

National Assembly for Wales
Constitutional and Legislative
Affairs Committee

**Inquiry into powers granted to Welsh
Ministers in UK laws: review of
outcomes**
November 2013



Cynulliad
Cenedlaethol
Cymru

National
Assembly for
Wales

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Remit and Powers

The Constitutional and Legislative Affairs Committee was established on 15 June 2011 with a remit to carry out the functions and exercise the powers of the responsible committee set out in Standing Orders 21. This includes being able to consider and report on any legislative matter of a general nature within or relating to the competence of the Assembly or the Welsh Ministers.

Current Committee membership



David Melding (Chair)
Deputy Presiding Officer
Welsh Conservatives
South Wales Central



Suzy Davies
Welsh Conservatives
South Wales West



Julie James
Welsh Labour
Swansea West



Eluned Parrott
Welsh Liberal Democrats
South Wales Central



Simon Thomas
Plaid Cymru
Mid and West Wales

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The Committee's recommendations

Recommendation 1. We recommend that the UK Government publishes a formal position regarding its objection to extending the application of the legislative consent process to cover modification of Welsh Ministers' functions which are outside the National Assembly's legislative competence. (Page 13)

Recommendation 2. We recommend that the Welsh Government publishes a clear timetable for the preparation of a Welsh statute book, including, as an interim step, improvements to the legislation.gov.uk website, to ensure that there is greater certainty about when the Welsh Government's policy objective will be delivered. (Page 17)

Recommendation 3. We recommend that the Welsh Government should consider looking at developing formal mechanisms with the UK Government to deal with specific non-devolved policy issues affecting Wales. (Page 28)

Recommendation 4. We recommend that the UK Government publishes Devolution Guidance Note 7: Court Proceedings regarding devolution issues as a matter of urgency. (Page 28)

1. Introduction

The Committee's remit

1. The remit of the Constitutional and Legislative Affairs Committee (“the Committee”) is to carry out the functions of the responsible committee set out in Standing Order 21 and to consider any other constitutional or governmental matter within or relating to the competence of the Assembly or Welsh Ministers.
2. Within this, the Committee considers the political and legal importance and technical aspects of all statutory instruments or draft statutory instruments made by the Welsh Ministers and reports on whether the Assembly should pay special attention to the instruments on a range of grounds set out in Standing Order 21.
3. The Committee also considers and reports on the appropriateness of provisions in Assembly Bills and UK Parliament Bills that grant powers to make subordinate legislation to the Welsh Ministers, the First Minister or the Counsel General.

Background

4. In March 2012, we published our report *Inquiry into powers granted to Welsh Ministers in UK laws*. It made 11 recommendations (included at Annexe A) which sought to improve the processes whereby provisions relating to devolved areas are included in UK Bills, including improved processes for considering Legislative Consent Motions and Memoranda¹ produced by the Welsh Government. Ten of the recommendations were addressed to the Welsh Government, with the remaining recommendation (recommendation 9 relating to committee support) relevant only to the Assembly Commission.
5. The Welsh Government responded to the report's recommendations in June 2012,² accepting, to varying degrees seven recommendations and rejecting three³. Responses to the report were

¹ For more information see: National Assembly for Wales, Research Service, *Quick Guide, The Constitution Series: 6 – Legislative Consent Motions*, November 2011

² Welsh Government, *Welsh Government Response to the Constitutional and Legislative Affairs Committee's Inquiry into Powers granted to Welsh Ministers in UK Laws*, 14 May 2012

³ See Annexe A.

also received from the Business Committee⁴ and the Assembly Commission⁵. A debate on the Committee's report took place in plenary on 27 June 2012.⁶

6. The Welsh Government, along with the Assembly's Business Committee⁷ has since taken steps in relation to the following areas:

- **Revision of Standing Orders 29 and 30⁸** (recommendations 5, 6 and 7): Despite the Welsh Government's initial rejection of recommendations 6 and 7 in its response of May 2012, the Business Committee considered revised Standing Orders in relation to recommendations 5, 6, and 7 of the report at its public meeting on 18 March 2013. Changes to Standing Orders were subsequently agreed by the Business Committee on 16 April 2013 and the Assembly on 1 May 2013. These changes implement the principles behind recommendations 6 and 7, and in part recommendation 5 (see paragraphs 12 to 14 and 19 to 20).
- **Adoption of Legislative Consent Memorandum procedure for any subordinate legislation made by UK Ministers alone** (recommendation 11): Standing Order changes in light of recommendation 11 were considered by the Business Committee on the 18 June 2013 and 2 July 2013. On 24 September 2013, it agreed to introduce a new Standing Order to cover certain aspects of recommendation 11, i.e. any subordinate legislation made by UK Ministers which amends primary legislation within the Assembly's competence. Standing Order 30A⁹ was agreed by the Assembly on 2 October 2013, and was based on the temporary procedure that had previously been adopted in relation to Ministerial consent motions emanating from the *Public Bodies Act 2011*.

⁴ Business Committee, *Business Committee Response to the Constitutional and Legislative Affairs Committee's Inquiry into Powers granted to Welsh Ministers in UK Laws*, June 2012

⁵ Letter from the Presiding Officer, *Report on Inquiry into Powers Granted to Welsh Ministers in UK Laws*, 15 May 2012.

