

# Committee on Better Governance for Wales White Paper

## BGW2 EV3

### The White Paper on Devolution: A real way forwards for Wales

**Marie Navarro and David Lambert**  
**Cardiff Law School**

The White Paper has several aims. Our paper will concentrate on Chapter 3, that is the proposals for enhancing the Assembly's legislative powers. No doubt other authors will comment extensively on the other Chapters.

This Chapter 3 is of particular interest to us in the context of Wales Legislation Online (<http://www.waleslegislation.org.uk/>) which has now been in existence for 6 years. It aims to set out the powers of the National Assembly for Wales as well as the legislation it produces. The consequences of Chapter 3 directly relate to our day to day work and interests.

#### **I. A New Framework of Assembly's Powers:**

The White Paper offers various possible ways of giving powers to the Assembly in the future:

I.1 The Assembly can continue to receive powers by means of transfer of functions orders made under section 22 of GOWA. This will allow it to receive functions presently exercised by central government in relation to Wales under existing Acts of Parliament. A recent example of this is the order transferring functions relating to animal health.

I. 2 New Acts of Parliament will continue to give powers to the Assembly in the same way that, on average, up to 15 Acts a year have done since 2000.

It will be possible in these new Acts to give powers to the Assembly in relation to subject matters for which they are not presently responsible. A recent example of this has been Fire and Rescue services.

For the future all bills giving powers to the Assembly will be drafted "in a way which gives the Assembly wider and more permissive powers to determine the detail of how the provisions should be implemented in Wales." Paragraph 3.12.

An example of such powers is in various sections of the Education Act 2002 and there is also a general power at the end of the Act by which the Assembly can make regulations "to give full effect" to the Act in section 212. In this section giving effect to the Act can include amending, adding to or repealing Acts of Parliament. So far since devolution such a power has only been given on very limited occasions to the Assembly. For the future it seems that this power will become a minimum requirement for all future legislation giving powers to the Assembly. In addition particular Acts could give more general powers to amend legislation in the body of the Act.

I.3 The Assembly will continue to be designated as the relevant body for implementing EU Directives under section 29 of GOWA and section 2(2) of the European Communities Act 1972. An average 2 such designations a year have been made so far.

I.4 The White Paper also proposes that the Assembly will be given enabling powers by Order in Council "to modify legislation or make new provision on specific matters or within defined areas of policy..." Paragraph 1.25.

The Assembly would derive many of its powers to make legislative provisions from these Orders in Council. These will specify the areas of policy within which the Assembly can legislate. It is only these Orders in Council NOT the Assembly's legislation made under them that will be subject to Affirmative resolution procedure Parliament. This will be debated for up to one and a half hours in each House prior to which the extent of the Order will probably be considered in a Committee of each or both Houses. Paragraph 3.21.

This proposal is subject to two major provisos at Paragraph 3.18:

- a. such powers will not be used in relation to matters which are the responsibility of UK Ministers in Wales
- b. the Assembly will not be given powers over the whole of any subject field listed in Schedule 2 to GOWA.

However the reference to such matters which are the responsibility of central government Ministers are not immutable i.e. they can gradually change as they have done since the beginning of devolution for example with the decision to give the Assembly powers in relation to Fire services and in relation to rail transport..

Presumably the reason for the exemption in b) is to distinguish the proposed new Assembly powers from subject areas legislative functions such as are possessed by the Scottish Parliament.

The initiative for an Order in Council will come from the Assembly as a request to the Secretary of State (for Wales) to consider the preparation and laying of a draft Order before Parliament.

### **The nature of the Orders in Council:**

The form of the Orders will not be specified in the proposed Government of Wales Bill. Their

content will be a matter for specific decision in each case.

Because of the limitations set out in a) and b) above, it is almost inevitable that each Order in Council will have provisos. The form which these provisos take would seem to vary according to the width of the policy area which the Assembly is seeking.

By reference to the useful examples given in paragraph 3.18 of the White Paper it is possible to envisage the nature of the provisos:

(i) Very specific policy areas – the example given in (a) of Para. 3.18 to amend specific existing legislation so as to combine the three existing Welsh Ombudsmen Offices into one- would probably be achieved by an Order stating that the power to be exercised would be to combine of the 3 Wales offices into one. The Order would then set out the existing Acts of Parliament which could be amended, added to or disapplied in their application to Wales by the Assembly to achieve this. The Order would be framed so as not to make these Acts alone subject to amendment or disapplication or addition. The Acts would only be given as examples so that other legislation could similarly be amended if necessary to achieve the objective of the designation in the Order.

