**ANNEX A**

Legislative consent after Brexit

*Territorial divergence in the UK: the Brexit problem*

The United Kingdom's withdrawal from the European Union has posed a number of significant challenges to the effective functioning of the UK constitution. This was an inevitable and foreseen problem given, inter alia, the territorially divergent EU referendum results (that produced 'leave' majorities in England and Wales but 'remain' majorities in Scotland and Northern Ireland), territorially divergent government positions (very strong support for continued EU membership in Wales and Scotland, a mixed position in Northern Ireland and a pro-EU withdrawal UK Government), territorially divergent political consequences (most salient in Northern Ireland, of course, but a catalyst too for the revival of the Scottish independence debate so soon after the 2014 referendum) and territorially divergent views about the return of EU competences in devolved areas (by default to the devolved level or to the UK level) and about the level of constitutional realignment required to manage the internal dynamics of the post-EU withdrawal UK (whether expansive of devolved autonomy or centripetal in its implementation).

Territorial tension has been exposed and exacerbated by the relatively weak constitutional safeguards for devolved autonomy and the relatively weak mechanisms that have existed for shared governance as between the UK and the devolved institutions. Whereas the limits of devolved competence are statutory in nature, and boundary disputes are therefore subject to review by the courts, the safeguards for devolution against unwelcome intervention from the centre are *political* in nature, and boundary disputes are resolved between the parties themselves. What underpins this aspect of devolution is a political rule – the so-called Sewel convention[1] - that the UK Parliament will not *normally* legislate with regard to devolved matters without the legislative consent of the relevant devolved legislature(s), and by a politically grounded (as opposed to statutory) system of intergovernmental relations. In each case the balance of control and decision-making power has tilted heavily towards the centre.[2] However, despite the reliance that the UK constitution places on

[1] See, Institute for Government, 'Sewel Convention' (2020), available at https://www.instituteforgovernment.org.uk/explainers/sewel-convention.

[2] With regard to intergovernmental relations, a more structured, principled and – for the most part – more equal system of IGR seems to have emerged from the Cabinet Office and Department of Levelling Up's *Review of Intergovernmental Relations* (13 January 2022), available at https://www.gov.uk/government/publications/the-review-of-intergovernmental-relations. For commentary on the new arrangements see Nicola McEwan at https://ukandeu.ac.uk/intergovernmental-relations-review/ and Dan Wincott at https://ukandeu.ac.uk/machinery-and-culture-of-uk-igr/.

consent, the scope, meaning, operation and constitutional status of that principle remain uncertain. This paper seeks to make some sense of the causes and effects of that uncertainty.

*What are the safeguards for devolution?*

Section 28(7) of the Scotland Act 1998 (with analogue provisions in Northern Ireland and (now) in Wales) makes explicit that the transfer of devolved competence 'does not affect the power of the Parliament of the United Kingdom to make laws for Scotland'. This provision, which restates the principle of parliamentary sovereignty in legislative language, serves a two-fold constitutional purpose. On the one hand, it facilitates shared governance, including the making of UK legislation in devolved areas where that is invited or welcomed by the Scottish Government (motivated, for example, by a lack of legislative capacity, to avoid doubt about legislative competence or to ensure appropriate UK-wide territorial coverage). On the other hand, it provides a constitutional backstop that allows for the UK Parliament to legislate in devolved areas, where intervention is deemed to be necessary at the UK level (for example, where devolved institutions have collapsed, where there is a requirement to correct any breach by devolved institutions of the UK's international obligations or, as was argued during the passage of the Scotland Bill, if a devolved government was to pass a budget beyond its means).[3]

This legal rule – the residual power for the UK Parliament to legislate in devolved areas - is regulated by constitutional convention: the political rule, given expression by Lord Sewel during the passage of the Scotland Bill, that 'Westminster [will] not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament'.[4] The convention as articulated by Lord Sewel (and as replicated in section 2 of the Scotland Act 2016) refers to UK legislation applicable in devolved policy areas (what Alan Trench calls the 'policy arm' of the Sewel convention). However, Devolution Guidance Note 10 instructs UK officials that consent should also be sought for bills that would alter (by constraining or by expanding) the legislative competence of the Scottish Parliament or the executive competence of the Scottish Ministers[5] (what Trench calls the 'constitutional' arm of the Sewel convention).[6] Again, this political rule serves a two-fold

