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## **The Government of Wales Act 2006: Welsh Devolution Still a Process and Not an Event?**

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## **Summary**

Following the Assembly Elections in May 2007 Wales moved into a new area in its devolutionary settlement with a change of government and new legislation - the Government of Wales Act 2006. The Act is designed to revise fundamentally the Government of Wales Act 1998. Critics at the time predicted that executive devolution would be unlikely to be stable and would lead to "catch up" devolution with more privileged nations such as Scotland. Hence the second phase of Welsh devolution in which a Westminster model of Government is introduced as well as enhanced legislative powers for the National Assembly for Wales, including powers for the Assembly to be given legislative competence by Order in Council to make law in certain of the devolved fields, as an interim stage towards achieving full legislative devolution following a referendum. This paper argues that the Government of Wales Act 2006 has not conclusively settled the constitutional issues of asymmetrical devolution, such as the distribution of power between London and Cardiff; the role of the Secretary of State; the clarity and transparency of Welsh governance; and the question of how long these interim arrangements will last before Wales gains legislative devolution.

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## (Heading) **Introduction**

One of “New Labour’s” first acts when it took office in 1997 was to introduce proposals for a Scottish Parliament and a Welsh and Northern Ireland Assembly. This followed on from its Election Manifesto of 1997:

(Indent) Subsidiarity is as sound a principle in Britain as it is in Europe. Our proposal is for devolution not federation. A sovereign Westminster Parliament will devolve power to Scotland and Wales. The union will be strengthened and the threat of separatism removed." (Labour Party 1997) Endent)

The devolution legislation was part of New Labour’s programme of modernisation of the constitution (Forman 2002, Morrison 2001) and deconcentration of power (Hopkins 2002, p 30). Devolution is also significant in taking the UK from a unitary or union state model to one that can better be described as quasi-federal (Bogdanor 2003). Devolution could also be seen, in part, as a manifestation of the European notion of subsidiarity bringing the state closer to its citizens and bridging the democratic deficit (Dardanelli 2007). However “Precisely what influence Europe had in promoting subsidiarity within the state is difficult to quantify; eighteen years of Conservative centralisation had caused bitter resentment and not only in Scotland and Wales but in the English regions. But events in Europe certainly informed the background.” (Birkinshaw 2003, p 228, and see Himsworth 2007). Most of the political drivers of devolution were historical and designed to deal with the issue of the rise of nationalist parties, in the Celtic nations of the UK.

In the end devolution was a gamble. It was clearly designed as a strategy to head off moves, particularly in Scotland, towards full independence within Europe. Experience from other European nations, such as Spain, indicates that, over time, a strategy of quasi-autonomous regions can well succeed, albeit at the expense of some internal instability as the less privileged regions attempt “catch-up” politics (Brighty 1999).

### **(Heading) Impact on the UK Constitution - devolution and sovereignty**

Devolution has been defined as "the delegation of central government powers without the relinquishment of sovereignty" (Kilbrandon Report 1973, para 543); New Labour sought to implement devolution, while retaining the traditional constitutional vocabulary of Westminster sovereignty:

(Indent) “The UK’s constitutional system continues to rest upon the sovereignty of the UK Parliament, and the regional level only obtains constitutional legitimacy from the largesse of this institution. In theory, therefore, the generosity of the UK Parliament could be rescinded at any time, while in Europe most systems of federal or regional government are enshrined in the national constitution.” (Hopkins 2002, p 18) (Endent)

But as most public lawyers appreciate, there is a big difference between constitutional theory and the realities of political power. Devolution was introduced by referendums in Scotland, Ireland and Wales, which makes the devolutionary settlement politically, if not constitutionally, entrenched so that in practice Westminster may not be able to reverse it except under pathological circumstances as in the case of Northern Ireland (Hadfield 2003).

The UK’s devolved institutions are immature, dating mainly from 1998, and lacking the benefit of constitutional guarantees backed up by a constitutional court (Birkinshaw 2003, p

245). Up to 3 May 2007 with a Labour administration in Westminster and Labour-dominated governments in Scotland and Wales, relations between the devolved bodies and the central government were relatively good. However goodwill is not a stable basis to manage future constitutional tensions which might well arise following the May elections and the establishment of a Scottish National Party minority administration in Scotland and a Labour - Plaid Cymru administration in Wales. Such constitutional tensions would present the first real test of the political and legal architecture of devolution.

This raises the question of just how Westminster governs post-devolution. We need to briefly consider four issues - co-ordination with Westminster, the devolved governments and the EU, finance and the role of the courts.

