Northern Ireland Assembly

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Legislative Consent Motions

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Review of legislative consent motions, their use and recent developments.

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Key Points

- **A legislative consent motion allows a devolved parliament to consent to the UK Parliament legislating in an area of devolved competence.**
- **In recognition of the status of the devolved legislatures, the Sewel convention states that the UK Parliament would not normally legislate in devolved matters without the consent of the relevant legislature.**
- **The Sewel convention is not legally binding, so the UK Parliament can legislate without the consent of the devolved legislature. The Sewel convention applies to Bills, and not subordinate legislation.**
- **Standing Orders of the Scottish Parliament, Senedd and Northern Ireland Assembly govern the internal processes of how those legislatures deal with legislative consent motions. There are many similarities across the three institutions as to how they approach the issue of legislative consent.**
- **The use of legislative consent motions had been largely straightforward and uncontroversial where it has been viewed as more efficient for the UK Parliament to legislate on a particular issue.**
- **The Ireland / Northern Ireland Protocol affects areas of devolved competence that were previously dealt with by EU law, but will not be subject to the Sewel convention as it is part of an international treaty.**
- **The Senedd and Scottish Parliament have amended their Standing Orders to allow for scrutiny of subordinate legislation made under powers in the EU Withdrawal Act (2018) and EU Withdrawal (Agreement) Act (2020), but the NI Assembly, as yet, does not have codified procedures.**

Executive Summary

A legislative consent motion allows a devolved parliament to consent to legislation from the UK Parliament which deals with an area of devolved competence.[1] The scope of the mechanism is delineated by the terms of the devolution statute, which lays out matters reserved to the UK Parliament; and the Sewel convention, which states that the UK Parliament will not, ordinarily, legislate for an area of devolved competence without the consent of the devolved parliament

Broadly, devolved legislatures can provide a legislative consent motion to three types of legislation from the UK Parliament. Most frequently, they apply where the Act deals with a matter of devolved competence. Legislative consent motions may also apply where the legislation affects the extent of devolved competence, either by changing the competence of the legislative assembly, or of a devolved government.

From a constitutional perspective, the Sewel convention is not binding and legislative consent motions, while important politically, have little legal effect.[2] The UK Parliament retains the right to legislate in any aspect of devolved competence, with or without consent, as it remains the sovereign parliament. Where it is convenient for the UK Parliament to legislate on behalf of the devolved legislatures the convention allows the relevant legislature to give consent, but it does not demand it in all circumstances.

The UK's decision to leave the EU has raised a number of issues around devolved legislation and legislative consent motions. These issues have two broad and overlapping themes. The first is the influence of the Sewel convention on devolution settlements in the context of the UK's exit from the EU. The second is how legislative consent mechanisms would operate where devolved powers intersect with EU law.

Against that background, this research paper has been produced to answer questions about the operation of the legislative consent motion, how it has been used in the past and how legislative consent motions will operate in the future.

The research has identified that the Senedd,[3] Northern Ireland Assembly and Scottish Parliament all approach legislative consent motions for primary legislation in a similar

[1] UK Parliament Glossary "legislative consent motion" retrieved 21st September 2020 https://www.parliament.uk/site information/glossary/legislative-consent/
[2] R (Miller) v Secretary of State for Exiting the European Union; In re McCord; In re Agnew [2017] UKSC 5, [2018] AC 61
[3] The National Assembly for Wales formally changed its name to the Welsh Parliament / Senedd Cymru on 6 May 2020. Guidance states that the institution will be commonly known as the Senedd in both languages. In the interests of clarity, this briefing paper will refer to the Senedd throughout.

way and using similar procedures. The SOs of the Senedd and the Scottish Parliament do allow for greater involvement of the legislature than the NI Assembly, with members having the right to bring LCMs to a vote where the executive fails to do so,

The majority of UK Parliament legislation which deals with devolved matters has been uncontroversial and, on the few occasions on which consent has been withheld, the matter has usually been dealt with by compromise on the part of the UK Government. Research has also shown that, from a constitutional perspective, a legislative consent motion is not essential to UK-wide legislation. This was illustrated by the refusal of legislative consent to the EU Withdrawal Act, and the Supreme Court's subsequent judgment in *Miller.*[4]

Legislative consent motions and the UK's Exit from the EU

The Sewel convention does not apply to situations where secondary legislation relates to or modifies devolved competence or functions. After the 31st December 2020, EU laws will no longer apply, and some domestic legislation, which relies on definitions or mechanisms laid out in EU law, may not function properly. Many of these are in areas of devolved competence.

The combined effect of the European Union Withdrawal Act (2018) and EU Withdrawal Agreement Act (2020)[5] is to grant powers to UK Government Ministers to make regulations in devolved areas of competence by way of statutory instrument (SI), where those powers intersect with EU law. This was achieved by amending the Government of Wales Act (2006), Scotland Act (1998) and Northern Ireland Act (1998) to grant UK Government Ministers additional powers to legislate in areas of devolved competence. In some circumstances, a Minister may exercise the powers jointly with one or more devolved authorities.

The Senedd and Scottish Parliament have procedures in place which define the process for review of statutory instruments, but no equivalent process appears in the Standing Orders of the NI Assembly. These consent processes show greater divergence than the legislative consent Standing Orders which apply to primary legislation. Accordingly, the Committee may wish to consider whether a change to the Standing Orders of the NI Assembly would be welcome, to facilitate scrutiny of legislation made under the auspices of the Withdrawal Act(s).

[4] As above, fn2.
[5] Hereafter referred to as the Withdrawal Act(s).

Summary

Legislative consent motions allow devolved parliaments to express their will when the UK Parliament seeks to legislate in an area of devolved competence. The challenges presented by the UK's exit from the EU have highlighted some of the deficiencies in this process. The consequences for the Sewel convention have yet to be fully explored and this paper identifies the procedures which the Scottish and Welsh Parliaments have developed to consent to legislation passed under the Withdrawal Act(s). The changes to the ordinary functioning of devolved consent are significant and the potential for further disagreement remains.

Contents

Introduction

This briefing paper has been prepared following a request from the Committee on Procedures, which asked for information on the following areas:

- The process and procedure for legislative consent motions (LCMs) in the other devolved legislatures, and whether it differs from Northern Ireland;
- The use of LCMs in the past in Northern Ireland, Scotland and Wales
- When giving consent, at what point does that power come back to the Assembly; and
- Any deliberations at Westminster on their understanding and use of the LCM procedure.

At present, any discussion of legislative consent mechanisms must engage with the UK's exit from the EU, and therefore this paper also considers the future of legislative consent mechanisms and developments resulting from the Withdrawal Act(s).

1 Background

Previous research by the House of Commons Library has stated that the Sewel convention underpins the concept of legislative consent. It is named after Lord Sewel who was the Parliamentary Under-Secretary of State at the Scottish Office and set out the policy during the passage of the Scotland Bill in 1997-98.[6]

> 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[7]

[6] House of Commons Library *The Sewel Convention* 25th November 2005, retrieved 17th September 2020 https://commonslibrary.parliament.uk/research-briefings/sn02084/
[7] HL Deb 21 Jul 1998 Vol 592 c 791

The UK Parliament retains the right to legislate in any aspect of devolved competence, with or without consent, as it is the sovereign parliament. There are circumstances where it is convenient for the UK Parliament to legislate on behalf of the devolved legislatures and the convention allows the relevant legislature, where it sees fit, to give consent.

Prior to the changes brought about by the UK's exit from the EU, legislative consent motions only applied to primary legislation, and did so in one or more of three circumstances -

- where primary legislation deals with a matter of devolved competence.
- where primary legislation changes the competence of a devolved assembly
- where primary legislation changes the competence of a devolved government.

The convention was recognised in the Memorandum of Understanding (MoU) between the UK Government and the devolved governments, which stated:

> 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.[8]

The latest version of this MoU was published in 2013 and was followed by a number of Devolution Guidance Notes, written to provide civil servants and policy makers with advice when dealing with devolved matters. Devolution Guidance Note 8 addresses post-devolution primary legislation affecting Northern Ireland.[9]

The next significant developments with the convention occurred when it was written into statute in the Scotland Act 2016 and the Wales Act 2017. The provision stated:

[8] Cabinet Office *Memorandum of Understanding and Supplementary Agreements Between the UK Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee* (October 2013)
[9] Cabinet Office *Devolution Guidance Note 8 Post Devolution Legislation Affecting Northern Ireland,* retrieved 17th September 2020 https://www.gov.uk/government/publications/devolution-guidance-notes

> But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the [devolved legislature].[10]

There is no equivalent statutory provision in relation to N. Ireland, but the decision to put the Sewel convention on a statutory footing does not change its status as a convention. Previous research on legislative consent motions highlighted criticism of the decision to put the convention into statute. It referenced the contribution of Lord Norton of Louth during passage of the Scotland Bill 2015-16:

> There is a Sewel convention, as we have heard, but it is different from what Lord Sewel enunciated in 1998. Putting the words of Lord Sewel on the face of the Bill does not put the Sewel convention in statute. Indeed, the clause as it stands narrows and undermines the convention. It narrows it by omitting a practice that has developed and been pursued on a continuous basis, and it undermines it by removing the essential feature that established it as a convention.[11]

The eventual inclusion of the provision in statute does not, in any case, limit the sovereignty of the UK Parliament. In fact, the Supreme Court in *R (Miller)* v *Secretary of State for Exiting the European Union* ruled that the Sewel convention remained just that, a convention, and so "policing the scope and manner of its operation does not lie within the constitutional remit of the judiciary".[12]

The Withdrawal Act(s) amended the devolution settlements for the three devolved parliaments. The effect was to give Ministers in the UK Government powers to pass SIs to deal with areas of devolved competence or alter the extent of devolved competence. The Welsh and Scottish Parliaments have since developed legislative consent procedures for dealing with these SIs and other legislative instruments.

2 Procedures for dealing with requests for legislative consent

The Standing Orders of the Scottish Parliament, Senedd and Northern Ireland Assembly set out how each legislature deals with requests for legislative consent (see Appendices 1-3). In broad terms, the process can be summarised as follows:

[10] *Scotland Act* 2016 c11 s2; *Wales Act* 2017 c4 s2.
[11] House of Commons Library *Brexit: Devolution and Legislative Consent* 29th March 2018, retrieved 17th September 2020 https://commonslibrary.parliament.uk/research-briefings/cbp-8274/
[12] As above, fn2

- Legislative consent memorandum lodged in the legislature by devolved Minister
- Memorandum referred to lead committee
- Lead committee reports or the time for report expires
- Vote in plenary on legislative consent motion

All three legislatures now have in place Standing Orders to regulate the process. The Scottish Parliament developed Standing Orders in 2005[13] and in 2009 the Northern Ireland Assembly followed Scotland's example to formalise the process[14]. Prior to 2011, the Senedd did not have the competence to make legislative Acts, but it formalised its own process in Standing Order 29.[15] The Scottish Parliament also has Standing Orders which deal specifically with the process for legislative consent motions under the Public Bodies Act 2011, (Chapter 9BA) which broadly mirrors the procedure for legislative consent motions under Chapter 9B.

The Scottish Parliament and Senedd have developed procedures to manage consent under the EU Withdrawal Act.

3 The Scottish Parliament and Legislative Consent

3a Legislative Consent in the Scottish Parliament

Chapter 9B of the Standing Orders of the Scottish Parliament (hereafter known as 9B) deals with the process for obtaining legislative consent. It applies to Bills which are under consideration in the UK Parliament and will apply to an area of devolved competence, alter the legislative competence of the Scottish Parliament or the executive competence of Ministers. Within two weeks of such a Bill completing the first amending stage in the UK Parliament, a member of the Scottish Government shall lodge a legislative consent memorandum with the Clerk. Any member may lay a legislative consent memorandum and then table a legislative consent motion, but must wait until either a Scottish Minister has lodged a memorandum or the deadline for doing so has passed.

[13] *Standing Orders of the Scottish Parliament* (2019) Chapter 9B
[14] *Standing Orders of the Northern Ireland Assembly* (2020) SO 42A
[15] *Standing Orders of the Welsh Parliament* (2020) SO 29

The memorandum should:

(a) summarise what the Bill does and its policy objectives;

(b) specify the extent to which the Bill makes provision—

(i) for any purpose within the legislative competence of the Scottish Parliament; or

(ii) to alter that legislative competence or the executive competence of the Scottish Ministers;

(c) in the case of a memorandum lodged by a member (including a member of the Scottish Government) who intends to lodge a legislative consent motion, set out a draft of the motion and explain why the member considers it appropriate for that provision to be made and for it to be made by means of the Bill; and

(d) in the case of a memorandum lodged by a member of the Scottish Government who does not intend to lodge a legislative consent motion, explain why not.[16]

Any subsequent amendments to the Bill which would exceed the scope of the original consent must be subject to further consent motions.

