



Cymdeithas y Cyfreithwyr  
The Law Society

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

October 2011

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Response from The Law Society

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<sup>1</sup> 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."<sup>2</sup>*

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.

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<sup>1</sup> Subordinate Legislation Committee Inquiry into the Scrutiny of Subordinate Legislation and Delegated Powers May 2009

<sup>2</sup> 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<sup>3</sup>, 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<sup>4</sup> 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<sup>5</sup>. 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.<sup>6</sup>

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

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<sup>3</sup> Standing Order 29.8

<sup>4</sup> *supra*, n.2

<sup>5</sup> Written Evidence of the Secretary of State for Wales to the Subordinate Legislation Committee, SLC9

<sup>6</sup> Standing Order 29.2

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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