



## **VIRTUAL PARLIAMENT**

**IWA Submission to the Presiding Officer's Committee Scrutinising  
the Wales Office White Paper *Better Governance for Wales***

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# OVERVIEW

*John Osmond*

Despite its shortcomings, due in large measure to the apparatus it was given at the start, the National Assembly has achieved a great deal in establishing itself as a Parliament in all but name. In six short years it has left behind the corporate body local government style ethos legislated for in the Government of Wales Act 1998. Instead it has created the Welsh Assembly Government on the one hand, and the independent Presiding Office with its parliamentary service on the other, in the process separating the executive from the legislature. It has also begun the process of creating a legal personality for Wales, generating a greater range of Welsh-specific legislation than in any other equivalent period, while at the same time demonstrating its inherent weaknesses in both initiation and scrutiny. Most importantly it has spawned the cross-party Richard Commission which, after great deliberation, recommended a coherent way forward for the Assembly to become a fully-fledged Parliament.

In large measure the White Paper agrees with these changes, and acts so to speak to make them legal. Thus, it says a new Wales Bill will be brought forward in the current session to formally constitute the Assembly Government, putting on a statutory footing the terms First Minister, Assembly Ministers, and moreover Deputy Ministers who simply appeared a few years ago as if on Rhodri Morgan's whim. Equally important, and generally unexpected it resurrects the title of Counsel General, a position that had been thought of as defunct following the spat between the First Minister and the Presiding Office over the failure to appoint a successor to the inaugural holder of the office, Winston Roddick QC. As the White Paper has it:

“The new status of Welsh Assembly Ministers as Ministers of the Crown, and the developing role of devolved government in Wales, now makes it appropriate to make more formal provision. A new statutory post of Counsel General to the Assembly Government will therefore be created.”<sup>1</sup>

This position will be directly equivalent to the Lord Advocate in Scotland. The Counsel General will be a member of the Cabinet, able to address the Assembly and answer AMs' questions, but need not necessarily be an Assembly Member. He or she will also have the power, as do UK Law Officers, to refer to the courts if there is doubt whether the Assembly, acting as a legislature, or the Assembly Government are acting within their legal powers.

The White Paper also formalises the split between the executive and legislative sides of the Assembly. In future civil servants will act exclusively in support of Assembly Ministers. Meanwhile, staff supporting the Assembly itself, via the Presiding Office, will have an independent status, like the clerks to the UK and Scottish Parliaments.

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<sup>1</sup> *Better Governance for Wales*, Chapter 2: *The New Executive Structure*, para 2.8.

Assembly Ministers will no longer participate directly as members of the Assembly committees. The White Paper says it agrees with the Richard Commission's analysis that, as it puts it, "Ministers' membership of the subject committees had inhibited the exercise of an effective scrutiny function, and that a culture of scrutiny on traditional parliamentary lines had failed to develop". Henceforth, the committee structure in the Assembly will not be dealt with in legislation, as in the 1998 Act which prescribed the committees that would be established. Instead, the Assembly itself will be able to establish committees as it sees fit, in accordance with Standing Orders.

It is at this point that the White Paper starts to go wrong. It was prompted by the Richard Commission recommendations and central to these is that the Assembly should become a fully-fledged Parliament, with primary law-making powers. The White Paper acknowledges the force of the Richard Commission argument. Essentially this is that the Assembly cannot be compared with a Whitehall department in competing for legislative time at Westminster for the measures it wishes to enact. Peter Hain had attempted to argue the point in the evidence he himself gave to the Commission. He told them there were a lot of frustrated Ministers in the UK Cabinet who could not get their bills into the Queen's Speech:

"There is always a big negotiation as to what goes in and what there is legislative time for and so far we have a pretty good track record of Welsh legislation, Welsh-only legislation and Welsh clauses in legislation. It does not follow that because you cannot get everything tomorrow, the fundamental settlement has to be altered in a substantial fashion."<sup>2</sup>

