# Constitutional and Legislative Affairs Committee

Meeting Venue:
**Committee Room 1 - Senedd**

Meeting date:
**31 October 2011**

Meeting time:
**14:30**

Cynulliad Cenedlaethol Cymru
National Assembly for Wales

For further information please contact:

**Steve George**
Committee Clerk
029 2089 8242
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Olga Lewis
Deputy Committee Clerk
029 2089 8154

## Agenda

### 1. Introduction, apologies, substitutions and declarations of interest

### 2. Instruments that raise no reporting issues under Standing Order 21.2 or 21.3

Negative Resolution Instruments

**CLA47 - The Marketing of Fresh Horticultural Produce (Wales) (Amendment) Regulations 2011**
Negative Procedure. Date made 18 October 2011. Date laid 18 October 2011. Coming into force date 8 November 2011

Affirmative Resolution Instruments

None

### 3. Instruments that raise issues to be reported to the Assembly under Standing Order 21.2 or 21.3

Negative Resolution Instruments

None

Affirmative Resolution Instruments

None

## 4. Legislative Consent Motion: Education Bill (Pages 1 - 12)

CLA(4)-09-11(p1) – Supplementary Legislative Consent Memorandum (LCM) for the Education Bill
CLA(4)-09-11(p2) – Supplementary Legislative Consent Motion
CLA(4)-09-11(p3) – Briefing on the Legislative Consent Motion: Education Bill

## 5. Committee Correspondence

**CLA36 - The Wildlife and Countryside Act 1981 (Variation of Schedules 5 and 8) (England and Wales) Order 2011** (Pages 13 - 17)
**Papers**:
CLA(4)-09-11(p4) – Letter from the Chair to the Minister dated 27 September 2011
CLA(4)-09-11(p4) – Annex (CLA36 – Report)
CLA(4)-09-11(p5) – The Minister's response dated 12 October

**CLA37 - The Single Use Carrier Bags Charge (Wales) (Amendment) Regulations 2011** (Pages 18 - 27)
CLA(4)-09-11(p6) – Letter from the Chair to the Minister dated 27 September 2011
CLA(4)-09-11(p6) – Annex (CLA37 – Report)
CLA(4)-09-11(p7) – The Minister's response dated 12 October 2011

## 6. Committee Inquiries: Inquiry into the Granting of Powers to Welsh Ministers in UK Laws (Pages 28 - 57)

**Papers to Note: Written evidence**
CLA(4)-09-11(p11) – CLA GP8 - The Law Society

**Alan Trench, Honorary Senior Research Fellow, The Constitution Unit, University College London**
**Papers:**
CLA(4)-09-11(p12) – CLA GP9 – Mr Alan Trench
CLA(4)-09-11(p12) – CLA GP9 - Annex 1 - DGN 9
CLA(4)-09-11(p12) – CLA GP9 – Annex 2 - DGN 10

## 7. Date of the next meeting (Pages 58 - 61)

**Papers to note:**
**CLA(4)-08-11**- Report of the meeting 17 October 2011

## 8. Motion under Standing Order 17.42 to resolve to exclude the public from the meeting for the following business

A Committee may resolve to exclude the public from a meeting or any part of a meeting where:

(vi) the Committee is deliberating on the conclusions or recommendations of a report it proposes to publish

To: Business Committee

From: Jane Hutt AM
Minister for Finance and Leader of the House

Date: 25 October 2011

**SUPPLEMENTARY LEGISLATIVE CONSENT MEMORANDUM (LCM) FOR THE EDUCATION BILL**

**Issue**

1. To consider the supplementary Legislative Consent Memorandum for amendments tabled to the Education Bill, in accordance with Standing Order 29.4 A copy of the Memorandum tabled on 13th October is attached at Annex A.

**Background**

2. The UK Government tabled an amendment to the Education Bill on 11 October 2011, which, subject to the will of Parliament, makes provision to impose sanctions on qualification awarding organisations. The Minister for Education and Skills has agreed that equivalent provisions be applied to Wales.

3. This amendment will ensure that there is compatible provision in Wales to be able to withdraw recognition from recognised body (awarding body); give clear direction where there is a failure to comply with a condition and the ability to impose a monetary penalty in circumstances where a recognised body has failed to comply with a condition. As Awarding bodies offer qualifications across Wales, England and Northern Ireland and more than half of the Welsh Joint Education Committee (WJEC) certificated award for GCSE and A levels are candidates in England it will ensure that the same powers of enforcement are applied to all candidates. The amendment also makes provision for recognised bodies to appeal against a decision to impose a monetary penalty and will not alter the Welsh Government's policy.

4. The Memorandum at Annex A provides the detail and reasoning as to why the Welsh Government considers it appropriate for provision to be made in this Parliamentary Bill when the Assembly has legislative competence for this matter.

5. The Bill completed report stage and is currently waiting its third reading in the House of Lords 4 November 2011.

**Advice**

6. Under Standing Order 29.4 the Business Committee may refer any legislative consent memorandum to a committee or committees for consideration. However, as the Bill is at a very late stage in its Parliamentary consideration, the Welsh Government would consider it appropriate on this occasion to pass this LCM for debate in plenary.

**Recommendation**

7. The Business Committee is asked to consider the LCM and agree that, due to the Bill's advanced progress through its Parliamentary stages and the limited time available for scrutiny, this LCM be passed for debate in plenary without Committee scrutiny.

# LEGISLATIVE CONSENT MEMORANDUM

# EDUCATION BILL

## Supplementary Legislative Consent Motion

"To propose that the National Assembly for Wales, in accordance with Standing Order 29.6, agrees that, in addition to the provisions referred to in motions NNDM4731 and NNDM4660, those provisions which have been brought forward in the Education Bill relating to powers to impose a monetary penalty, recover costs, receive appeals, give directions and withdraw recognition from recognised bodies, insofar as they fall within the legislative competence of the National Assembly for Wales, should be considered by the UK Parliament."

## Background

1. The above Motion was tabled by Leighton Andrews, Welsh Minister for Education and Skills, under Standing Order 29.6 of the Standing Orders ("SO") of the National Assembly for Wales ("NAW"). This memorandum is laid under SO29.2. SO29 prescribes that a Legislative Consent Motion must be tabled and a Legislative Consent Memorandum laid before the NAW if a UK Parliamentary Bill makes provision in relation to Wales that falls within the legislative competence of the NAW, or has a negative impact on that competence.

2. The Education Bill ("the Bill") was introduced on 26 January 2011 and can be found at:

   http://services.parliament.uk/bills/2010-11/education.html

## Summary of the Bill and its Policy Objectives

3. The Bill contains provisions on a range of policy areas and many of its provisions do not apply in Wales. The main purpose of the Bill is to create an education system that delivers for all children. Starting with basic literacy ability and continuing through to the attainment of qualifications, enabling students to continue their education or stand them in good stead for work. The Bill will take forward the commitments set out in the 'Importance of Teaching' White Paper and the Department for Business, Innovation and Skills 'Skills for Sustainable Growth and Further Education'. There will also be two elements of Higher Education Funding included in the Bill.

## Provisions in the Bill for which consent is sought

4. The Bill makes provision that applies similarly to England and Wales in relation to the powers of sanction which can be imposed by qualification regulators. The Welsh Ministers are the qualifications regulator in Wales, whereas the Office of Qualifications and Examinations Regulation ("Ofqual") fulfil the same function in England.

5. **Clause 23** will amend sections 32A and 32B of the Education Act 1997 in relation to the regulation of qualifications in Wales and sections 151 and 152 of the Apprenticeships, Skills, Children and Learning Act (ASCLA) 2009, which sets out the equivalent powers for Ofqual in England. These amendments will allow the Welsh Ministers and Ofqual to give directions and withdraw recognition from recognised bodies without needing to satisfy 'the prejudice test'. Currently, Ofqual and Welsh Ministers may only give directions or withdraw recognition if the failure to comply with the condition prejudices, or would be likely to prejudice, the proper award or authentication of any qualification; or prejudices, or would be likely to prejudice, persons who might reasonably be expected to seek to obtain any such qualification – 'the prejudice test'.

   Further provision has been drafted enabling both the Welsh Ministers and Ofqual to impose a monetary penalty and recover costs in relation to that monetary penalty where a recognised body has failed to comply with a condition. Before imposing a monetary penalty, there is a requirement on Ofqual and the Welsh Ministers to give notice with reasons to the recognised body of their intention to take this action. This notice will specify how and when the recognised body may make representations. The recognised body must be given at least 28 days to make representations to either the Welsh Ministers or Ofqual.

   The amount of a monetary penalty will be limited and will not exceed 10% of the recognised body's turnover. The turnover will be limited to amounts generated as a result of the recognised body's qualification functions. The Welsh Ministers will also be required to publish a statement of how they will determine the turnover of a recognised body.

6. Should the Welsh Ministers exercise their powers, the fines and the costs associated with recovering that fine, will be paid into the Welsh Consolidated Fund

7. The amendments also make provision for recognised bodies to appeal against a decision to impose a monetary penalty, or the amount of monetary penalty imposed. In the case of a decision by Ofqual, the appeal must be made to the first Tribunal and in the case of a decision by the Welsh Ministers, the appeal is to the Upper Tribunal.

8. In practice this will provide the Welsh Ministers and Ofqual with an effective and flexible system of sanctions for the regulation of the

qualifications system. The ability to impose a fine will act as a powerful deterrent. It will also provide a more proportionate response to issues of non-compliance by recognised bodies than their ultimate sanction of withdrawal of a recognised body's recognition and is more meaningful than public criticism alone. In addition, the removal of 'the prejudice test' will enable enforcement powers to be used swiftly in relation to all of the sanctions available to both the Welsh Ministers and Ofqual .

9. It is important that this Bill provides mirror provisions for the regulation of the qualifications system in England and Wales, as recognised bodies offer qualifications across Wales, England and Northern Ireland. The qualifications and examinations system needs to be supported by a regulatory regime which equally holds awarding organisations to account and has full public confidence across Wales, England and Northern Ireland.

10. These provisions are within the legislative competence of the NAW under the following headings:

Heading 5 – Part 1 of Schedule 7 to the Government of Wales Act 2006 - Education and training.

**Advantages of utilising this Bill**

11. It is the view of the Welsh Government that these provisions should be included in this UK Bill as it is represents the most appropriate and proportionate legislative vehicle to enable these provisions to apply in Wales at the earliest opportunity. It will allow the new powers to apply in time for the next examination series enabling the Welsh Ministers to exercise enforcement powers in accordance with Welsh priorities and concerns.

12. If those amendments are to apply only to England, the Welsh Ministers would be placed at a disadvantage. The lack of a consistent approach for the regulation of recognised bodies that operate in both England and Wales would have a detrimental effect in Wales. Ofqual could make a swift decision to use its new enforcement powers in relation to a recognised body's non-compliance, whereas the Welsh Ministers would be unable to impose any monetary penalty and would have to apply 'the prejudice test' for an equivalent failure to comply with conditions. This could add a significant delay in dealing with a recognised body's non-compliance in relation to Wales. The inability to impose a monetary penalty would also create confusion amongst the public, who may note the imposition of a monetary penalty by Ofqual in England and wonder why an equivalent penalty has not been imposed in relation to Wales.

13. This Legislative Consent Memorandum has therefore been laid, and the Legislative Consent Motion tabled, before the NAW for consideration.

**Financial Implications**

14. There are no financial implications for Welsh Ministers arising from these powers. Any costs will be met from existing resources as the provisions would be part of ongoing regulatory activity.

**Leighton Andrews AM.**
Welsh Minister for Education and Skills

# Constitutional and Legislative Affairs Committee

## Inquiry into the granting of powers to Welsh Ministers in UK Laws

## Legal Advice Note 2

Background

1. On 29 June 2011 the Constitutional and Legislative Affairs Committee agreed to carry out an inquiry into the practice of Westminster Acts conferring powers to make subordinate legislation on Welsh Ministers. The terms of reference for the inquiry include:

- The extent of the current National Assembly scrutiny of delegated powers given to Welsh Ministers through provisions in UK Acts and through other statutory mechanisms;
- The extent to which the National Assembly is able to exercise robust scrutiny of such processes through its Standing Orders; and
- The procedures for Legislative Consent Motions compared to the position in the other devolved legislatures.

