



Legislating by consent

How to revive the Sewel convention

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Summary

The United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power. However, the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government.

– The Sewel Convention¹

Since 1999, the Sewel (or legislative consent) convention has been a central pillar of the relationship between Westminster and the devolved legislatures in Edinburgh, Cardiff and Belfast. The convention provides that the UK parliament does not normally pass legislation that relates to devolved policy areas without the consent of the devolved legislature in question.

Consent is likewise sought for legislation that amends the powers of the devolved institutions themselves. As such, the convention is designed to create a protected sphere of political autonomy for Scotland, Wales and Northern Ireland, and to facilitate co-operation between the UK and devolved administrations.

Since 1999, consent has been given for over 200 Acts of Parliament. Disputes have been rare and usually resolved through negotiation and compromise.

Both the UK and devolved governments benefit from the Sewel convention and remain committed to making the consent process work. However, from the point of view of the devolved administrations, Brexit has exposed the convention's limitations as a guarantee of devolved autonomy.

Two key pieces of Brexit legislation have been passed without the consent of at least one of the devolved nations. Further disputes now loom, in particular over the government's controversial UK Internal Market Bill, but potentially also in relation to other Brexit-related legislation currently before parliament. If agreement cannot be reached on these matters, the UK government will again have to decide whether to press ahead with contentious legislation in devolved areas without agreement.

The consequences of this could be severe. It would make it far harder for the UK and devolved administrations to work together, for instance in areas where EU law and institutions must be replaced by new UK-wide arrangements. It would also reinforce the view that Brexit has left devolution vulnerable to unilateral actions taken at Westminster. This would risk undermining the stability of devolution, power-sharing in Northern Ireland – and the Union at large.

We therefore conclude that the legislative consent process should be strengthened and reformed, to rebuild consensus about the principles governing the UK–devolved relationship.

Recommendations in brief

We set out eight proposals for reform, which are designed to:

- mitigate disputes between the UK and devolved governments
- improve the transparency of the current system
- sharpen the accountability of UK ministers for decisions they take that relate to devolution
- improve awareness of the consent process within Westminster
- strengthen the relationship between the UK and devolved parliaments.

The recommendations are as follows:

- 1. The UK government should publicly accept that the Sewel convention applies in precisely the same way to legislation that amends the powers of the devolved bodies as to legislation in already devolved areas.** Without this guarantee, the devolved governments fear that Westminster may unilaterally take powers back from the devolved nations.
- 2. The UK and devolved governments should reach agreement on the limited circumstances in which consent need *not* be sought for legislation in devolved areas.** These circumstances could include legislation to deal with crises and to ensure that the UK complies with international obligations.

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3. **Whitehall departments should share draft legislation with their devolved counterparts an agreed minimum period before introduction into the UK parliament,** so that devolved views can be taken into account and disputes can be resolved as far as possible at this stage. This duty to consult should be set out in a revised memorandum of understanding agreed by the four governments.
 4. **At the point of introduction of a bill, the lead minister should lay a 'devolution statement' before parliament.** This would set out in detail whether and why consent is required, how the department has engaged with devolved counterparts during the pre-legislative process, whether consent is expected, and how the government plans to resolve any outstanding disagreements.
 5. **Each devolution statement should be referred to a parliamentary committee, which could also take evidence from the devolved bodies.** The committee would report on the consent issues relating to the bill, including on any unresolved disagreements, to inform parliamentary debate during the legislative process. This role could be played by an existing select committee or a new Devolution Committee with a wider remit to scrutinise inter-governmental relations.
 6. **In cases where there is disagreement between the UK and devolved administrations over whether consent is required, the committee should be able to seek expert advice,** either from specialist advisers employed directly by the committee, or from an independent advisory panel established as a standing body to consider competence disputes on behalf of parliament. The advice would address the specific question of whether and why the Sewel convention applies.
 7. **If ministers wish to proceed with legislation in devolved areas without consent, they should make a statement to parliament justifying this decision.** Moreover, an additional stage of the legislative process should be created at which each House of Parliament would debate and vote on a motion on the specific question of whether to proceed with the bill despite the absence of consent.
 8. **There should be fuller public information provided by the UK parliament about the consent status of each bill,** to make clearer the connection between consent motions at the devolved level and the legislative process at Westminster, and to further enhance awareness of the devolution issues at stake when legislation is passing through parliament.

We do not make the case for Sewel to be replaced by a judicially enforceable consent mechanism in which, for instance, the devolved legislatures could veto the passage of Acts of Parliament or the courts could strike down legislation passed without devolved agreement. This would imply a move towards something closer to a federal constitutional settlement. An argument can be made for a more radical constitutional upheaval of this kind, but this is beyond the scope of this paper.

Our approach is to take the current constitutional framework as a given, at least for the immediate future, and to set out proposals that could be implemented within this

context, if there is sufficient political will and a genuine desire to repair the UK–devolved relationship. In our model, therefore, the sovereignty of parliament would be retained, meaning Westminster could still, in theory, pass laws without consent in devolved areas, or even to amend the devolution settlements. But this should happen only in exceptional circumstances, and with far more safeguards and accountability than currently exist.

We note that committees in all four UK legislatures (including both Houses of Parliament) have recognised the need for reform of Sewel since 2018.² We hope that this paper, produced with the support of the Joseph Rowntree Reform Trust, will contribute to the ongoing debate on this matter.

Introduction

Devolution has transformed the British constitution and the way the UK governs itself. It created new legislatures in three of the four nations of the UK, and governments that hold responsibility for major public services and a large proportion of public spending within their territories. Since the beginning of devolution in 1999, further powers have been transferred to Scotland, Wales and Northern Ireland. Devolution to Scotland and Wales is now recognised in legislation to be a permanent part of the UK constitution,³ while in Northern Ireland, devolution is a central pillar of the Good Friday Agreement, backed by international agreement with the Irish government. In all three cases, it is unthinkable that Westminster would, of its own volition, seek to abolish the devolved institutions that it created two decades ago.

Despite its radical effect on the constitution, devolution left intact the core principle of parliamentary sovereignty, meaning that the UK parliament retained the power to legislate for all parts of the UK, on all matters, whether devolved or not. This left the new institutions in Edinburgh, Cardiff and Belfast potentially vulnerable to changing political winds at Westminster, which could, in principle, decide at a later date to unwind the 1999 reforms. 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. This commitment is known as the Sewel (or ‘legislative consent’) Convention, after Lord Sewel, who spelt it out on behalf of the government in the House of Lords in 1998 during the passage of the Scottish devolution legislation.⁴

The practice of seeking consent was extended to the Northern Ireland assembly, though devolution to Belfast functioned only intermittently in the early years of devolution, and to Cardiff, as the Senedd (Welsh parliament) gradually gained fuller legislative powers. As well as seeking consent for legislation in policy areas that are already devolved, the UK government from the start sought consent in the same way for any bills that would amend the powers of the devolved institutions themselves, whether to transfer additional functions to them or to impose new limitations on devolution.*

* For instance, consent was sought for the Learning and Skills Bill (1999–2000), on the grounds that it amended the competence of Scottish ministers. The Scottish Government has identified a total of 17 bills in the first four years of devolution, where consent was sought for this reason. www2.gov.scot/Resource/0051/00510602.pdf

After 1999, the convention swiftly became a central pillar of the relationship between Westminster and Edinburgh, and then with Belfast and Cardiff too. As the UK and devolved governments have been governed by different parties since 2007, this process had the potential to trigger regular clashes. But disputes have been rare, and usually resolved by negotiation and compromise. For much of its life, then, the Sewel convention succeeded in creating a protected sphere of political autonomy for the devolved nations, and facilitating co-operation between Westminster and the devolved capitals.

However, developments since the EU referendum in 2016 have cast doubt over the future of the Sewel convention as well as raising broader questions about the future of devolution. In particular, two key pieces of Brexit legislation – the European Union (Withdrawal) Act 2018 and the European Union (Withdrawal Agreement) Act 2020 – were passed by the UK parliament without devolved consent, from Scotland in 2018, and from all three devolved legislatures in 2020. In both these cases this occurred despite the UK government recognising that the convention applied. This had never happened before, and has undermined trust between the administrations and the sense that they have a shared understanding of the rules governing their relationship. It also exposed the limitations of the consent process as a guarantor of devolved autonomy.

The UK government has been at pains to argue that it was only in the exceptional circumstances of Brexit that it chose to legislate without devolved consent. But with Westminster having crossed the Rubicon, there is concern in the devolved nations that the UK parliament – particularly while it is dominated by the present Conservative government – will legislate without consent in devolved areas on a more frequent basis, not least because withdrawal from the EU has created additional areas of potential conflict on matters where EU law previously reigned supreme.

Consent has yet to be given for a number of Brexit-related bills. Battle lines have also now been drawn over the government's UK Internal Market Bill, which the UK government describes as necessary to prevent the emergence of barriers to trade between the nations of the UK, once EU law ceases to apply at the end of 2020. Even before the legislation was published, on 9 September, both the Scottish and Welsh governments had indicated that they were likely to oppose the bill, given the constraints this legislation may impose on the ability of the devolved nations to determine their own standards in areas such as food, environmental protection and animal welfare.⁵ Both reiterated their opposition to the proposals following the publication of the bill,⁶ and some parties in Northern Ireland have also expressed disquiet about the implications of the bill for the Northern Ireland protocol of the EU Withdrawal Agreement.⁷

If further legislation is passed by Westminster without devolved consent (on bills where Sewel clearly applies), this would further undermine trust between the governments and make it harder for them to work together in areas where EU law must be replaced by new UK-wide arrangements, such as the regulation of agriculture, food and the environment. It would also provide more ammunition for nationalists to argue that the

autonomy of the devolved nations is under threat, further destabilising the Union in the run-up to the May 2021 Scottish and Welsh elections, when the question of Scottish (and perhaps even Welsh) independence will be at the centre of political debate.