The Parliamentary Bureau refers a legislative consent memorandum to the committee responsible for the subject, ("the lead committee") which will consider it and provide a report. A legislative consent motion is not normally lodged until after publication of the lead committee's report and will always be considered in Parliament, usually after the fifth sitting day following publication. legislative consent motions are open to amendment like any other motion.

The Motion is then lodged by the relevant Minister and voted upon. A simple majority is required.

3b Legislative Consent for EU Withdrawal Act Instruments

The Scottish Parliament had developed Standing Orders to allow scrutiny of legislation which is made by UK Ministers under the provisions in the EU Withdrawal Act(s). This

[16] As above, fn13

was necessary because existing Standing Orders referred to Bills or primary legislation.

The protocol establishes that, "where there is agreement between the UK Government and the Scottish Government that the relevant provision should be subject to joint procedure (laid in both the UK Parliament and the Scottish Parliament) or be made in a Scottish Statutory Instrument (SSI) then the procedures set out in the protocol will not be required. These changes are laid out in a Protocol between the Scottish Government and Scottish Parliament which lays out their respective roles and responsibilities when managing scrutiny of SI legislation made under these powers."[17] That process is summarised below-

Phase 1 - Identification

Discussions will take place between the Scottish Government and UK Government counterpart departments on the most appropriate legislative vehicle to use (UK SI, SSI or instrument subject to Joint Parliamentary procedure). If the legislative vehicle considered appropriate is a UK SI then the process moves to phase 2.

Phase 2 - Notification

The Scottish Government will notify the Scottish Parliament where Ministers propose to consent to proposals in UK SIs which would be within devolved competence. This allows sufficient time for the Scottish Government to prepare the necessary SSIs if it intends to refuse consent. At this stage, the Scottish Government may or may not have seen the draft UK SI. The notification will be by way of a Notification of Intention to Consent (Notification) accompanied by a letter from the relevant Scottish Minister to the relevant lead subject committee. The notification and letter should also be copied to the Convener of the Delegated Powers and Law Reform Committee. A single notification to the Scottish Parliament may cover a number of proposals for correcting deficiencies The Scottish Government will share information with the Scottish Parliament about the expected timing and volume of notifications.

[17] Cabinet Secretary for Government Business and Constitutional Relations, Scottish Parliament *Protocol on obtaining the approval of the Scottish Parliament to the exercise of powers by UK Ministers under the European Union (Withdrawal) Act* 2018 *in relation to proposals within the legislative competence of the Scottish Parliament* (September 2018) http://www.parliament.scot/S5_Delegated_Powers/20180911CabSec.pdf (retrieved 17th September 2020)

From the date of receipt of the notification from the Scottish Government, the Scottish Parliament will normally have a maximum of 28 days for consideration.

The notification will detail—

- The name of the instrument in question (if known) or a title describing the policy area
- A brief explanation of law that the proposals amend
- Summary of the proposals and how these correct deficiencies
- An explanation of why the change is considered necessary
- Scottish Government categorisation of significance of proposals
- Impact on devolved areas
- Summary of stakeholder engagement/consultation
- A note of other impact assessments, (if available)
- Summary of reasons for Scottish Ministers' proposing to consent to UK Ministers legislating
- Intended laying date (if known) of instruments likely to arise
- If the Scottish Parliament does not have 28 days to scrutinise Scottish Minister's proposal to consent, why not?
- Information about any time dependency associated with the proposal
- Any significant financial implications

Phase 3 – Scrutiny

The Committee will consider the Scottish Minister's proposal to consent to proposals included in a UK SI, as contained in the notification.

To support committee consideration of notifications this protocol categorises proposals that may be included in a notification, so as to assist committees to prioritise scrutiny of more significant proposals. The categories also suggest that there are particular matters that the Scottish Government and Scottish Parliament agree should be subject to the joint procedure, or made provision for in an SSI rather than a UK SI. This protocol sets out different levels of scrutiny based on the significance of the proposal to be included in a notification. The categories are referred to as A, B and C, and are attached to this briefing as an Appendix.

In cases to which the Protocol does not apply, but the instrument is an SSI or otherwise required to be placed before the Scottish Parliament, it will be scrutinised under Chapter 10 of the Standing Orders. This procedure is similar to that under Chapter 9B, with some operational differences. The responsible committee shall determine whether to draw the attention of the Parliament to the instrument on the grounds that, for example, it imposes a charge on the Scottish Consolidation Fund, that it is excluded from challenge in the courts, or that there is doubt whether it is *intra vires*. The Committee has 22 days to report, and the instruments are subject to the negative or affirmative procedure. Where an instrument or draft instrument is to be considered by Parliament, the debate on the motion shall last no more than 90 minutes.

4 The Senedd and Legislative Consent

4a Legislative Consent in the Senedd

Standing Order 29 sets out how the Senedd deals with requests for legislative consent. The process is largely similar to that in the Scottish Parliament, in that a member of the government must lay a legislative consent memorandum normally no later than two weeks after its introduction in the UK Parliament.

The memorandum should contain similar information to a memorandum in the Scottish Parliament.

A legislative consent memorandum must:

(i) summarise the policy objectives of the Bill;

(ii) specify the extent to which the Bill makes (or would make) relevant provision;

(iii) explain whether it is considered appropriate for that provision to be made and for it to be made by means of the Bill;

(iv) where the Bill contains any relevant provision conferring power to make subordinate legislation on Welsh Ministers, set out the Senedd procedure (if any) to which the subordinate legislation to be made in the exercise of the power is to be subject; and

(v) where a legislative consent memorandum has already been laid in relation to the same provisions in the same Bill, set out how and why the new memorandum differs from the previous memorandum.

If a memorandum is laid in respect of a Private Members' Bill, this will be done by the Presiding Officer.

The Business Committee "must normally" refer the Memorandum to a committee, and where it has done so there shall be no debate on the motion until a report has been published or the deadline for issuing such a report has expired.

As with Scotland, Standing Orders do not appear to prohibit amendments to legislative consent motions, and a simple majority is required. A key difference is that debates on legislative consent motions may have one of the following time limits applied: 15, 30, 45, 60 or 90 minutes. One other distinction is that only a Minister may lay the memorandum but, thereafter, any member may table the motion. This has the effect of allowing a member to table a motion calling for the Senedd to withhold / grant consent, where that member disagrees with the approach taken by the Welsh Government. In Scotland, by contrast, any member may table the memorandum, but only that member may table the subsequent motion.

4b Legislative Consent in the Senedd – EU Exit SIs and other Acts.

Under the Intergovernmental Agreement[18] between the UK Parliament and the Senedd, combined with the EU Withdrawal Act(s), there are three principal ways in which regulations can be made in devolved areas –

- by the Welsh Ministers (under section 11 of, and Schedule 2 to, the 2018 Act);
- by UK Ministers acting alone in devolved areas with the consent of the Welsh Ministers (under sections 8 and 9 of the 2018 Act);
- by UK Ministers acting alone in devolved areas without the consent of the Welsh Ministers (under section 23 of the 2018 Act).[19]

[18] UK Government - *Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/702623/2018-04-24_UKG-DA_IGA_and_Memorandum.pdf retrieved 17th September 2020. This was later joined by the Scottish Government.
[19] Senedd *National Assembly for Wales Constitutional and Legislative Affairs Committee Scrutiny of regulations made under the European Union (Withdrawal) Act 2018: A guide* (2019) https://business.senedd.wales/documents/s83757/Scrutiny%20of%20regulations%20made%20under%20the%20European%20Union%20Withdrawal%20Act%202018%20A%20guide.pdf (retrieved 17th September 2020)

The Senedd has put in place Standing Orders which will allow scrutiny of subordinate and other legislation passed under the powers granted to UK Government Ministers under the EU Withdrawal Act. The Senedd's three new Standing Orders are examined below.

SO 30A sets out the procedure for dealing with SIs which amend primary legislation and are passed by UK Ministers.[20] This requires a member of the Welsh Government to lay a memorandum, normally no later than three days after it has been laid in the UK Parliament.

The contents of the memorandum are as specified below. Alongside this information, the Welsh Government must also lay supporting material provided by the UK Government, including Explanatory Memoranda and Regulatory Impact Assessments.

30A.4 A statutory instrument consent memorandum must:

(i) summarise the objective of the statutory instrument;

(ii) specify the extent to which the statutory instrument makes (or would make) relevant provision;

(iii) explain whether it is considered appropriate for that provision to be made and for it to be made by means of the statutory instrument;

(iv) where a statutory instrument consent memorandum has already been laid in relation to the same provisions in the same statutory instrument set out how and why the new memorandum differs from the previous memorandum.

A legislative consent memorandum which is laid under these circumstances will be referred to the appropriate committee, which has 35 days to report to the Senedd, unless the Business Committee sets a "timetable providing for a longer period".[21] Once the consent memorandum has been tabled, the motion may then be tabled. It shall not be debated until the responsible committee, and any other committee which is reporting on the memorandum, has reported. A member may lay a memorandum and motion in the same way as under SO29, but this is absent from SOs 30B and 30C.

[20] *Standing Orders of the Welsh Parliament* (2020) SO 30A
[21] As above, fn20 30A.8

Standing Order 30B deals with SIs which temporarily restrict the Senedd's legislative competence or the Welsh Minister's executive competence. The Welsh Government must lay a copy of the relevant draft regulations one working day after they are provided with a copy by the UK Government. Within seven days, a legislative consent memorandum must be laid. The Business Committee, again, will refer the memorandum to the relevant committee. The memorandum must -

(i) summarise the effect of the relevant draft regulations on the Senedd's legislative competence and/or the Welsh Ministers' functions;

(ii) make a recommendation as to whether the relevant draft regulations should be subsequently approved by the UK Parliament;

(iii) explain the reasons for the recommendation made in (ii).[22]

The consent decision motion must be tabled by a member of the Welsh Government 33 days after the memorandum. It may not be debated until 33 days have expired, or the relevant committee has reported, whichever comes first.

Standing Order 30C deals with UK Ministers making regulations to amend EU law or implement the Withdrawal Agreement, where these fall under devolved areas of competence (s8 and 9 of the Withdrawal Act 2018). Welsh Ministers may also make regulations under this power, whether acting alone or jointly with UK Ministers. In these cases, the Welsh Government must lay a written statement (known as a 30C written statement) notifying the Assembly of the regulations in question, normally within 3 working days of it being laid in the UK Parliament. The written statement must -

(i) summarise the purpose of the statutory instrument;

(ii) specify any impact the statutory instrument may have on the Senedd's legislative competence and/or the Welsh Ministers' executive competence; and

(iii) where the Welsh Ministers consented to UK Ministers making the relevant statutory instruments, explain the reasons why consent was given.[23]

[22] As above, fn20 SO 30B.4
[23] As above, fin 20 SO 30C.3

5 Northern Ireland Assembly

5a Legislative Consent in the NI Assembly

The Assembly adopted specific standing orders to deal with legislative consent following an inquiry by the Committee on Procedures in 2009. The Scottish Parliament and Senedd had, by that stage, developed standing orders of their own to govern the LCM process. The Committee on Procedures found that "procedures around legislative consent motions are Executive driven and while most of those consulted [as part of the Inquiry] were reasonably content with the current procedures it was considered that the provision of Standing Orders would go some way to giving a degree of ownership to the Assembly".[24]

Standing Order 42A deals with Legislative Consent motions and follows a similar procedure to that laid down in the Welsh and Scottish administrations' Standing Orders. As above, where a Bill of the UK Parliament deals with "a devolution matter"[25] a Memorandum is laid before the Assembly by the relevant Minister. Order 42A specifies that a Memorandum is a necessary precursor to a legislative consent motion. The information to be included in the memorandum is detailed in the Standing Order and, like the Welsh and Scottish equivalent, states -

> (3) A legislative consent memorandum may include the Bill and any explanatory notes attached to the Bill and shall include—
>
> (a) a draft of the legislative consent motion;
>
> (b) sufficient information to enable debate on the legislative consent motion;
>
> (c) a note of those provisions of the Bill which deal with a devolution matter; and
>
> (d) an explanation of—
>
> (i) why those provisions should be made; and
>
> (ii) why they should be made in the Bill rather than by Act of the Assembly.

