



Constitutional and Legislative Affairs Committee

Provisions about Welsh Ministers in UK Acts

Annex

Date of paper:

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1. Introduction

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.

This is of immediate interest given that although Part 4 of the *Government of Wales Act 2006* is now in force, some significant pieces of Westminster legislation currently before Parliament, such as the *Public Bodies Bill* (which is included as a case study at annex 1), continue to confer powers on Welsh Ministers without the involvement of the National Assembly.

2. Background

At a Plenary meeting of the Joint Ministerial Committee on 8 June 2011, a revised inter-governmental Memorandum of Understanding (“MoU”) was agreed between the UK Government, the Scottish Ministers, the Welsh Ministers and the Northern Ireland Executive Committee.

The revised MoU reaffirms the principles of co-operation underpinning the relationship between the UK Government and the devolved administrations.¹ In respect of Parliamentary Business the MoU states:

The United Kingdom Parliament 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.²

In practice this means that the consent of the Scottish Parliament and National Assembly for Wales is sought if a Westminster Bill contains provisions relating to devolved functions.

It is stressed however that the MoU is “a statement of political intent, and should not be interpreted as a binding agreement”.

2.1. *Devolution Guidance Notes*

Extensive technical guidance for Whitehall civil servants about dealing with devolution and the devolved administration can be found on the Cabinet Office’s [website](#). The pages relating to the [powers of the National Assembly](#) however have not been revised following the referendum in March 2011 which enacted Part 4 of the 2006 Act.

Further guidance for civil servants can be found in the sixteen [Devolution Guidance Notes \(“DGNs”\)](#). These are prepared to assist Whitehall civil servants in dealing with aspects of

¹ Written Ministerial Statement, Carwyn Jones AM, First Minister of Wales, *The Memorandum of Understanding*, 29 June 2011

² *Memorandum of Understanding*, June 2011

devolution. The locus of these DGNs has varied over the years but they are currently located within the Cabinet Office.

The DGNs deal with issues such as common arrangements; handling correspondence; the role of the Secretary of State for Wales; Post-devolution primary legislation affecting Wales and the attendance of UK Ministers and Officials at Devolved Legislatures.

Of these, the following 4 DGNs are directly relevant to the proposed inquiry.

- DGN1: Common working arrangements (last updated November 2005);
- DGN4: Role of the Secretary of State for Wales (last updated November 2005);
- DGN9: Post-primary legislation affecting Wales (no date provided);
- DGN16: Orders in Council under section 95 of the *Government of Wales Act 2006* (last updated July 2008)

It is to be anticipated that DGNs relating to Wales will be revised in respect of the result of the March 2011 referendum. DGN 16 would perhaps need to be revised in order to apply to s109 of the *Government of Wales Act 2006* which provides for the amendment of Schedule 7 by Order in Council.

There are existing DGNs that deal with Post- devolution primary legislation affecting Scotland and Ireland respectively.

DGN 9 currently states:

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.

Given that the legislative competence of the Assembly has expanded to cover almost the full range of ministerial functions it would also be expected the DGN 9 would also be subject to revision.

2.2. *Delegating executive powers to Welsh Ministers*

Welsh Ministers may currently gain powers to make subordinate legislation through:

- an Assembly Act;
- an Act of the UK Parliament ("UK Acts");
- a transfer of functions order made under Section 58 of the 2006 Act (the last order made under this provision was made in 2009); and
- designations to make regulations implementing European Union obligations under section 2(2) of the *European Communities Act 1972*.

The National Assembly closely scrutinises powers transferred to Welsh Ministers through an Assembly Act but it has no formal role in scrutinising similar provisions which are included in UK Acts.

