



# The Sewel Convention

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The Sewel Convention applies when the UK Parliament legislates on a matter which is devolved to the Scottish Parliament. It holds that this will happen only if the Scottish Parliament has given its consent.

The Convention has attracted a measure of criticism, on various grounds: that it has been used more frequently than was anticipated when it was introduced; that it has become an arrangement between the Scottish Executive and the UK Government, rather than between the two Parliaments; that it is a “soft” practice, not enshrined in statute nor parliamentary orders; and that it reduces the scope for informed scrutiny of legislation.

In November 2005 the Scottish Parliament made changes to its Standing Orders, following recommendations by its Procedures Committee, to entrench the procedures through which it gives its consent.

The Scottish Affairs Committee announced an inquiry entitled *The Sewel Convention: the Westminster perspective* on 27 October 2005.

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## Outline of the Sewel Convention

The “Sewel Convention” is a colloquial term for the UK Government's stated policy on legislation concerning devolved matters in the UK Parliament. It is named after the Government Minister, Lord Sewel, who set out the terms of the policy in the House of Lords during the passage of the *Scotland Bill 1997-98* on 21 July 1998:<sup>1</sup>

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

The Sewel Convention is just that: a convention. It is not enshrined in the *Scotland Act 1998*. However, it was embodied in the Memorandum of Understanding between the UK Government and the devolved executives, which was drawn up in 1999.<sup>2</sup> The Memorandum gives a broad statement of principles for relations between the executive authorities in the UK, Scotland, Wales and Northern Ireland. The Memorandum is not intended to be legally binding, but it does represent a political undertaking.<sup>3</sup>

The thinking behind the Convention is that the UK Parliament, as a sovereign body, retains full legal power to legislate on devolved matters, yet the spirit of devolution implies that political power rests with the Scottish Parliament. In order to avoid conflict, the Government undertook not to seek nor support relevant legislation in the UK Parliament without the prior consent of the Scottish Parliament. This consent is embodied in a “Sewel motion,” or, formally, a “legislative consent motion.”

The Sewel Convention applies when UK bills make provision for a devolved purpose (ie a matter on which the Scottish Parliament is competent to legislate), when they vary the legislative competence of the Scottish Parliament, or when they vary the executive competence of Scottish Ministers.<sup>4</sup>

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<sup>1</sup> HL Deb 21 Jul 1998 Vol 592 c 791

<sup>2</sup> [http://www.dca.gov.uk/constitution/devolution/pubs/odpm\\_dev\\_600629.pdf](http://www.dca.gov.uk/constitution/devolution/pubs/odpm_dev_600629.pdf). Latest version is Cm 5240, December 2001.

<sup>3</sup> For further detail, see SN/PC/3767, *Concordats and Devolution Guidance Notes*, 7 October 2005. [http://10.160.3.10:81/PIMS/Static%20Files/Extended%20File%20Scan%20Files/LIBRARY\\_OTHER\\_PAPERS/STANDARD\\_NOTE/snpc-03767.pdf](http://10.160.3.10:81/PIMS/Static%20Files/Extended%20File%20Scan%20Files/LIBRARY_OTHER_PAPERS/STANDARD_NOTE/snpc-03767.pdf).

<sup>4</sup> 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, 7<sup>th</sup> 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: <http://www.scottish.parliament.uk/business/committees/procedures/reports-05/prr05-07-vol02-01.htm>.

## A. Details

### 1. Origins

The White Paper, *Scotland's Parliament*, published in July 1997, stated that the UK Parliament would retain the power to legislate not just in reserved matters, but in devolved matters too. This was presented as an essential feature of its sovereignty, and as a recognition that no Parliament could bind its successors.<sup>5</sup> It was also felt that

there may be instances (eg international obligations which touch on devolved as well as reserved matters) where it will be more convenient for legislation to be passed by the UK Parliament.<sup>6</sup>

To this end Section 28 (7) of the Scotland Act 1998 provided that, “this Section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.”

When Lord Sewel made his eponymous comments he was responding to concerns that this power might lead to conflict between the Scottish and UK Parliaments. He made the point that it might sometimes be more appropriate for the UK Parliament to legislate, but that the Government expected it would do so only with the consent of the Scottish Parliament. The implication was that the Convention would have a restraining effect on the exercise by Westminster of the powers arising from its sovereignty. He went on to say that “if problems do arise the solution is for the Scottish Executive and the United Kingdom Government to resolve the matter through political dialogue.”<sup>7</sup>

### 2. Operation

Information on how the UK Government operates the Convention in practice is given in Devolution Guidance Note 10 (DGN 10), *Post-devolution primary legislation affecting Scotland*, issued by the Department for Constitutional Affairs.<sup>8</sup> There is a more detailed commentary in the evidence submitted by the Scotland Office to the Scottish Parliament Procedures Committee in 2005.<sup>9</sup>

DGN 10 states that:<sup>10</sup>

- the Memorandum of Understanding indicates that there will be consultation with the Scottish Executive on policy proposals affecting devolved matters whether or not they involve legislative change;
- although the convention refers to the Scottish Parliament, UK departments will in practice deal with the Scottish Executive. Departments should approach the Executive to gain consent for legislation when appropriate. It

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<sup>5</sup> *Scotland's Parliament*, Cm 3658, July 1997, para 4.2.

