



The Law Society

**All Wales Convention  
Law Society Wales Response**

**February 2009**

supporting  
solicitors

The Law Society is the representative body for over 100,000 solicitors in England and Wales. The Society represents and supports solicitors, negotiates on behalf of the profession and lobbies regulators, government and others.

In Wales the Law Society has a committee dedicated to legal issues both stemming from devolution of law-making and consequent upon a developing legal community. The committee is both proactive and reactive and comprises specialist lawyers (not all of whom are solicitors) drawn from across Wales who volunteer their time. The Wales Committee is supported by a dedicated staff based in Cardiff.

## **The Convention's call for evidence**

The interest of the Law Society in the development of the law and law-making in Wales is broad. Our interest is reflected in our submissions to other bodies since devolution. In particular our submissions to the National Assembly in respect of consultations on proposed laws and the Subordinate Legislation Committee's recent Inquiry into the scrutiny of subordinate legislation and delegated powers set out our views and concerns<sup>1</sup>. This submission responds to the issues raised in your questions within the context of the law-making process, access to it and the impact on solicitors.

Using your numbering we set out below our comments and observations on:

### **1. Awareness**

The current settlement emanates from the Government of Wales Act 2006 ("GOWA") and is fundamentally different from the settlement following the devolution referendum. Under the first settlement the National Assembly had subordinate legislation powers. Under GOWA executive law-making functions now lie with the Welsh Ministers and the National Assembly gained limited primary law making powers. It appears to the Wales Committee that the understanding of those who are not professionally engaged with devolution was limited under the devolution referendum settlement and remains so now.

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<sup>1</sup> <http://www.assemblywales.org/bus-home/bus-legislation/bus-leg-legislative-competence-orders/bus-legislation-lco-2008-6/bus-legislation-lco6-2008-writtenevidence.htm> <http://www.assemblywales.org/bus-home/bus-legislation/bus-leg-measures/bus-legislative-meas-nhsrrev/bus-legislation-meas-nhsr-writevid.htm> <http://www.assemblywales.org/bus-home/bus-committees/bus-committees-third1/bus-committees-third-sleg-home/bus-committees-third-sleg-cons-response.htm>

Recent seminars organised by the Law Society in North and South East Wales have demonstrated patchy awareness of the implications of both settlements, even among the legal profession. The awareness is clearly better amongst public sector lawyers who are working for public organisations, than those in the wider commercial sector. Discussion at the seminars also revealed a great deal of confusion in terms of researching the sources of laws in force for Wales. Those sources now total 12.

From the start of devolution in 1999, the Law Society has been aware that there was confusion as to the nature and extent of the Assembly's powers. This confusion has increased with the way in which the National Assembly is gradually given primary law making powers in defined areas of certain subjects. The staged devolution of power and the changing basis of law-making make for a difficult environment in which to raise awareness as to the precise nature and extent of devolution.

The Law Society has members who are engaged in practices where a thorough understanding of the current processes of making the law is vital. However the vast majority are engaged in areas where certainty in the law rather than the process of making it is central.

## **2. Devolution in practice**

Our members are dealing daily with the practical impact of devolution and have reported both good and bad aspects. Examples of these are:

- The development of differences in English and Welsh law
  - Of the 1,000 or so pieces of subordinate legislation made by the National Assembly (and now the Welsh Assembly Government "WAG") 60% have different provisions to those made under the same powers in England
  - Each year a number of Acts of Parliament are commenced at different times in England and Wales
  - Different guidance, codes of practice and circulars are issued in Wales in relation to WAG powers
  - Powers are exercisable by central government in relation to Wales under provisions in Acts of Parliament. Other provisions in the same Acts are the responsibility of WAG
- The increased separation between WAG and Whitehall means Wales does not have the benefit of tapping into a wider debate on policy issues where specialist advice is available in London e.g. delay in consideration of introduction of top up payments for students

- There is more machinery available than in Parliament for the public and Assembly Members to involve themselves in the consideration of bids for law making powers and of the laws to be made under these powers
- The right to be consulted and to engage in debate about decision making e.g. public engagement on donor transplant proposals is a positive development
- The closeness between representative groups, Assembly Committees and Assembly Members is already producing positive results eg the work of Hafal in driving forward Mental Health reform
- The Mental Health Review Tribunal ("the MHRT") is a devolved tribunal. The MHRT now sits outside the Tribunals Service and is sponsored by WAG. Experiences flowing from this are that the MHRT is able to have its own rules and because of the closer relationships within the MHRT and related bodies the MHRT is able to be more responsive. However, there are also major drawbacks in that the MHRT now sits outside the resources and relationships of the wider Tribunals Service thus leading to its members missing out on selection for service on other tribunals, training opportunities and selection for judicial posts.

