

National Assembly for Wales
Constitutional and Legislative
Affairs Committee

Inquiry into powers granted
to Welsh Ministers in UK laws

March 2012



The National Assembly for Wales is the democratically elected body that represents the interests of Wales and its people, makes laws for Wales and holds the Welsh Government to account.

An electronic copy of this report can be found on the National Assembly's website:
www.assemblywales.org

Copies of this report can also be obtained in accessible formats including Braille, large print; audio or hard copy from:

Constitutional and Legislative Affairs Committee
National Assembly for Wales
Cardiff Bay
CF99 1NA

Tel: 029 2089 8242

Fax: 029 2089 8021

Email: CLA.Committee@wales.gov.uk

© National Assembly for Wales Commission Copyright 2012

The text of this document may be reproduced free of charge in any format or medium providing that it is reproduced accurately and not used in a misleading or derogatory context. The material must be acknowledged as copyright of the National Assembly for Wales Commission and the title of the document specified.

National Assembly for Wales
Constitutional and Legislative
Affairs Committee

Inquiry into powers granted
to Welsh Ministers in UK laws

March 2012



Constitutional and Legislative Affairs Committee

The Constitutional and Legislative Affairs Committee was established on 15 June 2011 with a remit to carry out the functions and exercise the powers of the responsible committee set out in Standing Orders. This includes being able to consider and report on any legislative matter of a general nature within or relating to the competence of the Assembly or the Welsh Ministers.

Current Committee membership



David Melding (Chair)
Deputy Presiding Officer
Welsh Conservatives
South Wales Central



Suzy Davies
Welsh Conservatives
South Wales West



Julie James
Welsh Labour
Swansea West



Eluned Parrott
Welsh Liberal Democrats
South Wales Central



Simon Thomas
Plaid Cymru
Mid and West Wales

Contents

The Committee's Recommendations	4
The Committee's Role and Background to the Inquiry	6
Committee's Role	6
Background to the Inquiry.....	6
Evidence Received	7
Issues Arising from the Inquiry	8
Legislative Consent Motions.....	8
Sewel Convention	8
Recent Developments	9
Status of the Sewel Convention	9
Arrangements for Considering Consent Motions	10
The Need for Legislative Consent Motions.....	11
Early notification of LCMs	14
The Legislative Programme	14
Inter Government Liaison.....	16
Devolution Guidance Notes.....	19
Welsh Government Capacity.....	22
The Assembly's Scrutiny Arrangements.....	23
Standing Order 29	24
Standing Order 30	24
Scottish Parliament Arrangements	25
Scrutiny in Westminster	28
Scrutiny Capacity in the Assembly.....	31
Information on Welsh Minister's Powers	32
Scrutiny of Orders Made by UK Ministers that impact on the Assembly's Legislative Competence	34
Related Issues	35
Conclusion	37
Witnesses	38

List of written evidence40

The Committee's Recommendations

The Committee's recommendations are listed below, in the order that they appear in this Report. Please refer to the relevant pages of the report to see the supporting evidence and conclusions:

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. **page 10**

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 Welsh Ministers as soon as reasonably practicable after the Queen’s speech. Similar warning should be provided of relevant amendments to Bills. **page 15**

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. **page 22**

Recommendation 4. We recommend that the Welsh Government establishes a central unit that has the task of keeping abreast of legislative developments in Whitehall and Westminster that might affect Wales and the Assembly. **page 23**

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. **page 27**

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. **page 27**

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. **page 27**

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. **page 28**

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. **page 32**

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. **page 33**

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.

page 36

The Committee's Role and Background to the Inquiry

Committee's Role

1. The Constitutional and Legislative Affairs Committee's remit is to carry out the functions of the responsible committee set out in Standing Order 21¹ and to consider any other constitutional or governmental matter within or relating to the competence of the Assembly or Welsh Ministers.
2. Within this, the Committee considers the political and legal importance and technical aspects of all statutory instruments or draft statutory instruments made by the Welsh Ministers and reports on whether the Assembly should pay special attention to the instruments on a range of grounds set out in the Standing Orders.
3. The Committee also considers and report on the appropriateness of provisions in Assembly Bills and UK Parliament Bills that grant powers to make subordinate legislation to the Welsh Ministers, the First Minister or the Counsel General.

Background to the Inquiry

4. In June 2011 the Committee agreed to carry out an inquiry into the practice of UK Acts conferring powers to make subordinate legislation directly on Welsh Ministers.
5. This was of immediate interest because although Part 4 of the Government of Wales Act 2006 is now in force, some significant pieces of Westminster legislation such as the Public Bodies Bill² and the Localism Bill³ continued to confer powers directly on Welsh Ministers without the involvement of the National Assembly.
6. The terms of reference agreed for the Inquiry were to examine:
 - The extent of the current National Assembly scrutiny of delegated powers given to Welsh Ministers through provisions in UK Acts and through other statutory mechanisms;

¹ Standing Orders of the Fourth Assembly - National Assembly for Wales

² Now the Public Bodies Act 2011 (2011 c.24)

³ Now the Localism Act 2011 (2011 c.20)

- The extent to which the National Assembly is able to exercise robust scrutiny of such processes through its Standing Orders;
- The relevance of the UK Government's Devolution Guidance Notes in the light of recent Welsh constitutional developments;
- The procedures for Legislative Consent Motions (LCMs) compared to the position in the other devolved legislatures; and
- Any other matter relevant to the Inquiry.

Evidence Received

7. The Committee issued a call for written evidence in August 2011. Submissions were received from a number of organisations and individuals, which have been published on our pages on the National Assembly's website. A list of those who provided written evidence is in the Annexe at the end of this report.

8. We also took oral evidence from the Wales Governance Centre, Cardiff University; Dr Paul Cairney, University of Aberdeen; David Davies MP, chair of the Welsh Affairs Committee; Mr Alan Trench; Mr Richard Parry, University of Edinburgh; the Welsh Refugee Council; the Farmers' Union of Wales; and the First Minister, the Rt Hon Carwyn Jones AM.

Issues Arising from the Inquiry

Legislative Consent Motions

Sewel Convention

9. Legislative Consent Motions (LCMs) originated as *Sewel Motions* in relation to the Scottish devolution settlement. The *Sewel convention* was named after Lord Sewel (Minister of State in the Scottish Office during the passage of what became the *Scotland Act 1998*), who stated during the Lords Committee stage of the Bill that the Government expected “*a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament*”.

