

Constitutional and Legislative Affairs Committee

Inquiry into the Granting of Powers to Welsh Ministers in UK Laws

Response from Dr Paul Cairney

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Legislative Consent Motions: A Brief Summary of the Scottish Experience

The Inquiry highlights a key distinction in this field:

1. Between Legislative Consent Motions (LCMs or 'Sewel motions') that allow Westminster to legislate on behalf of the devolved assembly, and LCMs that also delegate powers to devolved government ministers (I tried, in vain, to dub them 'reverse-Sewel motions').

There are two further distinctions worthy of discussion when we compare Wales to Scotland:

2. The LCM process *before* and *after* the Scottish Parliament Procedure Committee's 2005 inquiry.
3. Consideration of an LCM, granting powers to devolved government ministers, *before* and *after* it has been passed.

1. Sewel and Reverse-Sewel motions

The Sewel motion process quickly became rather controversial in Scotland, with many opposition political parties (generally nationalist, beginning with the SNP from 1999-2003, then the Greens and Scottish Socialist part from 2003-7) often opposed in principle to their use and likely to express concern about their overuse. Much was made of the idea (articulated by Lord Sewel when responsible for guiding the Scotland Bill through the Lords) that the 'UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature'. This was taken to mean that the process would not happen much at all, prompting commentators to remark on the fact that almost as many Sewel motions were passed as Acts of the Scottish Parliament (also giving the impression that Scotland was handing back powers to Westminster in some way). This was not a convincing argument, given the innocuous nature of many of the motions and the fact that they often referred to very small parts of larger bills. There were more convincing arguments about 'political cowardice', when controversial issues were referred to Westminster, but these proved to be unusual cases (most notably on issues regarding sexuality, the age of consent and civil partnerships).

From 2007 there was an SNP effect, with the Scottish Government more likely to seek ways to legislate in the Scottish Parliament rather than propose a Sewel motion. However, the change was small and it rarely provoked tensions with the UK Government. The SNP used Sewel motions for the sake of expediency and passed 8.5 per year from 2007-11 compared to 9.5 from 1999-2007. Thus, several opposition MSPs pointed out the irony of the SNP using a procedure it had so often opposed in principle, prompting Communities and Sport Minister Stewart Maxwell

to make a remark which could have been said by any Labour/Liberal Democrat minister from 1999-2007:

It is suggested that the LCM impacts on the Scottish Parliament's legislative competence or is tantamount to our handing back powers to Westminster. Let me be clear: only through changes to the reservations in the Scotland Act 1998 can powers be handed back to Westminster or the legislative competence of our Parliament altered. Individual motions, such as the one that we are discussing, represent no more than a one-off agreement by the Scottish Parliament for Westminster to legislate on our behalf on a specific aspect of a devolved matter (Scottish Parliament Official Report 19.3.08 c.7106-7).

The SNP were less likely (in opposition, and perhaps also in government) to be opposed to 'reverse-Sewel' motions, giving powers to Scottish ministers, largely because the 'giving powers back to Westminster argument' was reversed. Notably, few commentators were worried about the lack of parliamentary scrutiny involved, prompting Cairney and Keating (2004) to argue:

On the face of it, these motions may seem attractive to devolutionists, since they devolve more responsibility from Westminster. However, the powers are generally conferred on Scottish ministers rather than the Scottish Parliament. They may therefore increase the use of secondary legislation and further tax the Subordinate Legislation Committee ... This is a particularly significant issue, since the usual rules do not seem to apply. Normally, when legislation is processed through the Scottish Parliament, the Subordinate Legislation Committee presses for any new ministerial powers to regulate or produce statutory instruments to be subject to formal scrutiny (for example to be subject to an affirmative resolution in the Scottish Parliament). However, in the case of Sewel motions the legislation is not considered in the same way and Scottish parliamentary committees do not have the opportunity to amend the legislation. Of course, ministers often stress during Sewel discussion that they will consult before regulating, but informal assurances do not carry the same weight as formal obligations and a democratic deficit may eventually be apparent.