The main political techniques for dealing with post-devolution governance, including conflicts between Westminster and the devolved administrations, are through Memorandums of Understanding and Concordats between the Westminster Government and the three devolved administrations (Scott 2001), with a Joint Ministerial Committee theoretically on hand to arbitrate on unresolved issues (Trench 2004). In addition there are bilateral concordats between individual devolved administrations and individual Whitehall Departments. Because so much of the way that intergovernmental relations are managed is deliberately political rather than legal, power remains in the hands of UK Government Ministers. These informal political relationships have worked in the past because there have been administrations of a similar political colour in Westminster and the devolved governments. However "The results of elections across the devolved administrations this year have highlighted the need for sound

formal mechanisms for the governments of the United Kingdom to work together." (Scottish Executive, 2007).

As far as relations between the devolved governments and the EU are concerned, again the real issues will only become apparent when the governments in Westminster and Edinburgh, Cardiff and Belfast diverge as they have since May 2007. At present any standing in European institutions is based on Concordats that are, as we have seen, non-legally binding arrangements between the Westminster government and the devolved governments:

(Indent) "The devolution Acts make two things abundantly clear. First, the devolved units have responsibility for the implementation of European obligations, to the extent that they fall within their spheres of responsibility. Secondly, the formal responsibility for international and European affairs lies exclusively in the hands of Whitehall and Westminster. In all cases, such affairs are reserved. However ... the devolved institutions have been given access to the UK's European decision-making process. Relevant ministers representing the devolved institutions will also be permitted to attend the Council of Ministers as part of the UK delegation and, in exceptional cases, to lead it. However, all these measures remain based purely upon Whitehall's largesse ... Such largesse could be withdrawn." (Hopkins 2003 p. 209) (Endent)

As far as finance is concerned, most of the money for the devolved regimes comes in the form of a block grant from Westminster. The amounts are based on the so-called Barnett Formula allowing for greater public expenditure per head in the devolved nations than in England (Heald & McLeod 2002). In addition the devolved administrations are only able to borrow with the consent of the Secretary of State (Hopkins 2002, p 243). The real issue, therefore, is that finance is under UK Treasury control so:

(Indent) "Should the political will of the UK and the devolved institutions vary significantly, this may prove a potentially disastrous situation for the devolved authorities. It will take a very



restrained UK Government to refrain from pulling on these financial levers if and when the devolved institutions step out of line." (Hopkins 2002, p 228). (Endent)

Finally, if political means fail it may be that the courts would be called upon to decide disputes between the Westminster and the devolved governments, bringing the judiciary into the political arena. As Bogdanor said when writing of the Scotland Act:

(Indent) "The Scotland Act not only in effect distributes powers. It also introduces a judicial element into the determination of that distribution. It therefore provides for an enacted constitution establishing a quasi-federal system of government and in effect a constitutional court to interpret the distribution of powers. Moreover the Scotland Act will in effect supersede the supremacy of Parliament, since Parliament will not in practice be able to alter its provisions without the consent of the Scottish Parliament. It would be difficult to imagine a greater constitutional revolution in the government of the United Kingdom." (Bogdanor 1999, p 294) (Endent)

### **(Heading) Asymmetrical devolution**

Perhaps the theory which best describes the government's devolutionary principle is that of 'asymmetrical' constitutional reform. "...it is not intended to set up a federal system in which power is divided nor a symmetrical system in which equal amounts of power are devolved to all the component parts." (Select Committee on Scottish Affairs 1998, para 17). Robert Hazell sees the UK as a union state, as opposed to a federation or a unitary state (Hazell 1998, p 51). A union state, unlike a unitary state, is able to tolerate some difference in the way that the different constituent nations are governed.

Asymmetrical devolution is presented by New Labour as a virtue of the UK constitution. The absence of uniformity is seen as a sign, not of fragmentation and incoherence, but of vitality

and positive diversity. The previous Lord Chancellor and architect of devolution, Lord Irvine, described the Government's approach as 'pragmatism based on principle':

(Indent) "It would be extraordinary if a Union of such diverse parts as the United Kingdom could yield to a uniform pattern of powers devolved from the centre. The continued harmony of a Union of parts so diverse requires structures sensitive to place and people, not uniform structures imposed for uniformity's sake. Intellectually satisfying neatness and tidiness is not the cement which makes new constitutional arrangements stick. What sticks are the arrangements to which people can give their continuing consent because they satisfy their democratic desires for themselves." (Lord Irvine 1998, p 3) (Endent)

New Labour's first wave of constitutional reform proposals – devolution, the Human Rights Act, House of Lords reform and reform of the office of Lord Chancellor - are extensive.