The purpose of this paper

There is a renewed debate at Westminster and in the devolved institutions about how the legislative consent process should work, whether it should be strengthened, and if so, how. This paper is the Institute for Government's contribution. Our views are based on interviews with civil servants, politicians, parliamentary officials and experts across the UK, as well as on a review of relevant literature and past debate. We are grateful to the Joseph Rowntree Reform Trust for its support of this project and to all those who have contributed.

This paper starts by discussing the historical precedents of Sewel and the constitutional and practical functions that it plays within the post-devolution UK constitution. We discuss the frequency with which the consent process has been used and the rarity of disputes since 1999. We then discuss the extent to which the legislative consent convention is embedded in rules within Whitehall, Westminster and at the devolved level, as well as the statutory recognition of the convention since the 2014 Scottish independence referendum.

We conclude that Sewel had become a central part of the UK constitution, which had been accepted by all sides as imposing obligations on their behaviour. The paper then explores the impact of Brexit on the Sewel convention, before concluding that Sewel is not broken but has been seriously damaged, and that reform to the legislative consent process is needed. Finally, we set out eight specific recommendations on how to do this.

Our proposals will go too far for some. Many in Whitehall and Westminster are instinctively sceptical of any reform they fear could restrict their freedom of action. And they will be too limited for others. Both the Scottish and Welsh governments, for instance, favour a binding consent mechanism that would give the devolved legislatures a legal veto over some UK primary legislation.* That would imply a much more radical constitutional upheaval in which parliamentary sovereignty was superseded by something akin to a federal relationship between Westminster and the devolved institutions, and by extension between the four nations of the UK.

There may be a case for more radical reform along these lines. However going down this path would open up profound questions about the nature of sovereignty, the relationship between parliament and the courts, the scope for constitutional entrenchment of the devolution settlements, and the place of England within the Union. Such questions are beyond the scope of this paper.

* The devolved legislatures do have a legal veto over certain forms of secondary legislation, such as the Section 30 Orders under the Scotland Act 1998 which are required to be passed by the House of Commons, House of Lords and the Scottish Parliament before becoming law.

Our ambitions are for more immediate and practical reform. While recognising the deeper principles at stake, we seek to outline a plausible short-term reform plan that could be implemented without fundamentally changing the nature of devolution and the Union. Our proposals are designed to:

- enhance the accountability of the UK government when it takes decisions that impinge upon devolution
- entrench the Sewel convention more fully in the legislative process
- create new opportunities for parliamentary consideration of the impact of legislation on devolution
- help to rebuild consensus about the principles that should govern the relationship between Westminster and the devolved institutions.

The Sewel convention protects devolved autonomy – as far as is constitutionally possible

As Lord Sewel himself noted in 1998 when first outlining the convention in parliament, the principle of legislating only with consent draws upon the precedent of the first period of devolution to Northern Ireland, from 1921 to 1972.⁸ During this period, the understanding developed that “the United Kingdom Parliament would legislate within the field of Northern Ireland’s ‘transferred’ powers only by invitation”.⁹ As Professor Jim Gallagher, a former director general for devolution at the Ministry of Justice, notes, this convention was eventually dispensed with only in the truly exceptional circumstances of the early 1970s, as the Troubles erupted and the UK government suspended devolution and asserted direct rule over Northern Ireland.¹⁰

The underlying principle of Sewel can be traced back even further, to the government of the dominions (such as Canada and Australia) under the British Empire and subsequent relations with the Irish Free State (1922–1937). It was recognised at the 1918 Imperial Conference that the Westminster parliament retained the right to pass imperial statutes for its dominions, but that this should only happen on the basis of consent. This was a formal acknowledgement of a practice that had been followed for many years prior to this.¹¹

In the 1931 Statute of Westminster, which recognised the sovereignty of the dominions, this convention was superseded by a legally binding constraint on parliamentary supremacy, which stated that:

No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.¹²

The modern Sewel convention therefore emerges from a long history of 'territorial statecraft' by the British state, in which the centre concedes substantial political autonomy to particular territories, and into which it encroaches only with consent, but within an overall constitutional framework that upholds the ultimate supremacy of the UK parliament.

This means that there are no domestic legal constraints on the power of parliament to legislate on all matters for the whole UK. It cannot bind itself or its successors, nor carve out areas of exclusive competence for the devolved legislatures. In the traditional formulation, it can "make or unmake any law whatever".¹³ The UK parliament can only be restrained politically – by conventions, intergovernmental agreements, and self-denying ordinances.

This is acknowledged in the memorandum of understanding, first agreed in 1999 between the UK and devolved governments and revised several times since then, which sets out principles and processes for managing intergovernmental relations. This document states that the "United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power".¹⁴ Parliamentary sovereignty is also explicitly acknowledged in each of the devolution acts.¹⁵ This means, as the House of Commons Library puts it, that "legislative power has been delegated, rather than ceded or divided".¹⁶

This stands in contrast to federal states such as Canada, where the constitutional spheres of authority of the provincial legislatures are protected by a codified constitution and courts that can annul federal laws that stray into areas of exclusive competence of the provinces. Canada's Supreme Court has a prominent role as "federal umpire"¹⁷ and regularly decides cases on the balance between federal and provincial powers, from disputes over prosecuting and policing to fisheries. If Canada's federal parliament wanted to legislate on one of the matters listed as a provincial competence, such as management of provincial hospitals or property rights,¹⁸ it would have to seek a constitutional amendment to enable it to do so. Such amendments have a high threshold, requiring the support of the Senate; the House of Commons and two-thirds of the 13 provincial legislatures (representing at least half of the population of Canada).

In the UK, there are no special thresholds or protections for amendments by the Westminster parliament to the constitution. Although the Scotland Act 1998 and Government of Wales Act 2006, as amended by legislation passed in 2016 and 2017 respectively, recognise devolution as "a permanent part of the United Kingdom's constitutional arrangements", which could be abolished only following a referendum on the issue,¹⁹ changes to these statutes, in theory at least, only require an ordinary Act of Parliament.

Federalism cannot exist without some form of codified constitution, or at least 'basic law', that is beyond unilateral amendment by the central federal legislature. In a federal, rather than devolved, system, the powers of the constituent units are therefore constitutionally guaranteed and protected by the courts against unwanted encroachment by the centre.²⁰ The doctrine of parliamentary sovereignty as it is currently understood prevents a federal arrangement in the UK.

However, while devolution did not dispense with the formal legislative supremacy of the Westminster parliament, the devolution statutes of 1998 have been recognised by the UK High Court as being “constitutional statutes”²¹ that carry a greater significance than ordinary domestic legislation. The Supreme Court later noted the “fundamental constitutional nature” of the Scotland Act,²² while Lords Bingham and Hoffmann suggested that the Northern Ireland Act 1998 is “in effect a constitution”.²³ Lord Steyn further observed that the devolution acts “point to a divided sovereignty” in the UK.²⁴ The purpose of devolution, as another Supreme Court judgment had it, was “to create a system for the exercise of legislative power... that was coherent, stable and workable”.²⁵ To deliver this coherence and stability, it was necessary from the outset to delineate a sphere of devolved law-making authority into which Westminster would encroach only by invitation, other than in exceptional circumstances.

Therefore, as Professor Gordon Anthony of Queen’s University Belfast concludes, “The fundamental purpose of the Sewel convention is to ensure that devolution works in a manner that respects the roles of the UK Parliament and the devolved legislatures.”²⁶ What the convention does, in other words, is protect the political autonomy of the devolved institutions within their spheres of competence, as far as is constitutionally possible.

The Sewel convention delivers benefits for both central and devolved government

As well as this important constitutional function, the consent process provides a mechanism through which the UK parliament can legislate in devolved areas with the express consent of the devolved legislatures. This delivers practical benefits for both UK and devolved governments. It provides a simple way to ensure that the law is consistent across the UK, in technical or other areas where there is no political disagreement about the desired objective and practical reasons to prefer a single UK-wide legal framework. For instance, in January 2020, consent was given by the three devolved legislatures to the Direct Payments to Farmers (Legislative Continuity) Bill, which created a framework to make direct 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: a recent example is the Domestic Abuse Bill currently before parliament, for which consent is required in Scotland and Northern Ireland, and which will ensure that courts across the UK are compliant with the Istanbul Convention on preventing domestic violence.

The legislative consent process can play a particularly useful role in areas where there is uncertainty about what is and what is not a devolved matter and/or a complicated intersection between reserved and devolved powers. In such areas, so long as there is agreement on the substantive policy questions, then Sewel allows legislation to be enacted without needing to resolve the question of where competence lies. This helps to avoid any risk of legal challenge: acts passed by the UK parliament cannot be

overturned in the courts, whereas devolved legislation can be struck down if found to stray into reserved areas.* Sewel is therefore regarded as a “neat fudge of the constitution” according to one Whitehall insider we spoke with.

