

**National Assembly for Wales Constitutional and Legislative Affairs
Committee**

Inquiry into the Granting of Powers to Welsh Ministers in UK Laws

Memorandum from the Wales Office

1. This memorandum sets out the response of the Wales Office, on behalf of the United Kingdom Government, to the invitation from the Constitutional and Legislative Affairs Committee of the National Assembly for Wales to submit written evidence in relation to its inquiry on the granting of powers to Welsh Ministers in UK laws. It sets out the overarching principles which inform the Government's approach to legislating in respect of Welsh Ministers' functions, and responds specifically in the five areas on which the Committee has welcomed views.

Key Principles

2. There are four key principles which inform the Government's approach to including provision relating to Welsh Ministers' functions in parliamentary Bills:

i. The UK Government works with the Welsh Government on matters relating to its legislative programme

3. The UK Government consults the Assembly on its legislative programme at the start of each session of Parliament. The Government of Wales Act 2006 requires the Secretary of State for Wales to undertake with the Assembly such consultation as appears to her appropriate. In practice, the Secretary of State for Wales appears before the Assembly soon after the start of each parliamentary session to present the UK Government's legislative programme and hear the views of Assembly Members on it.

4. The UK Government consults the Welsh Government in preparing and managing its legislative programme. The Wales Office engages with the Welsh Government as the UK Government puts together its legislative programme, and keeps the Welsh Government informed of progress as the parliamentary session progresses. UK Government Departments currently ensure that contact with the Welsh Government on individual Bills starts at an early stage in the Bill development process, and continues during the parliamentary stages of a Bill.

5. The UK Government believes it is essential to encourage close working relationships with the Welsh Government to ensure both Governments act in the interests of Wales and of the United Kingdom as a whole. This relationship should be one based on mutual respect, where both Governments share information relating to their legislative programmes, and to particular Bills which form part of those programmes, to enable the legislative aspects of the

Welsh devolution settlement to work effectively. Each Government, in turn, should maintain a close working relationship with its respective legislature.

ii. The Assembly would normally legislate on subjects within its legislative competence

6. The subjects within the Assembly's legislative competence are set out in Part 1 of Schedule 7 to the Government of Wales Act 2006, together with exceptions to that competence, and the Assembly would normally legislate in these areas. Parliament retains the right to legislate in any area of the Assembly's legislative competence, although the UK Government currently observes the convention that it will not bring forward legislation in areas devolved to the Assembly without the Assembly's consent. The Welsh Government would ordinarily be expected to bring forward legislation in the Assembly in order to fulfil its legislative competence.

iii. The UK Government would not normally ask Parliament to legislate on subjects which are within the Assembly's legislative competence without the consent of the Assembly.

7. Notwithstanding the principle above, there may be specific circumstances where the UK Government would agree a request by the Welsh Government to include provision in a parliamentary Bill on a subject within the Assembly's legislative competence, including provisions relating to Welsh Ministers' powers. This may be because there is no suitable Assembly Bill in the Welsh Government's legislative programme in which to make provision and / or the requirement is too specific to warrant an Assembly Bill of its own.
8. Any provision which the Welsh Government wishes to make would need to be agreed with the UK Government, and fall within the scope of the relevant parliamentary Bill. It should not adversely affect the handling or timing of the Bill.
9. The consent of the Assembly is required if provision is included in a parliamentary Bill which is within its legislative competence. It is the responsibility of the Welsh Government to promote the relevant Legislative Consent Motion (LCM) in the Assembly. The UK Government would seek to agree with the Welsh Government before a parliamentary Bill is introduced that the Welsh Ministers would support an LCM, and lay a motion and an accompanying legislative consent memorandum in the Assembly as soon as possible after the Bill is introduced in Parliament. We understand that the Assembly's Standing Orders require the Welsh Government to lay an LCM in the Assembly normally no later than two weeks after a Bill is introduced in Parliament. An LCM may also be required if the provision is amended during a Bill's parliamentary stages.

