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LEGISLATIVE CONSENT IN THE NORTHERN IRELAND ASSEMBLY AND OTHER LEGISLATURES

This paper is prepared for the Members of the Committee on Procedures of the Northern Ireland (NI) Assembly. This paper is prepared to facilitate Members' understanding of both the concept of Legislative Consent and the procedures and practices involved in the NI Assembly and other legislatures.

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SUMMARY OF KEY POINTS

This paper details the current procedures underpinning Legislative Consent in the Northern Ireland (NI) Assembly and other Legislatures. By reviewing the procedures and practices in other Legislatures, a number of issues have been identified which the Committee on Procedures may wish to consider further.

The following paragraphs provide a summary of those issues:

- One issue relates to the timing of a legislative Consent Motion. This is due to a number of concerns raised over the issue of significant changes being made to specific provisions of a Bill during its passage through Westminster.
- Another issue relates to criticisms which have been raised with regards to the Sewel Convention in Scotland, which the Committee on Procedures may wish to take account of during their inquiry. These concerns relate to the frequency of use of Sewel motions.
- Another issue relates to the reporting format of the relevant Committee on the UK Bill. At present in the NI Assembly a report of the Committee's considerations is given verbally by the Chair of the Committee in responding to the Minister during the motion debate itself. With regards to this issue, the Procedures Committee may wish to consider if it would be appropriate for the relevant NI Committee to report in writing to the Assembly before the Legislative Consent Motion is taken.

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INTRODUCTION

This paper has been prepared for Members of the Committee on Procedures by Research and Library Service. The purpose of this briefing paper is to facilitate the Committee's understanding of the procedures surrounding the process of Legislative Consent both in the Northern Ireland (NI) Assembly and in other legislatures. In particular this paper provides information on the following:

- a) Current procedures in the NI Assembly including those occasions where Legislative Consent Motions have been brought before the Assembly and whether there were any significant changes in the Bills in Westminster after the Motions were passed.
- b) Comparative information on the procedures used in other legislatures including Wales and Scotland, with particular reference being made to the 'Sewel Convention' in Scotland.

The Committee is currently reviewing the procedures surrounding Legislative Consent in the NI Assembly and has agreed upon the Terms of Reference for its Inquiry. These are:

- to identify those circumstances in which use of a Legislative Consent Motion is considered appropriate;
- to review the processes through which Legislative Consent Motions are introduced to the Assembly;
- to examine the arrangements for consultation with and consideration and reporting by committees of the proposed legislation and its outworkings;
- to consider the need to introduce a Standing Order to address the issues identified within the inquiry; and
- to report to the Assembly making recommendations, as necessary, on the findings of the Committee on Procedures.

In general terms, Legislative Consent refers to the agreement given by a devolved administration to allow the UK Parliament to legislate on an issue which the devolved administration would have regular legislative authority over (i.e. a devolved/transferred matter). The UK Government, the Scottish Ministers, the Welsh Assembly Government and the Northern Ireland Executive have agreed a Memorandum of Understanding (MOU) setting out the principles that underlie relations between them with regards to this process. The MOU between the UK Government and the devolved administrations 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."*¹

¹ Memorandum of Understanding between the UK Government, the Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee, 2001.

http://www.dca.gov.uk/constitution/devolution/pubs/odpm_dev_600629.pdf

In other words, although the UK Parliament can legislate on any issue including devolved matters, it would not normally do so without first obtaining agreement or consent from the relevant devolved administration. As each devolved administration has its own devolved settlement (i.e. the Northern Ireland Act 1998, the Scotland Act 1998 and the Government of Wales Act 1998), this statement will have a slightly different meaning for each of them. This is because each devolution settlement gives different powers to the legislatures in question. In each case however, the relevant UK Department will need to ascertain at an early stage whether each provision in the UK Bill relates to devolved, reserved or transferred matters under each settlement and ensure that the devolved administration share their understanding of this. If any of the provisions in the UK Bill relate to devolved matters, a Legislative Consent Motion will need to be secured in the devolved legislature.²

