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Constitutional and Legislative Affairs Committee

Inquiry into the Granting of Powers to Welsh Ministers in UK Laws

Response from Daniel Greenberg

SUBMISSION

TO THE CONSTITUTIONAL AND LEGISLATIVE AFFAIRS COMMITTEE

OF THE NATIONAL ASSEMBLY FOR WALES

INQUIRY INTO THE GRANTING OF POWERS

TO WELSH MINISTERS IN UK LAW

31st August 2011

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SUBMISSION OF DANIEL GREENBERG¹

1 SUMMARY

- 1.1 Devolution has significantly increased the complexity of the statute book, making it harder for the citizen to piece together a text of the law as it applies to his or her circumstances.
- 1.2 The recent acquisition by the National Assembly of enhanced legislative powers may suggest both a need and an opportunity for rationalisation of the existing processes.
- 1.3 One aspect of this may be a move for powers to be conferred on Welsh Ministers by legislation of the National Assembly wherever possible.
- 1.4 But where that is not possible, the National Assembly may still wish to have a formal voice in respect of the nature and extent of powers to be conferred on Welsh Ministers by Westminster legislation, whether or not the substance of the relevant area of law is devolved.
- 1.5 This could be achieved by building on the existing National Assembly's Standing Order 30 process so as to establish a formal consultative process between Cardiff and Westminster where it is proposed that a Westminster Bill should confer powers directly on Welsh Ministers.

2 BACKGROUND

- 2.1 The arrangements for devolution are already contributing to the factors making the statute book almost impossibly complicated for citizens to follow.
- 2.2 In particular, the emergence of an increasing number of "parallel texts", as UK-wide legislation is variously amended with differing degrees of extent, is making it increasingly difficult to establish a clear picture of the legislative text in relation to each jurisdiction.
- 2.3 The expansion of the National Assembly for Wales' powers as a result of the positive result of the referendum on its Act-making powers offers various opportunities for rationalisation and consolidation. The National Assembly may consider this an opportunity to consider generally whether the process of legislating is as streamlined as possible, with a view to making the result simpler and easier to use.
- 2.4 In particular, the National Assembly may feel that it is consistent with the increase in its legislative competence to ensure that powers to be exercised by Welsh Ministers are conferred by legislation of the National Assembly wherever possible.
- 2.5 It is inevitable, however, that Westminster legislation will continue to need to confer powers on Welsh Ministers in some contexts and circumstances.

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- 2.6 In some circumstances the National Assembly will in practice be required² to consent to the conferring of powers on the Welsh Ministers by Westminster legislation. As discussed below, however, this will not always be the case.
- 2.7 In all circumstances, however, the National Assembly may wish to have a formal opportunity to express views about the form in which, and the extent to which, powers are conferred. In particular, the National Assembly may consider this an important method of—
- (a) ensuring as consistent an approach as possible to the delegation of powers, with the aim of enhancing the overall clarity and simplicity of the statute book, and
 - (b) exercising some degree of control or influence over the extent to which powers are conferred on Welsh Ministers other than by the National Assembly.

3 **THE MEMORANDUM OF UNDERSTANDING**

- 3.1 The Inter-governmental Memorandum of Understanding as revised on 8th June 2011 reserves to the Westminster Parliament “authority to legislate on any issue, whether devolved or not”³.
- 3.2 There is a distinction to be drawn, which the Memorandum does not address, between the substantive policy of Westminster legislation and the mechanisms by which it is to be given effect. The question of conferring powers on Welsh Ministers concerns the latter issue.
- 3.3 Westminster legislation could purport to confer powers on Welsh Ministers either in relation to devolved or non-devolved areas of law. The Memorandum would give the National Assembly a presumption of involvement in the former case, but not the latter.
- 3.4 In all cases, however, the National Assembly may wish to have a voice in respect of the arrangements for powers to be conferred on Welsh Ministers.

4 **STANDING ORDER 30**

- 4.1 The paper *Provisions about Welsh Ministers in UK Acts*⁴ describes the arrangements under Standing Order 30 (Notification in relation to UK Parliament Bills).
- 4.2 The essential deficiency of these arrangements, however, is that they are confined to consideration within the National Assembly, and give the National Assembly no kind of voice within the Westminster Parliament on the issues under consideration.
- 4.3 In essence, the arrangements are a dialogue within Cardiff, rather than a dialogue between Cardiff and Westminster.

