

SEWEL MOTIONS IN THE SCOTTISH PARLIAMENT

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THE SEWEL CONVENTION

One of the most controversial aspects of Scottish parliamentary procedure since devolution has been the use of Sewel motions, whereby the Scottish Parliament agrees to Westminster legislating in devolved matters. It was originally envisaged that this procedure would be exceptional, yet in the first session forty one were passed, provoking criticism that Holyrood was dodging its responsibility, becoming a ‘copycat Parliament’ and undermining the principles of devolution. Gerry Hassan (2002) makes much of the fact that the Scottish Parliament was passing almost as many Sewel motions as full Acts. The SNP have also been highly critical of the procedure on principle. They argue that more distinct Scottish solutions should be found for Scottish problems and that, even when Holyrood is adopting the same policy as Westminster, it should pass its own legislation. Academic commentators have criticized the procedure as weakening parliamentary scrutiny (Page 2002) and some lawyers and interest groups complain that the mixture of bits of Westminster and Holyrood legislation makes the statute book untidy and difficult to follow. Scottish ministers, on the other hand, have defended the practice, arguing that the opposition has exaggerated the problem and insisting on a pragmatic approach that saves parliamentary time by not duplicating legislation that is effectively identical on both sides of the border. Further, this debate shows no sign of abatement.

Table 1
Types of Sewel Motion (Process) Outcomes

Motion Formally Opposed (1) SNP Opposition to use of Sewel Motions	Motion Debated In Chamber (4) Amendment proposed but motion not formally opposed	Motion Debated In Committee (7) Motion discussed in committee and ‘rubber stamped’
Food Standards Act 1999	Race Relations Act 2000	Sea Fishing Grants Act 2000
Financial Services and Markets Act 1999	(5) Sewel debate but no formal opposition	Representation of the People
Electronic Communications Act 1999	Criminal Justice and Courts Service Act 2000	Political Parties, Elections and Referendums Act 2000 (2/2)
Limited Liability Partnerships Act 1999	Adoption and Children Act 2002 (2/3)	Learning and Skills Act 2000
Regulation of Investigatory Powers Act 2000	Anti-Terrorism, Crime and Security Act 2001	Insolvency Act 2000
International Criminal Court Act 2001	NHS Reform and Health Care Profession Act 2002	Care Standards Act 2000
Criminal Justice and Police Act 2001	Police Reform Act 2002 (1/2)	Culture and Recreation Bill (Withdrawn)
Anti-Terrorism, Crime and Security Act 2001	Sexual Offences Bill 2003	Railways and Transport Safety Act 2003

continued

Adoption and Children Act 2002 (1/3)

Police Reform Act 2002 (1/2)

Extradition Bill 2002

Criminal Justice Bill 2002

(2) SNP Opposition to issue (and Sewel)

Government Resources and Accounts Act 2000

Outworking (Withdrawn Private Member's Bill)

Armed Forces Act 2001

Enterprise Act 2002

Private Hire Vehicles Act 2002

Waste and Emissions Trading Bill 2002

Crime (International Co-operation) Bill 2002

(3) Issue opposed by Conservatives

Sexual Offences (Amendment) Act 2000

(6) General debate, no significant opposition

Health and Social Care Act 2001

Tobacco Advertising and Promotion Act 2002

International Development Act 2003

Local Government Act 2003

Table 2
Sewel Motion Types/ Characteristics

Convenience/ Expediency	Entangled responsibilities	Cross-border/ UK body. Administrative	Safeguard powers or give powers to ministers
Representation of the People	Regulation of Investigatory Powers	Food Standards	Electronic Comm'n
Anti-Terrorism, Crime and Security	Criminal Justice and Courts Service	Financial Services and Markets	Political Parties, Elections and Referendums (2)
Sexual Offences (Amendment)	Tobacco Advertising and Promotion	Race Relations	(Part of) Health and Social Care Modernisation
	International Criminal Court	Insolvency	NHS Reform and Health Care Profession
	Outworking	Care Standards	Private Hire Vehicles
	Criminal Justice and Police	Government Resources & Accounts	Extradition
<i>continued</i>	Armed Forces	Sea Fishing Grants	Waste and Emissions Trading (Bill)
	Adoption and Children (3)	(Part of) Health and Social Care Modernisation	Local Government (Bill)
	Proceeds of Crime	Culture and Recreation	
	Crime (International Co-operation)	Police Reform (2)	
	Sexual Offences		
	Limited Liability Partnerships		
	Learning and Skills		
	Criminal Justice		
	International Development		
	Enterprise		
	Railways and Transport Safety		