As the devolved administration cannot seek to promote a Legislative Consent Motion until the Bill has been Introduced at Westminster, at this stage the UK Bill Minister will need to secure the devolved administration's agreement in principle to promote a Legislative Consent Motion. The devolved administration would then be expected to secure the Legislative Consent Motion before the UK Bill completes its final amending stage in the first House at Westminster. Practice has established that the devolved administrations are consulted at an early stage of the proceedings so that any devolution issues are resolved before the UK Bill is approved for Introduction to the UK Parliament.³

PART ONE: NORTHERN IRELAND

BACKGROUND

There are no formalised procedures in the NI Assembly with regards to Legislative Consent. However, guidance notes have been produced outlining the process which the UK Government and the NI Executive should follow when seeking Legislative Consent from the Assembly. There have been eight Legislative Consent Motions since the Assembly was restored in 2007, all of which have followed the processes outlined in the guidance notes. The eight UK Bills which have required a Legislative Consent Motion in the Assembly are outlined below, along with the date in which they were agreed.

- The Child Maintenance and Other Payments Bill – 22 October 2007
- The Dormant Bank and Building Society Accounts Bill – 27 November 2007
- The Climate Change Bill – 10 December 2007
- The Criminal Justice and Immigration Bill 2007
- The Health and Social Care Bill – 14 January 2008
- The Education and Skills Bill – 29 January 2008
- The UK Energy Bill – 18 February 2008
- The Pensions Bill – 1 July 2008

² A Legislative Consent Motion gives the devolved legislature the chance to agree collectively to the UK Parliament legislating on a devolved issue.

³ Cabinet Office Explanatory Notes, *Devolution – Scotland, Wales and Northern Ireland*
http://www.cabinetoffice.gov.uk/secretariats/economic_and_domestic/legislative_programme/guide_html/devolution.aspx

In practice, the relevant NI Minister will notify the Speaker and the Chairperson of the relevant Assembly Committee of the intention of the UK Government to legislate on NI devolved matters as soon as he/she is aware of the proposals.⁴ For example once the Minister for Health was informed of the provisions affecting NI within the Health and Social Care Bill, he wrote to the Health, Social Services and Public Safety Committee of the Assembly on the 24 September 2007, informing the Members of such proposals.

Once the Minister has informed the relevant Committee, the Chairperson can request a briefing from the Minister or Departmental Officials. This provides Members with the opportunity to explore fully the details of the proposals of the UK Bill.⁵ With regards to the example of the Health and Social Care Bill previously outlined, Departmental Officials briefed the Health, Social Services and Public Safety Committee on issues relating to the Bill on the 18 October 2007. This process allowed the Minister for Health to gain the agreement of the Committee in principle to support a Legislative Consent Motion.

Once the relevant NI Minister has gained the support of the relevant Assembly Committee, the Minister will lodge a Legislative Consent Motion for plenary debate. This Legislative Consent Motion would seek the endorsement of the Assembly to the Minister's proposal.⁶ In relation to the example of the Health and Social Care Bill, a Legislative Consent Motion was debated in the NI Assembly on the 14 January 2008 after the Introduction of the Bill in Westminster on the 15 November 2007.

Contact between the Whitehall Department and the relevant NI Department is continuous throughout the entire process of obtaining Legislative Consent. Even after Legislative Consent has been granted by the Assembly, Departments in the UK and NI should be in close contact throughout the passage of the Bill in Westminster. This process is vital as any significant changes to the devolved provisions which may have occurred to a Bill in Westminster, can be relayed to the relevant NI Minister as soon as possible. He/she can then inform the relevant Committee of any significant changes to the devolved provisions of the Bill. This is important as a second Legislative Consent Motion may be required if the provisions to which consent was given in the first place have changed.