The consent process is also a convenient timesaver from the perspective of Edinburgh, Cardiff and Belfast, since it provides an alternative route for devolved ministers to get desired legislative changes onto the statute book without needing to produce and pass their own bill. Moreover, where consent is given to UK legislation that relates to devolved matters, but that does not amend devolved competence, this does not remove the ability of the devolved bodies to pass their own legislation in the same area at a future point, should circumstances or political priorities change. In this way, granting consent to UK legislation does not constrain devolved autonomy – unless, that is, the legislation makes changes to the devolution settlement itself. It also avoids unnecessary duplication of effort and lightens the burden on the devolved institutions, which are smaller and have less capacity to draft and scrutinise legislation than Westminster and Whitehall.

This can be particularly valuable in times of crisis when a swift UK-wide response is desired. The Coronavirus Act 2020, for instance, was mainly drafted in Whitehall in close consultation with the devolved governments, with some sections even written by Scottish government officials, we were told. The legislation modified the powers of devolved ministers and legislated in areas within devolved competence, and therefore fell within the scope of the Sewel convention. Upon its introduction in April 2020, the legislation was immediately welcomed by devolved ministers and consented to by the legislatures in Cardiff Bay, Stormont and Holyrood.

This last example points to an additional function of the consent process. Many of the bills where consent has been sought have conferred additional functions on the devolved institutions – most often by extending the executive competence of devolved ministers, but also occasionally to amend the legislative competence of the devolved legislatures. The legislative consent process has therefore served as a mechanism to strengthen and deepen devolution, with consent, as well as to make minor technical adjustments to the devolution settlements. The Scotland Act 2016 and Wales Act 2017, for example, transferred a raft of fiscal, welfare and other functions to Edinburgh and Cardiff. In both cases, the UK government accepted that the changes should not be implemented without devolved consent, which was given only after agreement about the impact of these reforms on the devolved budgets.

In sum, when it works well, as it has done for most of the period since 1999, the Sewel convention delivers clear benefits to all sides.

* This occurred, for instance, to the Recovery of Medical Costs for Asbestos Diseases (Wales) Bill in 2015, see: ‘Recovery of Medical Costs for Asbestos Diseases (Wales) Bill - Reference by the Counsel General for Wales’, [2015] UKSC 3

Sewel's benefits are reflected in how often it is used

The legislative consent process has been used far more often than initially expected, with only rare disputes between the UK and devolved governments.

Previous [Institute for Government analysis](#) has shown that the legislative consent convention was used in its first 20 years (up to April 2019) to facilitate the passage of more than 200 Acts of Parliament. This included 155 bills in the case of Scotland, 61 for Wales and 65 for Northern Ireland (in many cases, the consent of more than one of the devolved nation was required).²⁷ As Professor Jim Gallagher notes, "In Scotland, there was initially some criticism of overuse of this procedure, notably from the Scottish National Party in opposition, but it is now regarded as a routine piece of good government."²⁸

Overall, bills subject to consent motions have most frequently fallen within the remit of the Home Office, the Department for Business, Enterprise and Industrial Strategy (and its predecessors) and the Ministry of Justice. The Northern Ireland assembly has sometimes been asked for consent for bills sponsored by the Treasury and the Department for Work and Pensions, reflecting the fact that the administration of social security and pensions is devolved to Northern Ireland but not Scotland and Wales. In Wales, consent is occasionally required local government and housing bills that do not apply in Scotland and Northern Ireland.²⁹

Before 2018, consent had been withheld by one or other of the devolved legislatures on just nine occasions. The Northern Ireland assembly and Scottish parliament had each withheld consent only once, for the Enterprise Bill (2015–16) and the Welfare Reform Bill (2011–12) respectively. On both these occasions, as the House of Commons Library details, the UK government agreed to amend the legislation so that the provisions to which the devolved institutions objected no longer applied in that part of the UK.³⁰ On other occasions, for instance in relation to the Public Service Pensions Bill (2011–12), an impending denial of consent by the Scottish parliament led to pre-emptive amendments that took the contested provisions out of the legislation, averting the need for a consent vote.³¹

Consent has been withheld most frequently in Wales, where there has been a messier delineation of devolved and non-devolved functions, especially in the 'conferred powers' model of devolution that existed until 2018, when the Wales Act 2017 came into effect.* This gave rise to a number of disputes over whether or not certain powers were devolved, and therefore whether legislation relating to those matters fell within the scope of the Sewel convention.

* In April 2018, Wales moved from a conferred powers model, where the Senedd could only legislate in the subject areas listed in statute, to a reserved powers model, where the Senedd can legislate on all matters except those listed as reserved to Westminster. This reform was designed in part to produce a clearer demarcation of devolved legislative competence, and therefore to reduce the frequency of disputes over competence (see: HM Government, Powers for a Purpose: Towards a Lasting Devolution Settlement for Wales, Cm 9020, February 2015, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/408587/47683_CM9020_ENGLISH.Pdf)

Before Brexit there had been seven votes by the Welsh assembly (now formally known as the Senedd Cymru or Welsh Parliament) to withhold consent. On two occasions, the UK government amended the bill to remove the contested provisions. This happened with the Police Reform and Social Responsibility Bill (2010–11) and the Local Audit and Accountability Bill (2013–14).³² Welsh consent was also withheld for one private member’s bill, the Medical Innovations Bill (2014–15), which the Welsh government and others feared would “expose vulnerable and desperate patients to false hope and futile and potentially harmful treatments”.³³ Further conflict was avoided since the bill fell when parliament was prorogued ahead of the general election.

On four occasions prior to Brexit, the UK parliament legislated despite a denial of consent from Cardiff. This happened with regards to the Anti-social Behaviour, Crime and Policing Bill (2013–14), the Enterprise and Regulatory Reform Bill (2012–13), the Housing and Planning Bill (2015–16), and the Trade Union Bill (2015–16).^{*} These were bills that the UK government argued did not relate to devolved matters, meaning that in its view, consent was not required.

This illustrates what, at least from a devolved perspective, is a limitation of the Sewel convention: the UK government can unilaterally determine whether consent is required. If it takes the position that a bill falls entirely within reserved competence, or has only a minor consequential impact on devolved matters, then it can proceed on the basis that consent is not required. This does not prevent the devolved administrations from taking a different view, or from laying a consent motion based on its own assessment of where consent is required. But, crucially, there is no formal requirement to resolve these differences of view, nor any mechanism by which to air such issues during the legislative process in the UK parliament. (We return to this point below.)

What this discussion shows is that, with a handful of exceptions, the legislative consent process has operated in the way that it was intended, as a facilitator of co-operation between central and devolved governments, and as a guarantee of devolved political autonomy. In addition, before 2018, the UK parliament had never passed legislation without consent in a situation where the UK government considered the relevant provisions of a bill to fall within the scope of the Sewel convention.

* The latter became the subject of a Supreme Court case after the Senedd passed its own legislation, replacing the public bodies which the UK Act abolished. The Attorney General for England and Wales referred the Welsh Bill to the Supreme Court, however the judges agreed that the Bill fell within devolved competence.

The Sewel convention is not reflected in the procedures of the UK parliament

The Sewel convention is put into practice in different ways in Westminster, within the UK government and in the devolved capitals. There are clear rules and expectations for both civil servants and politicians about how the UK government should work with the devolved administrations during the legislative process, and for how the devolved institutions should themselves consider the question of consent.

Within the UK government, the rules for how government departments should proceed when planning to introduce legislation in an area where consent may be required are set out in the Devolution Guidance Notes (DGNs) published by the Cabinet Office. There are separate DGNs relating to Scotland, Wales and Northern Ireland, with some variation reflecting certain differences between the three devolution settlements.³⁴ But the core principles are similar, and include that:

- departments are required to establish, at an early stage in developing proposals for a bill, whether the legislation will invoke the consent convention, by taking legal advice and consulting with the Scotland, Wales or Northern Ireland offices as appropriate.
- the convention is invoked in the same way for legislation that either relates to devolved matters or amends the powers of the devolved institutions.
- consent need not be sought where the impact of devolved matters is only incidental or consequential to the main purpose of the bill, but there should be meaningful consultation in these cases too.
- where consent is required, the department should consult as soon as possible with the affected devolved administration to ascertain whether there is likely to be devolved support for the bill.
- these steps should be taken before a department submits a bill to the Parliamentary Business and Legislation Cabinet Committee, which co-ordinates the government's legislative programme. In theory, by this point, the "essential requirement... is that devolution related issues have been substantively resolved",³⁵ and departments are expected to submit evidence making clear that they have consulted appropriately, and confirming that consent is expected.

At the devolved level, there are also clear requirements for how the consent process should work. After a bill requiring consent is introduced at Westminster, the devolved administrations produce a legislative consent memorandum, as required by the Standing Orders of the devolved legislatures in Cardiff, Edinburgh and Belfast. The memorandum sets out the bill's objectives, the reasons why consent is required, the consultation process that has been followed and usually indicates whether and why the devolved government believes consent should be given.

