

National Assembly for Wales

Pre-legislative Scrutiny of Legislative Competence Orders December 2009

This paper has been prepared to assist the Constitutional Affairs Committee Inquiry into the development of Schedule 5 to the Government of Wales Act 2006, including Exceptions to Matters.

Given that the Constitutional Affairs Committee is currently receiving evidence relating to recent developments in respect of the Welsh Language, Housing and Environment Orders, this briefing has a cut off point of autumn 2008. It is intended to provide Committee Members with an historic snapshot of early Legislative Competence Order scrutiny.

Members'
Research
Service



The National Assembly for Wales is the democratically elected body that represents the interests of Wales and its people, makes laws for Wales and holds the Welsh Government to account.

The Members' Research Service is part of the National Assembly for Wales. We provide confidential and impartial research support to the Assembly's scrutiny and legislation committees, and to all 60 individual Assembly Members and their staff.

Members' Research Service briefings are compiled for the benefit of Assembly Members and their support staff. Authors are available to discuss the contents of these papers with Members and their staff but cannot advise members of the general public. We welcome comments on our briefings; please post or email to the addresses below.

An electronic version of this paper can be found on the National Assembly's website at:
www.assemblywales.org/bus-assembly-publications-research.htm

Further hard copies of this paper can be obtained from:

Members' Research Service
National Assembly for Wales
Cardiff Bay
CF99 1NA

Email: MembersLibrary@wales.gsi.gov.uk

© National Assembly for Wales Commission Copyright 2010

The text of this document may be reproduced free of charge in any format or medium providing that it is reproduced accurately and not used in a misleading or derogatory context. The material must be acknowledged as copyright of the National Assembly for Wales Commission and the title of the document specified.

National Assembly for Wales

Pre-legislative Scrutiny of Legislative
Competence Orders
December 2009

Alys Thomas

Paper Number: 10/005



Members'
Research
Service

Summary

- Under the *Government of Wales Act 2006*, the Assembly may acquire legislative competence from Westminster through Legislative Competence Orders ("Orders") or through clauses in a Westminster Bill. Legislative Competence Orders must be approved by the Assembly, the House of Commons and the House of Lords.
- To date, eight Government Orders have been approved by the Assembly and Westminster and been approved by the Queen in Council. A further six are at various stages of progression. The Additional Learning Needs Legislative Competence Order was the first Order to be completed. Two Member led Orders have been introduced.
- The first Legislative Competence Order Committee decided that the **scope of its work** should be to decide whether legislative competence should be transferred to the Assembly, as provided for in the general principle of the proposed Order, and whether the proposed Order provides an appropriate framework to deliver the policy agenda.
- In April 2007 the House of Lords Constitution Committee agreed to perform **pre-legislative scrutiny of Orders** for an initial 12-month trial period. The Committee defined its criteria for scrutiny as "*matters of principle affecting a principal part of the constitution*".
- The Welsh Affairs Select Committee's (WAC) early reports reflected its concerns about the **scope of Orders** and the policy intentions of the Welsh Government as well as the mismatch in timing between scrutiny in the Assembly and at Westminster.
- The Secretary of State for Wales instigated a review of how **pre-legislative scrutiny** had worked in the first year (2007-8).
- Some MPs were concerned that **Measure-making (framework) powers** given to the Assembly through provisions in Westminster Bills were not receiving sufficient scrutiny. The Secretary of State has promised that notice and background briefing will be provided to MPs.
- **Devolution Guidance Note (DGN) 16** has been produced by the Wales Office and the Welsh Government to assist officials dealing with Orders at Westminster and Whitehall. DGN 9 has been revised to assist officials dealing with Measure-making (framework) powers in Westminster Bills.

Contents

1. Introduction.....	1
2. Passage of the Government of Wales Bill - Pre-legislative Scrutiny of Legislative Competence Orders	2
3. Early Legislative Competence Order Scrutiny in the Assembly	3
4. Scrutiny in the House of Lords	5
5. Scrutiny by the Welsh Affairs Select Committee.....	7
5.1. Initial Report on Pre-Legislative Scrutiny of Legislative Competence Orders	7
5.2. Scrutiny of the first Legislative Competence Orders	8
5.3. The Secretary of State’s Review.....	10
5.4. Response of the Presiding Officer	14
6. Matters added by UK Bills	15
7. Devolution Guidance Notes.....	17
7.1. Inter-governmental Relations post Devolution	17
7.2. DGN 16 Orders in Council under section 95 of the Government of Wales Act 2006	19
7.3. Devolution Guidance Note 9: Post-devolution Primary Legislation affecting Wales.....	22
Annex 1: Progress of Legislative Competence Orders and Measures	26
Government-proposed Legislative Competence Orders.....	26
Member-proposed Legislative Competence Orders	27
Committee-proposed Legislative Competence Orders.....	29

Pre-legislative Scrutiny of Legislative Competence Orders

1. Introduction

Following the National Assembly for Wales election in May 2007, provisions in the *Government of Wales Act 2006* came into force. These included provisions under Part III of the Act for the Assembly to make Measures in matters where it has legislative competence and to acquire legislative competence from Westminster through Legislative Competence Orders ("Orders") or through clauses in a Westminster Bill. Orders must be approved by the Assembly, the House of Commons and the House of Lords.

As at early February 2010, 14 Government Orders have been introduced in the Assembly and two Member proposed Orders. In the 2007-2008 session of Parliament, three Bills were proposed to add to the legislative competence of the Assembly by inserting new matters into Schedule 5 to the *Government of Wales Act 2006*. As at February 2010, eight Government Orders have been approved by the Assembly and both Houses of Parliament and undergone scrutiny by a Legislation Committee of the Assembly, the Welsh Affairs Committee in the House of Commons and the Constitution Committee of the House of Lords.

This paper provides background to the emerging thinking about the pre-legislative scrutiny by UK Government Ministers during the passage of the Government of Wales Bill and early developments, including the Welsh Affairs Committee Report and the Secretary of State for Wales' review. Given that the Constitutional Affairs Committee is receiving evidence regarding recent developments in respect of the Welsh Language, Housing and Environment Orders, this briefing has a cut off point of autumn 2008. It is intended to provide Committee Members with an historic snapshot of early Legislative Competence Order scrutiny.

2. Passage of the Government of Wales Bill - Pre-legislative Scrutiny of Legislative Competence Orders

When the *Government of Wales Bill* was going through Parliament it was anticipated that pre-legislative scrutiny of an Order would be required in the Assembly and at Westminster. The then Parliamentary Under-Secretary of State in the Wales Office, Nick Ainger MP, stated:

I should say immediately that I do not think that it is right that the Government should prescribe in the Bill how such scrutiny must be conducted, but that is what amendment No. 187 suggests. That would not allow parliamentarians the proper discretion to determine the most appropriate arrangements.¹

However, in a letter to Cheryl Gillan MP, the Shadow Secretary of State for Wales, Mr Ainger outlined how he anticipated that the process might work.

The process would normally start with discussions taking place between the Welsh Assembly Government and UK Government on the scope of the proposed Order in Council. If broad agreement was reached on this, the Secretary of State would forward to the appropriate Parliamentary body—the Welsh Affairs Committee for example—a Memorandum enclosing both the proposed Order in Council and a Memorandum from the Welsh Assembly Government explaining the scope of the proposal and the background to the request. In order to explain the scope fully, it would be necessary to draw attention to the provisions of the Act itself which restrict the extent of the Assembly's legislative competence.