[24] Northern Ireland Assembly Committee on Procedures *Inquiry into legislative consent motions* (2009)
[25] *Standing Orders of the Northern Ireland Assembly* SO42(a)(1)

Standing Orders of the Assembly do not appear to prohibit amendments to legislative consent motions. In common with the Standing Orders of the other devolved parliaments, Standing Order 42A requires sufficient information to be included in the Memorandum to allow debate.

Once the Memorandum is laid before the Assembly, the provisions of the Bill which are subject to a legislative consent motion shall "stand referred to the appropriate statutory committee" unless the Assembly orders otherwise. The Committee has 15 working days from the date of referral to consider the Provisions of the Bill and report to the Assembly. If they do not do so within 20 working days, the legislative consent motion may be moved. If the Committee does report, the motion may be moved 5 working days after the report is published.

5b NI Assembly Consent for EU Withdrawal Act Instruments

Unlike the Scottish and Welsh Parliaments, the NI Assembly has no formalised procedure for scrutiny of SIs and other legislative acts passed under the powers in the EU Withdrawal Act(s). The absence of a review power for statutory instruments was referred to in a 2009 report by the Procedure Committee, which noted the following

> III. A legislative consent motion is not required in relation to Whitehall subordinate legislation containing devolved provisions. However, steps 1-8 of the above process are also relevant to such cases where references to the Westminster Bill should be read as the Whitehall Statutory Instrument, except that legal advice should be sought from the Departmental Solicitor's Office rather than OLC and reference to the Executive should only be made where the decision falls within paragraph 2.4 of the Ministerial Code.[26]

This note does not appear to have been formalised in the Standing Orders of the Assembly, which currently require legislative consent motions only in respect of a Bill.[27]

In the absence of a fully functioning Assembly between January 2017 and January 2020, the UK Government consulted with devolved departments and carried

[26] As above, fn 24

[27] *Standing Orders of the Northern Ireland Assembly* SO 42(a)(1)

subordinate legislation through Westminster.[28] Since the Assembly returned following the "New Decade, New Approach" agreement, LCMs have been lodged to allow the Assembly to consent to primary legislation, such as the Environment Bill.[29] Legislative consent was refused in the case of the EU Withdrawal (Agreement) Act (2020).[30]

6 Informing the UK Parliament

None of the Standing Orders in the three devolved legislatures refer to how the UK Parliament should be informed following the outcome of a debate on a legislative consent motion. A research paper produced by the Scottish Parliament's research service noted that:

> *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.*[31]

[28] For a brief summary of this process, please see http://www.niassembly.gov.uk/assembly-business/research-and-information-service-raise/brexit-and-ni/brexit-related-statutory-instruments/

[29] Environment Bill (2020) legislative consent motion can be viewed at http://aims.niassembly.gov.uk/plenary/details.aspx?tbv=0&ptv=0&mcv=0&mtv=0&sp=0&spv=-1&per=1&it=0&pid=2&sid=p&pn=0&ba=1&doc=302500%20&fd=30/06/2020&td=30/06/2020 retrieved on 24th September 2020.

[30] NIA OR 20th January 2020 Vol. 125 No. 3 27

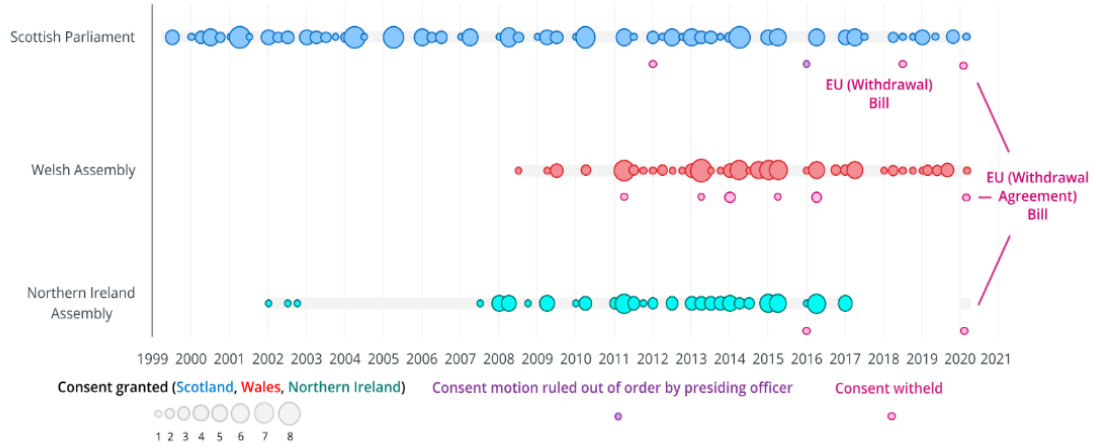
[31] http://www.parliament.scot/ResearchBriefingsAndFactsheets/Factsheets/Legislative_Consent_Processes.pdf

7 Use of legislative consent motions

This section reviews the history of legislative consent motions up to the passage of the EU Withdrawal Act(s), with a focus on the consequences of refusal.

In January 2020 the Institute for Government produced data on the number of LCMs since 1999. This is reproduced at figure 1 -

Figure 1:



The data from the IfG shows that LCMs have been largely uncontroversial. As it states, as of January 2020, "In total, out of more than 350 legislative consent motions, on just 13 occasions has consent been denied, in part or in full".[32] The research includes two further occasions on which consent has been withheld in the Senedd but the Bill fell, due to the dissolution of Parliament, and a further occasion on which the Senedd and the UK Government disagreed on whether consent was required.

7a Refused legislative consent motions (Pre-Withdrawal Agreement)

The table below details legislative consent motions which have been refused by the devolved parliaments and the response from Westminster, up to and including the Withdrawal (Agreement) Act 2020.[33]

[32] https://www.instituteforgovernment.org.uk/explainers/sewel-convention retrieved 14th September 2020

[33] As above, fn 32 and Commons Library Briefing Paper *Brexit, Devolution and the Sewel convention* https://commonslibrary.parliament.uk/research-briefings/cbp-8883/ retrieved 23rd September 2020

Date	Devolved Assembly	Legislation	Result
08.02.2011	Senedd	Police Reform and Social Responsibility Bill 2011	The election of Police and Crime Commissioners required consent because Panels were to be set up as Committees of local councils, which required legislative consent. Amendments were made to the Act to appoint the panels by order of the Home Secretary.[34]
22.12.2011	Scottish Parliament	Welfare Reform Bill 2012	Welfare Reform (Further Provision) (Scotland) Act 2012 gave Scottish ministers powers to make provision for devolved purposes in consequence of the Act.
29.01.2013	Senedd	Enterprise and Regulatory Reform Bill 2013	The NAW was asked to consent to provisions of the Bill which dealt with agricultural wages in Wales. It refused and passed its own legislation, the Agricultural Sector (Wales) Bill 2013. The AG referred the matter to the Supreme Court, which ruled that it was in the legislative competence of the Senedd.[35]
12.11.2013	Senedd	Local Audit and Accountability Bill 2014	The refusal related to internal drainage boards wholly or mainly in Wales, which were ultimately exempted from the auditing scheme.
26.11.2013	Senedd	Anti-Social Behaviour, Crime and Policing Bill 2014	Although legislative consent was refused, the UK Government continued with the Bill. The Parliamentary Under-Secretary of State made a written statement amending the Government of Wales Act so that the exception for ASBOs could be interpreted narrowly, ensuring the changes in the 2014 Act would remain a "consequential amendment not requiring consent". The NAW maintained its view that it did require consent.

[34] Police Reform and Social Responsibility Act (2011) s6, ss3 (12)
[35] Agriculture Sector (Wales) Bill; Reference by the Attorney General for England and Wales [2014] UKSC 43

3.2.2015	Senedd	Medical Innovations Bill 2014-2015	Bill did not progress as Parliament was prorogued.
7.12.2015	Northern Ireland Assembly	Enterprise Bill 2016	The NI Assembly objected to the cap on public sector exit payments and the Bill was amended to exempt Northern Ireland devolved authorities from the scheme.
26.1.2016	Senedd	Trade Union Bill 2016	The Senedd refused consent, and the UK Government continued with the Bill. The Welsh Government then passed the Trade Union (Wales) Act 2017 which disapplied the provisions of the Act the Senedd believed fell within devolved competence. The UK Government did not refer the matter to the Supreme Court.
29.1.2016	Senedd	Access to Medical Treatments (Innovation) Bill	The Welsh Government lodged a legislative consent memorandum which objected to this Private Members Bill. It received Royal Assent on 23rd March 2016, but no legislative consent motion was ever tabled.
15.3.2016	Senedd	Housing and Planning Bill 2016	Consent was withheld but the UK Government continued with the Bill, as the UK Government believed that no provisions of the Bill required consent. The request by the Welsh Minister, that the Bill be amended, was denied.
15.5.2018	Scottish Parliament	European Union (Withdrawal) Bill 2018	Legislative consent was withheld but the Bill was not passed as Parliament was dissolved.
8.1.2020	Scottish Parliament	European Withdrawal Bill 2020	Bill received Royal Assent despite lack of legislative consent
20.1.2020	NI Assembly	European Withdrawal Bill 2020	Bill received Royal Assent despite lack of legislative consent
21.1.2020	Senedd	European Withdrawal Bill 2020	Consent was later provided following discussions between the Senedd and the UK Government.

The Sewel convention holds that the UK Parliament will not normally legislate in devolved areas without the consent of the devolved parliament in question. Where consent has been refused in the past, the response of the UK Government has been mixed. On some occasions, agreement has been reached with the devolved parliaments to amend the Bill or make other accommodation and, on others, the UK Parliament has proceeded without consent.

When considering past refusals of legislative consent motions it is important to note that the majority have emanated from the Senedd which, up until the 2017 Act, operated under a system of enumerated powers, rather than the reserved powers model applicable in Northern Ireland and Scotland. In essence, the Welsh devolution model prior to 2017 provided the Assembly with a list of areas in which it could legislate, rather than the reserved powers model which details areas in which the devolved parliament cannot legislate.

It is helpful to compare the Supreme Court's decision in Agricultural Sector (Wales) Bill (Reference by the Attorney General for England and Wales) to the approach of the Supreme Court in *Miller*[36]. The issue in that case was whether agricultural payments (which were the subject of Westminster legislation) related to agriculture, which was a devolved area. The Welsh administration won the argument, and the UK Government took no further action. The Supreme Court has jurisdiction to hear proceedings about the powers of the devolved assemblies under the devolution settlements.[37]

In the *Miller* case, the Supreme Court was asked to consider the effect of the Sewel convention in relation to the Withdrawal Act. The Supreme Court found it could not rule on parliamentary proceedings in the UK Parliament, including the operation of the convention. Had the Westminster Government responded to the decision of the Court in the Agricultural Sector (Wales) Bill by legislating despite the Sewel convention, and the Welsh government chose to challenge that legislation, the Supreme Court may have decided not to rule on the matter.

As the table above shows, it is not wholly accurate to suggest that, outside of the EU Withdrawal Bill, the UK Government does not legislate in the absence of consent from the devolved parliaments. There have been differences of opinion on the extent of devolved powers, or the extent to which an Act engages devolved concerns. Where agreement cannot be reached, the UK Government has not demonstrated a consistent

[36] As above, fn2.

[37] Supreme Court Practice Direction 10, retrieved 17th September 2020 https://www.supremecourt.uk/procedures/practice-direction-10.html

approach. That said, outside of the EU Withdrawal Bill, the Scottish Parliament and NI Assembly have each refused consent on only one occasion. Those refusals prompted the UK Government to make changes to the Bills in question. The differences in the Welsh devolution settlement may account for the slightly different approach the UK Government has taken when responding to refusals of consent from the Senedd prior to the 2017 Act.

8 Return of powers when consent has been given

Legislative consent motions apply in one or more of the following circumstances:

- where primary legislation deals with a matter of devolved competence;
- where primary legislation changes the competence of a devolved assembly;
- where primary legislation changes the competence of a devolved government.