However "The reforms were not announced as part of a grand new constitutional settlement but have emerged piecemeal, with solutions being tailored to particular circumstances and pressures. This has led to the criticism that there is no overall design or direction to the reforms and many anomalies that will have to be dealt with at some time in the future."

(Gamble 2006, p 28). Soon after becoming Prime Minister Gordon Brown and his Lord Chancellor announced a second wave of constitutional reform (Secretary of State for Justice 2007). The *Governance of Britain* White Paper rejects any desire to set out a final blueprint for our constitutional settlement, but does make a number of proposals to limit the power of the executive and make the executive more accountable. It has very little, just 4 paragraphs, to say about devolution (Secretary of State for Justice 2007, paras 141 - 144).

One of the main issues, then, is whether 'New Labour's' programme of constitutional reform is coherent and can produce constitutional change with stability. Some critics ask whether New Labour's constitutional reform programme really tackles the real issues confronting governance in the twenty first century (Morison 1998) and to what extent it contributes to the

hollowing out of the state thesis (Rhodes 1994). Whilst the government and its critics have different views on the issue of *ad hocism*, there should be no doubt of their lasting significance:

(Indent) "A highly centralised system of government is being replaced by a form of quasi-federalism; this and other changes will lead to more checks and balances on the UK executive; parliamentary sovereignty is likely to be further eroded; there will be a tighter rule of law, with a shift of power to the courts; and our majoritarian, two-party system will be replaced by more pluralist forms of democracy." (Hazell & Sinclair 1999, p 161) (Endent)

A number of issues, therefore, have been thrown up by asymmetrical devolution. But for the purpose of this article we are going to concentrate on the Welsh question.

### **(Heading) Devolution Mark 1 - The Government of Wales Act 1998**

Wales has in legal terms been completely integrated with England since 1536 (Williams 1991). Since 1964 it had a separate department of the central executive, The Welsh Office, (since 1999 the Wales Office) responsible for internal, social and economic affairs with a Secretary of State who is a member of the Cabinet. The Welsh language is promoted by the Welsh Language Acts 1967 and 1993.

Within months of returning to office in 1997, Labour published its White Paper *A Voice for Wales* (White Paper 1997). The Government's proposals provided for executive devolution for Wales. A referendum was held on Thursday 18 September 1997. Unlike in Scotland there was no real popular pressure for devolution and the Welsh Labour Party was split on the subject. As a result of these political factors the vote was agonisingly close. 50.3% voted in favour of devolution, with 49.7% against, on a turn out of 50.1%.

The Government of Wales Act (GWA) received the Royal Assent in 1998. The members of the first National Assembly were elected in May 1999. The National Assembly for Wales comprises 60 members. The majority (40) are constituency members elected by the traditional first past the post system. There is also a number (20) of list members elected by the additional member system from closed party lists in five regions in order to introduce proportionality into the Assembly. The National Assembly assumed the responsibilities and budget of the Welsh Office (local government, health, education, agriculture, transport, etc.) with other governmental functions reserved to Westminster. Initially Westminster favoured a committee or local government model as opposed to a Cabinet model of government although this was to change to a hybrid model as the GWA was drafted (Rawlings 1998, p 479).

The Constitution Unit commented that the GWA "does not represent a properly thought out logical position, nor a particularly practical set of proposals ... Executive devolution is unlikely to be stable or long lasting." (Constitution Unit 1997) It was always predictable that the experience of executive devolution and the unfavourable comparison with Scotland would lead the Welsh Assembly to demand legislative devolution in the future. In Ron Davies' famous phrase "Devolution is a process not an event." (Davies 1999)

The Constitution Unit's prediction proved to be all too accurate. The process of implementing executive devolution in Wales on the basis of a transfer of power from the Welsh Office to the Assembly proved legally and constitutionally complex (see Rawlings 2001, Navarro & Lambert 2005); the division of legislative scrutiny between Westminster and Cardiff led to anomalies; and "the absence of a formal separation of powers led to a gap between the

commonsense perception that Wales had a legislature and an executive, and the constitutional reality that it had a single Assembly seeking to combine both roles.” (Bowers & Gay 2005, p 7).

### **(Sub-heading) The Richard Commission**

In 2002 the First Minister established a *Commission on the Powers and Electoral Arrangements of the National Assembly for Wales* (the Richard Commission, 2004). The main recommendation was that the Assembly was to be given primary legislative competence, similar but not identical to Scotland, by 2011. In the meantime there should be an expansion of the ability of the Assembly to make secondary legislation independently of Westminster:

(Indent) “The Commission concluded that the Welsh Assembly Government should be able to carry through its programme ‘without needing to rely on the willingness, legislative capacity and timetable of the Government at Westminster.’ (Richard Report, 256) ... The case for change rested not only on the limitations of the existing settlement, but also on the legislative and regulatory experience the Assembly had gained in the first four years.” (Jones & Williams 2005, p. 648). (Endent)

The Report also recommended restructuring the National Assembly to introduce a more traditional separation of powers with an executive and a legislature. In order to provide proper accountability and to service such a structure the Assembly membership should be increased from 60 to 80; these Assembly Members should to be elected by the Single Transferable Vote (STV) system, which would ensure that there was only one, as opposed to two types of Assembly Member.

