

Welsh Government Response to the Constitutional and Legislative Affairs Committee's Inquiry into Powers granted to Welsh Ministers in UK Laws.

March 2012

The Welsh Government welcomes this report and the opportunity to discuss these important issues. This inquiry is particularly timely given the recent change in the devolution settlement in Wales and we would like to thank the Committee for their work in undertaking it.

The recommendations in the report fit closely with our current position and practices and we are pleased to be able to accept, or accept in principle or in part, the majority of them. Where we accept a recommendation in principle, we consider that the recommendation requires further consideration and discussion, but we support the general principle behind it. We would be happy to discuss how these recommendations can be taken forward, and as a Government we will be happy to continue to keep the Legislative Consent Motion process under review in the future.

In respect of UK Parliament Bills and UK Government subordinate legislation, the Welsh Government must work within the devolution settlement contained in the Government of Wales Act 2006 and in accordance with the UK Government's Devolution Guidance Note (DGN) 9, departmental concordats, and the Welsh Government's reciprocal guidance which corresponds to DGN 9. This means maintaining and respecting the principle of confidentiality of intergovernmental negotiations prior to the publication of the UK Government's legislative programme and during the passage of individual Bills through Parliament.

As the First Minister stated in his evidence to the Committee, in general the Welsh Government follows the principle that primary legislation in devolved areas should be enacted by the National Assembly. Nevertheless, there are circumstances in which it is sensible for provisions that would be within the Assembly's legislative competence to be included in a UK Parliament Bill. The First Minister's written evidence gave a number of examples of when this might be appropriate.

The Welsh Government will always seek to respect the Assembly's desire for full scrutiny by relevant the Committee for the Legislative Consent Motions in respect of such provisions. Ideally, we would wish these provisions to be included either in the Bill on Introduction to the first House considering it, or inserted in the course of consideration in that House, and this would give Assembly Committees adequate time for scrutiny. However, when such provisions are taken forward by amendment in the later stages of the Bill's parliamentary consideration, the Welsh Government is not in control of the timetable and may need to bring forward a Legislative Consent Motion at very short notice for the Assembly's consideration.

The Welsh Government has considered the recommendations made by the committee and our detailed responses to the report's individual recommendations are set out below.

Recommendation 1 – We recommend that the Welsh Government should ask the Assembly to consider a “declaratory” resolution setting out the Assembly’s understanding of the Sewel convention as it applies to the Assembly.

Response: Accept

We agree that it would be useful for the Assembly to debate the Welsh equivalent of the Sewel convention as it applies (or will apply following changes that may be made as a result of this inquiry) to the Assembly. If this is agreed by Business Committee, the Government would be happy to lay a memorandum before the Assembly setting out our understanding of the convention as it applies/will apply in Wales..

Recommendation 2 – We recommend that a nominated Welsh Government Minister should be responsible for informing the Assembly of any UK Bills that impact on the Assembly’s competence or the powers of the Welsh Ministers as soon as reasonably practicable after the Queen’s Speech. Similar warning should be provided of relevant amendments to Bills.

Response: Accept in part

The Welsh Government is happy to adopt the Scottish Government’s practice of writing to the Presiding Officer, after the Queen’s Speech, identifying those Bills which are likely to have consent implications under Standing Orders; but it must be a matter for the Government as to which Minister should have this responsibility..

We would also be happy to provide additional information to the Assembly about the potential impact of individual Bills, or amendments to Bills, on matters within the Assembly’s competence. Advance notice of these (in other words notice ahead of the publication of Bills or amendments) will not however be possible; we cannot provide any information that would breach our duty of confidentiality under the Memorandum of Understanding with the UK Government.

Furthermore, it may often be difficult to provide early notice of amendments to Bills, particularly in the later stages of a Bill’s passage through Parliament when the deadlines imposed by the parliamentary timetable can be very tight. While we will endeavour to provide such notice where possible, there may be occasions when we will have to lay Legislative Consent Memoranda and Motions for the Assembly’s consideration at short notice.

Recommendation 3 – We recommend that the relevant Devolution Guidance Notes should be revised and published at the earliest opportunity and that the Welsh Government and the Wales Office should jointly consider how best to use this opportunity to embed knowledge of the Welsh devolution settlement across Whitehall departments.

Response: Accept.