Once a Bill has been passed by the UK Parliament, it remains in force until repealed by another Act of Parliament (unless it contains a 'sunset clause'). Outside of the s12 mechanism described below, a devolved parliament retains the power to legislate on any devolved subject, however, if its legislation contradicts the Act of the UK Parliament, it is unlikely to survive legal challenge.[38]

It is possible to pass legislation which contradicts the Act of the UK Parliament, (as in the case of the Welsh response to the Trade Union Act) but there is no guarantee that legislation will survive referral to the Supreme Court, as in the case of the Scottish Continuity Act.[39] The devolved assembly retains the power to legislate, unless an instrument is passed which circumscribes that power. Similarly, if a devolved legislature consents to the return of devolved powers to the UK Government, those powers will not return unless by operation of a 'sunset clause' or further legislation from the Westminster Parliament which returns the powers.

The EU (Withdrawal) Act(s) make specific provision for Ministers in the UK Parliament to legislate in devolved areas without consent by 'freezing' devolved competence in a particular area.[40] These are known as section 12 regulations,[41] and prompted

[38] The UK Withdrawal From The European Union (Legal Continuity) (SCOTLAND) Bill – A Reference by the Attorney General and the Advocate General for Scotland [2018] UKSC 64
[39] As above, fn 38
[40] At the time of writing, the elements of EU law to which Northern Ireland remains aligned by virtue of the Protocol are not affected by the 'freezing' powers referred to above.
[41] European Union (Withdrawal) Act 2018 s12

objections from the devolved governments, and withholding of consent by the Scottish Parliament. The effect of the section is to amend the devolution statutes by inserting a power for UK Ministers to prevent devolved assemblies from passing legislation which would modify retained EU law. This power is currently operative, and will last for two years from "exit day" – i.e. the end of the transition period, when EU law ceases to apply in the UK. Once made, this restriction would be operative for up to five years from the time it is applied.

The Common Frameworks Procedure, which is beyond the scope of this paper, represents a further change to the operation of devolved consent. Although the devolved governments will have input into common frameworks, and they are designed not to proceed without unanimous consent, it is as yet unclear how much scrutiny they will be subject to in devolved legislatures.

9 The Westminster view

9a Westminster view of the Sewel convention

Standing Orders of the House of Commons and House of Lords are silent on legislative consent motions. This reflects the view that the mechanisms for granting or withholding consent are internal matters for the devolved legislatures.

Erskine May, the guide to parliamentary practice and procedure, states:

> Erskine May also states (at Chapter 4 Para 27.6) that:
>
> *Where any of the devolved assemblies has passed such a motion, that is indicated in the list of bills in progress in House of Lords Business (see para 7.16), and in the House of Commons by a rubric to the item in the Order of Business or Future Business (see para 7.3). The text of the motions is also made available on the bill webpages and a rubric to that effect appears in the House of Commons Order Paper. Since October 2014, in any case where the Government had indicated that legislative consent would be sought in respect of provisions of a bill and that consent has been refused, reference has been provided to the decision of the relevant legislature not to grant consent.*[42]

[42] Thomas Erskine May, W. R. McKay, and Frank Cranmer. *Erskine May's Treatise on the Law, Privileges, Proceedings, and Usage of Parliament*. 25th ed 2019 retrieved 17th September 2020 https://erskinemay.parliament.uk/

There has been consideration of the Sewel convention by Commons committees. This has mainly focused on the Scotland Bill 2015-16 and more recently the implications of the UK's exit from the EU for legislative consent. This section summarises the main themes that emerged from those committees.

House of Commons Scottish Affairs Committee – the Sewel convention: the Westminster perspective, 2005-06

This report looked at how Members of Parliament could be better made aware that a particular Bill before the House of Commons had been subject to a Sewel motion in the Scottish Parliament. The report was in response to the Scottish Parliament's Procedures Committee inquiry into legislative consent motions.

The Scottish Affairs Committee made recommendations in respect of how Westminster could be notified of legislative consent motions and the 'tagging' of Bills to alert MPs that a piece of legislation had been subject to a LCM.

House of Commons Political and Constitutional Reform Committee – Constitutional implications of the Government's draft Scotland clauses, 2014-15

Referring specifically to the draft Scotland Bill and the decision to place the Sewel convention into the Bill, the Committee noted:

> *Draft clause 2 does not give the Sewel convention the force of statute, but may strengthen the convention politically. It fails to acknowledge that the convention extends to legislation affecting the competences of the devolved institutions. The presence of the word "normally" in the Sewel convention, and the applicability of the convention to legislation affecting the competences of the devolved institutions, be addressed in any redrafting of draft clause 2.*[43]

[43] House of Commons Political and Constitutional Reform Committee – Constitutional implications of the Government's draft Scotland clauses, 2014-15; retrieved 17th September https://publications.parliament.uk/pa/cm201415/cmselect/cmpolcon/1022/1022.pdf

House of Commons Public Administration and Constitutional Affairs Committee - Devolution and Exiting the EU: Reconciling Differences and Building Strong Relationships, July 2018

This report made significant comments on the fallout from the European Union (Withdrawal) Bill and the breakdown in trust between the UK Government and devolved parliaments.

The Committee highlighted the lack of consultation on the part of the UK Government with its counterparts, and called for adequate consultation:

> *It is highly regrettable that there was little consultation with devolved Governments in advance of the publication of the European Union (Withdrawal) Bill, as earlier consultation could have possibly avoided much of the acrimony that was created between the UK Government and the devolved Governments. When the UK Government is considering legislation that falls within a devolved competence, draft legislation should preferably be shared far enough in advance for a devolved government to identify and work through any issues in the legislation with the UK Government.*[44]

The Committee went on to highlight concerns about the actual status of the Sewel convention:

> *It is clear from the evidence to our inquiry that there is a considerable level of ambiguity surrounding the Sewel convention. It is unclear whether Lord Sewel's commitment on the floor of the House of Lords is to be taken as the definitive statement of the convention and exceptions to it, or whether the convention through the practice of this commitment developed and grew into a convention that the UK Government should never legislate without consent of a devolved legislature, notwithstanding the supremacy of the UK Parliament and its ability to legislate in an abnormal situation. Such ambiguity is apparent from the divergent views of the UK Government and the devolved administrations, as well as those of academic commentators.*
>
> *In the case of the European Union (Withdrawal) Bill, the Government chose to interpret the Sewel convention in such a way that legislative consent from the Scottish Parliament was deemed unnecessary because of the very particular*

[44] House of Commons Public Accounts Committee *Devolution and Exiting the EU: reconciling differences and building strong Relationships* 31st July 2018, retrieved 17th September 2020 https://publications.parliament.uk/pa/cm201719/cmselect/cmpubadm/1485/148502.htm

> *circumstances of the Bill. That interpretation of the Sewel convention was contested by the Scottish and Wales Governments. We recommend that the Government sets out a clear statement of circumstances under which legislative consent is not required by the Sewel convention in future in both the Devolution Policy for the Union that we have recommended it should state and in the Memorandum of Understanding between the UK Government and the devolved institutions.*

The implications of the UK's exit from the EU for the future of the Sewel convention, legislative consent motions and SIs are considered in the following section.

9b Scrutiny of EU Exit related SIs in the UK Parliament

Prior to the UK's exit from the EU, the vast majority of EU law was passed in the UK by statutory instrument. Over 90% of these were done via the negative procedure.[45] It is clear that, in order to facilitate the UK's exit from the EU, a great number of legislative changes will have to be made. According to the Hansard Society's SI tracker, since July 2018 there have been over 700 SIs related to the UK's exit from the EU.[46] Each require a certain amount of parliamentary scrutiny and, despite the use of delegated powers, they often deal with contentious issues. For example, fisheries, agriculture and immigration Acts all included broad delegated powers to allow Ministers to make further regulation.[47]

Despite the importance of the issues which SIs regulate, there have been a number of concerns about the quality of the instruments. Examples include eliminating the requirement for staff to be trained on spotting bovine-CJD, permitting the use of certain pesticides on plants and removing the requirement for retesting horses when checks for diseases came back as inconclusive.[48] Commentators have noted that some of the SIs dealing with EU Exit issues have gone beyond correction of technical deficiencies into areas of policy. Of greater concern is what has been described as a "relatively high error rate" and a "routine" failure to provide impact assessments.[49]

[45] House of Commons Library *Legislating for Brexit: Statutory Instruments and Implementing EU Law* 16th January 2017, accessed 17th September 2020 https://commonslibrary.parliament.uk/research-briefings/cbp-7867/

[46] https://sitracker.hansardsociety.org.uk last accessed 23rd September 2020

[47] UK in a changing Europe – Commentary, Brexit Legislation, J. Rutter and J. Owen 27th March 2020, accessed 17th September 2020 https://ukandeu.ac.uk/brexit-legislation/

[48] Joe Tomlinson, A. Sinclair *Brexit Delegated Legislation – Problematic Results* 1st January 2020, retrieved 17th September 2020 https://ukconstitutionallaw.org/2020/01/09/alexandra-sinclair-and-joe-tomlinson-brexit-delegated-legislation-problematic-results/

[49] Dr Ruth Fox, *The Legislative Challenge Posed By Brexit*, UK in a Changing Europe 1st April 2020 retrieved 17th September 2020 https://ukandeu.ac.uk/the-legislative-challenge-posed-by-brexit/

The 2018 Withdrawal Act put in place a new procedure[50] to allow enhanced scrutiny of SIs. Where an SI -

- gives a UK public authority a legislative power;
- involves a fee for a function which a UK public authority would exercise;
- creates or widens a criminal offence; or
- creates or amends a power to legislate -

the Minister must use the affirmative procedure, otherwise he or she is free to choose which procedure would apply. If the Minister chooses the negative procedure, they must lay before both Houses a proposed negative statutory instrument, which includes a draft of the instrument and a memorandum explaining why the negative procedure is appropriate. Once laid, a committee in each House has 10 sitting days to consider the SI and decide whether it should proceed under the negative procedure, or whether it must go through the affirmative procedure. If neither committee makes a recommendation, or agree it should be under the negative procedure, the Minister is free to lay the SI under that procedure. If the affirmative procedure is recommended but the Minister disagrees, the Minister must provide a written statement explaining why they disagree. When the affirmative procedure applies, the SI is subject to a vote in the House of Commons.

Statutory instruments which implement parts of the Ireland / N.Ireland Protocol are subject to the affirmative procedure in the UK Parliament where made by a UK Minister, acting alone or jointly with a devolved authority.[51]

Since 2017 only 25 statutory instruments have been scheduled for debate. Committees raised concerns about 420 SIs, and motions (that is, attempts to prevent the SIs from becoming law) were laid against 46. Of the total population of 2708, 315 SIs were made under the proposed negative procedure. SIs are not exclusively made to deal with EU Exit issues, many having been passed to deal with challenges during the Coronavirus pandemic and other, uncontroversial, matters. Nonetheless, this highlights how rarely SIs are subject to full scrutiny in UK Parliament.[52]

[50] European Union Withdrawal Act (2018) Sch 7
[51] EU Withdrawal Act 2018 Sch 8F
[52] https://statutoryinstruments.parliament.uk/

10 What now for LCMs?

The legislation introduced in the UK Parliament to give effect to the decision to leave the European Union has highlighted the limits of the constitutional effect of the Sewel convention.