As the Secretary of State indicated (Hansard Jan 9 col 36) the practice of joint scrutiny between the Welsh Affairs Committee and the relevant Assembly committee has worked well in the past. This could provide a good model for the scrutiny of proposed Orders in Council if the Welsh Affairs Committee so chooses, although it remains important that any Member should be able to scrutinise and comment on them.²

During the Committee Stage in the Lords, peers further probed how pre-legislative scrutiny of Orders would operate. Lord Rowlands laid an amendment to try to ascertain what the proposed Orders in Council might look like, having been unimpressed with the Mock Transport Order in Council that had been provided by the Wales Office.

That prompted me to wonder whether we should not at least try to consider what we should expect to be in a draft Order in Council. So the proposals I have put down as a basis for debate, not as an ultimate solution, would ensure that an Order in Council should at least identify the principal features of what would become an Assembly measure. I think that consideration of these issues, in particular the two illustrative examples provided by the Government, prompts the following questions: how much should be included in an order; how much of an indication should be given of a subsequent measure that the Assembly

¹ HC Debates 24 January 2006 c.1329

² Letter from Nick Ainger MP, Parliamentary Under-Secretary of State for Wales to Cheryl Gillan MP, Shadow Secretary of State For Wales, 17 January 2006.

would introduce; and how far should the Order in Council define the terms and limits of the subsequent measure? These are important questions.³

For the Government, Lord Davies of Oldham responded:

The key point is that it would be possible for the Assembly to acquire legislative competence under Part 3 only if the Government and Parliament were satisfied of the case for that in each specific matter in which competence was sought. The test for Parliament is whether it will be appropriate in principle to grant the legislative competence to the Assembly. Parliament has the right to ask—in fact, the duty to expect—as much information as it thinks necessary to reach such a judgment. However, we anticipate that that will be provided during the pre-legislative scrutiny of any proposed Order in Council. The Assembly rather than Parliament will scrutinise and decide on the detail and merits of a particular Assembly measure. The question whether the Assembly should be given competence to legislate on a particular matter is an entirely different issue. That, clearly, is for Parliament to consider. That is where the Order in Council is crucial.⁴

Lord Thomas of Gresford questioned whether it might be inappropriate for a particular measure to be attached to an Order in Council. Lord Davies of Oldham replied:

That is precisely the case. Not only might more measures be proposed under the powers granted by a specific Order in Council, but it is not unknown for legislative bodies to change their minds—it is not unknown for legislative bodies to see different majority parties in control, which certainly change their minds on what should be enacted. The Assembly might not just propose other measures under the same range of competence; it might also seek to contradict a measure that had obtained under a previous Administration—the noble Lord is absolutely right about that. Therefore, we cannot conceive of the Order in Council being specific to a measure. That would be so limiting a concept of devolution as to make a mockery of it. The Order in Council seeks to create the power of legislation, which the Assembly then follows through. I shall give way to my noble friend as I believe that he will help me even further. He has sought to identify the nature of the process which guarantees that Parliament has sufficient information to carry out this measure.

3. Early Legislative Competence Order Scrutiny in the Assembly

An Order can be proposed by the Welsh Government, an Assembly committee or an individual Member, if they are successful in ballots held from time to time by the Presiding Officer. There is a two stage process for considering an Order, involving the ‘pre-legislative scrutiny’ of a ‘proposed Order’ by a committee; and the approval, by the Assembly, of a ‘draft Order’. A list showing the progress of Orders to date is included at **Annex 1**.

Pre-legislative scrutiny allows Members the opportunity to consider the provisions of an Order before it becomes law. Once a **draft** Order has been introduced, the

³ [HL Deb, 6 June 2006, c 1154](#)

⁴ *Ibid.* c 1158

Assembly can only vote to accept or reject that Order in its entirety. It cannot amend the draft Order in any way. In order to allow the Assembly an opportunity to consider the Order before having to vote on it, a **proposed** Order is laid first. This proposed Order is considered by a committee (pre-legislative scrutiny), who report their findings and any recommendations to the Assembly. At this stage, it is possible to amend the proposed Order to take account of the recommendations of the committee, or any other considerations.

Having been subject to pre-legislative scrutiny and amended (if appropriate), a **draft** Order is formally laid before the Assembly, along with an Explanatory Memorandum. The Assembly then vote to approve or reject the draft Order, which cannot be amended.

If the draft Order is approved by the Assembly, it is the responsibility of the Secretary of State to lay the draft Order before Parliament for approval by both the House of Commons and the House of Lords.

In **June 2007**, the First Minister, the Rt.Hon. Rhodri Morgan AM, announced the Welsh Government's legislative programme and outlined plans for three Measures on NHS Redress; Learner Travel and 14-19 Education.⁵ He also outlined plans for six Orders relating to Additional Learning Needs; Environmental Protection and Waste Management; Vulnerable Children; Domiciliary Care; Affordable Housing and the Welsh Language.

The first Legislative Committee to be established, therefore, was the Proposed Additional Learning Needs Legislative Competence Order Committee on 4 July 2007. The Committee had five members. Two Labour and one from each other party group. The Committee was established before the One Wales Coalition Government was formed. This had two impacts on the constitution of the Committee: it gave the Government a majority and Carwyn Jones AM, having laid the proposed Order as Education Minister, remained on the Committee although he had been appointed as Counsel-General and Leader of the House.

At its meeting on 12 July 2007 the Committee agreed the scope of its work:

(i) to consider the general principles of the proposed Order, i.e. that legislative competence as specified in Matter 5.17 be conferred on the Assembly; and

(ii) to consider whether the proposed Order provides an appropriate framework for the delivery of the policy agenda on Additional Learning Needs, and in particular, whether the terms of the proposed Order are too broadly or too narrowly defined.

⁵ [First Minister, Rt.Hon. Rhodri Morgan AM, Statement on the Welsh Assembly Government's Legislative Programme, 6 June 2007.](#)

This approach had been discussed and was agreed by Members, as indicated by the Chair, Eleanor Burnham AM:

We have had some informal discussions before this meeting on the approach that we will take to the scrutiny process. It was considered that the scope of the committee's work should be to decide whether legislative competence should be transferred to the Assembly, as provided for in the general principle of the proposed Order, and whether the proposed Order provides an appropriate framework to deliver the policy agenda on additional learning needs; that is, are the terms of the proposed Order too broad or too narrowly defined.⁶

The Committee issued a general call for evidence and invited key organisations from within the fields of education and training to submit written evidence. It also took oral evidence from a number of witnesses. The Committee completed its work in January 2008.

In the course of 2008-9 the Assembly moved from using ad hoc committees to scrutinise Orders and Measures, which ceased to exist once scrutiny was completed, to **five permanent Legislation Committees**.

4. Scrutiny in the House of Lords

In March 2007 Baroness Amos, the then Leader of the House of Lords, wrote to the Constitution Committee of the House of Lords requesting that it consider conducting pre-legislative scrutiny on proposed Legislative Competence Orders under section 95 of the *Government of Wales Act 2006*, to complement the scrutiny role of the House of Commons Welsh Affairs Select Committee. This request was in line with the Committee's own report on the *Government of Wales Bill* in which it suggested that pre-legislative scrutiny in the Lords should be carried out by either the Delegated Powers and Regulatory Reform Committee or by itself. The Constitution Committee agreed on 18 April 2007 to perform this pre-legislative scrutiny role for an initial 12-month trial period.

⁶ Proposed Additional Learning Needs Legislative Competence Order Committee, Transcript, 12 July 2008.

In December 2007 the Constitution Committee produced a Report on the Scrutiny of Welsh Legislative Competence Orders in which it defined its criteria for scrutiny as “*matters of principle affecting a principal part of the constitution*” and stated that:

The overarching question will be whether, from a constitutional point of view, the request for legislative competence is within the overall letter and spirit of the devolution settlement.⁷

The Report states that the Committee’s consideration of proposed Orders would include consideration of the following questions.