These legislative consent memoranda are typically scrutinised and reported on by committees of the devolved legislature. The committee reports then inform a plenary debate on a 'legislative consent motion', normally moved by ministers, that either grants or withholds consent for the bill, in whole or in part. To prevent misuse of the system, the standing orders in each of the devolved legislatures require that consent motions must relate only to bills, or provisions of bills, that fall within the scope of the Sewel convention. This prevents the consent process from being used to hinder the progress of legislation on non-devolved matters. In the Scottish parliament, at least, the presiding officer can rule a proposed consent motion out of order, should he or she determine that Sewel does not apply. This is a sanction with bite: in 2015, the presiding officer of the Scottish parliament refused to allow a consent motion on the UK government's Trade Union Bill.³⁶

Legislative consent votes are usually scheduled to take place before the final amending stage of a bill at Westminster, in order that parliament can change the legislation in light of consent decisions taken at the devolved level. If amendments are subsequently passed by the UK parliament, devolved administrations can bring forward a supplementary legislative consent memorandum laying out the changes. If this happens after the first legislative consent motion has been voted on, then there will then be a second vote to grant or refuse consent for the amended bill.

So, the Sewel convention is part of the working practices of both UK and devolved governments, as well as in the procedures of the devolved legislatures. But there is no formal recognition of the consent process within the procedures of the UK parliament. In the House of Commons, the government has agreed that the passage of relevant legislative consent motions can be indicated on the daily order paper against the appropriate item of business, and the text of any motion is carried on the UK parliament webpage for the bill. However, there is no express requirement for either House to acknowledge the passage of a consent motion, or a decision by any devolved legislature to withhold consent. The absence of a direct procedural link between consent decisions taken by legislatures at the devolved level and proceedings in the Westminster parliament is a weakness of the process, especially since the convention is an expression of the relationship between legislatures rather than executives.

In addition, while the DGNs set out sensible requirements that in general appear to be followed closely by government departments, they do not clarify what should happen if consent is not forthcoming but there is a desire to press ahead with the legislation regardless. It is not clear how any disputes should be resolved, nor how departments and ministers should be held to account for how they interpret and implement their obligations to consult in good time and to seek compromise to resolve any disputes before introduction of the bill.

These are further limitations of the system whose implications have come to light during the Brexit process.

The Sewel convention is recognised in statute – but not in its full form

Having operated as a traditional, non-statutory constitutional convention for nearly two decades, the Sewel convention was recognised in statute in the Scotland Act 2016 and the Wales Act 2017. The commitment to put Sewel “on a statutory footing” had been made by the UK government following the 2014 Scottish independence referendum, as part of the cross-party Smith Commission agreement,³⁷ and was replicated for Wales (but not Northern Ireland).

These two statutes amended the existing devolution legislation to insert a reference to the Sewel convention after an existing clause that emphasised the continued ability of the UK parliament to legislate for the devolved nations. The relevant provisions now read as follows:

[Devolution of legislative powers to Scotland/Wales] ... does not affect the power of the Parliament of the United Kingdom to make laws for Scotland [/Wales].

But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish [/Welsh] Parliament.³⁸

This provision delivered on the commitment to put Sewel into statute, but in a minimalist way. First, because while the legislation reproduces Lord Sewel’s original wording it does not reflect the full scope of how the convention has worked in practice. As noted above, the Sewel convention has three distinct strands: it applies when UK legislation makes changes to the law in areas of devolved competence, and also when legislation alters either the legislative or the executive powers of devolved institutions.³⁹ However, the second and third strands are not incorporated into the statutory definition.

Second, although the Sewel convention has been put into statute and is now part of the body of written law, the provisions do not make it possible for a court to legally enforce it. In particular, the phrases “it is recognised that” and “not normally” were designed to avoid placing any constraints on the UK parliament, should it choose to legislate without consent in future. On behalf of the UK government, Lord Keen, advocate-general for Scotland, was explicit:

“This clause is clearly intended to indicate that **the discretion of Parliament to legislate for devolved matters will continue exactly as before** and that it is not intended to subject that discretion to judicial control. I would add that the words ‘it is recognised’ that appear in Clause 2 also reflect the continued sovereignty of the United Kingdom Parliament and that **it is for Parliament to determine when a circumstance may be considered not normal**” (emphasis added).⁴⁰

This approach was criticised at the time both at Westminster and at the devolved level. For instance, the Political and Constitutional Reform Committee (PCRC) of the House of Commons labelled the clause “‘legally vacuous’, i.e. merely declarative and without statutory force”. John Swinney, deputy first minister of Scotland, described the effect of the clause as “put[ting] the Sewel convention into statute as a convention, rather than put[ting] the convention on a statutory footing”.⁴¹

Although the Scottish government objected to the wording of this clause, it did not withhold its consent to the Scotland Act itself. At this point, it was generally seen as unlikely that the UK parliament would ever legislate without consent in a devolved area or to change the terms of devolution, so the Scottish government did not make this a red line in negotiations over the legislation, which transferred to Edinburgh a number of fiscal, welfare and other powers. As the PCRC had concluded in 2015: “Hardly anyone can envisage a likely situation in which [the convention] would be deliberately breached.”⁴² But the situation that hardly anyone had envisaged was the vote to leave the European Union.

Brexit has exposed the limitations of the Sewel convention

Following the 2016 EU referendum, many observers immediately recognised that Brexit would have an impact upon the devolution settlements and that the Sewel convention would be engaged for legislation giving effect to Brexit. As the Institute for Government concluded in October 2016:

Brexit cannot be treated as a simple matter of foreign relations. Leaving the EU will have a significant impact on the powers and budgets of the devolved bodies. This means the devolved parliaments will almost certainly seek to vote at some point on whether to give consent to the terms of Brexit.”⁴³

At that time it remained conceivable that UK-wide agreement on the terms of Brexit could be reached, as Theresa May had promised she would seek upon becoming prime minister in July 2016.⁴⁴

However, May’s aspiration proved unattainable, once her government ruled out a softer form of Brexit in which the UK remained within or closely aligned to the EU single market, and the withdrawal process consequently unfolded amid a series of disputes between the different administrations. This process, and four episodes in particular, have illustrated the limitations of the Sewel convention, and the continued vulnerability of the devolved institutions to the power of parliamentary sovereignty.

The first was the 2017 *Miller 1* case, which confirmed that the statutory recognition of Sewel had not transformed the convention into a legally enforceable consent requirement. The case concerned the triggering of Article 50 to give formal notification of leaving the EU and the Scottish and Welsh governments intervened to argue that if an Act of Parliament was needed for an Article 50 notification to take place, the consent of the devolved legislatures should be obtained for any such legislation. The Supreme

Court did not take a view on this question, making clear that it was not the role of the courts to determine whether and where the Sewel convention applies. The statutory recognition of Sewel in the Scotland Act 2016 (and the Wales Bill that was then before parliament) was thus confirmed to have no legal effect. The Supreme Court concluded:

“The Sewel Convention has an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures. But the policing of its scope and the manner of its operation does not lie within the constitutional remit of the judiciary.”⁴⁵

Professor of public law Gordon Anthony additionally argues that in *Miller 1* the Supreme Court implicitly rejected any suggestion from earlier case law that there is a form of ‘divided sovereignty’ within the UK, writing that “the ruling clearly envisaged only a subordinate constitutional role for the devolved legislatures”.⁴⁶ *Miller 1* thus marked a reassertion of the legislative supremacy of Westminster.

The second episode came in 2018 when the EU (Withdrawal) Act was passed by Westminster despite the Scottish parliament voting to withhold its consent. This case demonstrated that the UK parliament’s ability to amend the devolution settlements without consent was intact in practice as well as theory. The government had recognised as it introduced the bill that it would be subject to the Sewel convention, due to changes it made to the legislative and executive competences of devolved institutions. However, contrary to the expectations of good practice set out in the DGNs discussed above, the bill had not been subject to substantial pre-legislative consultation with the devolved administrations. Certainly, it was introduced before the devolution-related issues had been “substantively resolved”, as the guidance notes require.

The legislation was opposed by the Scottish parliament because it created a power for UK ministers unilaterally to impose temporary constraints on devolved legislative autonomy, designed as a way to limit regulatory divergence within the UK after EU law ceased to apply in the UK. The passage of the bill without consent led the Scottish government to declare that “The UK Government has effectively suspended the established legislative consent process in relation to legislation concerning EU withdrawal”. Consequently, it concluded that there was no “practical purpose” to bringing forward further legislative consent motions for Brexit-related legislation.⁴⁷ The view at the devolved level, we were told, was that Westminster had acted “legally but not constitutionally”.

The Welsh government gave the Withdrawal Act its reluctant blessing, following concessions by the UK government and an intergovernmental agreement about how the powers in the Act would be used by UK ministers. After a rocky start, the UK and Welsh governments were ultimately able to reach agreement on the legislation, demonstrating a continued commitment to the Sewel convention. However, on the point of principle, the Welsh government stood with its Scottish counterpart, arguing that the UK government had acted in an illegitimate fashion by ignoring the Scottish parliament vote to deny consent.