Whereas, previously, the UK Parliament has been willing to work with the devolved institutions to amend or remove any relevant clauses of Bills,

> The passing of the EU (Withdrawal) Act 2018 without the Scottish Parliament's consent marked the first time that the convention had been set aside by the UK Parliament…In the case of the EU (Withdrawal Agreement) Act, passed in January 2020 to give effect to the UK-EU Withdrawal Agreement in domestic law, all three devolved legislatures withheld their consent.[53]

As noted above, the Courts have shown an unwillingness to intervene in the event of disagreements between the UK and devolved parliaments on the operation of the Sewel convention. This was reinforced when the Scottish and Welsh governments developed legislation in response to the EUWA 2018-19, and the UK Government responded by referring both administrations to the Supreme Court. The ruling (which only dealt with the Scottish Bill as the Senedd came to an agreement with the UK Government) found that the sections of the 'Continuity' Bill which purported to amend the Scotland Act were beyond the powers of the devolved parliament.[54]

The Cabinet Office issued a Written Ministerial Statement in response to questions about the refusal of the devolved parliaments to consent to the Withdrawal Agreement Bill. The UK Parliament proceeded with the passage of the Bill in the absence of legislative consent motions. This statement explained the approach of the UK Government to the Sewel convention in the context of the UK's exit from the EU and described the decision to proceed as -

> *a significant decision and it is one that we have not taken lightly. However, it is in line with the Sewel convention… The Sewel convention—to which the government remain committed— states that the UK Parliament 'will not normally legislate with regard to devolved matters without the consent' of the relevant devolved legislatures. The*

[53] Nicola McEwan *The Sewel Convention* The UK in a Changing Europe 31st March 2020 retrieved 17th September 2020 https://ukandeu.ac.uk/the-sewel-convention/
[54] As above, fn38.

circumstances of our departure from the EU, following the 2016 referendum, are not normal; they are unique.[55]

It was noted at the time that consent had been sought without reference to the unique circumstances of the UK's departure from the EU and the effect these would have on the application of the Sewel convention.[56]

The terms of the European Union Withdrawal Acts[57] prevent devolved parliaments from modifying retained EU law insofar as that law has been modified by regulation made by a Minister of the Crown. This, in effect, gave UK Ministers the power to legislate for the devolved governments by way of statutory instrument, albeit that power is limited to areas of EU law which relate to devolved matters. These powers are time-limited by sunset clauses in the relevant Acts, and legislation made by Ministers under these provisions will remain in force until repealed – i.e. although the power to legislate in this way is time limited, the laws passed under this power are not. This has been described as "freezing" devolved competence and regulations made under this power are known as section 12 regulations.[58]

The Withdrawal Act does contain provisions relating to legislative consent in relation to these regulations. These are described as "consent decisions"[59] and defined as a decision to grant, withhold or refuse consent. Following a consent decision, or if such a decision is not made within 40 days of the Minister providing a copy of the draft statutory instrument to Scottish, Welsh or Northern Irish Ministers, the draft may be laid in the Houses of Parliament for approval.[60] Although this is a similar mechanism to the Sewel convention, there are three notable differences

- the Sewel convention applies to primary legislation, whereas these changes can be made by statutory instrument;
- the Sewel convention envisages devolved consent, whereas the Withdrawal Act(s) describe a consent decision as a decision to grant or refuse consent, or a failure to make a decision within 40 days;

[55] HC Deb Vol.670 Col 18ws
[56] As above fn 54
[57] European (Withdrawal) Act 2018 and European (Withdrawal Agreement) Act 2020
[58] European (Withdrawal) Act 2018 Explanatory Notes
[59] European (Withdrawal) Act 2018 s12
[60] As above, fn 60 at ss11 and following.

- the Sewel convention is a convention which restricts the UK Parliament, whereas the provisions in the Withdrawal Act(s) enable UK Ministers to act, granting them additional powers which are on a statutory footing.[61]

The new procedures for review of statutory instruments in the Senedd and Scottish Parliament allow concerns to be raised about SIs and their impact in devolved areas. This provides these administrations with further leverage in negotiating with the UK Government where they may object to the contents of SIs. It also acts as a quality check on the SIs themselves, and will allow for devolved assemblies to bring specific expertise to bear on the effects of such instruments. By providing additional scrutiny and constructive criticism on SIs, devolved parliaments can smooth out potential difficulties in the process of the UK exiting the EU.

11 Conclusion

Legislative consent motions are a commonly used mechanism to allow a devolved parliament to consent to the UK Parliament legislating in an area of devolved competence. In practice, withholding them exerts political pressure on the UK Government to amend Bills with which devolved legislatures disagree. Practice and procedure between the Senedd, Scottish Parliament and Northern Ireland Assembly exhibits little variance, bar some differences in scheduling, the ability of members to lodge LCMs in the Scottish Parliament, and the ability of members of the Senedd to take action where the Government has lodged the memorandum but not put the matter to a vote. Historically, the UK Government has shown some deference to the will of devolved institutions.

The UK's exit from the EU has caused concern about the future of the Sewel convention and the nature of legislative consent. The introduction of new powers under the Withdrawal Act(s), which allow Ministers to legislate in areas of devolved competence by statutory instrument, has created a new mechanism to obtain consent and introduced uncertainty around the future operation of legislative consent and the Sewel convention.

With respect to Northern Ireland, the picture is complicated by the Protocol. Should the UK Parliament pass legislation affecting devolved areas in which NI is aligned to EU legislation, it is not clear how that legislation would be effective. The Protocol clearly

[61] As above, fn 60.

states that certain matters will be subject to the jurisdiction of EU courts,[62] although the UK Government has responsibility for implementation and enforcement. The Common Frameworks will also intersect with devolved competence, and the opportunity for UK Government Ministers to freeze devolved competence in a particular area will remain in place for two years after the end of the transition period.

The provisions of the Withdrawal Act(s), which allow Ministers to legislate in areas of devolved competence by statutory instrument, have prompted the Senedd and the Scottish Parliament to develop Standing Orders so those devolved legislatures can scrutinise SIs and make consent decisions. Accordingly, it may be appropriate for the Committee to consider whether the NI Assembly should formalise procedures around scrutiny of, and consent to, SIs.

[62] Ireland / Northern Ireland Protocol 2019

Appendix 1 – Standing Order 42a of the Northern Ireland Assembly

42A. legislative consent motions

(1) A legislative consent motion is a motion which seeks the agreement of the Assembly to the United Kingdom Parliament considering provisions of a Bill which deal with a devolution matter.

(2) A legislative consent memorandum shall be laid in respect of any devolution matter for which a legislative consent motion is proposed.

(3) A legislative consent memorandum may include the Bill and any explanatory notes attached to the Bill and shall include—

(a) a draft of the legislative consent motion;

(b) sufficient information to enable debate on the legislative consent motion;

(c) a note of those provisions of the Bill which deal with a devolution matter; and

(d) an explanation of—

(i) why those provisions should be made; and

(ii) why they should be made in the Bill rather than by Act of the Assembly.

(4) The Minister whom the devolution matter concerns shall, normally not later than 10 working days after the relevant day, either—

(a) lay a legislative consent memorandum before the Assembly; or

(b) lay a memorandum before the Assembly explaining why a legislative consent motion is not sought.

(5) A member of the Assembly other than the Minister whom the devolution matter concerns may lay a legislative consent memorandum but shall not do so until—

(a) the Minister has laid a legislative consent memorandum under paragraph(4)(a);

(b) the Minister has laid a memorandum under paragraph (4)(b); or

(c) the 10 working days provided for in paragraph (4) have expired.

(6) Upon a legislative consent memorandum being laid before the Assembly, those provisions of the Bill dealing with a devolution matter shall stand referred to the appropriate statutory committee unless the Assembly shall order otherwise.

(7) The committee may, within 15 working days from the date of referral, consider those provisions of the Bill which deal with a devolution matter and report its opinion thereon to the Assembly.

(8) A legislative consent motion shall not normally be moved until at least—

(a) 5 working days after publication of the committee report; or

(b) 20 working days after the date of referral to the committee.

(9) A subsequent legislative consent motion may be moved if appropriate, having regard to the nature of any amendment dealing with a devolution matter made, or proposed to be made, to the Bill. Paragraphs (4) to (8) shall not apply to that motion.

(10) In this order a "devolution matter" means—

(a) a transferred matter, other than a transferred matter which is ancillary to other provisions (whether in the Bill or previously enacted) dealing with excepted or reserved matters;

(b) a change to—

(i) the legislative competence of the Assembly;

(ii) the executive functions of any Minister;

(iii) the functions of any department.

(11) In this order the "relevant day" means—

(a) in respect of a Bill other than a Private Member's Bill—

(i) the day the Bill is introduced in the United Kingdom Parliament; or

(ii) the day the Bill completes the stage in the United Kingdom Parliament during which an amendment is made to the Bill which makes it a Bill to which this order applies;

(b) in respect of a Bill which is a Private Member's Bill—

(i) the day the Bill completes the first stage at which it may be amended in the House of the United Kingdom Parliament in which it was introduced; or, if later,

(ii) the day the Bill completes the stage in the United Kingdom Parliament during which an amendment is made to the Bill which makes it a Bill to which this order applies.

(12) This order does not apply in respect of Bills which are consolidation Bills or Statute Law Revision Bills.

Appendix 2 – Standing Order 29 of the Welsh Assembly

29. STANDING ORDER 29 – Consent in relation to UK Parliament Bills

UK Parliament Bills Making Provision Requiring the Senedd's Consent

29.1 In Standing Order 29, "relevant Bill" means a Bill under consideration in the UK Parliament which makes provision ("relevant provision") in relation to Wales:

(i) for any purpose within the legislative competence of the Senedd (apart from incidental, consequential, transitional, transitory, supplementary or savings provisions relating to matters that are not within the legislative competence of the Senedd); or (ii) which modifies the legislative competence of the Senedd.

legislative consent memorandum

29.2 A member of the government must lay a memorandum ("a legislative consent memorandum") in relation to:

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

(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:

(a) agreed to; or

(b) tabled by a Minister of the Crown or published with the name of a Minister of the Crown in support,

in either House, makes (or would make) relevant provision for the first time or beyond the limits of any consent previously given by the Senedd, normally no later than two weeks after the amendments are tabled or agreed to.

29.2A Any member, other than a member of the government, who intends to table a legislative consent motion in relation to a relevant Bill must first lay a legislative consent memorandum, but must not normally do so until after a member of the government has laid a legislative consent memorandum in respect of that Bill.

29.2B The Presiding Officer must lay a legislative consent memorandum in relation to any UK Private Bill that is a relevant Bill on its introduction to the first House, normally no later than 2 weeks after introduction.

29.2C Any member, other than the Presiding Officer, who intends to table a legislative consent motion in relation to a relevant Private Bill must first lay a legislative consent memorandum, but must not normally do so until after the Presiding Officer has laid a legislative consent memorandum in respect of that Private Bill.

29.3

A legislative consent memorandum must:

(i) summarise the policy objectives of the Bill;

(ii) specify the extent to which the Bill makes (or would make) relevant provision;

(iii) explain whether it is considered appropriate for that provision to

be made and for it to be made by means of the Bill;

(iv) where the Bill contains any relevant provision conferring power to make subordinate legislation on Welsh Ministers, set out the Senedd procedure (if any) to which the subordinate legislation to be made in the exercise of the power is to be subject; and

(v) where a legislative consent memorandum has already been laid in relation to the same provisions in the same Bill, set out how and why the new memorandum differs from the previous memorandum.

29.3A Standing Order 29.3(iii) does not apply to a memorandum laid by the Presiding Officer under Standing Order 29.2B.

29.4 The Business Committee must:

(i) normally refer any legislative consent memorandum to a committee or committees for consideration; and

(ii)establish and publish a timetable for the committee or committees to consider and report on it.

29.5 [Standing Order removed by resolution in Plenary on 01 May 2013]

legislative consent motion

29.6 After a legislative consent memorandum has been laid, any member may, subject to Standing Orders 29.2A and 29.2C, table a motion ("a legislative consent motion") seeking the Senedd's agreement to the inclusion of a relevant provision in a relevant Bill.

29.7 The Senedd must consider a legislative consent motion which has been tabled.

29.8 When a legislative consent memorandum is referred by the Business Committee for consideration by a committee or committees in accordance with Standing Order 29.4, a related legislative consent motion must not be debated, until either:

(i) the committee or committees have reported in accordance with Standing Order 29.4; or

(ii) the deadline by which a committee is required to report in accordance with Standing Order 29.4 has been reached.

Appendix 3 – Standing Order 9b of the Scottish Parliament

CHAPTER 9B
CONSENT IN RELATION TO UK PARLIAMENT BILLS

Rule 9B.1 UK Parliament Bills making provision requiring the Parliament's consent

1. In this Chapter, a —relevant Bill‖ is a Bill under consideration in the UK Parliament which makes provision (—relevant provision‖) applying to Scotland for any purpose within the legislative competence of the Parliament, or which alters that legislative competence or the executive competence of the Scottish Ministers.

Rule 9B.2 Legislative consent motions

1. A motion seeking the Parliament's consent to relevant provision in a relevant Bill shall be known as a legislative consent motion. A legislative consent motion shall identify the relevant Bill by reference to its short title and the House of the UK Parliament in which and the date on which it was introduced.

2. A legislative consent motion shall not normally be lodged until after the publication of the lead committee's report.

3. Every legislative consent motion lodged shall be taken in the Parliament. The Parliament shall not normally take such a motion earlier than the fifth sitting day after the day on which the lead committee's report under Rule 9B.3.5 below is published.

