

CHAPTER THREE

A Comparison between the Office of the Secretary of State for Wales and the National Assembly for Wales

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This chapter seeks to highlight some of the considerable legal and procedural differences between the Office of the Secretary of State for Wales which has been responsible for the exercise of many central government functions in Wales since 1964 and the National Assembly for Wales which takes over most of his functions on 1st July 1999.

1 The Secretary of State for Wales

The Secretary of State for Wales is a member of the Cabinet and part of central government. The National Assembly is not part of central government which can, if necessary, through the Attorney General question the exercise or proposed exercise by the Assembly of its functions in the Courts. Schedule 8 to the Government of Wales Act 1998 enables all levels of courts and tribunals to consider such matters, referred to in the Schedule as “devolution issues”, and gives jurisdiction to the Judicial Committee of the Privy Council to pronounce on the legality of the exercise of the Assembly’s functions.

While the Secretary of State for Wales is a body corporate for the purpose of holding land, he is a member of the Office of the Secretary of State which is not a statutory body, but derives its authority from the Crown. The Office can exercise prerogative powers in functional areas which are not controlled by specific legislation.

2 The National Assembly

The Assembly is a wholly statutory body. It is a body corporate (section 1(2) of the 1998 Act) and it can only exercise statutory powers which are given to it:

- (a) by the 1998 Act - for example the reform of Welsh health authorities (section 27), the reform of other Welsh public bodies (section 28) and general powers relating to culture, sport and the Welsh language (section 32);
- (b) under the 1998 Act, and in particular:
 - section 22 of the Act under which the National Assembly for Wales (Transfer of Functions) Order 1999 has been made. This enables the Assembly to assume responsibility for the exercise of all or some of the Ministerial functions in 380 Acts of Parliament passed up to the end of 1998; and
 - section 29 of the Act under which it is anticipated that an Order in Council will be made enabling the Assembly to make regulations under section 29(2) of the European Communities Act 1972 implementing European Union Directives in some 20 competencies including planning, the environment and certain aspects of agriculture;
- (c) under Acts of Parliament which from 1999 onwards will give new functions to the Assembly within the subject fields specified in Schedule 2 to the 1998 Act.

3 The Exercise and Transfer of Functions

It is unusual for statutory powers to be given to a named Secretary of State. The statutory powers of the Secretary of State for Wales usually derive from functions expressed to be exercisable in Acts of Parliament by "the Secretary of State". It is then a matter of administrative agreement as to which Secretary of State in practice exercises the powers. Such statutory flexibility of expression of powers is not available to the Assembly which can only exercise statutory functions specifically given to it. To reflect the decision that generally the Assembly should only be able to have the powers in existing Acts of Parliament currently exercisable by the Secretary of State for Wales, it has been necessary to produce the complex provisions of the 1999 Transfer of Functions Order. The Order has had to dismember many Acts of Parliament which were not designed for such severance. An attempted exercise by the Assembly of a function in an existing Act which is not transferred to it, will mean the Assembly is acting ultra vires. The Transfer Order provides, according to the particular Act of Parliament or Regulations specified in the Order, either:

- (a) that all Ministerial functions are transferred to the Assembly; or
- (b) that all Ministerial functions, subject to specified exceptions, are transferred; or
- (c) that only certain sections or certain regulations are transferred.

A function which is transferred to the Assembly is either:

- (a) completely transferred to the Assembly so that it can be exercised by the Assembly separately and differently to the way in which the function is exercisable by central government in England (section 42(2) of the 1998 Act); or
- (b) transferred to the Assembly, but only exercisable with the consent of a central government Minister (for example, paragraph 9(2) of Schedule 5 to the National Health Service Act 1977 which requires the approval of "the Minister for the Civil Service" before the Assembly can exercise a function under the Act relating to pensions); or
- (c) transferred to the Assembly, but also exercisable by a central government Minister with regard to Wales - this is the concept of a "concurrent power" (for example, the functions under sections 39(1) and 40 of the Road Traffic Act 1988 "shall be exercisable by the Assembly concurrently with the Secretary of State").

There are also certain functions which might be construed as being only exercisable by the Assembly jointly with a central Government Minister - a possible example of this are the functions of the Animal Health Act 1981 "in respect of the functions of "the Ministers" insofar as exercisable by the Secretary of State for Wales". If the Secretary of State for Wales currently exercises these powers jointly with the Secretary of State for Scotland and the Minister of Agriculture, Fisheries and Food, it may be that these functions have to continue to be exercised by the Assembly in this way.

4 Subordinate Legislation

4.1 Application and extent

Much general subordinate legislation made by the Secretary of State for Wales is made together with a central government Minister exercising the same powers in the same way for England. This is because the Secretary of State for Wales is a member of the Cabinet and

part of central government. In an average year, of the 350 or so general statutory instruments which are made by the Secretary of State of Wales, some 270 are made as respects Wales together with a Minister exercising the same powers in the same way for England. A further 150 or so pieces of general subordinate legislation not made by statutory instrument are also produced many again for both Wales and England. Not being part of central government, the Assembly may wish to exercise both its executive and subordinate legislative powers differently as well as separately to the way in which the powers are exercised in England. It will have the legal power to do so under section 42(2) of the 1998 Act. Gradually this will have considerable implications for the application of public law in Wales and England.

