

Devolution Guidance Note 15

Scottish Legislative proposals giving Devolved Powers and Functions to UK Bodies

SUMMARY

- **Acts of the Scottish Parliament can, in certain circumstances, include provisions giving powers or functions to UK Government Ministers, UK departments or other UK bodies. This guidance note sets out the protocol agreed by the Scottish Government and the UK Government setting out the procedures which will apply if the Scottish Government is considering the possibility of legislating in this way.**

Scottish Legislative Proposals giving Devolved Powers and Functions to UK Bodies: Protocol between the Scottish Government and UK Government

1. Subject to the terms of the Scotland Act 1998 (and in particular the reservations set out in Schedule 5, which cover subjects such as the Constitution, Foreign Affairs, Defence, Financial and Economic matters, some aspects of Home Affairs, Employment and Social Security matters, etc.), Acts of the Scottish Parliament can include provisions giving powers or functions to UK Government Ministers, UK departments or other UK bodies. This protocol sets out the procedures which the Scottish Government and UK Government have agreed will apply if the Scottish Government is considering the possibility of legislating in this way.
2. There can be advantages in such powers or functions being included in Acts of the Scottish Parliament, not least in terms of ensuring that the legislative effect is transparent to those affected. Examples of the likely use of such powers include requirements that UK Government departments receive information and have the opportunity to act on that information. But at the same time, the UK Government Minister, department or body concerned will need to be confident that its use of such powers is not likely to be challenged by a third party on the grounds that they are outside the Scottish Parliament's legislative competence.
3. There are also a number of **alternative approaches**:
 - Orders under section 104 of the Scotland Act 1998. To be fully effective, Acts of the Scottish Parliament may require consequential amendments to be made to reserved legislation. The power at Section 104 of the Scotland Act 1998 allows the UK Government to make such consequential provisions by means of secondary legislation;
 - Agency arrangements can be established between the Scottish Government and the UK Government under section 93 of the Scotland Act 1998;
 - Primary Legislation in the UK Parliament if there is a suitable legislative vehicle; or
 - Administrative agreement between the Scottish Government and the UK Government.
4. In line with the commitments in the Memorandum of Understanding, **the Scottish Government will consult the relevant UK Government department at an early stage** when it is considering the possibility of legislation which might give devolved functions to UK Government Ministers, Government departments or other UK bodies, with the aim of securing agreement as to:
 - Whether it is appropriate for the Minister, department or body to carry out the task concerned;
 - If so, which of the alternative approaches is the most suitable in the specific circumstances of the case; and
 - Arrangements to cover the additional costs which will be incurred in carrying out the tasks, in line with the Treasury's Statement of Funding Policy. Plus related audit and accountability arrangements.

5. These consultations should also involve the Scotland Office, the Office of the Solicitor to the Advocate General and the Ministry of Justice.

Cabinet Office (Last Updated – November 2011)