<sup>6</sup> Para 4.4.

<sup>7</sup> HL Deb 21 July 1998, c791.

<sup>8</sup> <http://www.dca.gov.uk/constitution/devolution/guidance/dgn10.pdf>.

<sup>9</sup> “Memorandum by the UK Government,” in Scottish Parliament Procedures Committee, *The Sewel Convention*, 7<sup>th</sup> report 2005, SP Paper 428, Annexe C, 5 October 2005,

<http://www.scottish.parliament.uk/business/committees/procedures/reports-05/prr05-07-vol02-01.htm>.

<sup>10</sup> <http://www.devolution.odpm.gov.uk/dgn/pdf/dgn10.pdf>

will be for the Scottish Executive to indicate the view of the Scottish Parliament and to take whatever steps are appropriate to ascertain that view.

- whether consent is needed depends on the purpose of the legislation. Consent need only be obtained for legislative provisions which are specifically for devolved purposes, although Departments should consult the Scottish Executive on changes in devolved areas of law which are incidental to or consequential on provisions made for reserved purposes.
- always consult your Legal Adviser and the Scotland Office if you are in any doubt about whether a proposal may trespass on devolved matters. Do not assume that the Scottish Executive will necessarily share your view about where the boundaries lie as between reserved and devolved matters; and always consult Legal Advisers, including the Office of the Solicitor to the Advocate General (OSAG), and the Scottish Executive about these issues at an early stage in developing proposals for legislation.

DGN 10 also states that:

The convention relates to Bills before Parliament, but departments should approach the Scottish Executive on the same basis for Bills being published in draft, even though there is no formal requirement to do so.

In 2002 the Scotland Office presented evidence to the Scottish Parliament Procedures Committee, in which it characterised the Convention in pragmatic terms:<sup>11</sup>

The Government believe the Sewel Convention allows pragmatic solutions to be developed in proposing legislation, in both the UK and Scottish Parliaments. The Convention allows legislation at Westminster to be made for devolved matters when there are practical benefits for doing so, whilst recognising the role of the Scottish Parliament. Benefits include:

- reflecting the extent of legislation by the UK Parliament, which either the Scottish Executive wish to apply, or that needs to be extended to Scotland (for example, to make provisions in England and Wales work properly);
- maximising the efficient use of the time of legislators in both the UK and Scottish Parliaments, by avoiding the Scottish Parliament making identical legislation to provisions planned for England by the Government. This increases the Scottish Parliament's capacity to deliver by freeing up time for legislation on other devolved matters;
- enabling the UK Parliament to make UK-wide legislation, perhaps to ensure a single effective measure such as establishing a single UK implementing body; and
- to enable legislation to be made for devolved matters in Scotland securely, i.e. to avoid any risk of legal challenge to the *vires* of the Scottish Parliament.

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<sup>11</sup> Scottish Parliament Procedures Committee inquiry the Sewel convention: memorandum by the Scotland office, ODPM, October 2002, [http://www.scottishsecretary.gov.uk/Publications/PCR%20%20\(FinalEvidenceonSeweltoSPProceduresCom\)m/GP291102.htm](http://www.scottishsecretary.gov.uk/Publications/PCR%20%20(FinalEvidenceonSeweltoSPProceduresCom)m/GP291102.htm)

Legislation based on any of these benefits often involves dealing with highly technical matters, which may not in fact raise any, or any significant policy issues. If not included for Scotland in a UK Bill, the Scottish Parliament might have great difficulty in finding the time to legislate in these areas.

In 2003 a parliamentary answer from Helen Liddell, Secretary of State for Scotland, confirmed the government's position:<sup>12</sup>

The "Sewel Convention" is a commitment made by the Government during the passage of the Scotland Bill 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". Proposals for the inclusion of provisions relating to devolved matters in a UK Bill, and therefore the need to invoke the Sewel Convention, arise at the initiative of either the UK Government or the Executive, but in every case, require a process of discussion and agreement between the two Administrations. That process normally involves an exchange of correspondence between the UK Minister who is in charge of the Bill and the First Minister, or the relevant portfolio Minister. My Department recently provided written evidence to the Scottish Parliament's Procedures Committee on the way in which Sewel motions work. Further information on Sewel motions is provided in Devolution Guidance Note 10, "Post-Devolution Primary Legislation Affecting Scotland", which is published on the Office of the Deputy Prime Minister's website.

### **3. Sewel motions**

If the UK Government and the Scottish Executive agree that Westminster should legislate on a particular devolved matter, the Scottish Executive seeks the consent of the Scottish Parliament. It does this by introducing a motion that the UK Parliament should so legislate. These are known as "Sewel motions" or "legislative consent motions."