- Does the proposed Order appear to confer legislative competence that risks falling foul of the “general restrictions” defined by Parts 2 and 3 of Schedule 5 to the 2006 Act? These restrictions are: altering functions of Ministers of the Crown; criminal offences punishable by fines over level 5 or more than two years imprisonment; and amending certain Acts of Parliament.
- Does the proposed Order and any envisaged Measure described in the explanatory memorandum appear to apply beyond Wales or extend beyond England and Wales?
- Does the “matter” set out in the proposed Order properly fall within the “field” under which it is to be placed in Schedule 5?
- Do the provisions of the Measure envisaged in the explanatory memorandum accompanying the proposed Order properly “relate to” a “matter” set out in the proposed Order or another matter specified in Schedule 5?
- Does what is proposed appear to be incompatible with the Convention rights set out in the *Human Rights Act 1998*?
- Does what is proposed appear to breach European Community law?
- Have the necessary procedural requirements been followed in the making of the proposed Order?
- Will Measures made under the proposed Order significantly affect the institutional structure of government in Wales?
- Are there any other constitutional implications that ought to be drawn to the attention of the House and the Secretary of State?⁸

⁷ [HL Constitution Committee, *Scrutiny of Welsh Legislative Competence Orders*, Second Report 2007-2008, HL Paper 17, 4 December 2007.](#)

⁸ *Ibid.*, para.12

5. Scrutiny by the Welsh Affairs Select Committee

5.1. *Initial Report on Pre-Legislative Scrutiny of Legislative Competence Orders*

As suggested by Wales Office Ministers when the *Government of Wales Bill* was being discussed, the Welsh Affairs Select Committee (WAC) was considered the appropriate locus for scrutiny of Orders in the House of Commons. The Committee is invited to scrutinise the Order by the Secretary of State for Wales. **In May 2007 WAC published an initial Report on the scrutiny of Legislative Competence Orders.**⁹

The Report welcomed the opportunities provided for working jointly with Assembly committees in the scrutiny of proposed Orders, but asserted that its primary responsibility was to inquire into Government policy as it affects Wales and a balance would need to be struck in terms of workload. In cases where a proposed Order raises complex legal issues, has wide implications or is politically controversial, it may be appropriate for it also to be scrutinised by the Welsh Grand Committee,¹⁰ following its scrutiny by the Welsh Affairs Committee or by another committee of the House.

It recommended that the UK Government and the National Assembly give further consideration to the means by which the timetables of the National Assembly, the House of Commons and the House of Lords could be most effectively co-ordinated for the consideration of Orders. It agreed with the House of Lords Constitution Committee that pre-legislative scrutiny in the Commons and the Lords should be concurrent rather than consecutive.

The Report noted that it was a matter for the Assembly, and in particular for the originator of the proposed Order, how to take into account any differing and possibly competing recommendations contained in reports following the pre-legislative scrutiny of a proposed Order.

If there have been substantive changes between the proposed Order and the draft Order laid before Parliament, the UK Government should allow sufficient time for further parliamentary scrutiny if WAC or others wished to conduct it. Also, the debate of draft Orders should be undertaken on the floor of the House.

The Report recommended that the authorities of the National Assembly explore the possibility of making appropriate arrangements to represent the interests of the originator of a draft Order as it passes through its Parliamentary stages.

⁹ [HC Welsh Affairs Committee Report, *Legislative Competence Orders in Council, Second Report, 2006-2007*](#)

¹⁰ The Welsh Language Legislative Competence Order was considered by the Welsh Grand Committee in 2009.

The Parliamentary Under Secretary of State, **Nick Ainger MP**, had estimated that there would be 'four or five' Legislative Competence Orders annually 'evenly paced throughout the year', which he described as 'manageable'. He also indicated that pre-legislative scrutiny was expected to take between three and six months. WAC felt that this time frame was "reasonable as far as Westminster is concerned".

5.2. Scrutiny of the first Legislative Competence Orders

Actual scrutiny of the **Additional Learning Needs Legislative Competence Order** began on 7 November 2007 when the Committee took evidence from Huw Irranca-Davies MP, the Parliamentary Under Secretary of State in the Wales Office. It quickly became clear in proceedings that MPs wanted greater clarity about what Measures the Welsh Government wished to introduce once the Assembly had acquired the legislative competence. Questioned about this, Mr Irranca-Davies replied:

In terms of measures, I think there is a distinction between the role of both the Wales Office and the Welsh Affairs Committee in scrutinising this, which is scrutinising the scope, the appropriateness and various other issues within this. As to whether we should be speculating on the exact measures coming forward, I think that is something I would be loathe to do because that is, in the spirit and the letter of the Government of Wales Act, something that is within the gift of the Assembly.¹¹

Some MPs also felt that that the Order was too widely drafted and was in effect a 'blank cheque'. In response to these points, Mr Irranca-Davies said:

It is worth saying...that both from this Committee and from all the players involved - the Welsh Assembly Government Ministers, the NAW, ourselves in the Wales Office and Whitehall - this is very much a learning process, but one of the things that we are rapidly coming to grips with is, as each Order in Council comes through, recognising that it is within an appropriate degree of narrowness for a specific purpose, and that the justification is there for seeking this particular power. Certainly, in this particular Order in Council, we are very content that there has been a very good dialogue on that, and whilst you could always go further - you could always go wider - would you go wider for a particular reason or simply because you could do it? I think this is the right way of doing it, saying: "Here is what we are seeking; these are the competences we need."¹²

¹¹ [HC Welsh Affairs Committee, Inquiry on Additional Learning Needs Legislative Competence Order, EV5, 7 November 2007.](#)

¹² Ibid.

WAC published its report on the scrutiny of the Additional Learning Needs Legislative Competence Order in December 2007¹³ which outlined its **dissatisfaction** with elements of the process.

One issue was the **timing**. WAC had hoped to conduct joint scrutiny with the Assembly Legislative Competence Order Committee but the proposed Order was referred to WAC by the Secretary of State for Wales on 26 July 2007, shortly before the House of Commons rose for its summer recess. In the Assembly, the Business Committee required the Legislative Competence Order Committee to report by 23 November 2007 (later extended to 30 November) thus the Assembly Committee began its evidence-taking as soon as the Assembly resumed after its summer recess, and held its first evidence on 20 September.

The House of Commons returned on 8 October, and WAC evidence sessions did not commence until 7 and 21 November – by which time the Assembly Committee had completed its evidence-taking.

WAC also noted that the subsequent proposed Order had been published and referred to the Assembly before the “**clearance**” process with Whitehall departments has been completed. Also, progress had been made in scrutinising other proposed Orders in the Assembly before the Secretary of State for Wales had referred them to WAC, thus making joint scrutiny impossible.

In relation to the clearance process, the Report stated:

We regret that the Assembly Committee appointed to conduct pre-legislative scrutiny on the proposed Order on environmental protection and waste management has completed its inquiry and published its report before the proposed Order has been referred to Parliament by the Secretary of State. We further regret that the publication of the proposed Order on affordable housing and its referral for pre-legislative scrutiny before its clearance in Whitehall is another example of how this process is not working as anticipated.

We regret that due to timetabling considerations it was not practicable to explore the possibility of working jointly with the Assembly Committee on the proposed Order relating to people with additional learning needs. However, we are grateful to the Assembly Committee for keeping us informed of the course of its inquiry at every stage, and appreciate the opportunity for members of the Welsh Affairs Committee to attend its meetings in an observer capacity. Future timetabling arrangements should allow greater opportunities for the Assembly and Westminster committees to work together.