The Commission dismissed this argument in one cogent sentence:

"This views the Assembly as the counterpart of an individual UK Department, rather than the democratically elected body for the whole of Wales with responsibility for a broad range of policy matters."<sup>3</sup>

Now the White Paper accepts the force of this position. As it puts it:

"Once executive powers are conferred directly on Welsh Assembly Ministers rather than on the Assembly as a corporate body, they will also be able to exercise many of the Assembly's existing powers to make secondary legislation. ... Even so, these powers will not give the Assembly the ability significantly to influence the legislative framework within which the Assembly Government will operate. The Government believes that the Assembly should have this function."<sup>4</sup>

The question is: how? The most obvious answer is to follow the Richard Commission recommendation and straightforwardly give the Assembly primary powers. However, this option is not open to Peter Hain, since he is constrained by the Labour Party's determination to have a referendum before this can be allowed, and particularly following the experience of the recent referendum in North East England, the Westminster Government is not minded to follow this course in a hurry. Welsh Labour MPs at Westminster are not in a hurry either,

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<sup>2</sup> Report of the Richard Commission on the Powers and Electoral Arrangements of the National Assembly, Chapter 7: *the Wales-Whitehall relationship*, para. 57, 2004.

<sup>3</sup> *Ibid.*, para 58.

<sup>4</sup> *Better Governance for Wales*, Chapter 3: *Enhancing the Assembly's Legislative Powers*, para 3.4.

since they are acutely conscious of the Richard Commission's side recommendation that primary powers should be accompanied by an increase in Assembly Members and an implied decrease in Westminster MPs representing Wales. Peter Hain rationalises these realities by saying that a referendum, if held now, could not be won.

In these circumstances he has come up with a remarkably inventive middle way through the obstacles, so to say. This is to enable the National Assembly to exercise primary powers in all but name, though not for any entire subject field listed in Schedule 2 of the Government of Wales Act. The proposal is as follows:

- (i) following passage of the Bill, and in the wake of the 2007 Assembly election, the Assembly of the day will be able to signal to the Secretary of State such enabling legislative powers as it wishes to see conferred on it to enable it to legislate on specific matters or defined areas of policy where it has responsibility;
- (ii) assuming there was agreement that Wales should follow an initiative, the Secretary of State would frame an Order in Council giving the Assembly powers, in the specified aspects of policy, to modify or repeal existing Acts of Parliament or to make new provisions;
- (iii) such Orders in Council would have to be approved by both Houses of Parliament in short debates, after committee consideration; and
- (iv) the Assembly Government's parliamentary draftsmen would then proceed to draw up the required legislation which would be considered by the Assembly and its appropriate standing committees before passing into law, presumably following the Presiding Officer's signature.

Such is Peter Hain's ingenious device for giving the National Assembly primary powers through the back door. And the proposal does have at least three advantages. First, it has the potential for breaking the present Westminster logjam, providing the Assembly Government much more freedom of manoeuvre to pursue its own agenda without having to ask for the enactment of Wales-only bills. Secondly, the process will prove a useful learning curve for the Assembly, putting into place over time the procedures and expertise that are necessary to enact primary legislation. Finally, it moves the Assembly on in the direction of primary powers without having to traverse any political obstacles such as a referendum.

On the other hand, there are substantial drawbacks to the scheme. In the first place, Orders in Council for Wales still require the consent of the Westminster government of the day and both Houses of Parliament. This may work well enough while Labour continues to rule in both London and Cardiff, but such conditions inevitably change, even perhaps by the time these provisions come into force. Secondly, although the legislation that will be available to the Assembly under these terms will be potentially far reaching, it will still be secondary and not primary legislation. The importance of this is not the necessary distinction between the two – and it has to be conceded that the boundaries between primary and secondary legislation are increasingly becoming blurred – but the fact that secondary legislation is subject to judicial review for exceeding the limits of the power granted. It is only UK primary legislation which is generally immune from such challenge.