The procedure on this has evolved. Initially it was informal. The Scottish Executive would produce a memorandum about the bill, which was usually sent to the relevant committee. The committee could debate the motion if it wished, in addition to the debate in plenary. The Scottish Parliament indicated its consent by passing the motion.

In November 2005 the Scottish Parliament made changes to its Standing Orders to formalise the arrangements.<sup>13</sup> In doing so it was accepting the recommendations of its Procedures Committee, annexed to that Committee's report of the previous month.<sup>14</sup> The new provisions were set out in Chapter 9B of the Standing Orders. They formalised existing practice and introduced some new language.

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<sup>12</sup> HC Deb 5 Feb 2003 399 c291W

<sup>13</sup> *Minutes of Proceedings*, vol 3, no 35 Session 2, 23 November 2005. The Standing Orders are at: <http://www.scottish.parliament.uk/business/so/sto-c.htm>.

<sup>14</sup> *The Sewel Convention*, 7<sup>th</sup> report 2005, SP Paper 428, 5 October 2005: <http://www.scottish.parliament.uk/business/committees/procedures/reports-05/pr05-07-vol01.htm>.

Under the Standing Orders the Scottish Executive submits a “legislative consent memorandum” on any Sewel bill, which is passed to the relevant committee(s). The committee considers and reports on the memorandum. In the case of multiple committees, one is designated the lead committee and the other(s) report to it.<sup>15</sup>

Memoranda are submitted within two weeks of a Government bill being introduced. For a Private Member’s Bill they are submitted within two weeks of the bill completing its first amending stage.

Memoranda are also submitted when amendments are agreed to, or when they are tabled or supported by the Government, that make new provision in devolved matters, or that go beyond consent already given. These also are submitted within two weeks of the amendment being agreed to or tabled, respectively.

The legislative consent memorandum summarises what the bill does and its policy objectives, specifies the “Sewel” element, includes a draft of the legislative consent motion and gives the argument as to why it is necessary.

The legislative consent motion is not normally lodged until after the lead committee has reported.

The Scottish Parliament Procedures Committee discussed Sewel motions as were in June 2002.<sup>16</sup> The paper written for the Committee commented:

The Parliament’s standing orders do not identify Sewel motions as a distinct category of motion – in procedural terms, they are no different from any other motion. One implication of this is that they are subject to Rule 8.4.1, and can be amended. There has already been one example of an amendment to replace consent to the UK Parliament legislating on a devolved matter with an assertion of the Parliament’s right so to legislate.<sup>17</sup> It would also be possible, for example, for an amendment to seek to narrow the consent proposed to be given by a particular Sewel motion. (This might, in some cases, be an alternative to opposing the motion altogether.)

Chapter 9B of the Standing Orders does not exempt legislative consent motions from Rule 8.4.1, so they are still amendable.

The Sewel Convention has little effect in procedural terms at Westminster.<sup>18</sup>

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<sup>15</sup> The SO states that the lead committee “shall” report, whereas the secondary committee(s) “may” do so.

<sup>16</sup> Available at [http://www.scottish.parliament.uk/official\\_report/cttee/proced-02/prp02-09.pdf](http://www.scottish.parliament.uk/official_report/cttee/proced-02/prp02-09.pdf). The paper was debated at a meeting of the Committee on 9 June 2002, available at [http://www.scottish.parliament.uk/official\\_report/cttee/proced-02/pr02-0902.htm](http://www.scottish.parliament.uk/official_report/cttee/proced-02/pr02-0902.htm)

<sup>17</sup> The example was the (unsuccessful) SNP amendment to the motion on the *Anti-Terrorism, Crime and Security Bill*

<sup>18</sup> Memorandum by Paul Hayter (Clerk of the Parliaments) and Roger Sands (Clerk of the House of Commons), in Scottish Parliament Procedures Committee, *The Sewel Convention*, 7<sup>th</sup> report 2005, SP Paper 428, Annexe D, 5 October 2005, <http://www.scottish.parliament.uk/business/committees/procedures/reports-05/prr05-07-vol02-01.htm>.

#### **4. Private Members' Bills**

Margaret Beckett, as Leader of the House, submitted evidence to the Procedure Committee of the House of Commons in 1998, in which she commented on Private Members' Bills:<sup>19</sup>

The Government is likely to oppose any private Member's bill which seeks to alter the law on devolved subjects in Scotland or Northern Ireland. It will remain a question of judgement for individual Members whether to introduce legislation on an issue which Parliament has already decided should be devolved, unless it is clear that the proposal has the support of the devolved body concerned.

Scotland's First Minister, Donald Dewar, during a statement to the Scottish Parliament on 9 June 1999, made the following comments on Private Members' Bills:<sup>20</sup>

In addition, the Scottish Executive expects that the UK Government will oppose any private member's bill that seeks to alter the law on devolved subjects unless it is clear that the proposal has the support of the relevant devolved body. That is also the position of the UK Government.

#### **5. Amendment of bills subject to a Sewel motion**

There has been discussion about the role of the Scottish Parliament in cases where Sewel bills are amended in significant ways during their passage through the UK Parliament.