- iv. **The UK Government may ask Parliament to legislate in relation to Welsh Ministers' functions in non-devolved areas, but would normally seek the agreement of the Welsh Government to do so.**
10. Welsh Government Ministers exercise most of their executive functions in areas where the Assembly has legislative competence. Accordingly, provisions in parliamentary Bills relating to the functions of Welsh Government Ministers will often be within the Assembly's legislative competence and will, for that reason, require the consent of the Assembly (through an LCM).
 11. But Welsh Government Ministers may also exercise functions in areas which are non-devolved, where the Assembly does not exercise legislative competence. They may, for example, be best placed to exercise specific functions in relation to Wales in areas where the UK Government is implementing a policy in a non-devolved area UK-wide or GB-wide, or in relation to England and Wales.
 12. The UK Government would not normally bring forward legislation in such circumstances, or in a way which significantly affects Welsh Government Ministers' executive functions (other than incidental or consequential provision), without the consent of Welsh Government Ministers. We understand that in accordance with the Standing Orders of the Assembly, Welsh Government Ministers should notify the Assembly in a written statement about provisions in parliamentary Bills which have a significant impact on Welsh Government Ministers' functions. The UK Government considers it appropriate for the Assembly to agree with the Welsh Government the nature and extent of Assembly engagement in relation to such provision.
 13. In response to the specific areas on which the Committee has invited written evidence
 - i. **The extent of the National Assembly scrutiny of delegated powers given to Welsh Ministers through provisions in UK Acts and through other statutory mechanisms.**
 14. As explained in our discussion of key principles, the consent of the Assembly is required in relation to powers conferred on Welsh Government Ministers in parliamentary Acts in areas within the Assembly's legislative competence. The Welsh Government is accountable to the Assembly for the exercise of its functions, and in drafting provisions the UK Government and the Welsh Government may, for example, require a draft of a statutory instrument brought forward by the Welsh Government under delegated powers to be laid before, and approved by a resolution of, the Assembly (affirmative procedure) or provide for an instrument to be subject

to annulment by the Assembly (negative procedure). The Assembly would, in turn, be mindful of the need for such requirements in considering whether to approve an LCM brought forward by the Welsh Government in relation to such provision.

15. Similarly, if executive functions are conferred on Welsh Government Ministers in non-devolved areas, any relevant scrutiny functions would normally be conferred on the Assembly. Parliament however would continue to exercise legislative competence and could undertake scrutiny in the relevant area. The Assembly, in the same way, normally assumes any scrutiny function formerly exercised by Parliament in the event of executive functions being transferred to Welsh Government Ministers in non-devolved areas (for example, in a Transfer of Functions Order). In some very particular cases the exercise of a delegated power may be subject to both Assembly and parliamentary approval.

ii. The extent to which the National Assembly is able to exercise robust scrutiny of such processes through its Standing Orders.

16. The UK Government considers this to be a matter for the National Assembly, in consultation with the Welsh Government.

iii. The relevance of the UK Government's Devolution Guidance Notes in the light of recent Welsh constitutional developments.

17. The UK Government makes available (on the Cabinet Office website) a series of Devolution Guidance Notes (DGNs) setting out guidance to UK Government Departments on working arrangements between the UK Government and the Devolved Administrations.

18. These DGNs can cover arrangements relating to all administrations, or to specific bilateral relations between the UK Government and one of the Devolved Administrations. In the context of the Committee's inquiry, DGN9 (Post-Devolution Primary Legislation Affecting Wales) is of particular relevance. The content of this DGN had been agreed between the UK Government and the (then) Welsh Assembly Government before publication, and is mirrored by reciprocal Welsh Government guidance.

19. Following the affirmative vote in the 3 March Assembly powers referendum and the subsequent conferral on the Assembly of enhanced law-making powers in the 20 devolved areas, the UK Government has been working with the Welsh Government to revise relevant DGNs to reflect the new constitutional arrangement. In that regard, we have prioritised the revision of DGN9, and are also preparing a new DGN (DGN17) to set out the process for modifying the legislative competence of the Assembly under section 109 of the Government of Wales Act 2006 (replacing DGN16, which

dealt with Legislative Competence Orders under section 95 of the 2006 Act).

20. The UK Government believes that DGNs remain crucially important in ensuring an efficient and effective working relationship between Whitehall and the Welsh Government, and that the Welsh devolution settlement continues to work well in this respect. In terms of DGN9, the guidance is being updated to reflect the new constitutional arrangements in place following the March referendum, and will provide the basis for Whitehall departments' engagement with the Welsh Government on legislative matters.
21. The UK Government is mindful of the need to publish revised guidance, and is working to agree a revised DGN9 with the Welsh Government. It is also expected that this revised guidance will form the basis for reciprocal Welsh Government guidance.

iv. The procedures for Legislative Consent Motions compared to the position on the other devolved legislatures.