Orders in Council will typically lay down the parameters within which the Assembly can amend existing or enact new legislation in general terms; the Assembly will then proceed to legislate in the necessary detail within the provisions of the Order. Differences in interpretation between the two processes open up scope for aggrieved parties to have recourse to the courts to question whether the legislation is within the terms of the power granted. Both the Orders in Council and the legislation made under them will have to be drafted very carefully indeed. The Assembly itself will have to be highly conscious of the potential of litigation, if the role of the lawyers in Wales is not to be inflated. We might now see the reasoning behind the resurrection of the position of Counsel General.

A more philosophical objection to Peter Hain's compromise is that it greatly increases the complexity of the National Assembly's operation. Indeed, it follows the incremental pragmatic mechanisms of change instigated in the 1998 Act, giving the impression of continued a crab-like shuffle towards Welsh domestic autonomy, rather than the confident step contained in the Scotland Act of that year. We already have six sources of Welsh-related legislation (see the following chapter). This adds another three and is not designed to aid the understanding or involvement of the citizens of Wales who are already less than enthusiastic about becoming involved.

The White Paper contains a further, far reaching proposal for a referendum at some future unspecified time, that if successful, would result in the transfer of primary powers. Such a referendum would be triggered if two-thirds of the Assembly voted in favour. It is a somewhat innovative proposal in constitutional terms since it is designed to avoid the need to seek further legislation from a successor Parliament. As the White Paper puts it:

“The Government has no current plans for such a referendum but, in order to avoid the necessity of a third Government of Wales Bill, it proposes to provide for the possibility in this legislation.”

However, it is difficult to envisage circumstances in which such a process could be gone through without there being pressure for additional legislation. For instance, the Richard Commission made a powerful case that gaining primary powers should also entail an increase in AMs from 60 to 80 together with a more proportional electoral system, steps that the White Paper rules out.

Despite all these caveats, the White Paper probably represents the best that we could hope for in present circumstances. Certainly they testify to Peter Hain's brilliance in negotiating some pretty difficult rapids between the high ground of the Richard Commission and the lower reaches of his own backbenches. It may be a clever political fix, but a fix it remains. It is unlikely to last very long unless a steady stream of Orders in Council empowers the Assembly to make distinctive Welsh law. How likely is that?

# DEVELOPING PRINCIPLES FOR PRIMARY LEGISLATION FOR WALES

*Keith Patchett*

## **Introduction**

This submission concerns the mechanics of making law that applies to Wales. Many commentators<sup>5</sup> have remarked upon the complexity of the legislative arrangements and the consequences that flow from that both for the law-makers and, importantly, for those who have to give effect to the resulting legislation. At the same time, what has been achieved in this respect should not be downplayed. Given the nature of the scheme that the law-makers have been obliged to operate, we should acknowledge the innovative and progressive development of procedures and statutory devices to make the scheme effective. From the start there were problems to be solved – how new legislative functions should be conferred on the Assembly, how they should be formulated, how the Assembly could feed its requirements on legislative projects that affect Wales into the Whitehall/Westminster machinery and so on. By and large workable solutions have been found. But these have too often been reached, under the pressure of needing to move forward, through pragmatism and with too little regard for principles. Yet it is from a platform of principles that a system that is consistent, coherent and predictable should be built.

The Richard Commission enquiry and indeed its final report<sup>6</sup> can be seen as an opportunity to move the law-making system as it affects Wales onto more principled ground. The White Paper<sup>7</sup>, giving Government's response to the Commission's recommendations, promises important amendments to the original settlement. This submission focuses upon those proposals in the White Paper that concern law-making, in particular to see how far in this respect they facilitate or call for the development of a more principled approach.

## **The longer-term outcome?**

Patently, conferment upon the Assembly of primary powers to legislate in the form found in the Scotland Act 1998 would remove many of the current anomalies and constitute a more coherent basis for making Welsh-related legislation. Faced with Labour party opposition for

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<sup>5</sup> For example, Keith Patchett, "Principle or Pragmatism? Legislating for Wales by Westminster and Whitehall", *Devolution, Law Making and the Constitution*, c.4.