⁶ National Assembly for Wales, RoP, *Plenary: The Constitutional and Legislative Affairs Committee's Report on Powers Granted to Welsh Ministers in UK Laws*, 27 June 2012

⁷ Information about changes to the Assembly's Standing Orders proposed by the Business Committee is available from:

<http://www.senedd.assemblywales.org/mgCommitteeDetails.aspx?ID=144>

⁸ Standing Order 29 - Consent in relation to UK Parliament Bills; Standing Order 30 - Notification in relation to UK Parliament Bills

⁹ Standing Order 30A - Consent in Relation to Statutory Instruments made by UK Ministers

- **Revision of Devolution Guidance Notes (DGNs)** (recommendation 3): Both DGN9, *Parliamentary and Assembly primary legislation affecting Wales* and DGN17, *Modifying the legislative competence of the National Assembly for Wales* were revised by the Cabinet Office in 2012 to take into account changes to the Welsh devolutionary settlement.
 - **Early notification of UK Bills that require the Assembly's consent** (recommendation 2): A letter outlining the UK Bills emanating from the 2012-13 Queen's Speech that would require an LCM was provided to all Assembly Members by the then Minister for Finance and Leader of the House, Jane Hutt AM, on 17 May 2012. Similarly, the Minister for Local Government and Government Business, Lesley Griffiths AM, wrote to the Presiding Officer about the Queen's Speech for 2013 -14; the letter was provided as a supporting document for the plenary debate on the Queen's speech on 22 May 2013.
 - **The development of authoritative and easily accessible information about laws made in Wales and the powers of Welsh Ministers** (recommendation 10): On 4 October 2011, the Counsel General made an oral statement¹⁰ announcing that he would be looking at improving access to Welsh Laws and on Developing a Welsh Statute Book (updates were later provided by the Counsel General on 26 June 2012¹¹ and on 19 February 2013¹²).
7. At the time we started our work, however, the Welsh Government had not acted on, or provided information following the commitments made in relation to three recommendations:
- Laying a memorandum before the Assembly setting out the Welsh Government's understanding of the Sewel convention as it applies in Wales (recommendation 1);
 - Publishing 'reciprocal' guidance on how issues relating to inter-governmental relations are dealt with by the Welsh Government (recommendation 3); and

¹⁰ Welsh Government, Theodore Huckle QC (Counsel General), *Oral Statement - Access to Welsh Laws and Developing a Welsh Statute*, 4 October 2011

¹¹ Welsh Government, Theodore Huckle QC (Counsel General), *Oral Statement - Access to Welsh Laws and Developing a Welsh Statute - an update*, 26 June 2012

¹² Welsh Government, Theodore Huckle QC (Counsel General), *Oral Statement - Update on Access to Legislation*, 19 February 2013

- Providing details of any increased capacity within a dedicated Welsh Government unit to manage its relation with Whitehall and Westminster (recommendation 4).

8. We took evidence from the First Minister on 22 April 2013 to follow up on the outcome of the committee's first report. The First Minister wrote to us with further information on 10 July 2013 (attached at Annexe B).

2. General observations

9. Overall, we are broadly content with the progress being made to address and implement the recommendations contained in our original report. We welcome the constructive and positive way in which the First Minister is seeking to take forward work in this area.

10. We will continue to monitor the delivery of the commitments made by the First Minister over the remainder of the 4th Assembly.

11. We do, nevertheless, have some comments on some specific issues and these are set out in the following chapters.

3. Legislative consent process

Evidence

12. We note that, in relation to our original recommendation 5 on the application of the legislative consent process to any matter affecting the legislative competence of the Assembly or affecting the powers of Welsh Ministers, the Welsh Government could not agree to changes to the Assembly's Standing Orders proposed by the Business Committee due to the position of the UK Government.¹³

13. The First Minister explained that he did not agree with the UK Government's position,¹⁴ saying:

“The reasoning behind the response appears to be that it would put the Assembly in a position in which it would have to approve a UK Government Bill. I do not follow that, because that does not apply in Scotland and Northern Ireland. I see no reason why Wales should be treated any differently, in principle, to Scotland and Northern Ireland. So, I am not in agreement with the response that has been received, but we will, as a Government, continue to press the issue.”¹⁵

14. In a letter to the committee dated 10 July 2013, the First Minister said that recommendation 5 of our report:

“... relates to extending the application of the Legislative Consent process to cover modification of Welsh Ministers' functions which are outside Assembly legislative competence.

“While I agree with this recommendation, it can only be taken forward if the UK Government will agree to amend Devolution Guidance Note 9 to acknowledge that the Assembly's consent should be sought in these circumstances. The Secretary of State for Wales takes the view that the different application of the LCM process in Wales compared with Scotland and Northern Ireland is justified by the nature of the devolution settlements.

¹³ National Assembly for Wales, *RoP, Business Committee: Amendments to Standing Order Nos. 29 and 30: Consent in Relation to UK Parliament Bills*, [paragraph 29], 18 March 2013

¹⁴ Constitutional and Legislative Affairs (“CLA”) Committee, *RoP [paragraph 17]*, 22 April 2013

¹⁵ CLA Committee, *RoP [paragraph 17]*, 22 April 2013

I undertook to continue to press the Secretary of State on this. I have written to him again and intend to raise the issue with him at one of our regular bilateral meetings.”