A very specific policy area such as this would probably only give rise to the making of only one comprehensive set of laws by the Assembly. However it would not prevent the Assembly from changing these laws if it was decided to change the nature of the new Ombudsman Office in the future. Equally by making subsequent provisions the Assembly would be able to amend, add to or disapply future legislation enacted by Parliament relating to ombudsman in so far as such legislation applied to Wales "unless a particular Act contain a specific prohibition precluding use of the Assembly modifying powers" Para. 3.16.

(ii) The second example of "something rather wider" in the nature of an Order in Council is given in (b) of Para.3.18. The example is an enabling powers by which the Assembly could make laws for the protection and welfare of children. As the example shows the Assembly's laws could cover a range of policy matters relating to education, local government and social care.

Para 3.17 of the White Paper is in terms of "policy areas" for which either Assembly Ministers will be responsible or central government Ministers. Thus in education, central government is responsible, among other matters, for the pay and conditions of service of teachers.

This suggests that it would be possible to set out the general policy area of the protection and welfare of children as being the matter for which the Assembly can legislate and the provisos to that power could similarly be described by reference to policy areas. This is the way adopted by some of the Transfer of Functions Orders (TFOs) giving powers to the Secretary of State for Wales in the 1970's in particular in relation to education. This would avoid the extraordinary complexity of the 1999 TFO giving powers to the Assembly. Anything is better than that!!

This would also mean that if the policy area provisos to the Assembly's powers in an Order in Council are reasonably specific then the Assembly will be able to have wide general powers to

make legislation.

What needs to be avoided as far as possible are the exceptions to the Scottish Parliament's powers (set out in schedule 5 to the Scotland Act 1998) in so far as they refer to the "subject matter" of sections of Acts of Parliament. Such a concept is very difficult to apply.

As in the example at (i) above an Order in Council giving a wider policy area would permit the Assembly to amend or disapply relevant future Acts of Parliament.

The example given in (c) of paragraph 3.18 illustrating the wide nature of an Order which could be "something considerably wider" is similar to that of example in (b).

These various examples show that there is quite a variety of possible Orders in Council and a wide range of their scope.

## **II- Benefits of the White Paper:**

II-1 One of the benefits which seems not to have been commented on by anyone is the commitment in the White Paper from now onwards in Bills coming before Parliament to give "wider and more permissive powers" to the Assembly "to determine how the provisions of new Acts giving powers to the Assembly should be implemented." Such a general commitment is a major step forward because it will help to overcome the very variable nature of powers currently possessed by the Assembly. This is the interim proposition put forwards by the Richard Commission pending the implementation of its recommendation for full primary powers and it is a proposition which we have constantly highlighted in seminars to the Assembly, to the House of Lords and academic meeting.

Even if a future Act contains no more than a general power to "give full effect" to the objective of the Act this will give the opportunity for the Assembly to start making legislation of a wider nature and of the sort they will be able to make under Orders in Council after May 2007.

II-2 There is a fundamental misunderstanding in the media about the proposals to give the Assembly legislative powers by Orders in Council. The proposal is that only the Orders in Council will be the subject of approval in Parliament, not the laws made under them by the Assembly. This presents much more flexibility for the Assembly to make legislation than as been recorded in the media.

Once an Order in Council has been made then the Assembly can make law within the scope of the Order free from the requirement of Parliamentary intervention.

If the Assembly law is outside the enabling power of an Order in Council the law can be challenged by anybody not only by the Attorney General as a devolution issue under Schedule 8 to GOWA. In this respect the Scottish Parliament is in no different position to that of the Assembly. The Acts of the Scottish Parliament are a type of subordinate legislation. As such as with all subordinate legislation their legality can be challenged by the Courts and this is provided

for in the Schedule 6 to the Scotland Act 1998. Legality apart the Assembly laws as with Scottish Acts are not subject to Parliamentary supervision.