Devolution Guidance Notes are the responsibility of the UK Government but we can inform the Committee that revised Devolution Guidance Notes 9 & 16 (now renumbered as 17) reflecting the new devolution settlement have been published. The Welsh Government's reciprocal guidance will be published shortly.

The Welsh Government works with the Cabinet Office and Wales Office to raise awareness of the devolution settlement across Whitehall departments. We have drawn this recommendation to the attention of the Wales Office, and will consider with them the opportunities for awareness-raising presented by the publication of the revised Devolution Guidance Notes. Whitehall departments have working level contacts and senior officials with overall responsibility for handling devolution issues in their departments

Recommendation 4 – We recommend that the Welsh Government should establish a central unit that has the task of keeping abreast of legislative developments in Whitehall and Westminster that might affect Wales and the Assembly.

Response: Accept

The Welsh Government has always had in place, within the total resources it is able to devote to managing its relations with Whitehall and Westminster, a small team with this responsibility. It is intended, if a suitable officer can be found, to supplement the team to increase our capacity to deal with the impact of legislative developments at the UK level that might affect Wales and the Assembly.

Recommendation 5 – We recommend that Standing Order 30 should be removed and Standing Order 29 amended so that the consent of the Assembly is required for UK Parliament legislation on any matter affecting the legislative competence of the Assembly or affecting the powers of Welsh Ministers.

Response: Accept

The Welsh Government is supportive of the proposed extension of the circumstances in which Assembly consent is required in line with those already operating in Scotland and Northern Ireland. We believe that it is

appropriate that the Assembly should have a role in agreeing changes to the functions exercised by Welsh Ministers, whether or not they are in areas which are within the legislative competence of the Assembly, on the basis that the Assembly is responsible for scrutiny of the Welsh Government, and also responsible for approving the Welsh Government's budget.

However, it is important to note that this is not simply a matter of changing Standing Orders but will need to be discussed with the UK Government and, if agreed, covered in amendments to DGN 9.

In light of experience of difficulties caused by changes to the Assembly's legislative competence half-way through the last Parliamentary session, and given the recent Queen's Speech, the timing of such a change will need to be carefully considered. To avoid confusion over the appropriate process to follow, we consider it would be sensible to negotiate changes to the Standing Orders and DGN9 so that they come into effect at the beginning of, rather than part way through, a parliamentary session.

Recommendation 6 – We recommend that Standing Order 29 should be amended so that all Legislative Consent Memorandums (including matters now covered by Standing Order 29) are, apart from in exceptional circumstances, referred to an Assembly Committee for scrutiny.

Response: Reject

The decision as to whether a Legislative Consent Memorandum is subject to Committee scrutiny is one for Business Committee rather than the Government.

The Welsh Government's position on this issue is that the arrangements for scrutiny should be considered on a case by case basis, taking account of the Assembly's and Assembly Committees' roles and interests, and timing issues. On that basis, we would be content with a change to Standing Orders so that Legislative Consent Memorandums are normally referred to an Assembly Committee for scrutiny.

Our reason for rejecting this recommendation, therefore, is that we consider there would be practical difficulties in using the "apart from in exceptional circumstances" formulation – how would we define what "exceptional circumstances" might be? The same difficulties do not arise by agreeing that Memorandums would normally be referred to an Assembly Committee for scrutiny.

There is, of course, a relationship between this recommended change to Standing Orders and that proposed in recommendation 7. Both changes should be considered together, if they are taken forward.

Recommendation 7 – We recommend that Standing Order 29 should be amended so that a Legislative Consent Motion cannot be tabled by the Welsh Government until after the relevant Committee has reported on the Legislative Consent Memorandum.

Response: Reject

While we cannot agree to the recommendation as formulated above, we would agree to an amendment to Standing Orders to provide that the Welsh Government will not normally lay a Legislative Consent Motion (or ask for the plenary debate to be arranged) until after the relevant Committee has reported on the Legislative Consent Memorandum.

It is possible, under the current version of Standing Order 29, to separate the laying of the Legislative Consent Memorandum and Legislative Consent Motion. However, Standing Order 29 places a requirement on the Welsh Government to table a Legislative Consent Motion if it has laid a Legislative Consent Memorandum (whether at the same time or not), whereas the equivalent Scottish Parliament Standing Order does not place a similar restriction on the Scottish Government. This means that the Scottish Government is not required to lay a Legislative Consent Motion in every case where it has laid a Legislative Consent Memorandum, although in practice it normally does so.

