

National Assembly for Wales Constitutional and Legislative Affairs Committee

INQUIRY INTO THE GRANTING OF POWERS TO WELSH MINISTERS IN UK LEGISLATION

Memorandum by Alan Trench

1. This memorandum is submitted to assist the Committee in its inquiry into the granting of powers to Welsh ministers in UK legislation, in advance of my giving oral evidence to it.
2. In my view, there has historically been a significant difference between how the National Assembly has approached the question of the acquisition of devolved powers, and how the Scottish Parliament has. It is debatable whether the extent of this difference was appropriate while Part 3 of the Government of Wales Act 2006 was in effect. Following the entry into force of the ‘Assembly Act’ provisions in Part 4 of the 2006 Act, it is hard to see any justification for such a difference. The effect of that difference has been to weaken the control the National Assembly has exercised over the Welsh Government.
3. One starting point is the working of Scottish devolution. There, the underlying principle has clearly been that the Scottish Parliament acts as ‘gatekeeper’ whenever powers are to be devolved. This principle has applied to both the acquisition of legislative powers and for the devolution of executive powers to the Scottish Executive/Government, and has taken effect through a combination of statutory procedures and the application of the Sewel convention. In the case of legislative powers, there are two ways to extend the powers of the Scottish Parliament: by an order under section 30 of the Scotland Act 1998, or it by primary legislation. In the case of executive powers, this can be done by various order-making powers, of which the main one is in section 63 of the Act, or through primary legislation to which the Sewel convention applies.
4. All the relevant order-making powers require affirmative resolutions in favour of the order, from both the Scottish Parliament and both Houses of Parliament at Westminster. So far as the Sewel convention is concerned, the most authoritative statement remains that in the Memorandum of Understanding and Supplementary Agreements (now Cm 7864, 2010), which provides:

the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government’ (paragraph 14).
5. The extent to which this applies to the conferral of new devolved powers, or the withdrawal of ones that have previously been devolved, is set out in internal guidance of both the UK and Scottish Governments. In the UK case, the relevant document is Devolution Guidance Note 10 on *Post – Devolution Primary Legislation affecting Scotland*, which says that legislative consent is required for

provisions applying to Scotland and which are for devolved purposes, or which alter the legislative competence of the Parliament or the executive competence of the Scottish Ministers.

6. Members of the Committee will be well aware that, up to now, these issues have been treated rather differently when it comes to Wales, although in principle the Sewel convention applies equally to Wales so far as law-making powers are concerned. While Part 3 of the Government of Wales Act 2006 was in effect, there was a clear difference between conferrals of legislative powers by legislative competence order (at the Assembly's initiative, and so with its consent), and those that took place using primary UK legislation (so-called framework powers), which did not. Conferrals of executive powers similarly appeared to take place beyond the sight of the National Assembly. Thus, while the Scottish Parliament has been able to act as 'gatekeeper' of all devolved powers in Scotland, the National Assembly has sought or been able to play the same role in Wales.
7. So far as the UK Government was concerned, the key issue was the consent of the Welsh Assembly Government. The *Memorandum of Understanding* quoted above emphasises the role of the Government, not the Assembly itself. This went even further when it came to issues arising from UK legislation affecting the 'Fields' set out in Schedule 5 to the 2006 Act. The June 2007 version of Devolution Guidance Note 9, *Post-Devolution Primary Legislation affecting Wales*, provided

The MoU indicates that there will be consultation with the Welsh Assembly Government on policy proposals affecting devolved matters whether or not they involve legislative change. ... When primary legislation is prepared by Whitehall Departments, consideration should be given to what arrangements may be required for Wales. The 2006 Act provides for the Assembly's legislative competence to build up incrementally over time, so in many cases, and particularly in the early years, the Assembly will not have the legislative competence to make its own provision for Wales. ... Whitehall Departments will in practice deal with the Welsh Assembly Government. Departments should approach the Welsh Assembly Government to gain the consent of the National Assembly for Wales to legislation when appropriate. It will be for the Welsh Assembly Government to indicate the view of the National Assembly for Wales when appropriate and to take whatever steps are required to ascertain that view (paragraph 7)

DGN 9 also said

there will still be many areas where the Assembly does not have legislative competence and where the Welsh Assembly Government will want to seek enabling powers in the UK Government's legislative programme. These could either confer executive functions on the Welsh Ministers, or be 'framework' powers conferring legislative competence on the National Assembly for Wales, or both (paragraph 14)

Moreover, paragraph 17 of DGN 9 expressly notes the need to obtain the consent of the Welsh Assembly Government for provisions that impose functions on the Welsh ministers, remove them or otherwise modify them, and for provisions that add to the legislative competence of the Assembly. It expresses the view that only provisions which affect matters within the legislative competence of the Assembly or which have a negative effect on the legislative competence of the Assembly require the Assembly's consent.

8. The reliance of the Sewel convention on liaison between governments rather than legislatures has been the subject of discussion for some time. The House of Lords Select Committee on the Constitution, for example, criticised this practice in its 2003 report on *Devolution: Inter-Institutional Relations in the United Kingdom*, in a Scottish (and Northern Ireland) context; see chapter 4, particularly paragraph 131.¹
9. Welsh devolution since 1999 has been characterised by a strong executive and, in institutional terms, a relatively weak Assembly. That arises because of the nature of executive devolution to the Secretary of State for Wales and the Welsh Office, which provided the foundation on which the National Assembly was built, the arrangements put in place under the 1998 Act, and the continuation of those under the 2006 Act. The scope DGN 9 gave to the Welsh Government to decide what form further powers might take since Part 3 of the 2006 Act came into effect has reinforced this. It certainly created scope in principle for the Welsh Government to decide whether it would take executive or legislative powers, in circumstances where the advantages of seeking legislative powers were not always clear.
10. It remains unclear to me how extensive a difference it is in practice, however. There is no clear, publicly-available list setting out what powers have been conferred on the Welsh ministers by UK legislation since 2007. Sadly, this has not been issued by the Welsh Government, nor does it form part of the material available through the database Welsh Legislation Online. I hope that this inquiry will produce one. My own, incomplete and unsystematic, look at the recent statute book identified a significant number of cases where primary legislation conferred executive powers on Welsh ministers. None of these were cases where there was an immediately evident, strong prima facie argument that they should have been legislative powers instead. Indeed, they appeared to relate to existing devolved executive powers. (That, however, was a requirement for conferring legislative powers under Part 3 of the 2006 Act; see section 95(2).) The only statement one could make with confidence about these cases was that there was a lack of transparency about them, facilitated by the arrangements under DGN 9 and the apparently technical, if not obscure, nature of the issues involved.
11. Much of this debate is now historic. With the referendum and the commencement of the 'Assembly Act' provisions in Part 4 of the 2006 Act, the powers of the Assembly are much