The Scottish Affairs Committee took evidence from the Secretary of State, Helen Liddell, Scotland Office Minister George Foulkes and Advocate General for Scotland, Lynda Clark, on the Scotland Office Annual Report on 7 November 2001.<sup>21</sup> Committee member Mike Weir asked if there were any procedures to take account of the views of the Scottish Parliament when bills are amended in this way. Mrs Liddell and Mr Foulkes answered initially in terms of liaison with the Scottish Executive, but Mr Weir pressed the point:

(Mr Weir) That is the Executive in the law offices, but what I am asking is about Parliament itself, which passed the Sewel Motion on the basis of the Bill as drafted. I am not trying to be difficult here, I am just pointing out that this important bit of legislation could become a flashpoint between the two Parliaments.

(Mr Foulkes): You are certainly not being difficult, in fact I think you are being helpful. I do not know if it is intentional or not! Of course, it would be up to the Scottish Executive and it would be open to them to go back to the Scottish Parliament if there were to be a substantive change in the Bill in relation to Scotland during the course of the Committee stage. That might well happen.

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<sup>19</sup> Procedure Committee *Procedural Consequences of Devolution: Interim Report*, HC 148 of 1998-99, 13.1.99, Appendix 1, para 15

<sup>20</sup> Scottish Parliament Official Report, 9 June 1999 Vol 1 c358

<sup>21</sup> HC 345-i 2001-02, 21 February 2002, at:  
<http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmselect/cmsscota/345/1110701.htm>

(Mr Weir) There is no obligation on them to do so. That is the point I was coming to. The Executive could decide it is an important change to put before the Parliament. Equally, they could say "We agree with Westminster. Get on with it."

(Mr Foulkes) I think there may be no legal obligation but I think there might be a political imperative for them to do that, if there was a major change in relation to the principle. In relation to the question of mandatory/discretionary, that would be a major change.<sup>22</sup>

DGN 10 makes the following comment on amendments:

17. During the passage of legislation, departments should approach the Scottish Executive about Government amendments changing or introducing provisions requiring consent, or any other such amendments which the Government is minded to accept. It will be for the Scottish Executive to indicate the view of the Scottish Parliament. No consultation is required for other amendments tabled. Ministers resisting non-Government amendments should not rest solely on the argument that they lack the consent of the Scottish Parliament unless there is advice to that effect from the Scottish Executive.

18. The Scottish Executive can be expected to deal swiftly with issues which arise during the passage of a Bill, and to recognise the exigencies of legislative timetables (eg when forced to consider accepting amendments at short notice). Nevertheless since the last opportunity for amendment is at Third Reading in the Lords or Report Stage in the Commons the absence of consent should not be a bar to proceeding with the Bill in the interim.

The Scottish Executive has always undertaken that if the provisions in a Westminster bill concerning devolved matters were amended significantly, it would inform the Scottish Parliament by means of a supplementary memorandum:

A further motion would be required if the effect of the amendments was to introduce new provisions on devolved matters which went beyond the terms of the motion to which the Parliament had agreed.<sup>23</sup>

In the November 2005 changes to the Scottish Parliament's Standing Orders an attempt was made to formalise this, though it remains to be seen if there is still scope for argument over whether a particular amendment goes beyond existing consent.

## 6. Frequency of use

It is commonly argued that Sewel motions are used more frequently than was envisaged when Lord Sewel made his original comments. The Scottish Parliament's Procedures Committee took evidence from a number of witnesses who questioned this, arguing that

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<sup>22</sup> Evidence to Scottish Affairs Committee, 7 November 2001, Questions 17 – 18 <http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmselect/cmselect/345/1110702.htm>

<sup>23</sup> Memorandum by the Scottish Executive, in Scottish Parliament Procedures Committee, 7<sup>th</sup> report 2005, *The Sewel Convention*, SP Paper 428, Annexe C, 5 October 2005, para 12. <http://www.scottish.parliament.uk/business/committees/procedures/reports-05/prr05-07-vol02-01.htm>.

there was little or no clear expectation in the beginning as to how frequently consent would be sought or given.<sup>24</sup>

The Scottish Executive website provides information on the Sewel Convention, including a list of motions, the accompanying memoranda and a link to the relevant debate in the Scottish Parliament:

<http://www.scotland.gov.uk/Topics/Government/Sewel/Introduction>.

