

The Speaker



Northern Ireland
Assembly

Charles Walker OBE MP
Chair of the Procedure Committee
Journal Office
House of Commons
London SW1A 0AA

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Dear Mr Walker

Certification of Legislation Within Devolved Competence

Thank you for your letter of 28 July 2015 seeking information on the process of how it is determined if legislation is within the legislative competence of the Northern Ireland Assembly.

I am aware of some of the issues which have been raised during the debate on EVEL within the House of Commons. It is fair to say that the process of determining whether a Bill is within the legislative competence of the Assembly has largely been routine and has rarely been the subject of controversy. I am very happy to set out some greater detail on how the process operates at Stormont.

Submission of a Bill for Introduction

Section 10(1) of the Northern Ireland Act 1998 ("the 1998 Act") requires Standing Orders to include measures to ensure that a Bill shall not be introduced if I, as Speaker, decide that any provision within the Bill would not be within the legislative competence of the Assembly. Under Standing Order 30(1), any Minister or Member wishing to introduce a Bill in the Assembly is required to submit the full text of the Bill to the Speaker not less than 7 working days before the proposed date of Introduction. This is a minimum period, and even if the scheduled date is reached, the Bill cannot be introduced until I have signified to the relevant Minister or Member that I am content for the Bill to be introduced. Normally, my role can be conducted within this 7 day period but at times when the legislative programme is heavier, there are resource implications from a number of Bills being submitted at one time and my consideration may take longer.

Public Bills (i.e. Ministerial and Private Member's Bills) must be accompanied by an Explanatory and Financial Memorandum including the information specified in Standing Order 41(a)-(e). These documents are usually accompanied by a letter proposing a date for introduction. In addition, Standing Order 30(2) requires that a Member submitting a Private Member's Bill also submit a written statement to the effect that in their view it is within the legislative competence of the Assembly. In practice, this statement is also provided to me by Ministers submitting Executive Bills. Section 9 of the 1998 Act requires a Minister in charge of a Bill to make a statement in writing to the effect that in his or her view the Bill would be within the legislative competence of the Assembly and to publish it "in such manner as the Minister

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making the statement considers appropriate". The statement of legislative competence also appears on the front cover of all Assembly Bills and in the accompanying Explanatory and Financial Memoranda.

If section 8 of the 1998 Act applies, i.e. the Bill contains a provision which deals with an excepted matter and is ancillary to other provisions (whether in the Bill or previously enacted) dealing with reserved or transferred matters or a provision which deals with a reserved matter, requiring the consent of the Secretary of State prior to Introduction, a letter confirming that consent has been given is also submitted along with the Bill. Likewise, in certain circumstances outlined in section 63 of the 1998 Act, including where a Bill contains one or more provisions which impose or increase a tax, a recommendation is required from the Finance Minister under section 63 of the 1998 Act before the Bill can pass Final Stage. In practice, however, the text of the section 63 recommendation, if available at that stage, is submitted along with the text of the Bill prior to Introduction. This statement is also printed on the front cover of the Bill and included in the Explanatory and Financial Memorandum.

Advice to the Speaker

I will receive legal advice on the legislative competence of each Bill before reaching my decision. Once the Bill is submitted to me (prior to Introduction and Final Stage), a copy is immediately provided to the Assembly's Legal Services Office and legal advice is requested by the Speaker's Office on whether the provisions of the Bill fall within the legislative competence of the Assembly. Detailed legal advice is then prepared by the Legal Services Office, which deals with each clause of the Bill. This detailed legal advice is submitted to the Speaker's Office and is accompanied by a short memorandum confirming that the Bill is (or is not) within the legislative competence of the Assembly.

In most cases, the Adviser to the Speaker will discuss the legal advice with me before I take a decision to signify that the Bill may be introduced. However, in certain circumstances outlined in a protocol arrangement with the Speaker's Office, the Legal Services Office will formally advise me on the Bill in person prior to any decision on Introduction. This would include circumstances where the Legal Services Office has taken the view that a provision of the Bill is not within the legislative competence of the Assembly or where significant doubts as to the legislative competence of a provision have arisen, for example, as a result of the analysis of relevant case law.

Consideration must be given as to whether each provision of a Bill is within the legislative competence of the Assembly as outlined in section 6(2) of the 1998 Act. Matters considered by me pursuant to section 6(2) are: whether a provision would form part of the law of a country or territory other than Northern Ireland, or confer or remove functions exercisable otherwise than in or as regards Northern Ireland; whether a provision deals with an excepted matter and is not ancillary to other provisions dealing with reserved or transferred matters; whether a provision is compatible with Convention rights and EU law; whether a provision discriminates against any person or class of person on the grounds of religious belief or political opinion and whether a provision modifies an enactment in breach of section 7 of the 1998 Act.

The Legal Services Office will consider information submitted by the Executive: i.e. the Bill; the Explanatory and Financial Memorandum ('EFM') to the Bill (which includes a Ministerial statement of compatibility with Convention rights); the Ministerial statement of legislative competence.

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Other Executive information, while not formally submitted to me, may also be considered, including: the scope letter prepared by the Office of Legislative Counsel ('OLC'); and Departmental consultation documents on the Bill.

Consideration may also be given to other non-Executive information, including: other relevant provisions of the 1998 Act and other relevant legislation and jurisprudence; relevant academic texts and articles; Hansard reports on the previous stages of the Bill (where the Speaker is considering the Bill before Final Stage); and third party submissions provided at Committee stage.

Decision by the Speaker

Once I receive the formal legal advice, my Office will process the advice as soon as possible. In most cases, it is normally a simple judgement for me of whether or not the legal opinion confirms that the provisions of the Bill are within legislative competence. I do not take into account any other issues. Particularly, it is important for me to emphasise that the policy content of the Bill is not an issue for me to consider. If I have decided that the Bill can be introduced, I will write to the Member or Minister to signify my approval. After this, the Member may introduce the Bill on the floor of the Chamber.