¹ House of Lords Select Committee on the Constitution *Devolution: Inter-Institutional Relations in the United Kingdom* Session 2002-03, 2nd Report, HL Paper 28.

wider. This affects not only assumptions about whether parallels with practice of the Scottish Parliament (or Northern Ireland Assembly) are appropriate – though it is notable that the UK Supreme Court, in its recent judgment in *Axa General Insurance v. Lord Advocate* [2011] UKSC 46, directly compared the National Assembly’s legislative powers with those of the Scottish Parliament and Northern Ireland Assembly (see, particularly, paragraph 43). In practice, with Part 4 wholly in effect, the question raised by legislation at Westminster will be very different. In the past, the issue was to decide how a Westminster bill affecting a ‘field’ in Schedule 5 would operate – whether powers devolved should be executive or legislative ones in nature – and the Assembly Government dealt with all those questions. Now, the question presented by Westminster legislation will usually be that of ensuring that legislation for England does not apply in Wales – in other words, distinguishing provisions that apply in Wales from those applying in England. Any application of legislation relating to devolved subjects will raise questions of the application of the Sewel convention, and the need for the Assembly’s consent.

12. The Sewel convention is likely to be more important in the working of Welsh devolution, now that the Assembly has acquired primary legislative powers, than it is in Scotland. While it remains important in a Scottish context, the reasons for that are much stronger for Wales. The convention’s use in Scotland largely arises from the administrative entanglement of governmental functions between Scotland England, as well as overlaps between reserved and devolved functions. That administrative entanglement is all the greater for Wales, and so the convention is likely to need to be used more often. In a Scottish context, it has been clear that the main driver of its use has been the Westminster legislative programme (rather than Scottish authorities using UK legislation as a convenient practical vehicle to achieve their objectives – though that has happened as well).
13. One would expect much of this to be set out in a revised version of Devolution Guidance Note 9. I am told that work on this is underway within the Wales Office, but there is no indication of when that revised version might be published or indeed what involvement the Welsh Government will have in its framing. (Previous versions have been issued after consultation with the devolved government, though as internal UK Government guidance devolved consent is not required.) The committee may wish to pursue that issue with Welsh ministers, and perhaps to set out their views about what the new version of the Note should provide in their report.
14. The important questions for the future, to my mind, are how the Sewel convention applies to legislative relations between the UK Parliament and Wales, and what role the National Assembly wishes to assume in that. The following seem to me to be the key points:
 - a. *The nature of the approval given in legislative consent motions.* At present, these follow the Scottish precedent, and endorse the ‘consideration’ of provisions at Westminster. The Assembly might wish to look to endorsing the substantive legislative provisions, not their consideration.

- b. *The nature of legislative consent.* There is no reason why consent needs to be absolute, but rather in particular cases could be made specific or conditional – for example, seeking certain amendments to the Westminster legislation, or debarring other amendments. In a Scottish context, the most ‘conditional’ legislative consent motion so far is probably that passed on the Scotland bill in the third Parliament. A complex legislative framework was used to deal with questions of liability for human rights abuses arising from ‘slopping-out’ in Scottish prisons, following the *Somerville* judgment.
- c. *Ensuring that consent is given to Westminster legislation in its final form, not that in which it is introduced.* Usual practice for Scottish legislative consent motions (set out in DGN 10) is for the motion to be considered and approved at Holyrood before the second reading debate in the first House considering the bill at Westminster. This obviously makes it impossible for the consent to relate to the final form of legislation, which is likely to be amended significantly before it is finally passed. Some sort of mechanism to identify amendments relating to devolved matters, and to ensure that these are considered by the Assembly before they are passed into law.
- d. *The status of the Sewel convention itself.* At present, the foundation of the Sewel convention is Lord Sewel’s statement in Parliament when it was first mentioned, and the Memorandum of understanding – an agreement between governments. In my view, it would be desirable for the convention to have a stronger basis at Westminster, such as endorsement as by a resolution of the two Houses. That is obviously a matter for Parliament. However, the Assembly itself might wish to endorse the convention, and set out what it considers it means and what action the Welsh Government should take to comply with it. That would serve as an authoritative direction to the Welsh Government about what it needs to do to address these issues in future.
- e. *Ensuring that legislative consent motions receive an appropriate degree of scrutiny.* Some legislation that is subject to a legislative consent motion will be technical in nature, or attract a motion because its impact on devolved matters or powers is minimal. The amount of consideration these need will be different to those that raise issues of political controversy or raise important constitutional issues. Moreover, views may differ about whether a particular motion or bill is controversial, politically or constitutionally. To resolve those effectively, some sort of winnowing process is necessary, and such a winnowing should take place in the Assembly rather than depend on the assessment of the Welsh Government. This committee might well be an appropriate forum for that task.