<sup>6</sup> *Report of the Commission on the Powers and Electoral Arrangements of the National Assembly for Wales*, Spring 2004.

<sup>7</sup> *Better Governance for Wales*, Cm 6582, June 2005.

such a step, the Government's plan is ingenious – to include in the promised Bill provisions that enable a referendum on the issue to be held at some future date when more auspicious circumstances exist. This neatly offers something to both opponents and proponents. It is also implicit recognition that the Assembly itself may not be suitably equipped or experienced for a while to assume such responsibilities. Very pragmatic!

But this proposal is somewhat lacking in clarity. For it is by no means clear what precisely the Bill will contain in this respect. The White Paper tells us:

- to avoid a third Government of Wales Bill, the forthcoming bill will provide for the possibility of a referendum<sup>8</sup>;
- the referendum will be a post-legislative referendum<sup>9</sup>;
- the option of primary powers will be provided for in the bill<sup>5</sup>;
- the bill will specify the conditions that will trigger the referendum<sup>10</sup>.

In all probability it will be necessary for the forthcoming bill to make provision for the scheme of primary law-making in the devolved fields, except, as in Scotland, for such excluded matters that are reserved to Parliament. The Scotland Act 1998 contains extended and detailed provisions in this regard<sup>11</sup>. Presumably similar provisions, tailored to the more limited responsibilities of the Assembly, will be required for Wales<sup>12</sup>. Will these be included in the forthcoming bill? If not, how and when will they be provided? By Order in Council “when the time is ripe”? Is it feasible to assume that the circumstances at some indefinable future date will not demand further primary legislation? Without the finished detail, on what basis will it be possible to hold a post-legislative referendum? But if they are included, will this Part of the bill not require those with more immediate concerns to devote preparatory and legislative time to settle the detailed terms in what, in some respects would be a hypothetical exercise or at least one that may be viewed differently when a new Parliament and new Assembly are in place? How will such provisions fare in Parliament where, we know, there is opposition to such an extension of powers? One hopes that the presence of such a scheme in the bill does not detract from the attention that the more immediate amendments will require.

### ***Enhanced legislative powers***

The Government proposals with respect to enhancing the Assembly's present legislative powers are designed to meet a number of existing concerns, in particular:

- the welcome promise of greater consistency in drafting legislation affecting the Assembly powers,<sup>13</sup> though exactly what improvements will be instituted is not spelled out;

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<sup>8</sup> Para.3.23.

<sup>9</sup> Para.1.26.

<sup>10</sup> Para.3.24.

<sup>11</sup> Ss.28-36; Schedules 4 & 5.

<sup>12</sup> Para.3.26.

<sup>13</sup> Para.3.12.



- broader and more permissive secondary legislative powers in bills enabling the Assembly and the Assembly Government to provide implementation provisions in their final form<sup>9</sup>;
- conferment by Order in Council of powers to modify, repeal or to add new provisions to existing legislation with regard to matters specified in the Orders<sup>14</sup>;
- greater scope for the Assembly to develop procedures and structures for the scrutiny of legislation<sup>15</sup>.

These will be welcome developments, which will contribute to the Assembly's capacity to develop as a legislature. At the same time, one cannot help commenting that they smack of the same pragmatism that has led to the present complexity. Rather than reducing that complexity, in some respects they appear to add to it, as may be seen in relation, first, to the modes of allocating legislative powers and, secondly, to the form of the sources of those powers.

### ***Allocation of legislative powers***

At present legislative powers are conferred on the Assembly at large, by three main devices:

- Transfer of Functions Orders, under which specified Ministerial powers in existing legislation are transferred to the Assembly, sometimes in their entirety, sometimes subject to limitations;
- provisions in Acts of Parliament (or exceptionally subordinate legislation) authorising the making of secondary legislation to give effect to specified features of the particular Act or instrument (hitherto expressed in a bewildering variety of drafting devices);
- Designation Orders under the European Communities Act 1972 authorising the Assembly to make regulations implementing community obligations on specific topics within the devolved fields.

