



This confusion as to the extent of the Assembly's executive powers led to the creation of Cardiff Law School's website, Wales Legislation on Line. Debates in Parliament and in the Assembly, the Richard Commission and finally the 2005 White Paper explained the complexities of the executive system of devolution. The complexity continues.

The effect of the Part 2 Schedule 7 restriction is that unless the function is ancillary to the application of an Assembly Act, no such Act can affect a UK Ministerial function without the consent of a central government Minister. (This is equally a problem with a Measure made under Schedule 5). The 2006 Act does not explain which Minister would consent.

Because of the general nature of the Part 2 restriction on the legislative powers of the Assembly, to ascertain the extent of the legislative powers of the Assembly, it seems vital to know what these Part 2 Ministerial functions comprise. The nature of a function seems to require an analysis of the contents of Acts of Parliament, section by section, and an analysis of relevant EU law.

This is a considerable undertaking which was last embarked upon in the run up to the making of the Statutory Instrument, which, in 1999, transferred Ministerial functions to the Assembly, whether partly or wholly, in some 450 Acts of Parliament. These were the functions which, until 1st July 1999, were exercised, with the agreement of UK Ministers, by the Secretary of State for Wales. Prior to the 1999 Order, there was no written list of these Secretary of State for Wales' functions. As a Government lawyer in the Welsh Office from 1966 onwards, I, like my colleagues, intuitively knew the nature of the functions which UK Ministers would agree to the Welsh Office exercising.

Our knowledge was initially based on the series of Orders made from 1966 to about 1978 which under the Ministers of the Crown Acts transferred specified functions to the Secretary of State for Wales. These specific functions were either generally described or described by reference to particular Acts and even sections of Acts (as with the 1999 Transfer of Functions Order). When functions ceased to be transferred by particular Orders, then, as new Acts commenced, there would be discussions with central government as to which, if any, of the functions in the Act would be exercised by the Welsh Office. The discussion would be informed by our knowledge of the nature of the functions that had previously been transferred by Order. The division of existing functions could also be changed by agreement.

The whole system was very flexible, if known only to a limited number of civil servants. If a Minister exercised a function for which it had been agreed that another Minister would be administratively responsible, this did not matter in legal terms as the majority of functions were vested statutorily in the central office of "the Secretary of State". Any member of the collegiate central office could legally exercise the powers, be it the Secretary of State for Wales, or of the Environment, or any other Secretary of State office holder.

Such informality and flexibility was not the best basis on which to create the executive functions of the Assembly. As the Assembly was not part of central government, it now mattered legally as to who possessed the power to exercise the function. The devolution settlement was based on the idea that, initially, it would only be the functions of the Secretary of State for Wales that would be exercisable by the Assembly. This is where the problem of not being able to ascertain clearly which Minister exercised a particular function contributed to the complexity of the settlement. The Secretary of State for Wales' functions were spread over some 450 Acts, considerable numbers of subordinate legislative instruments and EU law. The result was the first attempt to set out these functions statutorily to enable their transfer to the Assembly to be achieved.

This was achieved in the complex 1999 Transfer of Functions Order, which at least attempted to bring together all the executive functions that the Assembly would be exercising on 1st July 1999. Inevitably this Order has been partially superceded by further Transfer of Functions Orders, EU legislation and numerous post 1999 Acts and amending Acts which either fully, or more usually, in part only, give functions to the Assembly. None of this post 1999 legislation is in any way consolidated, or listed either by subject matter, or in any other way (apart from the information on Cardiff Law School's website).

It would seem that the same problems arise in relation to ascertaining the full effects of Part 2 of Schedule 7 (and Part 2 of Schedule 5) There is no record of what are the retained Ministerial functions. Such a record seems to be necessary for there to be an understanding of the current and future extent of the Assembly's legislative powers. Such powers can only be properly assessed if central Government's retained powers are known. While, as in the Welsh Office days, officials in the Assembly Government and in Whitehall Departments may have a general understanding as to whether a proposed Assembly Act (or currently a Measure) would affect a Ministerial function, and, if so, attempt to negotiate an agreement for the Assembly to legislate in relation to such function, there can be little democratic involvement in the debate if Wales as a whole, and the Assembly, in particular, has no clear idea of who is responsible for the exercise of the particular functions.

To record the retained functions would require a far wider analysis than was undertaken in the preparation of the 1999 Transfer of Functions Order. Many Acts EU legislation and subordinate legislation have since come into force, which have either wholly or in part ,amended the references in the 1999 Order. Also the nature of the description of the legislative fields in Schedule 7 is much wider than the specific executive functions described in the 1999 Order.