Alan Trench
21 October 2011

**DEVOLUTION GUIDANCE NOTE 9: POST-DEVOLUTION PRIMARY
LEGISLATION AFFECTING WALES**

SUMMARY

- The Government of Wales Act 2006 (“the 2006 Act”) creates, from May 2007, a separate legislature, the National Assembly for Wales, and executive, the Welsh Assembly Government. The Act provides for a procedure for Parliament to confer legislative competence on the National Assembly for Wales by Order in Council. This will allow it to pass legislation, known as Assembly Measures, which can do anything an Act of Parliament can do within the general constraints set out in the Act, and within the scope of the particular legislative competence granted. Devolution Guidance Note [16] sets out the procedure for conferring legislative competence on the National Assembly for Wales by Order in Council.
- The White Paper ‘Better Governance for Wales’ set out the policy that *“The Government intends for the future to draft Parliamentary Bills 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”*, which remains the case. This note includes guidance on changing the Assembly’s legislative competence by ‘framework’ provisions in Parliamentary Bills.
- The Memorandum of Understanding between the UK Government and the Devolved Administrations (MoU) says: *“The United Kingdom Government retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power. However, the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government.”*
- This Convention applies when, under normal circumstances, Parliamentary Bills make provision specifically on matters within the areas where the National Assembly for Wales has legislative competence or the Welsh Ministers have functions. It does not apply when Bills deal with such matters only incidentally to, or consequentially upon, provision made in relation to a non-devolved matter. In these circumstances, the Welsh Assembly Government and Wales Office should nevertheless be consulted .
- The Convention relates to Bills being put before Parliament, but Departments should approach the Welsh Assembly Government on the same basis for Bills being published in draft, even though there is no formal requirement to do so. It should be followed for Private Member’s Bills to be supported by the UK Government.
- The Secretary of State for Wales has overall responsibility for Welsh specific provisions in the UK Government’s legislative programme, and is a member of the Legislative Programme Committee to represent Welsh interests.

Introduction

1} The UK Parliament retains its sovereignty and right to legislate on any matter after devolution. However, the establishment of devolved institutions in Scotland and Wales has created, under the Scotland Act 1998 and the Government of Wales Act 2006, delegated bodies with the power to promote legislation with the force of Acts of the UK Parliament. In order to respect the competence of those bodies under a sovereign Parliament, the UK Government has committed in the Memorandum of Understanding between it and the devolved institutions, not normally ask Parliament to legislate within the competence of those bodies without the agreement of those bodies. The implementation of the Government of Wales Act 2006 therefore places new responsibilities upon Whitehall Departments to consult the Welsh Assembly Government, to obtain the agreement of the Welsh Ministers in certain circumstances and to only proceed with certain provisions in Parliamentary Bills if the National Assembly for Wales agrees to their inclusion. For description of the key elements of the Government of Wales Act 2006 see annex 2.

2} This note sets out guidance for Whitehall Departments on arrangements for managing new legislation affecting the responsibilities of either the National Assembly for Wales or the Welsh Assembly Government. It sets out the expectations of the Cabinet Committee on the Legislative Programme (LP) in giving effect to this policy and how to manage it to ensure smooth running of the UK Government's legislative programme. LP expects devolution issues to be resolved by the time a Bill is brought before the Committee prior to its introduction into Parliament.

3} This note is not concerned with the process by which the Welsh Assembly Government is consulted about policy. Arrangements for this are set out in the MoU, the agreement on Common Working Arrangements (**Devolution Guidance Note 1**) and the bilateral concordats between Whitehall Departments and the Welsh Assembly Government.

4} The UK Government has agreed with the Welsh Assembly Government that they will normally consult each other from an early stage on the development of relevant legislative proposals, in confidence where necessary (**see Devolution Guidance Note 1 *Common Working Arrangements, which should be read separately, in particular paragraphs 30-35***). Departments should make clear when information is being passed in confidence.

5} This note does not extend to legislation which deals with emergencies or is similarly exceptional.

6} Guidance on the role of the Secretary of State for Wales, including in relation to primary legislation, is given in Devolution Guidance Note 4 ***The Role of the Secretary of State for Wales***. The Secretary of State has overall responsibility for Welsh provisions in the UK Government's legislative programme, as well as for constitutional and devolution policy as it applies to Wales. The Secretary of State for Wales is a member of LP and represents Welsh interests in this respect, regardless of which Department may be sponsoring any particular piece of legislation. Accordingly, the Wales Office needs to be involved at all stages in legislation relating to Wales. Section 33

of the Government of Wales Act 2006 places a duty on the Secretary of State for Wales to consult the National Assembly for Wales after the beginning of each Parliamentary Session on the UK Government's legislative programme and on non-programme Bills agreed for introduction subsequently (unless there are considerations relating to the Bill which make such consultation inappropriate). The consultation must include a personal attendance by the Secretary of State for Wales at Assembly proceedings, and provides an opportunity for the Assembly to consider the content of individual Bills, in addition to the UK Government's choice of priorities.

General

7} In general:

- The MoU indicates that there will be consultation with the Welsh Assembly Government on policy proposals affecting devolved matters whether or not they involve legislative change.
- Where the possibility of particular legislation has not been publicly announced, information going to the Welsh Assembly Government should be passed in confidence. The Welsh Assembly Government will not circulate or allude to Bill material without the consent of the lead Whitehall Department. Additional guidance on confidentiality is given in paragraph 11 of the MoU agreed between the UK Government and the devolved administrations. It is for the administration providing the information to stipulate restrictions on usage. Where such restrictions constrain wider consultation by the Welsh Assembly Government, the duty of confidentiality might extend to other bodies to be consulted, subject to the agreement of the sponsoring Department.
- When primary legislation is prepared by Whitehall Departments, consideration should be given to what arrangements may be required for Wales. The 2006 Act provides for the Assembly's legislative competence to build up incrementally over time, so in many cases, and particularly in the early years, the Assembly will not have the legislative competence to make its own provision for Wales. It is therefore important for Departments to consult the Wales Office and Welsh Assembly Government about all relevant proposals for primary legislation, so that suitable vehicles can be identified. This is particularly important during the bidding stages, to inform the bid from the Secretary of State for Wales for forthcoming programmes.
- Whitehall Departments will in practice deal with the Welsh Assembly Government. Departments should approach the Welsh Assembly Government to gain the consent of the National Assembly for Wales to legislation when appropriate. It will be for the Welsh Assembly Government to indicate the view of the National Assembly for Wales when appropriate and to take whatever steps are required to ascertain that view. Departments should also liaise closely with the Wales Office.
- Whether the consent of the National Assembly for Wales on the one hand, or the Welsh Assembly Government on the other, is needed depends on the nature of the provision in question. The UK

Government's commitments are set out fully at paragraph 17 of this note. Departments should consult the Welsh Assembly Government and the Wales Office on changes in devolved areas of law which are incidental to or consequential on provisions made for non-devolved purposes; the consent of the Assembly is not needed in these circumstances.