2. The Welsh Government laid on the 13th October a further Legislative Consent Memorandum (LCM) in relation to additional amendments to the Education Bill; the related Motion is scheduled for debate on the 1st November under Standing Order 29. On the 18th October, the Minister for Local Government and Communities made a written statement in relation to further amendments to the Localism Bill to grant powers to Welsh Ministers. This note looks briefly at the powers being granted to Welsh Ministers in each case, and considers the procedures that apply to them.

The Education Bill - LCM

3. A third LCM (that accompanies this note) in relation to this Bill was laid by Welsh Ministers on 13th October. It related to amendments to the Bill that would amend Part V of the Education Act 1997 in relation to Wales to correspond to amendments to Part 7 of the Apprenticeships, Skills, Children and Learning Act 2009 concerning the Office of Qualifications and Examinations Regulation (Ofqual) in relation to England. In each case they give the qualifications regulator the power to impose financial penalties on a

'recognised body' that awards or authenticates a qualification as well as related provisions regarding appeals and costs. The amendments relating to England and Wales were tabled at the same time at Westminster; this was not therefore a case of the inclusion of Wales being added to provisions originally intended for England.

4. The amendments also contain an order making power that affects the calculation of the penalty. Such an order would be subject to an affirmative procedure in the National Assembly.

5. The Government's justification for seeking these powers is set out in paragraphs 11 and 12 of the LCM. In summary, it is a wish to acquire the same regulatory tools as Ofqual, and at the same time.

6. The National Assembly's legislative competence in relation to Education and Training (as set out in Schedule 7 to the Government of Wales Act 2006) excludes only Research Councils. The provisions made by the amendments that are the subject of the current LCM could therefore have been made by an Act of the Assembly.

7. The amendments were published by Parliament on the 14th October, but must have been tabled the previous day as the LCM was laid at the National Assembly on the 13th October. It was considered by the Assembly's Business Committee on the 18th, with a view to its being debated in Plenary on the 1st November, the intervening week being half term. Report Stage in the Lords was commenced on the 18th October, and is scheduled to be completed on the 1st November. As this is the second House, the only opportunity for further amendment would be in the case of 'ping-pong' between the two Houses.

8. The Scottish timetable for consideration of legislative consent in relation to the Education Bill is worthy of note by way of comparison. The Bill was introduced in the House of Commons on 26 January 2011. The Legislative consent memorandum was lodged by the Scottish Government on 27 January 2011. It was discussed by the Education, Lifelong Learning and Culture Committee on 2 and 9 March 2011. The Committee's report was published on 10 March, and the motion was agreed on 17 March 2011.

<u>The Localism Bill – Written Statement</u>

9. This Bill too has been the subject of a series of LCMs, but the most recent development has been a written statement by the Minister for Local Government and Communities on the 18th October, the text of which is annexed to this note. The amendments in this case would 'confer powers on the Welsh Ministers to pass on to Welsh public authorities EU infraction fines that are imposed on the UK Government by the Court of Justice of the European Union'. The amendments for Welsh Ministers were laid on the 3rd October; the corresponding amendments giving powers to UK Ministers were

laid on the 7th September. The Welsh clauses now appear as clauses 58-67 in the Bill following completion of Report Stage in The Lords. Again, as this is the second House, the only opportunity for further amendment would be in the case of 'ping-pong' between the two Houses.

10. The amendments again contain an order-making power for Welsh Ministers –
"Designation of Welsh public authorities

*(1) The Welsh Ministers may by order designate a Welsh public authority for the purposes of this Part.*

*(2) The order must—*
*(a) specify the Welsh public authority by name;*
*(b) identify any EU financial sanction to which the designation applies; and*
*(c) describe the activities of the authority which are covered by the designation.*

*(3) The order may identify an EU financial sanction for the purposes of subsection (2)(b) by….".*

By virtue of clause 234(11), such an order would be subject to an affirmative procedure in the National Assembly.

11. The Government's justification for seeking these powers in this Bill is that 'represents the most appropriate and proportionate legislative vehicle to enable these provisions to apply in Wales at the earliest opportunity.'

12. The Government states that 'These amendments giving the Welsh Ministers powers to pass on fines to Welsh public authorities do not fall within the Assembly's legislative competence…'. No explanation is given as to why it has come to that view, having regard to the Assembly's extensive legislative competence in relation to public authorities in Wales.

13. The amendments to give powers to Welsh Ministers were laid on the 3rd October, but were not notified to the Assembly until the statement was made on the 18th October. In the meantime Report Stage had commenced on the 5th and been completed on the 17th October.

<u>Standing Order 29 – Consent in relation to UK Parliament Bills</u>

14. This Standing Order contains the LCM procedure, and applies as follows –
*"In Standing Order 29, "relevant Bill" means a Bill under consideration in the UK Parliament which makes provision ("relevant provision") in relation to Wales:*
*(i) for any purpose* ***within the legislative competence of the Assembly*** *(apart from incidental, consequential, transitional, transitory,*

*supplementary or savings provisions relating to matters that are not within the legislative competence of the Assembly);* ***or***
*(ii) which has a* ***negative impact on the legislative competence of the Assembly****."*

15. It will have been noted from paragraph 6 above that the Education Bill provisions do come within the Assembly's legislative competence. On the other hand, the Government (as was explained in paragraph 11 above) considers that the Localism Bill provisions do not come within that competence.

16. By virtue of Standing Order 29.4, Business Committee may formally refer any LCM 'to a committee or committees for consideration.' No LCM has yet been referred using this power. The current example of the Education Bill shows the difficulties that can arise. Although the amendments that are the subject of the LCM are sufficiently significant that referral could be justified, the timing is such, at the end of the Parliamentary process, that it would serve no useful purpose. It shows the importance of Welsh Ministers laying an LCM as soon as possible after the amendments have been tabled at Westminster. That was indeed done in this case, but the amendments were introduced at such a late stage in the parliamentary process that it did not assist the Assembly in achieving full scrutiny as permitted by Standing Orders.

17. The explanation in the previous paragraph underlines therefore the importance of amendments that would be subject to an LCM being introduced as early as possible in the legislative process at Westminster, rather than at the very last amending stage as here (and in the case of the Localism Bill amendments that are the subject of the written statement). Given the way that legislation, and particularly legislation specific to Wales, is dealt with at Westminster, it can be argued that the LCM route will always be second-best to Assembly legislation in terms of scrutiny. It could therefore be argued that it should not just be a matter of the Welsh Government giving the Assembly enough notice of likely LCMs but, rather, that it should not acquiesce in any proposal to legislate at Westminster, on something within the Assembly's legislative competence unless there is a very good reason for doing so.

<u>Standing Order 30 – Notification in relation to UK Parliament Bills</u>

18. This Standing Order contains the Written Statement Procedure, and applies as follows –
*"In Standing Order 30, "relevant Bill" means a Bill under consideration in the UK Parliament which makes provision ("relevant provision") in relation to Wales (<u>other than a provision which is a relevant provision within Standing Order 29</u>.1):*
*(i) which has a <u>significant impact on the functions of the Welsh Ministers</u> or of the Counsel General; or*

*(ii) which has an impact on the legislative competence of the Assembly (apart from incidental, consequential, transitional, transitory, supplementary or savings provisions).*

19. The recent statement in relation to the Localism Bill contains no explanation of why the Welsh Government does not consider the provisions to be within the legislative competence of the Assembly, with the result that Standing Order 30 (with no provision for Assembly scrutiny) applies, rather than Standing Order 29 (with some scrutiny provision). The Committee may wish to consider whether such an explanation should be provided in relation to such statements.

20. Standing Order 30.2(iii) (like Standing Order 29.2(iii)) requires notification of amendments in the applicable way within two weeks of the amendments being tabled or agreed to. Whilst the amendments to the Education Bill were notified (under Standing Order 29) on the day that they were tabled, the amendments to the Localism Bill were notified by way of Written Statement more than two weeks after they were tabled, after they had been debated in Parliament, and after the final opportunity (under normal circumstances) for amendment of the Bill had passed. They were nevertheless within the flexible time limit permitted by Standing Orders. The Committee may wish to consider whether greater consistency is appropriate.

Conclusion.

21. These two recent examples illustrate the two different procedures that apply in Wales to cases that would be subject to the same procedure in Scotland. They also highlight the implications in terms of scrutiny that arise when powers are given to Welsh Ministers by amendments very late in the legislative process at Westminster.

**Legal Services**

**October 2011**

“WRITTEN STATEMENT BY THE WELSH GOVERNMENT

TITLE UK LOCALISM BILL – TREATMENT OF EU INFRACTION FINES

DATE 18 October 2011

BY Carl Sargeant, Minister for Local Government and Communities

The Localism Bill was introduced into the House of Commons on 13th December 2010. The aim of the UK Government is to devolve greater powers to councils and neighbourhoods and give local communities control over housing and planning decisions.

The UK Government laid amendments to the Bill on 3 October to confer powers on the Welsh Ministers to pass on to Welsh public authorities EU infraction fines that are imposed on the UK Government by the Court of Justice of the European Union. These amendments mirror amendments laid by UK Government on 7 September in respect of UK Ministers to pass on fines to Welsh public authorities.

To date the UK Government has never been fined and these measures are intended to support the continuation of that position.

These amendments giving the Welsh Ministers powers to pass on fines to Welsh public authorities do not fall within the Assembly’s legislative competence and it is the view of the Welsh Government that it is appropriate for these powers to be conferred on the Welsh Ministers in this UK Bill as it is represents the most appropriate and proportionate legislative vehicle to enable these provisions to apply in Wales at the earliest opportunity.”

**Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol**

**Constitutional and Legislative Affairs Committee**

Cynulliad Cenedlaethol Cymru
National Assembly for Wales

Bae Caerdydd / Cardiff Bay
Caerdydd / Cardiff
CF99 1NA

John Griffiths AM
Minister for Environment and
Sustainable Development
Welsh Government
5th Floor
Tŷ Hywel
Cardiff Bay
CF99 1NA

27 **September** 2011

Dear Minister

**CLA36 - The Wildlife and Countryside Act 1981 (Variation of Schedules 5 and 8) (England and Wales) Order 2011**

Constitutional and Legislative Affairs Committee considered the above Statutory Instrument at its meeting on 19 September 2011 and agreed that I should bring to your attention the Committee's report made under Standing Order 21.3 on the merits of the Instrument.

The Committee agreed to invite the Assembly to pay special attention to this Instrument on the grounds "that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Assembly" (Standing Order 21.3(ii)).

The Committee's report was laid in the Table Office on 23 September 2011 and is attached for information. I would be grateful if you could consider the report and let the Committee have your response in due course.

I am copying this report to the First Minister for information and have also arranged for the report and this letter to be drawn to the attention of Assembly Members.

Yours sincerely

**David Melding AM**
Chair, Constitutional and Legislative Affairs Committee

**Constitutional and Legislative Affairs Committee Draft Report**

**CLA36**

**Title: The Wildlife and Countryside Act 1981 (Variation of Schedules 5 and 8) (England and Wales) Order 2011**

**Procedure**: **Negative**

This draft Order will apply to both England and Wales.

This Order deals with the protection of specified plants and animals under the Wildlife and Countryside Act 1981 ("the Act"). The Order adds four new animals to Schedule 5 of the Act and removes two existing entries from protection. The Order also extends protection afforded to two animals and decreases the level of protection afforded to two animals. The Order also adds two new plant entries to Schedule 8 and removes four existing plant entries. Schedule 5 lists animals protected under section 9 of the Act. Schedule 8 lists plants protected under section 13 of the Act.

**Technical Scrutiny**
Under Standing Order 21.2 the Assembly is invited to pay special attention to the following instrument:-

1. These Regulations have not been made bilingually.

[21.2(ix) – that it is not made or to be made in both English and Welsh].

**Merits Scrutiny**
Under Standing Order 21.3 the Assembly is invited to pay special attention to the following instrument:-

1. This Order could have been made in Wales by Welsh Ministers and therefore bilingually.

[21.3((ii) that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Assembly].