There have been two occasions in the NI Assembly where changes to the devolved provisions in a UK Bill at Westminster, has required the NI Minister to inform the relevant NI Committee. The two Bills in question are the Climate Change Bill and the Pensions Bill. In the first instance a Legislative Consent Motion regarding the Climate Change Bill, was supported by the Assembly on the 10 December 2007. However amendments to the original Bill were subsequently made in Westminster, which changed the policy affecting NI. Through subsequent correspondence with the relevant UK Department, the NI Minister for Environment was able to inform the Environment Committee of the changes to the Bill at an early stage. However, it was subsequently agreed by the Committee that a second Legislative Consent Motion was not necessary as the first Motion was perceived to be broad enough to encompass the amendments to the UK Bill.⁷

⁴ *Outline of Assembly Procedures on Legislative Consent Motions*, provided by the Legislative Programme Secretariat of the Office of the First Minister and Deputy First Minister.

⁵ Ibid

⁶ Ibid

⁷ Information gained through correspondence with the Legislative programme Secretariat of the Office of the First Minister and the Deputy First Minister.

In relation to the second occasion, a Legislative Consent Motion regarding the Pensions Bill was originally supported in the Assembly on the 26 February 2008. Within this Bill certain chapters applied to NI with the specific subject areas being mentioned in the Legislative Consent Motion. Amendments were subsequently made to the Pensions Bill during its passage through Westminster. These amendments included new subject areas not mentioned in the original Legislative Consent Motion. The Social Development Committee agreed that a further legislative Consent Motion would have to be put before the Assembly which outlined the new areas added to the Bill through the amendments. This subsequent Motion was agreed by the Assembly on the 1 July 2008.⁸

PART TWO: SCOTLAND

ORIGINS AND DEVELOPMENT OF THE SEWEL CONVENTION

What has become known as the Sewel Convention originated with remarks made by Lord Sewel, the junior Scottish Office Minister responsible for steering the Scotland Bill through the House of Lords, in July 1998. Referring to the provision in the Bill that asserts Westminster's continued right to legislate for Scotland on devolved as well as reserved matters, he said,

"We [the Government] 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."⁹

From the outset, this was to be a political convention rather than part of the legal foundations established by the Act. It was to be invoked primarily in relation to legislation on devolved matters, but used only with the Parliament's consent. The details of how and when this consent was to be obtained were not elaborated at the time.

In practice, the convention 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 i.e. the Scottish Executive, the Welsh Assembly Cabinet and the Northern Ireland Executive. The MOU has been supplemented by a series of "Devolution Guidance Notes", which are intended to be advisory but not legally binding on the parties of the MOU.¹⁰

The Guidance Note outlines how obtaining consent from the Scottish Parliament is only needed for legislative provisions which are specifically for devolved purposes, or which alter the legislative competence of the Parliament or the executive competence of the Scottish Ministers. These legislative provisions are also known as "Category

⁸ Ibid

⁹ House of Lords Debate, 21 July 1998, col 791. Cited in the Scottish Parliament Procedures Committee's Report on the Sewel Convention, 2005
http://www.scottish.parliament.uk/business/committees/procedures/reports-05/prr05-07-vol01.htm#_ftn1

¹⁰ Memorandum of Understanding, 2001
<http://www.justice.gov.uk/docs/odpm-dev-600629.pdf>

III” provisions. Category I and II provisions do not need Sewel consent. This is because they either:¹¹

- (i) do not apply to Scotland at all; or which apply to Scotland but relate to reserved matters and do not alter Scottish law on non-reserved matters or,
- (ii) the provisions do apply to Scotland and relate to reserved matters, but also contains provisions which make incidental or consequential changes to Scottish law on non-reserved matters.

