

### **Submission by Cymru Yfory/Tomorrow's Wales to National Assembly Subordinate Legislation Committee inquiry into the scrutiny of subordinate legislation**

1. This memorandum is submitted on behalf of Cymru Yfory/Tomorrow's Wales. It addresses two issues: first, issues arising from the ways in which powers are conferred on the National Assembly and the Welsh Assembly Government, and second, how this affects the remit and role of the Committee.
2. Undertaking a role that focuses on wider issues of the framing and drafting of legislation, at Westminster as well as in Cardiff Bay, presents a number of practical difficulties. It is well known that the formal obligations for UK Government departments to consult the Assembly Government during the process of framing and drafting legislation are often honoured with consultation that is late, sketchy, or both.<sup>1</sup> The recent introduction by the UK Government of advance notice, by publishing a Draft Legislative Programme in the July before the Queen's speech in October or November, should clarify matters somewhat. It will at least give earlier public notice of the bills that are likely to touch on devolved matters, and so make it easier for bodies outside government to engage with the issues arising from the devolution implications of UK legislation.
3. It appears to Cymru Yfory that these variations and inconsistencies serve the interests of Wales poorly, and that any action to redress them (and make the existing constitutional arrangements work better) would be welcome. An active role for the Assembly in looking at Westminster as well as National Assembly legislation would help greatly in improving the present system, and the Subordinate Legislation Committee is the organ of the Assembly best placed to undertake this role.
4. So far, the consideration of legislative issues relating to devolution in Wales and the powers of the National Assembly has principally been carried out by the House of Commons Welsh Affairs Committee at Westminster. That committee has looked at a number of issues over the years, including the making of primary legislation, problems that arose with the creation of a Children's Commissioner for England, the arrangements proposed by the 2005 White Paper *Better Governance for Wales* (implemented by the Government of Wales Act 2006), and the working of Legislative Competence Orders.<sup>2</sup> By contrast, the main consideration given to such issues by the National Assembly was in the 2001-2 Assembly Review of Procedure, which led to the adoption of the so-called 'Rawlings principles'. Even in that case, however, the Assembly did no more than enunciate them – it failed to make sure those principles were widely known, let alone applied in any sort of consistent or sustained manner.

### **How Wales's devolved institutions acquire functions**

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<sup>1</sup> The obligation is clearly set out in Ministry of Justice Devolution Guidance Note 9: *Post-Devolution Primary Legislation affecting Wales*, updated June 2007, available at <http://www.justice.gov.uk/guidance/devolutionguidancenotes.htm#nine>. For a discussion of the practice of inter-governmental bargaining about legislation (now dated in detail but not in how the process works in general), see A. Trench, 'Whitehall and the Process of Legislation after Devolution', in R. Hazell and R. Rawlings (eds), *Devolution, Law Making and the Constitution* (Exeter: Imprint Academic, 2005).

<sup>2</sup> Respectively House of Commons Welsh Affairs Committee, Session 2002–03 4th Report, *The Primary Legislative Process as It Affects Wales*, HC 73 (London: The Stationery Office, 2003); House of Commons Welsh Affairs Committee, Session 2003–04 5th Report, *The Powers of the Children's Commissioner for Wales*, HC 538 (London: The Stationery Office, 2004); House of Commons Welsh Affairs Committee, Session 2005–06 1st Report, *The Government White Paper: Better Governance for Wales*, HC 551 (London: The Stationery Office, 2005); House of Commons Welsh Affairs Committee, *Legislative Competence Orders in Council* Second Report of session 2006-07, HC 175 (London: The Stationery Office 2007).