15. In line with recommendation 1 of our report, the First Minister also indicated that he would be prepared to make a statement setting out the Welsh Government’s understanding of the Sewel convention¹⁶ as it applies in Wales, once the issues relating to Standing Order 29 had been resolved.¹⁷ He added:

“... I don’t think that it would be wise to make a statement while there are still some issues that have yet to be agreed.”¹⁸

16. He also agreed that when ready to make a statement he would be prepared to consult on it or share a draft with the committee.¹⁹

17. He confirmed the position in his letter of 10 July 2013, stating:

“Most changes to Standing Orders flowing from the Committee’s recommendations, apart from that relating to extending the LCM process to cover Welsh Ministers’ functions outside Assembly legislative competence, have been made or are about to be made. We will therefore, now proceed with drafting a statement, which I will share with the Committee after the Assembly returns from the Summer recess, prior to laying before the Assembly”.

18. The First Minister subsequently wrote to us on 2 October 2013 enclosing a copy of the memorandum and seeking our comments by the end of October.

Our view

19. We note the First Minister’s comments regarding the UK Government’s views on recommendation 5 and share the views he has expressed.

¹⁶ The convention named after Lord Sewel, the UK Government Minister who, during the Parliamentary passage of the *Scotland Act 1998*, gave a commitment that the UK Parliament would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament.

¹⁷ CLA Committee, *RoP [paragraph 23]*, 22 April 2013

¹⁸ CLA Committee, *RoP [paragraph 27]*, 22 April 2013

¹⁹ CLA Committee, *RoP [paragraphs 28 - 29]*, 22 April 2013

20. We welcome the fact that he is continuing to press the UK Government on this issue. It is unclear why the UK Government has opposed the principle behind recommendation 5. We believe that, in the interests of openness and transparency, the UK Government should set out clearly the reasons for the approach it has adopted.

Recommendation 1: We recommend that the UK Government publishes a formal position regarding its objection to extending the application of the legislative consent process to cover modification of Welsh Ministers' functions which are outside the National Assembly's legislative competence.

21. We are grateful to the First Minister for sharing a draft of his memorandum regarding Wales's equivalent of the Sewel convention following the resolution of issues relating to Standing Order 29. We wrote to the First Minister on 10 October 2013 indicating that we were broadly content with his memorandum.

4. Welsh Government guidance and capacity

Background

22. Recommendation 3 of our report stated that:

“... the relevant Devolution Guidance Notes should be revised and published at the earliest opportunity and...the Welsh Government and the Wales Office should jointly consider how best to use this opportunity to embed knowledge of the Welsh devolution settlement across Whitehall departments.”²⁰

23. The Welsh Government’s response stated that:

“Devolution Guidance Notes are the responsibility of the UK Government but we can inform the Committee that revised Devolution Guidance Notes 9 & 16 (now renumbered as 17) reflecting the new devolution settlement have been published. The Welsh Government’s reciprocal guidance will be published shortly.”²¹

24. Our report also recommended that the Welsh Government establish a central unit to keep abreast of legislative developments in Whitehall and Westminster that might affect Wales and the Assembly (recommendation 4).²²

25. In its response to our report, the Welsh Government stated that:

“The Welsh Government has always had in place, within the total resources it is able to devote to managing its relations with Whitehall and Westminster, a small team with this responsibility. It is intended, if a suitable officer can be found, to supplement the team to increase our capacity to deal with

²⁰ National Assembly for Wales, Constitutional and Legislative Affairs Committee, *Inquiry into powers granted to Welsh Ministers in UK laws*, March 2012, recommendation 3

²¹ Welsh Government, *Welsh Government Response to the Constitutional and Legislative Affairs Committee’s Inquiry into Powers granted to Welsh Ministers in UK Laws*, June 2012

²² National Assembly for Wales, *Constitutional and Legislative Affairs Committee, Inquiry into powers granted to Welsh Ministers in UK laws*, March 2012, recommendation 4

the impact of legislative developments that might affect Wales and the Assembly.”²³

Evidence

26. We explored these issues with the First Minister. He indicated that the reciprocal guidance referred to in the Government’s June 2012 response was being drawn up and that he would update the committee on the latest situation once the guidance had been published.²⁴

27. He indicated that he was content with the Welsh Government’s capacity to undertake monitoring of UK legislation to ensure the interests of Wales were protected and also to manage the relationship with the UK Government. In so doing, he said:

“... we also consider in what ways we can strengthen things in the future. That is an important part of Government. At present, I am content with the capacity that we have, but that does not mean that we are resting on our laurels and thinking that everything will be fine for the years to come. It is very important that we look carefully every year at the capacity that we have in order to build it for the future.”²⁵

Our view

28. We note the First Minister’s views and look forward to receiving the update about the reciprocal guidance once it has been published. We hope to be provided with this update before the end of the autumn term.