- Departmental legal advisers or the Wales Office should be consulted if you are in any doubt about whether a proposal relates to a devolved matter. On some occasions there may be a different opinion about whether devolved matters are affected, and it is always advisable to consult your Departmental legal advisers, as well as the Wales Office and the Welsh Assembly Government, about these issues at an early stage in developing proposals for legislation.

Legislative planning

8} From May 2007, the legislative competence of the National Assembly for Wales will be much more limited in scope than the executive functions of the Welsh Ministers¹. This is a direct consequence of the unique nature of the Welsh devolution settlement.

9} The National Assembly now has powers to pass Measures in relation to certain education matters and NHS redress. The 2006 Act also confers the power to pass Measures in relation to the operation of the Assembly itself. However as more matters are added to fields within schedule 5, there will be an increasing number of areas where legislation in relation to Wales could be passed either by Parliament or by the Assembly. In such cases the normal expectation is that the Assembly would legislate in relation to Wales. It is however possible that the Welsh Assembly Government will wish to take the opportunity to include provisions in a relevant Parliamentary Bill, rather than promoting a separate Assembly Measure. Such provisions should be included in a Bill at introduction in the UK Parliament.

10} In considering proposals for primary legislation from 2007-08 onwards, therefore, Departments will need to consider whether anything that is proposed for inclusion in a Bill would in fact be within the legislative competence of the Assembly, or would have a negative effect on that competence. This should emerge clearly from early consultation with the Welsh Assembly Government and the Wales Office. It will also be possible at all times to see what the Assembly's legislative competence covers, since it will be defined by the latest version of Schedule 5. This will be available on the Wales Office website (www.walesoffice.gov.uk) and Welsh Assembly Government (new.wales.gov.uk).

¹ Except where otherwise indicated, references to the Welsh Ministers should be taken as including reference to the First Minister and Counsel General, where they have functions conferred on them individually.

11} The arrangements set out below recognise that the Welsh Ministers' functions will for some time to come extend into areas outside the Assembly's legislative competence. Under the 2006 Act, the Assembly can seek legislative competence in those areas where Welsh Ministers exercise functions, and the arrangements set out below reflect that aspect of the Welsh devolution settlement.

12} There may however be some limited areas where the Welsh Ministers exercise functions, which remain the responsibility of the UK Government, for Wales as well as for England, in relation to which the Assembly could not seek legislative competence. The 2006 Act has flexibility to allow new fields to be added to Schedule 5, either by a UK Bill or by an Order in Council, and the Assembly could then seek legislative competence in relation to those fields in the same way as for the existing fields. As noted at paragraph 3.26 of the Better Governance for Wales White Paper, however, this flexibility would not extend to:

“those subjects which remain the responsibility of Whitehall Departments for Wales as well as for England. Like Scotland, these would include Fiscal and Monetary Policy, Immigration and Nationality and Social Security. Also excluded would be fields where the Scottish Executive, and the Secretary of State for Scotland before devolution, have functions but the Assembly does not, such as civil and criminal law, the administration of justice, police and the prison service.”

13} Provisions relating to such areas will remain a matter for the UK Government, regardless of whether a Welsh Minister exercises functions within them or not. Accordingly, the consent of Welsh Ministers to changes to their functions within such areas is not required, although they should be consulted. Departments should always consult Wales Office lawyers for a legal view on whether provisions fall into this category if there is any doubt.

14} By the same token, there will still be many areas where the Assembly does not have legislative competence and where the Welsh Assembly Government will want to seek enabling powers in the UK Government's legislative programme. These could either confer executive functions on the Welsh Ministers, or be 'framework' powers conferring legislative competence on the National Assembly for Wales, or both. There could also be provisions directly implementing a Welsh Assembly Government policy in Wales' although these are now less likely. These could be contained in Wales specific legislation, or in other appropriate Parliamentary Bills. Proposals for the inclusion of provisions in Parliamentary Bills from the Welsh Assembly Government need to be copied to the Wales Office from the outset, and the Wales Office will remain responsible for bidding for Welsh provisions in Bills in forthcoming legislative programmes. In the case of executive functions, or

detailed policy implementation through legislation, the inclusion of such provisions will be agreed in the normal way.

15) For 'framework' powers in Bills, it is important to recognise that they will confer legislative competence on the Assembly by amending Schedule 5 to the 2006 Act, in exactly the same way as Orders in Council conferring such legislative competence under the 2006 Act. Such provisions are consistent with UK Government policy set out in the second bullet point of the summary. As with proposed Orders in Council, the UK Government will need to agree the appropriateness of conferring such legislative competence, and in particular its scope and limits. Accordingly the letter to the relevant Cabinet committee seeking policy clearance for the Bill will need an explicit section on Welsh provisions headed "**Framework Powers for Wales – Scope and Limits and Exceptions**". Framework powers will have to fit within the scope of the legislative vehicle, and it would not be appropriate for the scope of a Bill to be widened simply to accommodate the scope of a proposed framework power. Exceptions are common place and care needs to be exercised to ensure that the legislative competence being conferred does not exceed the executive functions Welsh Ministers already have. When seeking policy clearance for a framework power in a Bill, to assist UK Government Ministers in forming a view as to the appropriateness of the National Assembly for Wales having the power the bid needs to be accompanied by an explanatory memorandum giving a clear description of the purpose for which the power is being sought.

16) As proposed Orders in Council will require policy agreement with all relevant Whitehall Departments, so will framework powers in Bills. The Wales Office has overall responsibility for managing this process for the UK Government. If Departments who are sponsoring Bills which will include a Welsh framework clause would prefer, the Wales Office will ensure that consistent policy agreement is secured. Because such provisions will not contain the legislative detail to deliver Welsh Assembly Government policy a template explanatory memorandum for such provisions has been agreed with the Welsh Assembly Government, which mirrors the explanatory memoranda which will accompany the Orders in Council. Once again, the Wales Office can manage or advise on the production of required supplementary information in the proper format.