Rule 9B.3 Legislative consent memorandums

1. A member of the Scottish Government shall lodge with the Clerk a memorandum (—a legislative consent memorandum‖) in relation to—

(a) any Government Bill that is a relevant Bill on introduction, normally no later than 2 weeks after introduction;

(b) any 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;

(c) any Bill that, by virtue of amendments—

i. agreed to; or

ii. tabled by a Minister of the Crown or published with the name of a Minister of the Crown in support,

in either House, makes (or would make) relevant provision for the first time or beyond the limits of any consent previously given by the Parliament, normally no later than 2 weeks after the amendments are tabled or agreed to.

2. Any member (other than a member of the Scottish Government) who intends to lodge a legislative consent motion in relation to a relevant Bill shall first lodge with the Clerk a legislative consent memorandum, but shall not normally do so until after a member of the Scottish Government has lodged a legislative consent memorandum in respect of that Bill.

3. A legislative consent memorandum shall—

(a) summarise what the Bill does and its policy objectives;

(b) specify the extent to which the Bill makes provision—

i. for any purpose within the legislative competence of the Scottish Parliament; or

ii. to alter that legislative competence or the executive competence of the Scottish Ministers;

(c) in the case of a memorandum lodged by a member (including a member of the Scottish Government) who intends to lodge a legislative consent motion, set out a draft of the motion and explain why the member considers it appropriate for that provision to be made and for it to be made by means of the Bill; and

(d) in the case of a memorandum lodged by a member of the Scottish Government who does not intend to lodge a legislative consent motion, explain why not.

4. Notice of any legislative consent memorandum lodged shall be given in the Business Bulletin. The Clerk shall arrange for the memorandum to be published.

5. The Parliamentary Bureau shall refer any legislative consent memorandum to the committee within whose remit the subject matter of the relevant provision falls. That committee (referred to as —the lead committee‖) shall consider and report on the legislative consent memorandum. Where the subject matter of the relevant provision 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. The other committee or committees (—the secondary committee or committees‖) may

also consider the legislative consent memorandum and report its or their view to the lead committee.

6. In any case where the Bill that is the subject of the memorandum contains provisions conferring on the Scottish Ministers powers to make subordinate legislation, the committee mentioned in Rule 6.11 shall consider and may report to the lead committee on those provisions.

Appendix 4 – Protocol on obtaining the approval of the Scottish Parliament to the exercise of powers by UK Ministers under the European Union (Withdrawal) Act 2018 in relation to proposals within the legislative competence of the Scottish Parliament

Appendix 5 –

National Assembly for Wales **Constitutional and Legislative Affairs Committee**
Scrutiny of regulations made under the European Union (Withdrawal) Act 2018:
A guide

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11 September 2018

Dear Conveners.,

With 62% of people in Scotland voting to remain in the European Union, the Scottish Government opposes EU withdrawal. We have nevertheless set out our views on how withdrawal could take place in a way which allowed Scotland to mitigate the effects of the UK's decision to leave the EU. It is our view that remaining in the Single Market and Customs Union, along with a significant expansion of devolved competence for the Scottish Parliament, is the only way in which Scotland's interests could be protected in EU withdrawal. It follows that the UK Government should take the idea of leaving in March 2019 without a withdrawal agreement off the table. Contemplating a No-Deal scenario is irresponsible, and should be unthinkable. It would have significant negative economic and social consequences for Scotland and indeed for the whole of the UK.

However the UK Government continues to insist that a No-Deal scenario is possible, despite the inevitable widespread damage and disruption it would cause. We must respond to this uncertainty as best we can. It is therefore our unwelcome responsibility to ensure that devolved law continues to function on and after EU withdrawal in this event. As part of that, I would like to set out how the Scottish Government intends to go about the regrettable but necessary task of preparing devolved law for EU withdrawal.

This is not about the question of where devolved powers will be exercised after EU withdrawal. Instead it is about the technical task of ensuring that important schemes and regulations can continue to operate despite withdrawal. It has been the consistent position of the Scottish Government that cooperation and coordination between the governments of these islands would be required to prepare our laws for the shock of EU exit. We set this out in the legislative consent memorandum for the EU (Withdrawal) Bill, and during the passage of the Continuity

Bill. That will remain our position as long as it is in Scotland's interests, as long as it can be done compatibly with the devolution settlement, and as long as the Scottish Parliament is afforded its proper role.

This necessary contingency planning will involve a substantial number of instruments to be made containing changes to reserved and devolved law. Where the policy outcome being sought is consistent across administrations, then it could be appropriate and in Scotland's interests to agree a UK-wide approach to statutory instruments (for example, to avoid duplication of effort, or where only technical or minor amendments are required). Where a different way of dealing with EU withdrawal, or a different policy outcome, is required in Scotland, we will pursue our own statutory instruments in the Scottish Parliament.

Because of the large number of instruments involved, this approach will protect, as best we can, the Scottish Government and Parliament's capacity for dealing with non-withdrawal-related legislation in the coming months and years.

The Scottish Government is determined to ensure that the Scottish Parliament will be given its necessary and vital role in scrutinising decisions by the Scottish Ministers to cooperate over legislative preparations and we will impress that matter on the UK Government in our discussions. Scottish Ministers will notify the Scottish Parliament of any proposal to consent to the UK Government using its powers in devolved areas. Annexed to this letter is a protocol, developed in collaboration between Scottish Government and Scottish Parliament officials, which will ensure that the Scottish Parliament is able to scrutinise Scottish Ministers' approach. We are working to ensure that the UK Government builds sufficient time into the timetable for this programme of legislation to ensure that the protocol can be followed in full. In addition it should be noted that in relation to correcting deficiencies, there is now substantial equalisation of Scottish and UK ministerial powers under the EU (Withdrawal) Act.

Of course, the Scottish Government deeply regrets the fact that substantial resources and time have to be devoted to preparing Scotland's laws for an an EU withdrawal that people in Scotland did not vote for, and that the situation that has been made worse and more urgent by the possibility of a No-Deal outcome.

I am happy to commit to giving evidence on any of these matters to your committees, and I have asked my officials to continue their liaison with yours to ensure that information is exchanged about the likely content and scale of the programme of notifications required.

MICHAEL RUSSELL

Annex

Protocol on obtaining the approval of the Scottish Parliament to the exercise of powers by UK Ministers under the European Union (Withdrawal) Act 2018 in relation to proposals within the legislative competence of the Scottish Parliament

Introduction

1. This protocol sets out a shared understanding between the Scottish Government and the Scottish Parliament on the process for obtaining the approval of the Scottish Parliament to the Scottish Ministers' consent to the exercise by UK Ministers of powers under the European Union (Withdrawal) Act 2018 ("the Act") in relation to proposals within the legislative competence of the Scottish Parliament.

2. The protocol also sets out how proposals for UK Statutory Instruments (SIs) will be categorised to help committees target their scrutiny in a proportionate manner.

3. The Scottish Government and the Scottish Parliament recognise that it may be necessary to re-visit the protocol to consider whether its provisions should apply to other legislation relating to the UK's withdrawal from the European Union.

4. The protocol applies to proposals which may result in statutory instruments containing provision under sections 8 or 9 of the Act where the provision could be made by the Scottish Ministers exercising their equivalent powers in Schedule 2 ("relevant provision"). Where there is agreement between the UK Government and the Scottish Government that the relevant provision should be subject to joint procedure (laid in both the UK Parliament and the Scottish Parliament) or be made in a Scottish Statutory Instrument (SSI) then the procedures set out in the protocol will not be required. In such instances, the Scottish Parliament will be able to scrutinise the instrument via either the joint procedure or the SSI procedure.

5. There is a separate protocol establishing the process for the consideration of SSIs under the Act and the categorisation of such instruments.

Background

6. The Act contains various delegated powers for:
   - UK Ministers to make regulations in all areas, including provisions within devolved competence;
   - Scottish Ministers to make regulations by SSI within devolved competence as defined in paragraphs 8 or 17 of Schedule 2;
   - UK Ministers and Scottish Ministers to make regulations in a UK SI under a joint procedure.

7. In that regard the Act is unusual in that it provides concurrent delegated powers to the UK Government and the Scottish Ministers to make provision within devolved competence as defined in paragraphs 8 and 17 of Schedule 2.

8. The UK Government indicated, in its Delegated Powers Memorandum that accompanied the Bill for the Act, that it will not normally use the powers in the Act to

amend domestic legislation in areas of devolved competence without the agreement of the relevant devolved authority.

9. It is recognised that the Scottish Parliament has power to legislate for matters within devolved competence (as defined in paragraphs 8 and 17 of Schedule 2). However, where the Scottish Ministers consent to the power being exercised by UK Ministers alone in relation to devolved competence this will be done by SI. In such cases the Act makes no provision for scrutiny by the Scottish Parliament of the exercise of that power. Both the Scottish Parliament and the Scottish Government recognise that, as a matter of principle, the Scottish Parliament should have the opportunity to consider in advance of the exercise of such powers whether it is content for the matter to be taken forward by SI rather than SSI.

10. As noted earlier, the protocol applies in respect of all SIs containing provision under sections 8 or 9 of the Act where that provision could be made by the Scottish Ministers exercising their equivalent powers in Schedule 2 ("relevant provision"). However, the protocol recognises that that not all relevant provisions will merit the same level of scrutiny. In prioritising scrutiny capacity the Scottish Parliament will wish to take a proportionate approach. The proportionality issue is addressed by suggesting a differentiated scrutiny approach depending on the significance of the provision proposed.

Process

11. The Scottish Parliament should be notified about all proposals which may result in UK SIs containing relevant provision prior to consent being given by Scottish Ministers to the UK Government to proceed. Please note, there may be instances in which Scottish Ministers do not wish to consent UK Ministers taking forward proposals for UK Sis containing relevant provision. In any such instance, Scottish Minister will take forward their own SSIs that the Scottish Parliament will be able to scrutinise when they are laid. The Scottish Government is taking a prioritised approach to the legislative fixes that are necessary before the end of March 2019 and will aim to fix all deficiencies by the end of December 2020. What the Scottish Parliament then does by way of scrutiny may vary depending of the significance of the proposal. The following process provides a guide as to how committees might wish to consider proposals for relevant provision in UK SIs, but it is not prescriptive or mandated.

Phase 1 - identification

12. Proposals for inclusion in SIs will emerge from deficiencies in legislation identified (by the Scottish Government or UK Government) that will need corrected as a consequence of the UK's withdrawal from the European Union. Discussions will take place between the Scottish Government and UK Government counterpart departments on how to fix the deficiencies identified and the most appropriate legislative vehicle to use (UK SI, SSI or instrument subject to Joint Parliamentary procedure). If the legislative vehicle considered appropriate is a UK SI then the process moves to phase 2.

Phase 2 - notification

13. At the earliest opportunity, the Scottish Government will notify the Scottish Parliament where the Scottish Ministers propose to give consent to proposals being included in UK SIs where the proposals would be within devolved competence. This is important

because if the Scottish Parliament recommends not to include provisions in a UK SI there needs to be sufficient time for the Scottish Government to prepare the necessary SSI, which may be challenging given the timescales necessary for developing SSIs. At this stage, the Scottish Government may or may not have seen the draft UK SI that the proposals are to be included in.

14. The notification will be by way of a Notification of Intention to Consent (Notification) accompanied by a letter from the relevant Scottish Minister to the relevant lead subject committee. The notification and letter should also be copied to the Convener of the Delegated Powers and Law Reform Committee.

15. A single notification to the Scottish Parliament may cover a number of proposals for correcting deficiencies or it may only cover a proposal to correct a single deficiency. This will be dependent on the nature of the legislation that is being corrected and the policy area. The precise timing of notifications may vary depending on the nature of what is being notified. However, the Scottish Government will share information with the Scottish Parliament about the expected timing and volume of notifications.

16. From the date of receipt of the notification from the Scottish Government, the Scottish Parliament will normally have a maximum of 28 days (subject to paragraph 18) in which to consider the notification.

