



Sefydliad Materion Cymreig  
Institute of Welsh Affairs

## **DEVOLUTION: A DECADE ON**

**IWA response  
to the  
House of Commons  
Constitutional Affairs Committee  
Call for Evidence**

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# CONTENTS

<b>PREFACE .....</b>	<b>1</b>
<b>1. OVERVIEW .....</b>	<b>2</b>
<b>2. PROGRESS OF DEVOLUTION IN WALES .....</b>	<b>4</b>
THE GOVERNMENT OF WALES ACT 1998.....	4
THE RICHARD COMMISSION .....	5
THE GOVERNMENT OF WALES ACT 2006.....	6
PUBLIC ACCEPTANCE OF DEVOLUTION .....	6
<b>3. SHORTCOMINGS OF CURRENT DEVOLUTION ARRANGEMENTS .....</b>	<b>8</b>
COMPLEXITY OF POWERS.....	8
SOURCES OF THE LAW RELATING TO WALES .....	11
CAPACITY OF THE ASSEMBLY .....	12
<b>4. RELATIONS BETWEEN CARDIFF AND LONDON .....</b>	<b>14</b>
<b>5. DEVOLUTION CONSEQUENCES .....</b>	<b>17</b>
REFERENDUM ON PRIMARY POWERS .....	17
A SEPARATE WELSH JURISDICTION .....	17
TREND TOWARDS FEDERATION .....	19
<b>APPENDIX: .....</b>	<b>20</b>
INQUIRY TERMS OF REFERENCE .....	20



## Preface

This report has been put together by a small working party brought together by the Institute in response to a call for evidence from the Constitutional Affairs Committee of the House of Commons, following the announcement of its inquiry into *Devolution: A Decade On* in February 2007. The inquiry's terms of reference, printed as an Appendix to this publication, explain that the inquiry was delayed until Autumn 2007 so that it could take account of the outcome of the May devolved elections, the creation of the Whitehall Ministry of Justice in the same month, and the publication of the UK Government's Green Paper *The Governance of Britain* in July. However, this report refers solely to the Welsh experience of devolution since the 1997 referendum.

The IWA is grateful to the members of the Working Party for their expert contribution. They are Keith Patchett, Emeritus Professor of Law at Cardiff University and a Fellow of the IWA; and David Lambert, Research Fellow, and Marie Navarro, Research Associate, at Cardiff Law School, responsible for the Wales Legislation Online website, [www.wales-legislation.org.uk](http://www.wales-legislation.org.uk), which sets out the powers and legislation made by the National Assembly for Wales.

John Osmond  
Director, IWA  
November 2007

## **1. Overview**

**1.1** At the end of the first decade of Welsh devolution it is safe to conclude that it is now the settled will of the people of Wales. Recent polling published by the Institute of Welsh Politics, Aberystwyth University, found a substantial fall in opposition to devolution since 1997, from 40 per cent to 17 per cent.<sup>1</sup> There is growing evidence of an acceptance that arrangements for Wales should reflect Welsh circumstances and needs. For example, the Aberystwyth survey found large majority support for the National Assembly rather than Westminster to have the “greatest influence over Wales”. On a range of matters, Welsh policies and delivery are now substantively different from those for England. As one illustration, some 56 per cent of the Assembly’s subordinate legislation is either unique to Wales or substantively different from the equivalent legislation applying to England.

**1.2** Recent reforms and improvements show a growing confidence, both in Wales and in London, in those responsible for delivering devolved government. So, for example:

- Improved governmental arrangements were speedily enacted and implemented under the Government of Wales Act 2006 with relatively little controversy.
- New fields of competence have been conferred, and none taken back.
- Devolved executive powers are now more extensive both in number and scope (though the distinction between those and reserved powers is still not always clear).
- It is much less common for powers to be shared with Whitehall or concurrently or jointly exercised. Rather, greater reliance is placed on consultation and agreement.
- Acts of Parliament more clearly differentiate Wales-related provisions, which increasingly confer powers in terms negotiated by Welsh Ministers.
- Whitehall has a better understanding of the need to accommodate devolution expectations, which is more thoroughly reflected, for example, in the applicable Guidance Notes.
- Parliament and its Committees are giving greater consideration to Welsh devolution issues, and Government is necessarily paying greater heed to the concerns and recommendations made by them.

