

# Committee for the Scrutiny of the First Minister

SFM(3)-01-10 (p3): 9 March 2010

## Evidence paper: the Welsh Assembly Government's Relationship with Westminster

### Introduction

1. This paper is intended as written evidence to inform the Committee for the Scrutiny of the First Minister on the relationship between the Welsh Assembly Government and Westminster; it is based on experience across the range of our responsibilities.

### Awareness of the devolution settlement within the civil service

2. All civil servants need at least a basic grasp of devolution, in the same way that they need an understanding of things like Freedom of Information and the Civil Service Code. However, understanding of devolution is patchy across Whitehall, at two levels: awareness and capacity to deal with devolution issues generally, but also understanding of the asymmetric system of devolution across the UK, with the differences in the settlements compounded by policy and political differences. This has been most evident in the handling of requests for legislative competence, which do not have an exact equivalent in any other administration.

3. Awareness of devolution is not of itself sufficient; in order to advise their Ministers well, civil servants need not only to know what is devolved as far as Wales is concerned and to understand the mechanics of the settlement, but also how to manage that positively and confidently. They need to know how to accept and work with policy differences between administrations. An awareness of devolution is most frequently observed in areas where the subject matter is long devolved, such as education and health and social services, though there are examples elsewhere.

4. The dangers posed by a lack of awareness and confidence in dealing with devolution amongst Whitehall officials could lead to unnecessarily complex arrangements which do not benefit organisations working across borders. For example "where a subject is ostensibly non-devolved" (such as social security or defence) but impacts on devolved subjects (for example skills, economic development, health, education). Differences in infrastructure, roles and responsibilities for public services have developed in response to Welsh needs and circumstances. Accountability for funding decisions on devolved services lies with the Welsh Assembly Government. Delivery approaches which may be straightforward in an English context need careful consideration as to whether and how they will work in Wales. This calls for liaison at the very earliest stages of policy development. This is where Whitehall needs especially to be able to act with assuredness in sharing information at an early stage since it will avoid far greater difficulties and wasted energies down the line. In the absence of such sharing of information, difficulties can particularly arise when the UK Government issues policy documents which cover both non-devolved and devolved functions, both because it may be unclear how far the commitments apply to the devolved administrations and because such documents do not always take adequate account of different administrative structures in the devolved nations.

5. There is also a danger that some Whitehall departments may assume that what goes for Scotland goes for Wales. For many reasons - differences in the scope of powers, policy differences and legal differences - a solution which works for Scotland will not always work for Wales. And taking the trouble to check this before advice is prepared (or instructions for Bills drafted) will again avoid the need to unpick matters publicly and at a later stage, which inevitably uses more resources all round - including Parliamentary time.

6. Whitehall needs to develop an ongoing, long-term commitment to embedding devolution within the Whitehall machinery and mindset. The Cabinet Secretary and Head of the Home Civil Service has shown his personal commitment to this, including by supporting a recent stocktake of Departments' relationships with devolved administrations which will allow everyone to benchmark progress. Continuing professional development, which is promoted across the whole of the civil service, is another way in which mutual learning, common standards and understanding is being supported. The regular meetings of Permanent Secretaries have provided a forum for leadership in promoting mutual understanding throughout the civil service. And to this end, we acknowledge that the Ministry of Justice and Cabinet Office have made some efforts to raise the profile of devolution through general awareness-raising sessions with Departments over the last year or two. However, much more work needs to be done to reach a larger number and wider range of officials across Whitehall to ensure that there is a baseline level of knowledge of devolution.

7. At official level, Welsh Assembly Government staff have worked with the Wales Office and directly with devolution contacts in other UK Government Departments to provide tailored training sessions for officials. These efforts will be stepped up in future, with a focus on helping people to identify the right contacts, understand the ground rules and share good practice, both in Whitehall and in the Welsh Assembly Government. It would also help if the UK Government, through individual Departments and at the centre, collaborated more closely with the Assembly Government and other devolved administrations in developing the content and delivery of devolution guidance and training.

