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Scottish Parliament Fact sheet

Consent Processes in the Scottish Parliament

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This fact sheet provides background information on the legislative consent processes in the Scottish Parliament arising from the Sewel Convention (primary legislation) and the Public Bodies Act 2011 (secondary legislation).



The Scottish Parliament
Pàrlamaid na h-Alba

CONSENT PROCESSES IN THE SCOTTISH PARLIAMENT

This paper provides background information on the legislative consent processes in the Scottish Parliament arising from the Sewel Convention (primary legislation) and the Public Bodies Act 2011 (secondary legislation).

SEWEL CONVENTION

The Sewel Convention was named after Lord Sewel, Minister of State in the Scottish Office during the passage of the Scotland Bill in 1998. In the Lords Committee stage of the Scotland Bill he stated that the Government expected:

“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” ([21 July 1998, Lords Hansard, vol 592, col 791](#)).

The principle of legislative consent was developed almost entirely at governmental level. It took formal shape in the Memorandum of Understanding (MoU) between the UK Government and the devolved administrations (the Scottish Executive, the Welsh Assembly Cabinet and the Northern Ireland Executive) in 2001. The latest version of the [MoU](#) was published in October 2013 and states:

“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.”

The MoU was supplemented by a series of Devolution Guidance Notes (DGNs), including DGN 10 ([Post-Devolution Primary Legislation affecting Scotland](#)), which was last updated in November 2005.

Following the Scottish Independence Referendum, the then Prime Minister, David Cameron, established a cross-party Commission under the chairmanship of Lord Smith. The [Smith Commission](#) was tasked with overseeing the process to take forward the devolution commitments on further powers for the Scottish Parliament. In line with one of the recommendations from the Smith Commission, the Sewel Convention was put on a statutory footing by Section 2 of the Scotland Act 2016. This inserted a new Section 28(8) of the Scotland Act 1998, which states:

“(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.”

LEGISLATIVE CONSENT MEMORANDUM AND MOTION

[Chapter 9B](#) of the Parliament’s Standing Orders sets out the rules and procedures for seeking legislative consent in the Scottish Parliament under the Sewel Convention. The requirement for consent only relates to primary legislation (bills) which has been introduced in the UK Parliament, the requirement to consent does not apply to secondary legislation (statutory instruments). Consent is also only required for UK bills which make ‘relevant provision’, which means provision which applies to Scotland in any of the following ways:

- for any purpose within the legislative competence of the Scottish Parliament
- to alter that legislative competence of the Scottish Parliament
- to alter the legislative or executive competence of the Scottish Ministers.

Executive competence relates to the devolution of powers to Scottish Ministers, including some responsibilities in reserved matters.

The limits on the legislative competence of the Scottish Parliament (reserved matters) are currently outlined in sections 29 and 30 and Schedules 4 and 5 of the Scotland Act 1998. For example, the Scottish Parliament has no power to legislate on constitutional matters. The same limits also apply to the executive competence of the Scottish Ministers, however executive competence over reserved matters can be conferred on Scottish Ministers by UK Acts. For example, the Railways Act 2005 gave Scottish Ministers sole responsibility for securing future ScotRail franchises.

A similar legislative consent process exists between the UK Parliament and the other devolved Assemblies.

Legislative Consent Memorandum

When any of the criteria on relevant provision are fulfilled a member of the Scottish Government is obliged to lodge a legislative consent memorandum. Prior to 30 November 2005, the memorandum was known as a Sewel memorandum.

Legislative consent memorandums may also be lodged by MSPs who are not Scottish Government Ministers, although this should not normally be done until a memorandum has been lodged on behalf of the Scottish Government.

All legislative consent memorandums should summarise what the Bill does, its policy objectives and specify the extent to which it makes relevant provision.

Legislative consent memorandums lodged by a member of the Scottish Government should also detail whether the Government intends lodging a legislative consent motion and the reasons for such a decision. If a legislative consent motion is expected to be lodged then the memorandum should include a draft of the motion.

Memorandums lodged by MSPs who are not members of the Scottish Government must include a draft legislative consent motion and must explain why it is appropriate for the UK Bill to make relevant provision.

A legislative consent memorandum should normally be lodged within two weeks of the Bill being introduced in the UK Parliament.

However, memorandums may be lodged at a later date, or be added to in a supplementary memorandum. This may be in order to reflect any amendments made to the Bill in either or both Houses of Parliament. For example, the memorandums for the Scotland Bill 2010-12 and Scotland Bill 2015-16 were both lodged at a date later than two weeks after introduction. Supplementary memorandums were also lodged for both Bills.

Consideration of the memorandum will be assigned to a lead Committee in the Scottish Parliament. Other Committees may consider the memorandum, referring their comments on the memorandum to the lead Committee. Where the Bill contains provisions which confers powers on Scottish Ministers to make subordinate legislation the Delegated Powers and Law Reform

Committee must consider those provisions and report on them to the lead Committee. The lead Committee will produce a report on the memorandum.

