

Health and Social Services Committee

HSS(2)-04-06(p7)

Date: 8 March 2006

Venue: Committee Rooms 3 &4, National Assembly Offices, National Assembly for Wales

Title: Government of Wales Bill – Schedule 11, Paragraph 33

Purpose

1. To consider paragraph 33, of Schedule 11 of the Government of Wales Bill <http://www.publications.parliament.uk/pa/cm200506/cmbills/121/06121.175-181.html> and advise the Assembly's Government of Wales Bill Committee of any concerns that Committee Members may have.

Background

2. The Government of Wales Bill ("the Bill") makes provision for the separation of the legislative and executive functions currently exercised by the Assembly and provides for the transfer of functions currently exercised by it. The general position is set out in Schedule 11 paragraph 28 which provides for the transfer of Assembly functions to the Welsh Ministers. The functions transferred include the making of subordinate legislation.

3. Prior to the establishment of the National Assembly all subordinate legislation applicable to Wales was made by the Secretary of State who was required (subject to limited exceptions) to follow the parliamentary procedure prescribed by the enabling Act of Parliament. These procedures may either be affirmative, in which case specific parliamentary endorsement of the instrument is required, or negative, in which case the instrument is subject to annulment if a Parliamentary motion so requires.

4. Where the function of making subordinate legislation was transferred to the Assembly, section 44 of the Government of Wales Act 1998 ("GOWA") operated to disapply the prescribed parliamentary procedure and under section 64 of GOWA the Assembly was required, through its Standing Orders, to provide procedures for the preparation, making, confirmation and approval of subordinate legislation. These procedures are contained in Standing Orders 24 to 30. Transferring the function of making subordinate legislation to the Welsh Ministers requires that provision be made in the Bill to impose upon the Welsh Ministers procedures for the making of subordinate legislation.

5. Legislative powers were conferred upon the Assembly in two ways. Many powers were existing Ministerial functions which were transferred to it by means of an Order in Council made under section

22 of GOWA (known as a Transfer of Functions Order or ‘TFO’) made in 1999 (and subsequently) whilst others have been directly conferred on the Assembly by Acts of Parliament passed since 1999. The Bill provides that the procedures to be applied to the legislative making functions acquired in these different ways and which are to transfer to the Welsh Ministers should be as follows.

Functions transferred by Order in Council under section 22 of GOWA:

6. The general position is to apply the parliamentary procedure which applied immediately before the function was transferred e.g. where the Secretary of State is required to obtain Parliamentary approval to proposed subordinate legislation, the Welsh Ministers will be required to obtain Assembly approval. This is provided for in Sch 11 paragraph 31.

Functions directly conferred on the Assembly:

7. Where functions which will be exercisable by the Welsh Ministers following transfer under paragraph 28 have been conferred directly on the Assembly (usually by Act of Parliament) there is no parliamentary procedure which can be attached to the particular power to make subordinate legislation. Two distinct situations arise: firstly where the Secretary of State has a corresponding function in relation to England and, secondly, where there is no corresponding function, the function being unique to Wales.

8. The Bill deals with these distinct situations as follows:-

- Where the Secretary of State has a corresponding function in relation to England and a particular parliamentary procedure applies, Schedule 11 paragraph 32 provides that the equivalent Assembly procedure to that parliamentary procedure will apply (affirmative or negative as the case may be).
- Where the function is unique to Wales Schedule 11 paragraph 33 specifies the procedure which is to apply in respect of a particular function.

Action

9. Schedule 11 paragraph 33 sets out two Tables. Table 1 lists those powers which are to be subject to the affirmative procedure and Table 2 lists the powers to which are to be subject to the negative procedure i.e. subject to annulment by resolution of the Assembly.

10. The Committee is requested to confirm that it is content with the proposed allocation of procedures.

Assembly Parliamentary Service - Legal Division