### **(Sub-heading) Better Governance for Wales**

In 2005 Labour's General Election Manifesto promised:

(Indend) "In Wales we will develop democratic devolution by creating a stronger Assembly with enhanced legislative powers and a reformed structure and electoral system to make the exercise of Assembly responsibilities clearer and more accountable to the public." (Labour Party 2005, p 108). (Endent)

Following the election the Government produced the White Paper *Better Governance for Wales* (White Paper 2005). The Government agreed with the Richard Report that there should be a formal separation between the executive and legislature; on legislation the Government argued " ... there is at present no consensus in Wales for a move to full law making powers for the Assembly along the lines of the Scottish Parliament model. The Government therefore proposes a more gradual, staged move towards greater legislative powers." (White Paper 2005, para 3.8); finally on the electoral system, it ignored the Richard proposal for an 80 member Assembly based on the STV system, whilst proposing to "prevent individuals from simultaneously being candidates in constituency elections and being eligible for election from party lists," (White Paper 2005, para 4.4).

### **(Heading) Devolution Mark 2 - The Government of Wales Act 2006**

The Government of Wales Bill was introduced into Parliament on 8 December 2005 and received the Royal Assent on 25 July 2006. In broad terms it implemented the White Paper

proposals. Most of the Act came into force following the Welsh Assembly elections in May 2007.

### **(Sub- heading) Restructuring the National Assembly**

The one area where there was total agreement between Richard and the Government was in relation to the creation of a Westminster model of government with a separation of powers. The National Assembly for Wales as constituted by the GWA 1998 was a body corporate on then local government lines with no separation between the executive and the legislature. This pleased nobody, and, as early as 2002 the Assembly signalled its desire to emulate the Scottish model of devolution by delegating most of its power to the First Minister and other Ministers. Even so this form of de facto quasi-Westminster government lacked transparency and accountability to the public (White Paper 2005, para 2.4). “The Richard Commission concluded ... that Ministers’ membership of subject committees had inhibited the exercise of an effective scrutiny function, and that a culture of scrutiny on parliamentary lines had failed to develop.” (White Paper 2005, para 2.14).

Hence the Act establishes the Welsh Assembly Government (WAG) (the executive) (Part 2) and the National Assembly for Wales (the legislature) (Part 1) as separate legal bodies. Most of the powers of the old National Assembly are transferred to the Assembly Government. The Act creates a First Minister who is appointed by the Queen on the nomination of the Assembly (ss 46 - 47). The First Minister then appoints Welsh Ministers (s 48) and Deputy Welsh Ministers (s 50) up to a statutory limit of 12 (s. 51). The Assembly Government is advised by a Welsh Law Officer, called the Counsel General to the Welsh Assembly Government, who is

part of the Government (s 49). Welsh Ministers take over the powers of the old Assembly in relation to partnership working, the promotion of local government, the voluntary sector, business, sustainable development, equal opportunities and the Welsh language (ss 72 – 79).

The National Assembly for Wales is made up of the 60 Assembly Members (AMs ) whose role is that of scrutiny – of the executive, policy and the budget – and, to an extent, law making. Ministers are removed from Assembly Subject Committees as part of the move to establish a separation of powers. This, and other changes made by the GWA 2006 to the organisation of business required a revision of Assembly Standing Orders. These were drawn up by the Standing Orders Committee of the Assembly, unanimously agreed by the Assembly in February 2007, and made by the Secretary of State in accordance with paragraph 20 of the GWA 2006, Schedule 11. Subsequent changes to standing orders can be made by a two-thirds majority of AMs.

The GWA 2006 establishes a Presiding Officer and Deputy who act as the Speaker of the Assembly (s 25). The Presiding Officer and four AMs from different political parties form a new corporate body – the National Assembly for Wales Commission - that has the power to employ staff to service the Assembly, hold property and make contracts (s 27 and Schedule 2). There is to be a Welsh Seal (section 116). Finance comes from a new Welsh Consolidated Fund into which the Welsh block grant calculated according to the Barnett formula will be paid(s. 117); payments from the fund are made by the Auditor General for Wales pursuant to budget motions approved by the Assembly (s 145 and Schedule 8). The Assembly Government is serviced by members of the Home Civil Service, whilst the Assembly is



supported by the Assembly Commission. This ends the previous practice of the same civil servants supporting both the executive and the legislature.

