EFFECT OF REMAINING UK MINISTERIAL FUNCTIONS AFFECTING SUBJECTS WITHIN THE ASSEMBLY’S LEGISLATIVE COMPETENCE

Introduction

1. At the oral evidence session attended by the Presiding Officer on 12th April 2013, the Commission on Devolution in Wales (“the Commission”) asked for further information on problems caused by the continued existence of functions of Ministers of the Crown (ie UK Government Ministers) in areas in which the Assembly has legislative competence.

2. The relevant functions are “pre-commencement functions” of Ministers of the Crown. This expression is defined as functions that existed immediately before 5th March 2011 (see section 105 of the Government of Wales Act 2006 (“GOWA”) and the Government of Wales Act 2006 (Commencement of Assembly Act Provisions (etc.) Order 2011, SI 2011/1011 (W. 150)).

3. By virtue of Schedule 7 to GOWA, Part 2, paragraph 1, and Part 3, paragraph 6, Assembly Acts cannot remove or modify such UK Ministerial functions, unless either the Secretary of State consents, or the removal/modification is incidental or consequential on other provisions of the Assembly Act.

4. The Assembly Commission wishes to clarify that it has not created a list or database of these functions and is not aware of the existence of such a list. The investment of staff resources necessary would have been disproportionate to any benefit obtained, given the unpredictability of the exact contents of Welsh-Government-proposed Assembly Bills; also, such a list would need to be kept up to date as certain Ministerial functions concerned were repealed (it being impossible, by definition, to create new “pre-commencement functions”).

5. However, the Commission can point to some examples from experience to date, drawn from legislation considered by the Assembly.

The Local Government Byelaws (Wales) Act 2012
6. This Act repealed a number of pre-commencement functions which allowed Ministers of the Crown to confirm certain byelaws made by local authorities in Wales.

7. The powers in question were “concurrent” with Welsh Ministers' powers: in other words, either the Welsh Ministers or a UK Secretary of State could confirm the byelaws.

8. The byelaws in question, and therefore the power to confirm those byelaws, concerned very local matters (e.g. the regulation of public toilets), with absolutely no implications beyond the borders of Wales.

9. The Secretary of State’s concurrent powers were contained in a default provision; ie a provision sweeping up byelaws for which no more specific confirming authority was prescribed.

10. Since the Assembly was established, the powers in question had never been used by a UK Secretary of State in relation to a byelaw made by a Welsh local authority.

11. The UK Attorney General considered that the repeal of the pre-commencement functions was outside the Assembly’s competence and referred the Act, while still a Bill, to the Supreme Court. The Supreme Court gave weight to all the above factors in ruling that the repeal of the functions was “incidental to” or “consequential on” other provisions of the (then) Bill – and so within competence.

12. Although the Court found in favour of competence, the existence of the functions resulted in the Bill being held up for some four months while the referral process took place. It also resulted in the expenditure of public money and the use of staff resources by the UK Government, the Welsh Government and the Assembly, in litigating the matter.

13. This example powerfully illustrates the problem that certain UK Ministerial powers relating to Wales remain on the statute book as historical relics and no longer serve any meaningful function. It is likely that, were there time for UK Governments to review and “tidy up” legislation more frequently than they do at present (even with the best efforts of the Law Commission), these functions would be repealed.
However, while they remain, they continue to act as an obstacle to the Assembly’s legislative competence.

**The Human Transplantation (Wales) Bill**

14. A number of sections of the Bill, as originally drafted, affected pre-commencement functions of UK Ministers.

15. One provision of the Bill (now section 8(1)(b)) conferred on the Welsh Ministers a power to make regulations debarring certain categories of person from acting as an appointed representative under the Bill. This power essentially mirrored the function of the Secretary of State conferred by section 4(10)(b) of the Human Tissue Act 2004 (“the 2004 Act”). The Secretary of State’s function in relation to Wales was removed.