**Legal Advisers**
Constitutional and Legislative Affairs Committee

**August 2011**

**Government's response**

The Government has responded as follows:

**The Wildlife and Countryside Act 1981 (Variation of Schedules 5 and 8) (England and Wales) Order 2011**

**Technical Response**

This composite Order amends Schedules 5 and 8 of the Wildlife and Countryside Act 1981.The Order adds four new animals to Schedule 5 and removes two existing entries from protection. The Order also extends the protection to two animals and decreases the level of protection afforded to two animals. The Order also adds two new plant entries to Schedule 8 and removes 4 existing plant entries. Schedule 5 lists animals protected under section 9 of the Wildlife and Countryside Act and Schedule 8 lists plants protected under section 13 of the Wildlife and Countryside Act.

**Merits Response**

The composite Order was made following representations by the GB conservation bodies through the Joint Nature Conservation Committee. This Order applies to England and Wales and accordingly, it is not considered reasonably practicable for this Instrument to be made bilingually."

**Constitutional and Legislative Affairs Committee**

**(CLA(4)-05-11)**

**CLA36**

**Constitutional and Legislative Affairs Committee Report**

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**Merits Scrutiny**
Under Standing Order 21.3 the Assembly is invited to pay special attention to the following instrument:-

2. This Order could have been made in Wales by Welsh Ministers and therefore bilingually.

[21.3((ii) that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Assembly].

**David Melding AM**
Chair, Constitutional and Legislative Affairs Committee

**19 September 2011**

**Government's response**

The Government has responded as follows:

**The Wildlife and Countryside Act 1981 (Variation of Schedules 5 and 8) (England and Wales) Order 2011**

**Technical Response**

This composite Order amends Schedules 5 and 8 of the Wildlife and Countryside Act 1981.The Order adds four new animals to Schedule 5 and removes two existing entries from protection. The Order also extends the protection to two animals and decreases the level of protection afforded to two animals. The Order also adds two new plant entries to Schedule 8 and removes 4 existing plant entries. Schedule 5 lists animals protected under section 9 of the Wildlife and Countryside Act and Schedule 8 lists plants protected under section 13 of the Wildlife and Countryside Act.

**Merits Response**

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John Griffiths AC /AM
Gweinidog yr Amgylchedd a Datblygu Cynaliadwy
Minister for Environment and Sustainable Development

Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref JG/06364/11

David Melding AM
Chair - Constitutional & Legislative Affairs Committee
Ty Hywel
Cardiff Bay
Cardiff
CF99 1NA

12 October 2011

Dear David,

**CLA36 - The Wildlife and Countryside Act 1981 (Variation of Schedules 5 and 8) (England and Wales) Order 2011**

Thank you for your letter of 27 September 2011 regarding The Wildlife and Countryside Act 1981 (Variation of Schedules 5 and 8) (England and Wales) Order 2011.

I thank you for your observations following the meeting of the Constitutional and Legislative Affairs Committee on 19 September, 2011. I have nothing further to add to the response provided to your Committee's draft report.

Best wishes,

John

**John Griffiths AC / AM**
Gweinidog yr Amgylchedd a Datblygu Cynaliadwy
Minister for Environment and Sustainable Development

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Llinell Ymholiadau Cymraeg 0845 010 4400
Correspondence.John.Griffiths@wales.gsi.gov.uk

**Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol**

**Constitutional and Legislative Affairs Committee**

Cynulliad Cenedlaethol Cymru
National Assembly for Wales

Bae Caerdydd / Cardiff Bay
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CF99 1NA

John Griffiths AM
Minister for Environment and
Sustainable Development
Welsh Government
5th Floor, Tŷ Hywel
Cardiff Bay, CF99 1NA

27 September 2011

Dear Minister

**CLA37 - The Single Use Carrier Bags Charge (Wales) (Amendment) Regulations 2011**

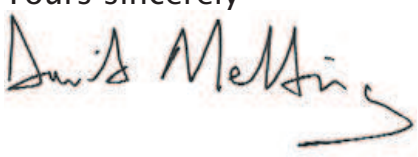
The Constitutional and Legislative Affairs Committee considered the above Statutory Instrument at its meeting on 19 September 2011 and agreed that I should bring to your attention the Committee's report made under Standing Order 21.3 on the merits of the Instrument.

The Committee agreed to invite the Assembly to pay special attention to this Instrument on the grounds "that it is of political or legal importance or gives rise to issues of public policy likely to be of interest to the Assembly" (Standing Order 21.3(ii)).

The Committee's report was laid in the Table Office on 23 September 2011 and is attached for information. I would be grateful if you could consider the report and let the Committee have your response in due course. In particular, the Committee noted that the Regulations are to come into effect on 1 October. The Committee understood that the Welsh Government has kept informed those with an interest in the changes these Regulations introduce. Nevertheless, Members expressed some concern that the Regulations were published very close to the coming into force date for what is a significant new policy.

I am copying this report to the First Minister for information and have also arranged for the report and this letter to be drawn to the attention of Assembly Members.

Yours sincerely



**David Melding AM**
Chair, Constitutional and Legislative Affairs Committee

**Constitutional and Legislative Affairs Committee**

(CLA(4)-05-11)

**CLA37**

**Constitutional and Legislative Affairs Committee Draft Report**

**Title: The Single Use Carrier Bags Charge (Wales) (Amendment) Regulations 2011**

**Procedure: Negative**

These Regulations amend the Single Use Carrier Bags Charge (Wales) Regulations 2010. They are made under the Climate Change Act 2008 and come into force on 1 October 2011.

The 2010 Regulations require sellers to charge a minimum price for singe use carrier bags. They impose record keeping and reporting requirements on sellers, appoint local authorities to administer the charging scheme and confer civil sanctioning powers on local authorities to enforce the Regulations.

The principal amendments made to the 2010 Regulations by these Regulations are summarised in the Explanatory Note that introduces the Regulations.

**Technical Scrutiny**

No points are identified for reporting under Standing Order 21.2 in respect of this instrument.

**Merits Scrutiny**

Background

The 2010 Regulations were considered by the third Assembly's Constitutional Affairs Committee on 17 November 2010. The Committee agreed to report on the Merits of the Regulations and a copy of that report is attached as an Annexe. The Report, which was not unduly critical of the regulations, drew attention to the following points among others:

- that the regulations were the first time in the UK that powers under the Climate Change Act 2008 were being used to require charges for carrier bags and the first time Civil Sanction Powers were being granted to local authorities in Wales;

- that the powers under which the regulations were being made were granted directly to Welsh Ministers and had not previously been scrutinised in the Assembly; and
- that there were a range of detailed concerns about how the regulations would work in practice and how they would impact on, in particular, small retailers.

Procedure

The original Regulations were made under the affirmative procedure and were debated and approved in Plenary on 29 November. This was because the enabling legislation requires the affirmative procedure to be used where the powers:

- are being used for the first time;
- impose new civil sanctions;
- increase or change the basis for determining monetary penalties; or
- amend primary legislation.

None of these factors apply to these amending regulations, which are, therefore, being made under the negative resolution procedure.

Specific Issues

*Impact on Small and Medium-sized Enterprises (SMEs)*

These regulations address one of the points reported by the Constitutional Affairs Committee in 2010. SMEs were concerned about the impact of the requirement to maintain records and provide them on request to any member of the public. The amending regulations now remove the reporting requirements for businesses with less than 10 full-time equivalent staff.

*Costs*

The regulations also appear to address another issue reported by the Constitutional Affairs Committee; whether costs incurred in the lead up to the regulations coming into force can be deducted from the income received from charging. The amending regulations now clarify that 'set up' costs count as 'reasonable costs' for the first reporting year and can be deducted.

*Timing*

These regulations come into effect in 12 days' time on 1 October 2011, which is the date on which charging for carrier bags also comes into effect. However, we understand that the Welsh Government has kept those with an interest in the amending regulations informed of

the possibility of these changes, which should therefore be expected by them.

In the light of the foregoing, the Committee agreed that the amendment regulations raise issues of public policy likely to be of interest to the Assembly. The Committee agreed to draw the draft Order and Regulations to the attention of the Assembly through a report under Standing Order 21.3(ii).

**David Melding AM**
Chair, Constitutional and Legislative Affairs Committee

**September 2011**

**ANNEXE**

**CA499**

**Constitutional Affairs Committee Report**

**Title: The Single Use Carrier Bags Charge (Wales) Regulations 2010**

**Procedure: Affirmative**

These Regulations make provision about a minimum amount (5p) which sellers of goods must charge for single use carrier bags. The Regulations are made under sections 77 and 90 of, and Schedule 6 to, the Climate Change Act 2008.

**Technical Scrutiny**

No points are identified for reporting under Standing Order 15.2 in respect of this instrument.

**Merits Scrutiny**

Background

These Regulations require sellers of goods to charge for single use plastic and paper carrier bags provided to customers. The Regulations set the charge at a minimum of 5p and require sellers of goods to keep and publish records in relation to the number of bags they sell in Wales and how the proceeds of the charge have been used.

The Regulations also appoint local authorities in Wales as administrators and confer powers on local authorities to use civil sanctions to deal with breaches of the Regulations.

Matters identified by the Government as being of special interest to the Constitutional Affairs Committee

These draft Regulations are the first in the UK to make use of the power to require sellers to charge for single use carrier bags under the Climate Change Act 2008.

They are also the first to confer powers on local authorities in Wales in relation to the use of civil sanctions. The civil sanctioning powers are accompanied by duties to publish guidance on how the powers will be used.

Other Issues

*Reduction in proposed charge*

Evidence from retailers during the consultation process indicated that a 5p charge would be a sufficient disincentive for people to purchase carrier bags. Previously the Welsh Government had calculated this to be 7p.

The Government now believe a 5p charge would be fairer to low income groups and would prevent a single use carrier bag costing more than a 'bag-for-life' which will be exempt from the charge. In the light of the representations received, they have decided to drop the charge from 7p to 5p, despite acknowledging that the lower charge will not 'internalise' the social and environmental costs of producing and selling carrier bags whereas 7p would have.

*Definitional Issues*

The consultation responses indicated continued confusion about a number of matters that do not appear to have been fully addressed in the Regulations or the EM. These include:

- whether plastic bags used for promotional goods, e.g. bags given away at conferences, will be subject to a charge;
- where goods are returned by the purchaser, whether the seller would be obliged to refund the carrier bag charge and whether the seller could deduct this from the gross proceeds as a reasonable cost under the regulations;
- whether a bag which breaks can be replaced free of charge.
- interpretation of the provisions which exempt some bags (for instance for health or hygiene reasons) but that would not subsequently be exempt if other items are placed in the bag.

*Cost and Record Keeping*

Retailers can deduct 'reasonable costs' from the gross proceeds from the charge on carrier bags, including costs of compliance and costs associated with communicating the charge to staff and customers. Larger retailers will be required to keep records and publish these records annually, smaller retailers will be required to keep records but not to publish them.

A degree of concern has been expressed by consultees on some of these issues. These include:

- it not being clear whether costs incurred in the lead up to the regulations coming into force (in October 2011) can be deducted;

- the regulations being implemented in different ways across Wales because local authorities, who will be responsible for administering and enforcing the charge, may not define 'reasonable costs' consistently;

- concern from SMEs about the impact of the requirement to maintain records and provide them on request to any member of the public.

*Penalties*

The regulations provide for a range of fixed monetary penalties none of which exceed £200. However, there is also provision for variable monetary penalties to be imposed by individual local authorities. These penalties have maximum values of £5,000 and £20,000 depending on the breach concerned. It is not yet clear to what extent local authorities will impose penalties according to different criteria in different parts of Wales.

*Paper Carrier Bags*

The regulations aim to reduce the number of single use carrier bags used annually in Wales. Of the 445 million bags used, 350 million are plastic and 95 million are paper bags. The charge is to be set at a level which 'internalises' the social cost of using a bag and therefore leads to reductions in consumption.

The charge will apply to both plastic and paper carrier bags. However, the Government has not been able (as it has for plastic bags) to calculate the social cost of a paper bag at this stage. For the purposes of the Regulatory Impact Assessment they assumed that the cost is the same as for a plastic bag. This assumption may not be correct.

<u>Committee Consideration</u>

The Committee noted the above matters and in particular:

- that the regulations are the first use in the UK of powers under the Climate Change Act 2008 to require charges for carrier bags and the first granting of Civil Sanction Powers to local authorities in Wales.

