



Findings from the Economic and Research Council's
Research Programme on *Devolution and Constitutional Change*



Devolution Briefings

The Nature and Scope of the Legislative Powers of the National Assembly for Wales

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Key Points

- The Assembly has no primary legislative powers.
- It has powers to make subordinate legislation under Acts or designation orders made under the European Communities Act 1972.
- The subject matter of an Act does not determine whether the Assembly is given powers. Particular Acts and designation orders may or may not give powers to the Assembly.
- Where an Act does give powers to the Assembly, it is unusual for all powers in the Act to be given to the Assembly. Powers are also often given to central government Ministers in relation to Wales (retained powers).
- The powers given to the Assembly are generally the same powers as those given to a Secretary of State in relation to England.
- Central government and the Assembly each have entirely different procedures for making subordinate legislation. Taking education and health as examples, there are few statutory provisions enabling the Assembly to be involved in the making of central government legislation for Wales and vice-versa.
- While under the same enabling powers, provisions in Assembly legislation may be different to the legislation made by central government in relation to England; but the examples of health and education show that it is unusual for central government when legislating for Wales to make different provisions to those for England.
- Much secondary legislation made by central government is divided in its application: some parts of a statutory instrument apply to England only and other parts of the same statutory instrument to England and Wales, and occasionally some to Wales only.
- **In short: it has become increasingly difficult to clearly ascertain what is the law which is now applicable to Wales.**

Assembly subordinate legislation

The National The Assembly for Wales has no primary legislative powers. The powers enabling the Assembly to make subordinate legislation arise from enabling provisions in Acts of Parliament, Transfer of Functions Orders made under the Government of Wales Act 1998

and Orders designating the Assembly as having certain competencies to implement EU Directives.

The Nature of the Powers given to the Assembly:

1. Acts giving powers to the Assembly. There is no consistency in either the extent of the powers given to the Assembly or in the structure of the Acts. Every Act is different and must be read section by section to ascertain if there is a power exercisable by the Assembly. It is rare to indicate on the face of an Act whether a power is exercisable by the Assembly or by central government in relation to Wales. A recent example is the Anti-Social Behaviour Act 2003 which has powers exercisable by the Assembly scattered throughout the Act, none of which is indicated in the contents of the Act.

Generally when England and Wales Acts give powers to the Assembly, they are the same in extent as those given to central government in relation to England. The Planning and Compulsory Purchase Act 2004 is a rare example of fundamentally different powers given to the Assembly in relation to Wales.

Table 1: Number of Acts per year giving powers to the National Assembly for Wales since 1999, including the 1999 Transfer of Functions Order for pre-devolution Acts:

TFO:1841-1998	350
1999	5*
2000	14
2001	7
2002	12
2003	13
2004	3**

*from July 1999
 ** Until July 2004

Powers are retained by central government in relation to England and Wales where it is considered necessary to uphold a central philosophy or to deal with cross border matters. Examples include teachers’ qualifications and pay and conditions, and matters relating to the health professions or medicines.

The powers given to the Assembly include a limited range of provisions enabling the Assembly to amend primary legislation and to commence certain provisions of Acts in Wales. Since devolution there have been very few Wales-only Acts giving powers to the Assembly. Usually the Assembly’s powers are found in Acts applying both to England and Wales.

2. Transfer of Functions Orders: The main Transfer of Functions Order was Statutory Instrument (SI) 1999/672 (the 1999 Order) made under the Government of Wales Act. This transferred Ministerial functions to the Assembly under some 350 Acts and 32 Statutory Instruments. In two thirds of the Acts, functions are retained by central government in relation to Wales. Several other Transfer of Functions Orders followed, but they are of much less importance and substance than the 1999 Order.