**(Sub-heading) Reforming electoral arrangements**

The Act makes three changes to the current electoral arrangements. First of all, it modifies the additional member system by ending the practice of dual candidacy – where candidates for the Assembly could stand as in both the constituency section and also as part of a party list (s 7). This provision was designed to end the so-called “Clwyd West” question where in the 2003 election three of the candidates in the constituency section managed to turn defeat into victory by virtue of the regional party list system (White Paper 2005, para 4.5), and to clarify the relationship between constituency and regional members. From May 2007 candidates have to decide to stand in either the constituency section or the regional section but not both. In Parliamentary debates the dual candidacy issue was the source of particular controversy amongst opposition parties who stood to lose most from the change. Both Rawlings (Rawlings 2005) and Trench (Trench 2005) believe that the Richard proposals would have dealt better with the anomalies inherent in the Additional Member system.

The second change was to provide for extraordinary general elections (s. 5) between ordinary general elections to deal with a situation where it was impossible to form a government that enjoyed the confidence of the Assembly or to nominate a First Minister. The triggers for an extraordinary general election are a two-thirds majority (or at least 40 votes) in the Assembly voting for dissolution or the failure to appoint a First Minister within 28 days of a general election. Following the general election of 3 May 2007 the 28 day period ended on 30 May. It

was only in the last week of this period, on 25 May, that Rhodri Morgan was nominated as the new First Minister of the Third Assembly and appointed by the Queen.

The third change in electoral arrangements was to allow the Assembly Commission to devote resources, either directly or indirectly through others such as the Electoral Commission, to promote awareness of devolution and encourage participation in elections (Schedule 2, paras 5 and 6). This power was designed to increase turnout in Assembly elections.

**(Sub-heading) Increasing legislative powers.**

The White Paper had set out a three-stage approach to the issue of the Assembly's legislative powers. Stage One was a commitment on the part of the Government to enhance the use of framework legislation. Stage Two enables Her Majesty in Council to transfer to the Assembly enhanced powers to legislate within specific current competences. Stage Three provides for the move to full legislative devolution following a referendum.

**(Sub-sub-heading) Stage One - Framework Powers**

Stage One did not require new legislation - what was lacking was a willingness in Whitehall to use the existing powers provided by the GWA 1998. Although Welsh devolution has been described as executive devolution this description was to an extent misleading as it was always envisaged that the National Assembly would have scope to be able to make secondary legislation deciding the detail of how the general principles of primary legislation might be applied in Wales (Jones & Williams 2005, p. 649). What happened in practice was an uneven

application of those powers. Some Whitehall departments, such as health and education, took the GWA 1998 seriously, others less so. The implementation of framework powers was a critical part of the Richard proposals.

In the White Paper the commitment was made that the “Government intends immediately in drafting primary legislation relating to Wales, to delegate to the Assembly maximum discretion in making its own provisions, using its secondary legislative powers.” (White Paper 2005, para 1.24). Two Acts containing framework powers soon followed – the Education and Inspections Act 2006 and the NHS Redress Act 2006.

Following Stage One the GWA 2006 provides powers to enhance the legislative role of the Assembly in two steps. Part Three of the GWA establishes the Orders in Council procedure and Part Four makes provision for full legislative competence following a referendum. Stage Two was never part of a Richard agenda that envisaged a much faster move to legislative devolution on the lines of the Scottish Parliament.

### **(Sub-sub-heading) Stage Two - Legislative Competence Orders**

(Indent) “Part 3 does represent not a fundamental change to the current devolution settlement, but rather a development of the settlement that will make it easier for the Assembly to deliver for the people of Wales. Just as at present, it would be for Parliament to determine what additional powers the Assembly may require. While the Assembly would be given greater discretion over the detail of Welsh legislation, Parliament will remain in charge. The development of the devolution settlement will help the Assembly break through the legislative logjam at Westminster. The Assembly has to wait for many years in many cases for its requests for primary legislation to be met. This has been the case even with non-controversial legislation such as the Bill to create a single public services ombudsman for Wales. “(Lord Evans 2006, col. 265) (Endent)