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5. Following the Government of Wales Act 2006 (referred to as 'the 2006 Act' for short), functions can be devolved to Wales in four main ways:
  - i) Legislative functions can be conferred on the National Assembly by a Legislative Competence Order (LCO) – an order in council made by the Crown with the approval of the UK Parliament on application by the Assembly, under section 93 of the Government of Wales Act 2006. Such an order adds specific 'matters' to the 20 'fields' set out in Schedule 5 to the 2006 Act.
  - ii) Legislative functions can also be conferred on the Assembly by UK Acts of Parliament, which directly add matters to Schedule 5 to the 2006 Act.
  - iii) Executive functions can be transferred to the Assembly Government or the Welsh Ministers by an order in council made under section 58 of the 2006 Act.
  - iv) Executive functions can also be conferred or transferred by Act of the UK Parliament.
6. The procedures relating to LCOs are well known, and such LCOs have to have the approval of the Assembly as a whole. However, there are no parallel requirements for the other three ways in which powers can be devolved. Orders under section 58 have to be approved by the Welsh Ministers themselves, but there is no statutory basis for their scrutiny by the Assembly or (so far as we can see) provisions set out in the Assembly's standing orders for their scrutiny in the Assembly. Powers conferred by Acts of Parliament at Westminster are wholly outside the scrutiny of the Assembly as matters stand, and indeed Devolution Guidance Note 9 specifically asserts (in para. 17, 2<sup>nd</sup> bullet point) that the consent of the Assembly is not required before framework powers are devolved to it by an Act of Parliament.<sup>3</sup>
7. In practice, these appear to be dealt with by the Assembly Government, often in private negotiations with UK Government departments (including, obviously, the Wales Office). Though a plenary debate is held annually on the Queen's Speech, and though scrutiny committees may decide to look in detail at the implications of certain Bills, the Assembly has no formal role in dealing with these matters, important though they are. Neither does the Assembly subject the Assembly Government to any substantial scrutiny of the powers it acquires (or chooses not to acquire).
8. UK Government internal guidance on how Westminster primary legislation should deal with devolved matters leaves these issues to be resolved on a case-by-case basis, depending on negotiations between the executive arms of government in Cardiff and London.<sup>4</sup> In relation to framework powers, Devolution Guidance Note 9 says (in para. 15):

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.
9. The note emphasises that it is for the Welsh Ministers/Welsh Assembly Government to signify assent in those few cases where it is needed on behalf of the Assembly. That

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<sup>3</sup> Op cit, note 1. For a general academic discussion of these issues, see A. Trench, 'Old Wine In New Bottles? Relations between London and Cardiff after the Government of Wales Act 2006' *Contemporary Wales* vol. 20 (2007), pp. 31-51.

<sup>4</sup> See Devolution Guidance Note 9: *Post-Devolution Primary Legislation Affecting Wales*.

does not necessarily mean that the Assembly Government will in fact consult the Assembly to establish whether it assents or not.

10. Both the mechanics of consultation and the substantive legislative outcomes remain highly variable. For example, the Assembly Government and Wales Office made much of the three Bills in the November 2007 Queen's Speech that would confer legislative functions on the National Assembly (by statutory amendment of Schedule 5). However, four other bills announced in that Queen's speech also concerned matters devolved to the Assembly Government but did not lead to the devolution of legislative functions to the National Assembly.<sup>5</sup> Unsurprisingly, there was little public discussion about this decision, which reportedly was taken because the Assembly Government preferred not to seek powers in these cases. Whether that decision was right or wrong is not for us to say. However, we do consider it wrong that such a decision was taken in private, that it was never subject to scrutiny or debate in Assembly, and indeed that it was taken without the Assembly being aware of what was happening. The upshot is that the process gives all power to the Assembly Government and leaves the Assembly with at best a marginal role in the acquisition of devolved powers.
11. This has two consequences. First, the Assembly has only a very limited role in determining the powers (whether legislative or executive) that are devolved to Wales. In practice, it is the Assembly Government not the Assembly that is in charge of the process, as it proposes the majority of LCOs, and is the only body in Wales to be in a position to know about or negotiate Schedule 5 amendments by statute, and it is left in sole charge of executive functions that are devolved. This increases the role of the Assembly Government at the expense of the National Assembly, and undermines both the role of the elected National Assembly and the constitutional principle of the supremacy of the legislature over the executive. Under current arrangements, the National Assembly as a legislature is not in control of which legislative powers are devolved to it, but rather the executive acts as gatekeeper of the Assembly's powers.
12. Second, the present situation is prone to lead to increasing confusion about what functions are devolved, and to make it harder for the general public to understand what functions are devolved or to which institution. It aggravates problems of transparency that already exist elsewhere in the present arrangements.
13. It is worth drawing a comparison here with practice in Scotland. There is often talk of the importance of the 'Sewel convention', which in its most authoritative form provides that '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'.<sup>6</sup> However, in its practical application to Scotland, the convention is treated as going further than this. Also subject to the requirement for consent from Holyrood (through what are now known there as 'legislative consent motions') are not just Westminster legislative provisions which substantively affect devolved matters, but also ones which confer functions on the Scottish Government or Scottish Ministers, and ones which affect the legislative powers of the Scottish Parliament.<sup>7</sup> This means that such functions need to be approved not just by the Scottish Government but also by the Scottish Parliament, which therefore is able to control the full