² As a matter of convention in accordance with the Memorandum of Understanding - but not as a matter of law or Parliamentary procedure.

³ Paragraph 14.

⁴ Prepared in August 2011 by the National Assembly for Wales’ Research Service for the Constitutional and Legal Affairs Committee’s inquiry.

4.4 That gives the National Assembly an opportunity to make representations to the Welsh Government about, in effect, the representations that it makes to the UK Government. It does not enable the views of the National Assembly to be communicated directly to Parliament.

4.5 Of course, the National Assembly cannot, by its Standing Orders or otherwise, compel the Westminster Parliament to talk or listen to the National Assembly. But while the Standing Order 30 arrangements continue to be entirely unilateral there must be a limit to their effectiveness as a means of communicating the National Assembly's concerns and interests to those responsible for passing Westminster legislation.

5 **A NEW PROCEDURE FOR DISCUSSION BETWEEN WESTMINSTER AND CARDIFF?**

5.1 In order to address the problem described in sections 3 and 4 above, 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.

5.2 In essence, both the UK Government and Parliament could be encouraged to establish arrangements that build on the existing Standing Order 30 procedure, and enable its results to be considered by the Westminster Parliament.

5.3 This would be in accordance with the aim set out in paragraph 4 of the Memorandum of Understanding "to allow administrations to make representations to each other in sufficient time for those representations to be fully considered".

5.4 The new arrangements could lead to the strengthening of the effect of the Standing Order 30 arrangements in their present form. By adding a new dimension to the dialogue - between the National Assembly and Parliament - the Welsh government would approach Standing Order 30 in the knowledge that it was one part of a discussion that could be expanded, and referred to, by Westminster Parliamentarians with interest in Welsh affairs as the Bill proceeded through Parliament.

5.5 Key features of the arrangements might include, for example—

(a) a requirement for the Minister in Charge of any Bill that conferred powers directly on the Welsh Ministers to submit a memorandum to the National Assembly before the Second Reading of the Bill in its first House⁵;

(b) consideration of the memorandum in the National Assembly, possibly in Committee and with the possibility of hearing evidence from Welsh Government or Westminster officials;

(c) the option for the National Assembly to agree a response, possibly by taking note of a Committee report, which would be transmitted to the Minister in Charge of the Bill and laid by him or her before Parliament⁶.

⁵ In a case where the powers had been requested by the Welsh Government, the UK Government's memorandum could either adopt or attach a memorandum produced by Welsh Ministers.

⁶ As a result of which it would become a public document, and could be included in the documents relating to the Bill made available on Parliament's website.

- 5.6 This would be separate from the consent mechanism discussed in paragraph 14 of the Memorandum of Understanding. In particular, this would be an opportunity to influence, not a requirement for consent.
- 5.7 It would be possible, although not essential, for the new arrangements to be partly accommodated within the arrangements for the Welsh Grand Committee in the House of Commons⁷.
- 5.8 It would also be possible, although again not essential, for the arrangements to be established as an addition to the Memorandum of Understanding.
- 5.9 The proposed arrangements would have some similarities with the arrangements according to which Bills are scrutinised by the House of Lords Select Committee on Delegated Powers and Regulatory Reform. In particular, that Committee receives a memorandum from the Minister in Charge of each Bill and makes a report to the House, generally before the Committee Stage⁸. The Committee also makes supplementary reports relating to significant amendments where time allows.
- 5.10 The proposed arrangements would not require legislation⁹. They would involve a new process within Government Departments that could be instigated entirely informally. The Parliamentary side of the arrangements might be achieved through changes to the Standing Orders; but it could probably also be achieved entirely informally.

6 **CONCLUSION**

- 6.1 Arrangements along the lines adumbrated in section 5 could be established quickly and with little or no formality.
- 6.2 The aim of the arrangements would be to ensure that the National Assembly always had an opportunity to influence proposals to confer functions on Welsh Ministers.
- 6.3 This would include, but would not be limited to, an opportunity to express a view as to whether each proposal to confer powers directly was appropriate, or could better be achieved by legislation of the National Assembly.

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⁷ House of Commons Standing Orders, SO 102-108.

⁸ The Companion to the Standing Orders in the House of Lords says (para.7.33): "The committee aims to report before the committee stage begins, though the House is under no obligation to delay proceedings if the committee has not reported by that time."

⁹ In particular, the use of the Command Paper procedure allows documents to be laid before Parliament without any legislative requirement.