

Paratowyd y ddogfen hon gan gyfreithwyr Cynulliad Cenedlaethol Cymru er mwyn rhoi gwybodaeth a chyngor i Aelodau'r Cynulliad a'u cynorthwywyr ynghylch materion dan ystyriaeth gan y Cynulliad a'i bwyllgorau ac nid at unrhyw ddiben arall. Gwnaed pob ymdrech i sicrhau bod y wybodaeth a'r cyngor a gynhwysir ynddi yn gywir, ond ni dderbynnir cyfrifoldeb am unrhyw ddibyniaeth a roddir arnynt gan drydydd partïon.

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## **Constitutional and Legislative Affairs Committee**

### **Inquiry into the granting of powers to Welsh Ministers in UK Laws**

#### **Legal Advice Note 2**

##### Background

1. 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.

The terms of reference for the inquiry include:

- 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 extent to which the National Assembly is able to exercise robust scrutiny of such processes through its Standing Orders; and
- The procedures for Legislative Consent Motions compared to the position in the other devolved legislatures.

2. The Welsh Government laid on the 13<sup>th</sup> October a further Legislative Consent Memorandum (LCM) in relation to additional amendments to the Education Bill; the related Motion is scheduled for debate on the 1<sup>st</sup> November under Standing Order 29. On the 18<sup>th</sup> October, the Minister for Local Government and Communities made a written statement in relation to further amendments to the Localism Bill to grant powers to Welsh Ministers. This note looks briefly at the powers being granted to Welsh Ministers in each case, and considers the procedures that apply to them.

##### The Education Bill - LCM

3. A third LCM (that accompanies this note) in relation to this Bill was laid by Welsh Ministers on 13<sup>th</sup> October. It related to amendments to the Bill that would amend Part V of the Education Act 1997 in relation to Wales to correspond to amendments to Part 7 of the Apprenticeships, Skills, Children and Learning Act 2009 concerning the Office of Qualifications and Examinations Regulation (Ofqual) in relation to England. In each case they give the qualifications regulator the power to impose financial penalties on a

‘recognised body’ that awards or authenticates a qualification as well as related provisions regarding appeals and costs. The amendments relating to England and Wales were tabled at the same time at Westminster; this was not therefore a case of the inclusion of Wales being added to provisions originally intended for England.

4. The amendments also contain an order making power that affects the calculation of the penalty. Such an order would be subject to an affirmative procedure in the National Assembly.

5. The Government’s justification for seeking these powers is set out in paragraphs 11 and 12 of the LCM. In summary, it is a wish to acquire the same regulatory tools as Ofqual, and at the same time.

6. The National Assembly’s legislative competence in relation to Education and Training (as set out in Schedule 7 to the Government of Wales Act 2006) excludes only Research Councils. The provisions made by the amendments that are the subject of the current LCM could therefore have been made by an Act of the Assembly.

7. The amendments were published by Parliament on the 14<sup>th</sup> October, but must have been tabled the previous day as the LCM was laid at the National Assembly on the 13<sup>th</sup> October. It was considered by the Assembly’s Business Committee on the 18<sup>th</sup>, with a view to its being debated in Plenary on the 1<sup>st</sup> November, the intervening week being half term. Report Stage in the Lords was commenced on the 18<sup>th</sup> October, and is scheduled to be completed on the 1<sup>st</sup> November. As this is the second House, the only opportunity for further amendment would be in the case of ‘ping-pong’ between the two Houses.

8. The Scottish timetable for consideration of legislative consent in relation to the Education Bill is worthy of note by way of comparison. The Bill was introduced in the House of Commons on 26 January 2011. The Legislative consent memorandum was lodged by the Scottish Government on 27 January 2011. It was discussed by the Education, Lifelong Learning and Culture Committee on 2 and 9 March 2011. The Committee’s report was published on 10 March, and the motion was agreed on 17 March 2011.

#### The Localism Bill – Written Statement

9. This Bill too has been the subject of a series of LCMs, but the most recent development has been a written statement by the Minister for Local Government and Communities on the 18<sup>th</sup> October, the text of which is annexed to this note. The amendments in this case would ‘confer powers on the Welsh Ministers to pass on to Welsh public authorities EU infringement fines that are imposed on the UK Government by the Court of Justice of the European Union’. The amendments for Welsh Ministers were laid on the 3<sup>rd</sup> October; the corresponding amendments giving powers to UK Ministers were

laid on the 7<sup>th</sup> September. The Welsh clauses now appear as clauses 58-67 in the Bill following completion of Report Stage in The Lords. Again, as this is the second House, the only opportunity for further amendment would be in the case of ‘ping-pong’ between the two Houses.

10. The amendments again contain an order-making power for Welsh Ministers –

“Designation of Welsh public authorities

*(1) The Welsh Ministers may by order designate a Welsh public authority for the purposes of this Part.*

*(2) The order must—*

*(a) specify the Welsh public authority by name;*

*(b) identify any EU financial sanction to which the designation applies; and*

*(c) describe the activities of the authority which are covered by the designation.*

*(3) The order may identify an EU financial sanction for the purposes of subsection (2)(b) by....”.*

By virtue of clause 234(11), such an order would be subject to an affirmative procedure in the National Assembly.

11. The Government’s justification for seeking these powers in this Bill is that ‘represents the most appropriate and proportionate legislative vehicle to enable these provisions to apply in Wales at the earliest opportunity.’

