



Northern Ireland  
Assembly

Committee on Procedures

# OFFICIAL REPORT (Hansard)

Legislative Consent Motions:  
Institute for Government

19 May 2021

# NORTHERN IRELAND ASSEMBLY

## Committee on Procedures

Legislative Consent Motions: Institute for Government

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**Members present for all or part of the proceedings:**

Ms Carál Ní Chuilín (Chairperson)  
Mr Thomas Buchanan (Deputy Chairperson)  
Mrs Rosemary Barton  
Mr Maurice Bradley  
Ms Sinéad Bradley  
Ms Nicola Brogan  
Mr Gerry Carroll  
Mr Gary Middleton

**Witnesses:**

Mr Akash Paun	Institute for Government
Ms Kelly Shuttleworth	Institute for Government

**The Chairperson (Ms Ní Chuilín):** In members' packs there is a paper from the Institute for Government, 'Legislating by consent: How to revive the Sewel convention'. We are joined by the joint authors of that paper, Akash and Kelly. You are both very welcome to the Procedures Committee. Without further ado, do you want to give us a briefing on your paper, please?

**Mr Akash Paun (Institute for Government):** Yes. OK. Chair and Committee, thank you very much for the invitation. It is a great pleasure to have this opportunity to contribute to the inquiry. Thank you for giving us that opportunity.

My name is Akash Paun. I am a senior fellow of the Institute for Government in London, where I lead its research programme on devolution. I am delighted to be joined by my colleague from the devolution team, Kelly. We will deliver this presentation together, based on the report you mentioned, which we published last September, on the Sewel convention. I will not say a lot about the Institute for Government, but, to be clear, it is a non-partisan independent think tank, and our mission is to improve the effectiveness of government across the UK. The devolution programme is just one part of the institute, and that is where Kelly and I work.

On the report that we are here to talk about, and on the broader issues, we decided to look at the question of the status of the Sewel convention in the context of strains that it and the legislative consent process had been put under, primarily as a result of Brexit. We had seen, of course, the passage of the European Union (Withdrawal) Act 2018 and the European Union (Withdrawal Agreement) Act 2020, both without the consent of at least one of the three devolved legislatures and despite the fact that, in both those cases, the UK Government recognised that consent for those pieces of legislation should be sought because of their effect on the devolution settlement. At the time that we were carrying out the research, there were also looming conflicts on various other bits of Brexit

legislation, most notably the United Kingdom Internal Market Bill, now Act, which ultimately proceeded, again without consent from the devolved level.

More broadly, we were carrying out that research in the context that there was a growing sense that Brexit had exposed the vulnerability of devolution to unilateral decision-making taken at Westminster and Whitehall. We felt that all of that had contributed to a deterioration of relations between UK and devolved institutions, at a time, moreover, when cooperation was becoming more rather than less important as a direct result of Brexit, which raises questions about how to cooperate in areas that were formerly governed by EU law. That is really why we started the project, and I argue that developments since we published that report last autumn have reinforced the importance of those issues and of trying to find ways to improve and repair relations between UK and devolved institutions.

As you know, based on our research, we developed a set of specific recommendations for how the Sewel convention and the legislative consent process could be strengthened. In a little bit, I will say a few words about the detail of those recommendations. Before I do, I will hand over to Kelly to talk through some of the research findings on which our conclusions were based.

**Ms Kelly Shuttleworth (Institute for Government):** Great. Thank you, Akash. I will briefly outline what the Sewel convention is, why it matters, how it functions and how it is used. I am sure that most of you will already know this, but I thought it was probably best to recap.

To begin, devolution to Scotland, Wales and Northern Ireland left the core principle of parliamentary sovereignty in the UK intact, meaning that the UK Parliament retains the power to legislate for all parts of the UK on all matters, whether devolved or not. However, from the outset, Westminster committed itself to a self-denying ordinance that it would not normally legislate on devolved matters without the consent of the devolved legislature in question. That commitment is known as the Sewel convention or the legislative consent convention, named after Lord Sewel, who gave that definition of it in the House of Lords in 1998. As Lord Sewel noted, the principle of legislating only with consent draws on a precedent of the first period of devolution to Northern Ireland from 1921 to 1972. During that period, there was an understanding that the UK Parliament would legislate in the field of Northern Ireland's transferred powers only by invitation. That convention was dispensed with only in the early 1970s, as the Troubles erupted. In our paper, we trace the underlying principle of Sewel back even further to the government of the dominions under the British Empire and relations with the Irish Free State.

