

DEVOLUTION GUIDANCE NOTICE 8: POST-DEVOLUTION LEGISLATION AFFECTING NORTHERN IRELAND

Summary

- **The Memorandum of Understanding with the devolved administrations states that:**

“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 convention applies when legislation makes provision specifically for a transferred (i.e. devolved) purpose. It does not apply when legislation deals with transferred matters only incidentally to, or consequentially upon, provision made in relation to a reserved or excepted matter, although it is good practice to consult the Northern Ireland Devolved Administration and the Northern Ireland Office in these circumstances.**
- **The same procedures should be followed for Private Members’ Bills to be supported by the Government.**
- **The convention relates to Bills before Parliament, but departments should approach the Devolved Administration on the same basis for Bills being published in draft, and for subordinate legislation which extends to NI in the transferred field, even though (in both cases) there is no formal requirement for agreement by the Northern Ireland Assembly.**

Introduction

This note sets out guidance for UK Government departments on handling legislation affecting Northern Ireland. The Memorandum of Understanding with the devolved administrations states that:

“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”. (December 2001, Cm 5240, paragraph 13)

The convention applies when primary legislation makes provision specifically for a transferred (i.e. devolved) purpose; it does not apply when such legislation deals with transferred matters only incidentally to, or consequentially upon, provision made in relation to a reserved or excepted matter, nor does it apply to subordinate legislation. This note sets out how Legislative Programme Committee expects departments to give effect to this policy intention, while ensuring the smooth management of the Government's legislative programme. The note does not extend to legislation which deals with emergencies or is otherwise exceptional.

General

2. In general:

- i. the Memorandum of Understanding indicates that there will be consultation with the Northern Ireland Devolved Administration on policy proposals affecting devolved matters in Northern Ireland, whether or not they involve legislative change. Such consultation will normally take place on a bilateral basis between the relevant lead Whitehall department and its NI counterpart(s)
- ii. the convention refers to "the agreement of the devolved legislature", adding that "the devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government." Therefore, UK Ministers should approach the Northern Ireland Administration. The approach should be made to the Northern Ireland Minister with lead responsibility for the policy area as it will be their responsibility to indicate the view of the Northern Ireland Assembly and to take whatever steps are appropriate to ascertain that view, including, obtaining the prior agreement of the Northern Ireland Executive Committee to the proposed legislation and consulting with the relevant statutory Assembly Departmental Committee. However the letter should be copied to both the First Minister and deputy First Minister (who hold the offices jointly) given their role in co-ordinating the work of the Executive Committee (unless the matter falls within the departmental responsibilities of the Office of the First Minister and deputy First Minister, in which case the letter should, of course, be put directly to FM and dFM). It should also be copied to the Secretary of State for Northern Ireland.
- iii. Whether agreement is needed depends on the purpose of the legislation. Agreement need be obtained only for legislative provisions which are specifically for transferred purposes, although departments should consult the relevant NI

department, copied to the Office of the First Minister and deputy First Minister and the Northern Ireland Office, on provisions made for reserved or excepted purposes as these could have implications for transferred areas of responsibility;

- iv. Always consult your Legal Advisers and the Northern Ireland Administration at an early stage in developing proposals for legislation if there is any doubt as to whether a proposal may trespass on devolved matters. Do not assume that the Northern Ireland Administration will necessarily share your view about where the boundaries lie between non-devolved and devolved matters. The Northern Ireland Office can also provide advice on these matters and should be copied in on any correspondence.
- v. UK departments considering legislation on reserved matters should consult the Northern Ireland Office and the Northern Ireland Administration to determine whether this is best done at Westminster or by means of parallel Assembly legislation (which will require the Secretary of State's consent). This is particularly important if the reserved matters concerned are likely to become transferred (i.e. devolved) responsibilities in the near future;
- vi. UK departments considering legislation altering the legislative competence of the Assembly (including amendments to Schedules 2 and 3 to the Northern Ireland Act 1998) should consult the Northern Ireland Office in the first instance; and
- vii. the relevant lead NI department and the Northern Ireland Office will ensure relevant UK departments are consulted about Assembly legislation which deals with reserved matters or deals, in an ancillary capacity, with excepted matters. Departments bringing legislative proposals to LP Committee will be expected to address the need for consultation or consent as described in the following paragraphs. They should ensure that the Northern Ireland Administration – and, as appropriate, the Northern Ireland Office – is engaged from an early stage, so that any potential areas of difficulty are identified and addressed, and should allow sufficient time for this when planning their Bills.

Long term legislative plans

4. Any bid to LP Committee for the inclusion of a particular Bill in a future legislative programme should state clearly that the proposed Bill, as applicable:

- I. either does not apply to Northern Ireland or only has provisions which deal with reserved or excepted matters that do not impinge on transferred matters;

- II. has provisions which apply to Northern Ireland which deal with reserved or excepted matters but which will impinge on transferred matters (i.e. are for non-devolved purposes, such as provisions about human genetics which will require action from health service organisations); or
- III. contains provisions applying to Northern Ireland and which deal with transferred matters (but not reserved or excepted matters), or which alter the legislative competence of the Northern Ireland Assembly or the executive functions of Northern Ireland Ministers or departments.