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<sup>1</sup> The statistics, the result of an ESRC-funded academic survey, were published on 17 September 2007.

**1.3** Despite these achievements, the Welsh devolution 'settlement' remains complex, without precedent and, in our opinion, not well understood. Those who are called upon to operate within the system have been faced from the outset by the need to come to terms with constantly evolving arrangements that have no counterpart in Scottish or Northern Irish devolution.

## **2. Progress of Devolution in Wales**

### ***The Government of Wales Act 1998***

**2.1** The first two terms were marked by pragmatic changes to the National Assembly's constitution as originally set out in the Government of Wales Act 1998. Principal among these were the de facto separation of its executive functions (carried out by the Assembly Government) from its deliberative and scrutiny role and the gradual emergence of an incipient Parliamentary Service (in the form of the Presiding Office) to support the Assembly in discharge of that role. These arrangements always sat uncomfortably with the Assembly's corporate structure, both arms of which had to be serviced by officials from the civil service under a single Permanent Secretary.

**2.2** Features of the original scheme that were designed to encourage inclusiveness and cross-party consensus, such as the Subject Committees, proved less successful than intended. In part this is attributable to the Committees' inability to bring sustained depth in their input to policy development and to shortcomings in scrutinising both the Executive's policy and the performance of Ministers. The presence of Ministers as full committee members was widely seen as contributing to confusion as to lines of responsibility and accountability.

**2.3** The original aim underlying the Assembly structure was one of executive devolution. However, this evolved to give the Assembly a fuller role in legislative activity, albeit under secondary legislative powers delegated, often in a piece-meal way, principally by Act of Parliament and Transfer of Functions Orders made under the 1998 Act. But acquisition of the additional powers (both executive and legislative) necessary to enable a coherent policy to be developed on a specific topic was dependent upon the goodwill and cooperation of Whitehall departments and their own priorities. Formal working arrangements between Cardiff and London were put in place, with the Wales Office playing a pivotal role. However, these were never tested in circumstances where different political parties were in government or in unfavourable economic conditions.

**2.4** There can be no question that the trend throughout the first two terms was an increase in the capacity of the Assembly to address Welsh issues. Unfortunately, the resulting picture was a



complex of specific, often detailed, powers rather than the conferment of the necessary authority to tackle policy issues in a fully integrated and coherent manner.

## ***The Richard Commission***

**2.5** The Richard Commission on the powers and electoral arrangements of the Assembly, established as a result of the Partnership Agreement between Labour and the Liberal Democrats in the first term, constituted a thorough and well-informed examination up to late 2003. It contained significant and coherent recommendations, many of which, but by no means all, carried weight with the UK Government in the preparation of the Government of Wales Act 2006. Among those recommendations not given current effect in that Act, the following stand out:

- The conferment of primary legislative powers in relation to designated subject areas, on the lines of the Scotland Act 1998, though with a more restricted range of subjects.
- An increase in the membership from 60 to 80 to strengthen the Assembly's capacity.
- To accommodate such an increase in numbers while continuing the principle of proportionality, the replacement of the AMS system by the introduction of STV as the mode of electing all the Assembly members.

**2.6** The case for implementation of these recommendations remains strong. Political developments and working experience during the current Assembly term may strengthen the argument for implementation in time for the next Assembly election. The mechanism for instituting primary legislative powers is in the Government of Wales Act 2006, though it is subject to the support of two-thirds of Assembly Members and approval by a referendum. As mentioned below, the Assembly may well prove to be handicapped by the limitation on its number of Members. This could worsen when primary powers are acquired. At the same time, it is difficult to see how the size of the Assembly can be increased without replacing the present AMS system by a different form of proportional representation. However, both these recommendations require amendment of the 2006 Act.