8. There needs to be more secondments and exchanges in both directions and more visits between Wales and London to see at first hand how devolution works and how Whitehall operates. There are many more Welsh Assembly Government officials with experience of Whitehall than there are Whitehall officials with experience of devolved government and we are keen to encourage continued interchange, whether through transfers, secondments or participation in shared learning and development

### The role of the Wales Office

9. Direct bilateral relations between relevant policy departments have been of prime importance. Whitehall departments are encouraged to approach Welsh Assembly Government departments directly in order to establish their policy position and their circumstances, while keeping the Wales Office informed. Officials need to clearly understand the different roles of the Wales Office and the Welsh Assembly Government.

10. The Wales Office has a particular role in Welsh legislation - specifically, the Secretary of State for Wales and the Wales Office Minister have a role in piloting Legislative Competence Orders through Parliament and in checking, through their representation on Legislation Committee, that any outstanding issues with the Welsh Assembly Government regarding the Welsh content of Parliamentary Bills or draft Bills are resolved before introduction or publication. Wales Office officials therefore play a role in ensuring that the significant groundwork required on both Bills and LCOs takes place and that information is shared in both directions to enable this to happen. This facilitating role makes it particularly important that Whitehall departments receive consistent messages about the operation of the devolution settlement and about the ground rules for engagement, from both the Wales Office and the Welsh Assembly Government.

Whether or not the Wales Office continues to be in place in the future, it is essential that there is a voice for Wales in the UK Cabinet, given the terms of the current settlement and the range of areas that remain the responsibility of the UK Government.

### **The Legislative Competence Order (LCO) Process**

11. There is general agreement that the Legislative Competence Order (LCO) process has been a learning curve for everybody. We have sought to take the learning from each case and build on experience each time.

12. The experience of progressing LCOs both in Whitehall and in Parliamentary pre-legislative scrutiny has varied depending on the subject matter of the Order, with Orders which were relatively narrow in scope generally proving more straightforward. However there are some key principles and common factors which help smooth handling.

13. At all stages, the focus needs to be on the legislative competence being sought rather than on the detail of the legislation that the Welsh Assembly Government has in mind. Conferring power on a legislature is fundamentally different from conferring subordinate legislative powers on Ministers.

14. The unique nature of Legislative Competence Orders has posed challenges, given that a request for legislative competence is completely different from proposed delegated powers for Ministers in a Bill - and completely different from subordinate legislation exercising those delegated powers, even if the Order itself takes the form of a Statutory Instrument. We have made progress in building understanding of the concept and of the approach which should therefore be adopted. The Devolution Guidance Note 15 for Whitehall officials, which the Wales Office developed in consultation with the Welsh Assembly Government, has helped in this respect.

Ministers and officials in Whitehall have had to familiarise themselves with the concept of conferring power on the Assembly, as a legislature, on a case by case basis. It is this grasp of the principle which has been fundamental to progress. Much time in the negotiations on the first LCOs was spent in obtaining recognition of the changes to the devolution settlement introduced by the Government of Wales Act 2006.

16. The second principle, which follows naturally from the point that enduring powers are being conferred on a legislature, is that those powers should encompass coherent areas of policy. Trying to limit the competence to the immediate policy intent of the government of the day, or to the precise boundaries of what is currently devolved to the Welsh Ministers, is unlikely to be consistent with enabling the National Assembly to achieve greater legislative coherence in relation to a particular topic. Such limitations, which may be sought in order to achieve clarity about the scope of the powers, will in practice result in greater complexity.

17. The practical factors which facilitate smooth handling include:

a formal start to the process, through the relevant Welsh Minister writing to their counterpart;

identification of a senior lead official in the Whitehall department responsible for the policy area in question, to co-ordinate the UK Government's input;

sharing of information on the intended scope of the Order, in advance of discussions on the draft of the proposed Order itself; and

the communication of target timescales early on in the process.