- that the powers under which the regulations are being made were granted directly to Welsh Ministers and have not previously been scrutinised in the Assembly.

- That there are a range of detailed concerns about how the regulations will work in practice and how they will impact on, in particular, small retailers;

- that the regulations apply to both paper carrier bags and plastic carrier bags. Even though the underlying cost factors for the two types of bag may be different they have been assumed to be the same and the RIA calculated on that basis.

The Committee agreed that it would be helpful for the Minister to address all of these points directly during the plenary debate on the draft Order.

In the light of these factors the Committee agreed that the draft Order and Regulations raise issues of public policy likely to be of interest to the Assembly. The Committee agreed to draw the draft Order and Regulations to the attention of the Assembly through a report under Standing Order 15.3(ii).

**Janet Ryder AM**
Chair, Constitutional Affairs Committee

**17 November 2010**

John Griffiths AC /AM
Gweinidog yr Amgylchedd a Datblygu Cynaliadwy
Minister for Environment and Sustainable Development

Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref JG/06363/11

David Melding AM
Chair - Constitutional & Legislative Affairs Committee
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12 October 2011

Dear David,

**CLA37 - The Single Use Carrier Bags Charge (Wales) (Amendment) Regulations 2011**

Thank you for your letter of 27 September regarding the Committee's consideration of the above Statutory Instrument.

I note the Committee's report and the concern that the Regulations were published very close to the implementation date of the policy. The Government acknowledges this and the Committee may wish to note that with the exception of the exemption for record keeping for small businesses and minor technical changes, the Welsh Government published details of the intention to make these regulatory changes in March 2011. Draft guidance that was published at the same time was written as though these changes had already been made to avoid any confusion. The Government is pleased that one of these regulatory changes addresses a concern reported by the Constitutional Affairs Committee in its report on the Draft Regulations in relation to "reasonable costs" now including costs reasonably incurred by a seller before the date on which the Regulations came into force.

The amendment for record keeping for sellers that employ less than 10 FTE on the first day of the reporting year was made in response to credible representations about the level of burden that record-keeping requirements would impose on the small business sector. The Government is pleased that this also addresses concerns raised by the Constitutional Affairs Committee in its report on the Draft Regulations. The Committee was concerned at

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the time about the impact on SMEs in relation to the requirement to maintain records and provide them on request to any member of the public. The amendment was widely communicated to our stakeholders and in the media in July 2011.

Best wishes,

John

**John Griffiths AC / AM**
Gweinidog yr Amgylchedd a Datblygu Cynaliadwy
Minister for Environment and Sustainable Development

Cymdeithas y Cyfreithwyr
The Law Society

# Inquiry into the Granting of Powers to Welsh Ministers in UK Laws

October 2011

cefnogi cyfreithwyr

supporting solicitors

The Law Society is the representative body for over 140,000 solicitors in England and Wales. The Society represents and supports solicitors, negotiates on behalf of the profession and lobbies regulators, governments and others.

In Wales the Law Society has a permanent office which is resourced to enable the profession across England and Wales to respond to both law and policy consultations and to respond to current legal issues both stemming from the devolution of law-making and consequent upon a developing and distinct legal community in Wales.

This paper is submitted in response to the Constitutional and Legislative Affairs Committee's inquiry into the Granting of Powers to Welsh Ministers in UK Laws.

**Overview**

This inquiry by the Constitutional and Legislative Affairs Committee ("the Committee") is welcomed as we move into the next phase of law-making in Wales.

When the Subordinate Legislation Committee looked at this issue in 2008/9[1] concerns had already been raised about the proper scrutiny of delegated powers. In particular we said the following in our response to that inquiry:

*"We are concerned that [the Welsh Assembly Government] continues to seek executive powers in UK Bills. It was expected that framework powers in UK Bills would produce powers to make Assembly Measures only so that all new executive powers would be subject to scrutiny by the National Assembly. This has not been the case*."[2]

We accept that in order to provide additional capacity for new ministerial powers it may be practically necessary for such powers to be included in UK Acts. However, it is important that the procedure for Bills in Westminster must include a point where the National Assembly can give its view on whether those powers are desirable and can be effectively scrutinised by the National Assembly.

In addition the National Assembly is the body charged with holding the Welsh Government to account and should have a formal role in the delegation of new powers to Welsh Ministers in order to discharge this function effectively.

[1] Subordinate Legislation Committee Inquiry into the Scrutiny of Subordinate Legislation and Delegated Powers May 2009

[2] Written Evidence of the Law Society Wales Office to the Subordinate Legislation Committee Inquiry September 2008, SLC2

Comments on the Committee's areas of interest:

**The extent of the current National Assembly scrutiny of delegated powers given to Welsh Ministers through provisions in UK Acts and through other statutory mechanisms**

The current processes for scrutiny, including referral to committees[3], can accommodate scrutiny of delegated powers in UK Acts. However they do not replicate the National Assembly's usual scrutiny processes for powers granted to the Welsh Ministers in Assembly Acts. It needs to be recognised that scrutiny of whether it is appropriate for powers to be delegated to the Welsh Ministers in UK legislation is going to be difficult to consider in isolation from the policy objectives of the UK legislation.

The Assembly Members' role scrutinising legislation continues to develop. In our written evidence to the Subordinate Legislation Committee in 2008[4] we set out our views regarding scrutiny of legislation.

**The extent to which the National Assembly is able to exercise robust scrutiny of such processes through its Standing Orders**

The National Assembly can provide for the scrutiny of delegated powers but it must undertake its scrutiny at the right point in the law making process in Westminster and the Westminster process must be able to accommodate the outcome of the National Assembly's scrutiny process.

It would appear that in order for the National Assembly to have a true scrutiny role then there should be a very early referral to Cardiff Bay from Westminster. During the last inquiry the Secretary of State for Wales, Peter Hain MP, gave evidence to the Subordinate Legislation Committee on how UK Bills took account of views from Wales[5]. It was assumed that the Welsh Assembly Government was the main player and that there would be discussions with officials in UK Departments. In this context the Standing Orders follow the assumption that the Welsh government remains the main player. The Standing Orders require that "a member of the government must lay a memorandum" regardless of the origin of the UK Act.[6]

But, it is the Bill procedure in Westminster which offers the best opportunity for affecting the final provisions in a UK Act: There is no point in providing for scrutiny of provisions in Cardiff Bay unless there is a formal point within the procedure in Westminster where the view of the National Assembly is received and can affect the outcome. We would expect that an inquiry on this point be initiated in Westminster in

[3] Standing Order 29.8

[4] supra, n.2

[5] Written Evidence of the Secretary of State for Wales to the Subordinate Legislation Committee, SLC9

[6] Standing Order 29.2

order to consider a formal role for the National Assembly during the passing of relevant Bills. As stated above, this needs to be at a very early stage.

Looking at the current Standing Orders ("SOs"), SO30 requires a written statement to be laid but only operates where a Bill is considered to have a "significant impact on the functions of the Welsh Ministers or of the Counsel General" which is vague. If no-one in the Welsh government considers that the impact of the Bill is 'significant' and no statement is laid what can the National Assembly do? There is no recourse.

**The relevance of the UK Government's Devolution Guidance Notes in the light of recent Welsh constitutional developments**

This question relates to the internal processes of Whitehall and Westminster and as such we offer no response on this point.

Internal protocols and papers such as Devolution Guidance Notes can assist the smooth operation of government and law making but their status and operation should be open and transparent. The consequences of deviating from the provisions should be known.

**The procedures for Legislative Consent Motions compared to the position in other devolved legislatures**

We are the Law Society of England and Wales and do not operate within the other devolved legislatures. The Committee may find it useful to undertake visits to the other devolved legislatures to discuss procedures as the Subordinate Legislation Committee did in 2008.

We should be pleased to offer such further evidence on this topic as the Committee may require

**National Assembly for Wales Constitutional and Legislative Affairs Committee**

**INQUIRY INTO THE GRANTING OF POWERS TO WELSH MINISTERS IN UK LEGISLATION**

**Memorandum by Alan Trench**

1. This memorandum is submitted to assist the Committee in its inquiry into the granting of powers to Welsh ministers in UK legislation, in advance of my giving oral evidence to it.

2. In my view, there has historically been a significant difference between how the National Assembly has approached the question of the acquisition of devolved powers, and how the Scottish Parliament has. It is debatable whether the extent of this difference was appropriate while Part 3 of the Government of Wales Act 2006 was in effect. Following the entry into force of the 'Assembly Act' provisions in Part 4 of the 2006 Act, it is hard to see any justification for such a difference. The effect of that difference has been to weaken the control the National Assembly has exercised over the Welsh Government.

3. One starting point is the working of Scottish devolution. There, the underlying principle has clearly been that the Scottish Parliament acts as 'gatekeeper' whenever powers are to be devolved. This principle has applied to both the acquisition of legislative powers and for the devolution of executive powers to the Scottish Executive/Government, and has taken effect through a combination of statutory procedures and the application of the Sewel convention. In the case of legislative powers, there are two ways to extend the powers of the Scottish Parliament: by an order under section 30 of the Scotland Act 1998, or it by primary legislation. In the case of executive powers, this can be done by various order-making powers, of which the main one is in section 63 of the Act, or through primary legislation to which the Sewel convention applies.

4. All the relevant order-making powers require affirmative resolutions in favour of the order, from both the Scottish Parliament and both Houses of Parliament at Westminster. So far as the Sewel convention is concerned, the most authoritative statement remains that in the Memorandum of Understanding and Supplementary Agreements (now Cm 7864, 2010), which provides:

> the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government' (paragraph 14).

5. The extent to which this applies to the conferral of new devolved powers, or the withdrawal of ones that have previously been devolved, is set out in internal guidance of both the UK and Scottish Governments. In the UK case, the relevant document is Devolution Guidance Note 10 on *Post – Devolution Primary Legislation affecting Scotland*, which says that legislative consent is required for

provisions applying to Scotland and which are for devolved purposes, or which alter the legislative competence of the Parliament or the executive competence of the Scottish Ministers.

6. Members of the Committee will be well aware that, up to now, these issues have been treated rather differently when it comes to Wales, although in principle the Sewel convention applies equally to Wales so far as law-making powers are concerned. While Part 3 of the Government of Wales Act 2006 was in effect, there was a clear difference between conferrals of legislative powers by legislative competence order (at the Assembly's initiative, and so with its consent), and those that took place using primary UK legislation (so-called framework powers), which did not. Conferrals of executive powers similarly appeared to take place beyond the sight of the National Assembly. Thus, while the Scottish Parliament has been able to act as 'gatekeeper' of all devolved powers in Scotland, the National Assembly has sought or been able to play the same role in Wales.

7. So far as the UK Government was concerned, the key issue was the consent of the Welsh Assembly Government. The *Memorandum of Understanding* quoted above emphasises the role of the Government, not the Assembly itself . This went even further when it came to issues arising from UK legislation affecting the 'Fields' set out in Schedule 5 to the 2006 Act. The June 2007 version of Devolution Guidance Note 9, *Post-Devolution Primary Legislation affecting Wales*, provided

> The MoU indicates that there will be consultation with the Welsh Assembly Government on policy proposals affecting devolved matters whether or not they involve legislative change. ... When primary legislation is prepared by Whitehall Departments, consideration should be given to what arrangements may be required for Wales. The 2006 Act provides for the Assembly's legislative competence to build up incrementally over time, so in many cases, and particularly in the early years, the Assembly will not have the legislative competence to make its own provision for Wales. ... Whitehall Departments will in practice deal with the Welsh Assembly Government. Departments should approach the Welsh Assembly Government to gain the consent of the National Assembly for Wales to legislation when appropriate. It will be for the Welsh Assembly Government to indicate the view of the National Assembly for Wales when appropriate and to take whatever steps are required to ascertain that view (paragraph 7)

DGN 9 also said

> there will still be many areas where the Assembly does not have legislative competence and where the Welsh Assembly Government will want to seek enabling powers in the UK Government's legislative programme. These could either confer executive functions on the Welsh Ministers, or be 'framework' powers conferring legislative competence on the National Assembly for Wales, or both (paragraph 14)

Moreover, paragraph 17 of DGN 9 expressly notes the need to obtain the consent of the Welsh Assembly Government for provisions that impose functions on the Welsh ministers, remove them or otherwise modify them, and for provisions that add to the legislative competence of the Assembly. It expresses the view that only provisions which affect matters within the legislative competence of the Assembly or which have a negative effect on the legislative competence of the Assembly require the Assembly's consent.