## ***The Government of Wales Act 2006***

**2.7** This Act made welcome improvements to the devolution arrangements in Wales, not least by the abolition of the corporate structure and by the formal separation of executive and legislative functions. The former functions are now vested in the Welsh Ministers by law rather than as previously by delegation. The Welsh Assembly Government is made formally accountable to the Assembly. The Assembly's legislative power is now to make Measures, a new form of subordinate legislation, on specific matters set out in Schedule 5 of the Act or as are from time to time added to that Schedule. The Act introduced a new mechanism for conferring such additional legislative competence by Order in Council at the behest of the Assembly. The power to make statutory instruments under delegated powers now rests with the Assembly Government. Improvements have also been made with respect to financial matters that are designed to give the Assembly greater capacity to scrutinise public spending plans and expenditure.

**2.8** There can be no question that the Act is an advance on the original scheme. However, it seems very probable that it will prove to be one more intermediate step in the evolution of the Assembly to becoming a full legislative institution. The Act contains provision for the conferment of primary legislative powers on the Assembly with respect to specified subject areas, but only after such a change has been approved by referendum at some unstated future date. In the meantime, Wales continues to be subject to a second phase of constitutional arrangements that are without precedent. It would be a misnomer to describe the past and present schemes as constituting a devolution *settlement*.

### ***Public Acceptance of Devolution***

**2.9** Although there is little evidence that the Welsh public is embracing devolution enthusiastically, it appears that there is widespread recognition that it is here to stay. Indeed, the most recent public opinion surveys indicate growing support for greater powers for the Assembly. The Institute of Welsh Politics poll, referred to earlier, found that support for full legislative powers has grown from 20 per cent in 1997 to 43 per cent today.

**2.10** Turnout at the 2007 election, at some 43 per cent, may suggest limited public interest, though the trend is upwards. As with many other public institutions in the United Kingdom, dissatisfaction

as to the achievements of devolution and the performance and delivery of public services is more frequently articulated than actual successes in giving effect to Welsh needs and priorities. There remains wide-scale ignorance of what devolution entails and how it operates. In part this is attributable to the poor coverage of Assembly and Assembly Government activities in the public media, especially the national press.

**2.11** The implications of the Welsh electoral arrangements are not well understood. The past dominance of the Labour Party has inculcated expectations derived from the practice of single party government. That proportional representation makes coalition government more probable than not is only just beginning to be acknowledged, not least in the political parties themselves. Until this is better recognised, it may be expected that public impatience will be registered when faced with inevitable inter-party negotiations.

## **3. Shortcomings of Current Devolution Arrangements**

### ***Complexity of Powers***

#### **Executive Powers**

**3.1** The arrangements under which Welsh Ministers currently hold or may acquire executive powers (including secondary legislative powers) are largely influenced by the initial scheme for transferring executive functions to the Assembly. The functions transferred were principally those specified powers that were at the time exercised by the Secretary of State for Wales in the limited range of fields set out in the 1998 Act. In many instances these did not result in the transfer of all the executive powers relating to the particular field, or subject topic within a field, some of which remained wholly or jointly with a UK Secretary of State. The extent to which executive powers created under Acts subsequent to 1998 were conferred on the Assembly has had to be negotiated with respect to each Bill. This contrasts with the Scottish arrangements, which in the main provided Scottish Ministers with the same executive powers as enjoyed by Ministers in England.

**3.2** The 2006 Act continues to make provision for the transfer of functions from UK Ministers to Welsh Ministers by Order in Council though in future the usual method for conferring such functions will be by primary legislation. In principle, such provisions could be drawn more broadly, rather than in the specific terms used in the past. The recent undertaking by Government to have less recourse to the creation of powers exercisable jointly or concurrently by a Secretary of State and Welsh Ministers is welcome.