Why does it matter? As mentioned, the Sewel convention is so important because of the principle of parliamentary sovereignty. That is acknowledged in the memorandum of understanding between the UK and devolved Governments, which sets out the principles and processes for managing intergovernmental relations. That document states:

*"The United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not."*

Parliamentary sovereignty is also explicitly acknowledged in each of the devolution Acts. That can be contrasted to federal states, such as Canada, where the constitutional spheres of authority of the provincial legislatures are protected by a codified constitution and courts can annul any federal laws that stray into those areas. The doctrine of parliamentary sovereignty, as currently understood in the UK, prevents any federal arrangement. The Sewel convention protects the political autonomy of the devolved institutions as far as is constitutionally possible.

How does it work? In the UK Government, there are rules for how Departments should proceed when they are planning to legislate in an area where consent may be required, as set out in the devolution guidance notes published by the Cabinet Office. It includes a requirement that Departments establish at an early stage whether the legislation will invoke the Sewel convention, take legal advice on that and then consult. The steps for the devolved legislatures are set out in their Standing Orders. Legislative consent votes are usually scheduled to take place before the final amending stage of Bills at Westminster so that Parliament can change the legislation in light of consent decisions. However, there is no formal recognition of the consent process in the procedures of the UK Parliament. There is no express requirement for either House to acknowledge the passage of a consent motion or a decision by a devolved legislature to withhold consent. The absence of that direct procedural link between consent decisions and processes in the Westminster Parliament is a definite weakness in the process, but, overall, it has its benefits.

In practice, the main thing about Sewel is that it delivers practical benefits for the UK and devolved Governments. It provides a simple way to ensure that the law is consistent across the UK in technical

areas where there is no political disagreement about a single UK-wide legal framework. For instance, in January 2020, consent was given to the Direct Payments to Farmers (Legislative Continuity) Bill, which created a framework for support payments to farmers after they lost access to EU funding. On other occasions, UK-wide legislation passed with consent can be the best way to ensure consistent compliance with international obligations. For example, the Domestic Abuse Act 2021 ensured that courts across the UK were compliant with the Istanbul convention on domestic violence. The legislative consent process can be particularly useful when there is uncertainty about what is and what is not devolved. Basically, so long as there is agreement on the substantial policy questions, Sewel allows legislation to be enacted without needing to resolve the tricky question of where competence lies. It also very often prevents legislation from going to court and is a convenient time saver from the perspective of devolved Governments. It is no wonder, then, that it has been used far more than was predicted when it was first established. In its first 20 years, it was used to facilitate the passage of more than 200 Acts of Parliament. That included 65 Bills for Northern Ireland, which, presumably, would have been more had the Executive been functioning consistently. Overall, Bills subject to consent motions have most frequently fallen within the remit of the Home Office, the Department for Business, Energy and Industrial Strategy, and the Ministry of Justice.

Before 2018, consent had only been withheld by one or other of the devolved legislatures on nine occasions. The Northern Ireland Assembly withheld consent only once: for the Enterprise Bill in 2015, which concerned a cap on public-sector exit payments. In that case, the UK Government agreed to amend the legislation so that the provision on payments no longer applied in Northern Ireland. Therefore, with just a handful of exceptions, the legislative consent process operated in the way that it was intended: as a facilitator of cooperation and a guarantee of devolved political autonomy. However, as Akash mentioned, Brexit put that process under considerable strain, and Bills were passed for the first time without consent.

I will hand over to Akash for a discussion on our recommendations on how to strengthen the convention if it is to survive.

**Mr Paun:** Thank you, Kelly. As we heard, it is primarily Brexit that has called into question the status of the Sewel convention. I now want to talk through some of our recommendations for what could be done.

I should say that our analysis and proposals are targeted principally at Westminster and Whitehall, rather than at how the LCM process should function in the Northern Ireland Assembly or, indeed, in Edinburgh and Cardiff. However, a central point that we make is that there should be a stronger, more formal connection between what happens at the devolved level and at Westminster during the passage of legislation where the consent issue arises. To some extent, the reforms that we suggest rely on processes being followed in a proper way at the devolved level in order that views from Belfast, Edinburgh and Cardiff can be more systematically fed into proceedings at Westminster in the way that we think that they should. Of course, I know that this is the issue that you are grappling with: how to ensure that processes are followed when legislation that falls within the scope of the convention comes forward. I will be very interested in your thoughts, as a Committee, on how our conclusions align with or, hopefully, mutually support conclusions that you might reach as part of the inquiry.