[3] See, A McHarg, 'Constitutional Change and Territorial Consent: the *Miller* Case and the Sewel Convention' in M Elliott, J Williams and AL Young, *The UK Constitution After Miller: Brexit and Beyond* (Hart, 2018) Ch 7.
[4] On the evolution of the convention see McHarg (fn 3).
[5] Devolution Guidance Note 10, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/60985/post-devolution-primary-scotland.pdf. See also Rule 9B of the Standing Orders of the Scottish Parliament, which makes referend to both the policy and the constitutional arms of the convention, available at https://www.parliament.scot/about/how-parliament-works/parliament-rules-and-guidance/standing-orders/chapter-9b-consent-in-relation-to-uk-parliament-bills#topOfNav.
[6] Alan Trench, 'Legislative Consent and the Sewel Convention' (updated March 2017) *Devolution Matters blog*, available at https://devolutionmatters.wordpress.com/the-sewel-convention/.

constitutional purpose. On the one hand, it protects the autonomy of the devolved institutions from unwelcome legislative interference in areas of devolved competence, or from unwelcome alterations to devolved competence.[7] On the other hand, it facilitates shared governance by allowing, where welcomed and/or invited by the devolved institutions, for constructive and co-operative legislative intervention by the UK Parliament to be made in devolved policy areas or to facilitate agreed alterations to devolved competence.[8]

*How does the Sewel convention operate in practice?*

We can approach this question in two ways. First, what is the process that underpins the Sewel convention. Second, how has the Sewel convention been used between the centre and the devolved jurisdictions.

*(i) Process*

Although the terms of the Sewel convention, as set out by Lord Sewel and as reproduced in the 2016 Act, describe a process of *legislative* consent, this is in practice (and as described in DGN10) an *executive*-led process in which UK departments approach the relevant Scottish Ministers, who in turn indicate to the UK Government whether the consent of the Scottish Parliament has been given or has been withheld.[9] In order to ascertain the views of the Scottish Parliament, the Scottish Government must lay a legislative consent memorandum that explains the extent to which a bill relates to devolved matters or alters devolved legislative or executive competence, that sets out the aims and policy objectives of the bill and which contains a draft legislative consent motion or reasons why legislative consent is not being sought.[10]

As Alan Page has explained, though the Scottish Parliament 'was slow to adapt its procedures to Westminster legislation in devolved areas', the eventual adoption of formal procedures in this area was intended to ensure that 'the Parliament ha[d] the information it needed at a sufficiently early stage to enable it to carry out the task of scrutiny effectively'.[11] Early engagement between governments does not only enable informed and effective parliamentary scrutiny. At a prior stage, private discussions will normally take place between the UK Government and devolved governments

[7] M Elliott, 'The Scottish Parliament, the Sewel Convention and Repeal of the Human Rights Act: a Postscript' (28 Sept 2015) *Public Law for Everyone blog*, available at https://publiclawforeveryone.com/2015/09/28/the-scottish-parliament-the-sewel-convention-and-repeal-of-the-human-rights-act-a-postscript/.
[8] McHarg (fn 3).
[9] In practice, the consent decision is communicated by the Clerk to the Scottish Parliament in writing to the Clerks to the House of Commons and the House of Lords.
[10] Scottish Parliament Standing Orders r.9B.1.1.
[11] A Page, *Constitutional Law of Scotland* (W Green, 2015) 220-221.

before a bill is published in order to deal with potentially problematic provisions.[12] However, the efficiency of these private discussions comes at a cost: transparency about, and scrutiny of, the nature and content of any concessions or amendments made in order to clear the bill for a smooth passage through the consent procedures.

*(ii) Use*

Until recently, external and internal analysis of the legislative consent process has highlighted the frequency with which the legislative consent procedure has been used (against the expectation some held at the outset that recourse to UK legislation in devolved areas would be made only in 'exceptional and limited circumstances'),[13] as well as the relatively uncontroversial nature of its use.[14] By 2015, for example, before the demands of EU withdrawal changed the consent dynamics, the Sewel convention had been engaged more than 140 times in Scotland[15] but consent had been withheld only once, in in relation to the Welfare Reform Bill. On that occasion, aspects of the bill, as they related to devolved policies (such as free school meals) and services (such as social care), were amended by the UK Government to allow the Scottish Parliament to pass legislation[16] giving Scottish Ministers powers to make provisions consequent of the 2012 Act in those areas.