Legislative Consent Motion

As outlined above, when a Bill contains relevant provision, members of the Scottish Government may include a draft legislative consent motion in the memorandum, – other MSPs who choose to lodge a legislative consent memorandum must include a draft motion in their memorandum. Prior to 30 November 2005 such a motion was known as a Sewel motion.

The example of a legislative consent motion given in the Parliament's [Guidance on Motions](#), shows how such a motion is typically worded:

S4M-02496 John Swinney: Financial Services Bill – UK Legislation—That the Parliament agrees that the relevant provisions of the Financial Services Bill, introduced in the House of Commons on 26 January 2012, relating to the enhancement of understanding and knowledge of the public of financial matters and the ability of members of the public to manage their own financial affairs, so far as these matters fall within the legislative competence of the Scottish Parliament, should be considered by the UK Parliament.

Devolved legislatures may decline legislative consent by voting against a legislative consent motion. For example, in the National Assembly for Wales, on 8 February 2011, the Assembly Members declined to approve the legislative consent motion relating to Police and Crime Panels (PCPs) provisions in the Police and Social Responsibility Bill. This was the first time that a legislative consent motion was not agreed by a devolved legislature in the UK.

Following the refusal of legislative consent by the Assembly the UK Government amended the Bill to give the Home Secretary, rather than local authorities, the power to form PCPs within Wales. These panels would be established separately from local government structures and would be a free-standing body, formed and maintained by the Home Secretary.

The wording of a legislative consent motion in the Scottish Parliament may include a qualification to the Parliament giving its full consent to the UK Parliament legislating on its behalf. For example, the motion on the Welfare Reform Bill 2010-12 did not call for full legislative consent and urged the UK Government to reconsider the Welfare Reform Bill, stating:

“That the Parliament [...] on the matter of legislative consent, agrees that the relevant provisions of the Welfare Reform Bill, introduced in the House of Commons on 16 February 2011, [...] so far as these matters fall within the legislative competence of the Parliament, or alter the executive competence of the Scottish Ministers, should be considered by the UK Parliament; [...] while agreeing the above position, urges the UK Government to reconsider the Welfare Reform Bill and, more broadly, its welfare reform agenda, which the Parliament considers will adversely affect vulnerable people across Scotland.”

The Parliament's Guidance on Motions also allows for 'Reasoned Amendments' to legislative consent motions which include concerns about the content of a UK Bill, for example:

S2M-4317.1 Mr David Davidson: Police and Justice Bill - UK Legislation—As an amendment to motion S2M-4317 in the name of Cathy Jamieson (Police and Justice Bill – UK Legislation), insert at end “but, in doing so, expresses serious concerns over the ambiguity of the status of an extradition request in respect of a person domiciled in Scotland against whom the Lord Advocate has decided not to proceed; notes that the United States of America has not, over a period of some three years, ratified the bilateral

extradition treaty with the United Kingdom, and accordingly, in the interest of equality between nations and recognising the distinctive nature of the Scottish legal system and the need to protect the civil liberties and human rights of those living in Scotland, urges the Minister for Justice to make representations to the UK Government based upon these concerns.”

A legislative consent motion must normally be decided on before the Bill reaches its final amending stage at Westminster in the House where it was first introduced to Parliament (i.e. the Commons or the Lords).

INFORMING THE UK PARLIAMENT

As outlined above, the Scottish Parliament has placed part of the Sewel Convention process into its Standing Orders rules, but the Standing Orders make no mention of how the information on the decision made in the Scottish Parliament is to be conveyed to the UK Parliament.

In practice, the Clerk of the Scottish Parliament writes to the Clerks of the two Houses of the UK Parliament to inform them of the outcome of the decision taken on a legislative consent motion. The Clerk also sends a copy of the relevant Scottish Parliament Minutes and a copy of the legislative consent memorandum.

When a motion is decided on in the Scottish Parliament, a copy of the memorandum and the Clerk’s letter on the outcome of the decision on the motion should appear on the Bill Documents’ page on the UK Parliament’s website.

The decision on a motion is also indicated next to the relevant Bill in the Bills in Progress section of the [House of Lords Business](#) and the Bill should be tagged in the House of Commons’ Order Paper.

The Scottish Parliament also maintains a webpage for each of the UK Bills subject to legislative consent, arranged by the [UK Parliament session](#) date, with a link to the Bill’s page on the UK Parliament website. This webpage also details the scrutiny of the memorandum carried out by Scottish Parliament Committees.

THE SUPREME COURT VIEW ON SEWEL CONVENTION

On 24 January 2017, the UK Supreme Court delivered its [judgment](#) in the Miller case. The court decided that formal notice of withdrawal from the European Union under Article 50 of the Treaty of European Union could not lawfully be given by UK Ministers under the Royal Prerogative without prior legislation being passed in both Houses of Parliament authorising that notice.

In its consideration, the UK Supreme Court examined the effect of the Sewel Convention as set out in section 28(8) of the Scotland Act 1998. The Supreme Court ruled that the Sewel Convention was a political convention which could not be enforced legally through the courts. Therefore, the courts have no role in determining how the convention is to be applied to any particular Bill or circumstances.

