

The Legislative Consent Process: Memorandum by the Welsh Government

Memorandum responding to the Assembly's Constitutional and Legislative Affairs Committee Report on Powers Granted to Welsh Ministers in UK Laws, Recommendation 1: "*We recommend that the Welsh Government should ask the Assembly to consider a 'declaratory' resolution setting out the Assembly's understanding of the Sewel convention as it applies to Wales*"

In its 2012 Inquiry into Powers granted to Welsh Ministers in UK Laws, the Committee recommended that the Welsh Government should ask the Assembly to consider a 'declaratory' resolution setting out the Assembly's understanding of the Sewel convention as it applies to Wales.

To assist the Assembly's consideration, this memorandum sets out the Welsh Government's approach based on its experience of the operation of the convention since the enactment of the Government of Wales Act 2006 giving limited primary legislative powers to the National Assembly. Following the 2011 referendum, the application of the convention has become more widespread as part of the widening of the Assembly's legislative competence.

The Constitutional Context

Generally speaking, the devolution settlements proceed on the basis that responsibility for the exercise of specified Ministerial (executive) powers is transferred from the UK Government to the devolved administrations; with certain exceptions, therefore, UK Government Ministers are no longer able to exercise such powers in respect of, in our case, Wales.

That is not, however, the case in respect of legislative powers; the relevant provisions in the Government of Wales Act 2006 conferring legislative competence on the Assembly "[do] not affect the power of the Parliament of the United Kingdom to make laws for Wales" (and there is equivalent provision in the legislation establishing the Scottish Parliament). So the effect of the 2006 Act (and the 1998 Scotland Act) is that both the UK Parliament and the devolved legislatures can make law for Wales or Scotland on matters within devolved competence.

It was recognised when the Scotland Bill was proceeding through Parliament in 1998 that this situation might well lead to inconsistent, or competing, legislation on devolved matters being made for Scotland by the UK Parliament and the Scottish Parliament. Having regard to the democratic legitimacy specifically enjoyed by the Scottish Parliament following the 1997 referendum, the UK Government considered that it would be appropriate for the UK Parliament to

adopt a self-denying ordinance in respect of matters within devolved legislative competence.

Accordingly, Lord Sewel, speaking for the UK Government on Scotland Bill proceedings in the House of Lords, said that the UK Government expected “a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament.”

This principle has been extended to all three devolved legislatures and is enshrined in the Memorandum of Understanding (MoU) between the UK Government and Devolved Administrations. Its application to Wales is set out in Devolution Guidance Note 9 which provides guidance to Whitehall officials on “Parliamentary and Assembly Primary Legislation Affecting Wales”.

The MoU confirms that the UK Government will operate as if there were a convention in place that Parliament would not normally legislate with regard to devolved matters without the agreement of the devolved legislature. The practical effect of the convention is that the UK Government is committed to working with the relevant devolved administration, to securing the consent of the relevant devolved legislature when it is proposing to introduce legislation into Parliament on devolved matters. Therefore any proposals to change the procedures giving effect to the convention require the agreement of the UK Government.

The Legislative Consent Process

The arrangements for enabling the Assembly to consider whether to give consent to Parliamentary legislation on devolved matters are set out in Standing Order 29 (SO 29). This requires the Welsh Government to lay a legislative consent memorandum about a Parliamentary Bill which makes provision in relation to Wales which is either within the legislative competence of the Assembly, or which modifies that competence. Provisions which are incidental, consequential, transitory etc. relating to non-devolved matters are exempt from this requirement.

SO 29 also sets out what must be contained within the memorandum, the timescales for laying it, and the expectation that it will be scrutinised by committee. After a memorandum has been laid, a legislative consent motion (LCM) may also be tabled and it is then a matter for the Assembly to decide whether to give its consent.

Principles

Now that the Assembly has its own primary legislative powers, the presumption is that it should legislate for Wales on devolved matters. However, there are circumstances when it is practicable and convenient to include devolved

provisions in Parliamentary legislation. Examples illustrating when this might happen were set out by the First Minister in his written evidence to the Committee's inquiry in November 2011. In these cases, the Welsh Government strives to give effect to the principle of legislative consent through timely and efficient procedures which enable the Assembly to give proper consideration to the issues.

The Welsh Government accepts that the principle of legislative consent being required where the Assembly has legislative competence is of the utmost importance. The Assembly is the democratically elected body accountable to the Welsh people for devolved matters. It should therefore be asked to give approval for Parliament to legislate on those matters.