8. The reliance of the Sewel convention on liaison between governments rather than legislatures has been the subject of discussion for some time. The House of Lords Select Committee on the Constitution, for example, criticised this practice in its 2003 report on *Devolution: Inter-Institutional Relations in the United Kingdom*, in a Scottish (and Northern Ireland) context; see chapter 4, particularly paragraph 131. [1]

9. Welsh devolution since 1999 has been characterised by a strong executive and, in institutional terms, a relatively weak Assembly. That arises because of the nature of executive devolution to the Secretary of State for Wales and the Welsh Office, which provided the foundation on which the National Assembly was built, the arrangements put in place under the 1998 Act, and the continuation of those under the 2006 Act. The scope DGN 9 gave to the Welsh Government to decide what form further powers might take since Part 3 of the 2006 Act came into effect has reinforced this. It certainly created scope in principle for the Welsh Government to decide whether it would take executive or legislative powers, in circumstances where the advantages of seeking legislative powers were not always clear.

10. It remains unclear to me how extensive a difference it is in practice, however. There is no clear, publicly-available list setting out what powers have been conferred on the Welsh ministers by UK legislation since 2007. Sadly, this has not been issued by the Welsh Government, nor does it form part of the material available through the database Welsh Legislation Online. I hope that this inquiry will produce one. My own, incomplete and unsystematic, look at the recent statute book identified a significant number of cases where primary legislation conferred executive powers on Welsh ministers. None of these were cases where there was an immediately evident, strong prima facie argument that they should have been legislative powers instead. Indeed, they appeared to relate to existing devolved executive powers. (That, however, was a requirement for conferring legislative powers under Part 3 of the 2006 Act; see section 95(2).) The only statement one could make with confidence about these cases was that there was a lack of transparency about them, facilitated by the arrangements under DGN 9 and the apparently technical, if not obscure, nature of the issues involved.

11. Much of this debate is now historic. With the referendum and the commencement of the 'Assembly Act' provisions in Part 4 of the 2006 Act, the powers of the Assembly are much

[1] House of Lords Select Committee on the Constitution *Devolution: Inter-Institutional Relations in the United Kingdom* Session 2002-03, 2nd Report, HL Paper 28.

wider. This affects not only assumptions about whether parallels with practice of the Scottish Parliament (or Northern Ireland Assembly) are appropriate – though it is notable that the UK Supreme Court, in its recent judgment in *Axa General Insurance v. Lord Advocate* [2011] UKSC 46, directly compared the National Assembly's legislative powers with those of the Scottish Parliament and Northern Ireland Assembly (see, particularly, paragraph 43). In practice, with Part 4 wholly in effect, the question raised by legislation at Westminster will be very different. In the past, the issue was to decide how a Westminster bill affecting a 'field' in Schedule 5 would operate – whether powers devolved should be executive or legislative ones in nature – and the Assembly Government dealt with all those questions. Now, the question presented by Westminster legislation will usually be that of ensuring that legislation for England does not apply in Wales – in other words, distinguishing provisions that apply in Wales from those applying in England. Any application of legislation relating to devolved subjects will raise questions of the application of the Sewel convention, and the need for the Assembly's consent.

12. The Sewel convention is likely to be more important in the working of Welsh devolution, now that the Assembly has acquired primary legislative powers, than it is in Scotland. While it remains important in a Scottish context, the reasons for that are much stronger for Wales. The convention's use in Scotland largely arises from the administrative entanglement of governmental functions between Scotland England, as well as overlaps between reserved and devolved functions. That administrative entanglement is all the greater for Wales, and so the convention is likely to need to be used more often. In a Scottish context, it has been clear that the main driver of its use has been the Westminster legislative programme (rather than Scottish authorities using UK legislation as a convenient practical vehicle to achieve their objectives – though that has happened as well).

13. One would expect much of this to be set out in a revised version of Devolution Guidance Note 9. I am told that work on this is underway within the Wales Office, but there is no indication of when that revised version might be published or indeed what involvement the Welsh Government will have in its framing. (Previous versions have been issued after consultation with the devolved government, though as internal UK Government guidance devolved consent is not required.) The committee may wish to pursue that issue with Welsh ministers, and perhaps to set out their views about what the new version of the Note should provide in their report.

14. The important questions for the future, to my mind, are how the Sewel convention applies to legislative relations between the UK Parliament and Wales, and what role the National Assembly wishes to assume in that. The following seem to me to be the key points:

    a. *The nature of the approval given in legislative consent motions*. At present, these follow the Scottish precedent, and endorse the 'consideration' of provisions at Westminster. The Assembly might wish to look to endorsing the substantive legislative provisions, not their consideration.

b. *The nature of legislative consent.* There is no reason why consent needs to be absolute, but rather in particular cases could be made specific or conditional – for example, seeking certain amendments to the Westminster legislation, or debarring other amendments. In a Scottish context, the most 'conditional' legislative consent motion so far is probably that passed on the Scotland bill in the third Parliament. A complex legislative framework was used to deal with questions of liability for human rights abuses arising from 'slopping-out' in Scottish prisons, following the *Somerville* judgment.

c. *Ensuring that consent is given to Westminster legislation in its final form, not that in which it is introduced.* Usual practice for Scottish legislative consent motions (set out in DGN 10) is for the motion to be considered and approved at Holyrood before the second reading debate in the first House considering the bill at Westminster. This obviously makes it impossible for the consent to relate to the final form of legislation, which is likely to be amended significantly before it is finally passed. Some sort of mechanism to identify amendments relating to devolved matters, and to ensure that these are considered by the Assembly before they are passed into law.

d. *The status of the Sewel convention itself.* At present, the foundation of the Sewel convention is Lord Sewel's statement in Parliament when it was first mentioned, and the Memorandum of understanding – an agreement between governments. In my view, it would be desirable for the convention to have a stronger basis at Westminster, such as endorsement as by a resolution of the two Houses. That is obviously a matter for Parliament. However, the Assembly itself might wish to endorse the convention, and set out what it considers it means and what action the Welsh Government should take to comply with it. That would serve as an authoritative direction to the Welsh Government about what it needs to do to address these issues in future.

*e.* *Ensuring that legislative consent motions receive an appropriate degree of scrutiny.* Some legislation that is subject to a legislative consent motion will be technical in nature, or attract a motion because its impact on devolved matters or powers is minimal. The amount of consideration these need will be different to those that raise issues of political controversy or raise important constitutional issues. Moreover, views may differ about whether a particular motion or bill is controversial, politically or constitutionally. To resolve those effectively, some sort of winnowing process is necessary, and such a winnowing should take place in the Assembly rather than depend on the assessment of the Welsh Government. This committee might well be an appropriate forum for that task.

Alan Trench
21 October 2011

# DEVOLUTION GUIDANCE NOTE 9: POST-DEVOLUTION PRIMARY LEGISLATION AFFECTING WALES

**SUMMARY**

- **The Government of Wales Act 2006 ("the 2006 Act") creates, from May 2007, a separate legislature, the National Assembly for Wales, and executive, the Welsh Assembly Government. The Act provides for a procedure for Parliament to confer legislative competence on the National Assembly for Wales by Order in Council. This will allow it to pass legislation, known as Assembly Measures, which can do anything an Act of Parliament can do within the general constraints set out in the Act, and within the scope of the particular legislative competence granted. Devolution Guidance Note [16] sets out the procedure for conferring legislative competence on the National Assembly for Wales by Order in Council.**

- **The White Paper 'Better Governance for Wales' set out the policy that *"The Government intends for the future to draft Parliamentary Bills in a way which gives the Assembly wider and more permissive powers to determine the detail of how the provisions should be implemented in Wales"*, which remains the case. This note includes guidance on changing the Assembly's legislative competence by 'framework' provisions in Parliamentary Bills.**

- **The Memorandum of Understanding between the UK Government and the Devolved Administrations (MoU) says: *"The United Kingdom Government retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power. However, the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government."***

- **This Convention applies when, under normal circumstances, Parliamentary Bills make provision specifically on matters within the areas where the National Assembly for Wales has legislative competence or the Welsh Ministers have functions. It does not apply when Bills deal with such matters only incidentally to, or consequentially upon, provision made in relation to a non-devolved matter. In these circumstances, the Welsh Assembly Government and Wales Office should nevertheless be consulted .**

- **The Convention relates to Bills being put before Parliament, but Departments should approach the Welsh Assembly Government on the same basis for Bills being published in draft, even though there is no formal requirement to do so. It should be followed for Private Member's Bills to be supported by the UK Government.**

- **The Secretary of State for Wales has overall responsibility for Welsh specific provisions in the UK Government's legislative programme, and is a member of the Legislative Programme Committee to represent Welsh interests.**

**Introduction**

1} The UK Parliament retains its sovereignty and right to legislate on any matter after devolution. However, the establishment of devolved institutions in Scotland and Wales has created, under the Scotland Act 1998 and the Government of Wales Act 2006, delegated bodies with the power to promote legislation with the force of Acts of the UK Parliament. In order to respect the competence of those bodies under a sovereign Parliament, the UK Government has committed in the Memorandum of Understanding between it and the devolved institutions, not normally ask Parliament to legislate within the competence of those bodies without the agreement of those bodies. The implementation of the Government of Wales Act 2006 therefore places new responsibilities upon Whitehall Departments to consult the Welsh Assembly Government, to obtain the agreement of the Welsh Ministers in certain circumstances and to only proceed with certain provisions in Parliamentary Bills if the National Assembly for Wales agrees to their inclusion. For description of the key elements of the Government of Wales Act 2006 see annex 2.

2} This note sets out guidance for Whitehall Departments on arrangements for managing new legislation affecting the responsibilities of either the National Assembly for Wales or the Welsh Assembly Government. It sets out the expectations of the Cabinet Committee on the Legislative Programme (LP) in giving effect to this policy and how to manage it to ensure smooth running of the UK Government's legislative programme. LP expects devolution issues to be resolved by the time a Bill is brought before the Committee prior to its introduction into Parliament.

3} This note is not concerned with the process by which the Welsh Assembly Government is consulted about policy. Arrangements for this are set out in the MoU, the agreement on Common Working Arrangements (**Devolution Guidance Note 1**) and the bilateral concordats between Whitehall Departments and the Welsh Assembly Government.

4} The UK Government has agreed with the Welsh Assembly Government that they will normally consult each other from an early stage on the development of relevant legislative proposals, in confidence where necessary (**see Devolution Guidance Note 1 *Common Working Arrangements*, which should be read separately, in particular paragraphs 30-35).** Departments should make clear when information is being passed in confidence.

5} This note does not extend to legislation which deals with emergencies or is similarly exceptional.

6} Guidance on the role of the Secretary of State for Wales, including in relation to primary legislation, is given in Devolution Guidance Note 4 ***The Role of the Secretary of State for Wales.*** The Secretary of State has overall responsibility for Welsh provisions in the UK Government's legislative programme, as well as for constitutional and devolution policy as it applies to Wales. The Secretary of State for Wales is a member of LP and represents Welsh interests in this respect, regardless of which Department may be sponsoring any particular piece of legislation. Accordingly, the Wales Office needs to be involved at all stages in legislation relating to Wales. Section 33

of the Government of Wales Act 2006 places a duty on the Secretary of State for Wales to consult the National Assembly for Wales after the beginning of each Parliamentary Session on the UK Government's legislative programme and on non-programme Bills agreed for introduction subsequently (unless there are considerations relating to the Bill which make such consultation inappropriate). The consultation must include a personal attendance by the Secretary of State for Wales at Assembly proceedings, and provides an opportunity for the Assembly to consider the content of individual Bills, in addition to the UK Government's choice of priorities.