There were a number of factors that combined to explain the positive – co-operative – experience of Sewel in the pre-Brexit era. These included: the political alignment between Labour and Labour-led governments at UK and devolved levels in Scotland until 2007; the prevailing attitude within the SNP when it won power to be seen as a constructive and responsible party of government[17] (albeit, as experience of the Welfare Reform Bill demonstrated, one that ought also to be seen to be standing up for Scotland within the UK); the pre-introduction engagement between governments to anticipate and resolve potential problems at an early stage, and the willingness of the UK Government at that stage to give way if consent was not likely to be forthcoming; the practical advantages of the Scottish Government inviting or welcoming UK Government legislation in devolved areas; and, what is often described as the 'technical' nature of many bills that make sense to be handled at the UK level.[18]

In each case, however, these indicators of co-operation obscured potential constitutional fault lines: political alignment and the informal resolution of consent issues initially stunted the

[12] Institute for Government (fn 1).
[13] Scottish Parliament OR June 16, 1999, col 403 (Donald Dewar).
[14] See, for example, Institute for Government (fn 1), Page (fn 9) 219.
[15] Page (fn 9) 219.
[16] See the Welfare Reform (Further Provision) (Scotland) Act 2012.
[17] See, for example, C McCorkindale and J Hiebert, 'Vetting Bills in the Scottish Parliament for Legislative Competence' (2017) 21(3) *Edinburgh Law Review* 319 at 343.
[18] Institute for Government (fn 1).

maturation of formal processes; private pre-introduction meetings had a negative impact on transparency and scrutiny; and, the advantages of inviting or welcoming UK legislation in devolved areas, sometimes explained by issues of capacity or consistency or by the 'technical' nature of the legislation, occasionally spilled over into policy areas (such as gender recognition or civil partnerships) that ought to have been the domain of the Scottish Parliament.[19] Indeed, in Wales during this period disputes between the UK and Welsh Governments about whether or not UK legislation related to devolved matters and therefore whether legislative consent motions were necessary (and, where withheld, whether they ought to be acted upon) were already being fought in areas such as crime and policing, trade union law and housing and planning. In another instance, the refusal by the (then) National Assembly for Wales to consent to UK legislation on agricultural wages led to the passage of devolved legislation that became subject to a (for the UK Government, unsuccessful) Supreme Court reference by the Attorney General.[20]

In the pre-EU withdrawal era, then, the legislative consent process (at least as it applied in Scotland) was one that was relatively well understood to include both a policy and a constitutional arm; that was respected on both sides as a constitutional rule that protected devolved autonomy and facilitated shared governance; in which the decision to withhold consent was the exception rather than the rule, but where a decision to withhold consent generated a constructive response from the UK Government by creating space for amendment in response to concerns from the Scottish Parliament and/or devolved legislation in the relevant areas; and, (reflecting this) against which UK legislation in devolved areas would only be made where that legislation was necessary on the part of the UK Government or where it was invited or welcomed by the Scottish Government. This is what Nicola McEwan has referred to as the 'former glory' of the convention.[21]

*What is the constitutional status of the Sewel convention?*

Despite the relatively (but not wholly) uncontroversial use of the Sewel convention, there have been calls for it to be strengthened in both major reviews of the Scottish devolution settlement: the Calman Commission (2012) and the Smith Commission (2014). For the Calman Commission, while the convention had been largely successful in defending the devolved sphere from unwanted or

[19] A Batey and A Page, 'Scotland's Other Parliament: Westminster Legislation About Devolved Matters in Scotland After Devolution' (2012) *Public Law* 501. Consistency was one of the reasons used to justify recourse to the LCM procedure in relation to both gender recognition (see Scottish Parliament, Official Report col 5658 (5 Feb 2004)) and civil partnerships (Official Report col 8925 (3 June 2004)). For sharp criticism of the use of the LCM procedure in the latter case, see P Cairney and M Keating, 'Sewel Motions in the Scottish Parliament' (2004) 47(1) *Scottish Affairs* 115.