17) The Welsh Ministers and the Assembly have executive and legislative competence respectively in certain areas. It therefore follows from the commitment made by the UK Government in the MOU that it will not normally seek to legislate in relation to those matters without the agreement of the devolved institutions. For the purposes of the Welsh devolution settlement Parliamentary Bills can include provisions in relation to Wales for a range of purposes. The different purposes are described here, together with the agreements that will normally be required in each different case:

- *Provisions that modify, impose, confer, remove, or otherwise affect functions of Welsh Ministers.* The consent of the Welsh Ministers should be obtained, through normal consultation between the UK and Welsh Assembly Government, by the time a Bill is considered by LP. **There is an exception to this** which is described in detail in paragraph 12 and 13 above, relating to areas where Welsh Ministers exercise

functions, but which lie outside the areas where legislative competence could be conferred on the National Assembly. In these circumstances, Welsh Ministers should be consulted but consent is not required.

- *Provisions that add to the legislative competence of the Assembly*
The consent of the Welsh Ministers should be obtained, through normal consultation between UK and Welsh Assembly Governments by the time a Bill is considered by LP. The consent of the National Assembly for Wales is not required.
- *Provisions that have a negative effect on the legislative competence of the Assembly or which is on matters within the legislative competence of the Assembly:*

The Welsh Ministers will need to obtain the consent of the Assembly. By the time a Bill is considered by LP agreement must be reached with Welsh Ministers to promote the relevant motion in the National Assembly for Wales as soon as possible after introduction. In the event that the motion was not passed in the National Assembly, the UK Government would, subject to collective agreement being secured, need to table an appropriate amendment removing the relevant provisions before the Bill reaches its final stage in the House of introduction. The Welsh Ministers will need to have regard to these timing requirements in tabling their motion. The same will apply if any significant amendments are made to the relevant provisions during a Bill's passage. The Wales Office will work with the Welsh Assembly Government to facilitate any consents required.

- *Provisions within the Assembly's legislative competence which are purely supplementary, consequential, incidental, transitional, transitory or saving provisions relating to provisions on non devolved matters.*
The Welsh Ministers should be consulted, but consent is not required. Departments should consult the Wales Office for a view on whether provisions fall into this category.
- *These consent requirements also apply where UK Ministers have the power to amend primary legislation by Order² and it is proposed to make an Order which would have any of the effects set out in the four bullet points above.* Constraints and restrictions are not normally placed on the scope of order making powers in the primary legislation which is conferring those powers, nor may it be possible to assess in advance when Orders made under such powers would fall within the ambit of this guidance note. Therefore, when UK Ministers are proposing to make such an Order, they will be expected to have regard to ensuring that the policy commitments set out here are observed in those Orders as they would be in primary legislation. Where a Bill would confer wide-ranging powers on UK Ministers to amend primary legislation by Order, Departments should pay particular attention to how those provisions would interact with the functions of Welsh Ministers and the legislative competence of the National Assembly.

² In this paragraph, "order" includes any type of subordinate legislation.

18} The series of consents described above applies in normal circumstances. It does not apply in relation to emergency legislation or legislation that is otherwise exceptional.

Preparation of Bills and Submission to LP

19} LP Committee expects all devolution issues to have been resolved by the time the Committee considers whether the Bill should be introduced. This means that, if provisions require the agreement of the Welsh Ministers, agreement with the Welsh Ministers has been reached, and that, in instances where the agreement of the National Assembly for Wales is required, that the Welsh Ministers have agreed to promote the relevant motion in the Assembly. Papers for LP must contain a statement to that effect. In addition papers to LP should:

- Briefly state the effect of the Bill in Wales and whether matters are within devolved competence or matters for UK Ministers or the UK Parliament.
- Briefly identify all agreements and consultations that may be required, both with the Welsh Ministers and the National Assembly for Wales, and within the UK Government, and confirm that they have been secured. The Secretary of State for Wales will be asked to confirm this at LP, so it is essential that the Wales Office is fully involved in the process of reaching these agreements.

20} There should, in addition to any earlier policy discussions, also be consultation with the Welsh Assembly Government as part of the process of formulating instructions to Parliamentary Counsel where these touch on the Welsh Ministers' or Assembly's responsibilities, so that their interests are understood from the outset and any dispute resolution process undertaken in good time.

21} An arrangement that has proved effective in the past is for Welsh Assembly Government lawyers to provide a draft of instructions for the lead Whitehall Department and the Wales Office to approve and then pass on to Parliamentary Counsel. In some cases, it may be appropriate for Parliamentary Counsel to take instructions direct from the Welsh Assembly Government lawyers; but this should be done only where it is the most effective way of operating and the lead Whitehall Departments and their Ministers agree to this arrangement. Instructions sent directly to Parliamentary Counsel in this way still require the active assent of the UK Government - instructions going directly from WAG lawyers to Parliamentary Counsel Office must always begin with a statement that they have been cleared with the Wales Office and lead Department, who will seek on each occasion to take a unified HMG view, rather than requiring two separate departmental clearance procedures, but with the proviso that instructions are always copied to those Departments. Each separate instruction will require such a statement, and subsequent rounds of instructions will also need to be authorised, particularly where those revisions change policy, or include new policies. Framework clauses will continue to require Wales Office authorisation and clearance.

22} Where Departments are sponsoring Bills which act as vehicles for Welsh provisions requested by the Welsh Assembly Government, Welsh Assembly Government support will be essential in order to ensure the smooth passage of the Bill, in relation to the Welsh specific provisions. It is recommended that a standard Service Level Agreement be put in place as soon as clearance to include the Welsh provisions in the Bill is obtained. The Wales Office has overall responsibility for the mechanics of the Welsh devolution settlement so can manage this on behalf of sponsor Departments, if they prefer.

23} Consultation with the Welsh Assembly Government can be facilitated if Departments ensure that Bill material accurately distinguishes between the Welsh Ministers and the National Assembly for Wales . Annex 1 to this note lists some of the main aspects of this. While this is not prescriptive, and is no substitute for detailed discussions, it should ensure that such discussions can focus on any substantive sticking points and are not dominated by relatively minor and technical matters.

Bills Published for Pre-Legislative Scrutiny and Private Members Bills

24} The procedures described above should also be followed for Bills being published in draft. The same procedures should be followed for a Private Member's Bill, if the UK Government intends to support it.