In other words, only Bills with provisions in Category III are subject to the convention requiring the consent of the Scottish Parliament. However, the MOU outlines how the UK Departments should consult the Scottish Executive on changes in devolved areas of law which are incidental to provisions made for reserved purposes. In practice therefore, under the Convention if the UK Government and the Scottish Executive agree that it is appropriate to include in a Westminster Bill provisions affecting devolved matters, the Executive will invite the Parliament to give consent to those provisions being dealt with by Westminster.¹²

This involves the Executive providing a memorandum about the UK Bill, which is usually considered by a relevant Scottish Parliament Committee. The Committee will then consider and report on the Legislative Consent Memorandum. The Executive also lodges a Sewel motion which the Parliament as a whole is invited to agree upon before the Bill reaches its final amending stage at Westminster, in the House it was introduced. However, a Sewel motion is not normally lodged until after the publication of the Committee’s report. If the motion is agreed to by the Parliament, the resulting Sewel resolution gives Westminster the formal go-ahead that the convention requires.¹³

Practices relating to the Sewel convention have gradually evolved and developed over the past number of years. For example, initially Sewel scrutiny was limited to debates in the Chamber. However, it then became more common for the main scrutiny to take place in a Committee, with a further Chamber debate (in addition to the moving and disposing of the motion) only if this was recommended by the Committee. In January 2003, practices developed further with the Scottish Executive publishing a memorandum which included some proposals for reform in relation to the Sewel convention. The most significant of these was to push back the normal deadline for obtaining the Parliament’s consent from Second Reading to the last amending stage in the first House i.e. either Report Stage in the Commons or Third Reading in the Lords. This was intended to give the Parliament and Committees in particular more time for scrutiny purposes.

Further developments occurred with regards to practices surrounding the Sewel convention with the Scottish Executive preparing a supplementary memorandum in August 2003. This confirmed that the change proposed in the January

¹¹ Devolution Note 10 – Post Devolution Primary Legislation affecting Scotland
<http://www.dca.gov.uk/constitution/devolution/guidance/dgn10.pdf>

¹² There is no legal requirement for such consent, given that section 28(7) of the Scotland Act gives the UK Parliament a continued and unqualified right to legislate for Scotland on devolved matters. The convention is an important political mechanism for ensuring that the UK Government does not legislate in devolved areas against the wishes of the Scottish Parliament.

¹³ Standing Orders of the Scottish Parliament, Chapter 9B
<http://www.scottish.parliament.uk/business/so/sto-4.htm#9b>

memorandum in relation to the deadline for obtaining consent, had since been adopted. The August memorandum also noted that towards the end of Session 1 (1999-2003) it had become common practice that very few Sewel memoranda were being referred to Committees at all, and proposed a return to the earlier practice of routine Committee consideration. In September 2003 it was subsequently stated by the Presiding Officer that the continued approach would be for all Sewel motions to be considered in Committee and for time to be allocated for a short debate in the Chamber if there were concerns that the Committee felt had not been satisfactorily addressed.

In 2005, the Procedures Committee of the Scottish Parliament undertook an inquiry into the use of Sewel motions and heard evidence from a number of individuals including Lord Sewel. Following the review, the motions were re-titled Legislative Consent Motions and the procedures were enshrined in the Scottish Parliaments Standing Orders.¹⁴

CRITICISMS AND LIMITATIONS OF THE CONVENTION

The frequency of use of Sewel motions has been one of the main targets of criticism regardless of its original intent. In Session 2 (May 2003- April 2007) 38 Sewel motions /legislative consent motions were passed.¹⁵ When Lord Sewel set out the convention it was a statement intended to show that the UK Parliament would refrain, except on a consensual basis, from using its legal power to legislate in devolved matters. It is argued by many that greater emphasis has now been put on the exception rather than the restraint.¹⁶

A related perception to the criticism above which has been highlighted, is that powers are being “handed-back” to Westminster, and that the use of the Sewel process is a kind of “counter-devolution”. In some instances, the criticism has been that the convention has been used inappropriately, to impose a general UK solution on a subject where a distinctively Scottish approach would have been preferable by some.