[20] *Agricultural Sector (Wales) Bill – a Reference by the Attorney General for England and Wales* [2014] UKSC 43.

[21] N McEwen, 'Is Brexit Eroding the Sewel Convention?' (21 Jan 2020) *SPICe Spotlight blog*, available at https://spice-spotlight.scot/2020/01/21/is-brexit-eroding-the-sewel-convention/.

inadvertent UK legislation,[22] the frequency of its use[23] as well as the executive-driven nature of the process,[24] had caused some 'suspicion and even hostility'.[25] The Commission therefore proposed to strengthen the *political* status of the convention by entrenching it within the standing orders in both Houses of the UK Parliament (recommendation 4.2) and by improving mechanisms for inter-parliamentary dialogue where LCMs are concerned (recommendation 4.3). In 2014, the Smith Commission, convened in response to the narrower than expected Scottish independence referendum result, proposed to strengthen the *legal* status of the convention, by placing it 'on a statutory footing'.[26] This was reflected in the new section 28(8) of the Scotland Act 1998, inserted by section 2 of the Scotland Act 2016, which conditioned the continued legislative sovereignty of the UK Parliament (section 28(7)) with the 'recogni[tion] that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament'. As recently as the passage of the Scotland Act 2016, this is to say, and although not fully realised, the constitutional trajectory has favoured *strengthening* both the political and the legal status of the Sewel convention.

*How has EU withdrawal changed the consent dynamics?*

Given the territorial divergences described above it is unsurprising that the process of EU withdrawal would in turn engage the question of territorial consent. The first formal catalyst for this was the UK Supreme Court decision in *Miller v Secretary of State for Exiting the European Union*.[27] There, having held that it would require an Act of Parliament to authorise notification of the UK's intention to leave the EU in accordance with article 50 TFEU, the Court nevertheless rejected the argument that – by virtue of the convention's replication in statute – the Court could and should adjudicate on whether any Notification Bill would require devolved consent. Far from being placed 'on a statutory footing', as the Smith Commission had recommended, the Court took the view that section 28(8) amounted to no more than statutory *recognition* of the already existing political rule. The purpose of the provision, the Court said, was not to create legal rights and duties on the part of the devolved and UK Governments; rather, it was to 'entrench [Sewel] as a convention'[28] – one that has an

[22] Commission on Scottish Devolution, *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century* (the Calman Commission) para 154.
[23] Ibid para 132.
[24] Ibid para 135.
[25] Ibid para 135.
[26] *Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament* (2014) 13.
[27] [2017] UKSC 5.
[28] *Miller* para 149.

'important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures'.[29]

On one reading, the impact of *Miller* on legislative consent was minimal – preserving but not diminishing the political convention (indeed, recognising its particular significance) whilst giving effect to the purpose of legislation that 'recognised' but did not *establish* a constitutional rule.[30] On another reading, however, *Miller* exposed some of the tensions that have characterised the EU withdrawal process and its aftermath. First, the Advocate General's argument for the UK Government, that only the policy arm (that the UK will normally seek consent to legislate in devolved areas) and not the constitutional arm (that the UK will normally seek consent to legislate to alter devolved competence) is covered by the convention (that the latter has occurred is a matter of practice and not duty) exposed fundamental disagreement between the UK and Scottish (and Welsh) Governments about the scope of the convention. This fundamental disagreement has in turn hardened some in the UK Government towards the view that the practice of seeking legislative consent – and, in particular, of seeking legislative consent with regard to the alteration of devolved competence – is a 'courtesy' but not itself a constitutional requirement.[31]

Second, it has been argued that, by weakening the political risks of ignoring or setting aside the convention, the judgment in *Miller* has emboldened the UK's approach to subsequent EU withdrawal-related legislation.[32] So, whilst it was recognised that legislative consent should be sought from the Scottish Parliament to the EU (Withdrawal) Bill, the EU (Withdrawal Agreement) Bill and to the Internal Market Bill – both because of overlaps with devolved competence (the policy arm) *and because of alterations made to devolved competence* (the constitutional arm) – in each case the legislation was enacted despite that consent being withheld. It is certainly arguable that – because of the time limited and the 'cliff-edged' nature of the negotiation period, and the requirement for domestic legislation to fulfil the UK's international obligations by giving domestic effect to the agreement – the EU (Withdrawal Agreement) Act passed the test of necessity as an exception to the requirement 'normally' to obtain consent. However, with regard both to the EU (Withdrawal) Act and the Internal Market Act the necessity of UK-wide legislation can be called into question. With regard to the former, the Supreme Court held in the *Continuity Bill reference* that the Scottish Parliament's parallel Continuity Bill, passed after the decision by the Scottish Parliament to refuse consent to the Bill for the EU (Withdrawal) Act *would* (save for a single provision) *have been*