**General**

7} In general:

- The MoU indicates that there will be consultation with the Welsh Assembly Government on policy proposals affecting devolved matters whether or not they involve legislative change.
- Where the possibility of particular legislation has not been publicly announced, information going to the Welsh Assembly Government should be passed in confidence. The Welsh Assembly Government will not circulate or allude to Bill material without the consent of the lead Whitehall Department. Additional guidance on confidentiality is given in paragraph 11 of the MoU agreed between the UK Government and the devolved administrations. It is for the administration providing the information to stipulate restrictions on usage. Where such restrictions constrain wider consultation by the Welsh Assembly Government, the duty of confidentiality might extend to other bodies to be consulted, subject to the agreement of the sponsoring Department.
- When primary legislation is prepared by Whitehall Departments, consideration should be given to what arrangements may be required for Wales. The 2006 Act provides for the Assembly's legislative competence to build up incrementally over time, so in many cases, and particularly in the early years, the Assembly will not have the legislative competence to make its own provision for Wales. It is therefore important for Departments to consult the Wales Office and Welsh Assembly Government about all relevant proposals for primary legislation, so that suitable vehicles can be identified. This is particularly important during the bidding stages, to inform the bid from the Secretary of State for Wales for forthcoming programmes.
- Whitehall Departments will in practice deal with the Welsh Assembly Government. Departments should approach the Welsh Assembly Government to gain the consent of the National Assembly for Wales to legislation when appropriate. It will be for the Welsh Assembly Government to indicate the view of the National Assembly for Wales when appropriate and to take whatever steps are required to ascertain that view. Departments should also liaise closely with the Wales Office.
- Whether the consent of the National Assembly for Wales on the one hand, or the Welsh Assembly Government on the other, is needed depends on the nature of the provision in question. The UK

Government's commitments are set out fully at paragraph 17 of this note. Departments should consult the Welsh Assembly Government and the Wales Office on changes in devolved areas of law which are incidental to or consequential on provisions made for non-devolved purposes; the consent of the Assembly is not needed in these circumstances.

- Departmental legal advisers or the Wales Office should be consulted if you are in any doubt about whether a proposal relates to a devolved matter. On some occasions there may be a different opinion about whether devolved matters are affected, and it is always advisable to consult your Departmental legal advisers, as well as the Wales Office and the Welsh Assembly Government, about these issues at an early stage in developing proposals for legislation.

**Legislative planning**

8} From May 2007, the legislative competence of the National Assembly for Wales will be much more limited in scope than the executive functions of the Welsh Ministers[1]. This is a direct consequence of the unique nature of the Welsh devolution settlement.

9} The National Assembly now has powers to pass Measures in relation to certain education matters and NHS redress. The 2006 Act also confers the power to pass Measures in relation to the operation of the Assembly itself. However as more matters are added to fields within schedule 5, there will be an increasing number of areas where legislation in relation to Wales could be passed either by Parliament or by the Assembly. In such cases the normal expectation is that the Assembly would legislate in relation to Wales. It is however possible that the Welsh Assembly Government will wish to take the opportunity to include provisions in a relevant Parliamentary Bill, rather than promoting a separate Assembly Measure. Such provisions should be included in a Bill at introduction in the UK Parliament.

10} In considering proposals for primary legislation from 2007-08 onwards, therefore, Departments will need to consider whether anything that is proposed for inclusion in a Bill would in fact be within the legislative competence of the Assembly, or would have a negative effect on that competence. This should emerge clearly from early consultation with the Welsh Assembly Government and the Wales Office. It will also be possible at all times to see what the Assembly's legislative competence covers, since it will be defined by the latest version of Schedule 5. This will be available on the Wales Office website (www.walesoffice.gov.uk) and Welsh Assembly Government (new.wales.gov.uk).

[1] Except where otherwise indicated, references to the Welsh Ministers should be taken as including reference to the First Minister and Counsel General, where they have functions conferred on them individually.

11} The arrangements set out below recognise that the Welsh Ministers' functions will for some time to come extend into areas outside the Assembly's legislative competence. Under the 2006 Act, the Assembly can seek legislative competence in those areas where Welsh Ministers exercise functions, and the arrangements set out below reflect that aspect of the Welsh devolution settlement.

12} There may however be some limited areas where the Welsh Ministers exercise functions, which remain the responsibility of the UK Government, for Wales as well as for England, in relation to which the Assembly could not seek legislative competence. The 2006 Act has flexibility to allow new fields to be added to Schedule 5, either by a UK Bill or by an Order in Council, and the Assembly could then seek legislative competence in relation to those fields in the same way as for the existing fields. As noted at paragraph 3.26 of the Better Governance for Wales White Paper, however, this flexibility would not extend to:

> *"those subjects which remain the responsibility of Whitehall Departments for Wales as well as for England. Like Scotland, these would include Fiscal and Monetary Policy, Immigration and Nationality and Social Security. Also excluded would be fields where the Scottish Executive, and the Secretary of State for Scotland before devolution, have functions but the Assembly does not, such as civil and criminal law, the administration of justice, police and the prison service."*

13} Provisions relating to such areas will remain a matter for the UK Government, regardless of whether a Welsh Minister exercises functions within them or not. Accordingly, the consent of Welsh Ministers to changes to their functions within such areas is not required, although they should be consulted. Departments should always consult Wales Office lawyers for a legal view on whether provisions fall into this category if there is any doubt.

14} By the same token, there will still be many areas where the Assembly does not have legislative competence and where the Welsh Assembly Government will want to seek enabling powers in the UK Government's legislative programme. These could either confer executive functions on the Welsh Ministers, or be 'framework' powers conferring legislative competence on the National Assembly for Wales, or both. There could also be provisions directly implementing a Welsh Assembly Government policy in Wales' although these are now less likely. These could be contained in Wales specific legislation, or in other appropriate Parliamentary Bills. Proposals for the inclusion of provisions in Parliamentary Bills from the Welsh Assembly Government need to be copied to the Wales Office from the outset, and the Wales Office will remain responsible for bidding for Welsh provisions in Bills in forthcoming legislative programmes. In the case of executive functions, or

detailed policy implementation through legislation, the inclusion of such provisions will be agreed in the normal way.

15} For 'framework' powers in Bills, it is important to recognise that they will confer legislative competence on the Assembly by amending Schedule 5 to the 2006 Act, in exactly the same way as Orders in Council conferring such legislative competence under the 2006 Act. Such provisions are consistent with UK Government policy set out in the second bullet point of the summary. As with proposed Orders in Council, the UK Government will need to agree the appropriateness of conferring such legislative competence, and in particular its scope and limits. Accordingly the letter to the relevant Cabinet committee seeking policy clearance for the Bill will need an explicit section on Welsh provisions headed **"Framework Powers for Wales – Scope and Limits and Exceptions".** Framework powers will have to fit within the scope of the legislative vehicle, and it would not be appropriate for the scope of a Bill to be widened simply to accommodate the scope of a proposed framework power. Exceptions are common place and care needs to be exercised to ensure that the legislative competence being conferred does not exceed the executive functions Welsh Ministers already have. When seeking policy clearance for a framework power in a Bill, to assist UK Government Ministers in forming a view as to the appropriateness of the National Assembly for Wales having the power the bid needs to be accompanied by an explanatory memorandum giving a clear description of the purpose for which the power is being sought.

16} As proposed Orders in Council will require policy agreement with all relevant Whitehall Departments, so will framework powers in Bills. The Wales Office has overall responsibility for managing this process for the UK Government. If Departments who are sponsoring Bills which will include a Welsh framework clause would prefer, the Wales Office will ensure that consistent policy agreement is secured. Because such provisions will not contain the legislative detail to deliver Welsh Assembly Government policy a template explanatory memorandum for such provisions has been agreed with the Welsh Assembly Government, which mirrors the explanatory memoranda which will accompany the Orders in Council. Once again, the Wales Office can manage or advise on the production of required supplementary information in the proper format.

17} The Welsh Ministers and the Assembly have executive and legislative competence respectively in certain areas. It therefore follows from the commitment made by the UK Government in the MOU that it will not normally seek to legislate in relation to those matters without the agreement of the devolved institutions. For the purposes of the Welsh devolution settlement Parliamentary Bills can include provisions in relation to Wales for a range of purposes. The different purposes are described here, together with the agreements that will normally be required in each different case:

- *Provisions that modify, impose, confer, remove, or otherwise affect functions of Welsh Ministers.* The consent of the Welsh Ministers should be obtained, through normal consultation between the UK and Welsh Assembly Government, by the time a Bill is considered by LP. **There is an exception to this** which is described in detail in paragraph 12 and 13 above, relating to areas where Welsh Ministers exercise

functions, but which lie outside the areas where legislative competence could be conferred on the National Assembly. In these circumstances, Welsh Ministers should be consulted but consent is not required.

- *Provisions that add to the legislative competence of the Assembly* The consent of the Welsh Ministers should be obtained, through normal consultation between UK and Welsh Assembly Governments by the time a Bill is considered by LP. The consent of the National Assembly for Wales is not required.
- *Provisions that have a negative effect on the legislative competence of the Assembly or which is on matters within the legislative competence of the Assembly*:

  The Welsh Ministers will need to obtain the consent of the Assembly. By the time a Bill is considered by LP agreement must be reached with Welsh Ministers to promote the relevant motion in the National Assembly for Wales as soon as possible after introduction. In the event that the motion was not passed in the National Assembly, the UK Government would, subject to collective agreement being secured, need to table an appropriate amendment removing the relevant provisions before the Bill reaches its final stage in the House of introduction. The Welsh Ministers will need to have regard to these timing requirements in tabling their motion. The same will apply if any significant amendments are made to the relevant provisions during a Bill's passage. The Wales Office will work with the Welsh Assembly Government to facilitate any consents required.
- *Provisions within the Assembly's legislative competence which are purely supplementary, consequential, incidental, transitional, transitory or saving provisions relating to provisions on non devolved matters.* The Welsh Ministers should be consulted, but consent is not required. Departments should consult the Wales Office for a view on whether provisions fall into this category.
- *These consent requirements also apply where UK Ministers have the power to amend primary legislation by Order[2] and it is proposed to make an Order which would have any of the effects set out in the four bullet points above.* Constraints and restrictions are not normally placed on the scope of order making powers in the primary legislation which is conferring those powers, nor may it be possible to assess in advance when Orders made under such powers would fall within the ambit of this guidance note. Therefore, when UK Ministers are proposing to make such an Order, they will be expected to have regard to ensuring that the policy commitments set out here are observed in those Orders as they would be in primary legislation. Where a Bill would confer wide-ranging powers on UK Ministers to amend primary legislation by Order, Departments should pay particular attention to how those provisions would interact with the functions of Welsh Ministers and the legislative competence of the National Assembly.

[2] In this paragraph, "order" includes any type of subordinate legislation.

18} The series of consents described above applies in normal circumstances. It does not apply in relation to emergency legislation or legislation that is otherwise exceptional.

**Preparation of Bills and Submission to LP**

19} LP Committee expects all devolution issues to have been resolved by the time the Committee considers whether the Bill should be introduced. This means that, if provisions require the agreement of the Welsh Ministers, agreement with the Welsh Ministers has been reached, and that, in instances where the agreement of the National Assembly for Wales is required, that the Welsh Ministers have agreed to promote the relevant motion in the Assembly. Papers for LP must contain a statement to that effect. In addition papers to LP should:

- Briefly state the effect of the Bill in Wales and whether matters are within devolved competence or matters for UK Ministers or the UK Parliament.
- Briefly identify all agreements and consultations that may be required, both with the Welsh Ministers and the National Assembly for Wales, and within the UK Government, and confirm that they have been secured. The Secretary of State for Wales will be asked to confirm this at LP, so it is essential that the Wales Office is fully involved in the process of reaching these agreements.

20} There should, in addition to any earlier policy discussions, also be consultation with the Welsh Assembly Government as part of the process of formulating instructions to Parliamentary Counsel where these touch on the Welsh Ministers' or Assembly's responsibilities, so that their interests are understood from the outset and any dispute resolution process undertaken in good time.

21} An arrangement that has proved effective in the past is for Welsh Assembly Government lawyers to provide a draft of instructions for the lead Whitehall Department and the Wales Office to approve and then pass on to Parliamentary Counsel. In some cases, it may be appropriate for Parliamentary Counsel to take instructions direct from the Welsh Assembly Government lawyers; but this should be done only where it is the most effective way of operating and the lead Whitehall Departments and their Ministers agree to this arrangement. Instructions sent directly to Parliamentary Counsel in this way still require the active assent of the UK Government - instructions going directly from WAG lawyers to Parliamentary Counsel Office must always begin with a statement that they have been cleared with the Wales Office and lead Department, who will seek on each occasion to take a unified HMG view, rather than requiring two separate departmental clearance procedures, but with the proviso that instructions are always copied to those Departments. Each separate instruction will require such a statement, and subsequent rounds of instructions will also need to be authorised, particularly where those revisions change policy, or include new policies. Framework clauses will continue to require Wales Office authorisation and clearance.