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<sup>5</sup> See R. Wyn Jones and R. Scully (eds.), *Wales Devolution Monitoring Report, January 2008* (Aberystwyth: Institute of Welsh Politics, 2008), pp. 49-50. Available at <http://www.ucl.ac.uk/constitution-unit/research/devolution/devo-monitoring-programme.html>

<sup>6</sup> See *Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee*, Cm 5240 (London: The Stationery Office, 2001), para. 13.

<sup>7</sup> See Ministry of Justice Devolution Guidance Note 10: *Post-Devolution Primary Legislation affecting Scotland*, updated November 2005, particularly paras. 4 and 6. Available at <http://www.justice.gov.uk/guidance/devolutionguidancenotes.htm#ten>. The Scottish Government has issued its own parallel guidance.

range of legislative functions that are devolved to Scotland.<sup>8</sup> This therefore safeguards the supremacy of the legislative branch of devolved government in Scotland, and ensures that the executive branch does not take on functions that the Parliament does not think should be devolved, or takes on functions without the full knowledge of the Parliament. As noted above, Devolution Guidance Note 9 asserts that this principle does not apply to Wales.

14. As an aside, it is worth noting that the Scottish Parliament became concerned during its second session about the working of the Sewel convention and issues of Parliamentary control of the practice of legislative consent.<sup>9</sup> This led to a major inquiry by the Parliament's Procedures Committee. Following its review, procedures at Holyrood have been revised to ensure greater consistency, and greater scope for the Parliament to control all aspects of the convention – whether they relate to the exercise of devolved legislative powers at Westminster, or ways by which the scope of devolved powers are adjusted.
15. As far as devolving legislative powers to Wales by statutory amendment of Schedule 5 is concerned, the Commons Welsh Affairs Committee has expressed concern about the situation but has taken no action to address it.<sup>10</sup> Such provisions therefore, in practice, fall outside their scrutiny too.
16. Cymru Yfory/Tomorrow's Wales consider that it is undesirable and inappropriate for the Assembly not to be responsible for all functions that are devolved to Wales, whether to the National Assembly or the Welsh Assembly Government. The present situation creates a serious democratic deficit, which can be remedied if the National Assembly takes charge of all conferrals or transfers of functions to both the Assembly and Assembly Government. The strength of the Assembly Government under the arrangements created by the 2006 Act mean that it is appropriate for the Assembly to act as 'gatekeeper' for all devolved functions, whether legislative or executive in nature. Such a role will require involvement from the Assembly in plenary, but more detailed consideration of these matters would be an appropriate task for what is presently the Subordinate Legislation Committee to take on, if (on one hand) it wishes to exercise a more active role in relation to Westminster legislation and (on the other) it wishes to develop a more active approach to legislative issues within the Assembly.

### **The overall remit and role of the committee**

17. It appears to Cymru Yfory that the committee's remit needs to be reviewed. At present, aspects of it require detailed scrutiny of highly technical matters. This applies principally to the first heading of its remit. This work is important and needs to be done well and effectively to ensure that a proper balance between the executive and legislative functions is maintained in secondary legislation. However, it is seldom high profile, and involves a great deal of complex legal analysis that is hard for Assembly Members to do, given their varied backgrounds and the many other calls on their time and energies.
18. Part of the difficulty appears to lie in the committee's predecessor, the Legislation Committee of the old (pre-2007) Assembly. That committee's concerns were largely with narrower and more technical matters, understandable given the limited legislative powers and role of the Assembly under the Government of Wales Act 1998. Even then, there were problems of workload given the volume of legislation made by the Assembly (all of

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<sup>8</sup> Transfers of executive functions to the Scottish Ministers, or at least those made under s. 64 of the Scotland Act 1998 (the main provision used for such transfers) do not need consent of the Scottish Parliament, though they do need approval by both Houses at Westminster.