The Northern Ireland assembly was **not sitting** at that point, so was unable to take a decision. But as one close observer pointed out to us, had devolution been functioning, the executive would likely have struggled to agree a position. Even if a legislative consent motion had been tabled, the anti-Brexit nationalist parties could have used the ‘**petition of concern**’ process at Stormont to block any consent motion.*

The third episode that demonstrated the limitations of Sewel came as a direct result of the passage of the Withdrawal Act. In April 2018, the Supreme Court was asked by the UK government to rule on the legality of a bill approved by the Scottish parliament to provide for continuity of EU law in Scotland after Brexit. The Scottish legislation had completed its passage through Holyrood *before* the Withdrawal Bill was passed by the UK parliament, but enactment of the Scottish bill had been delayed by it being referred to the Supreme Court. The court ruled that the Scottish bill had been almost entirely within devolved competence at the time it had been passed, but that the subsequent passage of the Withdrawal Act rendered it *ultra vires* (done without legal authority).⁴⁸

The Scottish bill was thus prevented from becoming law by a constraint on Scottish devolved autonomy passed after this bill and without the consent of the Scottish parliament. This case illustrates why it is important that the Sewel convention is understood to apply to legislation that amends devolved competence, as well as legislation relating to devolved policy areas.

The fourth episode came 18 months later, at the end of the Article 50 process of leaving the EU. Shortly after the 2019 election, the UK government introduced the European Union (Withdrawal Agreement) Bill (2019–20) to make legal provision for ratifying the Withdrawal Agreement and implementing it into domestic law. This bill was recognised by both UK and devolved governments to fall within scope of the Sewel convention, as it made technical changes to the devolution statutes to reflect the fact that the UK will remain aligned with EU law during the transition period, and gave devolved authorities new powers to help implement the Northern Ireland protocol. However, all three devolved legislatures refused consent for the bill – another first for UK constitutional politics.

The UK government argued that the devolved administrations had, in essence, misused the consent process to signal their opposition to the Withdrawal Agreement as a whole, rather than confining their criticism to the specific provisions that affected devolution. This point was made in January 2020, in a statement published alongside letters to the Scottish and Welsh administrations:

“The UK Government’s view [is] that the devolution settlements did not intend for the Devolved Administrations to be able to frustrate the UK Government’s exercise of reserved powers.”⁴⁹

* A petition of concern is a mechanism designed to help protect minority rights, through which 30 Members of the Legislative Assembly (MLAs) can require that an assembly decision has cross-community support (either 50% of total MLAs and 50% of unionists and nationalists, or 60% of total MLAs and 40% of unionists and nationalists). This mechanism can be invoked for any assembly vote, including a vote on a legislative consent motion. Source: Cabinet Office, Guide to Making Legislation, 2017, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/645652/Guide_to_Making_Legislation_Jul_2017.pdf

The devolved governments did take the opportunity of the consent process to reiterate their existing opposition to Brexit, and their frustration at the limited level of involvement they had been granted in the Brexit negotiations. Sinn Féin's Michelle O'Neill spelt out clearly that "It's significant that this Assembly sends a very firm message again that we reject Brexit, that we follow after Scotland has rejected Brexit, and I believe Wales will vote tomorrow to maybe also reject Brexit".⁵⁰ The Scottish government further stated that it "cannot recommend that the Scottish Parliament consent to a Bill to give effect to an agreement which it considers will do significant damage to Scotland".⁵¹ The Welsh government objected to the UK government's plans for a loose free trade deal with the EU, rather than the closer relationship preferred in Cardiff, and to what it saw as the continued risk of a no-deal Brexit at the end of the transition period.

These are matters for which consent is not required. However, both the Scottish and Welsh governments also expressed objections to provisions within the scope of the consent convention, such as powers given to UK ministers to make changes to the law in devolved areas in order to implement the Withdrawal Agreement.⁵²

The EU (Withdrawal Agreement) Act became law on 23 January 2020 without the consent of any of the three devolved legislatures. The UK government took the view that the circumstances of leaving the EU, following the 2016 referendum were "not normal – they are unique",⁵³ so legislating without consent was justified, since the convention only refers to what should "normally" happen. However, this claim was made only at the end of the process, when it had become clear that consent would not be granted. This raises the question of whether, if the government intends to legislate with or without consent, it should state at the outset that due to genuinely exceptional circumstances the Sewel convention does not apply. We return to this issue below.

This series of disputes has undermined the Sewel convention, with a breakdown in consensus about the norms and principles that underpin the consent process.

Trust in the legislative consent process has been eroded

In the aftermath of the passage of the Withdrawal Agreement Act, there was a danger that the Sewel convention could have collapsed altogether, had the devolved bodies taken the view that Westminster would do what it liked regardless of their consent. Conversely, the UK government could have concluded that since it can get its own way irrespective of the outcome of any consent motions, it might as well dispense with the convention and avoid the need for negotiation and compromise over the terms of legislation.

Fortunately, that has not happened. Both the UK and devolved governments have continued to work together on bills requiring consent. Whitehall departments have engaged with devolved counterparts in the normal way to seek to resolve disputes, devolved ministers have laid legislative consent memorandums, and the devolved legislatures have debated and passed a number of consent motions. For instance, in the first half of 2020, all three devolved legislatures gave their consent to the Direct

Payment to Farmers Act, Coronavirus Act and the Corporate Insolvency and Governance Act. The Scottish parliament also gave consent to the Private International Law (Implementation of Agreements) Bill, and the Northern Ireland assembly did likewise for the Agriculture and Environment Bills.

There are also indications of the continued ability of the UK and devolved administrations to compromise to prevent differences of opinion about the detail of legislation from spiralling into outright disputes over consent. The Welsh government, for example recommended in April 2020 that consent be given by the Senedd to the Trade Bill,⁵⁴ having expressed serious objections to the previous version of the bill introduced in the 2017–19 parliament.⁵⁵ This recommendation followed commitments made by the UK government to consult and seek the consent of Welsh ministers before using certain powers created by the bill to legislate in devolved areas.

A big breakthrough was also made with regard to the Fisheries Bill. Having previously objected to the legislation, the Scottish government in June 2020 signalled that it was content with concessions made by the UK government, for instance relating to the right of the devolved institutions in Edinburgh to regulate sea fishing off the coast of Scotland.⁵⁶ Engagement between the two administrations on this bill appears to have been extensive: one observer at Westminster described this as representing the “gold standard” of how the consent process should work. In August 2020, the Scottish government also recommended that consent be given to the Trade Bill, having opposed the previous version of this legislation.⁵⁷ It is clear from these examples that the benefits the convention brings are still recognised at central and devolved levels, and there is no desire for Sewel to fall away entirely.

As a result, one might conclude that everything is fine, that the Sewel convention has functioned as it should – with legislation passed without consent only in exceptional circumstances – and that all has now returned to normal. For instance, Stephen Barclay MP, then Brexit secretary, stated after the passage of the EU Withdrawal Agreement Act that “The refusal of legislative consent in no way affects the Sewel convention or the Government’s dedication to it.”⁵⁸ However, we believe that this interpretation greatly underplays both the significance of what has transpired during the Brexit process, with regard to the Sewel convention, and the potential for further disputes as the UK prepares to formally leave the EU single market and customs union on 31 December this year.

It is understood and (reluctantly) accepted within the devolved governments that Westminster has the legal ability to legislate without consent. However, the previous assumption that the UK and devolved institutions were playing by the same rulebook had been shattered. The consent process is based on trust between the two sides, but that trust has been damaged by the events of the past four years. As Professor Nicola McEwen of Edinburgh University puts it: “The paradox of the Sewel convention is that it only functioned as a principle and process that fostered a culture of cooperation so long as its limits were untested.”⁵⁹ Now that the limits have been tested, its ability to regulate centre–devolved relations has been cast into doubt.

Brexit has destabilised Sewel not only because of the headline disagreement about the nature of the UK–EU relationship, but also because it has increased uncertainty about the division of power between central and devolved government. In Edinburgh, we heard the view expressed that there is a “constitutional vacuum caused by Brexit.” As the Institute for Government has discussed in [previous research](#), there is a large body of EU law that constrains the autonomy of the Scottish, Welsh and Northern Irish institutions in policy areas that are not reserved to Westminster and, therefore, devolved by default.⁶⁰

As that law ceases to apply in the UK, new UK-wide legal frameworks will be required, which will often cut across the boundary between reserved and devolved competences. The Scottish political scientist Alan Convery has made the point that: “The problem is that leaving the EU exposes gaps in the UK constitution that need to be filled and many of them are in highly contentious areas”.⁶¹ Consequently, the consent process may become more contested between UK and devolved bodies, especially when there is uncertainty about precisely where the boundary between reserved and devolved power lies, and where it is therefore unclear whether the government is acting on behalf of the whole UK or just for England.

Brexit also opens up the possibility of consent disputes over international agreements, for instance if further primary legislation is necessary to give effect to any ‘future relationship’ agreement with the EU or trade deals struck with other economic partners such as the US, Australia and Canada. As in the Brexit process itself, responsibility for negotiating such agreements will rest with the UK government, since international relations are a reserved matter. However, domestic ratification and implementation are likely to engage the Sewel convention, when provided for in UK legislation, especially if trade agreements have an impact on devolved functions such as agriculture, food standards, animal welfare and the NHS.

Further disputes over legislative consent loom

Following the return of parliament from recess in September 2020, the UK government will seek to make progress with a number of Brexit-related bills where consent is required (see Table 1, overleaf), and which the government wishes to get passed before the end of the year. A series of clashes over consent may lie ahead.