We regret that this opportunity appears to have been ruled out in the case of some proposed Orders by their publication and examination prior to completion of the process of engagement with Whitehall departments. The Welsh Affairs Committee would wish to explore the possibility of working more closely with Assembly committees in the pre-

¹³ [HC Welsh Affairs Committee, *The Proposed Legislative Competence Order in Council on Additional Learning Needs*, Second Report 2007-2008, HC44, 21 December 2007.](#)

legislative scrutiny of proposals for draft Legislative Competence Orders. We would wish to consider experimenting with some degree of joint scrutiny where practicable.¹⁴ [my emphasis]

One joint scrutiny session between the Assembly Committee and WAC was held in respect of the proposed Order on Social Welfare. The WAC Report on the Order stated:

On this occasion, because the proposed Order was published and referred simultaneously to both committees for pre-legislative scrutiny, joint working – which had eluded us previously – proved possible. The Welsh Affairs Committee welcomes this positive development, and anticipates that in future proposed Orders will be published and referred to Westminster and National Assembly committees in a sequence which allows for such joint working. It is unfortunate that this has not proved to be the case with some of the proposed Orders published so far, which still await Whitehall clearance although their examination by an Assembly committee is underway or complete.¹⁵

WAC's Report on the Additional Learning Needs Order also put emphasis on the principle of "**powers for a purpose**", namely that the Welsh Government should be clearer about what Measures it would wish to introduce with the legislative competence bestowed through the Order in question. It said:

We are satisfied the explanatory memorandum produced by the Welsh Assembly Government to accompany this proposed Order addresses a widespread consensus that there is an identifiable need for such an Order, but the evidence provided did not do so effectively or convincingly. We will look for such clarity in the future.

While not asking for "every detail" of future Assembly Measures, nevertheless we believe that it would have been helpful for this Committee to have been given a clearer indication of the most immediate legislative proposals for which the additional competence being sought is considered necessary. This would then enable the Committee to judge the appropriateness of the proposed Order.¹⁶ [my emphasis]

5.3. *The Secretary of State's Review*

In March 2008, the Secretary of State for Wales, the Rt.Hon. Paul Murphy MP, appeared before WAC and indicated that he would be conducting a **review of the scrutiny of Legislative Competence Orders** which was completed in July 2008.¹⁷ In the course of the review, Wales Office Ministers and officials had held discussions with MPs from all parties, the First Minister and the Presiding Officer and officials from across Whitehall, the Welsh Government, Parliament and the

¹⁴ [HC Welsh Affairs Committee, *The Proposed Legislative Competence Order in Council on Additional Learning Needs*, Second Report 2007-2008, HC44, 21 December 2007.](#)

¹⁵ [HC Welsh Affairs Select Committee, *The proposed National Assembly for Wales \(Legislative Competence\) Order in the Field of social welfare 2008*, Fourth Report, 2007-2008, HC257, 5 March 2008.](#)

¹⁶ Op.cit., HC WAC, 21 December 2007, paras. 28 & 29.

¹⁷ [HC Welsh Affairs Select Committee, *Minutes of Evidence*, 11 March 2008.](#)

National Assembly for Wales. The WAC had submitted a Memorandum to the Secretary of State suggesting improvements to the Legislative Competence Order process based on its experience of scrutinising the four that had been referred to it.¹⁸

In its Memorandum, **the WAC strongly recommended that all proposed Orders continue to be referred to the Welsh Affairs Committee for pre-legislative scrutiny**, arguing that the rigour of scrutiny by Select Committee, in terms of hearing formal evidence, was effective and that Committee Members would develop expertise.

However, the Committee proposed that all Members of the House of Commons should be informed that an Order is being sought by the Assembly and that, as a matter of course, full information about any draft Order be provided to all Welsh MPs **before the Committee starts its deliberation** and that they be invited to submit any views for consideration by the Committee.

While WAC argued that scrutiny by the Committee as a whole was the best option, **it flagged up the possibility of using sub-committees**. It also ruled out a “one size fits all” approach to its scrutiny, retaining the option of pursuing pre-legislative scrutiny in ways other than the formal evidence sessions that had been the practice up to that date.

WAC proposed that members of the relevant legislation scrutiny committee in the Assembly should be offered a **standing invitation** to attend and sit in on any WAC scrutiny meetings. It added:

We do not consider that there will normally be any benefit of having joint scrutiny meetings in the sense of taking evidence jointly, but we do consider that there may well be Legislative Competence Orders where the subject matter would make it appropriate for holding a joint meeting of the two committees at the end of their separate scrutiny, to consider their respective recommendations.

Interestingly, given its strongly worded criticisms in December 2007 about the Welsh Government’s practice of laying Legislative Competence Orders in the Assembly before receiving “clearance” from Whitehall, resulting in Assembly scrutiny outpacing its own, WAC appeared to have changed its mind in the 2008 Memorandum. It found that: *“this has not proved to be a problem in practice”* and that *“it is not clear that there is any real advantage in having a proposed*

¹⁸ [HC Welsh Affairs Select Committee, Review by the Secretary of State of the procedure for Legislative Competence Orders in Council, Memorandum 2008.](#)

Legislative Competence Order referred to an Assembly Committee and to the Welsh Affairs Committee simultaneously."¹⁹ It explained its change of mind:

Our considered view now is that scrutiny by the Welsh Affairs Select Committee should normally take place after the Assembly committee has completed its scrutiny. This was not the intended process, but we have found in practice that there are considerable advantages. Indeed the two major advantages of scrutiny first by the Assembly committee and then by the Welsh Affairs Select Committee are:

- (a) that our Committee is able to see the evidence taken by the Assembly Committee and take it into account rather than repeating the same lines of investigation, and
- (b) that our Committee is able to look at an LCO that has been amended or redrafted in the light of the comments of the comments of the Assembly Committee.²⁰

However, **WAC did express concern about the volume of Legislative Competence Orders.** Stating that "*the Parliamentary Under-Secretary of State's assurance to us at the beginning of this process that Legislative Competence Orders would be 'evenly paced throughout the year' has not proved to be the case*" and the emerging situation was "*haphazard*".²¹

It urged the Wales Office and the Welsh Government to work together to bring a **greater predictability to the timetable of this process.** It went on:

In fact, the number of Legislative Competence Orders which have been proposed in the last 12 months has reached 11 already, including six by individual AMs. We note the Presiding Officer's intention that ballots by which individual AMs win the right to bring forward a proposed Legislative Competence Order will be held every two months. If the numbers were to be carried through into the actual level of draft Legislative Competence Orders requiring pre-legislative scrutiny a logjam would become inevitable and the quality of scrutiny would be seriously compromised. That in turn would risk bringing the Legislative Competence Order process into disrepute.

We urge the Assembly and the Wales Office to find ways of giving a proper focus to legislative work, aiming at producing a reasonable number of high-quality Orders each year rather than allowing volume to swamp the system here and in the Assembly as seems to be happening at the moment. We are convinced that a concentration on quality will enhance the credibility and standing of the Legislative Competence Order process.²² [my emphasis]

WAC also expressed concern about a lack of clarity in the way that Legislative Competence Orders are drafted. It feared that this might result in "*unintended powers for the Assembly*" being implicit in the drafting which may end up being tested in the Courts. This, it argued, "*would be bad for the system of Legislative Competence Orders as well as confusing and expensive.*"²³

¹⁹ [HC Welsh Affairs Select Committee, Review by the Secretary of State of the procedure for Legislative Competence Orders in Council, Memorandum 2008.](#)

²⁰ *Ibid.*, para.19

²¹ *Ibid.*, para.21

²² *Ibid.*, para. 22

²³ *Ibid.*, para.28

It therefore proposed that **a clause should be added to each Legislative Competence Order**, making it legally clear that the power is intended to provide the power that has been requested and outlined by the Assembly. The power to do something that had not been anticipated has not been transferred unless it is absolutely certain that it falls within the powers transferred.²⁴

On 21 July 2008, the Secretary of State for Wales wrote to the Chair of WAC, Hywel Francis MP, about the outcome of his review.²⁵ He stated:

My prime objective is to ensure that framework powers and Orders in Council are brought forward in a timely fashion, accompanied with sufficient information to enable effective scrutiny. It is clear that this requires both a renewed focus on applying arrangements we already have in place, such as ensuring framework powers in Bills are available on Introduction and briefing meetings open to all MPs and Peers take place, alongside new arrangements, such as those in our recently published Devolution Guidance Note 16 (DGN16).

