

**Submission from the Northern Ireland Assembly, Committee on Procedures to the House of Commons Procedures Committee Inquiry into *The Procedure of the House of Commons and the Territorial Constitution***

1. The Committee on Procedures (“the Committee”) of the NI Assembly welcomes the opportunity to provide evidence to the Procedures Committee of the House of Commons (“the Commons”) in relation to this important and timely Inquiry. Although the Commons Inquiry seeks evidence in three specific areas, this submission confines itself to points 2 and 3 of the Inquiry, as EVEL (English votes for English laws) is outwith the remit of the NI Assembly.

**(II) Procedures for notifying the House of decisions made in devolved legislatures where relevant, including decisions on legislative consent motions**

2. When the Committee received notification of this Inquiry, it had recently commenced its own Inquiry into Legislative Consent Motions (LCMs). Standing Order 42A sets out the arrangements for managing LCMs at the Assembly. A copy of Standing Order 42A is included as an appendix to this submission. The Committee makes the following points from the perspective of enhancing the existing procedural arrangements, from information flow and early communication to enabling more effective scrutiny in the Assembly as well as the communication back to the Commons of any decisions taken.

**How the Assembly is notified about Bills which require legislative consent**

3. The current LCM process in the NI Assembly follows the Devolution Guidance Note 8 and relies on the relevant Minister providing notification of any Bills which are forthcoming which may require LCMs. It is for the NI Minister with lead responsibility for the policy area to take the appropriate steps to ascertain the view of the NI Assembly, via the relevant Statutory Committee of the Assembly.

4. It is understood that the NI Assembly then operates in much the same way as the other devolved legislatures by informing the UK Parliament of the legislative consent decision, by correspondence.

**How much time the Assembly then has to carry out its consideration and determine whether to give consent**

5. Timescales and early communication are particularly important. The NI Assembly's Standing Orders allow the Minister a 10 day window to lay a consent memorandum detailing the devolution matter for which the legislative consent motion is being proposed.<sup>1</sup> Then the relevant statutory Committee has 15 days to consider the relevant provisions of the Bill. Although these timescales are very tight, generally speaking they have been manageable – at least in circumstances where the LCM relates to a technical or non-controversial matter and there has been prior engagement by the NI Minister with the relevant Assembly Committee about the need for an LCM in advance of the Bill's introduction.
6. If there has been no prior consultation, or if the LCM relates to a significant or controversial matter, then the Committees have reflected to this Committee (in Inquiry evidence) that 15 working days to consider and report on a LCM is often insufficient time. Where bills proceed very quickly through Parliament then, on occasion, there may not even be fifteen days for committees to carry out scrutiny.
7. In addition, if a Bill is going to progress very slowly through Parliament – and some Bills can take up to a year – then it seems only reasonable that there should be some way of the devolved legislatures having additional time to consider the matter.
8. Over the last year there have been a number of EU exit bills requiring an LCM which either completed their passage so quickly there was not enough time for

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<sup>1</sup> The legislative consent memorandum may include the Bill, explanatory notes comprising a draft of the motion, sufficient information to enable the debate on the LCM, a note of the specific provisions of the Bill which deal with the devolution matter (why the provisions are being proposed and why they should be made in the Bill, rather than by an Act of the Assembly).

Committees to carry out their scrutiny or completed their passage so slowly there would have been plenty of opportunity for the Committees to have taken more time (and therefore to have undertaken better scrutiny). However, because the NI Assembly has no indication of how quickly a bill will progress through Parliament, there is no way of knowing that more time might be available. The Committee would welcome the Commons' consideration of whether there could be any way that Parliament's procedures could provide more certainty or clarity about **how long** a devolved legislature has to consider any specific legislative consent issue.

### **What Parliament does with the information in relation to the Assembly position**

9. Following a decision by the NI Assembly on a legislative consent motion notification of the decision is sent to counterparts at the UK Parliament, along with any associated memoranda received from the relevant Department. The Committee is advised that these letters and memoranda are published on the relevant Bill's page of the UK Parliament website, and may also be 'tagged' on the Order Paper in the Commons<sup>2</sup>.
10. In terms of increased clarity, the Committee would hope that your Inquiry examines whether the process of notification of devolved consent could be more meaningful than a "tagging on the Order Paper".
11. The Committee considers that the Commons may wish to consider the merits of introducing a procedure to formally recognise whether or not devolved legislatures have given their consent for the UK Parliament to legislate on devolved matters.