17. The notification will detail—

- The name of the instrument in question (if known) or a title describing the policy area
- A brief explanation of law that the proposals amend
- Summary of the proposals and how these correct deficiencies
- An explanation of why the change is considered necessary
- Scottish Government categorisation of significance of proposals
- Impact on devolved areas
- Summary of stakeholder engagement/consultation
- A note of other impact assessments, (if available)
- Summary of reasons for Scottish Ministers' proposing to consent to UK Ministers legislating
- Intended laying date (if known) of instruments likely to arise
- If the Scottish Parliament does not have 28 days to scrutinise Scottish Minister's proposal to consent, why not?
- Information about any time dependency associated with the proposal
- Any significant financial implications

Phase 3 – parliamentary scrutiny

As noted at paragraph 16, from the date of receipt of the notification from the Scottish Government, the Scottish Parliament will normally have a maximum of 28 days to consider the notification. For the purposes of this protocol, in calculating any period of days, no account shall be taken of any time during which the Scottish Parliament is dissolved or is in recess for more than 14 days. The Scottish Parliament and the UK Parliament have different recess periods. The Scottish Government will seek to ensure that the United Kingdom Government is aware of Scottish Parliament recess periods

and take them in to account in its own legislative programming and that it respects the role of the Scottish Parliament under the terms of this protocol.

18. The Committee's consideration will be of the Scottish Minister's proposal to consent to proposals being included in a UK SI as contained in the notification.

19. To support committee consideration of notifications this protocol categorises proposals that may be included in a notification, so as to assist committees to prioritise scrutiny of more significant proposals. The categories also suggest that there are particular matters that the Scottish Government and Scottish Parliament agree should be subject to the joint procedure or made provision for in an SSI rather than a UK SI.

20. This protocol sets out different levels of scrutiny based on the significance of the proposal to be included in a notification.

21. A suggested approach to scrutiny is set out in relation to each of the categories. There is flexibility for a committee to do more or less in terms of scrutiny than what is set out below, within the timeframe set out in paragraph 16.

22. The categories make no provision for particular policy areas to fall into any one of the categories, but it may become apparent that there are policy areas where there is significant stakeholder interest and substantive proposals within this policy should necessarily normally fall into a higher category.

- **Category A**

These are proposals for UK SIs containing relevant provision which the Scottish Ministers must notify to the Scottish Parliament prior to granting consent in the way described above. This would be a residual category of all proposals for SIs subject to the protocol, where the relevant provision is not significant enough to fall within categories B or C. It is expected that matters falling into this category would not necessarily be so significant as to require a committee to take evidence from the relevant Scottish Minister or stakeholders. While proposals under category A may not be significant, committees would retain the right to take evidence on such proposals for SIs should they wish to do so and could come to the view that the Scottish Parliament should not give its approval to the Scottish Ministers giving their consent to UK Ministers. Set out below is an illustrative guide to the type of matters that may fall into category A.

Category A
It is expected that proposals for instruments falling into this category will have one or more of the following characteristics: • Minor and technical in detail; • Ensuring continuity of law; • Clear there is no significant policy decision for Ministers to make; • Proposals necessary for continuity where there may be a minor policy change, but limited policy choice and an “obvious” policy answer; • Proposals where Ministers have a policy choice but with limited implications, e.g. only one obvious policy option as to which body may provide an opinion or receive a report; • Transfer of functions - providing for a function of an EU entity to be exercised by a public authority in the UK, where a choice as to whether that should be amended to be the Secretary of State for Scotland, Scottish Ministers or somebody else is consistent with the devolution settlement or replicates what happens in practice now; • Updating references which are no longer appropriate once the UK has left the EU, such as provisions which refer to “member states other than the United Kingdom” or to “other EEA states” This is an illustrative list and not a comprehensive view of what falls into this category.

- **Category B**

Matters in category B are considered to be more significant than those contained in category A. Again these are proposals for UK SIs containing relevant provision which the Scottish Ministers must notify to the Scottish Parliament prior to granting consent in the way described above. It is expected, however, that these are matters where the lead committee may wish to take evidence on the notification from the Scottish Government (and potentially from external stakeholders where it is felt that the notification is particularly significant). A committee would not be obliged, however, to take evidence. Again, based on its consideration of the notification, a committee could come to the view that the Scottish Parliament should not give its approval to the Scottish Ministers giving their consent to UK Ministers.

Category B
It is expected that proposals for instruments falling into this category will have one or more of the following characteristics: • Proposals where a more significant policy decision is being made by Scottish Ministers. • Proposals predominantly concerned with technical detail but which include some more significant provisions that may warrant subject committee scrutiny; • Transfer of functions - providing for a function of an EU entity to be exercised by a public authority in the UK where there is a policy choice with significant implications about which public authority it should be e.g. a regulatory function exercisable by either SEPA or Scottish Water where Parliament may have an interest in the policy choice made by Scottish Ministers • Replacement, abolition, or modification of certain EU functions that have significant implications e.g reporting (both receiving and making reports), monitoring, compliance and enforcement; • Sub-delegation - creating or amending a power to legislate, for example transferring EU legislative powers to a UK public authority; • Provision which materially increases or otherwise relates to a fee in respect of a function exercisable by a UK public authority. This could include changes to the group of bodies or individuals required to pay such fees; • Provision which creates, or widens the scope of, a criminal offence, or which increases the penalty which may be imposed in respect of a criminal offence; • Provision which involves a significant financial impact on individuals, business, public sector or the economy (this could be automatically elevated to category C if it met a particular financial threshold); • Provision which creates, widens the scope of, or increases the level of fine for a fixed penalty. This is an illustrative list and not a comprehensive view of what falls into this category.

- **Category C**

Finally, there are matters that it is considered should be subject to joint procedure in the UK and Scottish Parliaments, in accordance with paragraph 2 of Schedule 7 to the Act. These are matters where it is considered that the Scottish Parliament will wish to consider the terms of the instrument not the proposal to legislate. This protocol does not identify matters falling into the category, but on the basis of experience the Scottish Government may come to the view that there are matters that should automatically fall into this category. In these instances, this protocol is not engaged as the Scottish Parliament will be able to scrutinise the instrument under the joint procedure. However, this category is included in this protocol for reference, to enable the Scottish Parliament to recommend to the Scottish Government that a proposal which may result in a UK SI is taken forward as an instrument under joint procedure.

Reporting

23. The lead Committee is under no obligation to use the full 28 day period outlined above, and may instead wish to write to the Scottish Government at an early stage to confirm that it is content with the Scottish Ministers' proposal to consent to the proposals being included in a UK SI.

24. However, the Committee may wish to undertake consideration of the proposal to consent to the matters being included in a UK SI and make a report to the Parliament.

25. That report may make one of three recommendations—

    1. That the Scottish Ministers should proceed to notify the UK Government of their decision to consent to the proposals being included in a UK SI to be made by UK Ministers.
    2. That the Scottish Ministers should not consent to the proposal being included in a UK SI to be laid solely in the UK Parliament and instead request that the proposals be included in a UK SI to be made under the joint procedure.
    3. That the Scottish Ministers should not consent to the proposals being included in a UK SI and instead should include the proposals in an SSI.

26. If a committee makes a recommendation as mentioned at sub-paragraph 2 or 3 of paragraph 26 then the lead Committee should notify the Scottish Government in writing. The Scottish Government should normally be given 7 days to respond. If the Scottish Government does not agree to the recommendation made then the Parliamentary Bureau should---

- by motion propose that the Scottish Parliament agrees to the Committee's recommendation, and
- schedule time in the chamber for debate on the motion.

27. That debate may take place after the period of 28 days has expired, but should take place within 14 days following the expiry of the 28 day period.

28. If the Scottish Parliament agrees to the motion the Scottish Government would normally not consent to the proposal being included in a UK SI and would either

request that the proposal be included in a UK SI to be made under the joint procedure or include the proposal in an SSI, depending on what the committee recommended.

Phase 4 – finalisation of the SI

29. Where the Scottish Ministers have consented to proposals being included in a UK SI to be made by UK Ministers the UK Government will proceed with drafting, or finalising the SI in question. The Scottish Government will track which UK SI or SIs the proposals are included in. When in receipt of a draft SI, the Scottish Government will take a view as to whether the SI reflects the proposals that were consented to. The Scottish Government will either—

- Advise the Scottish Parliament when the SI is laid in the UK Parliament and that it is content that the SI is drafted in a manner that is consistent with the consent granted.
- Advise the Scottish Parliament in writing to the lead Committee and the Delegated Powers and Law Reform Committee that there has been a variation in the approach taken to the proposals included in the SI, but that the variation is not so significant as to engage the need for a further process of obtaining the Parliament's approval. The letter will explain the Scottish Government's reasons.
- Advise the Scottish Parliament that there has been a more substantive variation to the approach taken to the proposals included in the SI and that as such it no longer reflects what the Scottish Parliament approved and that an SSI will be laid or alternatively the instrument will be subject to the joint procedure.

Revisions to this protocol

30. This protocol will be kept under review. The Scottish Government or the Scottish Parliament may propose revisions to the protocol and both will need to agree to any revisions made.

National Assembly for Wales
Constitutional and Legislative Affairs Committee

Scrutiny of regulations made under the European Union (Withdrawal) Act 2018: A guide

January 2019

www.assembly.wales

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Contents

1. Background

The European Union (Withdrawal) Act 2018

1. The *European Union (Withdrawal) Act 2018* (the 2018 Act) provides UK Ministers and the Welsh Ministers with regulation-making powers to amend existing primary and secondary legislation[1] in order to correct deficiencies in UK law that may arise following the UK's departure from the EU.

2. Section 8 of the 2018 Act gives UK Ministers the power to make regulations as they consider appropriate to prevent, remedy or mitigate any failure of retained EU law[2] to operate effectively or any other deficiency in retained EU law.

3. Section 9 gives UK Ministers the power to make regulations as they consider appropriate to implement any withdrawal agreement arising as a consequence of Article 50(2) of the Treaty on European Union.

4. Section 11 of, and Schedule 2 to, the 2018 Act confer powers on the Welsh Ministers to make regulations that correspond to powers conferred on UK Ministers by sections 8 and 9 of the 2018 Act (although the regulation-making powers of the Welsh Ministers are subject to limitations that do not apply to UK Ministers). Schedule 2 also allows for UK Ministers and the Welsh Ministers to act jointly when making regulations.

5. However, the powers in section 8 and 9 for UK Ministers are not limited to being exercised in England. **In effect, the powers permit UK Ministers to act in Wales in devolved areas., i.e. UK Ministers and the Welsh Ministers hold some powers concurrently.**

6. In an agreement between the UK and Welsh governments, the UK Government commits not to act in devolved areas without the agreement of the Welsh Government.[3] Its states:

> "The UK Government will be able to use powers under clauses 7, 8 and 9 to amend domestic legislation in devolved areas but, as part of this agreement, reiterates the commitment it has previously given that it will not normally do so without the agreement of the devolved

[1] Secondary legislation is also referred to as subordinate or delegated legislation

[2] Any law which, on or after exit day, continues to be, or forms part of domestic UK law

[3] *Intergovernmental Agreement on the European Union (Withdrawal) Memorandum and the Establishment of Common Frameworks*

> administrations. In any event, the powers will not be used to enact new policy in devolved areas; the primary purpose of using such powers will be administrative efficiency."

7. Section 14 of, and Schedule 4 to, the 2018 Act provides powers for the Welsh Ministers to make regulations in connection with fees and charges.

8. Section 22 of, and Schedule 7 to, the 2018 Act include provisions about the scrutiny by the National Assembly of regulations made by the Welsh Ministers under the 2018 Act, including the sifting of regulations proposed to be made using the negative procedure by the Constitutional and Legislative Affairs Committee (CLA Committee). The sifting process was introduced during scrutiny of the Bill that became the 2018 Act because of concerns about the scale and scope of the regulation-making powers being provided and the need for more scrutiny of the subordinate legislation as a result.[4] The sifting process, which could potentially result in proposals for negative procedure regulations to be changed to affirmative procedure regulations, is described in chapter 2.

9. Section 23 of the 2018 Act provides powers for UK Ministers to make regulations in relation to consequential and transitional provisions as they consider appropriate as a consequence of the 2018 Act.

10. With regard to making regulations in devolved areas, the result is that the 2018 Act includes a complex mix of concurrent and joint powers exercisable by the Welsh Ministers and UK Ministers.

11. The regulation-making powers under the 2018 Act are listed in Table 1. The regulations will be subject to the negative or affirmative procedures, or the urgent procedure, in accordance with section 22 and Schedule 7 to the 2018 Act.

Procedures for scrutinising regulations made under the 2018 Act

12. In its report, *Scrutiny of regulations under the European Union (Withdrawal) Act 2018: operational matters*, the CLA Committee made recommendations about how the National Assembly's Standing Orders should be changed to ensure that regulations arising from the 2018 Act are scrutinised effectively.

[4] Concerns were led by the House of Commons Procedure Committee and their work on the subject is available on their website.