[29] *Miller* para 151.
[30] *Miller* para 148.
[31] Henry Hill, 'Another Cabinet Clash with Gove Over the Government's pro-Union Approach' (27 Jan 2022) *Conservative Home*, available at https://www.conservativehome.com/thecolumnists/2022/01/henry-hill-another-cabinet-clash-with-gove-over-the-governments-pro-union-approach.html.
[32] McHarg (fn 3) 20.

*within devolved competence* but for the post-reference enactment of the Withdrawal Act, the effect of which was to render ultra vires any provision in the Scottish Bill that modify any protected provisions of that act.[33]

With regard to the latter, it has been argued that the implementation of a UK internal market is neither a necessary nor an urgent consequence of EU withdrawal.[34] By seeking, but proceeding without obtaining, legislative consent, then, we see that not only is the *scope* of the Sewel convention under strain (whether it consists of the policy arm only or of both policy and constitutional arms), but so too is its substantive content. First, because the requirement '*normally*' to obtain legislative consent seems to be stripped of its normative content – requiring no special justification (such as necessity or abuse of power) unilaterally to be set aside. Second, because, with this, the requirement normally to *obtain* consent seems to be evolving into a requirement merely to *seek* consent (whether that consent is obtained or withheld). Indeed, this less onerous condition of consent has now found expression in statute. In the EU (Withdrawal) Act 2018 - where the UK Government is required to seek a 'consent decision' from the Scottish Parliament before proceeding with regulations to mark those areas of retained EU law that it wishes to protect from modification by the devolved legislatures pending the establishment of new common frameworks to regulate the UK internal market - a 'consent decision' expressly includes a decision by the Scottish Parliament to *refuse* consent.[35] In the Internal Market Act 2020, the Secretary of State must seek the consent of devolved counterparts before exercising powers to amend the scope of the non-discrimination principle, the listed 'legitimate aims' that might justify a departure from non-discrimination against incoming goods and exclusions to market access principles, and to make appointments to the Office for the Internal Market Panel.[36] However, the Secretary of State may proceed in each case where consent is not given within one month of the day that it was first sought. In each case, under the Withdrawal Act and under the Internal Market Act, the Secretary of State must give reasons where they proceed without consent. More recently, that trajectory – from a duty to seek consent to a duty (merely) to consult – has taken explicit form with the inclusion (by way of a late stage amendment)[37] of a so-called 'consult plus' requirement in the Professional Qualifications Bill 2021-22. According to this provision, UK ministers or the Lord Chancellor must *consult* with devolved counterparts before

---

[33] *The UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill – A Reference by the Attorney General and the Advocate General for Scotland* [2018] UKSC 64. Section 21 of Schedule 3, part 1 of the EU Withdrawal Act 2018 inserted that act into the list of statutes, contained in Schedule 4 of the Scotland Act 1998, that are protected from modification by the Scottish Parliament.

[34] M Dougan et al, 'UK Internal Market Bill, Devolution and the Union' (2020) esp Q9, available at https://ukandeu.ac.uk/wp-content/uploads/2020/10/UK-internal-Market-Bill-devolution-and-the-union.pdf.

[35] See, for example, European Union (Withdrawal) Act 2018 s 12 and Sch 3 Pt 1.

[36] Internal Market Act 2020 ss 6, 8, 10, 18, 21 and Sch 3.

[37] See Commons amendment 2, available at https://bills.parliament.uk/publications/45731/documents/1595.

making regulations that otherwise sit within the sphere of devolved competence. This includes a duty on the part of the relevant UK minister to publish a report on the process and outcome *of the consultation*, detailing whether and how the views of the devolved authorities have been taken into account (including where a decision is made to proceed despite objections raised by the devolved authorities).[38]

On the basis that the effective management of the UK internal market requires buy in across the constituent parts of the UK, the absence of any statutory consent requirement undermines the potential for devolved jurisdictions to agree *to* new constitutional arrangements even where they do not agree *with* them.