During the passage of legislation

25} During the passage of legislation, the Welsh Assembly Government will provide full support to UK Ministers, as required and on request. If the UK Government proposes to amend a Bill or to accept an amendment, similar arrangements will apply if the amendment falls within devolved competence. Departments should approach the Welsh Assembly Government and Wales Office about such amendments. The Welsh Assembly Government can be expected to recognise the exigencies of the legislative timetables, for example when forced to consider accepting amendments at short notice. All amendments require at least LP clearance. Amendments that change policy or contain new policy will also require policy clearance. If the Welsh Assembly Government is unable to agree how to proceed with the Amendment in the time required the UK Government will be obliged to proceed to meet legislative deadlines, and will act accordingly.

26} Provided that the arrangements set out here have been observed, Ministers resisting non-Government amendments which fall within devolved competence, or Welsh specific provisions within Bills, will be defending provisions which have already obtained the consent of the National Assembly for Wales or Welsh Ministers.

ANNEX 1

Referring to the National Assembly for Wales and the Welsh Assembly Government in primary legislation

I. The following checklist aims to cover some largely technical points in referring to the Assembly and Welsh Assembly Government in UK Government Bills. It is neither exhaustive nor prescriptive. However, it should serve as a useful aide-mémoire for Departments and should minimise the need for discussions with Welsh Assembly Government officials to be dominated by relatively minor issues such as these.

Nomenclature

- II. Parliamentary Counsel will judge the most suitable way of referring to the National Assembly for Wales, or the Welsh Assembly Government, in a Bill, for example by their formal titles, or by a short title such as "the National Assembly", "the Assembly Government". However, the term "Welsh Assembly" is always to be avoided.
- III. The Government of Wales Act 2006 contains a definition of "Wales", which includes the sea around Wales to a distance of 12 nautical miles. Where a Bill confers functions on the Welsh Ministers or confers legislative competence on the Assembly which could be exercised in relation to the sea or to maritime activities, it should thus normally use the definition of Wales in section 158 of the Government of Wales Act 2006.

Functions in a Bill

- IV. Executive functions should normally be conferred on "the Welsh Ministers", as the collective term for the First Minister and Welsh Ministers (the Cabinet of the Welsh Assembly Government). It is also possible for functions to be conferred exclusively on the First Minister or on the Counsel General, but this will only be in circumstances where there is a particular reason for doing so. They should not be conferred on "the Welsh Assembly Government".
- V. Commencement provisions in a Bill (i.e. the means by which it comes into force) should normally apply on equal terms to England and Wales, and to UK Ministers and the Welsh Ministers. Again, proposed departures from these two presumptions should be discussed at an early stage in the pre-legislative process.
- VI. While it remains possible to confer functions on the Welsh Ministers by means of a Transfer of Functions Order under section 58 of the Government of Wales Act 2006, newly created Ministerial functions should normally be conferred directly on the Welsh Ministers by primary legislation. To do otherwise can increase the amount of Parliamentary time needed (by requiring Parliament to consider the Order as well as the Bill) and potentially misleads as to the UK Government's intentions (since

Parliament will assume the functions are not being conferred on the Welsh Ministers).

Statutory procedures

- VII. The procedures for the Welsh Ministers to make subordinate legislation will be similar to those applying to UK Ministers, with the Assembly in a similar position to Parliament with respect to powers to approve or annul statutory instruments. Bills conferring subordinate legislation powers on the Welsh Ministers will need to be clear whether they are to be subject to affirmative, negative or no procedure in the Assembly. Welsh Assembly Government lawyers can advise as to drafting precedents.
- VIII. A Bill should not normally subject the actions of the Welsh Ministers to UK Ministerial consent or approval (or vice versa), apart from certain functions which require the consent of HM Treasury. Exceptions to this should be explored as early as possible in the pre-legislative process.
- IX. Where there is a requirement for UK Ministers to consult the Welsh Ministers before acting (or vice versa), this should normally be included in legislation rather than in a concordat.

New public bodies

- X. The Welsh Assembly Government should be consulted at the earliest possible stage over any proposals to create new public bodies relating to its functions in Wales, since it may wish to adopt a different solution to suit Welsh circumstances. In such cases, depending on the timescales involved, it may be more appropriate to consider provision to grant the Assembly the legislative competence which would enable the Welsh Ministers to bring forward their own legislative proposals for consideration by the Assembly.

Where the Welsh Ministers will be wholly or partly responsible for public bodies and offices, these should have statutory titles in Welsh and English (e.g. "There is to be a body corporate called [title of body in English] or, in Welsh [title of body in Welsh]"). Welsh Assembly Government officials will be able to advise on a suitable Welsh title.

- XI. A new public office should only disqualify its holder from membership of the Assembly where that would cause an unavoidable conflict of interest with the Assembly's responsibilities. Disqualification from membership of the House of Commons does not always give rise to disqualification from the Assembly. Disqualification should generally be left to an Order in Council under section 12(1)(b) of the Government of Wales Act 1998 (or, for elections after May 2007, under section 16 (1) (b) of the Government of Wales Act 2006).
- XII. New public bodies which fall solely under the Welsh Ministers' control should normally be subject to their general powers to reform public bodies in Wales (Government of Wales Act 1998, section 28 and Schedule 4,)

these powers will remain in force and become powers of the Welsh Ministers by virtue of the transitional provisions in the Government of Wales Act 2006). A Bill should also normally provide for records of such a body to be Welsh public records (Government of Wales Act 2006, sections 146 and 148).

- XIV. Where the Welsh Ministers are to be wholly responsible for a new body, they should have the power to determine the form of that body's accounts, subject to Treasury consent.
- XV. Bills should provide that the Auditor General for Wales ("AGW"), and not the Comptroller and Auditor General, is to be responsible for auditing the accounts of any body which reports solely to the Welsh Ministers or to the National Assembly for Wales.
- XVI. Where the AGW audits a body's accounts, s/he should also have the power to conduct "value for money" examinations into that body.