The full detail of what we propose is, of course, in the report, but, in brief, it is a set of reforms at each stage of the consent process. First, there needs to be clarification of the scope of the Sewel convention. What we have seen over recent years is an attempt by the UK Government to narrow the scope of the convention, such that it is claimed that there is no need to seek consent for Bills that amend the powers of the devolved institutions. That strikes us as a threat to devolved autonomy, and that is a point that has also been made by the Welsh and Scottish Governments. That should be addressed.

Secondly, there needs to be better pre-legislative consultation between UK Departments and the devolved Administrations, including a requirement that legislation be shared in draft form a few weeks before introduction to Parliament. As Kelly mentioned, there is government guidance on how this process should work, but it is not always followed, which leads to problems.

Thirdly, at the point of their introduction to Parliament, Bills should be accompanied by what we call a devolution statement — you could also think of it as a devolution impact statement. That would set out whether and why the Bill requires consent from the different devolved legislatures, how the responsible Whitehall Department has engaged with its devolved counterparts during the policy process to try to iron out any issues, and whether there are unresolved disputes and how the Government intend to deal with those. For Bills that require consent, there could also be a requirement

that it and the accompanying devolution statement should be referred to the devolved legislatures directly, for instance via correspondence between the chief Clerks or the Speakers and Presiding Officers. It would be a matter for you in the Assembly, but those could then be referred to appropriate Committees to consider and report on, even in advance or in lieu of the Executive publishing a legislative consent memorandum, which I know does not always happen.

Fourthly, at Westminster, a UK parliamentary Committee, perhaps a new dedicated devolution Committee, should be tasked with scrutinising any such Bills and accompanying devolution statements and reporting to Parliament on how those Bills affect devolution. That Committee could also seek legal advice in cases where it is disputed as to whether consent is required, which occurs more frequently than people realise because of the lack of clarity sometimes about where the boundary lies between reserved and devolved matters. Also, very importantly, that new Committee should, as part of that process, take evidence from the devolved Administrations and, potentially, from Committees of the devolved legislatures, whether verbally or via written submissions, so that the Committee can report to Parliament based on as full a picture as possible of how the Bill is perceived to affect devolution in all parts of the UK.

Fifthly and finally, if, in certain exceptional circumstances, the Government want to proceed in the absence of consent, a Minister should give a statement to each House setting out the reasons why the Government believe that that is an appropriate course of action. There should then also be an additional stage of the legislative process during which each House debates and votes on the specific question of whether to proceed without consent. At the moment, that can happen almost without people noticing that it is happening. As part of that process, it would be crucial to ensure that any consent decisions and relevant reports from devolved legislature committees are put on the record and taken into account. Again, that relies on processes being followed in the normal way at the devolved level.

In conclusion, our recommendations are designed to operate within the existing institutional framework including, therefore, the ultimate sovereignty of the UK Parliament. There are people who may want to go further and impose binding constraints on the UK Parliament — something like a more federal system, perhaps. There are arguments in favour of that, but we have tried to set out reforms that could conceivably be implemented relatively quickly if there were political will at both UK and devolved levels. We believe that, if implemented, our reforms would improve how the process works by strengthening relations between the different institutions, sharpening the accountability of Ministers in the UK Government, making it clearer when the UK Parliament is legislating in devolved areas, increasing awareness at Westminster about how what it does impacts on devolved issues and providing new channels for communication between Westminster and the devolved bodies.

That brings us to the end of our presentation, and we are now interested in your thoughts and questions.

**The Chairperson (Ms Ní Chuilín):** OK. Thank you, Akash and Kelly, for your presentation. First, I will open it up to members for questions.

**Ms S Bradley:** Thank you, Akash and Kelly, for your presentation. I am one of those people that would like to take it further, but I also appreciate the parameters that your report is presented in and the solution mode that you are trying to achieve for a lot of the problems that we experience. At the Committee level, timing is a huge issue, and that is one of the things that I would like to see formalised in a better way. I appreciate that it can be very difficult to pin down a timing structure for some legislative pieces. However, it is almost an insult to tell a devolved institution, "We are still going through the procedure of a legislative consent motion, although we have reached a point in our legislative programme where we have already had that binding effect". There are cases where it does not help relations, to put it mildly, and you did speak to that.