10. One witness described the significance of the Sewel convention in the following terms “*...within the framework of an unwritten constitution and a system that remains underpinned by a doctrine of parliamentary sovereignty at Westminster, this is as close to a hard and fast form of entrenchment of the constitutional settlement as we are likely to get.*”⁴

11. Since the National Assembly first acquired primary legislative powers in 2007 (in matters where it had legislative competence) under Part 3 of the 2006 Act, the principle of requiring LCMs has also been extended to Wales.

12. The powers that have been transferred using LCMs are often minor or technical but have also included important powers over significant areas of policy. As the Farmers’ Union of Wales explained to us in relation to the *Public Bodies Bill*:

“... There are definitely big chunks in the Public Bodies Bill, such as the merger of the Countryside Council for Wales, the Forestry Commission and the Environment Agency, that will have big impacts in Wales in the future. It will have an impact on our members when those three bodies are merged together—the likelihood is that they will be merged”⁵

⁴ Record of Proceedings – Constitutional and Legislative Affairs Committee (RoP-CLA), 31 October 2011, paragraph 32, Alan Trench

⁵ RoP-CLA, 21 November 20/11, paragraph 32 - Andrew Gurney

Recent Developments

13. A revised Memorandum of Understanding (MoU) was agreed between the UK Government, the Scottish Ministers, the Welsh Ministers and the Northern Ireland Executive Committee on 8 June 2011. This reaffirmed the principles of co-operation underpinning the relationship between the UK Government and the devolved administrations⁶. In respect of Parliamentary Business the MoU states:

“The United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power. However, 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.”⁷

14. In practice this means that the consent of the National Assembly for Wales and the Scottish Parliament is sought if a Westminster Bill contains provisions relating to devolved functions. It is stressed however that the MoU is “a statement of political intent, and should not be interpreted as a binding agreement”.

15. On 8 February 2011 the Assembly declined to approve an LCM relating to Police and Crime Panel provisions in the *Police and Social Responsibility Bill*. The Bill was subsequently amended to take the provisions outside devolved competence in relation to local government.

Status of the Sewel Convention

16. In his written evidence, Alan Trench argued that it would be desirable for the Sewel convention to be underpinned by clearer Parliamentary endorsement. He also made the case for the Assembly to formally endorse the convention (in oral evidence⁸ he suggested a “declaratory” resolution of the Assembly).

⁶ Written Ministerial Statement, Rt Hon Carwyn Jones AM, First Minister of Wales, *The Memorandum of Understanding*, 29 June 2011.

⁷ *Ibid*

⁸ RoP-CLA, 31 October 2011, paragraph 89

“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.”⁹

Our View

17. It is now 15 years since the Sewel convention was first enunciated. For most of that time it has applied almost exclusively to Scotland. The changes to the Welsh devolution settlement brought about by the 2006 Government of Wales Act and by last year’s referendum mean that increasingly the convention will apply to Wales and the Assembly.

18. The principle set out by Lord Sewel, that Westminster would not normally legislate with regard to devolved matters without the consent of the devolved legislature, is one that the Assembly would no doubt endorse but it is not a matter that has been debated at length by the National Assembly. For this reason, we believe it would be useful for the Assembly to consider a motion setting out clearly its own understanding of the convention and how the Welsh Government should act in compliance with it.

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.

Arrangements for Considering Consent Motions

19. The National Assembly and the Scottish Parliament both have arrangements in place for considering legislative consent. These are in some respects similar but there are significant differences, which

⁹ Constitutional and Legislative Affairs (CLA) Committee Paper, reference CLA(4)-09-11(p12)

are considered later in this report. However, in essence both bodies require their respective Governments to provide them with:

- information about any proposal in a UK Parliament Bill that impacts on their legislative competence along with reasons why such a proposal is considered appropriate in the circumstances (Legislative Consent Memorandum) ;
- an opportunity for Committee scrutiny of the proposals; and
- the final decision on whether consent should be given to be taken by the whole Assembly or Parliament (Legislative Consent Motion - LCM).

20. Following the March 2011 referendum, the scope of the National Assembly's Legislative Competence is now considerably greater than it was in the third Assembly. It is, therefore likely that the need for the Assembly to give its consent to provisions in Westminster legislation will continue in future although it is not yet clear to what extent it may grow¹⁰.

The Need for Legislative Consent Motions

21. The First Minister in his written evidence¹¹ explained the Welsh Government's general approach to using UK Bills and the circumstances in which such provision might be appropriate:

“Taking provision in a UK Bill can enable pragmatic solutions to be reached in a timely fashion, while simultaneously respecting the competence of the Assembly through the LCM process. It can be a matter of practical good government for such provisions to be included in a UK Bill. Examples of where such an approach would be appropriate could include:

- when the UK Government's legislative proposal would be appropriate for Welsh circumstances but there is no time available for similar provisions to be brought forward in the Assembly;
- where the inter-connected nature of the relevant Welsh and English administrative systems mean that it is most

¹⁰ See for instance the First Minister's view on the scale of future use of LCMs (RoP-CLA, 21 November 2011, paragraph 90). For an alternative view, see Alan Trench's written evidence (CLA Committee Paper, reference CLA(4)-09-11(p12), paragraph 12) and oral evidence (RoP-CLA, 31 October 2011, paragraphs 55-58).

¹¹ CLA Committee Paper, reference, CLA(4)-12-11(p1)

effective and appropriate for provision for both to be taken forward at the same time in the same legislative instrument;

- where the devolved provisions in question are minor or technical and non-contentious;
- where the UK Bill covers both devolved and non-devolved matters and the Westminster route must be taken in order to achieve the policy objective;
- where the competence of the Assembly and/or the powers of the Welsh Ministers would be extended in a way that could not be achieved through an Assembly Act, given the limits on the Assembly's legislative competence."