Consultations and Statements of Policy

- XVII. Much primary legislation for Wales will continue to be included in England and Wales Bills, although it may well contain distinctive Welsh provisions. To avoid misunderstanding on the part of readers, therefore, any consultation document, White Paper, or other statement of policy relating to legislation should make it clear whether the legislation will contain powers for the Assembly to pass its own Measures in relation to Wales.
- XVIII. Wording should be agreed with the Wales Office and Welsh Assembly Government officials on a case by case basis, but the essence of the statement in relation to Wales might be:
"we intend to ask Parliament to grant the National Assembly for Wales legislative competence over a number of matters within the field of [eg: local government]. This will allow the Assembly to pass Measures appropriate to the situation in Wales."
- XIX. In general, the inclusion of a brief statement of this kind will not require that the document be published jointly with either the Welsh Assembly Government or the Wales Office. Whether a Welsh language version is required will be a matter for the lead Whitehall Department to consider in line with the requirements of its own Welsh language Scheme.

Contact details

- XX. If you have any queries, please contact:

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Ministry of Justice (Last updated – June 2007)

ANNEX 2

This annex provides a brief explanation of the component parts of the Government of Wales Act 2006, how they interrelate to confer enhanced legislative competence on the National Assembly for Wales, and how it can be exercised.

1. Schedule 5

Schedule 5 of the Government of Wales Act 2006 will define the scope of the Assembly's legislative competence, within areas where the Welsh Ministers exercise executive functions. Schedule 5 categorises the existing areas of policy responsibility devolved to the Welsh Assembly Government into 20 broad areas. These areas, called Fields, include subjects such as Housing, Education & Training and the Welsh Language.

These Fields will be populated with Matters either by Orders in Council made under Part 3 of GOWA 06 or through framework power provisions in UK Bills. (see below) The Matters will define the legislative competence for the Assembly to make legislation, similar to Acts of Parliament. Matters can only be added if they relate to one or more of the Fields.

Part 2 of Schedule 5 sets out some general restrictions on the Assembly's legislative competence while Part 3 of Schedule 5 sets out exceptions to those restrictions. These provisions mean that the Assembly will not be able to modify functions of Ministers of the Crown (ie non-devolved functions) without the consent of the Secretary of State, even if they lie within the scope of a matter over which it has legislative competence. This means that, where there are isolated Minister of the Crown functions within subjects which are generally "devolved", the protection of those functions need not be expressed by a specific reservation.

2. Framework powers

Framework powers are one of two legislative vehicles which insert Matters conferring legislative competence into the Fields in Schedule 5 of the Government of Wales Act. The concept of Framework Powers was set out in the Better Governance for Wales White paper in 2005. Framework Powers were included in two UK Acts prior to the full implementation of GOWA 2006. These were NHS Redress Act 2006 and the Education and Inspections Act 2006. They continue to be a valid way for the Welsh Assembly Government to seek legislative competence when appropriate legislative vehicles are available.

Framework Powers take the form of Wales Only clauses in Government Bills. They give the Assembly "wider and more permissive powers to determine the detail of how the provisions should be implemented in Wales". That detail will be contained in Assembly Measures and any subordinate legislation made under them.

3. Orders in Council

Orders in Council are the second of the legislative vehicles which insert Matters confirming legislative competence into the Fields in Schedule 5 of the Government of Wales Act.

The Welsh Assembly Government will normally seek to agree the terms of the Order in Council with the UK Government at two stages: before pre-legislative scrutiny stage in both the Assembly and in Parliament; and before the final (unamendable) draft Order is laid before Parliament for approval.

Devolution Guidance Note 16 will set cover this process.

4. Assembly Measures

Assembly Measures are a new category of legislation that will be made by the National Assembly without reference to Parliament. Once legislative competence has been transferred to the Assembly for a particular Matter under one of the Fields in Schedule 5, the Welsh Assembly Government will be able to bring draft Measures, which can amend existing Acts and make new provisions, before the National Assembly for Wales. The National Assembly's arrangements for scrutinising and approving Assembly Measures will be a matter for the Assembly itself and are set out in its Standing Orders, subject to minimum requirements set out in the Act.

5. Schedule 7

Schedule 7 will define the primary legislative competence of the National Assembly for Wales in the event of a successful referendum to that effect. If a subject is not listed, it will not be within the Assembly's legislative competence. The Schedule also contains general restrictions and exceptions to those restrictions. In particular, the Assembly will not be able to legislate so as to modify any Minister of the Crown function without the consent of the Secretary of State. This means that, where there are isolated Minister of the Crown functions within subjects which are generally "devolved", the protection of those functions need not be expressed by a specific reservation.

6. Assembly Acts

Following a successful referendum, when Schedule 7 comes into force, the Assembly will be able to pass Assembly Acts on anything within the scope of the legislative competence set out in Schedule 7, subject to the restrictions in that Schedule, and in the Government of Wales Act.

Devolution Guidance Note 10

Post – Devolution Primary Legislation affecting Scotland

SUMMARY

- **The Government announced on 21 July 1998:**

“we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament.”

This is now stated in the Memorandum of Understanding with the Devolved Administrations.

- **The convention applies when legislation makes provisions specifically for a devolved purpose. It does not apply when legislation deals with devolved matters only incidentally to, or consequentially upon, provision made in relation to a reserved matter, although it is good practice to consult the Scottish Executive in these circumstances.**
- **The convention relates to Bills before Parliament, but departments should approach the Scottish Executive on the same basis for Bills being published in draft, even though there is no formal requirement to do so.**
- **The same procedures should be followed for Private Member’s Bills to be supported by the Government.**

Introduction

1. This note sets out guidance for UK Government departments on handling legislation affecting Scotland. The Government announced on 21 July 1998 *“we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament”* (Lords Hansard col 791). This is now stated in the Memorandum of Understanding (MoU) with the devolved administrations and the Commons Procedure Committee has indicated its support for the convention. The convention applies when legislation makes provision specifically for a devolved purpose (see below); it does not bite when legislation deals with devolved matters only incidentally to, or consequentially upon, provision made in relation to a reserved matter. This note sets out how Legislative Programme Committee expects departments to give effect to this policy intention, while ensuring the smooth management of the Government’s legislative programme. The note does not extend to legislation which deals with emergencies or is similarly exceptional.