²³ Welsh Government, *Welsh Government Response to the Constitutional and Legislative Affairs Committee’s Inquiry into Powers granted to Welsh Ministers in UK Laws*, June 2012

²⁴ CLA Committee, *RoP [paragraph 31]*, 22 April 2013

²⁵ CLA Committee, *RoP [paragraph 37]*, 22 April 2013

5. Development of the Welsh Statute Book

Evidence

29. The First Minister explained what the Welsh Government had done to improve the accessibility of information about Welsh laws made in Wales:

“We are promoting stand-alone Bills for Wales where that is practicable, instead of amending existing legislation that, of course, would apply outside Wales. We are contributing to the work that is being led by the National Archives to improve the legislation.gov.uk website. We are developing an online encyclopaedia that will provide an explanatory narrative of the law within devolved areas. There are two issues that we will need to consider further on down the line. First, there is the issue of when we should look at consolidating legislation in the future, which would mean a substantial body of work where such legislation is taken forward. Secondly, there is the need for access to a law commission function, whether that is done through Welsh Ministers being able to seek the advice of the Law Commission directly, which is not possible at the moment, or whether there will be a need for a separate Welsh law commission. Our preference at this time is for Welsh Ministers to be able to have the appropriate access to the Law Commission of England and Wales in its present set-up.”²⁶

30. We also sought information from the First Minister about progress in developing a Welsh statute book, in light of recommendation 10 of our original report and previous statements by the Counsel General.²⁷

31. The First Minister wrote to us on 10 July 2013 updating the committee on progress. He told us that this was a “longer term project”, stating:

“A comprehensive Welsh statute book requires a commitment over many years to separate, consolidate and restate legislation that currently applies to England or the rest of the UK as well as Wales. The scale of such a project is vast and there are no quick fixes or easy answers. It will take time. The Counsel

²⁶ CLA Committee, *RoP [paragraph 15]*, 22 April 2013

²⁷ See paragraph 6

General is continuing to consider means in which this work could be accelerated and the resources involved in doing so.”

Our view

32. We welcome the Welsh Government’s commitment to make Welsh law more accessible and the steps it is taking to achieve that aim, although, as we consider later in this report, the use of UK Bill’s to deliver the Welsh Government’s policy objectives can detract from this process.

33. We consider that work on improving the legislation.gov.uk website has been slower than expected and we find this disappointing.

34. The provision of a Welsh statute book is in our view a vital component of improving accessibility to a growing body of distinctive Welsh law. We sense that there is some back-tracking from earlier statements by the Counsel General, which seemed to express a much more optimistic view about how quickly a Welsh statute book could be delivered. We recognise that this represents a considerable task for the Welsh Government, alongside the implementation of its legislative programme. However, we believe that this work should be a given an appropriate degree of priority to ensure that it does not drift and slip down the Welsh Government’s agenda.

Recommendation 2: We recommend that the Welsh Government publishes a clear timetable for the preparation of a Welsh statute book, including, as an interim step, improvements to the legislation.gov.uk website, to ensure that there is greater certainty about when the Welsh Government’s policy objective will be delivered.

6. Devolved provisions in UK Bills

Background

35. The First Minister told us on 21 November 2011 that:

“In the past, the practice has been to look at a Westminster Bill and then see what powers could be conferred to Welsh Ministers in devolved areas. I do not anticipate that this practice will be used much in the future, now that we have the power to pass Bills ourselves.

...

“... I would not anticipate a situation where a UK Government Bill conferred powers on Welsh Ministers, save in exceptional circumstances. The natural procedure in future would be for an Assembly Bill to confer such powers, with them set out on the face of the Bill.”²⁸

Evidence

36. When questioned on this issue, the First Minister said:

“First, my position has not changed since last November. My view remains that there should be a strong presumption in favour of using Assembly Bills, given the fact that we had the powers in 2011, rather than UK Bills, to give powers to Welsh Ministers. However, there may be circumstances where there is a UK Bill that is in situ, where fairly minor, but perhaps important, changes can be taken through via the UK Bill rather than producing an Assembly Bill. I anticipate that those situations will get fewer and fewer in the future, but I cannot rule them out completely, given the fact that there may be circumstances where that might happen.

There are always inter-governmental discussions ... where there may be sense in a UK Bill taking forward a particular item of legislation, rather than introducing an Assembly Bill at some

²⁸ CLA Committee, *RoP [paragraphs 90 and 92]*, 21 November 2011]

point in the future. However, the presumption always is that an Assembly Bill is the main vehicle.”²⁹

37. He added:

“There will be Bills that are England and Wales Bills, where there is an element of devolution to Wales and where it would not always be the case that we would want to have a separate Assembly Bill ... normally, an Assembly Bill would be the way forward.”³⁰

38. On 2 July 2013 the Minister for Food and Natural Resources issued a written statement³¹ indicating that he had suspended work on the draft Control of Dogs (Wales) Bill and explaining that he was pursuing his policy objectives through the UK Government’s Anti-Social Behaviour, Crime and Policing Bill. We considered a Legislative Consent Memorandum in relation to the Bill on 10 June 2013 and 24 June 2103, and sought further information from the Minister.³² In his response the Minister explained that:

“The National Assembly has the necessary legislative competence to proceed with the policy that we had outlined for our proposed Control of Dogs (Wales) Bill.

“Whilst our Bill would have achieved the policy objectives, in terms of enforcement the UK Bill has the potential to provide wider and more effective powers to the police, local councils and social landlords who are responsible for dealing with irresponsible dog owners and issues of dog control.