22. However, in oral evidence he made clear that the ability of the Assembly to make its own Acts had changed the Welsh Government's approach to the use of UK Acts to make legislation for Wales:

"In the past, the practice has been to look at a Westminster Bill and then see what powers could be conferred to Welsh Ministers in devolved areas. I do not anticipate that this practice will be used much in the future, now that we have the power to pass Bills ourselves."¹²

23. The recent *Public Bodies Bill*¹³ delegated significant subordinate legislation-making powers to Welsh Ministers. Speaking about the Bill the First Minister agreed that the Government saw it as an opportunity to acquire more functions for the devolved settlement but made it clear that such an approach would not be appropriate in future:

"Yes, it [the Welsh Government] did [see it as an opportunity to acquire more functions]. Bearing in mind that the Public Bodies Bill predated the referendum, we did not have the legislative capacity that we now have. I would not anticipate a situation where a UK Government Bill conferred powers on Welsh Ministers, save in exceptional circumstances. The natural procedure in future would be for an Assembly Bill to confer such powers, with them set out on the face of the Bill."¹⁴

24. This does not mean, however, that the need for and use of LCMs will diminish. Dr Paul Cairney of the University of Aberdeen told us

¹² RoP-CLA, 21 November 2011, paragraph 90

¹³ Now the Public Bodies Act 2011 c. 24

¹⁴ RoP-CLA, 21 November 2011, paragraph 92

that there had been a significant number of LCMs (Sewel Motions) in Scotland since the Parliament was established. However, he made the further point that, although some LCMs were controversial, the numbers did not tell the whole story:

“There have been roughly 100 Sewel motions produced in 10 or so years. When they were controversial in Scotland in the first few years, the suggestion was that there were as many Sewel motions being passed as there were pieces of Scottish Parliament legislation. That, in itself, was misleading because the motions referred to small parts of larger Bills. It was not that Westminster was constantly legislating on Scotland’s behalf. There have been a handful of cases where it seems that the Scottish Government has deliberately passed the issue back to Westminster because it seems too controversial. ...”¹⁵

25. And he concluded:

“...Those [controversial] examples are fairly infrequent. I present the view that almost all of these motions are innocuous. The numbers do not give a sense of the size of the process.”¹⁶

26. Alan Trench also expected there to be more LCMs in future as a result of the Assembly’s increased legislative competence:

“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 and 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

¹⁵ RoP-CLA, 10 October 2011, paragraph 9

¹⁶ Ibid, paragraph 11

practical vehicle to achieve their objectives – though that has happened as well).¹⁷

Our view

27. Before the March 2011 referendum, the Welsh Government could use the Legislative Competence Order and Measure making procedure to gain new powers to help them address their policy objectives. However, this was usually a protracted and often frustrating process. There were, therefore, clear pragmatic reasons for using Westminster legislation when the opportunity arose to provide Welsh Ministers with additional powers.

28. This pragmatic approach, outlined by the First Minister, was understandable and in most cases defensible but it is much less so now. The opportunity to use Westminster Bills for minor and technical reasons, or in an emergency, should not be discounted, but we were pleased to note the First Minister's clear view that, in future he expected an Assembly Bill would be the normal mechanism for conferring powers on Welsh Ministers.

29. However, LCMs remain a reasonable way of dealing with technical and non-contentious matters, particularly where these involve “cross-border” issues. They can also be used to expand the Assembly's legislative competence.

30. For these reasons we believe there are likely to be significantly more LCMs brought before the Assembly than we have seen in the past. We believe this is broadly acceptable provided that they do not become the vehicle for significant or politically contentious pieces of legislation that could be made in an Act of the Assembly. (Unless there are clear reasons for doing so such as considerable urgency or complex cross-border considerations)

Early notification of LCMs

The Legislative Programme

31. In order to bolster the role of the Scottish Parliament in the LCM process, the Scottish Parliament's Procedures Committee recommended in 2005 that:

¹⁷ CLA Committee Paper, reference, CLA(4)-09-11(p12), paragraph 9. (See also RoP-CLA, 31 October 2011, paragraphs 56 & 58)

“... the Executive should provide information about the implications of the Bills announced in each Queen’s Speech in a letter to the Presiding Officer, copied to all MSPs including committee conveners, and then brought prominently to the attention of the public through the Bulletin.”¹⁸

32. The latest letter¹⁹ containing information about Bills included in the UK Government’s legislative programme that require the consent of the Scottish Parliament was sent to the Scottish Parliament’s Presiding Officer, Alex Fergusson MSP by the Minister for Parliamentary Business, Bruce Crawford MSP, on 25 May 2010.

33. In their evidence to the committee on 3 October, the Wales Governance Centre stated, in relation to an ‘early warning’ system, that:

“We would suggest a dual approach: liaising between Parliament and committees, and ensuring that the Executive warns you in advance or as early as possible in the system. We think that the current two-week delay after introduction is a little too late for efficiency.”²⁰

34. When we asked the First Minister whether it would be useful to introduce similar arrangements in Wales he agreed that it would:

“This year’s Queen’s Speech will be the first since we have acquired our new powers. I am more than happy to consider adopting the Scottish practice.”²¹

Our View

35. We welcome the First Minister’s willingness to consider the approach used, apparently effectively, in Scotland:

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 Welsh Ministers as soon as

¹⁸ Scottish Parliament, [Procedures Committee Report: The Sewel Convention](#), October 2005, paragraph 2, paragraph 213

¹⁹ The Scottish Government, [Bruce Crawford \(Minister for Parliamentary Business\), Letter to Alex Fergusson MSP: Queen’s Speech 2010](#), 25 May 2010

²⁰ RoP-CLA, 3 October 2011, paragraph 70

²¹ RoP-CLA, 21 November 2011, paragraph 152

reasonably practicable after the Queen's speech. Similar warning should be provided of relevant amendments to Bills.

Inter Government Liaison

36. It is clear that before a Legislative Consent Memorandum and Motion come before the Assembly there is likely to have been protracted consideration of the matter by the UK Government and the Welsh Government and, possibly, the other devolved administrations.

37. In a written submission, the Wales Office explained the process as follows:

“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.”²²

38. In Scotland, Legislative Consent Memorandums are usually produced within days of the Westminster Bill being published, which suggests a high level of contact between civil servants in Scotland and Whitehall prior to publication. In Wales, LCMs are often produced at a much later stage which allows less time for effective scrutiny. The recent supplementary LCM on the Welfare Reform Bill was considered by the Children and Young People Committee²³. They pointed out that the Scottish Parliament had:

“...already considered the Welfare Reform Bill at length last year and it has been the subject of 4 committee reports between October and December, including consideration of the amendments that were laid before the Assembly for consideration on 3rd January 2012.”

39. Explaining why the LCM relating to these amendments had been laid much later in the Assembly than in the Scottish Parliament, the Deputy Minister, Gwenda Thomas AM, replied:

“...It was not until mid November 2011 that the UK Government offered further legislative concessions and not until late in December that it confirmed it would start the process to table those further amendments in the House of Lords.