The Scottish Parliament Information Centre also maintains a list of Sewel motions, with references to the debates on them in plenary and in committee:<sup>25</sup>

<http://www.scottish.parliament.uk/business/research/briefings-05/SewelMotionsSession2.pdf>

According to the Scottish Parliament's Procedures Committee,

during Session 1, 39 Sewel motions were agreed to by the Parliament, relating to 38 Westminster Bills. So far during Session 2 (up to 27 September 2005), there have been 22 motions relating to 22 Bills. All the motions have been lodged and moved by Executive ministers; all have been agreed to (in all but one case without amendment). Of the Session 1 motions, 28 were debated in the Chamber only, without prior consideration by a committee, while the other 11 were first considered by a committee (and then, in most cases, disposed of formally in the Chamber, without further debate). This Session so far, only two have been considered in the Chamber only. Of the remaining 20, six were considered at more than one committee meeting and all but two were debated again in the Chamber (rather than moved formally).<sup>26</sup>

A House of Commons written answer in 2004 gave lists of legislation enacted at Westminster following a Sewel motion, and of bills which failed or were in progress at that time.<sup>27</sup> A written answer in October 2005 gave the number of hours spent on Scottish bills on the floor of the House between the parliamentary sessions 1992-93 and 1999-2000.<sup>28</sup>

## B. Opinions

The frequency of use of Sewel motions has been one of the main targets of criticism, regardless of what the original expectation may or may not have been. When Lord Sewel set out the Convention it was a statement of restraint, intended to show that the UK Parliament would refrain, except on a consensual basis, from using its legal power to

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<sup>24</sup> *The Sewel Convention*, SP Paper 428, 5 October 2005.

<http://www.scottish.parliament.uk/business/committees/procedures/reports-05/pr05-07-vol02-01.htm>.

<sup>25</sup> *Sewel motions: session 2*, Scottish Parliament Fact sheet, 19 October 2005.

<sup>26</sup> *The Sewel Convention*, 7<sup>th</sup> report of the Procedures Committee 2005, SP Paper 428, 5 October 2005, paras 25-26.

<sup>27</sup> HC Deb 22 July 2004, cc460-2w:

[http://www.publications.parliament.uk/pa/cm200304/cmhansrd/vo040722/text/40722w20.htm#40722w20.html\\_wqn9](http://www.publications.parliament.uk/pa/cm200304/cmhansrd/vo040722/text/40722w20.htm#40722w20.html_wqn9).

<sup>28</sup> HC Deb 24 October 2005, c84w:

[http://www.publications.parliament.uk/pa/cm200506/cmhansrd/cm051024/text/51024w22.htm#51024w22.html\\_wqn5](http://www.publications.parliament.uk/pa/cm200506/cmhansrd/cm051024/text/51024w22.htm#51024w22.html_wqn5).

legislate in devolved matters. However, the exception has generated more interest than the restraint. The “Sewel” epithet is now a by-word for UK Parliamentary involvement.

Another criticism is that the Convention has become a matter of relations between the Scottish Executive and the UK Government, rather than coming clearly under the ownership of the two Parliaments. To some extent, this may be related to the composition of the respective governments and Parliaments. It might be that the dynamics of the Convention in use would change in the event that different parties came to power in the UK and in Scotland. Nevertheless, the present situation has given rise to concern in some quarters.

A further strand of criticism, related to the others, is that the use of Sewel motions reduces the scope for scrutiny by the Scottish Parliament.

Critics of the Convention have called for it to be used less often, and for it to be embedded in better articulated procedures in each Parliament.

Those who support the Convention argue that it is necessary in order for devolution to work. In their view it has been a success, because it has largely prevented conflict over which Parliament should be legislating on a given matter. They see it as a pragmatic mechanism and one that protects, rather than detracts from, the powers of the Scottish Parliament.

## **1. The two governments**

In 2005 the Scotland Office stated that “the UK Government ... consider that the continuation of the Convention is vital to the success of devolution.”<sup>29</sup>

At the same time the Scottish Executive described the Sewel Convention as “a cornerstone of the devolution settlement,” and it made the following comment:<sup>30</sup>

the Convention has provided an important constitutional safeguard which reflects and respects the devolution settlement and operates to the benefit of the people of Scotland.

## **2. House of Commons Procedure Committee**

In 1999 the Procedure Committee considered the Sewel Convention in its report, *The Procedural Consequences of Devolution*.<sup>31</sup> The Government submitted its view, setting out the Convention, in a memorandum to the Committee.<sup>32</sup> The Committee stated that,<sup>33</sup>

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<sup>29</sup> “Memorandum by the UK Government,” in Scottish Parliament Procedures Committee, 7<sup>th</sup> report 2005, *The Sewel Convention*, SP Paper 428, Annexe C, 5 October 2005.

<http://www.scottish.parliament.uk/business/committees/procedures/reports-05/prr05-07-vol02-01.htm>.

<sup>30</sup> Memorandum by the Scottish Executive, in Scottish Parliament Procedures Committee, 7<sup>th</sup> report 2005, *The Sewel Convention*, SP Paper 428, Annexe C, 5 October 2005, paras 3-4.

<http://www.scottish.parliament.uk/business/committees/procedures/reports-05/prr05-07-vol02-01.htm>.

<sup>31</sup> 4<sup>th</sup> report 1998-99, HC 185, 24 May 1999.

<sup>32</sup> 1<sup>st</sup> report 1998-99, *Procedural Consequences of Devolution: interim report*, HC 148, 18 January 1999, Appendix 1, para 17.

<sup>33</sup> Para 26.

we support the principles behind this statement and agree that the House should not legislate on devolved matters without the consent of the legislature concerned. Such matters have been dealt with by convention in the past, and we expect such a convention to be established once more.