“I am confident we are shaping the content of the draft UK Bill as it now includes the amendments to the Dangerous Dogs Act that we were seeking.

“We will continue to work with the UK Government to ensure the UK Bill and the supporting guidance, will meet our requirements but I retain the option of introducing a Welsh Bill.

²⁹ CLA Committee, *RoP [paragraphs 51-52]*, 22 April 2013

³⁰ CLA Committee, *RoP [paragraph 54]*, 22 April 2013

³¹ Welsh Government, *Written Statement - The Draft Control of Dogs (Wales) Bill*, 2 May 2013

³² Letter from the Chair of the CLA Committee to the Minister for Natural Resources and Food, *Legislative Consent Memorandum – Anti-Social Behaviour, Crime and Policing Bill: provisions relating to dogs*, 2 July 2013

...

“I have only suspended the Control of Dogs Bill, not withdrawn the proposals. However, if the UK Bill does not reach muster I have the option of moving forward with it.”³³

Our view

39. It is unclear whether there has been a slight shift in emphasis in the position of the First Minister and the Welsh Government, particularly given the suspension of work on the draft Control of Dogs (Wales) Bill and the proposed use of a UK Government Bill, the Anti-social Behaviour, Crime and Policing Bill, to deliver the Welsh Government’s policy objectives in this area.

40. We remain unconvinced by the arguments for adopting this approach put forward by the Minister for Food and Natural Resources in his letter to the committee of 15 July 2013. In our view, a Welsh Bill would have been a more appropriate way forward. It would have enabled more detailed scrutiny of the Minister’s proposals and allowed the Assembly to engage directly with stakeholders with an interest in the proposed law. Using a Welsh Bill would also have contributed to the Welsh Government’s commitment to make its laws more accessible.

41. We are therefore disappointed by the progress being made in this area and will continue to monitor closely the Welsh Government’s use of UK Bills to deliver its policy objectives over the remainder of the 4th Assembly.

³³ Letter from the Minister for Natural Resources and Food to the Chair of the CLA Committee, *Legislative Consent Memorandum – Anti-Social Behaviour, Crime and Policing Bill: provisions relating to dogs*, 15 July 2013

7. Inter-governmental arrangements

Background

42. The relationship between the Welsh and UK Governments is set out in the Memorandum of Understanding and Supplementary Agreements³⁴ ('MoU'), which is supplemented by 17 Devolution Guidance Notes (DGNs) prepared by the Cabinet Office and a number of cross-departmental concordats.

43. The MoU sets out the broad terms of how the UK, Welsh, Scottish and Northern Irish Governments should work together. The latest version was agreed on 16 October 2013. The MoU in particular provides for a Joint Ministerial Committee to co-ordinate inter-governmental relations formally and sets out a series of principles that underpin the relationship between each government.

44. In a speech to the London School of Economics on 8 November 2012, however, the First Minister stated that he wanted to develop 'more formal mechanisms of inter-governmental machinery, such as the Joint Ministerial Committee' to complement his vision for the future of the UK.

Devolution Guidance Notes

45. Of the Cabinet Office's 17 DGNs, 8 are of relevance to Wales. Of these, DGN9, *Parliamentary and Assembly primary legislation affecting Wales* and DGN17, *Modifying the legislative competence of the National Assembly for Wales* set out how relationships should be conducted between Welsh and UK Governments.

46. The purpose of DGN9 is to explain the main features of the Welsh devolution settlement to UK Government departments, including the possible effects of the settlement on policy development and legislation and the procedures relating to devolution which should form part of the legislative process.

47. In relation to the role of the Wales Office, DGN9 states that:

³⁴ Cabinet Office, *Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee*, October 2013

“The Wales Office keeps the Welsh Government informed of progress on the UK Government’s legislative programme as a whole. Departments should develop close working relationships with the Welsh Government on individual Bills and specific areas of devolved policy relating to those Bills, and should ensure regular contact, and, where possible, the timely sharing of information from an early stage in the legislative process. The Wales Office advises and supports Departments in doing this.”³⁵

48. The note adds that:

“Departmental Bill teams should contact the Wales Office as early as possible after being established to seek initial advice before engaging with the Welsh Government on any Welsh devolution issues relating to a Bill.”³⁶

49. In giving evidence to the Committee on 21 November 2011, the First Minister provided an overview of how the relationship between the Welsh Government, UK Government departments and the Wales Office operates in practice:

“It might help if I were to outline, very briefly, how we interact with the UK Government. On policy issues, we would interact directly with the appropriate UK Government department, copying the Wales Office in on the correspondence. On constitutional issues, I would normally write to the Prime Minister, again copying the Wales Office in on those issues.”³⁷

50. He also previously outlined how DGNs are used as a basis for resolving conflict between the Welsh and UK Governments:

“The guidance notes seek to outline how relations will be conducted between the Welsh Government and different parts of the UK Government. They also outline how UK Government departments should interact with the Welsh Government. Where there is disagreement between the UK Government and the Welsh Government, the issue for us is how those disagreements are resolved. They can be resolved in a number of ways, such as through the disputes process of the joint

³⁵ DGN9, paragraph 13

³⁶ DGN9, paragraph 14

³⁷ CLA Committee, *RoP [paragraph 174]*, 21 November 2011

ministerial committee. Ultimately, I suppose, these issues are resolved via the Supreme Court.”³⁸

51. In a subsequent letter to the Chair of the Committee for the Scrutiny of the First Minister on 17 January 2013, the First Minister indicated that:

“There will ... be occasions when there are differences of opinion between the two Governments on matters of competence, but in practice these tend to be resolved through discussion and good engagement.”