Our analysis (of the first full session) shows a complex picture. Certainly Sewel resolutions have been used more than expected, but comparing them to the number of Acts passed by the Parliament is highly misleading, since Sewel resolutions usually apply only to parts of an Act and some Acts will have more than one resolution, to deal with individual sections. Moreover, of the forty one Sewel motions, slightly less than half (twenty) were formally opposed. Of these twenty, nineteen were opposed by the SNP, thirteen of these because of the objection to Sewel motions in principle. SNP opposition to the remaining six was based on the use of a Private Member's Bill, the argument that the issue should be legislated for in Scotland, and/ or the argument that the motion is not competent. Not surprisingly, the Conservatives do not oppose Sewel motions on principle. However, they did oppose one motion based on the issue of reducing the age of homosexual consent.

Twelve Sewel motions were debated in the chamber but not formally opposed. Of these, one case involved an SNP attempt to amend, but not formally oppose, the motion, seven motions invoked general SNP disapproval of the Sewel motion process but support for the issue involved, and four were debated in general with no significant opposition. Finally, nine Sewel motions were not discussed in the chamber. Rather, they were taken with no significant opposition in committees and subsequently rubber stamped in

the chamber. These figures serve to at least qualify the debate on the *numbers* of Sewel motions. Approximately half of these motions were either not considered important enough to debate in the chamber (by any MSP since this is an open process), or were debated but not formally opposed.

TYPES OF SEWEL MOTION

The raw numbers of motions also obscure significant differences in their type and scope. We have categorized them under four headings. The first is where the Scottish Executive has decided to adopt the same policy as London, and go for a single Act for reasons of convenience. The second, by far the largest, arises from the entanglement of reserved and devolved functions. This is a common feature of federal and devolved systems of government but its scale appears not to have been foreseen. A third category concerns cross-border matters and administrative issues. Finally there is a group of motions that actually serve to safeguard devolved areas or give additional powers to Scottish ministers.

POLICY UNIFORMITY, CONVENIENCE OR EXPEDIENCY

There are three clear examples of resolutions to secure policy uniformity, although even here the Scottish Parliament retains discretion and the right to opt into or out of specific provisions of Westminster legislation (by means of an Executive memorandum which accompanies the motion). The Anti-Terrorism, Crime and Security Act 2001 was a piece of emergency legislation and a Holyrood Bill would duplicate many of its measures. Deputy Justice Minister Iain Gray argued that a Sewel motion was quicker and more efficient, while still allowing the Scottish Executive to legislate selectively:

Our rationale for a Sewel Motion is essentially pragmatic. We have separated out those items on which we think there is a distinctive Scottish approach needed. We will pursue these as appropriate. On the others, we do not think it acceptable to delay until next year's Criminal Justice Bill and we do not think that emergency legislation of our own is appropriate for proposals unlikely to differ either side of the Border. It is also right to move quickly and, so far as possible, on a common UK front.
(<http://www.scotland.gov.uk/pages/news/2001/11/SE4359.aspx>).

The Executive chose not to follow Westminster in three significant issues. International corruption provisions are excluded because of Scotland's distinct rules of evidence and procedure, but the other two opt-outs – relating to policies on racial hatred, as well as new police powers to remove face-coverings – are policy differences. These opt-outs were set out by the Scottish Executive in a memorandum that accompanied the motion (http://www.scotland.gov.uk/library3/law/sewel_memo.pdf), with a Ministerial Working Group set up to deal with the policy differences.