The reference to a past precedent for dealing with such matters through a convention, rather than through standing orders, was to the arrangements for Northern Ireland under the *Government of Ireland Act 1920*. There is commentary on this, along with further detail on the pre-history of the Sewel Convention, in a memorandum to the Procedure Committee by the Clerk of the House.<sup>34</sup>

### 3. Lord Sewel

Lord Sewel himself gave evidence to the Scottish Parliament Procedures Committee in 2005. He said,<sup>35</sup>

while a strong case for the use of Sewel motions can be made in relation to minor and technical matters that do not raise substantive points of policy, the Parliament should be cautious in using the Sewel route for matters of major policy, especially where the policy is contested and a matter of controversy. The more controversial a policy the more cautious the Parliament should be to transfer legislative competence. To have recourse to Sewel motions in these circumstances would be a negation of the 'spirit' of the devolution settlement, a denial of the proper purpose of a parliament and an attenuation of political accountability.

He went on to argue that the Convention had been broadened since he enunciated it, and he was unhappy with this. The original intention was that the Convention should apply only to legislation on devolved matters. Its application to measures giving additional powers to Scottish Ministers "results in real confusion."<sup>36</sup> He pointed to cases in which there had been confusion as to where legislative competence lay (whether at the Scottish or UK level), because of the complexity by which that competence was arrived at:<sup>37</sup>

Under present arrangements a Sewel motion is used to signify the support of the Scottish Parliament for Westminster legislation modifying the powers of Scottish ministers. A proposal to give Scottish ministers powers in relation to a reserved matter is itself a reserved decision. Although there may well be a strong case for seeking the view of the Scottish Parliament on such a proposal, it is difficult to reconcile the present practice with the original purpose of the Sewel Convention.

He concluded:<sup>38</sup>

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

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<sup>34</sup> HC 185, 1998-99, Appendix 18, paras 93-99.

<sup>35</sup> Submission from Lord Sewel, in Scottish Parliament Procedures Committee, 7<sup>th</sup> report 2005, *The Sewel Convention*, SP Paper 428, Annexe C, 5 October 2005, para 8.  
<http://www.scottish.parliament.uk/business/committees/procedures/reports-05/prr05-07-vol02-01.htm>.

<sup>36</sup> Para 10.

<sup>37</sup> Para 9.

<sup>38</sup> Para 10.

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.

Lord Sewel also argued that the Scottish Parliament should introduce new procedures to take ownership of the Convention, turning it into a more clearly articulated interface between the Scottish and UK Parliaments, and that it should set up a committee to oversee the process.

#### **4. House of Lords Constitution Committee**

The House of Lords Constitution Committee discussed the Sewel Convention in 2003, in its report entitled *Devolution: inter-institutional relations in the United Kingdom*.<sup>39</sup> It noted the evidence of Professor Alan Page:<sup>40</sup>

Professor Page's explanation for the frequency of legislation emphasised pulls toward uniformity across the UK despite the existence of a Scottish Parliament. These arose from a variety of factors, including electoral expectations, the administration of policies by UK bodies, avoiding 'regulatory arbitrage', applying EU or international law, or simply seeing no good reason why the law should differ between Scotland and other parts of the UK. Professor Page also highlighted reasons why such legislation may be attractive to the Scottish Executive, including the reliance on the UK Government to initiate reforms, avoiding disruption to the Executive's legislative programme for the Scottish Parliament, and avoiding any risk of legal uncertainty about the validity of Scottish legislation.

The Committee set out its concerns over the operation of the Sewel Convention.<sup>41</sup> These included that the Scottish Parliament had only one opportunity to consider a bill under Sewel, whereas it would have several opportunities if the matter were the subject of legislation in the Scottish Parliament itself. It lost the opportunity to amend the legislation, or, often, to consider the bill again if it were amended in the UK Parliament. The Committee was also concerned that "an issue which is fundamentally about co-operation between legislatures has turned in practice into co-operation between executives."<sup>42</sup>

The Committee said that the idea "interests us" of introducing a scrutiny reserve, similar to the procedure for EU matters, so that the Scottish Parliament would have a chance to give further approval to amendments touching on devolved matters. It also made a recommendation for contact between the two parliaments:<sup>43</sup>

While the UK Government may have a view about whether a Bill affects devolved matters or not, and what action should be taken as a result, we recommend that such communication should be between the UK Parliament and Scottish Parliament, not mediated by the executives at each end.

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<sup>39</sup> 2<sup>nd</sup> report 2002-03, HL 28, 16 January 2003, paras 126-33.

<sup>40</sup> Para 127.

<sup>41</sup> Paras 129-30.

<sup>42</sup> Para 130.

<sup>43</sup> Para 131.