5. Only Bills with provisions in category III are subject to the convention on seeking the agreement of the Northern Ireland Assembly. Although the main thrust of a Bill may be directed at reserved or excepted matters, it may nevertheless contain some provisions in this category. At LP, the responsible Minister should say whether the Northern Ireland Administration has agreed to seek the consent of the Northern Ireland Assembly to including any such provisions in category III in a UK Bill.

6. Bills in category I or in category II do not require the agreement of the Northern Ireland Assembly. In some Category II cases, however, the effects on transferred matters will be significant. LP will expect departments to have plans for consulting the Northern Ireland Administration in accordance with the Memorandum of Understanding and the relevant bilateral concordats. Such consultation may be undertaken in confidence, and the Northern Ireland Administration will respect any such confidence.

7. The Secretary of State for Northern Ireland has a role in respect of a number of reserved and excepted matters. Therefore the Northern Ireland Office should always be consulted at an early stage when developing any legislative proposals which could be relevant to Northern Ireland.

Bills ready for introduction

7. The essential requirement is that by the time proposals come to LP Committee for introduction, devolution-related issues have been substantively resolved. Papers for LP are required to contain a statement to that effect. Such papers should also identify the clauses which fall into each of the categories above.

8. If a Bill has provisions in category II which would impinge on transferred matters, the paper should indicate whether agreement has

been reached with the Northern Ireland Administration on the treatment of such clauses.

9. If a Bill has provisions in category III:

- i. where the provisions are of major significance in the Bill, there should have been prior consultation and agreement with the Northern Ireland Administration on these, LP expects that, by the time that the Committee considers whether the Bill is ready for introduction, agreement has been reached with the Northern Ireland Administration to seek the consent of the Northern Ireland Assembly; and
- ii. LP will also expect that agreement is reached for the view of the Northern Ireland Assembly to the inclusion of any such provisions to be expressed before the final amending stage in the first House in the UK Parliament.

10. If a Bill has provisions in category III which will change the legislative competence of the Northern Ireland Assembly, the paper for LP should identify the policy clearance for them, bearing in mind that such changes in legislative competence if made by Order in Council would require a prior resolution of the Northern Ireland Assembly (Northern Ireland Act 1998, sections 4(3) and 6(4)).

11. Finally, LP papers at this stage should say whether there are any potential amendments where the agreement of the Northern Ireland Assembly might have to be sought or which might prove controversial there.

Draft Bills

12. The convention relates to Bills before Parliament, but departments should approach the Northern Ireland Administration and the Northern Ireland Office on the same basis for Bills being published in draft, even though there is no formal requirement to do so.

Private Members' Bills

13. Essentially the same procedures should be followed for Private Members' Bills to be supported by the Government, with some minor modifications to reflect the fact that the procedures for Private Members' Bills are less certain than for Government Bills.

14. Departments should consult the Northern Ireland Administration at an early stage on any Private Member's Bill which they are minded to support and which contain provisions in category III. The aim should be for consent to be obtained by the time of Commons Committee Stage. Before then, the Government may need to reserve

its position pending agreement, particularly if the Bill was introduced in the House of Lords. Departments seeking clearance to oppose a Private Members' Bill in category III on policy grounds need only consult the Northern Ireland Administration if the Bill has a substantial effect on transferred matters.

15. It is possible that Private Members will claim to have themselves obtained the agreement of the Northern Ireland Assembly for such a Bill and rely on this as an argument in favour of the Bill. Even if there are not UK policy grounds for opposing such a Bill, the Government will resist the provisions on devolved matters if the Northern Ireland lead Minister (after having carried out any necessary consultations, including referring the matter to the Executive Committee, if appropriate) indicates that the provisions should not be extended to Northern Ireland, and will move any necessary amendments at Commons Committee or Report Stage.

16. In line with the Memorandum of Understanding and concordats, there should also be consultation with the Northern Ireland Administration where a department proposes to support a Private Members' Bill with provisions in category II which would impinge on devolved matters.

During the passage of legislation

17. During the passage of legislation, departments should approach the lead NI department, copied to the Office of the First Minister and deputy First Minister and the Northern Ireland Office, about Government amendments, (or any other amendments which the Government is minded to accept) which change or introduce provisions requiring the agreement of the Northern Ireland Administration. No consultation is required for other amendments tabled.

18. The Northern Ireland Administration will deal promptly with issues which arise during the passage of a Bill, and recognise the pressures of legislative timetables (e.g. when the Government is forced to consider accepting amendments at short notice). The last opportunity for amendment is at Third Reading in the Lords or Report Stage in the Commons, so the absence of agreement is not a bar to proceeding with the Bill before that point. Nevertheless, in the interests of orderly management of legislation, such issues should be sorted out well before that stage wherever possible.

Legislating by Order in Council

19. Powers remain under Section 85 of the Northern Ireland Act 1998 to use Orders in Council to make provision about matters in paragraphs 9-17 of Schedule 3 of that Act. Departments should note

that such Orders in Council must first have been laid before Parliament in draft for 60 days and referred to the Northern Ireland Assembly.

20. In case of doubt or where departments require further assistance they should contact Devolution and Legislation Division (NIO) – [Legislation & Parliamentary Unit – John Todd 0207 210 6575].