²² CLA Committee Paper, reference CLA(4)-12-11(p2)

²³ CLA Committee Paper, reference CLA(4)-03-12(p1&p2) - Supplementary LCM on the Welfare Reform Bill

It was in Welsh interests to hold off agreement to table a Legislative Consent Motion, signifying agreement to what the Bill would contain relating to the [Social Mobility and Child Poverty] Commission until we were satisfied as to what that content would finally be.”

40. She went on to say:

“The Standing Orders of the Scottish Parliament differ from those of the National Assembly. The Scottish Government need only table a Legislative Consent Motion after the committee which has considered a Legislative Consent Memorandum has reported. Therefore it was able to state in the memorandum laid in October that it was not yet content with what the Bill contained regarding the Commission but when it came to table the Legislative Consent Memorandum, which was debated on 22 December it was able to propose that the Parliament should give consent on that point.”

Our View

41. Current procedures seem to have created a perverse incentive not to provide the Assembly with information at an early stage but to proceed only when agreement has been reached on all details. This has the effect of providing little time for scrutiny and means that the scrutiny process cannot influence (other than through the nuclear option of rejecting an LCM) the final shape of the legislative proposal concerned.

42. In addition, the timetabling constraints, on which both the UK Government and the Welsh Government place such emphasis, do not appear to be a factor at all in the Scottish Parliament’s consideration of LCMs. As Dr Paul Cairney told us:

“Yes, as far as I am aware, they [LCMs] are all now subject to committee consideration. It is a routine process in that sense. However, the amount of time dedicated to that process varies from a few lines in the Official Report to many pages. With regard to how that affects the legislative process, I have never got the sense that the consideration of these motions has slowed down any UK legislation. There is now fairly good advance warning of what is going to happen, and there is

plenty of time for them to report before anything goes any further.”²⁴

43. We deal more fully with the Assembly’s scrutiny arrangements and Standing Orders later in the report, where we have made a number of specific recommendations for improvements.

Devolution Guidance Notes

44. The Memorandum of Understanding referred to earlier sets out the principles of co-operation underpinning the relationship between the UK Government and the devolved administrations.

45. Further more detailed guidance for civil servants can be found in the sixteen Devolution Guidance Notes (“DGNs”).²⁵ These are prepared to assist Whitehall civil servants in dealing with aspects of devolution. Responsibility for these DGNs currently lies with the Cabinet Office.

46. The DGNs deal with issues such as common arrangements; handling correspondence; the role of the Secretary of State for Wales; Post-devolution primary legislation affecting Wales and the attendance of UK Ministers and Officials at Devolved Legislatures. Of these, the following 4 DGNs are directly relevant to our inquiry.

- DGN1: Common working arrangements (last updated November 2005);
- DGN4: Role of the Secretary of State for Wales (last updated November 2005);
- DGN9: Post-devolution primary legislation affecting Wales (no date provided);
- DGN16: Orders in Council under section 95 of the Government of Wales Act 2006 (last updated July 2008)

47. In written evidence²⁶, the Wales Office described the role of DGNs and the latest position on their revision following the March 2011 referendum:

“18. ... DGNs can cover arrangements relating to all administrations, or to specific bilateral relations between the

²⁴ RoP-CLA, 10 October, paragraph 19

²⁵<http://webarchive.nationalarchives.gov.uk/+/http://www.justice.gov.uk/guidance/devolutionguidancenotes.htm>

²⁶ CLA Committee Paper, reference CLA(4)-07-11(p2)

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 [2011] 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."

48. In oral evidence, one of the First Minister's officials, Dr Hugh Rawlings, agreed that DGNs govern the day-to-day relationships between civil servants in relation to LCMs and the direct devolution of powers to Ministers:

“Yes, they do. We would assume that Whitehall civil servants have reference to the guidance notes, because that is the purpose of them being prepared, and that they would gain an understanding of how they should proceed from those guidance notes.”²⁷

49. Dr Rawlings also explained the latest position on updating the guidance:

“We are in detailed discussion with the Wales Office on this matter, and I would hope that they might be published fairly soon. The committee should remember, however, when we talk about discussions between the Welsh Government and the UK Government, that the UK Government is an extremely complex creature. We deal only with the Wales Office, and the Wales Office deals with the rest of the UK Government. It is only when the UK Government as a whole has an established position, as relayed to us by the Wales Office, that we can have a further discussion. So, we have these discussions and I am hoping that we will be able to reach a resolution, if not by Christmas, then in the early part of next year.”²⁸

50. Alan Trench in his oral evidence told us:

“...My focus on devolution guidance notes in general as being important came out of doing quite a lot of interviewing in Whitehall in the early years of devolution, and discovering that no-one looked at the memorandum of understanding or at the concordats, which were much talked about at that time—particularly bilateral concordats between particular departments and devolved Governments. No-one looked at those; they gathered dust on shelves. Very often, people did not know that they existed, and when they had known that they existed and had bothered to use them, they found that they were not very useful anyway, because they did not cover the situation that had arisen. What did count were the devolution guidance notes, because those were regularly consulted on and were also fairly regularly updated....”²⁹

²⁷ RoP-CLA, 21 November 2011, paragraph 180

²⁸ RoP-CLA, 21 November 2011, paragraph 169

²⁹ RoP-CLA, 31 October 2011, paragraph 110

Our View

51. Devolution Guidance Notes are the practical mechanism for ensuring that there is early and close working between Whitehall Government Departments and their Welsh Government counterparts. They are important in ensuring that Whitehall, in particular, is aware of the need for early and close liaison with the Welsh Government on legislation that might affect the Assembly's competence.

52. The current DGNs have not been updated since Part 4 of the Government of Wales Act 2006 came into force. While it is reassuring that the work of revising DGNs is now underway and apparently at an advanced stage, it is disappointing that more progress has not been made before now. We acknowledge the complexities, outlined by Dr Rawlings, but note that revised guidance has yet to be published, despite his hope that discussions would be resolved in the early part of this year. We hope that very early progress can now be made to publish revised guidance, which takes full account of the need for the Assembly to have an effective role in scrutinising LCMs in particular.

53. We also hope that the publication of the revised guidance will be used as an opportunity to refresh and improve knowledge of the Welsh devolution settlement across Whitehall.

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.