**3.3** The elaborate terms in which the powers of the Assembly Government are expressed, and the uncertainties arising from their inevitably jagged edges, are not thought to present significant problems for those called upon to exercise them. Nonetheless, the lack of clarity and certainty gives rise to difficulties for those dealing with the Government or who are required to hold it to account.

#### **Legislative Powers**

**3.4** The latest *Devolution Guidance Note No.9* spells out the convention that Parliament will not normally legislate with regard to devolved matters except with the agreement of the Assembly.<sup>2</sup> The Government of Wales Act 2006 establishes the Assembly's legislative competence to enact Measures in 20 Fields. That competence may be exercised only in relation to such Matters as are specifically designated in Schedule 5. The Act itself specifies only a small number of such Matters, all of which relate to the Assembly's operations. Accordingly, the Assembly's Measure-making power in relation to substantive policy areas is dependent upon the subsequent addition of Matters. This can be done by three distinct processes:

- Conversion by Order in Council of framework powers to make statutory instruments already contained in Acts of Parliament. This transitional device is being used only once, in relation to framework powers under the Education and Inspections Act 2006 and NHS Redress Act 2006.
- Legislative Competence Orders in Council implementing proposals initiated by the Assembly.
- Directly by provision in Acts of Parliament, granting permissive powers to the Assembly to determine the detailed application in Wales of the Westminster Government's legislative policy. This mode has already been adopted in legislation in the 2006-07 Session.

**3.5** The steps currently being taken under the first and third processes usefully enabled the Assembly to embark upon legislative activities early in its life and thereby to begin to acquire law-making experience. However, these arrangements perpetuate shortcomings experienced under the 1998 Act as well as bringing additional complexity in the development of the Assembly as an authentic legislature. For example:

- Rather than constituting a clearly understood settlement of devolved authority, the scheme is a constantly rolling and potentially unpredictable process for transferring legislative powers.
- With respect to both devolution clauses in bills and Legislative Competence Orders, outcomes are dependent upon the cooperation and goodwill of Whitehall and Westminster.

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<sup>2</sup> Ministry for Justice, *Devolution Guidance Note 9: Post-Devolution Primary Legislation Affecting Wales*, July 2007.

- Framework provisions in bills, which are likely to remain a major source of substantive powers, carry forward the UK Government’s policy objectives and priorities that may not coincide with those of the Assembly Government.
- Such provisions will be acceptable only if they are appropriate for the scope of the bill and if they do not exceed the executive functions that the Welsh Ministers already have;
- Only a limited number of LCOs annually seems likely (said to be in the order of five), given the time factors to which the elaborate procedures will give rise for the two Governments and for the Assembly and Parliament;
- A firm convention is yet to emerge as to the extent to which Parliament may take notice of the Measures enacted to implement powers conferred by LCOs.

**3.6** At the same time, the new LCO process is already being utilised vigorously. The Assembly is seizing the opportunities afforded by the new procedures to enhance its capacity to implement coherent legislative policies. The concern that the instruments might be drafted in the detailed and restrictive format used to express framework powers in bill clauses has not been borne out. However, at the time of writing there was a difference of opinion between Cardiff and London over the level of generality with which the new powers should be expressed. This involved the proposed Legislative Competence Order No 2 relating to environmental protection and including the collection and disposal of waste.

**3.7** The procedures to be followed with respect to LCOs put considerable emphasis on pre-legislative scrutiny. Unsurprisingly, concerns were expressed that neither the Assembly nor Parliamentarians had an opportunity to take a position on bill clauses until the bill has been published. It is perhaps unfortunate, as *Devolution Guidance Note No.9*, para.17 confirms, that there is as yet no Sewel convention that the assent of the Assembly must be sought in relation to statutory additions of legislative powers, as is the case for proposals that have a negative impact on Assembly powers

**3.8** However, Government has recently announced the intention to provide explanatory memoranda specifically on these clauses when the bill is introduced and an offer of early informal briefing sessions for both the Assembly and Parliamentarians. These procedures do not include any mechanism for formal feedback, rather they are intended to better inform those participating in the scrutiny of these bills during their passage through Parliament. It remains the case that the Assembly has no special standing to make its views known

to Parliament when draft bill clauses conferring new legislative powers are under consideration. It also remains to be seen whether the Assembly will seek to take advantage of the new powers of Parliamentary public bill committees to take evidence.