General

2. In general:
 - the MoU indicates that there will be consultation with the Scottish Executive on policy proposals affecting devolved matters whether or not they involve legislative change;
 - although the convention refers to the Scottish Parliament, UK departments will in practice deal with the Scottish Executive. Departments should approach the Executive to gain consent for legislation when appropriate. It will be for the Scottish Executive to indicate the view of the Scottish Parliament and to take whatever steps are appropriate to ascertain that view.
 - whether consent is needed depends on the purpose of the legislation. Consent need only be obtained for legislative provisions which are specifically for devolved purposes, although Departments should consult the Scottish Executive on changes in devolved areas of law which are incidental to or consequential on provisions made for reserved purposes.
 - always consult your Legal Adviser and the Scotland Office if you are in any doubt about whether a proposal may trespass on devolved matters. Do not assume that the Scottish Executive will necessarily share your view about where the boundaries lie as between reserved and devolved matters; and always consult Legal Advisers, including the Office of the Solicitor to the Advocate General (OSAG), and the Scottish Executive about these issues at an early stage in developing proposals for legislation.
3. Departments bringing legislative proposals to LP committee will be expected to address the need for consultation or consent as described in the following paragraphs.

Long-term legislative plans

4. Any submission to LP for the inclusion in a future legislative programme of a particular Bill should state clearly that the proposed Bill:
 - I. either does not apply to Scotland at all; or has provisions which apply to Scotland but, in the words of the Scotland Act 1998, “relate to” reserved matters and do not alter Scots law on non-reserved matters;
 - II. has provisions applying to Scotland and relating to reserved matters, but also contains provisions which make incidental or consequential changes

to Scots law on non-reserved matters (i.e. which are for reserved rather than devolved purposes); or

- III. contains provisions applying to Scotland and which are for devolved purposes, or which alter the legislative competence of the Parliament or the executive competence of the Scottish Ministers.

In determining whether provisions of a Bill are for devolved purposes, departments should have regard to the legislative context of the Bill as a whole.

5. Where necessary, the paper should indicate what proportion of a proposed Bill falls into each category.
6. Only Bills with provisions in category III are subject to the convention requiring the consent of the Scottish Parliament. (Although the main thrust of a Bill may be directed at reserved matters it may nevertheless contain some provisions in this category.) At LP, the responsible Minister should say whether he or she expects that the Scottish Executive and Parliament will agree to any such provisions.
7. Bills in category I or in category II do not require the consent of the Scottish Parliament. However the effects on non-reserved matters, including incidental or consequential modifications to the law, will in some cases be significant. LP will expect departments to have plans for consultation with the Scottish Executive in accordance with the MoU and the relevant bilateral concordats. Such consultation may be undertaken in confidence, and the Scottish Executive can be expected to respect any such confidence.

Bills ready for introduction

8. The essential requirement is that by the time proposals reach LP devolution related issues have been substantively resolved. Papers for LP are already required to contain a statement to that effect. Papers for LP should also identify the clauses which fall into each of the categories above.
9. If a Bill has provisions in category III:
 - I. where the provisions are of major significance in the Bill, there should have been prior consultation with the Scottish Executive on these and the LP paper should indicate that it will be possible to confirm at Second Reading that the Scottish Parliament has consented;
 - II. where the provisions are less significant, seeking consent need not hold up the Bill's progress at Westminster. The aim in such cases should be for consent to be obtained by the time those clauses are debated in committee, and the absolute deadline will be the last opportunity for them to be amended while the Bill is still before Parliament.
10. The paper should also:
 - identify any provisions which will change the legislative competence of the Scottish Parliament and the policy clearance for such provisions; and
 - identify any provisions that will change powers or functions of the Scottish Ministers, for example to give them regulation making or other powers, and the policy clearance for the change.
11. If a Bill has provisions in category II, or which would have a significant effect on devolved matters, the paper should indicate what consultations there have been with the Scottish

Executive or what plans there are for such consultation. The paper should indicate the outcome of any reference to the Joint Ministerial Committee or alternative dispute-resolution arrangements.

12. Finally, LP papers should say whether there are any potential amendments where the consent of the Scottish Parliament might have to be sought or which might prove controversial there.

Draft Bills

13. The convention relates to Bills before Parliament, but departments should approach the Scottish Executive on the same basis for Bills being published in draft. There is, however, no requirement to seek consent of the Scottish Parliament before publishing a draft. It may sometimes be helpful for the consent of the Scottish Parliament for a Bill to be sought on the basis of a (published) draft.

Private Members' Bills

14. Essentially the same procedures should be followed for Private Members' Bills to be supported by the Government, with some minor modifications to reflect the fact that the procedures for Private Members' Bills are less certain than for Government Bills.
15. Departments should consult the Scottish Executive at an early stage about any Private Members' Bill that they are minded to support containing provisions in category III. The aim should be for consent to be obtained by the time of Commons Committee stage. Before then, the Government may need to reserve its position pending consent, particularly if the Bill was introduced in the House of Lords. Departments seeking clearance to oppose a Private Members' Bill in category III on policy grounds need only consult the Scottish Executive if the Bill has a substantial effect on devolved matters. It is possible that Private Members will claim to have themselves obtained the consent of the Scottish Parliament for such a Bill and rely on this as an argument in favour of the Bill.
16. Even if there are not UK policy grounds for opposing such a Bill, the Government will resist the provisions on devolved matters if Scottish Ministers indicate that the Scottish Parliament has not given its consent, and will move any necessary amendments at Commons Committee or Report stage.
17. In line with the MoU and concordats, there should also be early consultation with the Scottish Executive where a department proposes to support a Private Members' Bill with provisions in category II or which would have a significant effect on devolved matters.

During the passage of legislation

18. During the passage of legislation, departments should approach the Scottish Executive about Government amendments changing or introducing provisions requiring consent, or any other such amendments which the Government is minded to accept. It will be for the Scottish Executive to indicate the view of the Scottish Parliament. No consultation is required for other amendments tabled. Ministers resisting non- Government amendments should not rest solely on the argument that they lack the consent of the Scottish Parliament unless there is advice to that effect from the Scottish Executive.
19. The Scottish Executive can be expected to deal swiftly with issues which arise during the passage of a Bill, and to recognise the exigencies of legislative timetables (eg when forced to consider accepting amendments at short notice). Nevertheless since the last opportunity for amendment is at Third Reading in the Lords or Report Stage in the Commons the absence of consent should not be a bar to proceeding with the Bill in the interim.

Department for Constitutional Affairs (Last Updated – November 2005)