Many agree that devolution has improved the perception of Wales both within and outside Wales. The Council of the Law Society met in Wales in June 2008 for the first time in 5 years. The Council visited the Senedd and was addressed by the Counsel General. Counsel Members' perception of Wales and appreciation of the working of the devolution settlement was greatly enhanced.

### **3. Effective government and scrutiny of legislation**

Executive law-making powers in Wales are broad however the current settlement does not provide WAG with an adequate route to translate policy into action through making changes in the law. The Government White Paper of June 2005 "Better Governance for Wales" recognised that it was necessary to give the National Assembly defined primary law making powers. The ability to make comprehensive laws to meet the particular needs of Wales within various subject areas would overcome the problem of the executive devolution settlement of having executive powers scattered within and over a disparate number of separate Acts of Parliament which apply both to England and to Wales.

However, the need to pursue legislative competence before the National Assembly can get defined law making powers restricts WAG's ability to react to events and to plan its delivery of policies. The process of gaining a Legislative Competence Order ("LCO") has too many stages and takes too long because of the involvement of both the National

Assembly and Westminster. The point of Wales gaining primary law-making powers through Orders in Council was to speed up the process but the procedures adopted in Westminster to pursue an LCO are more complex and time-consuming than securing time for Wales only clauses in Westminster Bills. The alternative and growing method of giving specific disparate executive powers directly to Welsh Ministers by Acts of Parliament does not achieve the aim of the making of comprehensive laws by the Assembly in relation to subject areas.

Also, while there is more involvement of the public and Assembly Members in law making here than in Parliament, effective scrutiny raises issues of capacity of the National Assembly itself. As there are only 60 Assembly Members once ministers and the Counsel General are taken into account there remain fewer than 45 members available to scrutinise legislation. Even with the slow pace of legislation this creates a significant demand on Members' time.

There is also concern that no-one is scrutinising the overall statute book as it relates to Wales (i.e. Westminster and Cardiff Bay legislation), nor the extent of the secondary legislative powers that the Welsh Ministers are now acquiring through separate legislative streams in Parliament and at the National Assembly.

#### **4. Legislation**

The Law Society has contributed to the law-making process through responding to consultations on Measures and LCOs. We have given written and oral evidence and have taken the opportunity to influence the law-makers. Access to the law-making process has been positive both in terms of receiving a fair hearing and of the practical procedures for engaging with the process.

Executive law-making by WAG is causing more concern. Some of our concerns were raised in our evidence to the Subordinate Legislation Committee.<sup>2</sup> With the transfer of subordinate law making powers to the Welsh Ministers we have lost an important avenue for scrutiny of the executive. This is because not all general subordinate legislation is subject to Assembly scrutiny. At the same time, as referred to above, WAG is still seeking executive law-making powers in new UK Acts of Parliament. It was assumed by many that following the coming into force of GOWA as a matter of convention any new functions for the Welsh Ministers would be made in new Assembly legislation and would not continue to be provided for within UK legislation. The level of engagement of bodies within civil society and other interested bodies with the law-making process in the Senedd is high and increasing. However by pursuing powers through Westminster legislation the law-making process moves away from the forum

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<sup>2</sup> Transcript of Oral Evidence Meeting of 4 November 2008 <http://www.assemblywales.org/bus-home/bus-committees/bus-committees-third1/bus-committees-third-sleg-home/bus-committees-third-sleg-agendas-2.htm?ds=11%2F2008&submit=Submit>

where the National Assembly is beginning to raise awareness and to develop relationships. The WAG should be encouraged to bring its proposals for new executive powers forward through the National Assembly and not 'piggy-back' on UK legislation. There are 13 such Bills in the current session of Parliament. Our clear perception is that WAG's persistence in looking to London is stunting the development of the National Assembly's status as Wales' law-making body in the devolved Fields.

## **5. Part 3 versus Part 4**

The Convention will be well versed in the mechanics of Part 3 and how a Matter is inserted into a Field. In relation to Part 3 our concern lies with the expression of the Matters as they are inserted into Schedule 5. It was expected that Schedule 5 would grow quickly and that if there were no referendum to move to Part 4 Schedule 5 could grow to provide powers as wide as Schedule 7 in time. It is apparent from the Matters which have been inserted to date that this is not possible. Firstly, the time taken for powers to be inserted is generally slow particularly due to the procedures adopted in central government and Westminster. Secondly, there is no coherence to the expression or extent of the Matters which have been inserted into Schedule 5 to date. Some Matters are broad e.g. Matter 15.4 "Fostering" (with no definition) and others are prescriptive e.g. Matter 10.1 on road charging schemes which includes an interpretation clause: this does not make for an appropriate schedule of legislative competence.