## ***Sources of the Law Relating to Wales***

**3.9** One consequence of the new legislative arrangements is the emergence of a plethora of sources of the law that relates specifically to Wales:

- (i) Acts of Parliament applying to England and Wales as a single jurisdiction.
- (ii) Wales-only Acts of Parliament.
- (iii) Provisions in Acts of Parliament that apply to Wales, including framework powers..
- (iv) Orders in Council approved by Parliament, including Legislative Competence Orders
- (v) Measures made by the Assembly modifying or supplementing existing legislation (including Acts of Parliament) or making new provision.
- (vi) Subordinate legislation made by Welsh Ministers implementing Community law under Designation Orders made under the European Communities Act 1972, s.2(2).
- (vii) Subordinate legislation made by Whitehall for England and Wales as a single jurisdiction.
- (viii) Subordinate legislation made by Whitehall specifically for Wales.
- (ix) Subordinate legislation made by the Assembly under Acts of Parliament or, exceptionally, under Whitehall subordinate legislation, prior to 2007.
- (x) Subordinate legislation made by the Assembly Government (or jointly with Whitehall) under provisions of Acts of Parliament.
- (xi) Subordinate legislation made by the Assembly Government under powers delegated by Assembly Measures.

**3.10** It is by no means clear that the necessary steps are being taken to ensure that Assembly Members, the legal profession and civil society generally are able to have access to an up-to-date collation of these sources of the law, as it affects Wales as distinct from other parts of the United Kingdom. We are strongly of the view that early consideration must be given to the separate publication of

a collation of current Welsh legislation, a resource that will become increasing needed as distinct Welsh law is enacted.

## ***Capacity of the Assembly***

**3.11** The separation of the Assembly from the Assembly Government necessarily transforms its role into a legislative and scrutiny body. In particular, the Subject Committees that dominated the first two terms have been replaced by Scrutiny Committees. These scrutinise the work of the Welsh Ministers and examine the expenditure, administration and policy of the Assembly Government and associated public bodies. Standing Orders also provide for Assembly Committees to examine proposed Measures, as well as standing Committees concerned with Finance, Subordinate Legislation, Equal Opportunities and European and External Affairs.

**3.12** These developments make considerable demands upon Assembly Members. The Richard Commission took the view that their numbers should be increased to 80, a view long advocated by IWA.<sup>3</sup> Given that committee membership must reflect the distribution of seats between the political parties in the Assembly, its present size inevitably leads to heavy burdens upon those Members, especially from the smaller parties, who must take on membership of a number of committees. The present composition of the Assembly (comprising 41 Members from the two Government coalition parties and 19 Opposition party Members) points up the nature of the task of those responsible for questioning the activities of the Assembly Government.

**3.13** In the past Assembly Members have been criticised for the indifferent quality of their contribution to Assembly debates and to the variable quality of their scrutiny activities. A larger pool of talent would be available if the size were to be increased. It is noteworthy that the pre-coalition Labour Cabinet of 2007 comprised the same group of persons as its immediate predecessor, though with changed portfolios, despite the apparently diminished confidence shown by the electorate in that Government. It seems the case that Assembly elections are not yet attracting the calibre of candidates that its enhanced role will require.