13. Following the Welsh Government's response to the report, and that of the Business Committee, the National Assembly agreed changes[5] to its Standing Orders (based on the Business Committee's recommendations).

14. Under the 2018 Act, regulations in devolved areas can be made in three main ways:[6]

- by the Welsh Ministers (under section 11 of, and Schedule 2 to, the 2018 Act);
- by UK Ministers acting alone in devolved areas with the consent[7] of the Welsh Ministers (under sections 8 and 9 of the 2018 Act);
- by UK Ministers acting alone in devolved areas without the consent[8] of the Welsh Ministers (under section 23 of the 2018 Act).

15. All regulations to correct deficiencies in EU law, whether made by UK Ministers or the Welsh Ministers, can be identified by the inclusion of the phrase "(EU Exit)" in their title.

[5] RoP, [178-191], 3 October 2018

[6] While there is scope for UK Minister and the Welsh Ministers to act jointly, or to use concurrent powers in a composite instrument, it is expected that such circumstances will occur rarely.

[7] Consent under the Intergovernmental Agreement on the European Union (Withdrawal) Memorandum and the Establishment of Common Frameworks, rather than statutory consent

[8] Consent under the Intergovernmental Agreement on the European Union (Withdrawal) Memorandum and the Establishment of Common Frameworks, rather than statutory consent

Table 1: Summary of main powers to make regulations in devolved areas under the European Union (Withdrawal) Act 2018

Power	Can be exercised by	Section or Schedule	Laid before	Does the sifting process apply under the 2018 Act
To correct deficiencies in retained EU law in devolved areas	UKMs acting alone	Section 8	UKP	Yes
	WMs acting alone	Part 1 of Schedule 2	NAW	Yes
	UKMs and WMs acting jointly	Part 1 of Schedule 2	UKP and NAW	No
	UKMs and WMs using concurrent powers in a composite instrument	Section 8 (UKMs) Part 1 of Schedule 2 (WMs)	UKP and NAW	Yes
To implement withdrawal agreement in devolved areas	UKMs acting alone	Section 9	UKP	Yes
	WMs acting alone	Part 2 of Schedule 2	NAW	Yes
	UKMs and WMs acting jointly	Part 2 of Schedule 2	UKP and NAW	No
	UKMs and WMs using concurrent powers in a composite instrument	Section 9 (UKMs) Part 2 of Schedule 2 (WMs)	UKP and NAW	Yes
Consequential and transitional provisions in devolved areas	UKMs acting alone	Section 23	UKP	Yes
Imposing and modifying fees and charges in devolved areas	UKMs acting alone	Schedule 4	UKP	No
	WMs acting alone	Schedule 4	NAW	No
	UKMs and WMs acting jointly	Schedule 4	UKP and NAW	No
	UKMs and WMs using concurrent powers in a composite instrument	Schedule 4	UKP and NAW	No
Regulations to freeze certain areas of retained EU law in devolved areas	UKMs acting alone (but subject to terms agreed in the Intergovernmental Agreement)	Section 12 (i.e. under the new section 109A of the *Government of Wales Act 2006*) Schedule 3, Part 1 (i.e. under new section 80(8) of the 2006 Act)	UKP (and always subject to affirmative procedure)	No (but before UKMs can lay before UKP, NAW to make a "consent decision" within 40 days)

Key: WMs = the Welsh Ministers. UKMs = UK Ministers. NAW = National Assembly for Wales. UKP = UK Parliament.

2. Regulations made by the Welsh Ministers

Background

16. Under the 2018 Act, regulations made by the Welsh Ministers to correct deficiencies in EU law can be subject to the negative procedure or the affirmative procedure. In each case, the particular procedure is determined by the 2018 Act itself.

17. As described in paragraph 8 of this guide, regulations which the Welsh Government proposes to make using the negative procedure are subject to sifting.[9] The regulations are being referred to as proposed negatives.

18. In order to manage the number of regulations that may come forward, the CLA Committee and Welsh Government have entered into a Protocol, which provides in particular for notice two weeks in advance of regulations that are likely to come forward.

The sifting process by the CLA Committee for proposed negative regulations

19. The sifting process is set out in paragraph 4 of Schedule 7 to the 2018 Act and is taken account of in new Standing Orders 21.3B, 21.3C, 27.1A, 27.9A and 27.9B. Taken together, the sifting process requires:

- all regulations proposed to be made by the Welsh Ministers under the powers in Parts 1 and 2 of Schedule 2 (other than those to be made jointly with UK Ministers), and which the Welsh Ministers consider ought to be made under the negative procedure, shall be laid in draft before the National Assembly;
- the proposed regulations must be accompanied by an explanatory memorandum setting out why the regulations should be subject to the negative procedure;
- within a period of 14 calendar days after laying, the Welsh Ministers may not make the proposed negative regulations (i.e. sign them into law), unless the CLA Committee have made a recommendation as to the appropriate procedure for the regulations;

[9] Other than regulations made under Schedule 4 to the 2018 Act.

- within those 14 calendar days, the CLA Committee may consider the proposed negative regulations and recommend that the regulations should follow an alternative procedure (such as the affirmative procedure);
- the criteria that the CLA Committee take into account in making their recommendation are set out in Standing Order 21.3C (see Box 1);
- information about the outcome of the scrutiny of proposed negative regulations is available on the CLA Committee's webpage.

Box 1: Standing Order 21.3C – sifting criteria

The responsible committee under Standing Order 21.3B must report on the appropriate procedure using the following criteria:

(i) whether the memorandum is sufficiently clear and transparent about why the government is of the opinion that the negative resolution procedure should apply;

(ii) whether the memorandum is sufficiently clear and transparent as to the changes that are being made by the regulations;

(iii) whether there has been adequate consultation on the regulations;

(iv) whether the memorandum is sufficiently clear and transparent about the impact the regulations may have on equality and human rights;

(v) whether the regulations raise matters of public, political or legal importance; and

(vi) any other matters the committee considers appropriate.

Note: the memorandum refers to an explanatory memorandum that must accompany any regulations laid before the National Assembly (in accordance with Standing Order 27.1)

After sifting by the CLA Committee

20. After the 14 calendar days have elapsed (or sooner if the CLA Committee has already made a recommendation) the Welsh Ministers may proceed with the proposed negative regulations by:

- the affirmative procedure, where the CLA Committee recommends the regulations should follow the affirmative procedure and the Welsh Government accepts that recommendation (i.e. the regulations require a debate and a vote in the National Assembly before it may be made and brought into force), or

- the negative procedure, where the CLA Committee has not made a recommendation for the regulations to be subject to the affirmative procedure or where it has, the recommendation has not been accepted by the Welsh Government(i.e. the regulations are made and may be brought into force, but they can be annulled if the National Assembly resolves to annul them within 40 days of them being laid).

21. Standing Order 27.9B requires that the explanatory memorandum to accompany the regulations must explain, if relevant, why the Welsh Government has not adopted a CLA recommendation to adopt the affirmative procedure.

22. The regulations are then subject to the standard process for scrutinising regulations and will be subject to scrutiny by the CLA Committee in accordance with the criteria set out in Standing Orders 21.2 and 21.3. For example:

- under Standing Order 21.2, matters considered include those that might call into question the legality of regulations or whether they are made in both English and Welsh. The Committee must consider and report on these matters. Matters reported under Standing Order 21.2 are known as technical reporting points.

- under Standing Order 21.3, matters considered include those that are likely to be of interest to the Assembly, such as regulations that do not implement policy in the way claimed or that are considered to be politically contentious or significant. The Committee may consider and report on these matters. Matters reported under Standing Order 21.3 are known as merits reporting points.

23. The CLA Committee will consider advice from National Assembly lawyers on any set of regulations where there are issues to report.

24. Otherwise they will be noted as having clear reports. At any one meeting, regulations with clear reports will be included in a separate document.

CLA reporting

25. All reports are then laid before the National Assembly enabling Assembly Members to:

- for affirmative regulations, decide whether to approve the regulations when are voted on in plenary;
- for negative regulations, decide whether to table a motion to annul them, which triggers a debate in plenary for Assembly Members to vote on that motion.

26. Information about the outcome of the scrutiny of these regulations subject to either the negative or affirmative procedures is available on the CLA Committee's subordinate legislation webpage.

3. Regulations made by UK Ministers acting alone in devolved areas (with consent of the Welsh Ministers)

Background

27. UK Ministers are able to make regulations in devolved areas under sections 8 and 9 of the 2018 Act. However, they can only do so with the consent of the Welsh Government (see paragraph 6 of the guide). These regulations will be laid before the UK Parliament only.

28. New Standing Order 30C requires that for such regulations made or to be made by UK Ministers under the 2018 Act, the Welsh Government must lay a statement (30C written statement) notifying the Assembly of the regulations in question normally within 3 working days of it being laid in the UK Parliament.

29. Where the regulations amend primary legislation, the Welsh Government must also lay a Statutory Instrument Consent Memorandum (SICM) under Standing Order 30A. Any member may then table a motion to require the National Assembly to formally give consent to the regulations.[10]

The sifting process in the UK Parliament for proposed negative regulations

30. For regulations proposed to be made under the negative procedure by UK Ministers in devolved areas and with the Welsh Government's consent, they too will be subject to the sifting process. In the UK Parliament, sifting is being undertaken by two committees:

- the European Statutory Instruments Committee in the House of Commons;
- the Secondary Legislation Scrutiny Committee in the House of Lords.

[10] Standing Order 30A was introduced in October 2013 and therefore not included specifically to deal with the UK's exits from the European Union.

31. The process for sifting is broadly the same although these committees have a longer period in which to sift[11] and their sifting criteria are expressed differently.

32. After the regulations have been sifted, the UK Government is obliged to make a written Ministerial statement to both Houses on every occasion they disagree with a recommendation from one or both of the sifting committees.[12]

After sifting in the UK Parliament

33. After sifting all regulations, all statutory instruments (whether negative resolution or affirmative resolution) are then formally scrutinised by the Joint Committee on Statutory Instruments and the Secondary Legislation Scrutiny Committee to undertake the usual technical and merits scrutiny carried out (mirroring the process undertaken by CLA Committee for all Welsh statutory instruments).

CLA scrutiny and reporting

34. Committee Members will receive advice from National Assembly lawyers about these regulations and the relevant Welsh Government 30C written statement, as well as any relevant SICM. The advice will include whether the approach adopted meets the test in the intergovernmental agreement (referred to in paragraph 6 of the guide) namely:

> "… the powers will not be used to enact new policy in devolved areas; the primary purpose of using such powers will be administrative efficiency."

35. If there are any issues, the Committee will likely write to the Welsh Ministers about the issues, and may draw them to the attention of the parliamentary committees referred to in paragraph 33. The timeframes involved mean the CLA Committee is not likely to be in a position to influence the sifting process in the UK Parliament.

[11] CLA Committee's report, *Scrutiny of regulations made under the European Union (Withdrawal) Act 2018: Operation matters* explains the background to the difference (pages 25-27)

[12] For a discussion of why this requirement does not apply in the National Assembly, see RoP, [178-191], 3 October 2018

4. Regulations made by UK Ministers acting alone in devolved areas (without the consent of the Welsh Ministers)

Background

36. UK Ministers are able to make regulations in devolved areas under section 23 of the 2018 Act, without the consent of the Welsh Government. These regulations will also be laid before the UK Parliament only.

37. The requirements of Standing Order 30C and Standing Order 30A also apply to such regulations and require that, for such regulations made or to be made by UK Ministers under the 2018 Act, the Welsh Government must lay a statement notifying the Assembly of the regulations in question normally within 3 working days of the regulations being laid in the UK Parliament.

38. These regulations will also be sifted and scrutinised by the parliamentary committees referred to in paragraph 30, again following the same procedures set out in paragraphs 31 to 33.

CLA scrutiny and reporting

39. Committee Members will receive advice from National Assembly lawyers about these regulations, and the relevant Welsh Government 30C written statement, as well as any relevant SICM. The advice will including whether the approach adopted meets the test in the intergovernmental agreement (referred to in paragraph 6 of the guide) namely:

> "... the powers will not be used to enact new policy in devolved areas; the primary purpose of using such powers will be administrative efficiency."

40. If there are any issues, the Committee will likely to write to the Welsh Ministers about the issues, and may draw them to the attention of the parliamentary committees referred to in paragraph 33. The timeframes involved mean the CLA Committee is not likely to be in a position to influence the sifting process in the UK Parliament.