The National Assembly's Standing Order 30 does however state that Welsh Ministers must lay a written statement before the National Assembly if an UK Bill makes provision in relation to Wales:

- (i) which has a **significant impact on the functions of the Welsh Ministers 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). [RS emphasis]

Such a statement must:

- (i) summarise the policy objectives of the Bill;
- (ii) specify the extent to which the Bill makes (or would make) relevant provision; and
- (iii) explain whether it is considered appropriate for that provision to be made and for it to be made by means of the Bill.³

In addition, the statement must be laid "normally no later than 2 weeks"⁴ after the introduction of the relevant Bill to the first House.

Such an approach had been adopted towards the end of the third Assembly by the then Minister for Children, Education and Lifelong Learning, Leighton Andrews AM, who made a statement in relation to the transfer of executive powers included in the [Education Bill](#).

Welsh Ministers have not yet however made statements in relation to the executive powers conferred on them by other Bills currently being scrutinised in the UK Parliament. These include the *Public Bodies Bill* and the *Localism Bill*. In the case of the latter an Explanatory Memorandum was produced and laid when these Bills were originally published but this dealt principally with the clauses conferring framework (legislative) powers. Subsequent to the result of the referendum on 3 March 2011, these clauses have been removed from the Bills.⁵

The Business Committee's review of Standing Orders in preparation for the fourth Assembly, published in March 2011, provided further information on how the Assembly would deal with statements made under Standing Order 30 in practice:

The written statement would be issued for information only, not as a basis for a decision, on a motion, by the Assembly. Such statements would not be referred by the Business Committee for committee consideration however any committee could choose to consider the statement if it so wished.⁶

The inclusion of these provisions in the Standing Orders came as a result of suggestions made by the Constitutional Affairs Committee of the third Assembly who responded to the Business Committee's consultation in July 2010. The Committee's response stated that:

³ [National Assembly for Wales, *Standing Orders, Standing Order 30* \[Accessed 6 July 2011\]](#)

⁴ *Ibid*

⁵ An update on these Bills has been produced by the Research Service.

⁶ National Assembly for Wales, Business Committee, *Review of Standing Orders in preparation for the Fourth Assembly*, March 2011, paragraph 112 [Accessed 6 July 2011]

... the current standing orders (operational during the third Assembly) seem to prevent the Committee from being able to consider Bills that grant powers to the Assembly, rather than just those that grant powers to Ministers.

On both these issues, the Committee is firmly of the view that there is a real scrutiny gap that needs to be addressed and that standing orders should enable reasonable scrutiny of Bills at an appropriate point. The Committee was not necessarily convinced that this task should fall to the Constitutional Affairs Committee; scrutiny Committees, with their more in-depth knowledge of the policy area concerned may be better placed to do so.

In either event, a requirement for Welsh Ministers to inform Committees, when they become aware that Westminster Bills and draft Westminster Bills have implications for the powers of Welsh Ministers or the Assembly, should also be considered so that Committees have meaningful opportunities to consider Bills and draft Bills.⁷

In a statement on the Welsh Government's "Review of Legislative Processes" in Plenary on 16 March 2011, the then Counsel General, John Griffiths AM, told Members that:

In terms of devolved provisions contained in UK Parliament Bills, I have asked officials to expand the use of written statements to set out executive powers. In cases where particularly significant provisions are included, a memorandum of devolved delegated powers should be laid before the Assembly once the Bill has been published in Parliament. Assembly spokespersons should be offered technical briefings on significant Welsh provisions or framework powers, similar to those briefings offered to Welsh MPs and peers by the Wales Office and Welsh Ministers in Parliament. We believe that these steps would significantly improve the information available to Members, as well as the transparency of Government.⁸

2.3. *Legislative Consent Motions*

The processes included in Standing Order 30 are different from those required when UK Bills seek to *legislate* in areas within the National Assembly's legislative competence. This occurs when UK Acts make legislative provisions which could otherwise be made by an Assembly Act, under the powers available in the 20 Subjects of Schedule 7 to the *Government of Wales Act 2006*.

In such circumstances, a convention exists whereby the UK Parliament would not normally legislate without first obtaining the consent of the National Assembly.