The Secretary of State agreed with WAC that it was best placed to continue to conduct pre-legislative scrutiny and asserted that he placed “*great importance on informing Members of both Houses about proposed Orders*” being referred for pre-legislative scrutiny. In response to WAC’s concerns about timing he noted that “*this is an issue that both the UK and Assembly Government recognise and are determined to improve*” which would be facilitated through improvements set out in DGN16, which is discussed fully below.

However, the Secretary of State was not enthusiastic about WAC’s advocacy of conducting scrutiny **after** the Assembly. He said:

Such an approach could lead to a considerable lengthening of the PLS period and subsequently the overall process for the clearance of an Order, Whilst it is of course a matter for the Welsh Affairs Select Committee when it commences PLS on a particular Order I will aim to continue publishing and referring Orders for PLS simultaneously with the Welsh Assembly Government.

In regard to how long WAC should take to scrutinise a Legislative Competence Order, he stated that it would be helpful if it issued an indicative time period for conducting pre-legislative scrutiny and issuing a report and recommendations, at the outset of scrutiny. This would assist in preparing the final stages of the Order making process.

²⁴ [HC Welsh Affairs Select Committee, Review by the Secretary of State of the procedure for Legislative Competence Orders in Council, Memorandum 2008.](#)

²⁵ [Letter from Rt.Hon. Paul Murphy MP, Secretary of State for Wales to Hywel Francis MP, Chair of the House of Commons Select Committee on Welsh Affairs, Review of Scrutiny Arrangements, 21 July 2008.](#)

The Secretary of State “*noted with interest*” the WAC recommendation that a clause be added to future Orders, making it legally clear that the powers in an Order provide the powers being requested and outlined by the Assembly. He judged that this “*raises issues beyond the process for PLS and will need to be considered separately to my review*”.

5.4. *Response of the Presiding Officer*

WAC’s Memorandum to the Secretary of State’s Review attracted some **press comment**, in particular the concerns expressed about the volume of Legislative Competence Orders coming forward and the use of terms such as “swamp” and “log jam”.

In mid August, the Presiding Officer of the National Assembly for Wales, the Rt. Hon. Lord Dafydd Elis-Thomas AM, wrote to the Secretary of State for Wales in which he argued that this conclusion was “*clearly contrary to the evidence actually set out in the memorandum itself.*” He continued:

The Assembly acquired its new legislative powers on the 25 May 2007. During the first twelve months following that date, 7 proposed LCOs were laid before the Assembly, five of which were proposed by the Assembly Government and two by back-benchers. As the memorandum itself makes clear, only four of these proposed Orders have as yet been referred to the Welsh Affairs Committee.

In paragraph 21 of its Memorandum, the Committee refers to the fact that it had expected to have to deal with “four or five LCOs annually”. In fact, it has only been asked to deal with four. Far from being swamped by more LCOs than expected, the number it has had to deal with has been at the lower end of what was estimated.

The Memorandum states that the Committee has already reported on three of the four LCOs referred to it, and expects to report on the fourth soon. In the Committee’s own words “We have published timely reports on all (sic.) of the proposed Orders which have been referred to us so far”.²⁶

The Presiding Officer argued that this did not support WAC’s assertion that it was being “swamped” by Orders. He also suggested that WAC had caused confusion with its statement that “*the number of LCOs which have been proposed in the last 12 months has reached 11 already*”.

He argued that WAC was incorrect to compare the figure of eleven with the “four or five” Orders which it expected to have to consider. He explained that the eleven “proposed” Orders is in fact a list of all proposals for Orders which have been announced by the Welsh Government and by individual AMs during the first 14 months since the new powers were acquired. It included one proposal which had

²⁶ Letter from the Rt.Hon. Lord Dafydd Elis-Thomas AM, Presiding Officer of the National Assembly for Wales to the Rt.Hon. Paul Murphy MP, Secretary of State for Wales, 17 August 2008.

already been rejected by the Assembly itself as well as one whose principle had not yet been considered by the Assembly. A further two (one from the Welsh Government and one from an individual AM) had so far only been the subject of announcements and had not yet been laid before the Assembly.

6. Matters added by UK Bills

As seen above, the powers of the Assembly to make Legislative Competence Orders and Measures came into force after the 2007 Assembly election. However, the Assembly had already acquired some Measure-making powers²⁷ through clauses in Westminster Acts which amended Schedule 5 to the *Government of Wales Act 2006*, adding matters to some of the Fields listed. The only Measure-making powers included in the Act as passed in 2006 were under *Field 13: The National Assembly for Wales*, which enabled the Assembly to make Measures in relation to certain matters relating to itself, such as the appointment of a Standards Commissioner.²⁸

However, prior to May 2007 and subsequently, Measure-making powers were acquired in other Fields²⁹ through Acts such as the *Further Education and Training Act 2007*³⁰ and the *Local Government and Public Involvement in Health Act 2007*³¹. In 2008 the *Planning Act*,³² the *Education and Skills Act*³³ and the *Local Transport Act*³⁴ also conferred further powers.

However, this method of the Assembly acquiring legislative competence **had not been identified** in the original White Paper, *Better Governance for Wales*³⁵ in 2005, and some MPs were concerned that these clauses were receiving **insufficient scrutiny** in Parliament. For example, during the Report stage of the *Further Education and Training Bill* in July 2007, Don Touhig MP stated:

Mr. Touhig: During Second Reading on 21 May, my right hon. Friend the Member for Torfaen (Mr. Murphy) and I raised concerns about the pre-legislative scrutiny of what is now clause 27. The clause not only transfers responsibility to legislate on further education and training from Parliament to the National Assembly, but makes changes to the devolution settlement in Wales. As I said on Second Reading, **I do not oppose the idea of using framework legislation to transfer power from Parliament to the National Assembly; however, clause 27 is a constitutional change—a change, I hasten to add, that has**

²⁷ Devolution Guidance Note 16 notes that the term, “Measure-making powers” is used by the Welsh Assembly Government but “framework powers” is used by Westminster and Whitehall.

²⁸ [National Assembly for Wales, Assembly Powers Tracking Note, Field 13: National Assembly for Wales](#)

²⁹ National Assembly for Wales, Assembly Powers Tracking Notes webpage

³⁰ [Further Education and Training Act 2007 \(Chapter 25\) s.27](#)

³¹ [Local Government and Public Involvement in Health Act 2007 \(Chapter 28\) s.235.](#)

³² [Planning Act 2008 \(c 29\) s202](#)

³³ [Education and Skills Act \(c25\) s149](#)

³⁴ [Local Transport Act \(c26\) s122](#)

³⁵ [Wales Office, Better Governance for Wales, CM 6582, June 2005.](#)

moved ahead without the full rigour of parliamentary scrutiny and debate. Indeed, the crux of the matter is that we are being asked to give new powers over further education and training to the National Assembly, even though it has not yet completed its consultation about how it would use such powers and has no settled view about what it would do with the powers if it had them.³⁶ [my emphasis]

Mr Touhig expressed his disappointment that the Public Bill Committee had not conducted line-by-line scrutiny of the relevant clause, as indicated by the Minister during the Second Reading Debate, therefore:

In effect, there has been no consideration in detail by Parliament of the merits of transferring a primary law-making power to the National Assembly. I stress that I am not opposed to using framework legislation to transfer responsibility for such matters from Parliament to the National Assembly, but I am wholly opposed to doing it by such a backdoor method.³⁷

When the then Secretary of State for Wales, Rt.Hon. Peter Hain MP, addressed the Welsh Grand Committee on the UK Government's legislative programme in December 2007 he gave an undertaking that:

Subject to demand, Public Bill Committees for Bills with framework powers—and I am grateful for the points put by my right hon. Friends the Members for Torfaen and for Islwyn—will now include at least one Welsh Member and time will be guaranteed to debate Welsh provisions.³⁸

The Shadow Secretary of State for Wales, Cheryl Gillan MP, and the Liberal Democrat spokesman, Roger Williams MP questioned Mr Hain about political balance on Public Bill Committees scrutinising Bills with framework powers. He replied that he could only speak for the Labour Party but other parties were free to make similar arrangements through “the usual channels.”³⁹

When the **Local Government Transport (HL) Bill** was considered by the Public Bill Committee there was one Welsh member on the Committee, Siân E.James MP, the Labour Member for Swansea East. The question was put that the clause stand as part of the Bill. Conservative members opposed the provision on the basis that the powers given were in effect tax-raising powers which went beyond the intentions of the *Government of Wales Act 2006* but the proposal stood.⁴⁰

Two Welsh members, both Labour, were on the Public Bill Committee considering the **Education and Skills Bill**. In the event, the Government amended the Bill in

³⁶ HC Debates, 12 July 2007, c 1690-91

³⁷ Ibid.

³⁸ [HC Debates, Welsh Grand Committee, 12 December 2007. c 8.](#)

³⁹ Ibid.

⁴⁰ [HC Debates, Public Bill Committee on the Local Government Transport \(HL\) Bill \(HL 106\), 8 May 2008, Col.s 374-377](#)

Committee to add further framework powers in respect of education and training.⁴¹

In his letter to Hywel Francis MP about the 2008 review, the Secretary of State said:

For framework powers, the UK Government must continue to provide as much information as possible to aid scrutiny. **We need to apply vigorously the procedures we have put in place.**

I will issue a Written Ministerial Statement immediately after the Queen's Speech drawing any Bills with framework powers to Members' attention. When a Bill containing a framework power is introduced, another written statement will be made informing Members. An Explanatory Memorandum will accompany every framework power. As soon as possible after introduction of a Bill containing a framework power a briefing session led by a Wales Office Minister and an Assembly Government Minister will be held in the relevant House, open to all Members. In the Commons, where there is a demand, at least one Welsh MP will be on every Committee scrutinising a Bill with a framework power. Subject to demand, and agreement by the usual channels, time for debate on a framework power will be guaranteed.

I believe that these arrangements coupled with the usual opportunities to scrutinise a Bill during its passage through Parliament, including public evidence sessions in the Commons, allow for effective scrutiny.⁴² [my emphasis]

7. Devolution Guidance Notes

7.1. *Inter-governmental Relations post Devolution*

From the outset of devolution, when the Scottish Parliament and National Assembly for Wales⁴³ were set up in 1999 (and subsequently the Northern Ireland Assembly), **a framework has evolved for the management of inter-governmental relations.**⁴⁴ The administrative coordinating principles for the UK were set out in a **Memorandum of Understanding (MoU)** in 2001⁴⁵ and in individual administrative concordats agreed between Government Ministers in the devolved administrations and Whitehall.⁴⁶

⁴¹ [HC Debates, Public Bill Committee on the Education and Skills Bill \(HC Bill 12\), 28 February 2008, Cols. 809-10](#)

⁴² Op.Cit., Letter from Secretary of State for Wales to WAC Chair, 21 July 2008.

⁴³ The Agreement was, in fact with the Cabinet of the National Assembly for Wales, although when the MoU was discussed in Plenary on 7 October 1999 the Opposition tried to make it extend to the Assembly as a whole, [RoP, 7 October 1999, p.28](#).

⁴⁴ Laffin M, Thomas A & Webb A, "Intergovernmental Relations after Devolution: The National Assembly for Wales", *The Political Quarterly*, 71(2), 2000. pp.223-233

⁴⁵ Ministry of Justice, Devolution: [Memorandum of Understanding and Supplementary Agreements - Between the United Kingdom Government Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee, Cm. 5240, December 2001](#).

⁴⁶ Welsh Assembly Government, Concordats between the Welsh Assembly Government and the UK Government, webpage.

The MoU is supplemented by agreements on the establishment of a Joint Ministerial Committee (JMC)⁴⁷ and for certain other areas where it is necessary to ensure uniform arrangements for relations between the UK Government and the three devolved administrations. In particular, broadly uniform arrangements need to apply to: handling of matters with an EU dimension; financial assistance to industry; international relations touching on the responsibilities of the devolved administrations; and statistical work across the UK. The MoU states that:

This Memorandum is a statement of political intent, and should not be interpreted as a binding agreement. It does not create legal obligations between the parties. It is intended to be binding in honour only.

However, the flesh has been put on the bones of the inter-governmental relations framework, established in the early days of devolution, by the development of **Devolution Guidance Notes (DGNs)** which have reflected the real life experience of the relationships of the devolved administrations with Whitehall.

These are prepared to assist Whitehall civil servants in dealing with aspects of devolution. The locus of these DGNs has varied over the years but they are currently located within the Ministry for Justice.⁴⁸

The DGNs deal with issues such as Common Arrangements; handling correspondence; the role of the Secretary of State for Wales; Post-devolution primary legislation affecting Wales and the attendance of UK Ministers and Officials at Devolved Legislatures.

In July 2008, new guidance, DGN 16 *Orders in Council under section 95 of the Government of Wales Act 2006*, was published having been developed by the Wales Office and the Welsh Government.⁴⁹

⁴⁷ The JMC had fallen into inactivity since 2002 but has recently been revived with the Rt. Hon. Paul Murphy MP, Secretary of State for Wales taking the lead for the UK Government in its revival. [Wales Office Update Bulletin, Summer 2008](#).

⁴⁸ [Ministry of Justice, Devolution Guidance Notes webpage](#)

⁴⁹ [Ministry of Justice, DGN 16, Orders in Council under section 95 of the Government of Wales Act 2006, July 2008](#).

7.2. *DGN 16 Orders in Council under section 95 of the Government of Wales Act 2006*

DGN 16 is intended to assist UK Government officials involved with **Legislative Competence Orders** by setting out the new legislative arrangements in Wales; setting out the principles to be applied when considering requests for enhanced legislative competence; and, explaining the procedures governing this process.

The initial part of the DGN outlines the role of Legislative Competence Orders as outlined in the *Government of Wales Act 2006* and the effect of amending Schedule 5 to add matters under the Fields listed. It states that “*a matter should be expressed as concisely as possible.*”⁵⁰

The DGN sets out the **guiding principles** which should inform **Whitehall Departments’** consideration of proposals for enhanced legislative competence from the Welsh Government. It states:

In doing so, colleagues should be clear about the reason for the proposal coming forward. Why does the Welsh Assembly Government want the National Assembly to have legislative competence? For example, is there a manifesto pledge or public commitment to seek competence? Is the Welsh Assembly Government currently unable to fulfil its legislative programme and deliver its policy commitments using its existing powers?