The White Paper proposes a number of changes that may add further complexity to these arrangements:

- most existing implementation powers will become the responsibility of Assembly Government Ministers, but the Assembly will retain these in some cases (described as "important" functions<sup>16</sup>). Will there be some criteria by which this division between Assembly and Assembly Government, which will require adaptations to a mass of provisions, will be worked out? When powers are retained by the Assembly, will further delegation to Ministers be ruled out?
- future allocations will typically confer the legislative powers directly on the Assembly Government Ministers, though again presumably in important cases they will go to the Assembly. Again, will there be some principles by reference to which

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<sup>14</sup> Paras.3.16ff.

<sup>15</sup> Paras.3.30-32.

<sup>16</sup> Para.2.12.

this will be determined? Again, will further delegation by the Assembly to Assembly Ministers be prohibited?

- how will the proposal to achieve greater consistency in the way that these wider powers to legislate implementation provisions are drafted be secured? Will there be guidelines that reduce the kinds of variation that we have seen in the past?
- Orders in Council permitting the Assembly to modify or add to legislation on specified policy areas will not be confined, as they are at the moment, to the subject matter of the particular Act in which the power is granted. It is apparent from the White Paper<sup>17</sup> that the powers could relate to policy areas within the devolved fields in terms that are broad or narrow, specific or general or extend to altering both existing and future legislation, as defined by the Order. But all will depend upon the form in which the powers are granted. Will there be guidelines that ensure that these powers are consistently deployed and are not unduly restricted or coupled with limitations that power retentive Whitehall departments consider to be necessary? The way the powers are cast will take on particular importance if increased possibilities of judicial review of their exercise are to be avoided.

### ***Sources of Welsh-related legislation***

Disregarding legislation in non-devolved fields and instruments that are not general subordinate legislation, at present there are six main sources of legislation affecting Wales:

- Wales-only Acts.
- Provisions of Acts applying to Wales specifically.
- Acts applying to England and Wales as a single jurisdiction.
- General subordinate legislation made by the Assembly under Acts or exceptionally under Whitehall subordinate legislation.
- Subordinate legislation made by Whitehall specifically for Wales.
- Subordinate legislation made by Whitehall for England and Wales as a single jurisdiction.

Under the Government's proposals, we are likely to have three further sources:

- Measures made by the Assembly under Orders in Council modifying or supplementing existing legislation.
- General subordinate legislation made by the Assembly Government under provisions of Acts.
- General subordinate legislation made by the Assembly Government as delegated under Assembly Measures made under Orders in Council.

Does this not add further problems of the accessibility of the law, which is a continuing concern of Welsh lawyers in particular? These can only be compounded by potential difficulties in tracking down whether and in what ways particular provisions in Acts have

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<sup>17</sup> Para.3.18.

been modified or supplemented under Assembly Measures. Reference to an Act and to the instruments made under it can no longer be guaranteed to establish the legal position operative for Wales. What one sees on the traditional can is not necessarily what one has to use. It could be necessary to find out whether another can is required, whether its contents have to be applied and to mix them with those in the principal container. Clearly some principles are required to ensure that those who need to can obtain statute law as it relates to Wales in a coherent form. The Department for Constitutional Affairs' Statute Law Database, which, we are told, is intended to provide on-line up-to-date legislative texts with Welsh modifications incorporated, cannot become available soon enough.

### **Benefits and implications**

We must accept that these pragmatic developments may be inevitable, given where the reforms must start. However, in principle, we should welcome the decision to institute arrangements that enable the Assembly to become more fully engaged with the final version of the legislation that the Assembly Government must execute. Enhancement of its legislative powers patently brings the Assembly closer to becoming a thoroughly parliamentary institution.