Although Standing Orders are a matter for the Assembly, it is the Government's view that there would be value in considering an amendment to Standing Order 29 to remove the requirement on the Welsh Government to lay a Legislative Consent Motion in relation to each and every Legislative Consent Memorandum that it lays. Such an amendment should allow the Welsh Government to provide the Assembly at an earlier stage with a memorandum explaining the possible implications of a UK Bill, perhaps before we have completed our detailed negotiations with the UK Government; this could enable the relevant Assembly Committee to begin its scrutiny sooner. The Welsh Government would then lay an LCM for debate in the Assembly at the appropriate time following those negotiations.

Recommendation 8 – We recommend that where the Welsh Government or a Committee that has scrutinised an LCM so recommends, consent should be conditional and subject to later approval of the final provisions.

Response: Reject

Even under the current arrangements, it would be possible for the Assembly to give conditional consent. However, conditional consent gives rise to practical difficulties which could make the LCM system unworkable.

In particular, it is difficult to envisage how later approval of the final provisions would be given. In order for the Assembly to have a say on the final form of

the relevant Bill provisions, approval of a 'final' LCM would have to take place after the last amending stage in Parliament, but that would mean that the Bill could not be amended to take account of the Assembly's views if consent was refused.

In our view, the changes we propose in response to Recommendations 6 and 7 would go some way towards addressing the issue highlighted by the Committee in relation to Recommendation 8, which is the disincentive under the current version of the Standing Orders for the Welsh Government to provide information about provisions in a Bill within the Assembly's competence before we have full details of what the provisions are. By breaking the currently necessary link between Legislative Consent Memorandums and Motions, it would be possible to provide information in a Memorandum before we have full details of the relevant provisions, and follow this with a Consent Motion at a later date (but before the last amending stage in the second House).

Recommendation 9 – We recommend that the Assembly Commission should keep under review the resources available to Assembly Committees to help them consider and prioritise work on Legislative Consent Memorandums.

Response: This is a matter for the Assembly Commission

Recommendation 10 – We recommend that the Welsh Government and the National Assembly consider how best to maintain and develop authoritative and easily accessible information about laws made in Wales and the powers of the Welsh Ministers.

Response: Accept

This is an issue that the Welsh Government takes very seriously and the Counsel General's statement to the Assembly in October 2011 sets out the steps the Government is taking in this regard. The Counsel General will be providing an update to the Assembly shortly.

There is certainly more that the Welsh Government and the Assembly can do, but it is important to recognise that improving public understanding of laws made in Wales will also require the engagement of Welsh Civic Society more generally, involving range of partners including the Welsh legal profession, commercial publishers and academia.

**Recommendation 11 – We recommend that the Assembly's Standing Orders should be amended:
to require the Welsh Government to seek the consent of the
Assembly to any subordinate legislation made by UK Ministers**

alone that has an impact on the Assembly's legislative competence; and so that the procedures for considering subordinate legislation are extended along the lines of the temporary procedure recently agreed by the Business Committee for considering Public Bodies Act Orders.

Response: Accept in principle

The Welsh Government has consistently taken the view that it is appropriate for the Assembly's consent to be sought to UK Government subordinate legislation (e.g. Public Bodies Act Orders) that would fall under Standing Order 29 if the provision had been contained in a Bill. We agree, therefore, with the principle that the Assembly should have a role in considering and giving consent to subordinate legislation made by UK Ministers that has an impact on the Assembly's legislative competence.

The UK Government has also agreed that where UK Government subordinate legislation amends primary legislation in relation to Wales in an area within the legislative competence of the Assembly, the DGN9 principles should apply. We would be happy to work with Assembly officials and with the UK Government to see whether it is possible to agree a process for obtaining the Assembly's consent to subordinate legislation made by UK Ministers which has an impact on the Assembly's legislative competence.

However, we have to be mindful of the fact that such subordinate legislation is already subject to a procedure in the UK Parliament, and that (unlike for Public Bodies Act Orders) there is no statutory requirement for the Assembly to give its consent. Any process for obtaining the consent of the Assembly, therefore, would need to be agreed with the UK Government and be sufficiently flexible to take account of the different subordinate legislation procedures and timelines in Parliament.