22. The UK Government considers the procedures for LCMs in the Assembly to be a matter for the Assembly itself, in consultation with the Welsh Government. However, we consider it important that the Welsh Government agrees with the UK Government to promote an LCM in the Assembly before a parliamentary Bill is introduced which includes provision in an area within the Assembly's legislative competence. That should include a commitment to support that LCM, and to lay a motion and an accompanying legislative consent memorandum in the Assembly as soon as possible after the parliamentary Bill is introduced.
23. The Assembly should ideally give its consent well before, but at least by, the time the relevant clauses are considered in Committee in the House of introduction, and certainly before the Bill reaches its final amending stage in the House of introduction. The absolute deadline (which applies primarily in relation to amendments to relevant clauses which trigger the need for an LCM) is the last opportunity for the clauses to be amended while the Bill is still before Parliament.
24. The UK Government is mindful of the need for Whitehall departments and the Welsh Government to work together closely as the Welsh Government prepares a motion, in order to meet these deadlines. Certain factors inevitably complicate the process, including the fact that the sitting and recess dates for Parliament and the Assembly are not always the same, and that amendments may be made to a Bill after its introduction which trigger the need for an LCM. We consider it important that Bill Teams in Whitehall departments are aware of these factors. Another important factor is that the Assembly's Business Committee may refer a legislative

consent memorandum to another Assembly committee or committee(s) for consideration, and the Assembly would not debate an LCM until the committee has reported.

25. This process makes it all the more important for LCMs to be presented to the Assembly in a timely way, and for the UK Government and the Welsh Government to engage as early as possible about bringing forward an LCM for the Assembly to consider. By the same token, it is also important for the Assembly to be respectful of the parliamentary process, and deadlines, in managing the process of considering an LCM.
26. As a general rule, in relation to Bills introduced before the Assembly Act provisions came into force, the UK Government sought an LCM only if a Bill included provision which was within the Assembly's legislative competence at the time of introduction (or at the time when amendments were tabled). LCMs were not sought retrospectively, as a result of the wider legislative competence exercised by the Assembly since 5 May 2011, for provisions which were already included in Bills before that date.

v. Any other matters relevant to the Inquiry.

27. The Assembly Research Service's paper *Provision about Welsh Ministers in UK Acts* provides background and context to the Committee's inquiry. It identifies the Public Bodies Bill as an example of a "current UK Bill which seeks to delegate significant subordinate legislation-making powers to Welsh Ministers", and explains that the Bill provides a framework enabling changes to be made to public bodies and providing executive powers to both UK Government Ministers and Welsh Government Ministers to allow for those changes to be taken forward.
28. It is important to note that this Bill was introduced in Parliament in October 2010, before the March referendum on Assembly powers and the subsequent conferral on the Assembly of enhanced law-making powers (and so was subject to the general rule described in paragraph 26). In developing proposals it was necessary to work on the basis of the Assembly's legislative competence at the time. Following the Assembly's acquisition of wider powers, where amendments have been made to relevant clauses of the Bill, or new clauses added, the UK Government has worked closely with the Welsh Government to consider the implications of the new constitutional arrangements.
29. The Assembly has approved an LCM for the Public Bodies Bill relating to the powers of the Welsh Ministers in relation to environmental and other bodies, and the powers of UK Government Ministers insofar as they extended to areas within the Assembly's legislative competence. The provisions in clause 9 of the Bill mean that UK Government Ministers will not have the power to make

provision in Orders which are within the Assembly's legislative competence unless the Assembly gives its agreement. The Assembly will therefore be able to decide whether any changes are made which are within its legislative competence following Royal Assent of the Public Bodies Act.

30. The Welsh Ministers' powers under the Bill are subject to Assembly procedures equivalent to the parliamentary procedures which apply to orders made by UK Government Ministers. They give the Assembly and its committees a greater role in relation to orders under the Bill than is usual for subordinate legislation, for example enabling the Assembly to require an enhanced affirmative procedure to be followed. This reflects the significance of the powers in the Bill.

Wales Office
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