### **The Order in Council mechanism**

In particular, the Order in Council mechanism is an ingenious extension of the original interim 13.2 device suggested by the Richard Commission<sup>18</sup> and the First Minister's 13.2 plus.<sup>19</sup> Effectively used, it has two particular advantages:

- It obviates the need to compete for a place for Wales-only bills in the Government's legislative programme and it can substitute for Welsh-specific provisions in combined bills. The Wales Office has identified a dozen matters that have been or are being dealt with in those ways that could have been enacted by the new procedure<sup>20</sup>. This suggests that Wales-only bills in devolved fields may in due course become features of the past.
- It would enable the Assembly to bring coherence to policy areas where the legislation is at present fragmented or lacking provisions necessary for integrated policy development.

The Wales Office examples relate in the main to the institution of new agencies or restructuring of existing administrative schemes. However, the White Paper recognised the possibility that powers of a "general and continuing" nature could be conferred in specific policy areas<sup>21</sup>, which presumably could extend to powers to amend or repeal provisions in future Acts of Parliament. Depending on how these powers are drafted, this could allow the Assembly not only to rationalise the law in Wales relating to a policy area, but it could enable the Assembly to pursue very different policy objectives from those of central Government. Again, one must ask whether there is here too need for some principles as to the circumstances for which such potentially far-reaching powers are likely to be granted.

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<sup>18</sup> Op. cit, n.2, above, paas.3-13-3.20.

<sup>19</sup> Welsh Labour Party, *Better Governance for Wales*, 2004.

<sup>20</sup> *Bills and Bill provisions which could have been enacted by the Assembly under a new Order in Council*: information deposited in the libraries of the Houses of Parliament, June 2005.

<sup>21</sup> Para.3.21.

Such possibilities point up how important the terms of the powers conferred by the Orders in Council will be. But the proof will be in the eating. In the past, the content of the various instruments has been influenced, again pragmatically, by considerations and compromises consequent upon detailed negotiations. It is difficult to imagine that in particular cases similar factors will not come into play in determining the extent to which lead Whitehall departments are prepared to see legislative competence on policy-related issues pass to Wales. Concerns have been already expressed, especially about extended use of Henry VIII style powers.<sup>22</sup> Past experience suggests that Whitehall might not always readily accede to proposed changes when the modes of conferring legislative competence on the Assembly and the Assembly Government are under consideration. This could be particularly the case were administrations of different political colours to be in power in Cardiff and London. Parliament, and in particular Welsh MPs, may have reservations about the loss to the Assembly of legislative responsibilities for specific policy areas.

### ***The need for principles***

It will be important then how the new forms of conferring legislative powers are developed. Scrutiny of such powers would be strengthened if there were agreed principles as to their use and form by which new powers could be assessed. It is worthy of note that though the Rawlings principles, even after being approved by the Assembly, were somewhat cavalierly regarded in London, the White Paper reflects several of them – to use a phrase “their time has come”. It could be helpful to evolve further principles governing the operation of legislative functions in the new circumstances. For example, they might provide:

- Guidance as to when Orders in Council rather than permissive provisions should be used, and vice versa.
- That Henry VIII clauses (including repeals and amendments) in bills should only be used for transitional and consequential provisions necessitated by legislation already in existence.
- That powers to add, or make modifications to, substantive provisions or conferring prospective repeal and amendment powers be confined to Orders in Council;
- Revocation or variation of Orders in Council should require the agreement of the Assembly.<sup>23</sup>
- guidance as to when legislative powers in bills should be conferred on the Assembly rather than Assembly Government Ministers.

Perhaps a place could found for them in the Devolution Chapter of the Cabinet Office’s Guide to Legislative Procedure<sup>24</sup>.

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<sup>22</sup> Patchett, op.cit., n.1 above at 147-149.

<sup>23</sup> As in the case of Transfer of Functions Orders: Government of Wales Act 1998, s.22(4)(b).

<sup>24</sup> *Cabinet Office Guide to Legislative Procedure* (2004), c.12.