Welsh Government Capacity

54. Alan Trench told us that there is a team in the Scottish Government charged with managing inter-governmental relations and legislative liaison. He identified this as a significant factor in "...more active and engaged processes at Holyrood to identify Bills..."³⁰. He expanded on the role of this team in his oral evidence:

"...I suspect from what I know that that comes about from the way in which consultation between the Scottish Government

³⁰ RoP-CLA, 31 October 2011, paragraph 44

and the UK Government would proceed at the stage before legislation is framed. In principle, that process should work in exactly the same way between the Welsh Government and the UK Government, but, in practice, I fear that it does not. However, because of the nature of the Scottish Government, it is engaged in this process and knows that it has to watch it. There is a significant team within the constitution directorate of the Scottish Government that is concerned with legislative liaison, whether it is the Sewel convention or the Westminster legislative programme. So, there is a serious high-level engagement on the official side that precedes what happens in the Parliament.”³¹

Our View

55. Realistically, early and informed engagement by the Welsh Government is the best way of ensuring that the Assembly is presented with legislative proposals at an early enough stage to give them proper consideration. The need to proactively keep abreast of legislative developments in Whitehall and Westminster is as important in Wales as in Scotland. If anything, the greater interconnection between the Welsh and English administrative and legal systems probably makes the need more pressing.

56. Whether its capacity to engage with the Westminster legislative process needs to be strengthened and improved is a matter for the Welsh Government. However, we believe that the establishment of a unit along the lines of the one in Scotland deserves consideration.

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

The Assembly’s Scrutiny Arrangements

57. We have already outlined briefly the scrutiny arrangements for legislative consent in the Assembly and Scottish Parliament. Set out below is a more detailed description of the arrangements that apply in each legislature.

³¹ Ibid

58. The Assembly's arrangements for scrutinising provisions in Westminster Bills that impact on the Assembly's legislative competence or impact on the functions of the Welsh Ministers are set out in the Assembly's Standing Order 29 and 30.

Standing Order 29

59. Standing Order 29 requires the Welsh Government to seek the consent of the Assembly to a Bill under consideration in the UK Parliament that makes provisions within the legislative competence of the Assembly or which has a negative impact on the Assembly's legislative competence. The Government is required to lay a Legislative Consent Memorandum explaining:

- the policy objectives of the Bill concerned;
- how the Bill's provisions impact on the Assembly's legislative competence; and
- setting out the Welsh Government's view of whether it is appropriate for the provisions to be made (and if so by means of the Bill in question).

60. At the same time, the Welsh Government has to table a motion seeking the Assembly's agreement to the inclusion of the provision in the Bill.

61. The Business Committee may also refer the matter to a Committee or Committees for further scrutiny and, if so, must publish a timetable for the Committees to report. The Legislative Consent Motion cannot be debated in plenary until the Committee has reported or the deadline set for the Committee by the Business Committee has passed.

Standing Order 30

62. Standing Order 30 requires the Welsh Government to make a written statement when a Westminster Bill (other than one to be considered under Standing Order 29) contains provisions which has a significant impact on the functions of the Welsh Ministers or which has an impact on the legislative competence of the Assembly. However, the consent of the Assembly is not needed and there is no provision for Committee consideration. In practice, there has only been one

example of a statement being made under this Standing Order in the current Assembly³².

63. This may be in part due to the somewhat confusing nature of the Standing Order itself, which also requires a subjective judgement of what is “significant”. In their written evidence the Law Society said:

“Looking at the current Standing Orders (“SOs”), SO30 requires a written statement to be laid but only operates where a Bill is considered to have a “significant impact on the functions of the Welsh Ministers or of the Counsel General” which is vague. If no-one in the Welsh government considers that the impact of the Bill is ‘significant’ and no statement is laid what can the National Assembly do? There is no recourse.”³³

Scottish Parliament Arrangements

64. There are a number of similarities between the arrangements in the Scottish Parliament and those in the Assembly. In both cases, the Government is required to lay a memorandum setting out the reasons for the provisions, their effect and why the Government believes the provisions are appropriate to be made. The consent of the Assembly or the Parliament is required through consideration of a motion in plenary. However, there are also some significant differences.

65. Unlike the Assembly, the Scottish Parliament’s standing orders do not differentiate between provisions that are within legislative competence and those that only impact on the functions of Ministers. The consent of the Parliament is required for any Westminster Bill that makes provision “...*applying to Scotland for any purpose within the legislative competence of the Parliament, or which alters that legislative competence or the executive competence of the Scottish Ministers on any matter that is within the parliament’s competence*”³⁴.

66. The Scottish Parliament’s Standing Orders are also different in other ways. Firstly, unlike the Assembly, where the matter is at the

³² Further details can be found in an exchange of correspondence between the Committee’s Chair and the First Minister in relation to a written statement by the Welsh Government on the Localism Bill. The correspondence was discussed at the Committee’s meeting on 16 January 2012. - CLA Committee Paper, reference CLA(4)-01-12(p5&6)

³³ CLA Committee Paper, reference CLA(4)-09-11(p11)

³⁴ Standing Orders of the Scottish Parliament - Rule 9B (9B.1 1. UK Parliament Bills making provision requiring the Parliament’s consent.)

discretion of the Business Committee, there is a requirement for all legislative consent memorandums to be referred to a committee of the Parliament to consider and report³⁵. In addition, a Legislative Consent Motion is not considered by the Parliament until after the committee has reported³⁶. This effectively gives the committee concerned, rather than the Government, control over the timetable for scrutinising proposals.

67. Legislative Consent Motions cannot be tabled in the Scottish Parliament until after a committee has reported³⁷. This contrasts with the position in the Assembly where the Government is required to table a Legislative Consent Motion at the same time that it lays the Legislative Consent Memorandum. As we noted earlier [para 41], this difference may be of considerable significance if the effect of the Assembly's current Standing Order is to create a perverse incentive for the Government to delay laying Legislative Consent Memorandums before the Assembly.

Our View

68. There was broad support among those who gave evidence that the Assembly should strengthen its Standing Orders in respect of the consideration of LCMs. The three main areas where this strengthening was thought to be desirable were:

- for all LCMs to be referred to a Committee for scrutiny as a matter of course;
- an end to the current differentiation between matters within the Assembly's legislative competence (Standing Order 29) and matters impacting on the functions of Welsh Ministers or impacting on the legislative competence of the Assembly (Standing Order 30); and
- to allow the Assembly and its Committees to consider LCMs before the detail of clauses had been agreed between the Welsh and UK Governments, including on a conditional basis.

69. The First Minister in his oral evidence, expressed some concerns about the practical difficulties of working within the Parliamentary timetable, but saw no reason in principle why LCMs should not be

³⁵ Ibid (Rule 9B.3 5.)

