

Written evidence submitted by the Scottish Government (TTC 17)

The procedure of the House of Commons and the territorial constitution

The operation and effect of the standing orders establishing the “English votes for English laws” procedures

The Scottish Government has consistently expressed concerns over the impact of English Votes for English Laws (EVEL) as it removes the ability of Scottish MPs to fully scrutinise the effect of UK legislation. By ensuring Scottish MPs cannot vote on issues which can have considerable effect in Scotland the measures taken simply magnified the ‘West Lothian Question’ issue and created a further question - whether Westminster is any longer a UK-wide Parliament.

Scottish Ministers also challenged the legitimacy of the EVEL process in terms of its inherent inability to address impacts on devolved interests (a concern also expressed in reports published by UK Parliamentary Committees). The key issue was the potential for legislative frameworks subject to EVEL resulting in a serious financial impact to Scotland in regard of Barnett consequentials.

More fundamentally, EVEL was a clear attempt to provide a forum for scrutiny of ‘England only’ measures, analogous to the principle of devolved legislatures. Considerations of an English Parliament is a matter for the people of England. The Scottish Government would not normally involve itself with such matters as we recognise that this is a matter for the English people, just as the government of Scotland is a matter for the people who live here. The UK Parliament is not, however, the correct place for an English Parliament. Scottish MPs are voted by the Scottish people to represent Scotland on UK issues at Westminster. The dilution of their ability to do so is unacceptable.

The Scottish Government welcomed the decision of the UK Government to remove EVEL. The Scottish Government would encourage inter-governmental consideration of robust and effective pre-legislative engagement mechanisms to properly assess legislative impacts under the current UK constitutional framework. Such principles have long been enshrined in the UK Government’s own devolution guidance. It is unfortunate that the practical experience frequently falls short of what Scottish Ministers consider to be necessary and reasonable requirements.

Procedures for notification to the House of decisions of the devolved legislatures relevant to matters under consideration in the House, including decisions on legislative consent motions

The Scottish Government is committed to acting in the best interests of Scotland. This includes working constructively with the UK Government and Westminster in order to benefit the people of Scotland. We recognise that there may be occasions when it is helpful, sensible and practical to use Westminster legislation to change law on devolved matters, or to alter the competence of the Scottish Parliament or Scottish Ministers.

The Scottish Government has and will support any necessary consent for UK Government Bills where we can find common ground, but only after close consideration

of their policy intent. Where the Scottish Government considers a Legislative Consent Motion (LCM) is in the national interest it will seek the consent of the Scottish Parliament.

However, the Scottish Government considers the legitimacy of the consent machinery depends on two specific principles.

First, the vital importance of inter-governmental engagement taking place as early as possible on all UK legislation that may contain devolved provision or impact on matters falling within devolved interests, consistent with the UK Government's own guidance to its officials (as set out in Devolution Guidance Note 10). That position should not be hindered on the basis of the sensitivity of the subject matter or its political profile.

Scottish Ministers are responsible for devolved matters and have a direct governance role, accountable to a democratically elected parliament, for the exercise of that responsibility. It is simply not acceptable for them to be treated in the same manner as an external stakeholder or consultee. The Scottish Government also has obligations under Scottish Parliament Standing Orders to lodge legislative consent memorandums on bills requiring consent, normally within 2 weeks of introduction of a such a bill. It is a matter of significant regret that the UK Government has on numerous occasions notified the Scottish Government of the substance of relevant Bills only a short time in advance of any such Bill's introduction at Westminster. This not only demonstrates a lack of respect towards the Scottish Government, but also to the Scottish Parliament.

Second, that where the Scottish Ministers do not wish to recommend that the Scottish Parliament consent to provisions, nor indeed where the Scottish Parliament resolves that a UK Bill should not contain provision requiring consent, the UK Government and Parliament should respect that decision. Incidences of the UK Government not respecting the legislative consent decisions of Scottish Parliament have occurred during the Brexit process, most notably the Internal Market Act to which the Parliament did not give its consent. The same applies to the European Union (Withdrawal), the European Union (Future Relationship), and the European Union (Withdrawal Agreement) Bills

The Covert Human Intelligences Sources Bill (non-Brexit related) was an example of the correct approach. Whilst engagement between the two Governments to reach an agreeable position on amendment was not successful, the UK Government took the necessary steps to remove the relevant provisions from the Bill following the decision of the Scottish Parliament not to give its consent. **On this occasion, the position of the Scottish Parliament and Scottish Government was presented in the Lords on the floor of the House, with the Deputy Speaker inviting the Minister to give a 'statement on legislative consent'¹. The Scottish Government would welcome such a statement being required in all instances where consent of devolved legislatures is required.**

The Scottish Government has previously sought to engage constructively with the UK Government on proposals to strengthen the legislative consent process. In August 2018 the then Cabinet Secretary for Government Business and Constitutional Relations wrote to Chancellor of the Duchy of Lancaster concerning the implications of the EU (Withdrawal) Act 2017 for the application of the Sewel Convention. The Commons Public Administration and Constitutional Affairs Committee (PACAC) has also made proposals to strengthen the Convention. Proposals include:

¹ [Covert Human Intelligence Sources \(Criminal Conduct\) Bill - Thursday 21 January 2021 - Hansard - UK Parliament](#)

- Stronger statutory provision setting out the Sewel Convention properly, as recommended by the Smith Commission and proposed in 2015 by the Scottish Government and committees of the Parliament, notably the Devolution (Further Powers) Committee.
- “The House of Commons and the House of Lords should consider establishing a procedure to acknowledge more clearly that a Bill is in an area that requires legislative consent and whether that consent has been given by a devolved legislature; and where such consent cannot be obtained, what procedures should follow.” (PACAC, paragraph 66)
- “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.” (PACAC, paragraph 68)
- Procedures for legislative consent could be revisited to refresh and augment the current UK Government guidance (DGN10) to reflect developments since 1999, notably changes to accompanying documents to UK Bills (which now include a table on geographical extent and legislative consent, which is not currently produced in consultation with devolved administrations).
- “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.” (PACAC, paragraph 65)

The Scottish Government notes the Committee’s interest in Westminster procedure with regards to devolved consent and will follow developments with interest.

The Committee will want to note that [the recent agreement between the Scottish Government and the Scottish Green Party](#) included this commitment:

to protect the powers of the Scottish Parliament, we will press for the Sewel Convention to be strengthened and legally defined, and for the UK Government to respect the legislative consent decisions of the Scottish Parliament

The procedural steps required to facilitate greater joint working between committees of each of the UK’s devolved legislatures and committees of the House, for purposes including shared scrutiny of intergovernmental working on policy areas of common interest

- The Scottish Parliament receives regular reports from the SG on intergovernmental activity
- Any proposed arrangements for *interparliamentary* scrutiny (by both Westminster and Holyrood) would require careful consideration given differing accountability (UK Ministers to UK Parliament / Scottish Ministers to Scottish Parliament).

- Any proposal for formal joint scrutiny (i.e. a joint Committee) would require careful consideration of practical issues. For example, how to establish such entities be (perhaps in respective Parliamentary Standing Orders); h how recommendations would be taken forward and under whose authority.
- Whilst joint working is possible in certain circumstances (for example, British Irish Parliamentary Assembly, and the Interparliamentary Forum on Brexit), that is not part of formal Parliamentary machinery. Rather the case that discussion at in the forums can raise awareness of issues and potentially lead to activity in respective legislatures.

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