## ***The need for Assembly scrutiny***

Arguably, the formulation of new powers calls too for substantial involvement by the Assembly in influencing and monitoring the content of the permissive legislative powers and the Orders in Council. Problems have been encountered in the past in ensuring that the voice of the Assembly is heard at the most opportune times during the preparatory and deliberative processes<sup>25</sup>. Some difficult issues will have to be addressed in the new Standing Orders. For example, will Assembly requests for Orders in Council powers derive from a legislative programme formulated by the Welsh Assembly Government or will the Assembly have a right of initiative?

At the Parliamentary level, some problems in enabling Assembly views to be taken into account during the Parliamentary stages occur from limitations in current Parliamentary procedures. The White Paper makes only passing reference to such matters as “the principle of mutual recognition between the legislatures”<sup>26</sup> and the “rebalancing of legislative authority” between them<sup>27</sup>. In this context of new and wider powers, will Parliament develop its procedures to facilitate more of a partnership approach? Indeed, will Government support and encourage such a trend?

## ***Concluding observations***

Two final observations of a rather different nature may be offered.

### **1. Wales as a jurisdiction**<sup>28</sup>

Perhaps we need to pay more attention to the almost incidental emergence of a growing body of Welsh law (much of it concerned with administration and executive powers) – an almost unique example of a distinct body of law for a sub-jurisdiction within a single law jurisdiction. Under existing practice, no Act or bill may formally extend to Wales alone. For that reason, even Wales-only statutes apply to England and Wales<sup>29</sup>. But surely some limited extent provision will be needed to confine the Assembly’s legislative capacity to Welsh related circumstances.

It is true that in most instances, problems do not arise, as jurisdictional limits are commonly defined for the Welsh executive bodies that put the law into effect. But the more that legislation in Wales differs from that of England with respect to substantive matters affecting persons or regulating their activities, the more important it will be to establish when Welsh

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<sup>25</sup> Patchett, *op.cit.*, n.1, above.

<sup>26</sup> Para.3.37.

<sup>27</sup> Para. 3.7.

<sup>28</sup> TH Jones & JM Williams, “Wales as a Jurisdiction” [2004] PL 78.

<sup>29</sup> Fifteenth Report of the House of Lords Select Committee on the Constitution, *Devolution: Its effect on the Practice of Legislation at Westminster* (2003-4, HL 192), para.6: CMG Himsworth, “The General effects of Devolution upon the Practice of Legislation at Westminster”, *Op. cit.*, Appendix, para.25.

rather than English law applies or indeed whether the Assembly or the Assembly Ministers have been authorised to legislate for disputed cases. Connecting factors may need to be spelled out in individual instruments.<sup>30</sup> Are more principles required here?

## **2. Giving effect to the White Paper**

The final point relates to the form of the legislation that will implement the White Paper. Such a statute will need to make wide-ranging changes to the contents of the Government of Wales Act 1998. There will be general agreement that it would be highly undesirable for the constituent legislation for the Assembly to be spread across two Acts that require amendments to be read across from one to the other. However, drafters are usually reluctant to include in a bill provisions that re-enact important statutory features without change, since this opens up the possibility of debate on issues that Government will not wish re-opened<sup>31</sup>. In this case doubts may be expressed as to whether the Government would wish to have debate on such matters as the number of AMs and the electoral arrangements. However, the alternative would be the rather unusual course of following an Amendment Act with a Consolidation Bill that does no more than consolidate the two Acts (and other amendments that have been made since 1998) into a single Act. Such a bill would have to go to the Joint Select Committee but would pass all the Parliamentary stages without the possibility of further amendment. One hopes that the principle of a single Act for what is essentially a constitutional instrument will be adhered to.

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<sup>30</sup> E.g. the connecting factors used to indicate which “older people” are within the ambit of the Commissioner for Older People (Wales) Bill: cl.17.

<sup>31</sup> G Thornton, *Legislative Drafting* (London, Butterworths, 4th ed, 1996), 414.