³⁶ Ibid (Rule 9B.2 3.)

³⁷ Ibid (Rule 9B.2 2.)

scrutinised further.³⁸ He also agreed that there was a strong argument for ending the differentiation inherent in Standing Orders 29 and 30.³⁹

70. While we understand the First Minister's concerns about the practicalities of working within the Parliamentary timetable, the experience in Scotland suggests these concerns may be overstated. However, whatever the practicalities may be, the fundamental principle remains that the Welsh Ministers should be fully accountable to the National Assembly. If this principle is to be meaningful, the Assembly must be able to properly scrutinise all legislative consent proposals and must be satisfied that it has had proper opportunity to do so.

71. We are also concerned that the current arrangements may provide a temptation for Ministers to "sub-contract" significant matters of legislation, without the need for usual levels of scrutiny. Such concerns are likely to diminish if there is a good level of trust between the Assembly and the Welsh Government. The level of trust is likely to be higher if the Assembly feels that it is firmly in control of the scrutiny process in 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.

Recommendation 6: We recommend that Standing Order 29 should be amended so that all Legislative Consent Memorandums (including matters now covered by Standing Order 30) are, apart from in exceptional circumstances, referred to an Assembly Committee for scrutiny.

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.

72. We have noted the First Minister's concerns about being mindful of the need to work within the Parliamentary timetable. As we also

³⁸ RoP-CLA, 21 November 2011, paragraphs 145 and 146

³⁹ RoP-CLA, 21 November 2011, paragraph 101

note earlier, this does not seem to be unduly problematic in Scotland. We believe that the Business Committee's current role in deciding whether to refer an LCM to a Committee and setting a timetable for scrutiny is, apart from in exceptional circumstances, an unnecessary constraint on Committees' responsibility for setting and managing their own scrutiny agenda. Nevertheless, we recognise that Committees, in scrutinising LCMS, will also need to be mindful of the constraints of the parliamentary timetable. We believe that they will be.

73. We commented earlier that our current Standing Orders appear to have been interpreted in a way that creates an incentive to provide LCMs only when all details of what has been proposed have been agreed between the Welsh and UK Governments. We believe that the ability to consider and give consent to LCMs on a conditional basis will allow the Welsh Ministers to bring forward LCMs earlier so that they and the UK Government can take account of Assembly scrutiny in agreeing the terms of a final Legislative Consent Motion. This should also be of assistance in helping fit in with the UK Parliament's timetable.

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.

Scrutiny in Westminster

74. In their evidence to the committee, the Wales Governance Centre suggested that the scrutiny of UK Bills that confer powers on Welsh Ministers could be improved by setting up "some form of informal link between Assembly committees and Westminster committees"⁴⁰. This approach:

"... would help your work considerably, and assist in giving a wider sort of spectrum to the House of Lords committee and its equivalent in the House of Commons, if they knew your concerns. Together, it seems to me, you could put a lot of pressure on the Government."⁴¹

75. David Lambert added:

⁴⁰ RoP-CLA, 3 October 2011, paragraph 70

⁴¹ RoP-CLA, 3 October 2011, paragraph 66

“We would emphasise the need to liaise with Westminster committees ... It would be much weightier if the parliamentary committees were also able to reflect the concerns of the Assembly, because they do not seem to be able to do so at the moment. So, this is not so much about the legislative consent motions as machinery. You have all the expertise, conventions and principles that these committees have established over the years, which we discussed in our evidence to one of the previous committees: use it.”⁴²

76. Daniel Greenberg also suggested in his written evidence that:

“... the National Assembly may wish to consider encouraging the establishment of new arrangements within Whitehall and Westminster that would, in effect, ensure that the National Assembly has an opportunity formally to influence the process where it is proposed to confer powers directly on Welsh Ministers.”⁴³

77. Others had misgivings, such as Alan Trench:

“I would be rather sceptical It is something that, as I recall, was tried in the earlier years of the Assembly. It was hugely difficult in practical terms, in ensuring that Standing Orders at each end were framed so that a meeting could happen and could work. It was then found that there were very significant differences in the ways of working, the attitudes, and the approaches of Members on the two sides. As I recall, that process was a very short-term experiment that was not repeated. There would be some accountability problems as well if one were to do that, particularly, and very obviously, if you were to do that at a stage when you were considering a tangible legislative proposal, rather than at an earlier stage when you were either conducting a pre-legislative inquiry or trying to carry out some sort of forensic or more wide-ranging general inquiry. When you have committees fulfilling a legislative role, it is going to be really very difficult indeed,

⁴² RoP-CLA, 3 October 2011, paragraph 110

⁴³ CLA Committee Paper, reference CLA(4)-06-11(p3)

again because you are blurring lines of accountability. So, I am afraid that I would have great misgivings about that.”⁴⁴

78. Significantly, the Chair of the Welsh Affairs Committee, David Davies MP also felt that there were practical and political difficulties:

“After the Second Reading of a Westminster Bill... a Bill committee will be convened. There is no guarantee, if part of that Bill relates to Wales, that a Welsh MP will be sitting on that committee. There is perhaps a role for a relevant committee in the Assembly—perhaps your committee—to write to the Chair of the Welsh Affairs Committee, or to the Secretary of State for Wales, drawing our attention to the fact that there is a relevant clause in that Bill that will have particular effect on Wales, and asking whether they will ask Welsh MPs to put their names forward to be selected to sit on that Bill committee. One would then expect them to concentrate on that particular area. However, trying to give the Welsh Affairs Committee a direct role in that scrutiny would be fraught with political problems, not just on our side, but also on yours.”⁴⁵

Our view

79. There are clear practical difficulties in greater liaison between the Assembly and its Committees and Parliamentary scrutiny processes. In practice, Parliamentary scrutiny of powers granted to Welsh Ministers is unlikely to have a strong focus on specifically Welsh issues, particularly if there are no Welsh Members on the relevant Bill Committee.

80. Some of these issues were usefully summed up by the Chair of the Welsh Affairs Committee when he said:

“... would you be happy if members of the Welsh Affairs Committee decided something that changed the law, given that some of them are not from Wales and that the majority come from a party that is not in power, unfortunately for me, in the Assembly? I do not think that you would accept that, and I do not want to cause constitutional problems. ... You are correct,

⁴⁴ RoP-CLA, 31 October 2011, paragraph 130

⁴⁵ RoP-CLA, 17 October 2011, paragraph 46

and I agree with you ...: I do not see a strong role for the committee.”⁴⁶

81. Even if the practical difficulties could be overcome, and scrutiny in Westminster became more focused on Welsh clauses, a strong theme running through the Inquiry has been the need, in principle, for Welsh Ministers to be accountable to the Assembly.