The House of Lords Constitution Committee returned to Sewel in November 2004, when it published a report entitled *Devolution: Its Effect on the Practice of Legislation at Westminster*.<sup>44</sup> This contained an appended paper by Professor CMG Himsworth, in which he summarised concerns. These included the lack of “specialised Scottish scrutiny” which might be “more detailed and expert” if carried out in the Scottish Parliament rather than at Westminster.<sup>45</sup> The general consent which the Scottish Parliament gives in the form of a Sewel motion implies consent to the principles of the Bill, although it is given on the basis of the Scottish Executive’s memorandum rather than the Bill itself. But as for the detailed scrutiny:<sup>46</sup>

There can be no guarantee of the sufficiency of Scottish parliamentary expertise; or time spent on the Scottish issues; or access by lobbying groups, now more focused on Holyrood. At a technical level, there can be no direct provision for an input into Bill procedures at Westminster from the Scottish Parliament’s Subordinate Legislation Committee where powers are conferred on the Scottish Ministers.

## 5. Scottish Parliament’s Procedures Committee

In October 2005 the Scottish Parliament’s Procedures Committee published a report entitled *The Sewel Convention*.<sup>47</sup> This included a wide range of evidence from politicians, principally MSPs, and academics, encompassing a span of opinion.

In broad terms, the Committee saw the need for a mechanism such as the Sewel Convention. It acknowledged differences of opinion about the frequency of use of Sewel motions and the operation of the Convention, but it felt that it did not in principle take away from the Scottish Parliament’s powers. Instead, at the level of principle, the Convention was an important statement of the political primacy of the Scottish Parliament in devolved areas.

However, the Committee acknowledged difficulties of perception, and argued that transparency and certainty were impaired by the informal nature of the Convention. The Committee’s main recommendation was for “a new set of Rules to regulate the Sewel scrutiny process within the [Scottish] Parliament.”<sup>48</sup> As mentioned above, this recommendation was accepted by the Parliament and new rules were introduced in November 2005.

The Committee said,<sup>49</sup>

we recognise, like most of our witnesses, that the devolved arrangements put in place in 1998 create a need for some mechanism along the lines of what has become known as the Sewel Convention.

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<sup>44</sup> 15<sup>th</sup> report 2003-04, HL 192, 18 November 2004:

<http://pubs1.tso.parliament.uk/pa/ld200304/ldselect/ldconst/192/19202.htm>.

<sup>45</sup> Paras 52-53.

<sup>46</sup> Para 53.

<sup>47</sup> 7<sup>th</sup> report 2005, SP Paper 428, 5 October 2005:

<http://www.scottish.parliament.uk/business/committees/procedures/reports-05/prr05-07-vol01.htm>.

<sup>48</sup> Para 212.

<sup>49</sup> Para 126.

The Convention was an important political move, securing the Scottish Parliament's primacy in devolved matters, notwithstanding the continuing sovereignty of the UK Parliament. The Committee went on:<sup>50</sup>

We also believe that the Convention is there to be used in appropriate circumstances. We may differ among ourselves about how often we would expect that to be, or about the criteria that should be applied in identifying suitable opportunities, but we all recognise that circumstances will from time to time arise – and have done already – where Scotland can secure, by being included in legislation at Westminster, an outcome that would not otherwise easily be available. We therefore accept that Sewel motions can be a legitimate Parliamentary device.

The Committee recognised the feeling that the mechanism had been used more often than was envisaged at the time of Lord Sewel's comments, but it declined to comment on whether it had been used to excess. It noted the view of some witnesses that there was no clear guide as to anticipated frequency of use in 1998. The Committee rejected the argument that the use of the Sewel Convention eroded the devolution settlement.<sup>51</sup>

The Parliament's powers are set out in statute and are new powers, created in addition to Westminster's. Since they have not been transferred from Westminster, they cannot be "handed back". All that a Sewel motion can do is convey the Parliament's agreement to Westminster legislating in a devolved area on a particular occasion. This does not weaken the Parliament's right to refuse consent the next time, even in very similar circumstances, still less its power to legislate itself in that area (including by varying or even repealing any Westminster legislation to which it previously consented). It is therefore incorrect to say that when the Parliament agrees to a Sewel motion to enable Westminster to legislate on a devolved matter, this somehow involves the Parliament handing back powers to Westminster. Such an assertion betrays a basic misunderstanding of devolution.

The Committee argued that the Convention had been largely successful in preventing Government legislation from "straying inadvertently into devolved areas."<sup>52</sup> However, the emphasis on making the Convention work at a level of detail in the everyday life of departments had led to a "perception of an Executive-driven process in which the Parliamentary role is secondary."<sup>53</sup>

The Committee acknowledged the "suspicion and even hostility" with which Sewel was regarded in some quarters.<sup>54</sup> It went on:

We therefore believe it would now be in everyone's interests if the Parliament as a whole was to assume a greater degree of control and ownership over the process, including by embedding the main elements of Sewel scrutiny into the standing orders.

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<sup>50</sup> Para 130.

<sup>51</sup> Para 132.

<sup>52</sup> Para 134.

<sup>53</sup> Para 135.

<sup>54</sup> Para 135.

In making this recommendation, the Committee was particularly concerned that future scrutiny should be a right, rather than depending on Ministers' willingness to provide time and documentation. In addition, greater transparency would be achieved if the procedure were embedded in Standing Orders, since every step of the scrutiny process would be properly documented.