As ever, disputes appear most probable between Westminster and Holyrood, where the issue of Scottish independence has risen back up the agenda. The Scottish government has recommended that the Scottish parliament withhold consent from the Immigration and Social Security Bill, which it argues does “not fully respect the devolution settlement”, due to powers it confers on UK ministers to amend devolved law. The Scottish government also opposes consent due to its objections to reserved aspects of the bill such as the end of freedom of movement.⁶²

Table 1: **Consent status of Brexit legislation (2019–20 session)**

	Date introduced	Consent status (as of 11 September 2020)		
		NI	Scotland	Wales
European Union Withdrawal Agreement Act 2020	19 Dec 2019	Consent withheld	Consent withheld	Consent withheld
Direct Payments to Farmers (Legislative Continuity) Act 2020	9 Jan 2020	Consent given	Consent given	Consent given
Agriculture Bill	16 Jan 2020	Consent given	Partial consent given. Unresolved dispute over some parts of bill.	Recommended by WG. Not recommended by committee.
Environment Bill	30 Jan 2020	Consent given	Recommended by SG. Not recommended by committee.	Recommended by WG.
Fisheries Bill	29 Jan 2020	Recommended by (NIE)	Recommended by SG	Recommended by WG.
Private International Law (Implementation of Agreements) Bill	27 Feb 2020	Recommended by NIE	Consent given	Consent not required
Immigration and Social Security Co-ordination (EU Withdrawal)	5 Mar 2020	Recommended by NIE	Not recommended by SG	Consent not required
Trade Bill	18 Mar 2020	Unknown	Recommended by SG	Recommended by WG. Not recommended by committee.
UK Internal Market Bill	9 Sept 2020	Unknown	Likely to be contested	Likely to be contested

Source: Institute for Government analysis. SG = Scottish government; WG = Welsh government; NIE = Northern Ireland executive.

A dispute may also arise in relation to the Agriculture Bill. The Scottish parliament has passed a consent motion for this legislation, in line with the recommendation of the Scottish government. However, the consent motion only covered certain parts of the bill, and the Scottish government has made clear that it “does not accept that the approach taken to this Bill is entirely consistent with devolved responsibilities”.⁶³ Notably, there is disagreement over Part 6 of the bill, which is designed to ensure that the UK complies with its obligations under the World Trade Organization (WTO) Agreement on Agriculture, and might limit the ways the devolved governments can support farmers. However, the UK government argues that this part of the legislation does not require devolved consent⁶⁴ – another example of a disagreement about whether consent applies in the first place.

Finally, the Scottish government has recommended that consent be given to the UK government’s Environment Bill. However, in an unusual development, the parliamentary committee tasked with scrutinising the issue of legislative consent disagreed, stating in a June 2020 report that it is “unable to make a recommendation in relation to the LCM [legislative consent motion] for the Environment Bill”.⁶⁵ The committee criticised how the bill provided extensive powers to ministers – in both the UK and Scottish governments – with weak provision for parliamentary scrutiny of how those powers are used.

This case serves as a reminder that for all the dominance of governments, in the end the Sewel convention is supposed to define the relationship between legislatures, and ultimately it is for the devolved legislatures to decide whether to grant consent, and for the UK parliament to decide whether to proceed in cases where consent has not been given.

Tensions between ministers and committees have also arisen in the Senedd. The Welsh government has in general taken a more emollient approach to legislative consent than its Scottish counterpart. It has recommended consent to the UK fisheries, environment and (as noted above) trade bills, citing the need for a UK-wide legal framework and the convenience of allowing Westminster to pass the legislation. However, more than one Senedd committee has criticised the Welsh government for its reliance on Westminster to make the necessary legal changes and for the way the bills confer extensive powers on ministers, with limited scope for parliamentary oversight. For instance, a report on the Environment Bill criticised the Welsh government for its “failure to provide adequate justification for seeking extensive regulation making and executive powers via UK Bills”.⁶⁶ In this case, the committee nonetheless gave a qualified recommendation that consent be granted.

Meanwhile, the Welsh Legislation, Justice and Constitution Committee has criticised the broad powers being given to UK ministers under the Trade Bill, which could be used to amend the powers of the Senedd, if deemed necessary to implement future trade deals.⁶⁷ The committee called on Welsh ministers to seek amendments to the bill accordingly. If such amendments are not made, it is not clear whether the Senedd will vote for consent.

Finally, the Welsh government has also given a half-hearted recommendation that consent be granted to the Agriculture Bill, while continuing to criticise clauses that give UK ministers the power to make subordinate legislation on issues such as the regulation of organic products.⁶⁸ In this case, the relevant committee concluded that, given the equivocal reassurance from Welsh ministers that the bill would defend devolved interests, it is “not in a position to recommend to the Senedd that it gives consent to the provisions in the Bill”.⁶⁹ Amendments might therefore be required before Welsh consent is given.

Disputes over consent appear less likely in the case of Northern Ireland. As noted, the assembly has already consented to the agriculture and environment bills. The executive has also recommended consent to the Fisheries Bill, Private International Law (Implementation of Agreements) Bill and Immigration and Social Security Coordination Bills. It is expected that consent will be given to all these bills in autumn 2020, despite minor reservations from the relevant assembly committee in the case of the Fisheries Bill. The executive position on the Trade Bill is not yet known, so it is possible that this will be a more contested issue.

The UK Internal Market Bill poses the greatest threat yet to Sewel

In addition, a big dispute is now unfolding in relation to the bill the government has introduced with the stated purpose of protecting the UK internal market after the end of the transition period. The legislation was published in early September 2020,⁷⁰ and included provisions to create new principles of mutual recognition and non-discrimination to allow businesses to trade across the UK market without friction. This means that anything that is acceptable for sale on the market in one part of the UK will automatically be acceptable for sale in another.

The devolved administrations argue that this will impose new constraints on the devolved institutions, preventing them from restricting the sale of goods that undercut their standards in areas such as food, animal welfare and environmental protection, if those goods are acceptable elsewhere in the UK. In addition, the bill amends the three devolution settlements to reserve to Westminster the power to regulate “distortive or harmful subsidies”, which is at present an EU competence. This provision could limit the ability of the devolved nations to introduce their own schemes for subsidising particular sectors or businesses once EU state aid law ceases to apply in the UK. It also creates new powers for UK ministers to spend money in the devolved nations “in connection with economic development, infrastructure, culture, sport and educational or training activities”, all of which are largely devolved responsibilities.⁷¹

The legislation has been strongly criticised by the Scottish and Welsh governments. The Scottish government has stated that the proposals are:

“fundamentally inconsistent with devolution because the approach in the paper centralises control in the UK government and UK parliament, cutting across devolved powers by imposing new domestic constraints on the exercise of these functions.”⁷²

Similarly, the Welsh government has stated that the proposals would:

“remove or emasculate the current rights of the devolved institutions to implement changes to the regulatory environment in devolved policy areas governed to date by EU law, such as labelling, or environmental standards”⁷³

Jeremy Miles, Welsh counsel general, also criticised the lack of communication, claiming to have been briefed on the bill two hours after the media.⁷⁴ Both the Scottish and Welsh governments are likely to recommend against consent being granted to this bill, unless substantial concessions are made by ministers at Westminster. The legislation has also been criticised by nationalist and non-aligned parties in Northern Ireland on the grounds that the bill would give ministers powers to undermine the Northern Ireland protocol of the EU Withdrawal Agreement.⁷⁵ The bill therefore risks exacerbating tensions within the fragile five-party coalition that forms the Northern Ireland executive – only returned from a three-year collapse in January 2020. Securing cross-community consent from the Northern Ireland assembly for this bill will therefore be very challenging.⁷⁶

Unless the UK government decides – or is forced – to accept substantial amendments to its legislation, the bill is therefore unlikely to receive the consent of any of the three devolved legislatures, even though the UK government’s own analysis shows that every single clause of the bill falls within the scope of the Sewel convention.⁷⁷ As such, this bill may pose the greatest challenge yet to Sewel.

The Sewel convention should be reformed and strengthened

The above discussion has shown that the Sewel convention has been put under strain by Brexit, and that further disputes over consent are likely, in particular as legislation is passed to replace EU law, to protect the UK internal market, and, potentially, to implement future international agreements. To some extent, this may be unavoidable. The UK and devolved governments have different views and priorities, and will inevitably clash over the terms of proposed legislation from time to time. But in our view, further disputes could further destabilise relations between the UK and devolved institutions and undermine confidence within the devolved nations that the Sewel convention serves to protect their interests.

In this final section of this paper, we therefore set out eight proposals for reform, which we hope will inform debate in Westminster and across the UK. Recommendations 1 and 2 are changes to be made to the system as a whole: to clarify the scope of the Sewel

convention and to define the limited circumstances in which the consent process can be sidestepped. Recommendations 3 to 7 are proposals for reforms at each stage of the legislative process. Finally, Recommendation 8 relates to how the UK parliament should improve its public information relating to the consent status of legislation.

This package of measures is designed to mitigate disputes between the UK and devolved governments, to improve the transparency of the system, to sharpen the accountability of UK ministers for decisions they take that relate to devolution, to improve awareness of the consent process within Westminster, and to strengthen relations between the UK and devolved parliaments.

Our recommendations are primarily targeted at the consent process relating to government legislation. However, many of the same principles and mechanisms should be applied to private member's bills, at least to those that have the backing of government and therefore have a realistic chance of becoming law.