PART THREE: WALES

Standing Order 26¹⁷ outlines the procedures of the National Assembly for Wales with regards to consent in relation to UK Parliament Bills affecting Wales. This Standing Order states that a member of the Government is required to lay a Legislative Consent Memorandum¹⁸ in relation to:

- (i) Any UK Government Bill that is a relevant Bill¹⁹ on its introduction to the first House, normally no later than 2 weeks after introduction;

¹⁴ Scottish Procedures Committee Report on the Sewel Convention, 2005
<http://www.scottish.parliament.uk/business/committees/procedures/reports-05/prr05-07-vol01.htm>

¹⁵ The Scottish Parliament website
<http://www.scottish.parliament.uk/business/legConMem/LCM-Stats.htm>

¹⁶ House of Commons Factsheet on The Sewel Convention, November 2005 pg 10.

¹⁷ Standing Orders of the National assembly for Wales
<http://www.assemblywales.org/bus-docs-third-standingorders.pdf>

¹⁸ A legislative memorandum must summarise the policy objectives of the Bill, specify the extent to which the Bill makes relevant provision and explain whether it is considered appropriate for that provision to be made.

¹⁹ A ‘relevant Bill’ means a Bill under consideration in the UK Parliament which makes provision (“relevant provision”) in relation to Wales, for any purpose within the legislative

- (ii) Any UK Private Member's Bill that was a relevant Bill on introduction and remains a relevant Bill after the first amending stage in the House in which it was introduced, normally no later than 2 weeks after it completes that stage;
- (iii) Any Bill introduced into the UK Parliament that, by virtue of amendments agreed to making relevant provision for the first time or beyond the limits of any consent previously given by the Assembly. This memorandum must be laid no later than 2 weeks after the amendments are tabled or agreed to.

Standing Order 26 also states when a Legislative Consent Memorandum is laid, the government must at the same time table a Legislative Consent Motion. This motion seeks the Assembly's agreement to the inclusion of a relevant provision in a relevant Bill.

To date, the National Assembly for Wales has only dealt with two Legislative Consent Motions with only 15 minutes being allocated for each debate. Furthermore, no Committee of the National Assembly for Wales has undertaken any scrutiny of the relevant UK Bill. With regards to amendments to such motions, it is the Presiding Officer's view that amendments may be tabled provided that if they were agreed they would not cast into doubt the decision of the Assembly in relation to the main question. The National Assembly for Wales has had limited experience with regards to Legislative Consent and are therefore still developing practice.²⁰

PART FOUR: POTENTIAL ISSUES FOR CONSIDERATION

WHEN SHOULD THE ASSEMBLY'S CONSENT BE SOUGHT

A number of NI Committee Chairpersons have highlighted the importance of timing with regards to Legislative Consent Motions. This is due to concerns over the issues of significant changes being made to specific provisions of a Bill during its passage through Westminster. It could be argued that the timing of a motion is crucial to ensure any significant changes to provisions in a UK Bill are taken into account during a debate on the motion. Therefore the Committee may wish to take into account the timing of a Legislative Consent Motion, taking into consideration the potential change in provisions which may occur during its passage through Westminster.

ROLE OF COMMITTEES

It is current practice for the relevant NI Minister who is responsible for obtaining the Assembly's consent, to provide the relevant NI Committee with a Legislative Consent Memoranda. These documents should explain the need for and the background to the legislative proposals. A copy of the Westminster Bill specifying the NI provisions should also be provided. In practice, at present in the NI Assembly a report of the Committee's considerations is given verbally by the Chair of the Committee in responding to the Minister during the motion debate itself. With regards to this issue, the Procedures Committee may wish to consider if it would be appropriate for the relevant NI Committee to report in writing to the Assembly before the Legislative

competence of the Assembly; or which has a negative impact on the legislative competence of the Assembly.

²⁰ Information gained through correspondence with the Clerk to the Procedures Committee in the National Assembly for Wales.

Consent Motion is taken. It is worth noting that the Legislative Programme Secretariat of the Office of the First Minister and Deputy First Minister have indicated that it would not be appropriate for the procedures in the NI Assembly to require a Committee to report in writing. The Procedures Committee may wish to clarify the reasoning for this view at the evidence stage of the inquiry.