If any legislation can be carried out in the devolved institution, that will be my first choice on every day of the week. However, particularly with Brexit and COVID, there were situations where we wanted our farmers or fisheries to get their money as quickly as possible. We can see that, and we will not be cutting our nose off to spite our face. We recognise that that will have to happen on occasion. However, at the very least, what I also see missing from this is — sometimes you will charge on and not only do the devolved institutions not get an opportunity to give a timely expression of their views, but stakeholders are completely out of the equation. Where is the piece in the Westminster thread where the stakeholders are given an opportunity to have a voice if a piece is being rammed through, even if for a good reason? As we are being rushed through the process, we are desperately trying to engage with stakeholders to make sure there is an expression of their view. Very often, the people

who will be affected most do not get to speak. I want to see that firmly set in the parameters. This is a helpful paper, which I genuinely appreciate. Thank you.

**The Chairperson (Ms Ní Chuilín):** I fully support what Sinéad said, but if the Sewel convention is working well as it is, how can you strengthen accountability from the British Government to the devolved institutions? You have made very helpful recommendations; what is your feedback in relation to whether they will be properly considered? There is obvious discontent across all the devolved institutions about this. Sinéad's point comes back to us time and time again. Not only are we, as Members of the legislative Assembly, not given enough time to scrutinise, but stakeholders and different sectors are not given notice either. It feels a wee bit colonial — that is my word, not the Committee's — and it needs to be knocked on the head. I am sure that there is a politer way of putting it. Other than the recommendations that you have laid out, what more does the institute consider should be included in the reform of a legislative consent motion process?

**Mr Paun:** Thanks very much for those questions. I appreciate that the timing issue is a frustration at the Assembly level; Bills may suddenly be rushed through, and it is not clear how long you may have to consider the consent issues and at what point, therefore, it makes sense for you to look at the Bills and report on them, and so on. It is quite hard for us to find a simple solution, because the UK Government will always guard their control of their legislative programme quite jealously. As you say, there will be circumstances in which, with the best will in the world, there is an urgent reason to press through legislation. However, I totally agree that legislation is rushed through when it has not been shared in advance with the devolved Governments, often because there are issues between Whitehall Departments that take a long time to iron out and there is an unwillingness to engage externally, even with devolved counterparts, until Whitehall has reached a position; then a Bill can be rushed out late in the day. That squeezes the opportunity for devolved views to be taken into account.

Among other things, our recommendations are designed to improve transparency and to create a process, or a set of processes and reporting requirements, that might at least make it clearer when the Government have not consulted properly. I will come to your question about the politics of whether or not any of this is likely, but if our package of reforms, or something similar, were to be implemented, debate and consideration at Westminster would be more informed by and in tune with what went on at the devolved level. At the moment, that can be very easily overlooked. In a debate, MPs from Scotland, Wales or Northern Ireland can get up make points about consent not having been given or ask, "Has the House considered these implications for the devolved institutions?", but it does not happen in a systematic and formal way. If you do something along the lines of what we suggest, both on proper reporting from the Government on devolution issues and on better scrutiny by a Committee in Westminster that will then coordinate or communicate with devolved counterparts, that will start to help reduce the impact of the problem. I hope that that makes sense.

Chair, you asked whether any of this is likely to happen. The Government are not particularly interested in any reforms that they see as imposing new process and new constraints on their freedom of action. That is the simple reality. We spoke to people in the Government about it. We do not expect them to endorse this in the short term. At Westminster, however, more generally, I think there is a growing realisation that the existing process is not fit for purpose and that something needs to be done. You have been in touch with the House of Commons Procedure Committee. We have also spoken to it, and it is looking at this issue, as is the House of Lords Constitution Committee. We hope, over time, to build a wider coalition of support for some of the reforms.

**The Chairperson (Ms Ní Chuilín):** Thank you. It is what it is. At the end of the day, there is an acknowledgement that change is needed, but, with the pace of change, that has not landed yet. It is going to be a process that people from each of the devolved institutions will continually raise, but I do not know what impact that will have. We spoke to the Procedure Committee, but, beyond courtesy, I do not know what impact that will have either.

I offer members an opportunity to come back at a later stage, and we can feed that through. We would appreciate your sharing any information that you have. I found your evidence beneficial and contemporary. It reflects a lot of concerns that we have had or that have been given to us. I thank both of you for your attendance and your work. Keep going.

**Mr Paun:** Thank you so much for having us. It has been a pleasure.

**The Chairperson (Ms Ní Chuilín):** No bother. Thank you, Kelly and Akash.

**Ms Shuttleworth:** Thank you.