Potential measures that the Welsh Assembly Government may wish to bring forward in the short to medium term may prove helpful in gaining this understanding. But the Welsh Assembly Government is not only limited to implementing policies mentioned in Explanatory Memoranda, and departments’ consideration should focus on the appropriateness of the scope and content of proposed Orders rather than the likely detail of any Measures that may be presented to the National Assembly once the Order is made.⁵¹

The DGN says that the Welsh Government has undertaken to consult the UK Government at an early stage in the development of proposed Orders in order “*to facilitate a mutual understanding of their intended scope and their relationship with existing devolved functions.*”⁵²

There is an expectation that proposals for legislative competence will be granted providing the proposed Order meets the following guiding principles:

- **The proposals deepen but do not broaden the settlement** : proposals for legislative competence must relate to one or more of the ‘fields’ listed in Schedule 5 to the 2006 Act, which correspond to policy areas where Welsh Ministers already have executive powers.

⁵⁰ [Ministry of Justice. DGN 16, Orders in Council under section 95 of the Government of Wales Act 2006 , July 2008.](#)

⁵¹ *Ibid.*, para.10

⁵² *Ibid.*, para.11

- **Scope is allowed for policy divergence:** UK Government departments therefore should not normally object to proposals for legislative competence on the grounds that the Welsh Government could pursue policies that differ from England, or because policy divergence could incur criticism of one of the distinct approaches. Provided that the proposal is otherwise consistent with these principles any concerns that conferring legislative competence could lead to policy divergence should be dealt with between Ministers.
- **Ensure the case for powers is made:** UK Departments will want to have an indication of the purpose for which the competence is being sought in order to assist officials to determine whether the scope of the proposed Order is appropriate and advise Ministers on the suitability of devolving competence. The Welsh Government should be able to make the case for the legislative competence it is seeking. The guidance elaborates:

The Welsh Assembly Government might, in some cases, seek powers when its policy is yet to be settled – for instance, where consultations are planned. In such cases, UK Government departments will want to clarify the scope of the policy area for which the Welsh Assembly Government is seeking competence in order to consider fully the case for conferring competence.

- The UK Government will need sufficient information on the broad policy intentions of the Welsh Government in order to gain a clear understanding of the rationale for the scope of the powers being sought. There is an expectation that the Welsh Government will share this information with the UK Government.⁵³

The DGN notes that legislative competence conferred by the Order will be enduring. It should not therefore be the aim to make an Order which is drafted so tightly that it would only allow the delivery of the Welsh Government’s immediate objective. Orders should have sufficient flexibility to allow the delivery of other policy aims in the future within the subject area.⁵⁴

- **Clearly defined scope:** The UK Government will only wish to promote a proposal to Parliament where the scope is clearly understood and disclosed. In particular, there is a need to consider carefully the meaning of key terms used in the proposed Order. In doing so, UK Departments should be mindful of the need to ensure Parliament will have all the information it requires to decide whether or not to confer the legislative competence.

⁵³[Ministry of Justice. DGN 16, Orders in Council under section 95 of the Government of Wales Act 2006, July 2008.](#)

⁵⁴ *Ibid.*, para.21.

- **Appropriate Breadth of Matters:** The 2005 White Paper *Better Governance for Wales* said that when appropriate, matters which are widely drawn may be added into Schedule 5, but Orders should not give the National Assembly powers over the whole of any of the fields listed in Schedule 5 in one go.
- **Ensure coherence of law:** Assembly Measures have to operate within a common England and Wales legal jurisdiction and UK Departments need to consider the impact of enhanced legislative competence on the coherence of law within that jurisdiction. The Wales Office has primary responsibility within the UK Government for ensuring the ongoing coherence of Schedule 5, but Departments should be aware of the potential effects of a particular proposed Order on the Schedule.
- **Respect UK powers and interests:** UK Government Departments should, in considering a proposed Order, also consider the possible impact on non-devolved functions and the potential to inhibit the UK Government's ability to deliver its policy objectives.

The Welsh Government has given a commitment that before it introduces a Measure in the National Assembly, the relevant Welsh Minister will have resolved any issues which may impact on the responsibilities of the UK Government. This is not limited solely to impacts on Minister of the Crown functions. The Welsh Minister will do so in consultation with the Wales Office and other relevant UK Government Departments.

DGN 16 outlines the process for making a Legislative Competence Order, but identifies as the “the first stage” ensuring agreement between the UK Government and Welsh Government on the scope and content of the proposed Order. This is what the WAC Report referred to as “clearance”. The Welsh Government has agreed that it will normally consult the UK Government at an early stage in the development of Legislative Competence Orders and agree the terms of a proposed Order before it is published. Discussions may be in confidence where necessary. The DGN outlines the procedure:

The Welsh Assembly Government's proposed Orders form part of the legislative programme agreed by the Welsh Assembly Government.

Once agreed, the First Minister will write to the Secretary of State for Wales informing him of the programme. Discussions on proposed Orders will normally be initiated by a letter from the lead Welsh Assembly Government Minister to their equivalent UK Government Minister and the Secretary of State for Wales.

The letter will set out the intention to develop an Order, its proposed scope and indicate the timetable for making the Order, within the Welsh Assembly Government's legislative

programme. This letter will initiate engagement between the administrations, enabling the Welsh Assembly Government to address any concerns of the UK Government when drafting the proposed Order. Relevant information should be shared between the two governments to help inform discussions, including drafts of the proposed Order and the Explanatory Memorandum.

The relevant Welsh Assembly Government and UK Government departments should work together to agree the text of the proposed Order at official level. The Wales Office and the Welsh Assembly Government's Constitutional Affairs and Legislation Management Division should be closely engaged in supporting these discussions. The broad framework for managing this stage of the process is set out overleaf.

Once agreement has been reached at official level, firstly the Cabinet of the Welsh Assembly Government and then the UK Government's Cabinet will be asked to agree formally the proposed Order.

The Attorney General will need to agree the proposed Order before UK Cabinet clearance is obtained. To seek the agreement of the UK Cabinet, the Secretary of State for Wales will write to Cabinet colleagues enclosing the proposed Order and its accompanying Explanatory Memorandum. The Memorandum should provide a clear description of the context and rationale for the powers in the short to medium term, for which the powers are sought. This will help Ministers decide the appropriateness of the National Assembly gaining legislative competence in the relevant policy area.⁵⁵

The terms of the draft Order and the legislative process will be dealt with by intergovernmental teams, chaired by a Wales Office official and must include an official from the lead Whitehall department. It may also include nominated representatives from other departments with a policy interest and Wales office officials. On the Welsh Government side, there will be officials from the lead department and from the Constitutional Affairs and Legislation Management Division (CALM). Members of the projects teams are accountable to their respective Ministers.

7.3. Devolution Guidance Note 9: Post-devolution Primary Legislation affecting Wales

DGN 9 on *Post-devolution Primary Legislation affecting Wales*⁵⁶ has been edited to take account of the *Government of Wales Act 2006* and now includes guidance on changing the Assembly's legislative competence by **'framework' provisions** in Parliamentary Bills. It sets out the expectations of the Cabinet Committee on the Legislative Programme (CCLP) in giving effect to this policy and how to manage it to ensure smooth running of the UK Government's legislative programme. CCLP

⁵⁵ [Ministry of Justice. DGN 16, Orders in Council under section 95 of the Government of Wales Act 2006, July 2008.](#)

⁵⁶ [Ministry of Justice, Devolution Guidance Note 9: Post-devolution Primary Legislation affecting Wales](#)

expects devolution issues to be resolved by the time a Bill is brought before it prior to its introduction into Parliament.

The guidance states that:

When primary legislation is prepared by Whitehall Departments, consideration should be given to what arrangements may be required for Wales.

The 2006 Act provides for the Assembly's legislative competence to build up incrementally over time, so in many cases, and particularly in the early years, the Assembly will not have the legislative competence to make its own provision for Wales. It is therefore important for Departments to consult the Wales Office and Welsh Assembly Government about all relevant proposals for primary legislation, so that suitable vehicles can be identified. This is particularly important during the bidding stages, to inform the bid from the Secretary of State for Wales for forthcoming programmes.⁵⁷ [my emphasis]

DGN 9 advises officials, that, as with proposed Legislative Competence Orders, the UK Government will need to agree the appropriateness of conferring such legislative competence, and in particular its scope and limits.