82. Although, we would not discourage Assembly and Westminster Committees from working together on matters of common interest where this is practical, we do not believe that this is a way of significantly improving scrutiny of Bills. We also believe that attempts at such joint scrutiny may further blur lines of Ministerial and legislative accountability. Nevertheless, there is no reason why the attention of Westminster committee or Welsh members of those committees should not be drawn to the views of an Assembly committee that has scrutinised a Legislative Consent Memorandum.

Scrutiny Capacity in the Assembly

83. We concluded earlier, that there is likely to be a significant increase in the number of LCMs put before the Assembly. If this assessment is correct and our recommendations for improved Committee scrutiny are accepted, then there could be a significant impact on the workload of individual Committees.

84. To a large extent how much extra work will be needed will depend on the nature of the LCMs and how controversial they are considered to be. When we asked Dr Paul Cairney how distinctions were drawn in Scotland between innocuous and less innocuous proposals he told us:

“The committees decide how important they are. If a committee decides that there is nothing really to discuss, then it will have a discussion with a routine meeting once and then recommend that it go through. If it decides that it is worthy of more discussion, then it will occasionally invite evidence from other people and have two or three committee meetings before it goes to plenary.”⁴⁷

⁴⁶ Ibid paragraph 83

⁴⁷ RoP-CLA, 10 October 2011, paragraph 23

Our View

85. What is important is that Assembly Committees have available the resources, particularly expert staff, to help them sort the wheat from the chaff.

86. Whether the Assembly needs to strengthen its staffing to deal with an increase in LCMs will depend to a large extent on what develops in practice in future. We do not think that there is currently a case for additional staffing in this area. However, we believe that this is an area that the Assembly Commission should keep under review in the light of experience.

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.

Information on Welsh Minister's Powers

87. A number of witnesses praised Cardiff Law School's "Wales Legislation Online". This is a website⁴⁸ which aims to show all the powers of the National Assembly and the laws it has made, as well as the powers of the Welsh Government and the laws made by it under devolved powers. The website also aims to show subordinate law made by Central Government applying to Wales under devolved Acts. Wales Legislation Online is supported by the National Assembly for Wales and the Welsh Government.

88. As helpful as Wales Legislation Online is, most of the witnesses agreed that it would be helpful if there were available a comprehensive authoritative listing of Welsh Ministers' powers obtained under Legislative Consent and other procedures.

89. Daisy Cole of the Welsh Refugee Council made the point that the boundaries of devolved responsibility are not always clear and can cut across devolved and non-devolved competence in areas.

"This is the issue: it is simple on paper—you have the Government of Wales Act 2006 and the devolved responsibilities—but, in reality, you have people who are speaking way beyond the agreed boundaries. This makes our

⁴⁸ <http://www.wales-legislation.org.uk/>

job really difficult. To advocate at community level to make meaningful change is difficult. I suppose that we are looking for something that really shows that, if you step out of line, there will be people looking to see what you are doing. At the moment, all kinds of things can happen around child safeguarding, but there is no scrutiny. There is no-one saying, ‘Actually, child safeguarding is a devolved issue, so if you are operating like this, we need to have scrutiny of it’. That is the problem. A gap has been allowed to develop over time, and there are people really suffering because of it.”⁴⁹

90. The First Minister agreed that more work needed to be done in this area:

“... I know that the Counsel General shares my concern about the need to publicise—if I can put it that way—Welsh laws more openly. I know that the Counsel General is keen to ensure that we see the development of a Welsh statute book in future. In terms of administrative powers, however, at the moment, the Wales Legislation Online website is the place where those powers are collated. We are nonetheless looking at this matter, because we know that the use of that website is quite limited, to see how we might improve things for the future.”⁵⁰

Our View

91. There is a clear need for a comprehensive and authoritative source of information about the powers of Welsh Ministers and laws that are made in and that affect Wales. Wales Legislation Online deserves the credit that it has received for the job it does. However, as we move toward developing a Welsh Statute Book it is important that the Welsh Government and the National Assembly consider whether further development is needed in this area.

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.

⁴⁹ RoP-CLA, 14 November 2011, paragraph 28

⁵⁰ RoP-CLA, 21 November 2011, paragraph 165

Scrutiny of Orders Made by UK Ministers that impact on the Assembly's Legislative Competence

92. Since we finished taking evidence for this Inquiry, the Public Bodies Act has received Royal Assent. Our original focus on the Bill was on the significant powers it gave Welsh Ministers to reform certain public bodies in Wales.

93. The Act is the main legislative vehicle for taking forward the UK Government's review of public bodies. It allows UK Ministers, by Order, to abolish, merge or transfer the functions of a wide range of public bodies, including many which have responsibilities in both Wales and England. Many of these Orders will, therefore, make provision about matters that could otherwise be made by an Act of the Assembly. In these circumstances, the Public Bodies Act itself requires UK Ministers to obtain the consent of the National Assembly before the Orders can be made.

94. We understand that there may be as many as around 50 of these Orders that will require the Assembly's consent over the next 12-18 months. Unfortunately, these Orders do not fit within the Assembly's current Standing Orders for either legislative consent (Standing Orders 29 and 30) or for subordinate legislation (Standing Order 21 and 27).

95. As the Standing Orders make no specific provision for this type of Order, it would be open to the Welsh Government to lay the Orders and then table motions seeking the Assembly's consent. However, the Government has agreed that, as far as practicable, enough information and sufficient time should be provided to allow proper scrutiny of these Orders, including in Committee.

96. In the light of this, the Business Committee has now agreed a temporary procedure for considering these Orders. The essential points of this procedure are:

- The Government will lay draft Orders at the earliest possible point.
- Along with the draft Order, the Government will lay any supporting material (such as Explanatory Memorandums, Regulatory Impact Assessments etc) prepared by UK Ministers and will at the same time table a motion seeking the Assembly's consent to the Order.