Another example of convenience, or even the exploitation of Westminster legislation to further Scottish Parliament aims, comes with the Representation of the People Act. This is a reserved matter that deals in part with provisions for postal voting, with a particular emphasis on disabled voters. The Sewel motion extends this provision to Scottish local government elections (since it would be an anomaly if the provisions were available in national but not local elections). The motion was approved without dissent by the Local Government Committee and passed without debate in the chamber.

We also include in this category the Sexual Offences (Amendment) Bill to reduce the minimum age of consent to homosexual sex and create an offence for a person over 18 who engages in sexual activity with someone under 18 if they are held to be in 'a position of trust'. It is likely that the Scottish Executive was keen not to be embroiled in another controversy like that over Section 28, and certainly there was a desire for a uniform regime. There was also, however, a technical reason for using a Sewel resolution. The original bill was introduced before devolution in the 1998/9 Westminster session, but defeated in the Lords. The government then proposed to use the Parliament Act to ensure its passage if this was repeated when it was reintroduced. However, this could not be done if the Scottish (or any) provisions were modified. Indeed, this was the stated basis for SNP co-operation. The motion does not prevent the Scottish Parliament from acting in this devolved area in the future.

ENTANGLED RESPONSIBILITIES

Not surprisingly, most of the examples in this category relate to crime, since the boundaries are most blurred in this area and the issues are highly sensitive. The legislation establishing the International Criminal Court is a prime example of this type. The whole matter could have been handled with a Sewel motion, but the political importance of the issue was such that Westminster and Holyrood produced their own bills, albeit with similar wording. There was a Sewel motion because the competence of the Scottish Parliament to legislate on this matter is open to interpretation (for example, powers of arrest are devolved, but extradition is reserved). The Sewel motion removes doubt by asking Westminster to legislate on the areas with blurred distinctions of responsibility to avoid the possibility of legal challenge.

The same can be said of the Proceeds of Crime Act 2002, although in this case no Scottish bill is put forward. The Sewel motion is again required because some areas – drug trafficking, money laundering and taxation – are reserved, whilst other civil and criminal matters are devolved. Justice Minister Jim Wallace argued that the motion reduces the risk of loopholes arising through the separate processes of legislation, since the bill aims to:

Put drug trafficking and other crimes on to an all-crimes basis ... Comprehensive UK legislation will therefore prove more effective and avoid the risk of inadvertent safe havens on either side of the border. (Official Report, 24.10.01, Vol. 3 No. 24, Col. 3250).

The Sewel motion on the Criminal Justice and Courts Service Act 2000 is justified both by expediency and by the potential for loopholes. The Westminster Act deals with the strengthening of provisions, which address the registration and monitoring of sex offenders. Further, the equivalent legislation would not be possible in Scotland until at least nine months later. So Jim Wallace proposed to use the Westminster proposals in part as an interim measure:

We believe that it is vital to maintain a common registration regime on either side of the border, to avoid any potential loopholes in enforcement. We must ensure that there is no incentive for sex offenders to move to a particular jurisdiction, for example, because the penalty there is lighter. There would also be particular difficulties if there were a requirement to notify the police when travelling abroad from England and Wales, but not from Scotland. (Official Report, 5.10.00, Vol. 8 No. 10, col. 1032).

This emphasis is continued with the Sexual Offences Bill (2003) in which measures to strengthen monitoring provisions (including notification procedures and the abilities of offenders to travel overseas) and the ‘automatic triggering’ of offences on the Sexual Offenders register are extended to Scotland with the Sewel motion. However, the executive also signalled its intent to maintain a Scottish approach to implementation. Whilst a list of offences is maintained in England and Wales to allow judges to assess the sexual element of a crime, the ‘common-law approach’ is used in Scotland to allow judges more discretion in judging cases.

The Regulation of Investigatory Powers Bills appear to have similar problems that require Westminster encroachment. The bills cover clearly distinct areas, such as English and Scottish police authorities. However, they also refer to complex issues such as the operation of customs and excise officers (reserved) in the prevention of crime in Scotland (devolved), as well as Scottish police force access to UK intelligence sources. Jim Wallace again:

This period of consideration has shown that although the subject matter of the Regulation of Investigatory Powers Bill contains areas where legislative competence is perfectly clear, there are other areas where the legal issues become more complex and subject to interpretation, or where the question whether the Scottish Parliament has legislative competence depends on the way in which the legislation is framed. (Official Report, 6.4.00, Vol. 5 No. 4, col. 1462).