To re-cap, where the 'former glory' of Sewel was defined by a well-understood definition of the convention that included both policy and a constitutional arms, now we find disagreement about the scope of the convention at least with regard to the latter; where the relatively uncontroversial operation of the convention pointed to a co-operative spirit, the convention now manages more (and increasingly) confrontational relationships across the territorial constitution; where the expectation was that the convention would be respected and - unless invited, welcomed or necessary – where bills would be amended to address devolved concerns or to carve space for bespoke devolved legislation, now we see consent decisions set aside and in circumstances that arguably fall short of any 'necessity' test.

Members of the Scottish Parliament should therefore be wary of attempts to narrow the scope and weaken the content of the Sewel convention. They should push the UK Government (to recognise the constitutional arm as convention and not mere practice; to share draft legislation at an early stage with Scottish Government counterparts and with relevant scrutiny committees) and the UK Parliament (to assume a greater scrutiny role where UK legislation overlaps with devolved competence or seeks to alter devolved competence; to work closely with Scottish, Welsh and Northern Irish MPs, and with members of devolved legislatures, to identify and address areas of concern) to enhance the convention as an opportunity to defend devolved autonomy and to facilitate shared governance.[39]

*What about the Scottish Government's role?*

[38] The 'consult plus' process falls short of the Scottish Parliament's call for a statutory *consent* mechanism to be inserted into the Bill (see the report on the relevant LCM by the Delegated Powers Committee, available at https://bills.parliament.uk/publications/45731/documents/1595 (at p 4).

[39] For recommendations for reform, see Institute for Government, 'Legislating by Consent: how to revive the Sewel convention' (17 Sept 2020), available at https://www.instituteforgovernment.org.uk/publications/sewel-convention.

As with concerns expressed in the early days of the devolution settlement - that the invitation for the UK Parliament to legislate in certain devolved areas, or the acquiescence to a UK-wide approach for practical reasons of expediency or capacity, had deprived the Scottish Parliament of its opportunity to exercise its legislative and scrutiny functions in important devolved areas - there is concern too that the sheer scale of the legislative response to EU withdrawal might create a similar pattern. For example, the Scottish Government has recommended that legislative consent be given to the Animal Welfare (Kept Animals) Bill for reasons of efficiency and capacity despite those covering a number of matters of 'significant public concern…that are within the legislative competence of the Scottish Parliament'.[40] The Scottish Parliament should be vigilant in its scrutiny of legislative consent motions to ensure that its own role is not hollowed out on account of overreliance by the Scottish Government on UK legislation in important areas of devolved competence (counterintuitively at a time when the convention is arguably being weakened and when relationships between governments are increasingly fraught).

*What about delegated legislation?*

Whilst (as noted above) the Sewel convention does not extend to *delegated* legislation made in devolved areas or that alters devolved competence, the Scottish Government and the Scottish Parliament – recognising that 'the UK Government will increasingly make use of…statutory powers to make instruments arising from the UK's withdrawal from the EU that would include provisions within the competence of the Scottish Parliament', and that 'UK Ministers will [be expected to] seek the consent of Scottish Ministers,' in the exercise of those powers, 'irrespective of whether there is a statutory obligation on UK Ministers to obtain such consent' – have agreed a protocol to ensure that the Scottish Parliament has the opportunity to give 'effective and proportionate' scrutiny where such consent is sought. The protocol explains the principle that 'Scottish Ministers will normally wish to give such consent where the policy objectives of the UK and Scottish Ministers are aligned and there are no good reasons for having separate Scottish subordinate legislation'.[41] References in the protocol to 'proportionate' scrutiny recognise that not all provisions require the same level of scrutiny. It continues by stating that 'in most cases' the Scottish Parliament 'will decide whether to approve the proposal by the Scottish Ministers to consent before Ministers consent to the UK

[40] See the relevant LCM (esp at para 29), available at https://www.parliament.scot/-/media/files/legislation/bills/lcms/animal-welfare-kept-animals-bill/splcms061.pdf.