**3.14** Assembly Members must necessarily rely upon the support services provided by officials if they are to be fully informed and

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<sup>3</sup> See for example, *Making the Assembly Work*, IWA Constitution Working Party, November 1997.



prepared in the performance of their increased functions. Steps have been taken to create an effective Parliamentary Service, which will be required to undertake new and more demanding tasks than its predecessor, notably with respect to LCOs initiated by Members or Assembly Committees and to Measure-making. In particular, it remains to be seen whether the Service can recruit specialist legal support service to assist Members when engaged in law-making activities.

## 4. Relations Between Cardiff and London

**4.1** Co-operation and coordination between the Governments in Cardiff and London and between the Assembly and Parliament continue to be central to the smooth workings of the devolution arrangements. The experience so far is that different Whitehall Ministries have met the need to deal with Wales-related matters in variable ways, to some extent dependent on whether their functions are capable of being devolved to Wales or not. So for example, the Department of Education has been relatively relaxed about the transfer of framework powers to the Assembly. On the other hand, the Home Office, before its division, tended not to involve the Assembly readily in Welsh matters that arose in non-devolved fields.

**4.2** In principle, past relationships fostered through the pivotal role of the Wales Office should facilitate the development of new organisational procedures governing the acquisition by the Assembly of enhanced legislative powers. However, the picture may change as a result of other possible developments:

- The emergence of coalition government in Wales.
- The restructuring of some Whitehall Ministries (already the case with respect to Home Affairs and Justice).
- Were the Wales Office to be merged with other Territorial Offices into another Ministry, there would be a consequential loss for Wales of direct representation in the UK Cabinet.

**4.3** The value of a senior Whitehall Minister and a distinct Office providing the link between the Governments in Cardiff and London has been borne out in the first two terms of the Assembly. There is every reason to believe that such arrangements will continue to be necessary if Welsh interests are to be safeguarded in the Whitehall system. Unlike Scotland and Northern Ireland, dependency of the Welsh institutions on those in London is for the time being built into the devolution scheme.

**4.4** In the early years of devolution, relationships with Whitehall were negotiated through the medium of a series of Concordats. It appears that reliance on these in more recent times has diminished and their relevance has lessened as actual working relationships have developed. To an extent their relevance may have diminished with the development of the *Devolution Guidance Notes*, although these are more concerned with the mechanisms of UK Government

law-making than with the relationship between particular departments and the Welsh Ministers. Arguably, there is a case for a renewal of the existing Concordats to reflect changed circumstances and acquired experience. In particular, revitalised Concordats would bring home to Whitehall the altered institutional structure in Wales, as well as the need to accommodate the declared intention of the UK Government to support the enhancement of the Assembly's legislative competence.

**4.5** The first terms of the Assembly have seen the evolution of largely effective working relationships at the governmental level. It is noteworthy that differences in the past have been resolved without recourse to formal intergovernmental mechanism or to the courts. It is reasonable to expect that these will continue to provide a firm basis for continued cooperative arrangements, even in the event of political changes in Cardiff or London or both.

**4.6** The relationship between the Assembly and Parliament is perhaps less satisfactory, as no formalised procedures exist whereby the Assembly can engage at Westminster. This shortcoming may become more important in the future now that the Assembly is a separate institution exercising powers similar to those of Parliament. Devolution obviously involves the transfer of deliberative and scrutiny functions as well as executive, and therefore a diminution of the matters within the remit of MPs. At the same time, the scheme adopted for Wales leaves important responsibilities with Parliament and with Whitehall, which remains accountable to Parliament, not least in relation to the continuing process of transferring further powers to Wales. Moreover, England and Wales remains a unitary jurisdiction with which the Assembly and Parliament have related responsibilities, not found in relation to Scotland and Northern Ireland.

**4.7** The Welsh Affairs Committee and the Welsh Grand Committee provide fora where such matters can be scrutinised and debated. Yet there are no formal links whereby the Assembly is given privileged opportunities to make its position known through these committees to Parliament. The Welsh Affairs Committee has sought evidence through Assembly Members and joint meetings have taken place between that Committee and Assembly Committees, with satisfactory outcomes, though only on an ad hoc basis. The new procedures relating to the formulation and debating of Legislative Competence Orders will provide further opportunities for joint workings, but they will require Assembly and Parliamentary officials to put in place more systematic arrangements to enable the Assembly to bring its position to Parliamentary notice in timely ways. It will be important that proposed Orders that are initiatives

of Assembly committees or individual members, rather than of Welsh Ministers, are effectively presented to Parliament.