However, the motion does not just refer to loopholes. Wallace also argues that the appeals tribunal set up for individuals to complain about intrusive surveillance should be UK-wide to ensure a breadth of experience vested in one body. This could thus also go into our next category, as could the Criminal Justice and Police Act 2001, which extends mostly to England and Wales. The motions relates to the execution of

warrants – issued in England and Wales – in Scotland, the operation of UK enforcement agencies (such as the Inland Revenue) in Scotland and the UK-wide access to police information.

The Armed Forces Act 2001 enables chief constables of police forces to request help from the Ministry of Defence police. It also allows the latter to enjoy equivalent powers of arrest when intervening in civilian disputes. The Sewel motion is again designed to ensure uniformity in these procedures and allow Scottish chief constables to request this help. It is a requirement of the Act that its provisions be renewed every five years.

The Crime (International Cooperation) Bill legislates on issues such as cross-border evidence gathering and freezing and mutual assistance agreements (including the enforcement of international driving bans). It covers a ‘complicated mix of reserved and devolved provisions reaching across a multiplicity of agreements’ (Official Report, 21.11.02, Vol. 4. No. 31, col. 16099) and is again justified by the need for UK consistency and the potential for major criminals to exploit cross-border loopholes.

The Tobacco Advertising and Promotion Act 2002 demonstrates a flaw in the Sewel process, which is that a motion does not guarantee that Westminster will carry through the relevant policy (see Keating et al 2003). The original bill fell after the dissolution of Parliament in 2001 and the matter was pursued by SNP MSP Nicola Sturgeon in a Member’s Bill that was almost a carbon copy of the original (although less extensive because some matters covered in the UK bill are reserved). This in turn was withdrawn when the bill was reintroduced at Westminster. The Sewel motion was necessary in this case because, whilst issues such as broadcasting are reserved, other parts of the Act give Scottish ministers the power to effect regulations on devolved issues (putting this also into our fourth category – see below). Further, the Scottish Executive argue that some issues – brand sharing, distributions at nominal cost and advertising by electronic means – are better legislated on a UK-wide basis:

Those are areas on which it is difficult to legislate, from both a technical and a legal standpoint, and on which legislation would, potentially, be difficult to enforce in a Scotland-only context. Moreover, they may – under the technical standards directive – require notification to the EU, which would take some time. We are keen that that does not delay the introduction of wider statutory controls. (Malcolm Chisholm, Official Report 17.1.01, Vol. 10 No. 3, col. 267)

The Sewel motion regarding the Outworking Bill suffered a similar fate to the original Tobacco Bill. The bill relates to introducing regulations to prevent the advertising of fraudulent home-working schemes. Alasdair Morrison of the Executive argues that although this issue is devolved, the UK legislation would ensure quicker legislation, uniformity and the closing of loopholes (Official Report, 31.1.01, Vol. 10 No. 7, col. 773). However, this case is much more significant, because: (a) this relates to a Private Member’s Bill (albeit endorsed by the UK government); and (b) the bill was withdrawn with no prospect of being reintroduced.

The Adoption and Children Act 2002 is a particularly interesting example, since it involves three Sewel motions passed between April 2001 and January 2002 (with the Act receiving royal Assent in November). The first motion was designed to allow adoption orders to be recognised in Scotland, England and Wales and also related to inter-country adoption practices. It allowed Westminster to strengthen legislation on bringing a child to the UK for adoption (following the high profile case of the adoption of the Kilshaw twins from the US) and to prohibit inter-country adoption advertising. The second motion allowed for the production of a UK list of countries with adequate adoption laws (enabling bilateral agreements). The third motion allowed the Westminster legislation to set up an adoption register (of children as well as prospective adopters) as a means to coordinate the adoption process. There are two other notable points about this case. It demonstrates that the passing of a Sewel motion does not preclude Scottish consideration of the same policy area. Indeed, Jack McConnell, then Minister for Education, announced the set-up of a review of Scottish adoption services to coincide with the first Sewel debate and a preliminary conclusion from the group supported the third motion on Scottish inclusion in the UK register. It also demonstrates the strained relationship between opposition party (and most notably SNP) support for the issues contained within Sewel motions, and the objection to the process itself, since the SNP voted for the first but against the other motions.