The letter to the relevant Cabinet committee seeking policy clearance for the Bill, therefore, should have an explicit section on Welsh provisions headed "*Framework Powers for Wales – Scope and Limits and Exceptions*". **Framework powers** will have to fit within the scope of the legislative vehicle, and it is not considered appropriate for the scope of a Bill to be widened simply to accommodate the scope of a proposed framework power.

Care should be exercised to ensure that the legislative competence being conferred does not exceed the executive functions Welsh Ministers already have. When seeking policy clearance for a framework power in a Bill, to assist UK Government Ministers in forming a view as to the appropriateness of the National Assembly for Wales having the power the bid needs to be accompanied by an explanatory memorandum giving a clear description of the purpose for which the power is being sought.⁵⁸

Framework powers in Bills will require policy agreement with all relevant Whitehall Departments, as is the case with Legislative Competence Orders. The Wales Office has overall responsibility for managing this process for the UK Government.

Welsh Ministers and the Assembly have executive and legislative competence respectively in certain areas. It therefore follows from the commitment made by the UK Government in the MoU that it will not normally seek to legislate in relation

⁵⁷ Ibid., para.7

⁵⁸ Ibid.15

to those matters without the agreement of the devolved institutions. For the purposes of the Welsh devolution settlement, Parliamentary Bills can include provisions in relation to Wales for a range of purposes. The different purposes are described here, together with the agreements that will normally be required in each different case:

- **Provisions that modify, impose, confer, remove, or otherwise affect functions of Welsh Ministers.** The consent of the Welsh Ministers should be obtained, through normal consultation between the UK and Welsh Government, by the time a Bill is considered by CCLP.
- **Provisions that add to the legislative competence of the Assembly.** The consent of the Welsh Ministers should be obtained, through normal consultation between UK and Welsh Governments by the time a Bill is considered by LP. The consent of the National Assembly for Wales is not required.
- **Provisions that have a negative effect on the legislative competence of the Assembly or which is on matters within the legislative competence of the Assembly.** The Welsh Ministers will need to obtain the consent of the Assembly. By the time a Bill is considered by CCLP agreement must be reached with Welsh Ministers to promote the relevant motion in the National Assembly for Wales as soon as possible after introduction. In the event that the motion was not passed in the National Assembly, the UK Government would, subject to collective agreement being secured, need to table an appropriate amendment removing the relevant provisions before the Bill reaches its final stage in the House of introduction. The Welsh Ministers will need to have regard to these timing requirements in tabling their motion. The same will apply if any significant amendments are made to the relevant provisions during a Bill's passage. The Wales Office will work with the Welsh Government to facilitate any consents required.
- **Provisions within the Assembly's legislative competence which are purely supplementary, consequential, incidental, transitional, transitory or saving provisions relating to provisions on non devolved matters.** The Welsh Ministers should be consulted, but consent is not required. Departments should consult the Wales Office for a view on whether provisions fall into this category.
- **These consent requirements also apply where UK Ministers have the power to amend primary legislation by Order and it is proposed to make an Order which would have any of the effects set out in the four bullet points above.** Constraints and restrictions are not normally placed on the scope of order making powers in the primary legislation which is conferring

those powers, nor may it be possible to assess in advance when Orders made under such powers would fall within the ambit of this guidance note. Therefore, when UK Ministers are proposing to make such an Order, they will be expected to have regard to ensuring that the policy commitments set out here are observed in those Orders as they would be in primary legislation. Where a Bill would confer wide-ranging powers on UK Ministers to amend primary legislation by Order, Departments should pay particular attention to how those provisions would interact with the functions of Welsh Ministers and the legislative competence of the National Assembly.⁵⁹

⁵⁹ Ibid. para.17

Annex 1: Progress of Legislative Competence Orders and Measures (February 2010)⁶⁰

Government-proposed Legislative Competence Orders

14 Government-proposed Legislative Competence Orders have been introduced so far. Of these, eight have completed their progress.

Legislative Competence Order	Introduced	Status
<u>Education and training</u>	June 2007	Completed (Royal approval received April 2008)
<u>Environmental protection and waste management</u>	June 2007	Completed (Royal approval received February 2010)
<u>Vulnerable children</u>	July 2007	Completed (Royal approval received December 2008)
<u>Domiciliary care</u>	November 2007	Completed (Royal approval received July 2008)
<u>Affordable housing</u>	December 2007	Approved by the Assembly only (January 2009). Superseded by Sustainable Homes Order (see below)
<u>Red meat industry</u>	September 2008	Completed (Royal approval received July 2009)
<u>Carers</u>	December 2008	Completed (Royal approval received November 2009)
<u>Exceptions to matters</u>	June 2009	Completed (Royal approval received November 2009)

⁶⁰ National Assembly for Wales, Progress of Legislation web page.

<u>Welsh language</u>	February 2009	Completed (Royal approval received February 2010)
<u>Culture</u>	June 2009	Pre-legislative scrutiny by Assembly Committee, House of Commons' Welsh Affairs Committee and House of Lords' Constitution Committee
<u>Local government</u>	July 2009	Approved by the Assembly (February 2010), has yet to be approved by Parliament
<u>School governance</u>	October 2009	Pre-legislative scrutiny by Assembly Committee, House of Commons' Welsh Affairs Committee and House of Lords' Constitution Committee
<u>Sustainable homes</u>	November 2009	Pre-legislative scrutiny by Assembly Committee, House of Commons' Welsh Affairs Committee and House of Lords' Constitution Committee
<u>Transport</u>	December 2009	Pre-legislative scrutiny by Assembly Committee, House of Commons' Welsh Affairs Committee and House of Lords' Constitution Committee

Member-proposed Legislative Competence Orders

Two Member-proposed Legislative Competence Orders have been introduced so far. Of these, one has completed its progress.

Legislative Competence Order	Introduced	Status
<u>Provision of mental health</u>	February 2008	Completed (Royal approval received

<u>services</u>		February 2010)
<u>Domestic fire safety</u>	February 2008	Approved by the Assembly (January 2010), has yet to be approved by Parliament
<u>Provision of bus and coach services</u>	Not yet introduced	Assembly grants leave to introduce the proposed Legislative Competence Order (April 2008)
<u>Displaying of national flags and motifs on vehicle registration plates</u>	Not yet introduced	Assembly grants leave to introduce the proposed Legislative Competence Order (October 2008)
<u>Hard surfaces</u>	Not yet introduced	Assembly grants leave to introduce the proposed Legislative Competence Order (July 2009)
<u>Preferential parking scheme</u>	-	Assembly refuses leave to introduce the proposed Legislative Competence Order (December 2009)
<u>Carers</u>	-	Withdrawn (December 2008). The Welsh Government brought forward its own Legislative Competence Order covering these areas.
<u>Local government electoral arrangements</u>	-	Assembly refuses leave to introduce the proposed Legislative Competence Order (June 2008). Will not progress further.
<u>Official language status</u>	-	Assembly refuses leave to introduce the proposed Legislative Competence Order (December 2008). Will not progress further.
<u>Major development travel</u>	-	Assembly refuses leave to introduce the proposed Legislative Competence Order

<u>plans</u>		(March 2009). Will not progress further.
--------------	--	--

Committee-proposed Legislative Competence Orders

One Committee-proposed Legislative Competence Order has been introduced so far. None have yet completed their progress.

Legislative Competence Order	Introduced	Status
<u>Highways and transport</u>	June 2009	Committee to prepare Draft Legislative Competence Order.