Concordats

52. In addition to the MoU and DGNs, the Welsh Government has entered into 12 bilateral concordats with counterparts in various UK Government departments. Only four concordats have been entered into by the Welsh Government during the 4th Assembly to date.

53. As with the MoU, these concordats are not legally binding and are meant to set out only informal and flexible arrangements to ensure best practice.

54. In giving evidence alongside the First Minister on 21 November 2011, a Welsh Government official stated the following in relation to concordats:

“As far as the concordats are concerned, their significance varies in relation to Whitehall departments, in terms of the regularity and familiarity of their dealings with us. They tend to be particularly useful when there are negotiations between us and a Whitehall department that is not in regular communication with us. That kind of department may not have as clear an understanding of devolution as the Department for Education, for example, which has become accustomed, over many years, to seeing Welsh education issues dealt with here. If a Whitehall department only has very occasional dealings with us ...

“... a concordat is particularly helpful. With other departments that we deal with on a regular—even daily—basis, we may not

³⁸ CLA Committee, *RoP [paragraph 173]*, 21 November 2011

even have reference to a concordat. Both sides, as it were, understand the rules of the game.”³⁹

Evidence

55. We asked the First Minister about the adequacy of inter-governmental arrangements. He told us:

“The structure is fine; there are plenty of organisations and agreements in place to govern the inter-governmental relationship. We have, of course, the joint ministerial committee, which meets in Plenary—if I remember—once a year and outside of that twice a year. There is the joint ministerial council on Europe, which also meets to deal with European matters. We have the memorandum of understanding, the devolution guidance notes, and the dispute avoidance and resolution protocol, which is linked up with the joint ministerial committee. The question is about the willingness to implement them. I do not believe that there is a need for a different structure, but there is always a need for a commitment to use that structure in order to facilitate better relations and, sometimes, to avoid disputes.”⁴⁰

56. In making these comments, the First Minister identified the current legislative settlement as problematic, suggesting that the reserved powers model as operated in Scotland offered greater clarity, noting that:

“The fact that we have a constitutional settlement that is not as clear as the Scottish settlement is bound to lead to disputes.”⁴¹

57. He highlighted how the Welsh Government and the UK Government were unable to overcome their disagreement over the *Local Government Byelaws (Wales) Act 2012*, resulting in the dispute being resolved by the Supreme Court. In so doing, he said:

“Actions such as that should be exceptional, but, under our present settlement, I do not think that they will be, in the future. There will be scope for more matters to be decided in the Supreme Court. That is not the way in which inter-

³⁹ CLA Committee, *RoP [paragraphs 176 and 178]*, 21 November 2011

⁴⁰ CLA Committee, *RoP [paragraph 56]*, 22 April 2013

⁴¹ CLA Committee, *RoP [paragraph 60]*, 22 April 2013

governmental relationships should work. The machinery for dealing with inter-governmental relations works; the problem is that the basis on which that machinery works is not as clear as it might be.”⁴²

58. He also noted, for example, some differences in the way in which devolution matters were defined in the MoU and DGNs and emphasised the need for greater clarity:

“The more clarity that there is, the easier it is for inter-governmental relationships to work more efficiently, and the easier it is for officials and politicians to understand the limits of the different powers.”⁴³

59. The First Minister also felt that DGN7, *Court Proceedings regarding devolution issues*, which has not yet been published by the UK Government, would be valuable in providing more clarity about the constitutional settlement and the *Government of Wales Act 2006*. He did, however, sound a note of caution, saying:

“Without clarity in the legislation, I do not see that guidance note 7 could be effective enough.”⁴⁴

60. The First Minister suggested one potential way of avoiding conflict:

“One of the weaknesses that I perceive in the current settlement is that it is not possible, as far as I am aware, to go to the Supreme Court and ask for a ruling over whether something is in competence. It has to be done once a Bill has been taken through the Assembly. There is no way of getting a preliminary ruling to that extent. I know that there will be those who argue that you cannot really do that until you see the detail, which I appreciate, but sometimes there will be an issue where a ruling on the limits of the settlement would be quite useful.”⁴⁵

61. The First Minister also spoke about the UK Government’s decision to reverse its plans to remove the requirement for Welsh membership

⁴² CLA Committee, *RoP [paragraph 60]*, 22 April 2013

⁴³ CLA Committee, *RoP [paragraph 62]*, 22 April 2013

⁴⁴ CLA Committee, *RoP [paragraph 69]*, 22 April 2013

⁴⁵ CLA Committee, *RoP [paragraph 80]*, 22 April 2013

of the Independent Judicial Appointments Commission. He told us how this had come about:

“What happened was that it was brought to my attention, to the best of my recollection, by officials. I raised the issue directly in November last year with the Lord Chancellor in a meeting and said that I objected to the original proposal. Then, on 29 January, the Lord Chancellor wrote to me, confirming that he had considered the matter further and had decided to include a Welsh commission representative in the Crime and Courts Bill.”⁴⁶