### **Procedures for notification of an absence of consent**

12. Where the NI Assembly has either withheld or not yet provided consent, is there any way that the Commons Procedures could be amended to include some type of procedural consequence for this? Committee recently noted the comments of

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<sup>2</sup> This "tagging" is in the form of an italic reference on the business papers – no details from the relevant consent memorandum or explanatory notes are attached

the House of Lords Procedure and Privileges Committee, agreed by the House of Lords on 20 October 2020 that:

*“when legislative consent has been refused, or not yet granted by the time of third reading, a minister should orally draw it to the attention of the House before third reading commences. In doing this the Minister should set out the efforts that were made to secure consent and the reasons for the disagreement.”*

13. The Committee considers that such a procedure, particularly if adopted by both Houses of the UK Parliament, would better ensure the views of the devolved legislatures are respected throughout the legislative process.

### **Other Issues**

14. Another issue which has become apparent in the NI Assembly within the last year is Bills being passed in Parliament, in the absence of Assembly knowledge or consent. On a number of occasions in recent months the Assembly has not been notified of about Bills in Parliament which have dealt with devolution matters– i.e. examples of occasions when Executive Ministers have not complied with NI Assembly Standing Order 42A and have therefore not informed the Assembly about a Bill for which the UK Government had presumably sought legislative consent.

15. The effect of this is that Parliament then went on to consider and pass legislation on devolved matters without the Assembly having been informed about the devolved provisions within those Bills. This meant there was no scrutiny or even consideration by the Assembly of the UK Government legislating on a devolved matter. This is clearly unsatisfactory from the NI Assembly’s perspective, leaving a gap in both procedure and scrutiny.

16. The Committee would therefore request that consideration is given to whether the Commons’ procedures could be amended in a way that would allow the Assembly to be informed directly (and at the same time as the Minister) about any Bills being introduced to Parliament that require legislative consent.

17. The Institute for Government (IfG) recently provided a helpful briefing to the Committee and has highlighted the issue that it has become apparent that the UK and devolved governments seem to interpret the Sewel convention differently. It would certainly be helpful if the Commons Inquiry could bring clarity to the parameters of the convention as it will not be helpful in the longer term for any of the legislatures to be in the position of uncertainty or speculation over the continued application of the Sewel Convention or the use of LCMs.
18. The Committee noted the IFG recommendations made in their report ***Legislating by Consent: How to revive the Sewel Convention*** and noted particularly that the implementation of recommendations 7 and 8 could provide a mechanism for addressing the points the Committee has made.

**(III) The procedural steps required to facilitate greater joint working between committees of each of the UK's devolved legislatures and committees of the House**

19. Inter-parliamentary scrutiny can be an effective tool in holding governments to account (particularly in relation to inter-governmental matters), so the Committee welcomes the Commons' interest in examining the procedural steps by which greater joint working could be better facilitated.
20. The NI Assembly's Committee on Procedures has not (at the time of writing) agreed a position on whether or not joint working between committees is something that should be provided for on a formal procedural basis. The Committee recently requested research on the possible approaches which could be taken and any associated procedural steps. This research paper can be found at <http://www.niassembly.gov.uk/assembly-business/committees/2017-2022/procedures/research-papers-2021/>.
21. It is generally acknowledged that Members regard opportunities for joint working on relevant matters across parliaments as worthwhile. The Committee notes the

relative pros and cons of each of the approaches in the research paper and the different aspects of each.

22. The Committee noted on the one hand that a more formal approach to enabling joint-working, through procedures in Standing Orders, would provide a degree of clarity in terms of the powers of any new joint Committee to meet, call for evidence or issue reports (in the same way as existing Committees do). The Committee also noted the range of examples of historic and current inter-committee working.
23. The Committee further acknowledged that in order for joint working to have full capability in terms of scrutiny, each committee (working in a new joint committee arrangement) would need to be able to call witnesses and papers etc under the full authority of its own Standing Orders.
24. The Committee noted that the less formal models have also had a useful place in terms of developing a cooperative and flexible approach to joint working, whilst presenting some limitations in terms of parliamentary privilege and the issuing of reports.
25. Whilst the Committee is committed to the principle of close inter-parliamentary cooperation and of joined-up scrutiny of relevant intergovernmental matters, it has not yet reached a view on which option might be best and would welcome the opportunity to give consideration to any specific proposal on its own merits.

**42A. Legislative Consent Motions (extract from NI Assembly Standing Orders)**

- (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 II

<http://www.niassembly.gov.uk/assembly-business/committees/2017-2022/procedures/research-papers-2021/>