Part Three of the GWA 2006 allows Parliament by Order in Council under s 95 of the GWA to devolve to the Assembly the power to make law in relation to specific “Matters” within the twenty devolved “Fields” (see Annex 1). These fields are listed in Schedule 5, Part 1 of the GWA 2006. They are subject to restrictions laid down in Part 2 of Schedule 5 and qualified by exceptions to the restrictions in Part 3. Once a Legislative Competence Order (LCO) has been made inserting a new matter in a field the Assembly will be able to make laws known as Assembly Measures (s 93). The Part III LCO procedure is therefore a dynamic one. Prior to May 2007 there were only a handful of Matters specified in Schedule 5. After May 2007 new Matters can be added amending Schedule 5 either through the LCO procedure or through an Act of Parliament. The same procedure can be used to add new Fields to Schedule 5 or to amend Part 2 or Part 3. In this way the powers of the Assembly will accumulate over time. Given the dynamic nature of the Assembly’s legislative competence it is vital that there is an up to date version of Schedule 5 on the Assembly website (see [http://www.assemblywales.org/schedule\\_5\\_consolidated\\_list.pdf](http://www.assemblywales.org/schedule_5_consolidated_list.pdf)).

The best way to explain Part 3 is by taking the above example of the Public Services Ombudsman (Wales) Act 2005. This only came into law after waiting in a legislative queue in Westminster. Had Part 3 of the GWA 2006 been in force the Assembly could have asked Parliament for a LCO to extend Schedule 5 allowing the Assembly to create a Public Services Ombudsman. Providing the Welsh Secretary and both Parliament and the Assembly agreed then the Assembly could have gone ahead and created the necessary Assembly Measure.

The White Paper gives examples of potential LCOs: “The first could relate to something very specific, such as the functions of the Ombudsman in Wales. The second could relate to a much

broader issue, such as the protection and welfare of children, described as a “limited policy area, but one cutting across a range of the Assembly’s functions, such as education, local government and social care.” The third could relate to something much wider, such as the structure of the NHS in Wales.” (Bowers & Gay: 2005:19). However the Government’s clear intention is that Parliament would not transfer powers to the Assembly to pass Assembly Measures over a whole field or competence (White Paper 2005, para 3.18).

The following description of the process for making Assembly Measures by the new Part III procedure is based on the GWA 2006, the new Assembly Standing Orders, and the Report the Welsh Affairs Committee (Welsh Affairs Committee 2007a). Essentially the process involves a number of stages (see Annex 2). The first stage involves initiating a proposed LCO. Orders may be initiated by an individual AM following a ballot, an Assembly Committee or by the Welsh Assembly Government. It was not envisaged that there will be more than four or five such requests per year and the process is likely to last between three and six months (Welsh Affairs Committee 2007a, para 44). In fact when the First Minister announced his legislative programme for the year in June 2007 he proposed 6 LCOs and three Measures.

The second stage is pre-legislative scrutiny of the proposed LCO by both the Assembly and Parliament. In the Assembly once a proposed LCO is laid it will normally go for detailed consideration to an Assembly committee which will carry out pre-legislative scrutiny and report their findings to the Assembly. There will then be an opportunity to amend the proposed LCO.

Pre-legislative scrutiny in Parliament is not laid down in the legislation, and is therefore a matter for Parliament, but would involve the Welsh Affairs Select Committee possibly jointly with the relevant Assembly Committee. Normally Parliament will be happy to delegate pre-legislative scrutiny to the Welsh Affairs Select Committee or an *ad hoc* committee, but in the case of more complex or contentious proposals scrutiny may also be carried out by the Welsh Grand Committee consisting of all Welsh MPs. It is envisaged that scrutiny by the House of Lords Constitution Committee would be concurrent and would complement rather duplicate the work of the Commons (Welsh Affairs Committee 2007a).

The draft LCO will be accompanied by an Explanatory Memorandum setting out the policy of the provision. Scrutiny of the draft LCO at the pre-legislative stage will include whether the matter is within the competence of the Assembly (section 94 and Parts 2 and 3 of Schedule 5) and the “appropriateness” of the Order. The test of appropriateness is based on the White Paper:

(Indent) “This consideration [of draft Orders] could be informed by understanding the use the Assembly might propose to make of these powers in the immediate future. However, as the power would be a general and continuing one for that particular policy area, this would serve only as an example of what could be done; the issue for the Committees and for each House would be the appropriateness in general of delegating legislative authority to the Assembly on the particular policy area specified in the draft Order in Council.” (White Paper 2005, para 3.21). (Endent)

Stage three follows pre-legislative scrutiny and is broken into sub-stages – the approval of a draft LCO by the Assembly, the Secretary of State’s consideration of the request for a proposed LCO, and the approval of a final draft LCO by Parliament. At this stage a final draft Order will be drawn up for approval by the Assembly along with an Explanatory Memorandum setting out how recommendations by committees of Parliament and the

Assembly at the pre-legislative stage have been taken into account. The Assembly can approve or reject the draft LCO but cannot amend it. If it is approved the First Minister must notify the Secretary of State for Wales. The Secretary of State then has sixty days either to lay the draft final Order before both Houses of Parliament or if he vetoes it, he must give his reasons in writing to the First Minister (section 95 (7)).