Narrow Matters are inefficient as the level of prescription contained within the field is such that it does not anticipate future law-making to enable policy making of any extent to be made. This is contrary to the expressed intention of the June 2005 White Paper. Some LCOs are as specific as Ministerial executive powers and deliver little power to the National Assembly outside the ability to pass a Measure to deliver a single policy. This was not expected. It was anticipated that more broadly drafted LCOs would be made in order to draw down whole sections of legislative competence within Fields and thus speed up the process of populating Schedule 5.

The advantage of moving to Part 4 is that Schedule 7 is a clearer and more comprehensive list of the subjects (with clear restrictions) within which the National Assembly will have competence to legislate. The rule of law requires that law is certain. More certainty would be achieved under more comprehensive law making powers.

## **6. Capacity**

WAG gained the resources of the old Welsh Office including an established legal department. Their legal department has been strengthened with time, and has also had the benefit of the appointment of a director of legal services; further, it has a dedicated senior legislative draftsman with his own office.

In contrast the National Assembly has had to create its own Legal Service Directorate. The legal support to backbench and opposition Assembly Members is not resourced in the same way as WAG, yet it is vital that Assembly Members outside the government have the same support when preparing and leading proposals for new legislation for Wales.

The legal community in Wales is embracing devolution. We are seeing a growing number of practitioners specialising in 'Welsh public law'. However, there remains a need for their number to grow and for an increase in the support available to them through education and training.

Looking at the wider legal community the HM Courts Service moved to an all Wales circuit in 2007 and the Administrative Court will have a permanent office based in Cardiff from April this year. However, there are concerns regarding service and capacity across the country particularly in North Wales for example about the availability of High Court judges to sit there. At the same time the Legal Services Commission is undergoing a further reorganisation. Although their Wales Committee is unaffected this time the Wales Director role is no longer full time and the Cardiff office is due to close.

## **7. Impact**

There is a growing impact of both new laws and a change of approach within the public sector with a consequent impact on society. The legal profession in Wales and beyond is faced with embracing the changes made by new laws. This includes ensuring full knowledge of and access to the law made in Wales in order to act in their clients' best interests.

### **The consolidation of Welsh law**

The further role of a parliament is to establish processes and bodies to review and consolidate legislation and to encourage debate among policy-makers in society. There is a move towards this role but progress is slow. We should very much encourage the National Assembly to press ahead with activity in this area since it is as relevant to Part 3 as it is to Part 4 and would begin to create a holistic approach to law-making for Wales: something of special importance given the overlapping sources of laws and law-making powers.

## Access to Welsh legislation

Finally, a factor which is of concern across the profession is that of access to the growing body of Welsh law. While Wales Legislation On-Line<sup>3</sup> sets out powers and laws of the National Assembly and WAG, the lack of a single access point for all legislation applying to Wales (of which there are now 12 sources) is a major obstacle to access to the law of Wales. Of particular importance is executive-made legislation which has been outlined above. Access to it is in some areas non-existent. Following lobbying by the Law Society on the Government of Wales Bill, WAG undertook to publish all its subordinate legislation on its website however this has only been from January 2006. (General Statutory Instruments are published by the Office of Public Sector Information.) While a report on access to non-Statutory Instrument subordinate legislation between 1999 and 2006 acknowledging the then “National Assembly had a duty to publish its law”<sup>4</sup> was published in September 2007 no action has yet been taken to implement its recommendations and the ‘missing’ legislation is still impossible to access. In addition the ‘overlapping’ nature of England and Wales and Wales only primary and subordinate legislation lends itself to confusion. The development of law-making in Wales requires access to a variety of sources. We advocate a single database for all legislation applicable to Wales to be compiled and maintained as a public service.

We trust our comments will be of assistance to the Convention. We should be pleased to expand on our comments and provide further evidence to the Convention as required.

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<sup>3</sup> <http://www.wales-legislation.org.uk/> (financed by the National Assembly, Welsh Assembly Government and Cardiff Law School)

<sup>4</sup> <http://new.wales.gov.uk/publications/infolink/pre2006si/:jsessionid=B1VdJ2pFSspl4mBbptQh85Mh312zQ9GlnybR8CGyGkTDkn6R5R6Q!649662111?lang=en>



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