The National Assembly provides this consent by agreeing to a Legislative Consent Motion ("LCM") which is tabled by the Welsh Government and voted upon by Assembly Members in Plenary. Standing Order 29 states that the Welsh Government must lay a LCM if a UK Bill makes 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

⁷ [National Assembly for Wales, *Response to the Review of Standing Orders: Constitutional Affairs Committee, SOR18*, 15 July 2010 \[Accessed 6 July 2011\]](#)

⁸ [National Assembly for Wales, RoP, 16 March 2011 \[Accessed 7 July 2011\]](#)

(ii) which has a **negative impact on the legislative competence** of the Assembly.⁹ [RS emphasis]

Standing Order 29 also allows an Assembly Committee to consider and report on a LCM but only if it has first been referred for committee consideration by the Business Committee. No such provision existed during the third Assembly where the scrutiny of LCMs was not considered by Assembly Committees and only subject to a 15 minute Plenary debate and vote.

2.4. *Comparisons with Scotland and Northern Ireland*

The nature of LCMs in Scotland is slightly different from that in the National Assembly. The Scottish Parliament's Standing Orders state that a LCM must be brought forward by a member of the Scottish Government if a Bill under consideration in the UK Parliament:

... makes provision ("relevant provision") applying to Scotland for any purpose within the legislative competence of the Parliament, or which **alters that legislative competence or the executive competence of the Scottish Ministers**.¹⁰ [RS emphasis]

In terms of parliamentary consideration, a LCM may be referred by the Parliamentary Bureau (the Scottish Parliament's "Business Committee") to "the committee within whose remit the subject matter of the relevant provision falls".¹¹

The Parliament's Standing Orders also state that any UK Bill which is subject to a LCM and which contains provisions delegating subordinate legislation powers on the Scottish Ministers may be considered by the Scottish Parliament's Subordinate Legislation Committee.

The Scottish Parliament's Procedures Committee produced a report on "The Sewel Convention" (the term which predated "Legislative Consent Motions" in Scotland) in 2005. The report, which looked at the principle behind the use of the convention in Scotland and the transparency and accountability of the parliamentary procedures in place to scrutinise its use, can be seen [here](#). In the report's conclusion, the committee stated that:

We recognise the need for a mechanism along the lines of the Convention. Its purpose is to assert the Parliament's political (if not legal) primacy in devolved areas – any legislation must either be the product of its own deliberations or require its explicit consent. Either way, it remains in control. We believe that this is a fundamental principle for the Parliament, and it is one we strongly endorse.¹²

⁹ [National Assembly for Wales, *Standing Orders*, Standing Order 29 \[Accessed 6 July 2011\]](#)

¹⁰ [Scottish Parliament, *Standing Orders of the Scottish Parliament* \[Accessed 7 July 2011\]](#)

¹¹ Ibid

¹² [Scottish Parliament, *Procedures Committee 7th Report: The Sewel Convention, 2005 \(Session 2\)*, paragraph 211 \[Accessed 7 July 2011\]](#)



In Northern Ireland it is current practice for the relevant NI Minister who is responsible for obtaining the Assembly's consent, to provide the relevant NI Committee with a Legislative Consent Memorandum. These documents should explain the need for and the background to the legislative proposals. A copy of the Westminster Bill specifying the NI provisions should also be provided. In practice, at present in the NI Assembly a report of the Committee's considerations is given verbally by the Chair of the Committee in responding to the Minister during the motion debate itself.

Annex 1: Case study: the *Public Bodies Bill* [HL]

An useful example of a current UK Bill which seeks to delegate significant subordinate legislation-making powers to Welsh Ministers is the *Public Bodies Bill*¹³ (“the Bill”), which will have its Second Reading in the House of Commons on 12 July 2011.

The Bill is an enabling bill which means it will not itself make any changes to public bodies. Instead it provides executive powers to allow for the abolition and / or modification of the public bodies listed or the transfer of functions between those bodies. During its parliamentary passage it attracted criticism for the extent of powers given to Ministers, including Welsh Ministers. The Research Service’s paper on the original bill can be seen [here](#).

