



Ein cyf/Our ref: LF/FM/0995/13

David Melding AM  
Chair, Constitutional and Legislative Affairs Committee  
National Assembly for Wales  
Cardiff Bay  
CF99 1NA

18<sup>th</sup> October 2013

Dear David

I am writing in response to your letters of 2 July and 3 October concerning powers for commencement orders to include incidental, supplementary, consequential, transitory and transitional provisions (sometimes described collectively as “ancillary provisions”).

I am grateful to your Committee for its consideration of this issue in relation to recent Assembly Bills. It is important to ensure that we have effective and appropriate arrangements for bringing Assembly Acts into force, and that we distinguish between matters which are properly part of the commencement of an Act and matters which are not.

As I said in my letter of 5 August, ancillary provisions that are included in an order bringing an Act into force must relate to the commencement of that Act. They will be provisions that are necessary or desirable for the purpose of bringing the new legislation into force or in order to ensure an orderly transition to the new legal regime when it comes into force. For example, they may provide that applications or proceedings that have begun under the old regime are to be completed under that regime (or set out how cases will be transferred into the new regime); or they may provide that authorisations or appointments made under an existing system are to be treated as if they had been made under a new one. Ancillary provisions in commencement orders will not be free-standing “substantive” provisions.

Nevertheless, I asked officials to review the content of commencement orders that have been made by the Welsh Ministers. That review has been carried out, and does not suggest that commencement powers are being used in unexpected ways.

Since the start of the Third Assembly, the Welsh Ministers have made approximately 120 orders under commencement powers in Assembly Acts and Measures and Acts of Parliament. About one third of those orders have included ancillary provisions, or have amended ancillary provisions contained in earlier orders.

These ancillary provisions have usually been limited transitional or saving provisions, designed to ensure that the previous legislation continues to apply to existing cases after the commencement of the new legislation, or in some cases to apply the new legislation to

things done before the commencement date. This is often necessary to make clear how and when an Act will come into force, and to ensure that it does so smoothly.

A small number of commencement orders, including the two orders mentioned in your letter of 2 July, have made more extensive provision. In those cases, although the consequential or transitional provisions were more detailed, they were still considered necessary or desirable to ensure a smooth and effective transition to the new legal regime.

Accordingly, I do not consider that commencement orders are being used to include “non-commencement provisions”. Ancillary provisions are included in commencement orders for purposes related to the provision that the orders make about commencement.

However, the concerns expressed by your Committee in its scrutiny of recent Bills suggest that it would be helpful to clarify the limitations on commencement powers. This may be particularly desirable where there are also stand-alone powers to make orders to give effect to an Act, which contain similar references to “consequential” or “transitional” provision. The Office of the Legislative Counsel will therefore consider whether future Government Bills should spell out that powers to make ancillary provision in commencement orders are limited to making provision in connection with the coming into force of the Act.

Your letter and your Committee’s reports have also raised the question of the appropriate degree of scrutiny for ancillary provisions made in connection with commencement. The Assembly will have approved the substantive provisions of an Act, usually leaving the Welsh Ministers to set the commencement date in an order subject to no Assembly procedure. Since any ancillary provisions in a commencement order must be made in connection with commencement, it is appropriate for them to be included in a commencement order.

In particular, transitional, transitory or saving provisions are very often needed to make clear whether the old law or the new Act will apply to things taking place at the time of commencement. These provisions are necessary to give effect to the commencement of the Act, so it is convenient to include them in the commencement order itself.

However, other types of consequential, incidental and supplementary provision are needed less often in connection with commencement. I expect careful consideration as to whether powers to make these types of provision in commencement orders are needed, and for Ministers to set out in the Explanatory Memorandums why such powers are included in Government Bills.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Carwyn Jones', written in a cursive style.

**CARWYN JONES**