62. He also told us that communications between the two Governments were “fine” on non-devolved issues,⁴⁷ adding:

“I do not see any issue at the moment in terms of there needing to be a more formal structure to deal with these issues, because non-devolved departments will engage with us. They are happy to have an exchange of correspondence, and to examine certain issues ... I am not particularly concerned about the formal nature of the relationship between ourselves as a Government and departments at Whitehall that deal with issues that are not devolved to Wales.”⁴⁸

63. On concordats, the First Minister told us that they are “important in the way that they govern relationships” but noted that:

“The difficulty can sometimes come not in terms of the concordat but in terms of an understanding of the different governance in Wales on the part of departments that are not used to dealing with devolved government in Wales. Reminding them of that is something that we keep on doing.”⁴⁹

64. He did not see the need for more concordats as a consequence, rather:

“... the need for ... a constant reminding of Whitehall departments of the nature of devolution, particularly in regard to Wales. Many of them are quite used to dealing with devolved

⁴⁶ CLA Committee, *RoP [paragraph 111]*, 22 April 2013

⁴⁷ CLA Committee, *RoP [paragraph 119]*, 22 April 2013

⁴⁸ CLA Committee, *RoP [paragraph 119]*, 22 April 2013

⁴⁹ CLA Committee, *RoP [paragraph 107]*, 22 April 2013

counterparts in Scotland and Northern Ireland, and areas that are devolved there, but not in Wales. Quite often, it is those departments that find it more of a challenge to understand the nature of governance in Wales.”⁵⁰

Our view

65. We note the complexity of the current devolution settlement and the challenges it creates for inter-governmental relationships. We agree with the First Minister that this complexity is more likely to lead to disputes between governments. However, change (if any) to the settlement could be many years away and it is therefore important to focus on how the existing arrangements could be improved.

66. The importance of effective government-to-government relationships, including timely communication between governments, cannot be overestimated given the complexity of the current settlement. The numerous documents—the MoU, DGNs and concordats—that facilitate the smooth operation of these potentially complex inter-relationships are therefore of crucial importance and need to be updated regularly, particularly to take account of experience.

67. The continual review and updating of these documents can be marginalised alongside the frantic pace and continually evolving nature of government activity. Nevertheless, we believe that both the Welsh and UK Governments should commit to a formal and regular programme of review if they have not already done so. Such a formal review would also serve to provide a regular reminder to Whitehall departments about the implications of devolution for their work.

68. It may also prove useful to locate in one easily accessible place details of the MoU, and all relevant DGNs and concordats together with an overview of the inter-relationships between them to enable greater understanding amongst those involved in the delivery of the tasks that the documents aim to facilitate.

69. On a more specific issue, we note the mechanism by which the UK Government reversed its plans to remove the requirement for Welsh membership of the Independent Judicial Appointments Commission. It appears to us that, on this occasion, the resolution of this issue owed

⁵⁰ CLA Committee, *RoP [paragraph 109]*, 22 April 2013

more to a chance meeting rather than to a formal process. While we do not doubt that the First Minister would have written to the Lord Chancellor on this issue, we believe that there would be considerable benefits to putting in place a more formal mechanism for dealing with non-devolved issues.

Recommendation 3: we recommend that the Welsh Government should consider looking at developing formal mechanisms with the UK Government to deal with specific non-devolved policy issues affecting Wales.

70. We also note the First Minister's comments regarding *Devolution Guidance Note 7: Court Proceedings regarding devolution issues*. We agree with him that it would be valuable in providing more clarity about the constitutional settlement and the *Government of Wales Act 2006*, particularly given that 2 Bills have already been referred to the Supreme Court.

Recommendation 4: we recommend that the UK Government publishes Devolution Guidance Note 7: Court Proceedings regarding devolution issues as a matter of urgency.

71. We note with interest the First Minister's comments (at paragraph 59) about holding pre-legislative hearings in the Supreme Court on matters of legislative competence. While we can envisage some practical difficulties with such an approach, we believe that there would be some merit in the Welsh Government examining this issue in more depth.

Annexe A – Inquiry into powers granted to Welsh Ministers in UK laws (March 2012): recommendations and subsequent responses

Recommendation 1. We recommend that the Welsh Government should ask the Assembly to consider a “declaratory” resolution setting out the Assembly’s understanding of the Sewel convention as it applies to the Assembly.

Government Response: Accept

Business Committee Response: Note

Recommendation 2. We recommend that a nominated Welsh Government Minister should be responsible for informing the Assembly of any UK Bills that impact on the Assembly’s competence or the powers of Welsh Ministers as soon as reasonably practicable after the Queen’s speech. Similar warning should be provided of relevant amendments to Bills.

Government Response: Accept in part

Recommendation 3. We recommend that the relevant Devolution Guidance Notes should be revised and published at the earliest opportunity and that the Welsh Government and the Wales Office should jointly consider how best to use this opportunity to embed knowledge of the Welsh devolution settlement across Whitehall departments.

Government Response: Accept

Recommendation 4. We recommend that the Welsh Government establishes a central unit that has the task of keeping abreast of legislative developments in Whitehall and Westminster that might affect Wales and the Assembly.