The UK Government's Memorandum of Understanding (MoU) establishes the principle of early engagement with the devolved administrations on matters of mutual interest, including legislation. Welsh Government officials are often involved in discussions on legislative proposals affecting devolved matters with Whitehall officials on a confidential basis as they develop ahead of the Queen's Speech which announces each new legislative programme. Officials consult Welsh Ministers on the likely implications of these provisions and there will be inter-Ministerial correspondence setting out the Welsh Ministers' position with a view to resolving any disagreements ahead of the Bill's introduction, so enabling Welsh Ministers to support the inclusion of the proposed provisions when an LCM is debated in the Assembly.

Shortly after the Queen's speech, the Welsh Government Minister responsible for Government Business writes to the Presiding Officer identifying those Bills which may require a Legislative Consent Motion. The Secretary of State for Wales's statement to the Assembly on the Queen's speech provides further information. However, it is often only when the detailed provisions of a Bill are examined that decisions on the need for Assembly consent can be taken (and amendments to a Bill during the course of its passage through Parliament may require such decisions to be reconsidered, and additional consent motions laid before the Assembly).

If provisions in a Parliamentary Bill require the Assembly's consent, this needs to be secured, at the very latest, before the final amending stage in the second House, i.e. the House, normally the House of Lords, which is considering the Bill after it has already passed through the other House. The object of this timetable is that if Assembly consent is not forthcoming, the Bill can be amended as necessary.

Practical experience to date

The first LCM before the Assembly was debated on 17 June 2008. As at 13 December 2013, 51 LCMs have been tabled in the Assembly, of which 16 were

tabled in the period before May 2011 when the Assembly acquired primary legislative competence.

The Welsh Government believes that in most circumstances the legislative consent process works effectively, enabling the Assembly to scrutinise the relevant provisions in UK legislation, with the benefit of prior Committee scrutiny. Where a provision falls within devolved competence, if the Assembly does not consent, the Welsh Government will ask the UK Government either to amend the Bill so that it is likely that the Assembly would be able to give its consent, or to omit the provisions touching on devolved matters so that an LCM is no longer required.

The Welsh Government strives to meet the Standing Order requirements, and normally lays LCMs within two weeks of the date of introduction of the relevant Bill, or within two weeks of the date of laying of the relevant UK Government amendments. However, a Bill may be subject to a series of relevant amendments, requiring revised or supplementary memoranda to be laid. In these circumstances, it may sometimes be sensible to delay the laying of the memorandum, so that all amendments can be covered in the same memorandum, or to postpone the planned Assembly debate of the first memorandum to allow additional time for scrutiny of a revised or supplementary memorandum. In all instances, the Welsh Government aims to balance the Assembly's legitimate need for sufficient time for scrutiny, with the need to ensure that the relevant provisions are considered by the Assembly in good time to allow for amendment of the Bill if the Assembly's consent is not forthcoming.

As at 13 December 2013, the Assembly has withheld its consent to provisions in UK Legislation affecting devolved matters on four occasions:

In the first case, the Police Reform and Social Responsibility Bill, the UK Government revised its proposals to remove the impact on devolved matters. The need for legislative consent was not disputed.

In the second case, relating to provisions in the Enterprise and Regulatory Reform Bill abolishing the Agricultural Wages Board, the UK Government argued that these provisions fell outside the Assembly's competence and that legislative consent was not required. It refused therefore to amend the Bill. The Welsh Government subsequently introduced its own legislation which was passed by the Assembly, but which is now the subject of a reference by the Attorney-General to the Supreme Court.

In the third case, relating to provisions in the Local Audit and Accountability Bill, the UK Government agreed to amend the Bill by tabling an amendment to remove cross-border Internal Drainage Boards from the England auditing regime.

In the fourth case, the Assembly refused to give approval to a UK Government amendment to the Anti-social Behaviour, Crime and Policing Bill, which replaced the Anti-social behaviour order exception in Schedule 7 to the Government of Wales Act 2006 with a new exception. Following the Assembly's refusal to give legislative consent, the Welsh Government asked the UK Government to remove the relevant provision from the Bill. The UK Government disputed the need for an LCM, and has refused to remove the provision from the Bill.

Conclusion

The requirement for Assembly consent to Parliamentary legislation within devolved competence is an important aspect of the UK's constitution based on devolution: it serves to reconcile the continuing legal principles of unlimited Parliamentary legislative competence with the democratic legitimacy enjoyed by the Assembly and the public expectation that it will have lead responsibility to legislate for Wales on devolved matters. The Welsh Government therefore attaches considerable importance to ensuring that the requirement for consent in appropriate circumstances is fully observed, and that the Assembly has proper opportunities to give these matters the full and careful consideration they deserve.

Welsh Government
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