In an attempt to to ascertain what are the Part 2 reservations in relation to one Field in Schedule 7, that of education, one of our law graduates is working with Marie under the aegis of the Wales Governance Centre. To do this, she is trying to find the retained UK Ministerial functions in no less than 61 Acts of Parliament which appear to relate to education.

The Field of education in Schedule 7 is subject to but one exception expressed on the face of the Field. As regards the Field of environment, there are no specifically expressed exceptions at all. This is in contrast to the many exceptions to the proposed 3 matters in the current draft environment Schedule 5 LCO which was published last month. From a recently published report of the Assembly's pre legislative committee which considered the LCO, these exceptions appear to be a summary of Whitehall's understanding of the environmental powers which are retained by central government. Other fields in Schedule 7 have stated exceptions and some do not. A further complication is that where exceptions are stated by reference to a particular Field, the exceptions apply to every Field in the Schedule. Consequently, the exceptions relating to the Field of highways and transport would seem to apply to prevent legislation being made by the Assembly to control the safety of school buses. (This is even though the Assembly Government's legislative programme for 2009/2010 includes a bid for an LCO to control the safety of school buses). Additionally with or without stated exceptions on the face of Schedule 7, the general reservations in part 2 of Schedule 7 continue to apply to each Field.

At present there is no indication as to whether new exceptions, for example on the lines of those in the current draft environment LCO, will be inserted in Schedule 7 using the Order making power in section 109 of the 2006 Act, or whether reliance will be made on the general Ministerial functions reservation in Part 2 of the Schedule, or perhaps a mixture of both. An Order has already been made in 2007 inserting minor exceptions in the Schedule. Any future Order will require the prior consent of the Assembly.

Marie's latest list (relevant extracts of which are enclosed) of current and proposed LCOs in Schedule 5 shows that for recently introduced draft LCOs, it is becoming the practice to insert express exceptions either in particular Fields (environment being an example) or generally applicable exceptions by amending Part 2 of Schedule 5. The exceptions made to a particular Field are now known as "fixed exceptions". They would apply only to the provisions of the particular Field. This is in contrast to exceptions which are proposed to be inserted in any amended Part 2 of Schedule 5. These exceptions are known as "floating exceptions" as they apply to every Field in Schedule 5.

Some of the specific exceptions which are already on the face of Schedule 7 are beginning to be used as the models for "floating exceptions" in the proposed amendments to Part 2 of Schedule 5. There are certain differences between the extent of some of the Schedule 7 and 5 exceptions. Some of the Schedule 5 exceptions are not as wide as the parallel exceptions in Schedule 7. In so far as there are exceptions in Schedule 5 which are not in Schedule 7 (an example being the exceptions to the proposed environment LCO), it may be that, because of the need to obtain the prior consent of the Assembly before an Order is made amending Schedule 7, central government would only rely on the general reservations in Part 2 of Schedule 7, if it comes into force.

## Conclusion

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Part 2 of Schedule 7 presents considerable unknowns. Examples are :

1. What constitutes a function of a Minister of the Crown? Are such functions ascertainable only by analysing individual sections of considerable numbers of Acts, EU law and subordinate legislation, or can such functions be summarised, in the way apparently attempted by Whitehall in the fixed exceptions to the proposed environment LCO and the floating exceptions in the proposed revisions to Part 2 of Schedule 5?

Confusingly, unlike the majority of the exceptions to the legislative powers of the Northern Ireland Assembly set out in Schedules 2 and 3 to the Northern Ireland Act 1998, Schedule 5 to the Scotland Act 1998 adopts a mixture of general summaries of exceptions and specific exceptions such as sections 1 to 3 and sections 5 to 16 of the Cinemas Act 1985. It will be noted that the subject matter of section 4 of that Act is considered to be something which can be safely left to the Scottish Parliament to legislate upon.

2. Will the exceptions in Schedule 5, whether fixed or floating, be incorporated by Orders in Schedule 7?

3. What is the effect of general subject areas which cannot be linked to the legislative powers of the Assembly because they do not appear as a Field in Schedule 7? Criminal law is an example. This was claimed as an overall central government Ministerial function, by the Attorney General's Office. Her office considered that no power of the Assembly could impinge upon this area to the extent that the Assembly could not legislate to ban the physical chastisement of children, because such ban could only be enforced by criminal sanctions. This is a somewhat breathtaking interpretation of a Ministerial function which, if enforced over the whole of the functions of central government, could have wide repercussions on the ability of the Assembly to legislate in many Fields. In any case, as regards criminal law, the Assembly is expressly permitted in both Schedules 5 and 7 to create criminal offences punishable with specified terms of imprisonment or fines.

It is suggested that consideration needs to be given to the resolution of these questions, and possibly others, before any referendum on Part 4 can take place.

Yours sincerely,



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