In practice, several aspects of devolved and reserved issues may be covered by one motion, since a piece of UK legislation will often cover devolved ground and then leave the implementation to devolved government ministers. Indeed, we might *expect* this combination of outcomes, based on a desire by executives to allow Westminster to legislate for pragmatic reasons (for expediency or policy uniformity; to close loopholes; to deal with entangled responsibilities; to address UK bodies operating in devolved areas) and to address the (generally misleading) idea that power is being given back to Westminster. Consequently, the practice often satisfies devolution sensibilities perhaps at the expense of parliamentary involvement. This lack of parliamentary involvement, in legislative consent and wider public policy issues, is a general feature in Scottish and UK politics.

2. The LCM process before and after the Scottish Parliament Procedure Committee's 2005 inquiry

The Procedures Committee's review did not criticise, or call for an end to, the Sewel process (a key recommendation was to call them 'legislative consent motions'). Rather, it recommended a more systematic consideration of each motion in the relevant committee. Subsequently, the convention arose in which the relevant minister would appear before a committee to explain the need for the LCM. This generally involves one (or more) evidence-gathering session, followed by the (generally unused) opportunity to vote on the motion in committee, followed by the (generally unused) opportunity to debate and vote on the motion in plenary. The

outcomes can be tracked either on the Scottish Government website¹ or the Devolution Monitoring reports² which, more often than not, summarise the motion and end with 'There was no debate or vote in plenary'. This outcome reflects the generally-innocuous nature of the matters under consideration. It reminds us of the argument, often pursued by UK Government ministers, that Sewel motions have been used so regularly because UK departments have been sensitive to the charge that they are legislating without devolved parliament consent – causing a large number of small policy issues to receive disproportionate attention.

3. Consideration of an LCM, granting powers to devolved government ministers, before and after it has been passed.

In general, the scrutiny of those motions ends after they have been passed. There is little post-legislative scrutiny of Scottish Parliament or UK legislation. A key exception regards the new Scotland Bill which takes forward recommendations (most of which can be found in the Calman Commission report) to extend devolution in a small number of areas and reform, to some extent, the Scottish Parliament's control over income tax. In this unusual case, the Scottish Parliament passed a motion giving *conditional* consent. It asked the UK Government to reconsider some issues (regarding, for example, how to address a shortfall in income related to income tax volatility and the limits to Scottish ministerial borrowing) and return an amended Scotland Bill to the Scottish Parliament for further approval via a second Sewel motion (the second motion would have been expected later this year, but the size of the SNP win now complicates that process).

The Use of Ministerial Powers

As far as I know there has been no systematic study of the use of these powers by Scottish ministers. Such a study would be difficult because the LCM process merely reinforces a process of delegating powers to ministers that operated long before devolution in 1999 (such as the 'executive devolution' granted to Scottish ministers, allowing them to decide if new nuclear power stations can be built in Scotland) and continues when legislation is passed by the Scottish Parliament. Scottish Parliament legislation is often amended at stage 2 or stage 3 to make sure that the powers are only used following a *positive* resolution by the Scottish Parliament, rather than allowable unless there is a *negative* resolution. While this seems significant, it also seems to be part of a game between executive and legislature, in which both benefit from the change (the Scottish Government 'throws it a bone' and the Scottish Parliament looks like it has amended the legislation effectively). There is very limited scrutiny of this process, for the following reasons:

1. The Scottish Parliament only has the resources to analyse a very small proportion of subordinate legislation in any great depth or to perform the occasional inquiry incorporating post-legislative scrutiny.
2. Subordinate Legislation Committee membership is rarely cherished or sought by MSPs.
3. It is rare for the Scottish Parliament to assert itself in relation to the Scottish Government, either because the government has a majority (1999-2007, 2011 onwards) or because the parties rarely form a united front during periods of minority government (2007-11) or engage at that level of policy detail.

Overall, this is a process (like most others) dominated by executives, with minimal parliamentary involvement beyond the formal process of consent.

¹ <http://www.scotland.gov.uk/About/Sewel>

² <http://www.ucl.ac.uk/constitution-unit/research/research-archive/archive-projects/devolution-monitoring06-09>