The Railways and Transport Safety Bill (2003) demonstrates that a Sewel motion may be required if reserved issues are not made explicit in enough detail. The bill addresses the application of road transport drug and alcohol testing provisions to marine operations. The motion is required because whilst maritime safety is reserved, the detail of the bill relates to the definition of marine crafts, which technically qualify as devolved matters because they are not explicitly covered by the reservations that relate to maritime safety under the Scotland Act.

The Limited Liability Partnerships Bill dealt mostly with a reserved matter - the regulation of business associations, with the Sewel motion addressing the power to make regulations on the process of winding up a limited liability partnership (which is devolved). Similarly, the Learning and Skills Bill deals mostly with the set up of Learning and Skills councils in England and Wales. However, it also covers individual learning accounts, which has blurred lines of responsibility. The bill covers measures to pay the education (devolved) fees into personal bank accounts (reserved). The Sewel motion allows the details of this set up to be decided by Scottish ministers using statutory instruments (see below).

The International Development Act addresses the alleviation of global poverty and the procedures through which the UK would contribute. Although international development is reserved, the Sewel motion is required to address the abilities of Scottish statutory bodies (such as the emergency services) to provide international assistance, since when engaging in international work, the personnel of these bodies are jointly employed by a central body. Many of these issues are administrative, addressing, for example, the effects on wages and pensions of emergency workers who work abroad.

The Enterprise Act 2002 seeks to increase the use of administration (which protects a company from creditors while it restructures) and decrease the use of receivership (involving the stripping of assets by the main creditor, usually a bank) in corporate insolvency proceedings. The Sewel motion is required because whilst insolvency, company law and receivership are reserved matters, administration is devolved. Interestingly, the SNP voted against this motion, not because of the Sewel process, but because of its argument that receivership should also be a devolved issue.

The Criminal Justice Act 2003 again demonstrates the ability of Scottish ministers to adopt a pick'n'mix approach to Westminster legislation. Whilst the Act deals almost exclusively with England and Wales, the Sewel motion extends some of these provisions to Scotland. These include the granting of police officer status to expert civilians involved in, for example, fraud investigations, reporting restrictions in cases where the prosecution may appeal an acquittal (to ensure uniformity), and the obligation of Scottish courts to report breaches of suspended sentences passed in England and Wales but served in Scotland.

MOTIONS WHICH COVER UK REGULATORY BODIES OR MINOR ADMINISTRATIVE MATTERS

This category includes matters of UK-wide administrative structures, and dealing with administrative anomalies. Sewel motions can also be used to address the problem of cross-border public authorities which often remain reserved but act in devolved areas. In the Care Standards Bill, the motion is used to abolish the (UK) Central Council for Education and Training in Social Work in part because the Westminster bill was at a more advanced stage than the regulation of Care (Scotland) Bill.

The Food Standards Act 1999 set up the UK-wide Food Standards Agency following the White Paper **The Food Standards Agency: A Force for Change** (Cm 3830). The Sewel motion is required because, whilst food is a devolved area, the FSA would be a UK body with a Scottish arm (although Scotland and Northern Ireland have the competence to withdraw from these arrangements). This could also qualify under expediency because the Westminster Bill was at an advanced stage.