3. Orders designating the Assembly under the European Communities Act 1972: Some 12 of these Orders in Council have been made enabling the Assembly to implement EU Directives in specified matters. Unlike most of the powers given to the Assembly under Acts,

the Assembly’s competences are described by reference to subject areas. However the areas are usually circumscribed by provisions. All designation orders studied until now include the following subparagraphs:

- “(2) Regulations made by the Assembly shall apply in relation to Wales only, except where made jointly with a Minister or government department.
- (3) Where the Assembly is designated by this Order in relation to any matter, for which any Minister or government department has been designated by any other Order for the purposes of section 2(2) of the Act, any of them may make regulations and, if regulations are made by more than one, they may do so jointly.”¹

Assembly Statutory Instruments

The Government of Wales Act 1998 and the Assembly Standing Orders usually require that draft Statutory Instruments may be considered by Assembly Subject Committees and must be put before the plenary Assembly for approval, with or without amendments, before they can be made. At present, there is very little debate of Assembly SIs in either Subject Committees or by the Assembly in plenary.

Table 2: Statutory Instruments made by the Assembly:

Year	General SIs
1999(from 5/08)	30
2000	124
2001	242
2002	224
2003	217
2004 (till 1/06)	95

Central Government SIs applying to Wales are not subject to any Assembly procedure unless the enabling Act requires their approval by the Assembly. Likewise Assembly SIs are rarely subject to any UK Parliamentary procedure.

A comparison between Assembly Legislation in Wales and Central Government Legislation in England

Where the Assembly has the same powers to make subordinate legislative in Wales as that possessed by central government in relation to England:

- It is unusual for the powers to be exercised in each country at the same time
- Sometimes the powers are exercised in England but not in Wales or vice-versa
- Where the powers are exercised in both countries, it is usual for the Assembly SI to be made after (sometimes a long time after) the equivalent SI made for England
- Often, when made, the Assembly SI will have the same concept as that for England though expressed differently. Sometimes the concept is slightly different, occasionally it is quite different
- Some Acts give the Assembly powers to commence some of the provisions of an Act. Assembly commencement orders are usually not made in parallel with such orders

¹ See for example: Statutory Instrument 2000 No. 2812 The European Communities (Designation) (No. 3) Order 2000

applying to England and, where made, may commence different provisions to those commenced in England

Central Government Legislation in Wales in the fields of health and education

Acts giving certain powers to the Assembly usually also give other powers to central government in relation to Wales. This may result in more SIs being made in a particular subject area by central government in relation to Wales (usually in relation to England and Wales) than by the Assembly.

Much of the secondary legislation made by central government is divided in its application: some parts of an SI apply to England only and other parts of the same SI to England and Wales, some to Wales only.

The number of SIs made by the Assembly and central government per year in the fields of health and education since 1999 are set out in Tables 3 and 4.

Table 3: Assembly and Central Government SIs in Health:

Year	National Assembly for Wales	Central Government
1999	5	22
2000	11	72
2001	18	31
2002	25	68
2003	37	59
2004	22	25
Total	118	277

Table 4: Assembly and Central Government SIs in Education:

Year	National Assembly for Wales	Central Government
1999	11	12
2000	14	41
2001	14	36
2002	31	33
2003	34	16
2004	9	6
Total 2002-2004	74	55
Total all years	113	144

Central Government SIs made in conjunction with the Assembly

It is also interesting to see that since devolution very little secondary legislation has been made by central government and the Assembly acting together in the areas of health and education. Before devolution with the Secretary of State for Education would usually have made the SI as regards England and the Secretary of State for Wales the SI as regards Wales. No such legislation was made at all from 2002-2004 in the field of education. It is also noteworthy that most secondary legislation made by central government in these areas is made without any involvement in their making by the Assembly.

For the first five years after devolution only 19 SIs in relation to England and Wales or in relation to Wales only were made by central government in conjunction with the Assembly in the field of health and 6 in the field of education (Tables 5-6). In all other cases, the Assembly has no specific machinery in either the Government of Wales Act or in its Standing Orders for considering and making representations about such secondary legislation. This is the same situation with regard to the non-involvement of central government in the making of Assembly SIs. **The result is that each law-making body is unaware of the activities of the other body.**

Table 5: UK-Wales Cooperation in Making SIs in Health:

Year	Total number of SIs made by central government	SIs made by central government/Assembly
1999	22	1
2000	72	2
2001	31	1
2002	68	4
2003	59	7
2004	25	4
Total	277	19

Table 6: UK-Wales Cooperation in Making SIs in Education:

Year	Total number of SIs made by central government	SIs made by central government/Assembly
1999	12	2
2000	41	1
2001	36	1
2002	31	2
2003	34	0
2004	9	0
Totals	180	6

Only 6.86% of the SIs made by central government in health involve the Assembly in the process of making such SIs. In education the percentage is even lower, with only 3.33% of the SIs made by central government involving the Assembly in the process of making such SIs. Interestingly in education no common SI were produced at all from 2002-2004. Central government and the Assembly act solely within their respective functions.