Recommendation 1: The UK government should recognise the full scope of the Sewel convention

Since 1999, consent has been sought under the Sewel convention for three categories of legislation. These are bills that:

1. are for devolved purposes, meaning they relate to policy matters that are already devolved
2. amend the powers of the devolved parliaments or assemblies
3. amend the powers of devolved ministers (or in Northern Ireland, the functions of departments of the Northern Ireland executive).

The three strands of the Sewel convention are reflected in the government's Devolution Guidance Notes (DGNs) as well as in the standing orders of the devolved legislatures.

However, the UK government has in the past few years attempted to redefine the convention, claiming that only the first type of legislation falls within the scope of Sewel, and that consent is sought for legislation in strands 2 and 3 only as a matter of "practice", rather than as part of the convention proper. This argument has been advanced publicly by Lord Keen, the advocate general for Scotland (a UK minister), during the passage of the Scotland Bill 2016 and in front of the Supreme Court, and it is reflected in the explanatory notes published alongside some government legislation.⁷⁸

This might seem a small point but is in fact rather significant. Without the second and third strands of the convention, which protect the devolution settlements from unilateral amendment, it becomes possible for the UK parliament to bypass the legislative consent process altogether, first by taking powers in a certain area back to Westminster and then by bringing forward legislation in that area on the basis that consent is no longer required.

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- **We recommend that the UK government should publicly accept that the scope of the Sewel convention extends in precisely the same way to legislation that amends the powers of the devolved institutions as to legislation passed within devolved areas.**

This full definition of the Sewel convention could be set out in the revised memorandum of understanding due to be produced as part of a long-delayed Review of Intergovernmental Relations and could also be reflected in statute, through amendments to the Scotland Act and Government of Wales Act.

A further question is whether the Sewel convention should be recognised in statute on the same basis in the case of Northern Ireland. In principle, we believe it would be sensible for there to be symmetrical treatment of the three devolved legislatures. However, such a reform should only be considered if there were cross-community support for this from the parties in Belfast.

Recommendation 2: The UK and devolved governments should jointly set out the (limited) circumstances in which the UK parliament can justifiably legislate without consent

The Sewel convention refers to what should “normally” happen before legislation affecting devolved powers is passed. However, as Professor Nicola McEwen, director of the Centre on Constitutional Change in Edinburgh, has written “One of the problems with the convention as it stands is that the scope and application of the word ‘normally’ has never been determined.”⁷⁹

One concern we heard in interviews was that the UK government might argue that just as Brexit itself is a “not normal” situation, and so justified legislating without consent, by extension the same applies to any legislation made necessary by Brexit (including the various bills being passed to replace EU law, and even future legislation to implement trade deals).

In our view, such an approach would be difficult to justify. As Professor Sionaidh Douglas Scott of UCL wrote in 2016, in reference to the statutory recognition of the Sewel convention, “if ‘normally’ simply means the UK Government’s stipulated interpretation of the term, then the provision is pointless”.⁸⁰ Equally, however, we do not agree with the view that “not normally” equals “never”, meaning that the UK parliament can in no circumstances legislate without consent.

- **We recommend that the UK and devolved governments seek to agree a joint statement setting out a list of circumstances in which legislative consent need not be sought.**

That is, they should try to define the term “not normally”. As suggested by the House of Commons Public Administration and Constitutional Affairs Committee (PACAC) in 2018, any such statement could be incorporated into a revised memorandum of understanding between the UK and devolved governments.⁸¹ It should not be for the UK government to make a unilateral declaration of when the consent process can be bypassed.

The types of circumstance in which the consent requirement *could* be legitimately bypassed include a security emergency, health crisis or natural disaster, especially if the devolved legislatures were not sitting and swift legislative action were required. Another undeniably “not normal” situation is when devolution to Belfast has ceased to function, as has occurred for several periods since 1999 (including the three years up to January 2020), requiring the UK parliament to legislate for Northern Ireland in devolved areas without consent.⁸²

More contentiously, there might be circumstances when UK-wide legislation is required to ensure compliance with international law or treaties entered into with other nations. In such cases, the UK government might legitimately argue that it has to legislate with or without consent to ratify international obligations. However, if the UK government enters into international agreements that affect devolved matters, then the devolved governments should be properly involved in the negotiations leading to such agreements.

Recommendation 3: Whitehall departments should be required to share draft legislation with the devolved administrations prior to introduction into parliament

When the Sewel convention works well, it is due to open communication between the UK and devolved governments. There are clear expectations set out in internal Whitehall guidance notes that departments will consult early with devolved counterparts to identify whether any consent issues might arise later in the process, and how these can be resolved.

For the most part, this guidance is followed. However, practice appears to vary between departments and depending on the nature of the legislation in question. There have been recent cases where the UK government has apparently shared its legislative plans late or not at all.

For instance, the Scottish fisheries secretary stated that the final version of the Fisheries Bill was only formally shared with the Scottish ministers the day before it was published.⁸³ Based on public statements, there appears to have been little prior consultation on the contents of the UK Internal Market Bill either.

The UK government would itself benefit from a more robust approach to consultation, since in failing to consult in a timely and systematic fashion, it is more likely to make unforced errors in legislative drafting, including provisions that trigger disputes due to careless drafting and decision making.

A case in point is the EU Withdrawal Bill, which was introduced in June 2017 again after minimal prior consultation with the devolved governments. The bill was roundly attacked by the Scottish and Welsh governments (and others) as representing “a naked power-grab, an attack on the founding principles of devolution”.⁸⁴ Over the following year the bill was substantially amended, addressing a number of the devolved concerns. Earlier sharing of the legislative plans could have ensured that the bill was introduced in a more acceptable form, avoiding unnecessary political pain for the UK government.

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- **We recommend that a formal commitment be entered into by the UK government that it will share draft bills – or at least relevant sections – with the devolved administrations an agreed period (perhaps 21 or 28 days) prior to a bill being introduced into parliament.**

Sharing legislation in advance is no guarantee that agreement will be reached. But it does increase the likelihood that potential disagreements can be identified and resolved before the bill reaches parliament, at which point differences of opinion can harden into political disputes. Ideally, there would be engagement even earlier in the policy process. As McEwen again has pointed out: “more effective and cooperative intergovernmental working could identify and address difficult issues long before the formal legislative process kicks in.”⁸⁵ But a commitment to share legislation before introduction would be better than nothing.

A counter-argument we have heard is that a binding requirement to share legislation a few weeks in advance of introduction could cause difficulties for the UK government, on the grounds that bills are often signed off internally close to the time of introduction. Our view is that would be no excuse. If the UK government is unable to reach agreement internally on the terms of a bill, then the introduction of the bill should be delayed to provide sufficient time for devolved views to be taken into account.

There would naturally need to be allowance for exceptions when legislation has to be introduced urgently, for instance in response to a security or health crisis, as when legislation was swiftly passed in March 2020 to tackle coronavirus, in which case existing procedures for ‘fast-track legislation’ would be expected to apply.⁸⁶ In addition, the devolved administrations would have to commit to maintaining confidentiality, except in cases where the government itself chose to make draft legislation public, which has become more common in recent years and enables pre-legislative scrutiny to take place.⁸⁷

- **This duty to consult and to share draft legislation in advance of a bill’s introduction should, at the least, be set out in a revised memorandum of understanding agreed by the four governments, and laid before the four legislatures.**

The Scottish government has proposed creating a statutory duty to consult, in which it would be unlawful (except in exceptional circumstances) for a minister to introduce a bill requiring consent if that bill had not been shared in advance with the relevant devolved administrations.⁸⁸ However, this would risk drawing the courts into the internal workings of parliament, raising questions about compatibility with Article IX of the 1688 Bill of Rights, which protects the proceedings of parliament from being questioned in any court.⁸⁹ We therefore conclude that rather than seeking a legislative remedy it would be more advisable to improve the sharing of information through intergovernmental agreement.

Recommendation 4: When a bill is introduced, the government should lay a 'devolution statement' before parliament that sets out whether consent is needed – and whether it is expected

Another weakness of the current arrangements is that there is little transparency about how the responsible department has dealt with devolution issues prior to the introduction of a bill. At present, explanatory notes attached to each government bill set out the government's assessment of which if any of the bill's provisions require devolved consent. This is useful information but it does not go far enough.

- **The government should publish a formal devolution statement (or 'statement of compatibility with devolution and the legislative consent convention') at the point of introduction of each bill.**

This would be analogous to the requirement that bills be accompanied by a statement of compatibility with the Human Rights Act. Another precedent can be found in the Environment Bill, which will require ministers to state that any future bill making new environmental law "will not have the effect of reducing the level of environmental protection provided for by any existing environmental law."⁹⁰

We suggest that a devolution statement could be required to contain:

- details of how the devolved governments have been consulted during the development of the legislation, including at what point the bill (or relevant parts of the bill) has been shared with devolved counterparts
- analysis of which parts of the bill require consent and the reasoning behind this (for instance, whether provisions legislate in devolved areas, or amend the competence of any the devolved institutions)
- confirmation of whether the relevant devolved governments agree with the above analysis of where consent is required
- confirmation of whether the relevant devolved governments have indicated, during the pre-legislation consultation process, that they are prepared to recommend consent be given to the relevant provisions of the bill
- information on how the UK and devolved governments have tried, or will try, to resolve any disagreement over consent issues.