The Financial Services and Markets Act 2000 provides the framework within which a single regulator for the financial services industry, the Financial Services Authority, will operate. It equips the Authority with a full range of statutory powers and creates the Financial Services and Markets Tribunal. The Act also establishes the framework for single ombudsman and compensation schemes. The Sewel motion is used because the act deals with bankruptcy law, which is devolved. The FSA will have the power to petition for the bankruptcy of a sole trader. In Scots law, bankruptcy is normally a creditor-driven process. Angus

Mackay (Deputy Minister of Justice) states that the act creates a precedent in Scots bankruptcy law, as the FSA will not be a creditor, but will act on behalf of individuals who might sustain loss through the continued activities of a sole trader. Further, the Scottish Parliament could not pass legislation to give the FSA that power, as the regulation of financial services is a reserved matter (Official Report, 23.6.99, vol. 1 no. 11, col. 696).

The Race Relations (Amendment) Act – following the MacPherson inquiry into the murder of Stephen Lawrence – extends the Race Relations 1976 Act in relation to public authorities, outlawing race discrimination in functions not previously covered. It also makes chief officers of police vicariously liable for acts of race discrimination by police officers. The Sewel motions relate to the abilities of the Commission for Racial Equality (in consultation with Scottish ministers) to give direction to Scottish public authorities. Interestingly, when this matter was debated, the SNP argued that the legislation did not go far enough (see Scottish Parliament, Official Report 25.05.00, Vol. 6 No. 10 col.1059).

The Insolvency Act 2000 provides for a moratorium for small businesses in financial difficulty, changes the procedure for disqualifying persons who are unfit to be company directors, and amends the Insolvency Act 1986 to ensure that it is compatible with the European Convention on Human Rights (ECHR). The Sewel motion relates to the power to make regulations to implement the United Nations Commission on International Trade Law model law on cross-border insolvency.

The Government Resources and Accounts Act 2000 is slightly different from these examples in that the motion involves making a policy decision rather than addressing a reserved-devolved ambiguity. The Act sets up Partnerships UK, a public-private body (with a 49 per cent government stake) which fosters and gives advice on public-private partnerships. The executive (Jack McConnell, then Finance minister) argues that Scotland should participate at the UK level to enjoy economies of scale associated with a larger body. That is, the alternative of a devolved Scottish body was a possibility and so inclusion is a clear policy decision.

Some Sewel motions deal with innocuous administrative problems. The provision may be an unintended consequence or unintended encroachment on devolved matters or deal with anomalies or delays caused by the interaction of reserved and devolved matters. A good example of this type can be found in the case of the Police Reform Bill. The Sewel motion is in part used to allow Scottish police officers to be seconded to the Independent Police Complaints Commission (for England and Wales). It allows a consequential amendment to the Police (Scotland) Act 1967 to safeguard Scottish officers' terms and conditions of service whilst on secondment. Further, as Jim Wallace argues, 'Technically, that is a devolved matter, but it is part and parcel of wider proposals that are not devolved' (Official Report, 30.01.02, Vol.3 No.48, Col. 5888). The motion also allows for the Scottish Inspectorate of Constabulary to be consulted (on a statutory basis) before the England and Wales equivalent inspects Ministry of Defence police forces (reserved) in Scotland, Scottish police officers to be given equivalent rights when operating within the EU, and abolishes the requirement that police officers be Commonwealth citizens.

Similarly, the Sea Fishing Grants (Charges) Act 2000 was necessary to rectify a problem with the original legislation and therefore to ensure the validity of charges made in the administration of certain grant schemes relating to sea fishing. The Sewel motion allows Westminster to rectify this mistake in the UK as a whole (see <http://www.uk-legislation.hmso.gov.uk/acts/acts2000/20000018.htm> for a list of the original Acts affected).

Another example is the first part of the Sewel motion relating to the Health and Social Care Act 2001. The motion regards the end of the system of preserved rights in community care (the rights to higher rates of income support for some people who have been living in residential accommodation since before 1 April 1993). The aim is to transfer responsibility for the allocation of the appropriate care from the Department of Social Security to local authorities. Allowing Westminster legislation to cover the transition to post-1993 arrangements (consistent with the recommendations of the Sutherland Report) removes the need for the Scottish Executive to wait for the DSS provision before introducing legislation (it therefore also has expediency characteristics).