22} Where Departments are sponsoring Bills which act as vehicles for Welsh provisions requested by the Welsh Assembly Government, Welsh Assembly Government support will be essential in order to ensure the smooth passage of the Bill, in relation to the Welsh specific provisions. It is recommended that a standard Service Level Agreement be put in place as soon as clearance to include the Welsh provisions in the Bill is obtained. The Wales Office has overall responsibility for the mechanics of the Welsh devolution settlement so can manage this on behalf of sponsor Departments, if they prefer.

23} Consultation with the Welsh Assembly Government can be facilitated if Departments ensure that Bill material accurately distinguishes between the Welsh Ministers and the National Assembly for Wales . Annex 1 to this note lists some of the main aspects of this. While this is not prescriptive, and is no substitute for detailed discussions, it should ensure that such discussions can focus on any substantive sticking points and are not dominated by relatively minor and technical matters.

**Bills Published for Pre-Legislative Scrutiny and Private Members Bills**

24} The procedures described above should also be followed for Bills being published in draft. The same procedures should be followed for a Private Member's Bill, if the UK Government intends to support it.

**During the passage of legislation**

25} During the passage of legislation, the Welsh Assembly Government will provide full support to UK Ministers, as required and on request. If the UK Government proposes to amend a Bill or to accept an amendment, similar arrangements will apply if the amendment falls within devolved competence. Departments should approach the Welsh Assembly Government and Wales Office about such amendments. The Welsh Assembly Government can be expected to recognise the exigencies of the legislative timetables, for example when forced to consider accepting amendments at short notice. All amendments require at least LP clearance. Amendments that change policy or contain new policy will also require policy clearance. If the Welsh Assembly Government is unable to agree how to proceed with the Amendment in the time required the UK Government will be obliged to proceed to meet legislative deadlines, and will act accordingly.

26} Provided that the arrangements set out here have been observed, Ministers resisting non-Government amendments which fall within devolved competence, or Welsh specific provisions within Bills, will be defending provisions which have already obtained the consent of the National Assembly for Wales or Welsh Ministers.

## ANNEX 1

### Referring to the National Assembly for Wales and the Welsh Assembly Government in primary legislation

I. The following checklist aims to cover some largely technical points in referring to the Assembly and Welsh Assembly Government in UK Government Bills. It is neither exhaustive nor prescriptive. However, it should serve as a useful aide-mémoire for Departments and should minimise the need for discussions with Welsh Assembly Government officials to be dominated by relatively minor issues such as these.

### Nomenclature

II. Parliamentary Counsel will judge the most suitable way of referring to the National Assembly for Wales, or the Welsh Assembly Government, in a Bill, for example by their formal titles, or by a short title such as "the National Assembly", “the Assembly Government”. However, the term "Welsh Assembly" is always to be avoided.

III. The Government of Wales Act 2006 contains a definition of "Wales", which includes the sea around Wales to a distance of 12 nautical miles. Where a Bill confers functions on the Welsh Ministers or confers legislative competence on the Assembly which could be exercised in relation to the sea or to maritime activities, it should thus normally use the definition of Wales in section 158 of the Government of Wales Act 2006.

### Functions in a Bill

IV. Executive functions should normally be conferred on “the Welsh Ministers”, as the collective term for the First Minister and Welsh Ministers (the Cabinet of the Welsh Assembly Government). It is also possible for functions to be conferred exclusively on the First Minister or on the Counsel General, but this will only be in circumstances where there is a particular reason for doing so. They should not be conferred on “the Welsh Assembly Government”.

V. Commencement provisions in a Bill (i.e. the means by which it comes into force) should normally apply on equal terms to England and Wales, and to UK Ministers and the Welsh Ministers. Again, proposed departures from these two presumptions should be discussed at an early stage in the pre-legislative process.

VI. While it remains possible to confer functions on the Welsh Ministers by means of a Transfer of Functions Order under section 58 of the Government of Wales Act 2006, newly created Ministerial functions should normally be conferred directly on the Welsh Ministers by primary legislation. To do otherwise can increase the amount of Parliamentary time needed (by requiring Parliament to consider the Order as well as the Bill) and potentially misleads as to the UK Government's intentions (since

Parliament will assume the functions are not being conferred on the Welsh Ministers).

**Statutory procedures**

VII. The procedures for the Welsh Ministers to make subordinate legislation will be similar to those applying to UK Ministers, with the Assembly in a similar position to Parliament with respect to powers to approve or annul statutory instruments. Bills conferring subordinate legislation powers on the Welsh Ministers will need to be clear whether they are to be subject to affirmative, negative or no procedure in the Assembly. Welsh Assembly Government lawyers can advise as to drafting precedents.

VIII. A Bill should not normally subject the actions of the Welsh Ministers to UK Ministerial consent or approval (or vice versa), apart from certain functions which require the consent of HM Treasury. Exceptions to this should be explored as early as possible in the pre-legislative process.

IX. Where there is a requirement for UK Ministers to consult the Welsh Ministers before acting (or vice versa), this should normally be included in legislation rather than in a concordat.

**New public bodies**

X. The Welsh Assembly Government should be consulted at the earliest possible stage over any proposals to create new public bodies relating to its functions in Wales, since it may wish to adopt a different solution to suit Welsh circumstances. In such cases, depending on the timescales involved, it may be more appropriate to consider provision to grant the Assembly the legislative competence which would enable the Welsh Ministers to bring forward their own legislative proposals for consideration by the Assembly.

Where the Welsh Ministers will be wholly or partly responsible for public bodies and offices, these should have statutory titles in Welsh and English (e.g. "There is to be a body corporate called [title of body in English] or, in Welsh [title of body in Welsh]". Welsh Assembly Government officials will be able to advise on a suitable Welsh title.

XI. A new public office should only disqualify its holder from membership of the Assembly where that would cause an unavoidable conflict of interest with the Assembly's responsibilities. Disqualification from membership of the House of Commons does not always give rise to disqualification from the Assembly. Disqualification should generally be left to an Order in Council under section12(1)(b) of the Government of Wales Act 1998 (or, for elections after May 2007, under section 16 (1) (b) of the Government of Wales Act 2006).

XII. New public bodies which fall solely under the Welsh Ministers' control should normally be subject to their general powers to reform public bodies in Wales (Government of Wales Act 1998, section 28 and Schedule 4,)

these powers will remain in force and become powers of the Welsh Ministers by virtue of the transitional provisions in the Government of Wales Act 2006). A Bill should also normally provide for records of such a body to be Welsh public records (Government of Wales Act 2006, sections 146 and 148).

XIV. Where the Welsh Ministers are to be wholly responsible for a new body, they should have the power to determine the form of that body's accounts, subject to Treasury consent.

XV. Bills should provide that the Auditor General for Wales ("AGW"), and not the Comptroller and Auditor General, is to be responsible for auditing the accounts of any body which reports solely to the Welsh Ministers or to the National Assembly for Wales.

XVI. Where the AGW audits a body's accounts, s/he should also have the power to conduct "value for money" examinations into that body.

**Consultations and Statements of Policy**

XVII. Much primary legislation for Wales will continue to be included in England and Wales Bills, although it may well contain distinctive Welsh provisions. To avoid misunderstanding on the part of readers, therefore, any consultation document, White Paper, or other statement of policy relating to legislation should make it clear whether the legislation will contain powers for the Assembly to pass its own Measures in relation to Wales.

XVIII. Wording should be agreed with the Wales Office and Welsh Assembly Government officials on a case by case basis, but the essence of the statement in relation to Wales might be:
*"we intend to ask Parliament to grant the National Assembly for Wales legislative competence over a number of matters within the field of [eg: local government]. This will allow the Assembly to pass Measures appropriate to the situation in Wales."*

XIX. In general, the inclusion of a brief statement of this kind will not require that the document be published jointly with either the Welsh Assembly Government or the Wales Office. Whether a Welsh language version is required will be a matter for the lead Whitehall Department to consider in line with the requirements of its own Welsh language Scheme.

**Contact details**

XX. If you have any queries, please contact:

• Head of Legislation and Strategic Policy Branch, Wales Office: 029 20 898048

• Deputy Director of the Wales Office: 029 20 898483

**Ministry of Justice (Last updated – June 2007)**

**ANNEX 2**

This annex provides a brief explanation of the component parts of the Government of Wales Act 2006, how they interrelate to confer enhanced legislative competence on the National Assembly for Wales, and how it can be exercised.

## 1. Schedule 5

Schedule 5 of the Government of Wales Act 2006 will define the scope of the Assembly's legislative competence, within areas where the Welsh Ministers exercise executive functions. Schedule 5 categorises the existing areas of policy responsibility devolved to the Welsh Assembly Government into 20 broad areas. These areas, called Fields, include subjects such as Housing, Education & Training and the Welsh Language.

These Fields will be populated with Matters either by Orders in Council made under Part 3 of GOWA 06 or through framework power provisions in UK Bills. (see below) The Matters will define the legislative competence for the Assembly to make legislation, similar to Acts of Parliament. Matters can only be added if they relate to one or more of the Fields.

Part 2 of Schedule 5 sets out some general restrictions on the Assembly's legislative competence while Part 3 of Schedule 5 sets out exceptions to those restrictions. These provisions mean that the Assembly will not be able to modify functions of Ministers of the Crown (ie non-devolved functions) without the consent of the Secretary of State, even if they lie within the scope of a matter over which it has legislative competence. This means that, where there are isolated Minister of the Crown functions within subjects which are generally "devolved", the protection of those functions need not be expressed by a specific reservation.

## 2. Framework powers

Framework powers are one of two legislative vehicles which insert Matters conferring legislative competence into the Fields in Schedule 5 of the Government of Wales Act. The concept of Framework Powers was set out in the Better Governance for Wales White paper in 2005. Framework Powers were included in two UK Acts prior to the full implementation of GOWA 2006. These were NHS Redress Act 2006 and the Education and Inspections Act 2006. They continue to be a valid way for the Welsh Assembly Government to seek legislative competence when appropriate legislative vehicles are available.

Framework Powers take the form of Wales Only clauses in Government Bills. They give the Assembly "wider and more permissive powers to determine the detail of how the provisions should be implemented in Wales". That detail will be contained in Assembly Measures and any subordinate legislation made under them.

**3. Orders in Council**
Orders in Council are the second of the legislative vehicles which insert Matters confirming legislative competence into the Fields in Schedule 5 of the Government of Wales Act.

The Welsh Assembly Government will normally seek to agree the terms of the Order in Council with the UK Government at two stages: before pre-legislative scrutiny stage in both the Assembly and in Parliament; and before the final (unamendable) draft Order is laid before Parliament for approval.

Devolution Guidance Note 16 will set cover this process.

4. **Assembly Measures**
Assembly Measures are a new category of legislation that will be made by the National Assembly without reference to Parliament. Once legislative competence has been transferred to the Assembly for a particular Matter under one of the Fields in Schedule 5, the Welsh Assembly Government will be able to bring draft Measures, which can amend existing Acts and make new provisions, before the National Assembly for Wales. The National Assembly's arrangements for scrutinising and approving Assembly Measures will be a matter for the Assembly itself and are set out in its Standing Orders, subject to minimum requirements set out in the Act.

**5. Schedule 7**
Schedule 7 will define the primary legislative competence of the National Assembly for Wales in the event of a successful referendum to that effect. If a subject is not listed, it will not be within the Assembly's legislative competence. The Schedule also contains general restrictions and exceptions to those restrictions. In particular, the Assembly will not be able to legislate so as to modify any Minister of the Crown function without the consent of the Secretary of State. This means that, where there are isolated Minister of the Crown functions within subjects which are generally "devolved", the protection of those functions need not be expressed by a specific reservation.

6. **Assembly Acts**
Following a successful referendum, when Schedule 7 comes into force, the Assembly will be able to pass Assembly Acts on anything within the scope of the legislative competence set out in Schedule 7, subject to the restrictions in that Schedule, and in the Government of Wales Act.