PUBLIC BODIES ACT CONSENT

Another form of consent process used in the Scottish Parliament was introduced by the [Public Bodies Act 2011](#), a UK Act which received Royal Assent on 14 December 2011, and was itself subject to a legislative consent motion in the Scottish Parliament in March 2011.

The UK Public Bodies Act 2011 gave UK Ministers the authority (via its order making powers) to abolish, merge or transfer the functions of public bodies listed in its schedules, and some of those bodies operate in both the reserved and devolved areas.

The order-making powers were designed to enable UK Ministers to take forward the [proposals](#) announced on 14 October 2010 for the reform of a substantial number of UK public bodies for which the UK Government was responsible.

A new process was created on the basis that any such order was to be made by UK Ministers rather than in a Bill and therefore would not fall within the scope of the existing legislative consent process.

Section 9 of the 2011 Act requires that the Scottish Parliament's consent be sought for any provisions in an order made under Sections 1 to 5 which would fall within the Scottish Parliament's legislative competence, if it were contained in an Act of that Parliament or modified the functions of Scottish Ministers.

A formal procedure for the Scottish Parliament to give consent to these orders was considered by the Session 4 Standards, Procedures and Public Appointments Committee. The procedure for scrutiny of Public Bodies Act Consent memorandums is set out in [Chapter 9BA](#) of the Parliament's Standing Orders.

Public Bodies Act consent memorandum and motion

A member of the Scottish Government should normally lodge a Public Bodies Act consent memorandum for a Public Bodies Act order, no later than one week after the order is laid before the UK Parliament.

Similar to the procedures for lodging legislative consent motions under Chapter 9B, any MSP, who is not a member of the Scottish Government, may lodge a Public Bodies Act consent motion. Again, they must first lodge a memorandum, but this is not normally done until after the Scottish Government has lodged its own Public Bodies Act consent memorandum.

A Public Bodies Act consent memorandum must be accompanied by a copy of the relevant Public Bodies Act order. It should summarise what the order does and its policy objectives, and explain which provisions of the order give rise to the requirement for the consent of the Parliament under section 9 of the Act (see above).

When the memorandum is lodged by a member of the Scottish Government it should detail whether a Public Bodies Act consent motion will be lodged and the reasons for this decision. If a motion is to be lodged, the memorandum should include a draft.

MSPs who are not members of the Scottish Government must include a draft motion in their memorandum and must explain why it is appropriate for provision to be made by means of the order.

Notice of Public Bodies Act consent memorandums lodged will appear in the Business Bulletin. The Clerk of the Scottish Parliament will arrange for the memorandum and the order to be published.

The Parliamentary Bureau refers the memorandum to the Committee whose remit covers the subject matter of the relevant provisions. Where the subject matter falls within the remit of more than one Committee, the Parliament may, on a motion of the Parliamentary Bureau, designate one of those Committees as the lead Committee. That lead Committee considers and reports on

the memorandum. Any other Committee(s) (secondary Committee(s)) may also consider the memorandum and report their views to the lead committee.

The memorandum is also referred to the Delegated Powers and Law Reform Committee which should consider the order and report to the Parliament normally no later than 20 days, but definitely no later than 22 days, after the memorandum is lodged (excluding any time during which the Parliament is dissolved or is in recess for more than 4 days). In considering the order, this Committee should determine whether the attention of the Parliament should be drawn to it on any of the grounds mentioned in [Rule 10.3.1](#) of the Standing Orders; that is the Committee's usual grounds for scrutinising subordinate legislation.

Those grounds include that:

- there appears to be a doubt whether the instrument is within competence
- the instrument raises a devolution issue
- the instrument has been made by what appears to be an unusual or unexpected use of the powers conferred by the parent Act
- drafting of the instrument appears to be defective.

In preparing its report, the lead Committee should take into account the reports of the Delegated Powers and Law Reform Committee or any secondary Committee(s).

A Public Bodies Act consent motion should not normally be lodged until after the lead Committee has published its report.

A decision on every Public Bodies Act consent motion lodged is taken in the Parliament. The Parliament will not normally take such a motion earlier than the fifth sitting day after the day on which the lead Committee's report is published.

There is no specific mention of Public Bodies Act consent motions in the Parliament's Guidance on Motions.

As with legislative consent motions the Scottish Parliament can decline consent, by voting against a consent motion. However, an important difference is that the instrument cannot be made if consent is refused. That is because there is a legally enforceable restriction which has been applied by the UK Parliament.

The Scottish Parliament maintains a webpage for each of the orders subject to Public Bodies Act consent, arranged by the [UK Parliament session](#) date.

This webpage details the scrutiny of the memorandum carried out by Scottish Parliament Committees.

Francesca McGrath



Address:

Public Information Service

The Scottish Parliament

Edinburgh

EH99 1SP

Telephone:

0131 348 5000

0800 092 7500 (Public Enquiries)



Fòn: 0131 348 5395 (Gàidhlig)

Text: 07786 209888

Textphone users can contact us on 0800 092 7100



Email: sp.info@scottish.parliament.uk

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Contacting the Public Information Service

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