The plan of the Culture and Recreation Bill was to introduce new and larger bodies to co-ordinate art and cultural institutions (such as the Film Council and the Council for Museums, Archives and Libraries). The

Sewel motion was required to ensure that the new bodies maintained the same relationships with, say, Scottish museums and libraries as the former bodies. However, this bill fell from the House of Lords following a lack of parliamentary time.

MOTIONS WHICH PROVIDE FOR THE DEVOLUTION OF POWERS IN THE FUTURE

Motions are not only used to pass power back from Edinburgh to London. Some of them give Scottish ministers powers to act in reserved fields, although as Deputy First Minister Jim Wallace noted, these are not strictly Sewel motions (Official Report, 21.11.02, Vol. 4. No. 31, col. 15607). One such motion accompanied the Electronic Communications Act. The act provides for an approvals scheme for businesses and other organisations providing cryptography services, the legal recognition of electronic signatures, and the removal of obstacles in other legislation to the use of electronic communication and storage in place of paper – all reserved matters. However, it includes provisions for Scottish Ministers to use statutory instruments, rather than primary legislation, to introduce equivalent electronic commerce measures in Scotland. This example may raise the matter of the democratic process in another way, since the Sewel motion may give Scottish ministers powers to make secondary legislation without recourse to primary legislation through the Scottish Parliament (see Reid 2003; Himsforth 2002). This problem may have been recognised during discussion of the Learning and Skills Act 2000, since any statutory instrument used by Scottish ministers is subject to a resolution of the Scottish Parliament.

In other cases, Sewel resolutions are used to safeguard Scottish prerogatives. One accompanied plans contained in the NHS Reform and Health Care Professions Act because, whilst the existing health care regulatory bodies come under reserved matters, the Scottish Executive could introduce a new regulatory body that would come under devolved control. That is, whilst Westminster has sought to introduce a new body for all health care profession regulation, it leaves the Scottish set-up to Scottish ministers. Another health policy motion involves extending prescribing rights to practitioners such as pharmacists, physiotherapists and chiropodists (under the second part of the motion relating to the Health and Social Care Act 2001). The motion allows Scottish ministers to decide, through regulations, which professions can prescribe which medicines.

Another example of devolving powers to Scottish ministers is the Political Parties, Elections and Referendums Act, which followed the Neill Committee report on campaign expenditure and donations to political parties. This motion gives Scottish Ministers enabling powers to transfer any of the functions of the Local Government Boundary Commission for Scotland to the Electoral Commission (including monitoring compliance with campaign expenses regulations). The Electoral Commission would act on the basis of Scottish legislation and any enabling powers used would be subject to control of the Scottish parliament at a later date. A further Sewel motion on this bill was passed four months later to enable Westminster to oblige broadcasters to draw up a code of practice on involvement of candidates in broadcasts before elections.

Arguments around these motions have arisen in some cases when not everyone is convinced that the area is reserved in the first place. This arises during the debate on the Private Hire Vehicles (Carriage of Dogs etc.) Act 2002, a Private Member's Bill proposed by Neil Gerrard MP. The Act applies the requirement on taxis to carry guide dogs free of charge to private hire vehicles, which the Executive argues is a reserved matter. The Sewel motion enabled Westminster to amend the Civic Government (Scotland) Act 1982 to allow Scottish ministers to make regulations to this end. However, the SNP argued that such matters are devolved and could be contained within a comprehensive local government bill through the Scottish Parliament. The Extradition Bill presents similar tensions with some opposition MSPs. The Bill seeks to streamline extradition proceedings on matters such as the authentication of documents, and to sign up to the European Arrest Warrant creating a fast-track extradition arrangement with Member States of the European Union. The Sewel motion enables Scottish ministers (and Scottish courts) to deal with the extradition of fugitives to and from Scotland within the Scottish legal framework. Again, the SNP argued that Westminster was legislating on devolved matters that were presented as reserved (in other words, they argue that the loophole/blurred boundaries justification is used when it is clear the matter is devolved). In particular, Christine Grahame MSP argued that the Sewel motion was not competent because the issue regards the

implementation of European directives (the European Arrest Warrant) by Scottish Courts, a matter which is devolved (Official Report, 21.11.02, Vol. 4. No. 31, col. 15612).