12. The Government states that ‘These amendments giving the Welsh Ministers powers to pass on fines to Welsh public authorities do not fall within the Assembly’s legislative competence...’. No explanation is given as to why it has come to that view, having regard to the Assembly’s extensive legislative competence in relation to public authorities in Wales.

13. The amendments to give powers to Welsh Ministers were laid on the 3<sup>rd</sup> October, but were not notified to the Assembly until the statement was made on the 18<sup>th</sup> October. In the meantime Report Stage had commenced on the 5<sup>th</sup> and been completed on the 17<sup>th</sup> October.

#### Standing Order 29 – Consent in relation to UK Parliament Bills

14. This Standing Order contains the LCM procedure, and applies as follows –

*“In Standing Order 29, “relevant Bill” means a Bill under consideration in the UK Parliament which makes provision (“relevant 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*  
*(ii) which has a **negative impact on the legislative competence of the Assembly.***”

15. It will have been noted from paragraph 6 above that the Education Bill provisions do come within the Assembly’s legislative competence. On the other hand, the Government (as was explained in paragraph 11 above) considers that the Localism Bill provisions do not come within that competence.

16. By virtue of Standing Order 29.4, Business Committee may formally refer any LCM ‘to a committee or committees for consideration.’ No LCM has yet been referred using this power. The current example of the Education Bill shows the difficulties that can arise. Although the amendments that are the subject of the LCM are sufficiently significant that referral could be justified, the timing is such, at the end of the Parliamentary process, that it would serve no useful purpose. It shows the importance of Welsh Ministers laying an LCM as soon as possible after the amendments have been tabled at Westminster. That was indeed done in this case, but the amendments were introduced at such a late stage in the parliamentary process that it did not assist the Assembly in achieving full scrutiny as permitted by Standing Orders.

17. The explanation in the previous paragraph underlines therefore the importance of amendments that would be subject to an LCM being introduced as early as possible in the legislative process at Westminster, rather than at the very last amending stage as here (and in the case of the Localism Bill amendments that are the subject of the written statement). Given the way that legislation, and particularly legislation specific to Wales, is dealt with at Westminster, it can be argued that the LCM route will always be second-best to Assembly legislation in terms of scrutiny. It could therefore be argued that it should not just be a matter of the Welsh Government giving the Assembly enough notice of likely LCMs but, rather, that it should not acquiesce in any proposal to legislate at Westminster, on something within the Assembly’s legislative competence unless there is a very good reason for doing so.

#### Standing Order 30 – Notification in relation to UK Parliament Bills

18. This Standing Order contains the Written Statement Procedure, and applies as follows –  
*“In Standing Order 30, “relevant Bill” means a Bill under consideration in the UK Parliament which makes provision (“relevant provision”) in relation to Wales (other than a provision which is a relevant provision within Standing Order 29.1):*

*(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).*

19. The recent statement in relation to the Localism Bill contains no explanation of why the Welsh Government does not consider the provisions to be within the legislative competence of the Assembly, with the result that Standing Order 30 (with no provision for Assembly scrutiny) applies, rather than Standing Order 29 (with some scrutiny provision). The Committee may wish to consider whether such an explanation should be provided in relation to such statements.

20. Standing Order 30.2(iii) (like Standing Order 29.2(iii)) requires notification of amendments in the applicable way within two weeks of the amendments being tabled or agreed to. Whilst the amendments to the Education Bill were notified (under Standing Order 29) on the day that they were tabled, the amendments to the Localism Bill were notified by way of Written Statement more than two weeks after they were tabled, after they had been debated in Parliament, and after the final opportunity (under normal circumstances) for amendment of the Bill had passed. They were nevertheless within the flexible time limit permitted by Standing Orders. The Committee may wish to consider whether greater consistency is appropriate.

#### Conclusion.

21. These two recent examples illustrate the two different procedures that apply in Wales to cases that would be subject to the same procedure in Scotland. They also highlight the implications in terms of scrutiny that arise when powers are given to Welsh Ministers by amendments very late in the legislative process at Westminster.

#### **Legal Services**

**October 2011**

“WRITTEN STATEMENT BY THE WELSH GOVERNMENT

TITLE UK LOCALISM BILL – TREATMENT OF EU INFRACTION FINES

DATE 18 October 2011

BY Carl Sargeant, Minister for Local Government and Communities

The Localism Bill was introduced into the House of Commons on 13th December 2010. The aim of the UK Government is to devolve greater powers to councils and neighbourhoods and give local communities control over housing and planning decisions.

The UK Government laid amendments to the Bill on 3 October to confer powers on the Welsh Ministers to pass on to Welsh public authorities EU infraction fines that are imposed on the UK Government by the Court of Justice of the European Union. These amendments mirror amendments laid by UK Government on 7 September in respect of UK Ministers to pass on fines to Welsh public authorities.

To date the UK Government has never been fined and these measures are intended to support the continuation of that position.

These amendments giving the Welsh Ministers powers to pass on fines to Welsh public authorities do not fall within the Assembly’s legislative competence and it is the view of the Welsh Government that it is appropriate for these powers to be conferred on the Welsh Ministers in this UK Bill as it is represents the most appropriate and proportionate legislative vehicle to enable these provisions to apply in Wales at the earliest opportunity.”