**4.8** In this context, it is of concern that relations between the Assembly and the House of Lords are even less formalised, apparently being dependent upon the interest and industry of individual peers, very few of whom have Welsh connections.

## **5. Devolution Consequences**

**5.1** Little discussion has taken place as to the longer implications of Welsh devolution. Yet profound consequences flow from likely future developments, for instance when the National Assembly acquires full legislative powers.

### ***Referendum on Primary Powers***

**5.2** The emergence of coalition Government has increased the likelihood that the move to a more Scottish-style legislature, envisaged in Part 4 of the Government of Wales Act 2006, will occur sooner rather than later. We support the case for an early referendum and the initiative of the Coalition Government to set up an all-Wales Convention to prepare the way. However, we remain concerned that the Assembly will not be of a size that will be able to cope with the new demands that will be made on it. Accordingly, we take the position that the 2006 Act should be amended to increase the number of AMs to 80 and, necessarily, that the mode of election should be altered to STV. Such steps should be taken before any referendum is held so that the people of Wales are enabled to vote in the full knowledge of the system that will operate in future. At the same time, consideration should be given to whether additional Fields of competence should be added.

### ***A Separate Welsh Jurisdiction***

**5.3** It is sometimes overlooked that legislation emanating from Cardiff constitutes part of the law of the unitary jurisdiction of England and Wales and is therefore capable of being applied or enforced in courts in both England and Wales. In the past, much of the law made in relation to Wales has affected administration and organisational activity in Wales. In the main, those persons or entities affected have been based, resident or employed in Wales. Accordingly, issues affecting them have been resolved by bodies or courts in Wales. The law applied was to be found in Acts of Parliament and subordinate legislation implementing those Acts. In principle, Acts of Parliament had primacy over any conflicting subordinate legislation made by the Assembly. Though found in differently sourced instruments, the law in Welsh statutory

instruments did not differ substantially from that in England in many matters.

**5.4** The Government of Wales Act 2006 introduces a significant change. Measures made by the Assembly may amend, add to, repeal, replace or re-enact any provisions of Acts of Parliament as they apply in relation to Wales, provided that they meet the terms of the relevant Legislative Competence Orders and relate to a Matter specified in Schedule 5 of the Act. Following a successful referendum, the Assembly will acquire power to make its own Acts, with similar wide-ranging effect, in relation to broad subject areas. The scene is set, therefore, for the emergence of primary legislation from two sources that carry equal legal weight, though one of which can operate only in relation to Wales. This leads to a legally unprecedented situation in which, within a single jurisdiction, there can be two sets of primary law applicable to the same matter or subject. Both sets of law must be given effect by the courts of England and Wales, though if the issue has arisen in connection with a matter or subject on which there is legislation applying in relation to Wales that law must be given effect.

**5.5** As the areas on which the Assembly can legislate extend, the divergence between the law in relation to Wales and the law that affects England will increase. In time this could well encompass entire subjects that impact on individuals much more substantially than in the past. Examples include protection and well-being of children including adoption and fostering; protection of consumers with respect to food and drink; and environmental issues. Moreover, the Welsh legislation would have priority for those individuals or bodies from outside Wales who enter into transactions in Wales.