The same issue arose in the Waste and Emissions Trading Bill. Arguably this case suggests the transfer of responsibility for devolved issues from Holyrood to Westminster, only for the implementation responsibility to be given straight back to Scottish ministers through regulations. The bill addresses the UK commitment to implement the EU's Landfill directive. Member States must produce a strategy to reduce the amount of biodegradable waste going to landfill (to 75 per cent of the amount produced by that state in 1995 by 2006, to 50 per cent by 2009 and to 35 per cent by 2016, with a four year extension for states like the UK which sent to landfills more than 80 per cent of their collected municipal waste in 1995). The Sewel motion would allow a UK-wide framework to divide the UK's obligation to constituent administrations and local authorities, including a package of financial incentives and penalties for companies to reduce waste. In turn, Scottish ministers would be responsible for the maintenance of the Scottish arm, with the option to introduce a separate Scottish framework (through statutory instruments) in the future.

CONCLUSION

There is not much evidence that the Scottish Parliament is giving up its policy-making prerogatives to Westminster through the use of Sewel motions. Where a uniform policy has been adopted, this is as a result of a conscious decision and the Scottish Executive has often chosen to opt in only to parts of UK Acts. A future Scottish administration wishing to take a different line would be free to introduce its own legislation to replace the UK laws in whole or in part. By analyzing the motions rather than simply counting them, we have also seen that their scope is relatively limited often referring to small portions of a larger Act and often uncontroversial. Indeed, only half of them had to go to a vote. There are some important ones (Page 2002; Page and Batey 2002) but they are much fewer than some of the publicity would suggest.

Much more frequent than the desire for policy uniformity is the matter of legislation falling between the devolved and reserved spheres. The Labour-Liberal Democrat coalition in Scotland has not regarded this lack of clarity as a major problem and has instead sought to present a seamless government, without loopholes or anomalies. This is facilitated by the dominance of the Labour Party at both levels. In the event of a different parties coming to office in Edinburgh and London, these entangled responsibilities could cause difficulties. Indeed if Sewel resolutions were no longer to be used, then more cases would end up with the Judicial Committee of the Privy Council to resolve issues of jurisdiction.

There remains a serious argument about the lack of proper parliamentary scrutiny of Sewel motions (Page 2002; Page and Batey 2002). They can be debated both in committee and in the chamber but, once approved, responsibility for legislation is transferred to Westminster, which may modify it or even fail to pass it altogether. In one case, the Regulation of Investigatory Powers Bill, the Sewel motion was considered before the Scottish Bill was introduced, and so the Scottish Parliament was being asked to refer parts of its bill before it could gauge what the bill was likely to include. The problem extends to interest groups in Scotland, which have occasionally complained that, when a matter is referred to Westminster, they find it more difficult to intervene in the debate and amendments, and have to leave matters to their UK counterparts .

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

Finally, suspicions raised in the case of the Sexual Offences Bill that the Scottish Executive might use Sewel motions for reasons of political cowardice were strengthened with a decision in 2003, which falls outwith our period. Rather than proceeding with the idea of civil partnerships in Scotland, the Executive announced a Sewel motion to opt into the Westminster bill. There were objections here both to the procedure and the substance, since the Westminster proposals apply only to same-sex couples and are narrower than the civil partnerships proposed for Scotland in Patrick Harvie's Member's Bill (Hutcheon 2003). This criticism was sustained by Lord Sewel himself, who has criticized the use of such motions to avoid sensitive matters (**Herald** 13-02-04).

The experience of Sewel motions illustrates the necessarily difficult and fluid boundaries between reserved and devolved matters. This is not peculiar to Scotland but is a feature of all devolved and federal systems. More recent issues such as Dungavel – in which the First Minister is criticised for not intervening in a largely reserved matter – and the UK Supreme Court – which highlights the continued use of a UK institution to resolve Scottish civil cases – suggest that devolution is by no means a 'settlement', but a dynamic process subject to continuous conflict and change.

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