Orders under clauses 1 to 5 of the Bill may in principle affect matters which are the responsibility of the devolved institutions in Wales, in the following respects:

- It is possible that the exercise of the powers in clauses 1 to 5 may affect functions of the Welsh Ministers or relate to matters within the legislative competence of the National Assembly for Wales . Any such provision requires the consent of the Welsh Ministers or the National Assembly for Wales (clause 9(6) to (8)).
- Clause 1 of the Bill specifies the Welsh Ministers as “an eligible person” to whom functions may be transferred under clauses 1, 2 and 5 . Again any such provision requires the consent of the Welsh Ministers (clause 9(7)).¹⁴

Clauses 13 to 16 provide Welsh Ministers with powers to effect changes to public bodies in Wales.

The Bill has completed its passage through the House of Lords where it was subject to considerable amendment and had its First Reading in the House of Commons on 10 May 2011.

Clause 13 sets out the power of Welsh Ministers to bring forward orders to modify certain environmental public bodies in Wales:

- the Countryside Council for Wales;
- the Welsh devolved functions of the Environment Agency;
- the Forestry Commissioners;
- and the functions of a Welsh Flood and Coastal Committee.

Clause 14 allows Welsh Ministers, by order, to abolish the following public bodies:

- agricultural dwelling-house advisory committees;
- agricultural wages committees;
- the Environment Protection Advisory Committee;
- and the regional and local fisheries advisory committee.

¹³ Public Bodies Bill (HL) 2011

¹⁴ Public Bodies Bill (HL) 2011, Explanatory Notes [revised 10 May 2011]

The Secretary of State's consent is required for an order under clauses 13 or 14 which transfers a function to, or confers a function on, the Environment Agency

Clause 20 sets out the procedure by which orders under the legislation can be made by Welsh Ministers. Welsh Ministers are required to lay a draft order and an explanatory document.

Speaking for the UK Government in the Lords, Lord Henley explained that these clauses had been requested by the Welsh Government:

to enable them to give effect to possible institutional changes flowing from their ongoing review of how environmental policies are delivered in Wales. This review is linked to wider policy proposals to develop a more integrated ecosystems approach to managing the natural environment in Wales.¹⁵

On 8 March 2011 the Assembly passed a Legislative Consent Motion allowing the UK Government to bring forward amendments to the Bill in devolved matters. The First Minister told Plenary that:

The UK Government has tabled an amendment to clause 9 of the Bill so that any Order that is made by a UK Minister under clauses 1 to 6 that engages the Assembly's legislative competence will require the Assembly's consent, thus giving the Assembly a full opportunity to consider the implications of any such proposals. Prior to the Bill's being introduced in the House of Lords in October, we agreed with the UK Government the inclusion of Order-making powers in clauses 13 and 14 to enable Welsh Ministers to modify and transfer the functions of the Countryside Council for Wales, the Environment Agency, and the Forestry Commission. We have since agreed Government amendments to extend those powers to regional flood and coastal committees.

The UK Government has also agreed to table amendments that remove from Schedules 1 to 6 to the Bill all bodies for which Welsh Ministers alone are responsible, instead giving Welsh Ministers comparable Order-making powers in relation to those bodies. The bodies concerned include the Welsh national park authorities and internal drainage boards that are wholly, or mainly, in Wales. The inclusion of these powers in the Bill will enable Welsh Ministers to pursue a more integrated approach to delivering environmental policies in Wales.¹⁶

The First Minister also noted that:

During the parliamentary passage of the Bill, additional safeguards have been proposed regarding the consultation and scrutiny of Orders made under the Bill. As a result, Orders that are made under this Bill will be subject to the superaffirmative procedure. This will equally apply to Orders that are made by Welsh Ministers, requiring a draft Order to be laid before the Assembly following a 12-week consultation on the Order.¹⁷

However, in the House of Lords, Labour peer Lord Rowlands expressed concern that making detailed legislation about the Order powers of Welsh Ministers best lay with the Assembly, not Parliament:

¹⁵ HL Debates, 4 April 2011 c.1542

¹⁶ RoP, 8 March 2011

¹⁷ Ibid.