If I have taken the decision on the basis of the legal advice that the Bill is not within the legislative competence of the Assembly, I will also write to the Member or Minister to notify him/her that the Bill cannot be introduced. I will not specify the reasons for this decision nor will I share the legal advice which is privileged to me. In the past my legal advisers have been authorised to meet the Member or engage with relevant departmental officials to outline the broad areas with which there are difficulty. This is intended to be helpful to the Minister or Member, particularly if minimal amendments may bring the Bill within legislative competence. However, it is for the Member or Minister to take the decisions and undertake the work to make any drafting amendments to the Bill. Those providing legal advice to me will not be involved in making any revisions. Once a Member or Minister has been informed by me that I have decided that a Bill cannot be introduced, any further versions of it will have to re-submitted and recommence the formal process.

Obviously, as with any legal opinion, there are sometimes differing views. However, I consider only my own legal advice to make my decision independently and impartially. In that context, my decision should also be made without lobbying and I will normally turn down requests from Members or Ministers who wish to engage with me before I have formally undertaken my statutory role to decide whether the Bill is within the legislative competence of the Assembly (I take a similar approach to amendments). Similarly, I will not consider legal advice provided from the Executive, a Member or others who are taking positions in favour or against the Bill. I will not debate my decision on whether the Bill is within legislative competence. As with all procedural decisions under Standing Order 1(2), my decision is final and Members should not challenge it.

Amendments

Following the Second Stage debate on the floor of the Assembly and consideration by the Statutory Committee for the relevant department, amendments may be proposed to an Assembly Bill at Consideration Stage or Further Consideration Stage. Each amendment tabled by a Minister, a Committee or a Member is screened for admissibility against criteria and on this basis the Bill Office provides advice to me. The issue of whether or not an amendment falls within the legislative competence of the Assembly is not required to be considered within

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Standing Orders and was removed from the Speaker's criteria for selection a number of years ago. This was on the basis that Members may well wish to test the legislative powers of the Assembly on a given issue. Following the briefing by the Bill Office, I take a decision on which amendments should be included on the Marshalled List.

Safeguards

While the legislative competence of the Assembly is not a criterion for selection of amendments, Standing Order 37A allows for an Exceptional Further Consideration Stage. This additional stage can only be held if, after the Further Consideration Stage of a Bill and prior to its Final Stage, the Minister or Member of the Assembly in charge of the Bill submits a statement to me, in writing, asserting-

"(a) as a consequence of an amendment made to the Bill, either a provision of the Bill is outside the legislative competence of the Assembly, or the Bill has a serious technical defect, and

(b) that the Assembly had not fully considered prior to making, or not making, any relevant amendment that the Bill might, as a result, be outside the legislative competence of the Assembly or have a serious technical defect."

Further, Standing Order 37A(3) is specific that an amendment proposed to a Bill at Exceptional Further Consideration Stage shall only be selected if I am satisfied that:

"(a) the amendment is intended

to bring the Bill within the legislative competence of the Assembly, or

to correct any serious technical defect;

(b) that the proposed amendment deals with a matter specified in the statement under paragraph (1)(a) and which has arisen as a consequence of an amendment made to the Bill; and

(c) that the Assembly had not fully considered prior to making, or not making, any relevant amendment that the Bill might, as a result, be outside the legislative competence of the Assembly or have a serious technical defect."

As with the Introduction of a Bill, section 10(2) of the 1998 Act requires me to consider a Bill before it enters Final Stage to see whether any provisions of it require consent from the Secretary of State before it is allowed to proceed. When the Speaker's Office seeks advice on this issue, advice is again sought on the legislative competence of the provisions of the Bill. I am not required under the 1998 Act to consider legislative competence at this stage but it is prudent for me to be aware of any issues which may have arisen.

Referral to the Supreme Court

Once a Bill has passed its Final Stage, I will send it to the Attorney General for Northern Ireland ("AGNI") and the Advocate General for Northern Ireland. Pursuant to section 11(1) of the 1998 Act, the AGNI or the Advocate General for Northern Ireland may refer the question of whether a provision of a Bill would be within the legislative competence of the Assembly to the Supreme Court for decision. Such a reference must be made within 4 weeks beginning with the passing of the Bill; or the passing of the Bill after Reconsideration Stage.

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Should the Supreme Court decide that any provision of the Bill would not be within the legislative competence of the Assembly, Standing Order 40 provides for the amendment of the Bill by the Assembly at Reconsideration Stage.

Section 12 of the 1998 Act, and Standing Order 40(1)(b) provide for reconsideration where a reference has been made under section 11 of the 1998 Act in relation to a provision of a Bill, and the Supreme Court decides to make a reference to the CJEU for a preliminary ruling in connection with that reference and neither of the references has been decided or otherwise disposed of. In such a scenario the Assembly may resolve to reconsider the Bill. The Assembly shall then notify the Advocate General for Northern Ireland and the AGNI and the person who made the reference shall in turn request the withdrawal of the reference.

It should be noted that section 14(2)(b) of the 1998 Act provides that the Secretary of State shall not submit a Bill for Royal Assent at any time when a reference under section 11 of the 1998 Act has been made but has not been decided or otherwise disposed of by the Supreme Court.

I hope the information provided here is useful to the Committee's deliberations. The context is obviously different and I do not think there is a complete comparison between determining whether a Bill is within the legislative competence of the Northern Ireland Assembly and the provisions you are considering. If you require any further information, Robin Ramsey (robin.ramsey@niassembly.gov.uk) in my office will be happy to assist you.

Yours sincerely



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