

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
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