II-3 Much has been made of the situation when a government is in power in the Assembly and a government of a different political colour is in power in Westminster. The assumption seems to be that the Assembly will find it very difficult to continue to receive new powers under new Orders in Council and that possibly existing Orders in Council will be repealed.

It might be useful to recollect that the Welsh Office continued to receive new powers by TFOs both when there was a Labour Government and a Conservative Government in power in Whitehall. At no time was there any threat to amend existing TFOs.

We consider that if the Assembly votes overwhelmingly for a new Order in Council to give them powers to implement new policy areas it would be very difficult for a Secretary of State in receiving such request from an elected body to refuse to put a draft to Parliament and it would be very difficult for Parliament to refuse to approve the Order. Equally it is not conceivable that once an Order in Council has been approved that it will be repealed. While it is possible to repeal an Order in Council because it continues to give enabling powers to Assembly to make laws within its ambit, the effect of repealing an Order in Council will be to automatically repeal all the laws made under that Order in Council as well, unless they were specifically saved.

II-4 We agree with paragraph 3.15 of the White Paper, that an Order in Council will enable the Assembly to make law which at present it can only be made by an Act of Parliament. Acts of Parliament giving powers to the Assembly "are constrained by the legislative priorities of the UK government."

Furthermore once an Order in Council is in place the Assembly can change the law it has previously made by using the provisions of the Order. Orders in Council which give wider policy area powers will enable new policy to be reflected in new law made under the Order without the need to require further enabling provisions under new Acts.

II-5 Arising from what is said above in II-4 the concept of an Order in Council describing a policy area within which the Assembly can make law is very different to that of an Act which usually sets out lists of specific powers under which the Assembly can exercise functions. This gives considerably more flexibility to the Assembly to make laws. It is not constrained by the parameters of individual sections of Acts.

II-6 Taking the example in the White Paper of an Order in Council giving legislative powers to the Assembly in relation to the protection and welfare of children, this would enable the Assembly to "modify- i.e. amend, repeal or extend the provisions of Acts of Parliament in their application to Wales or to make new provisions." In relation to this policy area Para.3.16 What more can one ask for? It would enable the Assembly to disapply all the separate provisions relating to children's welfare and protection which are to be found in a number of Acts (see examples in our Annex) covering education, local government and social care, so that these separate provisions would only apply to England. The Assembly could start with a clean sheet in

relation to Wales and set out a comprehensive statement of the law as it applies in Wales for the protection and welfare of children.

In setting out this comprehensive statement, the Assembly's laws having disapplied relevant current legislation, could include aspects of this legislation which amendments or additions as part of its comprehensive statement of the law.

In general while current legislation giving powers relating to policy areas to central government Ministers as regards Wales could not be amended or disapplied, but there is nothing in the White Paper by which with the Cabinet's agreement the boundaries of such policy areas could be reduced, so that this Assembly's laws could then amend or disapply legislation no longer coming within these policy areas.

## **Conclusion**

This is an infinitely flexible settlement proposed for the Assembly.

The only difference between that scheme and general legislative competence is that the general legislative competence of the body is set out initially in an Act in relation to subject areas with stated restrictions. The Assembly's powers to make law are not set out in an Act of Parliament but in a series of Orders in Council.

While no individual Order in Council could give a total subject area competency to the Assembly in time a series of policy areas Order in Council can add up to a subject area.

In our opinion this is a very efficient way of giving over time to the Assembly all the powers it needs to implement the policies it intends to carry out. In the future this may obviate the need for the Assembly to have general primary legislative powers as it would in due course receive all the powers it needs in relation to Wales to implement its policies.

A final thought is that the equivalent of the Sewell Convention may emerge whereby the UK Parliament voluntarily agrees not to legislate for Wales in matters for which the Assembly is given competence by Orders in Council, unless the Assembly so requests.

For the first time there could be a series of Acts which apply only to England with laws for Scotland and Wales being made by the respective devolved bodies- a interesting development of the British Constitution.

Marie Navarro and David Lambert

The enabling provision in a future Order in Council could summarised in one sentence "children welfare and protection subject to central government Ministers" instead of the various powers separately listed in the above 18 Acts.

The individual provisions contained in these 18 Acts could be disapplied, added to or amended in their application to Wales and entirely new provisions made so that there is one comprehensive set of laws applying to children welfare and protection in Wales instead of the considerable number of separate provisions in the present 18 Acts.