Thus as regards a function to make subordinate legislation under an Act exercisable in Wales by the Assembly, different legislation could apply to Wales and to England by virtue of new subordinate legislation being made for England together with the repeal of existing subordinate legislation in its application to England, with the Assembly either:

- (a) not making parallel provisions in Wales;
- (b) making different provision in Wales;
- (c) amending, but not repealing the existing subordinate legislation; or
- (d) even if making parallel provisions in Wales, not making the legislation at the same time as England because of the different procedure (as to which see 5 below) applicable to the making of Assembly subordinate legislation.

Given the annual average of about 500 pieces of general subordinate legislation produced by the Secretary of State for Wales each year, the potential for different subordinate legislation applying to Wales and to England becomes significant. This includes a possible different manner of implementation of EU Directives in Wales and in England.

4.2 The Assembly

It is rare for an Act of Parliament to refer to the exercise of functions under the Act specifically in Wales. The powers are usually expressed to be exercisable for England and Wales as a whole or for any "area". This enables the Secretary of State for Wales, if he wishes to exercise not only any executive power under the Act as regards the whole or part of Wales but also to make subordinate legislation separately and differently for the whole or any part of Wales.

A consequence of the Assembly not being part of central government means that if it is intended to give powers under a new Act of Parliament to be exercisable by the Assembly, the Act must expressly give such powers either in the Act itself or by order to be made under the Act. Already in the current session of Parliament, there are Bills proceeding through Parliament which give powers to the Assembly.

Such powers may include the function of commencing the operation of the Act as it applies to functions exercisable by the Assembly.

For almost the first time (except usually in Acts which have applied solely to Wales) part or all of an Act of Parliament may be commenced at different times in Wales and in England. Consequently, not only will there be the probability of different general subordinate legislation in certain functional areas applying to Wales and to England, but there will also be the possibility of different Acts of Parliament or parts of Acts applying to Wales and to

England at least during a period when provisions in the new Act have been applied (together with consequent repeals of existing legislation) in one country but not the other.

4.3 Making

Perhaps one of the most significant differences between the law and practice of central government and that of the Assembly will be that which applies to the making of the Assembly's subordinate legislation. Not having powers to make primary legislation, the Assembly's main way of implementing its policies will be to make subordinate legislation within its enabling statutory powers.

As currently also applies to central government, the exercise of any of the functions of the Assembly, including its legislative functions must not be incompatible either with community law (section 106 of the 1998 Act) or international obligations (section 108 of the Act). However there are also requirements which do not currently apply to the exercise of functions by central government. Thus:

- (a) the exercise of the Assembly's functions must not be incompatible with the Convention rights of the Human Rights Act 1998 (section 107 of the Government of Wales Act) (the Act will not commence until October 2000);
- (b) subject to "particular circumstances", its general statutory instruments must be in both Welsh and English (section 66(4) of the 1998 Act) and each language text "shall be treated for all purposes as being of equal standing" (section 122(1) of the Act);
- (c) all the Assembly's general statutory instruments, subject to "particular circumstances" must be the subject of an appraisal "as to the likely costs and benefits of complying with" legislation (section 65(1) of the Act). "Appropriate consultation" must usually be carried out if it appears that the costs of complying with the legislation will be "significant" (section 65(3) of the Act);
- (d) the exercise of the Assembly's functions (including its legislative functions) must have "due regard to the principle that there should be equality of opportunity for all people" (section 120(1) of the Act);
- (e) the Assembly must have a scheme "setting out how it proposes in the exercise of its functions, to promote sustainable development" (section 121(1) of the Act);
- (f) in the exercise of all its functions, it is probable that the Assembly must comply with its standing orders as a matter of law. These are required to be made under section 46(1) of the Act. In particular the requirements of Standing Order 22 must be followed with regard to the procedure for making Assembly subordinate legislation, as much of this Standing Order derives from specific provisions in the 1998 Act.

4.4 Amendment

Arising from these specific provisions in the Act relating to subordinate legislation there comes a major difference between the inability of Parliament to amend subordinate legislation laid before it by the Secretary of State and the ability both of the Assembly and, as regards particular pieces of Assembly legislation, also of subject committees, to amend Assembly legislation. Standing Order 22 gives such ability together with the opportunity for the legislation to be debated by a subject committee or committees or by the Assembly in plenary session. Even the opportunity to debate the Secretary of State's subordinate legislation is denied Parliament, except in very limited circumstances.

While both these amendment and debating possibilities are very welcome there must be a question as to the speed by which Assembly subordinate legislation will be made. A full scrutiny and amendment procedure as set out in Standing Order 22 could take up to 40 Assembly working weeks (the equivalent of a year). Certainly the current 500 or so general subordinate legislative instruments made solely or together with another Government Minister by the Secretary of State for Wales could not be subject to this full procedure. The Assembly will therefore have to decide how far it wishes to be in complete control of every aspect of the consideration of its legislation.

5 Scrutiny

Finally the limited opportunity for the committees of Parliament, particularly its select committees, to question officials of the Secretary of State for Wales will probably give way to a much wider examination of their work. The 1998 Act and the Assembly's Standing Orders together provide for the establishment of some 19 committees with the power to create additional ad hoc committees. Potentially many more officials will appear before this number of committees and as those officials will owe their loyalty to the Assembly as a whole and not only to Government Ministers, as at present, the committees may be permitted to expect answers to questions some of which may not be fully answered under the present central Government system.