Potentially, the statement might also include a declaration of whether the ministers believe the circumstances to be "not normal", with reference to any prior inter-governmental agreement about the meaning of this term (as per Recommendation 2), implying that the government view is that the legislation should be passed with or without consent.

The statement would have two key purposes. The need to publish this information would encourage Whitehall departments to consult sooner and to take devolution into account more systematically during the development of legislative proposals.

In addition, it would enable the UK parliament (and also the devolved legislatures) to consider and scrutinise the legislation informed by clear information about how passage of the bill would impact on devolution. As constitutional lawyer Paul Reid has written, “if policing [of the Sewel convention] is to be left to the politicians [rather than the courts]... the convention should be armed with some other political teeth.”⁹¹

As with the duty to consult in advance of introduction of a bill, we believe that the requirement to introduce a devolution statement should be set out in a revised memorandum of understanding agreed between the UK and devolved governments.

The option, and potential implications, of placing this requirement into statute – to create a legal obligation to produce publish such information alongside a bill – could also be considered, a reform which would be in line with the required statements under the Human Rights Act and Environment Bill mentioned above.

Recommendation 5: A committee of the UK parliament should scrutinise the UK government devolution statement – and report on any unresolved issues relating to legislative consent

Our fifth recommendation takes the logic of the previous recommendation further. To give the devolution statement meaningful influence over how the UK government engages with the devolved administrations, there would need to be parliamentary scrutiny of this information at Westminster, just as in the devolved legislatures, each legislative consent memorandum is considered and reported on by one or more relevant committees.

- **Each devolution statement should be referred to a relevant committee of the UK parliament.**

The committee should conduct a short analysis of the information provided by the government, consider whether appropriate consultation procedures had been followed, and note any unresolved disagreements.

The devolved administrations, and relevant committees of the devolved legislatures, should be given the opportunity to feed in their views to the committee. Based on this information, the committee could decide whether to conduct further scrutiny, for instance by inviting oral evidence from UK and devolved ministers or officials.

- **The committee would then publish a report into the devolution and consent issues relating to the bill in question, including on any unresolved disagreements, and this report would inform parliamentary debate as the legislation proceeded.**

Even if our recommendation of devolution statements is not acted upon, then we still suggest that an appropriate committee should consider the devolution issues arising from all bills requiring consent.

There are a number of options for which committee would be best placed to take on this task. Of the existing committees, the choices would include the relevant department select committee, the territorial select committees,⁹² or perhaps PACAC, which has

long taken a close interest in devolution and inter-institutional relations. The above are all Commons committees, so to inform debate in the Lords, the Lords Constitution Committee could play a similar role.

An alternative model would be to create a new Committee on Devolution to carry out this task, as recommended in 2013 by the McKay Commission.⁹³ This could either be a Commons committee (as McKay suggested), or a joint committee of the two Houses of Parliament. In addition to playing the role described above in the legislative consent process, a devolution committee could take on a wider role in scrutinising inter-governmental relations and other aspects of devolution.

No matter which particular committee played this role, what we see as of most importance is the principle that there should be proper scrutiny of the devolution and consent issues relating to all bills where the Sewel convention applies, by a cross-party body with the necessary capacity and resources to fulfil this role. This will ensure that the UK parliament can vote on the bill more fully informed about how the legislation will affect the devolved institutions.

Recommendation 6: Where there is disagreement over whether a bill falls within scope of the Sewel convention, the relevant committee should seek independent legal advice on the issue

A further problem with current practice is that the UK government can unilaterally declare whether or not legislative proposals fall within the scope of the Sewel convention. There is no right of appeal for devolved governments, and little scrutiny of how government departments determine whether and why consent should be sought.

There have been a number of cases where the UK and devolved governments have not been in agreement over whether the Sewel convention applies. These disagreements have been caused by differing interpretations of where the boundary between reserved and devolved matters lies, and what is defined as a minor “consequential” impact on devolved matters, in which case consent is not required.

In at least one case, the Enterprise and Regulatory Reform Bill (2012–13), the UK government’s assertion that the bill did not relate to devolved matters, and therefore did not require (Welsh) consent, was later determined to be incorrect by the Supreme Court. However, since parliament is legally sovereign, the passage of the bill was not affected by the fact that consent should have been sought for the legislation under the Sewel convention. The government could assert that Sewel did not apply, and that was the end of the story. It strikes us as unreasonable that one party to a dispute can simply assert that their position is correct, without any transparent way for this to be challenged.

- **Where is an unresolved disagreement over whether Sewel applies, the committee tasked with scrutinising the consent issues (see Recommendation 5) should have the power to seek expert legal advice on the specific question of whether the bill, or particular provisions of the bill, falls within the scope of the convention.**

One approach would be simply to ensure that the committee could appoint specialist advisers to produce analysis of the competence questions, which could then be incorporated into any committee report on the legislation. This would be in line with the role that expert advisers play in informing the work of the Lords Constitution Committee and Joint Committee on Human Rights.

An alternative model would be to create an independent advisory panel as a standing body, to which competence questions could be referred by any parliamentary committee.

Either way, the advice provided would have no legal impact on the passage of the legislation. However, it would make it harder for the UK government to simply assert, without being required to justify its position, that consent is not required, in order to avoid its obligations under the Sewel convention. Conversely, it would also ensure that the devolved institutions could not claim in bad faith that consent *was* required, as a way to impede the UK parliament's ability to pass legislation in non-devolved areas.

Recommendation 7: If ministers wish to press ahead without consent, the government should justify this to parliament, and each House should debate and vote on the matter

Our seventh recommendation relates to the circumstances in which consent is withheld for a bill, but ministers propose that the legislation be enacted anyway. At present, due to the absence of any formal procedural recognition at Westminster of the legislative consent process, it is possible for the consent requirement to be bypassed without a conscious decision by MPs or peers. Anecdotal evidence suggests that at least some MPs voted on the EU Withdrawal Bill in 2018 unaware of the fact that the legislation had not been granted Scottish consent. In such circumstances, we reach a similar conclusion to both the House of Lords Constitution Committee and Welsh government:⁹⁴

- **A relevant minister should make a statement to each House of Parliament setting out the government's reasons for advocating that the Sewel convention be bypassed.**

This would ensure, as the public lawyer Paul Reid has put it, that "the Government would be forced to face the political price of that decision" to legislate without consent.⁹⁵

- **There should also be an additional stage of the legislative process, as the Welsh government has advocated,⁹⁶ at which the UK government would move a motion to legislate notwithstanding the absence of consent.**

Debate on this motion could be informed by the reports from parliamentary committees and independent legal experts (see Recommendations 3 and 4). In addition, any consent decisions taken by the devolved legislatures should be formally communicated to each House via the Speaker.

These reforms would need to be put into standing orders, and we also recommend that the House of Commons Procedure Committee, and relevant authorities in the House of Lords, consider precisely how this could be made to work.

To be clear, under our proposals the UK parliament will retain the legal ability to pass legislation with or without consent as parliamentary sovereignty will remain intact. However, we believe it is neither appropriate, nor conducive to good intergovernmental and inter-parliamentary relations, for parliament to pass contested legislation without clarity about whether it is acting in breach of the Sewel convention. This proposed reform, building on the prior recommendations set out above, is designed to ensure that if Westminster were to legislate without devolved consent, it would do so knowingly and deliberately – just as the English votes on English laws (EVEL) procedures make clear when parliament is legislating on matters relating exclusively to England.

Recommendation 8: There should be fuller public information provided by the UK parliament about the consent status of all bills

Alongside the above procedural reforms, our final recommendation addresses the limited amount of public information regarding Sewel. At present, it can be difficult to establish which bills, and which specific clauses, fall within the scope of the convention, and what stage of the consent process each bill is up to.

- **The UK parliament should provide fuller public information about the consent status of each bill before parliament.**

There are various ways to rectify this. For instance, on the 'Bills before Parliament' section of the UK parliament website, an additional column could be added specifying for each bill whether consent is required from any or all of the three devolved legislatures, or whether the matter is in dispute.⁹⁷ In addition, within the page for each individual bill, consent motions should be incorporated into the graphic that shows the 'Progress of the Bill'. Additional documentation relating to the consent process, including any relevant committee reports from UK or devolved parliaments, could be tagged to this page as well.

The purpose of such changes would be to strengthen the connection between the consent process at the devolved level and the legislative process in the UK parliament, as well as to raise awareness of the consent issues at stake with any individual bill.

Conclusion

This report has discussed the history and purpose of the Sewel convention and has outlined the many benefits that it delivers to both central and devolved governments. We have shown that after two decades of mostly smooth sailing, Sewel has been put under serious strain by Brexit – strain that is likely to worsen with upcoming Brexit-related legislation. Without reform, there is a risk of the convention, and the legislative consent process that puts Sewel into practice, collapsing altogether.

However, meaningful reform will happen only if there is commitment – from both the UK and devolved governments – to repair their relationships and to agree on how a reformed consent process should work. If this commitment is not there, and in particular if the UK government decides to make a habit of legislating without consent in devolved

areas, without making serious attempts to secure that consent, then the implications for the stability of the Union could be severe.

The reforms we propose are not intended, or expected, to be the end of the story, but we do believe that their implementation would mark a huge improvement on current practice. We also hope that this paper will encourage a serious debate across the UK about what might need to change in the relationship between Westminster and the devolved nations if the Union is to hold together for the long term.

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