Statutory Instruments made by Central Government making different provisions for Wales

The following tables represent the SIs made by central government in health and education applying to England and Wales and the numbers made by central government for Wales only. These tables show that England and Wales usually continue to be legislated for together and that central government continues to treat Wales in the same way as it did pre-devolution, legislating in the same terms for England and Wales without differentiating between the two countries. It shows that **there is little recognition that devolution has occurred in Wales, and that consideration should be given to treating Wales differently to England.**

Table 7: Central Government Statutory Instruments on Wales: Health:

	Same	Differences	Wales Only
2004	22	3	0
2003	64	2	0
2002	60	6	1

Table 8: Central Government Statutory Instruments on Wales: Education:

	Same	Differences	Wales Only
2004	6	0	0
2003	13	1	1
2002	24	1	4

To summarise, subordinate legislation made by central government in relation to Wales has the following characteristics:

- Usually while the law in a particular matter can be contained in one SI for England (often applying partly to England and Wales and partly to England only) in Wales it has to be found in at least two SIs one made by central government applying to England and Wales and one made by the Assembly for Wales only corresponding to the England only provisions of the England and Wales SI.
- In most fields, not only health, even after nearly five years of devolution, central government is still producing more secondary legislation in relation to Wales than the Assembly.
- In the field of education since 2003 the Assembly is now the main secondary legislator, a new pattern.
- Since devolution very little secondary legislation has been made by central government and the Assembly acting together in the areas of education and health.
- Only 6.86% of the SIs made by central government for Health in Wales involve the Assembly in the process of making such SIs.
- In education the percentage is even lower, only 3.33% of the SIs made by central government involve the Assembly in the process of making such SIs.
- A very large number of SIs made by central government does not state whether they apply to Wales.
- Sometimes SIs made by central government together with the Assembly are included in the HMSO Assembly SIs list and therefore have a Wales (W.) number, at other times they are included in the central government SIs list with only the central numbering system.
- Central government usually continues to treat Wales in the same way as it did pre-devolution, legislating in the same terms for England and Wales without differentiating between the two countries.

Conclusions

As the Richard Commission recognises at paragraph 16 of Chapter 5 of its Report each Assembly Minister has to work within a very detailed set of powers derived from: the Government of Wales Act; Transfer of Functions Orders; post-devolution Acts of Parliament; and EU Designation Orders.

This means that the powers to make subordinate legislation applying to Wales post devolution have no clear division between powers given to central government and those given to the Assembly.

Because there is no relevant legal or administrative machinery in existence central government is usually unaware of the subordinate legislation being made by the Assembly and vice versa.

Generally while many of the concepts contained in Assembly SIs are similar to those made under parallel powers by central government for England they can be expressed differently. Sometimes the concepts themselves may be slightly or fundamentally different.

It is unusual for central government SIs made for Wales post-devolution to have different contents to those made for England because they are usually contained in single England and Wales SIs.

Law in Wales is also becoming different to that applicable in England in so far as it is contained in SIs made by the Assembly or where central government has amended the pre-devolution law in relation to England only.

This ESRC Briefing was written by Marie Navarro and David Lambert, Editors of Wales Legislation Online website at www.waleslegislation.org.uk, setting out the powers of the National Assembly for Wales and its legislation.

The Devolution and Constitutional Change Programme was set up by ESRC in 2000 to explore the series of devolution reforms which have established new political institutions in Scotland, Wales, Northern Ireland, London and the other English regions since 1997. It has commissioned 35 projects around the UK to carry out top-class academic research and to contribute to the policy debates surrounding devolution.

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