18. Since the Wales Office has led on the formal clearance of LCOs by the UK Government and liaison with the Welsh Affairs Committee, as well as facilitating the process of official level clearance which precedes Ministerial clearance, its assistance in the process has been essential, although it is the engagement and understanding of the relevant policy departments and their Ministers that remains the key factor at the outset. We also of course rely on the contribution of Wales Office Ministers who take the LCOs through the Parliamentary processes.

19. Perhaps understandably, given their novelty and the fact that they were initiated by the Welsh Assembly Government, it was not always easy at first to convey the sense that these Orders are critical to delivery of the Welsh Assembly Government legislative programme, in the same way that the preparation of Parliamentary Bills is time critical. We have tried to tackle this, partly by setting out clearer expectations at the outset, with tighter project management, and partly thanks to the support and efforts of the Wales Office in endeavouring to secure clearances which recognise that the Welsh Assembly Government also has to timetable its legislative business in the Assembly. However the fact remains that the process does demand time and resource at all stages, even for relatively straightforward Orders. It puts particular pressure on those points through which all LCOs pass, given that they do currently all follow the same process whatever their scale.

## **Communication between Whitehall and the Assembly Government**

20. There are a range of mechanisms, like the MoU and JMC, and formal and informal networks that are there to help facilitate communication between Whitehall and the Assembly Government, both through political and official channels. There are also over 100 forums where Welsh Assembly Government and Whitehall officials meet.

21. It is recognised that policy differences or even uncertainty about sharing policy proposals which are subject to change may act as a constraint on sharing information. However, early sharing of information where there is a "need to know", in confidence where necessary, will lead to smoother and more effective delivery in the long run. The Memorandum of Understanding provide important guidelines to officials in this respect. Regular contacts (both structured and informal and at all levels), with clear ground rules, are essential to the good functioning of inter-governmental relations. There is increasing evidence of this happening in areas where it is clearly essential (such as where European legislation and regulation is involved) but this level of awareness is important across all areas of government.

22. Much comes down to the skills, behaviours and experience of individuals and to the relationships they develop with their counterparts. Face-to-face engagement is very important in building relationships grounded in trust and encouraging genuine two-way dialogue between the Assembly Government and Whitehall, and Assembly Government officials are encouraged to build on the mechanisms and networks, by establishing senior level contacts, through Permanent Secretaries and Directors General, to supplement working level contacts. Establishing a shared understanding of the Welsh Ministers' responsibilities in related policy areas at the outset have led to better informed and thus more fruitful communications

23. In looking for areas of good practice, the work of the British-Irish Council deserves recognition for the extent of collaborative policy work on important issues of mutual interest. When looking for the reasons underlying productive relations between Wales and Whitehall it is sometimes the work undertaken in this forum that has provided the basis.

## **Whitehall guidance on devolution**

24. The review needs to respect the fact that much of the existing guidance was closely negotiated with the devolved administrations. This is what underpins its worth as an operational tool. We welcome attempts to raise the profile of this guidance and provide simpler access but it is important that the results are acceptable to the devolved administrations. Guidance to officials in Whitehall and in Wales has to be mutually compatible: we recognised this ourselves in publishing guidance to Welsh Assembly Government officials which is consistent with that given in the Whitehall Devolution Guidance Notes. We welcome the fact that the Ministry of Justice and Cabinet Office have sought the views of officials from the Assembly Government and the other devolved administrations on their current project to revise the devolution guidance for Whitehall Departments.

25. The Memorandum of Understanding, and the bilateral concordats between the Assembly Government and individual Whitehall Departments, continue to be an important part of the inter-governmental machinery and the updated MoU has now been agreed together with a new dispute resolution process and the bilateral concordats have also been updated. Even informal dealings need the underpinning of a formal statement about the relationship.

## **Conclusion**

26. There have been some positive developments over the past eighteen months, with new energy being put into raising the profile of devolution as a factor which now permeates Government policy making and delivery. However experience remains mixed and it will be important to intensify efforts to establish a more comprehensive and assured approach to managing relations between the Welsh Assembly Government and Whitehall.

**Carwyn Jones AC/AM**

**Prif Weinidog Cymru/First Minister for Wales**