**5.6** It seems inevitable that the emergence of a separate body of law will give rise to demands for the separate treatment of Welsh legal matters from that for English legal matters. These would become stronger should the case for devolution of the criminal justice system, soon to be under consideration by the Assembly Government under the terms of the *One Wales* coalition agreement, be accepted. This implies the creation of a Welsh jurisdiction, entailing, at the minimum, a separate court system, judiciary, legal profession and statute book, alongside a distinct jurisdiction for England and parallel to those in Scotland and Northern Ireland. This possibility has already acknowledged by the Counsel General, Carwyn Jones.<sup>4</sup>

**5.7** If such a separation took place, it is by no means clear what other institutional arrangements, for example those undertaking

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<sup>4</sup> *Western Mail*, 14 September 2007.

regulatory activities in relation to Wales, may have to be put on a separate footing from those for England. Our concern is that the implications of such a development, which seems a probable long-term consequence of legislative devolution, should be recognised and not permitted to emerge, in a disconnected way, by force of circumstance. There is a good case for an examination of the extent to which full or partial separation of Welsh and English legal jurisdictions is feasible, practical, affordable and desirable.

### ***Trend Towards Federation***

**5.8** Devolution may not be the most beneficial constitutional solution or even viable for the United Kingdom in the longer term. The current trend towards a quasi-federal arrangement seems likely to continue, demanding more active and formal constitutional links between the parts of the United Kingdom. In future we can envisage greater autonomy for Scotland, 'English laws for England', a separate jurisdictional status of Wales from England, and closer relationships between Northern Ireland and the Irish Republic. All these may require a formalised constitutional structure in which intergovernmental bodies such as the Joint Ministerial Committee and the British-Irish Council would play much more substantial roles than at present.

**5.9** In our view, far-reaching and long-term thought concerning the possible future structure and institutional arrangements of the United Kingdom, and perhaps the wider British Isles, should undertaken well before the evolution of events forces changes that may not be in the best interests of the countries affected. It is hard to see how any future discussions as to the possibility of a written constitution can proceed without a fundamental examination of this issue.

## **Appendix:**

### ***Inquiry Terms of Reference***

In February 2007 the Constitutional Affairs Committee announced its inquiry into *Devolution: A Decade on*. In July the Committee said it would begin taking oral evidence from October 2007, stating that it would be refocusing its inquiry to take into account changes that had occurred since the elections to the devolved Parliament and Assemblies and the creation of the Ministry of Justice in May, and the publication of the Government's Green Paper *The Governance of Britain* on 3 July. The terms of reference were as follows:

#### **Devolution: A Decade On**

2007 marks the tenth anniversary of the devolution referenda which resulted in the creation of the Scottish Parliament and the National Assembly for Wales. The impact of devolution on the politics and governance of the constituent parts of the UK where it has been implemented cannot be underestimated, and has been the focus of much political and academic interest. However, asymmetric devolution has also had a considerable impact on the centre, and in particular on the practices and procedures of Westminster and Whitehall. A decade on, the Constitutional Affairs Committee has decided to undertake an inquiry into the impact of devolution at the UK level, and its consequences for the United Kingdom's constitution.

In doing so, the inquiry will focus on some major questions: what problems and issues have arisen? What outstanding issues remain to be addressed? What does the future hold? The inquiry will therefore examine the condition of the UK's constitution a decade on.

#### **The Terms of Reference for the inquiry are as follows:**

1. Westminster: How does Parliament deal with devolution issues, e.g. legislating for Scotland and Wales.
2. What issues remain outstanding, e.g. 'the English question'.
3. Whitehall: What impact has devolution had on Whitehall? Has there been a change in culture? How have they responded to the divergence in policy making? How have the Concordats developed, and are they working?



4. Intergovernmental relations: How are bodies such as the British Irish Council working? What about representation at the EU level?
5. What is the future of the current Secretaries of State for Scotland, Wales and Northern Ireland? Are the current arrangements for the Wales and Scotland offices within the MoJ appropriate?
6. Devolution and the Courts: have there been legal disputes in the context of devolved/reserved issues and policy divergence?
7. What are the other outstanding issues around reserved and devolved issues? How could these be best resolved? Is the UK's model of asymmetric devolution sustainable?
8. What are the broader consequences of devolution for the future of the UK's constitution?