

Devolution Guidance Note 10

Post – Devolution Primary Legislation affecting Scotland

SUMMARY

- **The Government announced on 21 July 1998:**

“we would expect 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 is now stated in the Memorandum of Understanding with the Devolved Administrations.

- **The convention applies when legislation makes provisions specifically for a devolved purpose. It does not apply when legislation deals with devolved matters only incidentally to, or consequentially upon, provision made in relation to a reserved matter, although it is good practice to consult the Scottish Executive in these circumstances.**
- **The convention relates to Bills before Parliament, but departments should approach the Scottish Executive on the same basis for Bills being published in draft, even though there is no formal requirement to do so.**
- **The same procedures should be followed for Private Member’s Bills to be supported by the Government.**

Introduction

1. This note sets out guidance for UK Government departments on handling legislation affecting Scotland. The Government announced on 21 July 1998 *“we would expect 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”* (Lords Hansard col 791). This is now stated in the Memorandum of Understanding (MoU) with the devolved administrations and the Commons Procedure Committee has indicated its support for the convention. The convention applies when legislation makes provision specifically for a devolved purpose (see below); it does not bite when legislation deals with devolved matters only incidentally to, or consequentially upon, provision made in relation to a reserved matter. This note sets out how Legislative Programme Committee expects departments to give effect to this policy intention, while ensuring the smooth management of the Government’s legislative programme. The note does not extend to legislation which deals with emergencies or is similarly exceptional.

General

2. In general:
 - the MoU indicates that there will be consultation with the Scottish Executive on policy proposals affecting devolved matters whether or not they involve legislative change;
 - although the convention refers to the Scottish Parliament, UK departments will in practice deal with the Scottish Executive. Departments should approach the Executive to gain consent for legislation when appropriate. It will be for the Scottish Executive to indicate the view of the Scottish Parliament and to take whatever steps are appropriate to ascertain that view.
 - whether consent is needed depends on the purpose of the legislation. Consent need only be obtained for legislative provisions which are specifically for devolved purposes, although Departments should consult the Scottish Executive on changes in devolved areas of law which are incidental to or consequential on provisions made for reserved purposes.
 - always consult your Legal Adviser and the Scotland Office if you are in any doubt about whether a proposal may trespass on devolved matters. Do not assume that the Scottish Executive will necessarily share your view about where the boundaries lie as between reserved and devolved matters; and always consult Legal Advisers, including the Office of the Solicitor to the Advocate General (OSAG), and the Scottish Executive about these issues at an early stage in developing proposals for legislation.
3. Departments bringing legislative proposals to LP committee will be expected to address the need for consultation or consent as described in the following paragraphs.

Long-term legislative plans

4. Any submission to LP for the inclusion in a future legislative programme of a particular Bill should state clearly that the proposed Bill:
 - I. either does not apply to Scotland at all; or has provisions which apply to Scotland but, in the words of the Scotland Act 1998, “relate to” reserved matters and do not alter Scots law on non-reserved matters;
 - II. has provisions applying to Scotland and relating to reserved matters, but also contains provisions which make incidental or consequential changes

to Scots law on non-reserved matters (i.e. which are for reserved rather than devolved purposes); or

- III. contains provisions applying to Scotland and which are for devolved purposes, or which alter the legislative competence of the Parliament or the executive competence of the Scottish Ministers.

In determining whether provisions of a Bill are for devolved purposes, departments should have regard to the legislative context of the Bill as a whole.

5. Where necessary, the paper should indicate what proportion of a proposed Bill falls into each category.
6. Only Bills with provisions in category III are subject to the convention requiring the consent of the Scottish Parliament. (Although the main thrust of a Bill may be directed at reserved matters it may nevertheless contain some provisions in this category.) At LP, the responsible Minister should say whether he or she expects that the Scottish Executive and Parliament will agree to any such provisions.
7. Bills in category I or in category II do not require the consent of the Scottish Parliament. However the effects on non-reserved matters, including incidental or consequential modifications to the law, will in some cases be significant. LP will expect departments to have plans for consultation with the Scottish Executive in accordance with the MoU and the relevant bilateral concordats. Such consultation may be undertaken in confidence, and the Scottish Executive can be expected to respect any such confidence.