What is remarkable is that here we are, post referendum, with power having been transferred to legislate in Cardiff on this and other issues, yet in a Bill of this House we are writing out in detail the procedures that Welsh Ministers have to go through to justify and consult. In other words, we are writing into Welsh Ministers' responsibilities the super-affirmative procedures that we are applying to UK Ministers. Putting aside the general merits of the issue, I think that it is quite extraordinary that at this moment in time we are seeking to write into a Bill a remarkable clause that lays out in great detail the responsibilities of Welsh Assembly Ministers to consult. Again, I respectfully suggest that that should be the decision of the Assembly.¹⁸

In its original report of the *Public Bodies Bill*, the House of Lords Committee on Delegated Powers and Regulatory Reform stated:

Clause 13(1) enables Welsh Ministers by order subject to affirmative procedure in the National Assembly for Wales (NAW) to alter, abolish or add to the functions of the Countryside Council for Wales (CCW), the Environment Agency (so far as relating to Wales) and the Forestry Commissioners (in so far as relating to Wales). Clause 13(2) to (4) provides for orders to transfer functions between Welsh Ministers, the CCW, the Environment Agency, the Forestry Commissioners or a new body. **We have similar concerns about this clause as for clauses 1 to 5 - at present the power is insufficiently limited and our conclusions on those clauses also apply to clause 13.**

There is a further aspect which seemed to the Committee to call for an explanation which is not provided in the memorandum. It is apparent from clause 13(7) that orders under subsection (7) should be capable of applying to matters which are not within the legislative competence of the NAW (see subsections (7)(a), (c) and (d) and (8)). It is by no means unprecedented for Welsh Ministers to have power to make subordinate legislation in relation to matters about which the NAW could not enact a measure. But these are no ordinary powers, for they involve re-writing the statute book. The net result of what is proposed here is that Parliament should delegate to Welsh Ministers the power to amend Acts of Parliament in matters as respects which Parliament has not delegated to the NAW the power to amend Acts of Parliament by enacting measures, and all subject to no Parliamentary control at Westminster whatsoever. **The Committee calls to the attention of the House this unexplained aspect of clause 13, so that it might seek an explanation from the Government.**¹⁹

The peer in charge of the Bill, Lord Holbeach, replied on behalf of the UK Government:

The Committee also called to the attention of the House what it called the 'unexplained aspect' of clause 13 giving Welsh Ministers extensive powers to make subordinate legislation by amending Acts of Parliament in relation to matters about which the National Assembly for Wales could not enact a measure. In this regard, we would draw to the attention of the Committee the powers of the Welsh Ministers to make Designation Orders under the European Communities Act 1972. These powers extend to areas where there is no corresponding legislative competence for the National Assembly for Wales, for example in relation to services in the internal European Union market (SI 2009/221) or road tunnel safety (SI 2005/1971). A further example would be Planning Act 2008 which gives Welsh

¹⁸ HL Debates, 4 April 2011 c.1546

¹⁹ [HL Committee on Delegated Powers and Regulatory Reform, 5th Report 2010-2011, HL Paper 57, Public Bodies Bill \[HL\] 10 November 2010.](#)



Ministers the power to apply England only provisions to Wales where there is no legislative competence.²⁰

The Bill was amended in response to some the concerns expressed. New clauses relating to powers of Welsh Ministers can be seen in **Annex 2**.

²⁰ Ibid, UK Government Response, 19 November 2010
Enquiry no: 11/1550/Alys Thomas & Owain
Roberts

Annex 2: Powers of Welsh Ministers in the *Public Bodies Bill*: supplementary

17 Purpose and conditions for orders made by Welsh Ministers

(1) The Welsh Ministers may make an order under section 13 or 14 only if they consider that the order serves the purpose of improving the exercise of public functions having regard to—

- (a) efficiency,
- (b) effectiveness,
- (c) economy, and
- (d) securing appropriate accountability to the Welsh Ministers.

