

Legislative Consent after Brexit

Briefing Paper for the Scottish Parliament
Constitution, Europe, External Affairs and Culture Committee

Prepared by

Prof Nicola McEwen, University of Edinburgh
Research Fellow, Centre on Constitutional Change; Senior Research, UK in a Changing Europe

1. The Sewel convention and Westminster Parliamentary Sovereignty

The sovereignty of the Westminster parliament remains one of the most important principles of the UK constitution. Each of the devolution statutes made clear that the law-making powers given to the devolved institutions do ‘not affect the power of the Parliament of the United Kingdom to make laws’ for Scotland, Northern Ireland and Wales, including in areas of devolved competence.

But in recognizing and adopting the Sewel convention, the UK parliament willingly followed a ‘self-denying ordinance’¹ that effectively limited its authority to legislate on devolved matters without the consent of the devolved legislatures.

The convention was recognized in statute in the Scotland Act 2016 and the Wales Act 2017. Section 28 of the Scotland Act now qualifies the affirmation of Westminster parliamentary sovereignty with the recognition that “the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.” This echoes the wording set out in the Memorandum of Understanding, first agreed between the governments at the outset of devolution.² As we know from the Supreme Court’s judgement in Miller, statutory recognition did not accord any additional legal weight to the convention. Nor, it appears, did it strengthen its symbolic significance.

Devolution Guidance Notes, which serve as operational guidance for Whitehall officials, set out in more detail when and how the convention is expected to operate, and arguably interpret its scope more broadly. DG10, applicable to Scotland, notes that legislative consent should be sought in the case of UK Bills containing ‘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’.³

The Sewel convention has become an important symbol of the political authority of the devolved institutions that can empower the Scottish Parliament to exercise influence over Westminster legislation that affects devolved matters or devolved competence. For example, the preliminary withholding of consent for the Scotland Bill 2015-16 gave an opportunity to Scottish parliamentary committees and ministers to reshape the legislation and influence key

¹ Cowie, G and D Torrance, 2020, ‘Devolution: The Sewel Convention’, HC Briefing Paper, CBP 8883, <https://researchbriefings.files.parliament.uk/documents/CBP-8883/CBP-8883.pdf>

² Memorandum of Understanding, 2013, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf

³ Devolution Guidance Note 10, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/60985/post-devolution-primary-scotland.pdf

elements related to its implementation, especially the Fiscal Framework. The convention has also served as a widely used mechanism to support coordination between administrations in the development of legislation.

2. Brexit and the Sewel convention

The passing of the EU (Withdrawal) Act without the consent of the Scottish Parliament marked the first time that the convention had been set aside by the UK Parliament. But the process of withholding consent, alongside parallel ‘Continuity’ legislation, nonetheless provided insight into the opportunities for influence that the convention could provide. Withholding consent led to intense intergovernmental negotiations and resulted in significant changes to the devolution clauses of the Bill. Although not sufficient for the Scottish Parliament to grant consent (in contrast to the Senedd), these changes minimized the constraining impact that the legislation, as originally drafted, would have had on the law-making powers of the Scottish Parliament, and paved the way for work on common frameworks.

Since then, setting aside the Sewel convention when consent is withheld has become, if not routine, then less exceptional. The Withdrawal Agreement Act (2020), which gave effect to the UK-EU Withdrawal Agreement in domestic law, was passed despite all three devolved legislatures withholding their consent, amid concerns that the legislation gives UK ministers powers to make decisions in devolved matters, and on devolved powers, without their agreement. Other Brexit-derived legislation has proceeded without consent, including the European Union (Future Relationship) Act (2020), the Subsidy Control Act (2022) and the Professional Qualifications Act (2022). Most controversially, the United Kingdom Internal Market Act (2020) was passed without consent. In contrast to other Brexit-related legislation, UKIMA had the explicit and central purpose of altering devolved competence, limiting the regulatory reach of laws passed in each jurisdiction, and empowering the UK government to spend on areas that would otherwise be devolved matters. The inability of the Scottish Parliament or Scottish ministers to influence the outcome of these Acts of Parliament suggest that recurring decisions to withhold consent are likely to produce diminishing returns. These examples may also reflect less willingness on the part of the current administration to amend its legislation to accommodate the concerns of the devolved institutions.

