the then Welsh Assembly should not give consent to the *EU (Withdrawal Agreement) Bill*. The then Assembly voted on the memorandum on 21 January, denying consent by 35 votes to 15.

[117] 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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