(2) The Welsh Ministers may make an order under either of those sections only if they consider that—

- (a) the order does not remove any necessary protection, and
- (b) the order does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise.

18 Consent of UK Ministers

(1) The Secretary of State's consent is required for an order under section 13 or 14 which transfers a function to, or confers a function on—

- (a) the Environment Agency,
- (b) the Forestry Commissioners, or
- (c) any other cross-border operator.

(2) The Secretary of State's consent is required for an order under section 13 or 14 made by virtue of section 15 which in any other way modifies the functions, other than Welsh devolved functions, of a person referred to in subsection (1).

(3) A Minister's consent is required for an order under section 13 or 14 which transfers a function to, or modifies the functions of, the Minister.

19 Consultation by Welsh Ministers

(1) Where the Welsh Ministers propose to make an order under sections 13 to 16 they must consult—

- (a) any body or person exercising public functions to which the proposal relates,
- (b) such other persons as appear to them to be representative of interests substantially affected by the proposal, and

(c) such other persons as they consider appropriate.

(2) If, as a result of consultation under subsection, it appears to the Welsh Ministers appropriate to change the whole or part of the proposal, they must carry out such further consultation with respect to the changes as seems appropriate.

(3) It is immaterial for the purposes of this section whether consultation is carried out before or after the commencement of this section.

20 Procedure for orders by Welsh Ministers etc

(1) If after consultation under section 19 the Welsh Ministers consider it

appropriate to proceed with the making of an order under sections 13 to 16, the

Welsh Ministers may lay before the National Assembly for Wales—

(a) a draft order, and

(b) an explanatory document.

(2) The explanatory document must—

(a) introduce and give reasons for the order,

(b) explain, in the case of an order under section 13 or 14, why the Welsh

Ministers consider that—

(i) the order serves the purpose in section 17(1), and

(ii) the conditions in section 17(2)(a) and (b) are satisfied, and

(c) contain a summary of representations received in the consultation.

(3) The Welsh Ministers may not act under subsection (1) before the end of the period of twelve weeks beginning with the day on which the consultation began.

(4) Subject as follows, if after the expiry of the 40-day period the draft order laid under subsection (1) is approved by a resolution of the National Assembly for Wales, the Welsh Ministers may make an order in the terms of the draft order.

(5) The procedure in subsections (6) to (9) shall apply to the draft order instead of the procedure in subsection (4) if—

(a) the National Assembly for Wales so resolves within the 30-day period,

or

(b) a committee of the Assembly charged with reporting on the draft order so recommends within the 30-day period and the Assembly does not by resolution reject the recommendation within that period.

(6) The Welsh Ministers must have regard to—

(a) any representations,

(b) any resolution of the National Assembly for Wales, and

(c) any recommendations of a committee of the Assembly charged with reporting on the draft order, made during the 60-day period with regard to the draft order.

(7) If after the expiry of the 60-day period the draft order is approved by a resolution of the National Assembly for Wales, the Welsh Ministers may make an order in the terms of the draft order.

(8) If after the expiry of the 60-day period the Welsh Ministers wish to proceed with the draft order but with material changes, the Welsh Ministers may lay before the National Assembly for Wales—

(a) a revised draft order, and

(b) a statement giving a summary of the changes proposed.

(9) If the revised draft order is approved by a resolution of the National Assembly for Wales, the Welsh Ministers may make an order in the terms of the revised draft order.

(10) For the purposes of this section an order is made in the terms of a draft order or revised draft order if it contains no material changes to its provisions.

(11) An order may not be made by the Secretary of State under section 15(6) unless a draft of the instrument containing the order has been laid before, and approved by a resolution of, each House of Parliament.