If the Secretary of State lays the draft final Order the matter is passed to Parliament who decides whether to grant the power by the affirmative resolution procedure. If approved by both Houses the Order is passed to the Privy Council for the Queen to make the Order. Once the Order is made a new Matter is inserted in one of the Fields in the GWA 2006 Schedule 5 and the Assembly has gained a new legislative competence.

Once a LCO has been made a Measure is introduced into the Assembly with a 'statement of legislative competence' by the Presiding Officer and an Explanatory Memorandum. The Measure is considered using a four stage process. Stage 1 involves the agreement of the general principles of the Measure in Committee. The Committee produces a report and can propose amendments. The Committee's report is then considered in the Assembly and if the Assembly agrees the general principles of the Measure it passes to Stage 2. At this stage there is detailed consideration in Committee of the Measure and any amendments. Stage 2 is completed when all amendments are dealt with. At Stage 3 the Assembly considers the amendments made by the Committee and any other amendments made by AMs. Once all the amendments are dealt with Stage 4 takes place in which the Assembly votes on whether or not to approve the final text of the Measure (APS Procedures Unit 2007, para 5.15).

As in Scotland there is provision for a post-enactment re-consideration stage if there is an issue about whether the Assembly had the competence to make the Measure. The Attorney General or the Counsel General can initiate judicial scrutiny on competence (s. 99). At present the jurisdiction belongs to the Judicial Committee of the Privy Council, but it will transfer to the new Supreme Court of the United Kingdom once this comes into being. (Henceforth references are to the Supreme Court). At the end of the Assembly stages of a Measure there is a four week “cooling-off” period before the Measure is presented to the Queen in Council. During this period either the Attorney General or the Counsel General may refer the proposed Measure to the Supreme Court to consider whether it is within the powers of the Assembly.

Similarly within the four-week period the Secretary of State may order the Clerk of the Assembly not to submit it to the Queen in Council, if the Secretary of State has reasonable grounds to believe that its provisions are: incompatible with international obligations or the interests of defence or national security; or might have a serious adverse effect on water resources, water supply or water quality in England; or would have an adverse effect on the operation of the law as it applies to England; or on non-transferred matters (s 101). Once the Assembly Measure has been passed the Clerk may submit it to Privy Council providing s/he has been notified by the Secretary of State that s/he does not intend to use section 101 powers and by the Attorney General and the Counsel General that they do not intend to make a reference to the Supreme Court.

The Assembly may reconsider a proposed Measure if it is ruled *ultra vires* by the Supreme Court, or if there has been a reference to the European Court of Justice, or if the Secretary of State has intervened under section 101 (s 98(6)).



Finally, given that sovereignty is retained at Westminster and the Westminster Parliament reserves the right to legislate on devolved matters in Wales (ss 93 (5) and 107 (5)) there will have to develop something akin to the Sewel, or legislative consent convention, whereby Westminster has a statutory right to legislate for the devolved institutions but, by convention, only does so with the consent of those institutions (Page & Batty 2002, Wintrobe 2005). The UK government has signalled that it would expect that the legislative consent convention would normally apply to Wales (Devolution Guidance Note 9 2007).

There are still outstanding issues in relation to Part Three. Firstly, whether legislative competence will mainly be granted by the LCO procedure or by Act of Parliament? In its response to the Welsh Affairs Committee the UK Government stated that:

(Indent) "...the Order in Council procedure will be of particular relevance, where there is no suitable Bill in the Government's programme to which the required Welsh provisions could be attached, and no time for a Wales-only Bill given other legislative priorities. Where there are UK Bills which provide a suitable legislative vehicle to deliver framework powers to the National Assembly, it is the Government's view that it is entirely appropriate to do so, not least for the efficient utilisation of legislative capacity. (Welsh Affairs Committee 2007b). (Endent)

The concern of the Welsh Affairs Committee was that framework powers would receive less detailed scrutiny than LCOs. Secondly, how well the scrutiny mechanisms will work. Whether Parliament or the Secretary of State will block proposed LCOs on policy as opposed to constitutional grounds (Cymru Yfory 2006; Paun & Lau 2007), or whether a new constitutional convention will arise in which Assembly requests for LCOs will be agreed providing they are appropriate and not *ultra vires* the GWA 2006. It is still unclear at the time

of writing whether debate on draft LCOs will be undertaken on the floor of the House as proposed by the Welsh Affairs Committee (Welsh Affairs Committee 2007a, para 41).