The Summary of Conclusions in full was as follows:

#### SUMMARY OF CONCLUSIONS

209. The Procedures Committee has conducted this inquiry conscious of widespread criticisms made about the operation of the Sewel Convention. **We believe that it is in no-one's interests for a significant aspect of the Parliament's business, and its principal interface with the Westminster Parliament, to be so dogged by controversy and misunderstanding.** (paragraphs 1 to 4)

210. Our aim in this report is twofold. **At a procedural level, locating the current, largely ad hoc procedures within the framework of the Rules should enable better information to be made available, enhancing the opportunities for scrutiny and increasing transparency.** In so doing, we hope to give the Parliament shared ownership in what has hitherto been regarded as a device used by and for the Executive alone. **At a political level, there is a broader goal – to secure a degree of consensus about the general need for procedures of this sort and a shared understanding of when and how they should be used, and at the same time to lay to rest some of the persistent misunderstandings that have arisen.** (paragraphs 5 and 6)

211. We recognise the need for a mechanism along the lines of the Convention. **Its purpose is to assert the Parliament's political (if not legal) primacy in devolved areas** – any legislation must either be the product of its own deliberations or require its explicit consent. Either way, it remains in control. **We believe that this is a fundamental principle for the Parliament, and it is one we strongly endorse.** (paragraphs 126, 129)

212. Our main recommendation is for a new set of Rules to regulate the Sewel scrutiny process within the Parliament. We have aimed to devise procedures that are sufficiently flexible to accommodate all the circumstances that we think may arise. We don't see Sewel procedures as just being about enabling the Executive to obtain the consent it needs as part of its agreement with the UK Government. They are also about the Parliament as a whole maintaining awareness of what is happening at Westminster that impinges on its area of interest and responsibility, so that it is in a position to engage with that process in a timely and well-informed way. (paragraphs 138, 140, 146)

213. **We recommend that the Executive should provide information about the implications of the Bills announced in each Queen's Speech in a letter to the Presiding Officer, copied to all MSPs including committee conveners, and then brought prominently to the attention of the public through the Bulletin.** (paragraph 149)

214. **The memorandums provided by the Executive should become formal Parliamentary documents, required under standing orders. The Executive memorandum should either explain why the Executive intends to lodge a Sewel**

**motion, or why it does not. In addition, any non-Executive member proposing to lodge a Sewel motion should also first be required to provide his or her own memorandum.** (paragraphs 153, 159, 162)

215. On the question of when the Executive memorandum is required, we recommend that:

with any Government Bill introduced as a “relevant Bill” – that is, a Bill that makes provision for a devolved purpose, or that alters the Parliament’s legislative competence or the executive competence of Scottish Ministers – the memorandum should normally be lodged within two weeks of the Bill’s introduction;

with any Private Member’s Bill that is introduced as a relevant Bill, the memorandum should normally be lodged within two weeks of the Bill completing its first amending stage; and

with any Bill amended to become a relevant Bill, it should normally be lodged within two weeks of the amendments being tabled or supported by the Government, or otherwise being agreed to. (paragraphs 165-169)

216. The memorandum should give an outline of the Westminster Bill as a whole, plus further information about the relevant provision made. In most cases, it should also give reasons for supporting the provision that is to be made, and why it is considered better to make that provision in a Westminster Bill rather than by some other means – and should include a draft of the motion proposed. But where the Executive is not intending to lodge a Sewel motion, its memorandum would require instead to explain its reasons for not supporting the Westminster Bill. (paragraphs 170-72)

**217. Sewel scrutiny should continue to be carried out mainly by the existing subject committees,** with Westminster provisions to give the Executive new powers to make subordinate legislation also being considered by the Subordinate Legislation Committee. It should be for the Bureau to decide (or recommend) which committee should be the lead committee. **The lead committee’s report should normally be published at least five working days before the motion is debated in the Chamber.** (paragraphs 176-178, 183, 184)

**218. The motions – which we recommend are formally referred to as “Legislative Consent Motions” – should be capable of being lodged by any MSP,** but normally not until after the lead committee’s report has been published. The motion should clearly state what sort of consent is to be conveyed, and should identify the Westminster bill in question. Any additional wording used to set parameters on the extent of the consent conveyed should be as objective as possible. **Every such motion lodged should be taken in the Chamber.** The Bureau should take account of the lead committee’s view before deciding how much time (if any) to allocate for debate on the motion (paragraphs 186-191, 194-197)

219. We make no particular recommendation on whether committees should undertake further scrutiny of Westminster Bills after a motion has been agreed to. **We do not support the idea of a second opportunity for the Parliament to consider the Bill at the end of the Westminster process.** (paragraphs 200-2002)

220. Although not, strictly, within our remit, we also suggest some changes to Westminster procedure, including “tagging” relevant Bills in Parliamentary documents, and mentioning any Sewel implications in the Explanatory Notes. We also recommend that the Presiding Officer should send copies of any Legislative Consent resolution to the Speaker of the Commons and the Lord Chancellor. (paragraphs 203-206)