[41] Protocol on Scrutiny by the Scottish Parliament of Consent by Scottish Ministers to UK Secondary Legislation in Devolved Areas Arising from EU Exit (V2) (1 June 2020) (SIP 2), available at https://www.parliament.scot/-/media/files/committees/statutory-instrument-protocol.pdf.

Government's request' (Type 1 approval) but that 'in technical cases' scrutiny will occur after the event (Type 2 approval).

This protocol, Statutory Instrument Protocol 2 (SIP 2), builds upon but expands the scope of its predecessor agreement. Where SIP 1 applied only in relation to regulation-making powers under the EW (Withdrawal) Act 2018, SIP 2 applies to a much broader range of EU withdrawal-related regulation-making powers (including to various provisions of the UK Internal Market Act 2020).[42] Despite the feeling that SIP 1 had worked well and provided a solid starting point for the successor protocol there are number of areas that might attract further scrutiny by the Scottish Parliament. First, it will be for the Scottish Government to determine whether scrutiny will come before agreement is reached with the UK Government or whether a provision is of a 'technical' nature such that scrutiny will occur only after the fact. Type 2 (retrospective) consent is limited, in Annex B to the protocol, to provisions that the Scottish Government deem, inter alia, to be 'clearly technical' in nature and that '[do] not involve a policy…decision made by UK or Scottish Ministers'. However, and as noted above, the boundary between technical and policy measures is contestable at the edges. Scrutiny by committees of type 2 should be alert to the possibility that, on occasion, there may be (perhaps unintended) policy impacts to decisions nevertheless deemed to be technical in nature. Second, anxious scrutiny should therefore be applied to the principle that consent to the exercise of UK powers will 'normally' be given where policy aims align and there are 'no good reasons' for having Scottish subordinate legislation. As is the case with regard to legislative consent, the legislative and scrutiny functions in devolved areas of the Scottish Parliament are constitutional goods in and of themselves and so care must be taken not to hollow out that the role by an overreliance on pragmatic consent. Third, and most significantly, the capacity for scrutiny by the Scottish Parliament under the protocol is itself dependent upon the strength of any consent mechanism in the relevant UK legislation. Where there is a statutory requirement on the part of UK ministers to obtain the consent of devolved counterparts (such is the case with regard to many of the powers inserted into retained EU law by use of the 'deficiency correcting' powers in the EU (Withdrawal) Act 2018),[43] the protocol has bite: the Scottish Government would not consent, and the UK Government therefore could not proceed, where the Scottish Parliament expresses disapproval. Where there is no statutory consent requirement but the protocol is nevertheless engaged because of the political commitment of the UK Government to seek consent, disapproval has no meaningful impact because the consent of the Scottish Government is not of UK Government action. Here, however, the Scottish Parliament would be made aware of the proposed instrument,

[42] SIP 2, Annexe A.
[43] See, for example, s3(2) of the Direct Payment to Farmers (Legislative Continuity) Act 2020.

which would not be the case in the absence of any such protocol or equivalent procedure (which is the case, for example, in Northern Ireland). Finally, where there is no statutory requirement or political commitment on the part of the UK Government to seek consent the protocol is redundant: there is no consent decision on the part of the Scottish Government upon which the Scottish Parliament's scrutiny function can bite.

*So what?*

Just as the UK's territorial constitution is itself in a state of flux, so too are the constitutional rules that bind that union. A constitutional order that places weight on the principle of territorial consent has struggled to adapt to the territorial divergence, and increasingly the territorial confrontations, generated by the process and implementation of EU withdrawal. This causes a three-fold concern. First, the weakening of the Sewel convention threatens to undermine devolved autonomy and the capacity for shared governance. Second, the changing nature of consent, both in convention and in statute, threatens to undermine the democratic input necessary if devolved nations are to agree *to*, even if not *with*, new constitutional trajectories. Third, and looking inwards, too ready a recourse to consent by the *Scottish* Government threatens to undermine the Scottish Parliament's legislative and scrutiny functions in devolved policy areas. Underpinning all of this: the rapid evolution and proliferation of consent mechanisms requires a return to first principles: to better understand what consent demands as a constitutional fundamental (as our advisor, Michael Keating, has said, we know it is something more than a courtesy and less than a veto, but not much more than that) and whether it is (and if so, how it can be made) fit to regulate the pressures of the post-EU withdrawal constitution.