- The Welsh Government will at the same time lay a Legislative Consent Memorandum addressing the issues set out in current Standing Order 29.3 (i-iii). (That is, why it's needed, how it impacts on the Assembly's competence and why it is appropriate to do it in this way.)
- Each Order will be referred automatically to the Constitutional and Legislative Affairs (CLA) Committee for consideration. CLA Committee may, if it considers it necessary, invite other Committees to consider an Order.
- CLA and any other Committee it asks to do so, may report to the Assembly following which the motion seeking the Assembly's consent to the Order will be debated in Plenary.
- To allow CLA and other Committees sufficient time to consider each Order, the expectation is that they should be given 35 days from the date an Order is laid (excluding recess periods) to report to the Assembly. More time may be given at the Welsh Government's discretion or if requested by Committees.
- The consent motion would not be considered in Plenary until 40 days after an Order is laid.

Related Issues

97. Orders under the Public Bodies Act are not the only example of orders made by a UK Minister that have had an impact on the Assembly's Legislative Competence. A recent order under the Regulatory Enforcement and Sanctions Act 2008⁵¹ also amended primary legislation within the Assembly's legislative competence. Orders under the Legislative and Regulatory Reform Act 2006⁵² may in due course seek to do the same.

98. This has prompted a recognition that the Assembly's Standing Orders may need to be changed to provide specific procedures for Orders made by UK Ministers that amend primary legislation within the Assembly's competence.

Our View

99. There is clearly a need for the Assembly's Standing Orders to capture Orders of this sort. In doing so, the same basic principles of

⁵¹ Regulatory Enforcement and Sanctions Act 2008 (2008 c.13)

⁵² Legislative and Regulatory Reform Act 2006 (2006 c.51)

scrutiny and accountability should apply as with other types of Legislative Consent Motions. That is, that the Assembly should have sufficient and timely information and reasonable opportunity for detailed scrutiny in Committee. We are glad to hear that the Welsh Government has recognised these principles in agreeing to the procedure set out above.

100. These Orders are though somewhat different in nature to LCMs in that they give effect to powers already in existence rather than create wholly new powers. Despite the fact that they amend primary legislation, they remain pieces of subordinate legislation. For these reasons, we believe that they are best dealt with by amending the Assembly's procedures for considering subordinate legislation in line with the temporary procedure already agreed by the Business Committee.

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.**

Conclusion

101. At the outset⁵³, we indicated that our Inquiry would be guided by the general principle that powers should only be granted to Welsh Ministers in devolved areas with the informed consent of the National Assembly, which should be able to exercise appropriate scrutiny over the process concerned. We remain of that view.

102. A number of themes have emerged from the evidence we received but it is fair to say that foremost among these is the need for the Assembly to be able to scrutinise legislative proposals effectively and be able to hold the Welsh Ministers to account when they propose and use legislative powers.

103. More use of Legislative Consent Motions can be expected in the future given the Assembly's expanded legislative competence. This can be an effective and efficient way of dealing with technical and non-contentious matters, particularly where these involve "cross-border" issues. However, LCMs should not be used for significant or politically contentious pieces of legislation that could be made in an Act of the Assembly unless the matter is clearly urgent or if cross-border interconnectivity cannot be dealt with in any other way.

104. The guiding principle should be that the Assembly should be fully in control of the scrutiny and approval of powers that affect its competence and of the powers of Ministers accountable to it. The changes we have recommended to the Assembly's Standing Orders will help turn this principle into practice.

105. Earlier and better warning of UK Bills that have implications for the Assembly's competence will help provide the Assembly with reassurance that its role in legislating for Wales is respected by both the UK and Welsh Governments. This means that Whitehall needs a better understanding and to take account of the new devolution settlement in Wales. The Scottish experience demonstrates that this need not be problematic providing that the guiding principle above is followed.

⁵³ Call for written evidence August 2011

Witnesses

106. The following witnesses provided oral evidence to the Committee on the dates noted below. Transcripts of all oral evidence sessions can be viewed in full at www.assemblywales.org

<i>Date</i>	<i>Organisation</i>	<i>Represented by:</i>
3 October 2011	Wales Governance Centre, Cardiff Law School	<ul style="list-style-type: none">- David Lambert, Research Fellow- Marie Navarro, Research Associate- Manon George, Research Assistant
10 October 2011 (Video-conference)	University of Aberdeen	<ul style="list-style-type: none">- Dr. Paul Cairney, Senior Lecturer in politics and international relations
17 October 2011	Welsh Affairs Committee	<ul style="list-style-type: none">- David Davies MP, Chair- Paul Evans, Clerk of the Table Office, House of Commons
31 October 2011	The Constitution Unit, University College London	<ul style="list-style-type: none">- Alan Trench, Honorary Senior Research Fellow
7 November 2011	School of Social and Political Science, University of Edinburgh	<ul style="list-style-type: none">- Richard Parry, Reader in social policy
14 November 2011	Welsh Refugee Council	<ul style="list-style-type: none">- Mike Lewis, Chief Executive,- Daisy Cole, Head of Influencing, PR & Child Policy
21 November 2011	Farmers Union of Wales	<ul style="list-style-type: none">- Gavin Williams, Chair Land Use and Parliamentary Committee- Andrew Gurney, Policy Officer (Land Use)
21 November 2011	Welsh Government	<ul style="list-style-type: none">- The First Minister the Rt. Hon

Carwyn Jones AM

- Dr Hugh Rawlings CB, Director,
Constitutional Affairs and Inter-
Governmental Relations

List of written evidence

The following people and organisations provided written evidence to the Committee. All written evidence can be viewed in full at

www.assemblywales.org

<i>Organisation</i>	<i>Reference</i>
Mr Dylan Rees	CLA(4)-06-11(p1)
Dr Paul Cairney, Senior Lecturer in politics and international relations, University of Aberdeen	CLA(4)-06-11(p2)
Mr Daniel Greenberg	CLA(4)-06-11(p3)
Wales Governance Centre, Cardiff Law School	CLA(4)-06-11(p5)
Farmers Union of Wales	CLA(4)-07-11(p1)
Welsh Refugee Council	CLA(4)-07-11(p2) CLA(4)-14-11(p4)
The Police Federation of England and Wales	CLA(4)-07-11(p3)
The Law Society	CLA(4)-09-11(p11)
Mr Alan Trench, Honorary Senior Research Fellow, Constitution Unit, University College London	CLA(4)-09-11(p12) CLA(4)-09-11(p12) Annex 1 CLA(4)-09-11(p12) Annex 2
Mr Richard Parry, Reader in Social Policy, School of Social and Political Science, University of Edinburgh	CLA(4)-10-11(p7)
The Welsh Government	CLA(4)-12-11(p1)

Organisation

The Wales Office

Reference

CLA(4)-12-11(p2)