Bills ready for introduction

8. The essential requirement is that by the time proposals reach LP devolution related issues have been substantively resolved. Papers for LP are already required to contain a statement to that effect. Papers for LP should also identify the clauses which fall into each of the categories above.
9. If a Bill has provisions in category III:
 - I. where the provisions are of major significance in the Bill, there should have been prior consultation with the Scottish Executive on these and the LP paper should indicate that it will be possible to confirm at Second Reading that the Scottish Parliament has consented;
 - II. where the provisions are less significant, seeking consent need not hold up the Bill's progress at Westminster. The aim in such cases should be for consent to be obtained by the time those clauses are debated in committee, and the absolute deadline will be the last opportunity for them to be amended while the Bill is still before Parliament.
10. The paper should also:
 - identify any provisions which will change the legislative competence of the Scottish Parliament and the policy clearance for such provisions; and
 - identify any provisions that will change powers or functions of the Scottish Ministers, for example to give them regulation making or other powers, and the policy clearance for the change.
11. If a Bill has provisions in category II, or which would have a significant effect on devolved matters, the paper should indicate what consultations there have been with the Scottish

Executive or what plans there are for such consultation. The paper should indicate the outcome of any reference to the Joint Ministerial Committee or alternative dispute-resolution arrangements.

12. Finally, LP papers should say whether there are any potential amendments where the consent of the Scottish Parliament might have to be sought or which might prove controversial there.

Draft Bills

13. The convention relates to Bills before Parliament, but departments should approach the Scottish Executive on the same basis for Bills being published in draft. There is, however, no requirement to seek consent of the Scottish Parliament before publishing a draft. It may sometimes be helpful for the consent of the Scottish Parliament for a Bill to be sought on the basis of a (published) draft.

Private Members' Bills

14. Essentially the same procedures should be followed for Private Members' Bills to be supported by the Government, with some minor modifications to reflect the fact that the procedures for Private Members' Bills are less certain than for Government Bills.
15. Departments should consult the Scottish Executive at an early stage about any Private Members' Bill that they are minded to support containing provisions in category III. The aim should be for consent to be obtained by the time of Commons Committee stage. Before then, the Government may need to reserve its position pending consent, particularly if the Bill was introduced in the House of Lords. Departments seeking clearance to oppose a Private Members' Bill in category III on policy grounds need only consult the Scottish Executive if the Bill has a substantial effect on devolved matters. It is possible that Private Members will claim to have themselves obtained the consent of the Scottish Parliament for such a Bill and rely on this as an argument in favour of the Bill.
16. Even if there are not UK policy grounds for opposing such a Bill, the Government will resist the provisions on devolved matters if Scottish Ministers indicate that the Scottish Parliament has not given its consent, and will move any necessary amendments at Commons Committee or Report stage.
17. In line with the MoU and concordats, there should also be early consultation with the Scottish Executive where a department proposes to support a Private Members' Bill with provisions in category II or which would have a significant effect on devolved matters.

During the passage of legislation

18. During the passage of legislation, departments should approach the Scottish Executive about Government amendments changing or introducing provisions requiring consent, or any other such amendments which the Government is minded to accept. It will be for the Scottish Executive to indicate the view of the Scottish Parliament. No consultation is required for other amendments tabled. Ministers resisting non- Government amendments should not rest solely on the argument that they lack the consent of the Scottish Parliament unless there is advice to that effect from the Scottish Executive.
19. The Scottish Executive can be expected to deal swiftly with issues which arise during the passage of a Bill, and to recognise the exigencies of legislative timetables (eg when forced to consider accepting amendments at short notice). Nevertheless since the last opportunity for amendment is at Third Reading in the Lords or Report Stage in the Commons the absence of consent should not be a bar to proceeding with the Bill in the interim.

Department for Constitutional Affairs (Last Updated – November 2005)