<sup>9</sup> Scottish Parliament Procedures Committee, 7th Report, 2005 (Session 2), *The Sewel Convention*, SP Paper 428. Available at <http://www.scottish.parliament.uk/business/committees/procedures/reports-05/prr05-07-vol01.htm>

<sup>10</sup> See House of Commons Welsh Affairs Committee, *Legislative Competence Orders in Council* op cit, especially paras. 45-49.

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which was, of course, 'subordinate' in the technical sense). With the broader legislative powers now available to the Assembly, and the implications of a formal separation of powers between the Assembly and Assembly Government, the role the committee needs to undertake is wider and the issues it needs to address are considerably more complex.

19. Other aspects of the committee's present remit – reviewing Assembly Measures and Westminster legislation for the way they confer powers on the Assembly and the Assembly Government – call for a more direct input on the part of members, as they raise more directly constitutional or political issues. This applies particularly to the broader issues in the fifth section of its remit. The committee is called on to act as the watchdog of both the way that Westminster legislation treats the devolved institutions in Wales and the practice of the separation of powers within Wales. These are highly important constitutional tasks, which are quite different in nature from the technical examination of legislation which has hitherto been the centre of its remit. Cymru Yfory is concerned that present arrangements, and the present remit of the committee, may mean that is preoccupied with the detailed technical issues and has difficulties giving the time and attention needed for the more strategic and constitutional aspects of its role.
20. In this context, it is worth noting that the committee's role presently combines the work of one joint Parliamentary committee, the Joint Committee on Statutory Instruments, as well as three House of Lords committees – the Constitution Committee, the Delegated Powers and Regulatory Reform Committee and the Merits of Statutory Instruments Committee, and three Commons committees – the Delegated Powers Committee, the Statutory Instruments Committee, and to an extent the Procedure Committee. It parallels work undertaken by the Procedure Committee in the Scottish Parliament as well as the Subordinate Legislation Committee there, while the work relating to legislative competence is undertaken by the Scottish Parliament in plenary. The boundary between devolved and non-devolved matters is much clearer in the Scottish case in any event, meaning that the sort of careful and thorough scrutiny this needs in a Welsh context is less necessary there.
21. Remedying these problems to give greater focus to the more difficult issues will not be easy. Replacing the existing committee with two, one to deal with 'technical' issues and one to deal with the more substantive ones, might be a solution to some of the problems, especially given the number of committee undertaking similar work at Westminster.
22. Another approach might be for the detailed and technical issues to remain within the ambit of the present committee, along with the scrutiny of provisions in Assembly Measures and other legislation made in Wales. A new committee would be established, however, with overarching responsibility for scrutinising relations between the devolved government and Assembly in Wales and UK institutions. The scrutiny of Westminster legislation affecting devolved functions would fall within the remit of that committee, along with issues relating to the conduct of intergovernmental relations more generally.
23. However, we also appreciate that the limited number of AMs and the demands on their time mean that creating another committee may not be practicable. If such changes are not possible, Cymru Yfory would recommend the following as ways of improving the present situation:
  - i) A review of ways of working, to ensure that AMs are able to focus their time and attention. The role of the committee's staff in undertaking technical review could be emphasised, and if necessary more staff support for the committee obtained.
  - ii) This would imply that detailed scrutiny would not normally be undertaken by the committee as a whole, even if it were done in the committee's name. Preliminary work, to identify matters requiring attention from AMs, could be undertaken by staff subject to guidance from the committee. Matters requiring the attention of AMs could then be reviewed by a small panel or sub-committee, to consider whether there was in fact an issue that required further attention or whether concerns could be resolved in other ways (for example, by asking the Assembly Government informally to revise or amend a proposed order.) This would enable only those issues that required the

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- attention of the committee as a whole to be brought before it. This could involve the establishment of a formal sub-committee.
- iii) Similarly, it could be appropriate to have a sub-committee with special responsibility for Westminster legislation affecting devolved matters.
  - iv) A further change would be to re-name the committee, to emphasise the breadth of its role. In reality it is already a 'Legislation Committee' rather than a 'Subordinate Legislation Committee'.

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