

Constitutional and Legislative Affairs Committee

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

Response from Cardiff Law School

Memorandum

1. A Brief Summary of the Main Points in the Submission.

The Committee's General Principle

The letter from the Constitutional and Legislative Affairs Committee inviting submissions to this inquiry states that in making its recommendations the Committee "will be guided by the general principle that powers should only be granted concerned" For the reasons set out in this submission, we support the first part of this general principle.

We consider that an Act of Parliament which makes provision in relation to Wales which is within the legislative competence of the Assembly to do so or which has a negative impact on its legislative competence has the same effect as an Order in Council made under section 109 of GOWA 2006. Such an Order in Council which affects Schedule 7 to GOWA 2006 by amending the legislative competence of the Assembly cannot, normally be made without the consent of the Assembly under section 109 (4) of the Act. It is therefore perfectly acceptable that if it is proposed that a UK Bill would affect the legislative competence of the Assembly, then the Assembly should be given the opportunity of deciding whether to consent to such provisions.

However, we have reservations about the apparent wide statement in the second part of the Committee's principle that the National Assembly ' should be able to exercise appropriate scrutiny over the process concerned. This would seem to imply that it would be for the Assembly alone and not the UK Parliament to decide what should be the procedure for the making of subordinate legislation. We believe that the procedure for scrutinising the powers of the Welsh Ministers should be included on the face of the UK Bill and therefore decided by Parliament. In devolved areas such procedure could then be changed by an Assembly Act.

.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.

1). delegated powers in UK Acts.

We consider that on balance the Assembly should retain the distinction made in its Standing Orders between the circumstances when a legislative consent motion is

required and when there is no such requirement. This is even though there is no such distinction made in the Rules of the Scottish Parliament

2). delegated powers in other statutory mechanisms.

We do not support continuing the distinction made in the Government of Wales Act between the requirement in section 109 of the Act (Orders in Council made which amend Schedule 7 to the Act and section 58 of the Act (Orders in Council transferring central government Ministerial powers exercisable in Wales to Welsh Ministers). With section 109 Orders, the consent of the Assembly to their making is usually necessary, but in the case of section 58 Orders it is the consent of the Welsh Ministers which is required.

. The extent to which the National Assembly is able to exercise robust scrutiny of the delegated powers processes through its Standing Orders.

We consider that:

1). the Assembly's Standing Order 30 should be amended to permit there to be debates on powers in UK Bills coming within the Standing Order.

2). with Standing Order 29, the Business Committee should be required to place before an Assembly Committee (s) consideration of powers coming within the Standing order.

3). the Assembly should be notified by Welsh Ministers at draft bill stage not, after a Bill has been laid in Parliament of Bill which requires a legislative consent motion under Standing Order 29.

. The Relevance of the UK Government's Devolution Guidance Notes

DGN 9 will need to be amended overall to take account of the coming into force of Part 4 of GHOWA 2006. Additionally we recommend that paragraph 17 should be amended to reflect the provisions of Rule 9B.1 of the Scottish Parliament. This Rule requires there to be a Legislative Consent Motion if a UK Bill proposes to alter the legislative competence of the Scottish Parliament. Paragraph 17 does not support this in relation to the Assembly.

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

As regards Northern Ireland there are currently no provisions for Legislative Consent Motions. With the Scottish Parliament Rule 9B makes no difference between the different provisions in UK Bills which in any way affect devolution. There is such a difference in the Assembly's Standing Orders. For the reason given elsewhere in this submission, we do not consider that this difference should be changed.

. Other Matters Relevant to the Inquiry

We do not consider that the Assembly should be given powers in UK Bills to decide the procedure for the making of subordinate legislative powers given to the Welsh

Ministers. This should continue to be a matter for the UK Parliament and the particular procedure should continue to be placed on the face of the Bill.

2. A Brief Introduction to the persons submitting Evidence

We are Public Lawyers who teach or have taught the subject in Cardiff Law School. Marie is the editor of Wales Legislation on line which seeks to set out all the powers of the Welsh Ministers howsoever derived. It also sets out the primary law of the Assembly and the Welsh Ministers subordinate legislation. Manon has been the websites researcher for the past 18 months and now has a University Scholarship to study for a PhD in the effects of Part 4 of GOWA. David was a government lawyer in the Welsh Office throughout its existence until 1999 and was then the initial legal adviser to the Assembly's Presiding Office. We have all presented evidence to previous Assembly Committees.

Particular Factual Information

We would draw the Committee's attention to the apparent short debates the Assembly has on potential Legislative Consent Motions. Why is this when powers in UK Bills giving functions to Welsh Ministers can be substantial. For example should the Assembly be given additional information particularly in the form of Committee reports in order for it to be more fully informed?

.Recommendations for Action

We would particularly draw attention to the 3 recommendations summarised above in relation to the consideration of the nature of the scrutiny of the delegated powers through the Assembly Standing Orders.