Government Response: Accept

Recommendation 5. We recommend that Standing Order 30 should be removed and Standing Order 29 amended so that the consent of the Assembly is required for UK Parliament legislation on any matter affecting the legislative competence of the Assembly or affecting the powers of Welsh Ministers.

Government Response: Accept

Business Committee Response: Accept

Recommendation 6. We recommend that Standing Order 29 should be amended so that all Legislative Consent Memorandums (including matters now covered by Standing Order 29) are, apart from in exceptional circumstances, referred to an Assembly Committee for scrutiny.

Government Response: Reject

Business Committee Response: Accept in principle

Recommendation 7. We recommend that Standing Order 29 should be amended so that a Legislative Consent Motion cannot be tabled by the Welsh Government until after the relevant Committee has reported on the Legislative Consent Memorandum.

Government Response: Reject

Business Committee Response: Accept in principle

Recommendation 8. We recommend that where the Welsh Government or a Committee that has scrutinised an LCM so recommends, consent should be conditional and subject to later approval of the final provisions.

Government Response: Reject

Recommendation 9. We recommend that the Assembly Commission should keep under review the resources available to Assembly Committees to help them consider and prioritise work on Legislative Consent Memorandums.

Government Response: This is a matter for the Assembly Commission
Commission Response: In considering our priorities for our budget proposals for 2013-14 and the remainder of the fourth Assembly, the Commission will continue to ensure that all the necessary support is available.

Recommendation 10. We recommend that the Welsh Government and the National Assembly consider how best to maintain and develop authoritative and easily accessible information about laws made in Wales and the powers of the Welsh Ministers.

Government Response: Accept

Recommendation 11. We recommend that the Assembly's Standing Orders should be amended:

- to require the Welsh Government to seek the consent of the Assembly to any subordinate legislation made by UK Ministers alone that has an impact on the Assembly's legislative competence; and
- so that the procedures for considering subordinate legislation are extended along the lines of the temporary procedure recently agreed by the Business Committee for considering Public Bodies Act Orders.

Government Response: Accept in principle

Business Committee Response: Accept in principle

Annexe B – Letter from First Minister, 10 July 2013



Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref: MB/FM/2597/13

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

10 July 2013

Dear David

The Constitutional and Legislative Affairs Committee's report on its inquiry into powers granted to Welsh Ministers in UK laws

Following my evidence to the Committee on 22 April, I am writing to provide an update on some of the matters we discussed.

Implementation of recommendation 5 of the Committee's report

This recommendation relates to extending the application of the Legislative Consent process to cover modification of Welsh Ministers' functions which are outside Assembly legislative competence.

While I agree with this recommendation, it can only be taken forward if the UK Government will agree to amend Devolution Guidance Note 9 to acknowledge that the Assembly's consent should be sought in these circumstances. The Secretary of State for Wales takes the view that the different application of the LCM process in Wales compared with Scotland and Northern Ireland is justified by the nature of the devolution settlements.

I undertook to continue to press the Secretary of State on this.. I have written to him again, and intend to raise the issue with him at one of our regular bilateral meetings.

Guidance for Welsh Government officials on liaison with the UK Government over Assembly Bills, Parliamentary Bills and Section 109 Orders.

Work is underway to update the earlier guidance on this which is significantly out of date. This is, in effect, the Welsh Government counterpart to DGN 9 and DGN 17. Subject to consultation with the Wales Office, I hope to be in a position to share this guidance with the Committee by the end of the year.

Implementation of recommendation 1 of the Committee's report

In response to this recommendation, the Welsh Government agreed to lay a memorandum before the Assembly setting out our understanding of the Sewel convention as it applies to Wales.

Most changes to Standing Orders flowing from the Committee's recommendations, apart from that relating to extending the LCM process to cover Welsh Ministers' functions outside Assembly legislative competence, have been made or are about to be made. We will, therefore, now proceed with drafting a statement, which I will share with the Committee after the Assembly returns from the Summer recess, prior to laying before the Assembly.

Work on a Welsh statute book

Finally, the Committee asked me about our progress in improving access to legislation and I undertook to respond in writing with more detailed information.

It is important to be clear about the elements of the work involved when talking about what has been referred to as a "Welsh statute book".

The statement made by the Counsel General in June 2012, related to one specific aspect of the work currently underway, which is ensuring that the legislation.gov.uk website is available in the Welsh language. We are not talking here about ensuring that the legislation of the National Assembly and the Welsh Ministers is published in Welsh - that is happening and always has. We are talking about translating the website itself. I am pleased to be able to inform the Committee that, after a delay caused by the work being more complex than anticipated, the new site is in its final testing stages, part of which involves Welsh Government officials checking its content. The launch of the newly bilingual site is therefore imminent.

The other elements of the work are longer term projects. A comprehensive Welsh statute book requires a commitment over many years to separate, consolidate and restate legislation that currently applies to England or the rest of the UK as well as Wales. The scale of such a project is vast and there are no quick fixes or easy answers. It will take time. The Counsel General is continuing to consider means in which this work could be accelerated and the resources involved in doing so.

Similarly the Welsh Government's collaboration with Westlaw to create an online encyclopaedia of Welsh laws is also a huge task and remains a work in progress. The Counsel General answered an Oral Question on this issue in plenary on 19 June, and will inform Members of further progress in due course.

Yours sincerely

CARWYN JONES