3. What constitutes ‘normally’

One of the problems with the convention as it stands is that the scope and application of the word ‘normally’ has never been defined. In defending the decision to proceed with the EU (Withdrawal Agreement) Bill without the consent of any of the devolved legislatures, the Chancellor of the Duchy of Lancaster, Michael Gove, suggested that it was a decision not taken lightly, but was nonetheless in line with the legislative consent 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.”⁴

⁴ [https://hansard.parliament.uk/commons/2020-01-23/debates/20012313000012/EU\(WithdrawalAgreement\)Bill](https://hansard.parliament.uk/commons/2020-01-23/debates/20012313000012/EU(WithdrawalAgreement)Bill)

But deciding that circumstances are unique and ‘not normal’ only after consent has been sought and refused undermines the status and significance of the convention. While one may accept that the circumstances of the Brexit deals and their corresponding speedy implementation in domestic law may indeed be unique, it is difficult to mount a similar defence of proceeding without consent in the case of the United Kingdom Internal Market Act, the Professional Qualifications Act or key aspects of the Subsidy Control Act.

The Committee may want to consider whether clarity can be provided concerning what should constitute the ‘abnormal’ or unique circumstances that may justify setting aside the Sewel convention. However, any such process could have a constraining impact on the law-making and scrutiny powers of the Scottish Parliament. It is difficult to imagine a circumstance more unique and abnormal than Covid. Yet, in contrast to many other countries, including some long-established federations, the Sewel convention was not set aside for Covid, and the governments instead worked collaboratively to produce the Coronavirus Act on a UK-wide basis, with the consent of the devolved legislatures.

The process of securing legislative consent is set out in detail in the Scottish Parliament’s standing orders. This is also the case in the other devolved legislatures. There is no equivalent process in the Westminster parliament. While it is for that parliament to determine its own standing orders, the Committee may wish to use inter-parliamentary channels to offer insight into how this may be done. The House of Commons Procedure Committee took evidence to this effect last year, as part of an ongoing inquiry into *The Procedure of the House of Commons and the Territorial Constitution*.⁵

4. The Sewel Convention and Intergovernmental Relations

Although the Sewel Convention sets out a clear parliamentary procedure, it should also be understood as an intergovernmental process. It is notable that recent successes and failures of the Sewel convention mirror patterns of intergovernmental interaction. The Scottish Government has long had a productive relationship with the Department for Environment, Fisheries and Rural Affairs (DEFRA). In the case of the Fisheries Bill, the Scottish Government felt able to recommend consent following ‘intensive (intergovernmental) discussion’ that ‘resolved a number of points of disagreement... recognise the powers and competencies of the various administrations and allow them to work co-operatively or independently as is necessary’.⁶ By contrast, relationships have been more strained with the Department for Business, Enterprise and Innovation, where there is less history of cooperative working and arguably less understanding of and/or sympathy for devolution. In some cases, as with the Immigration and Social Security Co-ordination (EU Withdrawal) Bill, there appeared to be little intergovernmental discussion prior to the Bill’s introduction, an essential step to facilitating the coordinating function of the Sewel convention. The Committee may want to explore the extent to which new intergovernmental machinery can facilitate and improve communication and consultation prior to the publication of legislation that may engage the Sewel convention.

5. Redefining Consent

The Sewel convention has generated a detailed process within the Scottish Parliament that provides opportunities to relevant committees to examine, consult and report on proposals to

⁵ <https://committees.parliament.uk/oralevidence/1775/pdf/>

⁶ https://archive2021.parliament.scot/S5_Bills/SPLCM-S05-41.pdf

give or withhold legislative consent, and gives the Chamber an opportunity to determine next steps.

However, recent UK legislation has presented a variety of alternative processes for seeking and sometimes securing the views of the devolved institutions. These create a confusing picture and have different implications for the authority of the devolved institutions and the Scottish Parliament’s capacity for legislative oversight. As made clear in the table below, none of these provide either the Scottish Government or the Scottish Parliament with the same degree of authority, influence, coordinating capacity or oversight as can be provided for by the Sewel convention.

<i>EU (Withdrawal) Act</i>	<ul style="list-style-type: none"> ▪ s.12 regulatory powers of Secretary of State subject to a <i>consent decision</i> by the devolved legislatures. ▪ A consent decision includes any decision, including to agree, not to agree, or to refuse to consider draft regulations ▪ Secretary of State may proceed regardless of consent decision after 40 days, with a duty to provide an explanation
<i>UK Internal Market Act</i>	<ul style="list-style-type: none"> ▪ Regulatory powers of Secretary of State to amend scope of Market Access Principles subject to <i>seeking consent</i> from devolved ministers. ▪ Secretary of State may proceed without consent after one month if consent is withheld. ▪ Extensive amending powers of the Secretary of State (permitted between Dec 2023 and Dec 2025) are subject to <i>consultation</i> with devolved ministers.
<i>Professional Qualifications Act</i>	<ul style="list-style-type: none"> ▪ Regulatory powers of Secretary of State or the Lord Chancellor that fall within devolved competence subject to <i>consultation</i> with devolved ministers ▪ A report must be published detailing the result of the consultation and any changes to the regulations that have been made (or justifiably not made) in response to the consultation.