**Devolution Guidance Note 10**

**Post – Devolution Primary Legislation affecting Scotland**


**SUMMARY**

- **The Government announced on 21 July 1998:**

  **"we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament."**

  **This is now stated in the Memorandum of Understanding with the Devolved Administrations.**

- **The convention applies when legislation makes provisions specifically for a devolved purpose. It does not apply when legislation deals with devolved matters only incidentally to, or consequentially upon, provision made in relation to a reserved matter, although it is good practice to consult the Scottish Executive in these circumstances.**

- **The convention relates to Bills before Parliament, but departments should approach the Scottish Executive on the same basis for Bills being published in draft, even though there is no formal requirement to do so.**

- **The same procedures should be followed for Private Member's Bills to be supported by the Government.**

**Introduction**

1. This note sets out guidance for UK Government departments on handling legislation affecting Scotland. The Government announced on 21 July 1998 *"we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament"* (Lords Hansard col 791). This is now stated in the Memorandum of Understanding (MoU) with the devolved administrations and the Commons Procedure Committee has indicated its support for the convention. The convention applies when legislation makes provision specifically for a devolved purpose (see below); it does not bite when legislation deals with devolved matters only incidentally to, or consequentially upon, provision made in relation to a reserved matter. This note sets out how Legislative Programme Committee expects departments to give effect to this policy intention, while ensuring the smooth management of the Government's legislative programme. The note does not extend to legislation which deals with emergencies or is similarly exceptional.

**General**

2. In general:

   - the MoU indicates that there will be consultation with the Scottish Executive on policy proposals affecting devolved matters whether or not they involve legislative change;

   - although the convention refers to the Scottish Parliament, UK departments will in practice deal with the Scottish Executive. Departments should approach the Executive to gain consent for legislation when appropriate. It will be for the Scottish Executive to indicate the view of the Scottish Parliament and to take whatever steps are appropriate to ascertain that view.

   - whether consent is needed depends on the purpose of the legislation. Consent need only be obtained for legislative provisions which are specifically for devolved purposes, although Departments should consult the Scottish Executive on changes in devolved areas of law which are incidental to or consequential on provisions made for reserved purposes.

   - always consult your Legal Adviser and the Scotland Office if you are in any doubt about whether a proposal may trespass on devolved matters. Do not assume that the Scottish Executive will necessarily share your view about where the boundaries lie as between reserved and devolved matters; and always consult Legal Advisers, including the Office of the Solicitor to the Advocate General (OSAG), and the Scottish Executive about these issues at an early stage in developing proposals for legislation.

3. Departments bringing legislative proposals to LP committee will be expected to address the need for consultation or consent as described in the following paragraphs.

**Long-term legislative plans**

4. Any submission to LP for the inclusion in a future legislative programme of a particular Bill should state clearly that the proposed Bill:

   I. either does not apply to Scotland at all; or has provisions which apply to Scotland but, in the words of the Scotland Act 1998, "relate to" reserved matters and do not alter Scots law on non-reserved matters;

   II. has provisions applying to Scotland and relating to reserved matters, but also contains provisions which make incidental or consequential changes

to Scots law on non-reserved matters (i.e. which are for reserved rather than devolved purposes); or

III. contains provisions applying to Scotland and which are for devolved purposes, or which alter the legislative competence of the Parliament or the executive competence of the Scottish Ministers.

In determining whether provisions of a Bill are for devolved purposes, departments should have regard to the legislative context of the Bill as a whole.

5. Where necessary, the paper should indicate what proportion of a proposed Bill falls into each category.

6. Only Bills with provisions in category III are subject to the convention requiring the consent of the Scottish Parliament. (Although the main thrust of a Bill may be directed at reserved matters it may nevertheless contain some provisions in this category.) At LP, the responsible Minister should say whether he or she expects that the Scottish Executive and Parliament will agree to any such provisions.

7. Bills in category I or in category II do not require the consent of the Scottish Parliament. However the effects on non-reserved matters, including incidental or consequential modifications to the law, will in some cases be significant. LP will expect departments to have plans for consultation with the Scottish Executive in accordance with the MoU and the relevant bilateral concordats. Such consultation may be undertaken in confidence, and the Scottish Executive can be expected to respect any such confidence.

**Bills ready for introduction**

8. The essential requirement is that by the time proposals reach LP devolution related issues have been substantively resolved. Papers for LP are already required to contain a statement to that effect. Papers for LP should also identify the clauses which fall into each of the categories above.

9. If a Bill has provisions in category III:

I. where the provisions are of major significance in the Bill, there should have been prior consultation with the Scottish Executive on these and the LP paper should indicate that it will be possible to confirm at Second Reading that the Scottish Parliament has consented;

II. where the provisions are less significant, seeking consent need not hold up the Bill's progress at Westminster. The aim in such cases should be for consent to be obtained by the time those clauses are debated in committee, and the absolute deadline will be the last opportunity for them to be amended while the Bill is still before Parliament.

10. The paper should also:

- identify any provisions which will change the legislative competence of the Scottish Parliament and the policy clearance for such provisions; and

- identify any provisions that will change powers or functions of the Scottish Ministers, for example to give them regulation making or other powers, and the policy clearance for the change.

11. If a Bill has provisions in category II, or which would have a significant effect on devolved matters, the paper should indicate what consultations there have been with the Scottish

Executive or what plans there are for such consultation. The paper should indicate the outcome of any reference to the Joint Ministerial Committee or alternative dispute-resolution arrangements.

12. Finally, LP papers should say whether there are any potential amendments where the consent of the Scottish Parliament might have to be sought or which might prove controversial there.

**Draft Bills**

13. The convention relates to Bills before Parliament, but departments should approach the Scottish Executive on the same basis for Bills being published in draft. There is, however, no requirement to seek consent of the Scottish Parliament before publishing a draft. It may sometimes be helpful for the consent of the Scottish Parliament for a Bill to be sought on the basis of a (published) draft.

**Private Members' Bills**

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

15. Departments should consult the Scottish Executive at an early stage about any Private Members' Bill that they are minded to support containing provisions in category III. The aim should be for consent to be obtained by the time of Commons Committee stage. Before then, the Government may need to reserve its position pending consent, particularly if the Bill was introduced in the House of Lords. Departments seeking clearance to oppose a Private Members' Bill in category III on policy grounds need only consult the Scottish Executive if the Bill has a substantial effect on devolved matters. It is possible that Private Members will claim to have themselves obtained the consent of the Scottish Parliament for such a Bill and rely on this as an argument in favour of the Bill.
16. Even if there are not UK policy grounds for opposing such a Bill, the Government will resist the provisions on devolved matters if Scottish Ministers indicate that the Scottish Parliament has not given its consent, and will move any necessary amendments at Commons Committee or Report stage.

17. In line with the MoU and concordats, there should also be early consultation with the Scottish Executive where a department proposes to support a Private Members' Bill with provisions in category II or which would have a significant effect on devolved matters.

**During the passage of legislation**

18. During the passage of legislation, departments should approach the Scottish Executive about Government amendments changing or introducing provisions requiring consent, or any other such amendments which the Government is minded to accept. It will be for the Scottish Executive to indicate the view of the Scottish Parliament. No consultation is required for other amendments tabled. Ministers resisting non- Government amendments should not rest solely on the argument that they lack the consent of the Scottish Parliament unless there is advice to that effect from the Scottish Executive.

19. The Scottish Executive can be expected to deal swiftly with issues which arise during the passage of a Bill, and to recognise the exigencies of legislative timetables (eg when forced to consider accepting amendments at short notice). Nevertheless since the last opportunity for amendment is at Third Reading in the Lords or Report Stage in the Commons the absence of consent should not be a bar to proceeding with the Bill in the interim.

Cynulliad Cenedlaethol Cymru
National Assembly for Wales

**Constitutional and Legislative Affairs Committee**

**Report: CLA(4)-08-11 : 17 October 2011**

**The Committee reports to the Assembly as follows:**

**Instruments that raise reporting issues under Standing Order 21.2 or 21.3**

**Negative Resolution Instruments**

**CLA46 - The Local Inquiries, Qualifying Inquiries and Qualifying Procedures (Standard Daily Amount) (Wales) Regulations 2011**
**Procedure:** Negative.
**Date made:** 3 October 2011
**Date laid**: 4 October 2011
**Coming into force date**: 1 April 2012

The Committee agreed the Report under S.O.21.3 on this statutory instrument, which is attached as Annex 1.

**Committee Correspondence**

**CLA20 - The Beef and Pig Carcase Classification (Wales) Regulations 2011**

The Committee noted the Minister's response to the Chair's letter dated 23 September 2011.

**CLA31 - The National Curriculum (Assessment Arrangements on Entry to the Foundation Phase) (Wales) Order 2011**

The Committee noted the Minister's response to the Chair's letter dated 27 September 2011. The Committee agreed that the Chair should respond to the Minister asking that the Committee be informed in writing if the powers under Article 5 are used again in future.

**CLA42 - The Protection from Tobacco (Sales from Vending Machines) (Wales) Regulations 2011**

The Committee noted the Minister's response to the Chair's letter dated 5 October 2011.

**CLA19 - The Head Teachers' Qualifications and Registration (Wales) (Amendment) Regulations 2011**

The Committee noted the Minister's response to the Chair's letter dated 27 September 2011.

**CLA17 - The National Health Service (Concerns, Complaints and Redress Arrangements) (Wales) (Amendment) Regulations 2011**

The Committee noted the Minister's response to the Chair's letter dated 27 September 2011.

**Other Business**

**Committee Inquiries: Inquiry into the Granting of Powers to Welsh Ministers in UK Laws**

The Committee took oral evidence from David Davies MP, Chair, Welsh Affairs Committee and Paul Evans, Clerk of the Table Office, House of Commons.

**Resolution to Meet in Private**

In accordance with Standing Order 17.42(vi) the Committee resolved to exclude the public from the remainder of the meeting to discuss the evidence submitted thus far on the Inquiry into the Granting of Powers to Welsh Ministers in UK Laws.

**David Melding AM**
Chair, Constitutional and Legislative Affairs Committee

**17 October 2011**

**Annex 1**

**Constitutional and Legislative Affairs Committee**

**(CLA(4)-08-11)**

**CLA46**

**Constitutional and Legislative Affairs Committee Report**

**Title: The Local Inquiries, Qualifying Inquiries and Qualifying Procedures (Standard Daily Amount) (Wales) Regulations 2011**

**Procedure: Negative**

These Regulations prescribe the standard daily amounts which may be recovered by the Welsh Ministers for each day on which—
(a) a local inquiry sits or the person appointed to hold the local inquiry is otherwise engaged on work connected with it; or
(b) the person appointed to undertake a qualifying inquiry or, as the case may be, a qualifying procedure is engaged on work connected with the qualifying inquiry or qualifying procedure.

**Technical Scrutiny**

No points are identified for reporting under Standing Order 21.2 in respect of this instrument.

**Merits Scrutiny**

Regulatory Impact Assessment

The Explanatory Memorandum says that a Regulatory Impact Assessment (RIA) is "Not required as the revision of the Regulation is to make increases in statutory fees." However, when these fees were uprated last (in 2007) an RIA was provided.

Calculation of New Fee Levels

There is no information in the Explanatory Memorandum to explain how the increases in fees have been calculated, the total amount of extra income that it is estimated will be raised as a result and the impact this will have on local authority and Welsh Government budgets and funding as a result.

Committee Consideration

The Committee is concerned at the lack of explanation for the above matters contained in the Explanatory Memorandum and at the lack of a

Regulatory Impact Assessment. The Committee is of the view that when subordinate legislation imposes new or increased fees or charges on public or private bodies or individuals this should be accompanied by a self-contained explanation of how the fees or charges have been calculated and their wider impact on the bodies or people the changes affect. The Committee agrees that the information provided in the Explanatory Memorandum is inadequate for this purpose.

The Committee agreed that this raises a matter of public policy likely to be of interest to the Assembly and agreed to draw the matter to the attention of the Assembly through a report under Standing Order 21.3(ii).

**David Melding AM**
Chair, Constitutional and Legislative Affairs Committee

**17 October 2011**