16. What is now section 9(2) conferred on the Welsh Ministers power to make regulations specifying the circumstances where consent is deemed to have been given to activities involving material from a living adult who lacks capacity to consent. The corresponding function of the Secretary of State, which was removed in relation to Wales, is to be found in section 6 of the 2004 Act.

17. Further provisions of the Bill conferred on the Welsh Ministers powers to amend the list of qualifying relationships to be included in the Code of Practice to be prepared by the Human Tissue Authority pursuant to section 26 of the 2004 Act, and to amend the definition of “qualifying relationship”. These effectively removed existing powers of the Secretary of State under section 27(9) of the 2004 Act, so far as Wales was concerned.

18. The Welsh Ministers sought the consent of the Secretary of State to these provisions of the Bill, and this was obtained. The process of doing so inevitably caused some use of staff resources within the Welsh and UK Government. It also caused some use of resources within the Assembly Commission, as our Legal Directorate had to consider competence for the Bill before consent had been obtained. Therefore we had to consider the possibility that consent would not be forthcoming, and the impact of that on competence. The tight time-table of the Welsh Government’s legislative programme means that this will frequently be the case.
19. More importantly, there appeared to be no constitutional reason for the Assembly’s competence to be restricted by the existence of these functions. In this case, those functions were relatively recent and constituted an important, if small, part of the jigsaw of provisions making up a consent regime in this sensitive area of policy. However, once the principle of devolution of this area has been accepted, there appears to be no logic to the retention, by the UK Government, of these powers over detailed pieces of the jigsaw.

The Social Services and Wellbeing (Wales) Bill

20. This Bill highlighted a practical issue. The Welsh Government sought the consent of the Secretary of State for various provisions in the Bill. Some consents were not obtained in time for the introduction of the Bill. This meant that the Bill had to be amended for introduction into the Assembly, by removing the provisions that would have been outside competence by reason of their effect on UK Ministers’ functions.

21. It was necessary to do this because, on introduction of a Bill, the Member in charge must be able to make a statement, in good faith, that in his or her opinion, the provisions of the Bill would be within the legislative competence of the Assembly (see section 110(2) GOWA). The Presiding Officer interprets the words “would be” as meaning “would be, if passed as introduced”; any other interpretation would, in her view, circumvent the provisions of GOWA designed to ensure respect for the boundaries of the Assembly’s legislative competence.

22. The need to make these changes entailed a cost in terms of staff time both within the Welsh Government and the Assembly.

23. The Assembly Commission cannot comment on the reasons for the delay in obtaining consent, nor on where responsibility lies. In the report of the Assembly’s Constitutional and Legislative Affairs Committee on the Bill (pages 18-19, para. 44), the Committee concluded:

“We are surprised that the issue of obtaining appropriate consents has yet to be resolved, particularly given that the Welsh Government’s proposals ... are likely to have been developed over a considerable period of time ... Nevertheless, we note that the implementation of the
Deputy Minister’s policy intentions has been affected by the current constitutional settlement.”

Effect on non-Government Bills

24. The problem of delay, caused by the need to seek consent for effect on pre-commencement functions, is heightened in the case of non-Government Bills (Bills proposed by a back-bench Member, a Committee or the Commission. This is not a tangential issue. Such Bills are much more likely to progress in the Assembly than in the UK Parliament; indeed, two of the Acts passed in the present Assembly have been non-Government Bills and two further non-Government Bills are at an advanced stage. The reason for an even greater risk of delay in these cases is the convention that government must speak to government; ie the Welsh Government seeks consent from the UK Government on behalf of the Member in charge of the Bill, thus, inevitably, extending the chain of conversations that need to take place.

25. This is not, of course, an argument for the removal of the need for consent where that is constitutionally necessary – as in the case of an Assembly Bill that purports to impose a new function on a UK Minister without UK Government consent. But it is a further argument in favour of removing unjustified restrictions – such as the protection of now-redundant UK Ministerial functions - from the system.

National Assembly for Wales Commission
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