### **(Sub-sub-heading) Stage Three - Full legislative Devolution**

(Indent) “Part 4 of the Bill provides for the Assembly to acquire full law-making powers over all the devolved subjects without further recourse to Parliament. This is the third stage as set out in the White Paper. However because this is a fundamental constitutional change, the Bill ensures that it can take place only if it has been approved by the people of Wales in a referendum. ... In this way we hope to settle for a generation the distracting debate over the extent over the extent of the Assembly’s powers. By providing a mechanism for achieving primary powers, the onus will be on the supporters of change to win the argument.” (Lord Evans 2006, col. 266) (Endent)

Given that the United Kingdom Government regards the move to full law-making powers as a constitutional step-change it has provided in the GWA 2006 for a number of significant hurdles to be overcome before the Assembly can enjoy the power to make Acts of the National Assembly of Wales (s 107). The trigger mechanism for a referendum is significant – two-thirds of the Assembly will have to approve the draft Order in Council providing for the referendum (s 103). This special majority requirement is contrary to standard UK constitutional practice. Even after such a majority is achieved the Secretary of State is given a veto on whether or not to lay the order before Parliament (s 104). If s/he decides to do so then both Houses of Parliament would have to vote to approve the draft Order. The referendum question and the date of the poll would be specified by the Order in Council (Schedule 6). Following this the referendum would go ahead with a simple majority vote deciding the issue (s103 (2)).

What the GWA 2006 does is to provide a statutory basis for the transfer of further legislative powers to the Assembly without the need for fresh legislation. Should there be a positive vote in a referendum then the Welsh Assembly Government would issue a commencement order (s 105) after which Part 3 of the Act would be replaced by Part 4 (s 106) and the Assembly would be able to pass Acts of the Assembly in relation to the fields specified in Schedule 7. The procedures for passing Assembly Acts (ss 110 And 111) and the system of pre and post-enactment scrutiny are broadly the same as for Assembly Measures (s 112).

It is noticeable that Wales in this respect is not to follow the Scottish model, in which matters reserved to Westminster are specified and everything else is devolved. Instead the GWA 2006 adopts the 'defined functions' model (Rawlings 2005, p 850) where the devolved powers are listed. The explanation given for this is that whilst Scotland is a separate legal jurisdiction "An important feature of the enhanced legislative competence of the Assembly is that it will legislate within a unified England and Wales jurisdiction." (Bush 2006).

(Indent) "If the Assembly had the same general power to legislate as the Scottish Parliament then the consequences for the unity of the England and Wales legal jurisdiction would be considerable. The courts would, as time went by, be increasingly called upon to apply fundamentally different basic principles of law and rules of law of general application which were different in Wales from those which applied in England. The practical consequence would be the need for different systems of legal education, different sets of judges and lawyers and different courts. England and Wales would become separate legal jurisdictions. ... In order to avoid this result the simplest solution is to follow the Scotland Act 1978 model, limiting the legislative competence of the Assembly to specified subjects." (Joint Memorandum 2005) (Endent)

In respect of Stage Three the legislation merely paves the way for a referendum. The UK government have no plans to hold one. Indeed the Secretary of State for Wales has indicated that: "My view is that the new Assembly arrangements should be allowed to bed down

through the next Assembly term – between 2007 and 2011 – and that there is no case for considering a referendum until at least the following Assembly term of office.” (Hain 2005).

On the other hand, the new administration in Cardiff is committed:

(Indent) "... to use the Government of Wales Act 2006 provisions to the full under Part III and proceed to a successful outcome of a referendum for full law-making powers under Part IV as soon as practicable, or before the end of the Assembly term.

Both parties agree in good faith to campaign for a successful outcome to such a referendum. The preparations for securing such a successful outcome will begin immediately." (Labour Party and Plaid Cymru 2007). (Endent)

### **(Heading) Conclusion**

It seems that, despite the re-introduction of devolution to Northern Ireland (Burns 2007) many of the outstanding devolutionary issues have still not been settled (Ward 2000, p 129).

Devolution is still asymmetrical and unstable with Wales, Scotland and the London Assembly all seeking enhanced devolution; it has not dealt with the rise of nationalist parties, especially in Scotland with the Scottish National Party beginning a National Conversation that could lead to independence; the devolved regimes still have little or no fiscal autonomy and are now beginning to question the Barnett formula (Wyn Jones & Scully 2007. p. 49); finally, as we have observed, the real test of the devolution settlement will come now we have a Scottish Nationalist minority government in place in Scotland and the a Labour - Welsh Nationalist coalition in place in Wales.

Then there is what might best be put as the English question (Tomaney 1999, Hazell 2006). Although there has been devolution from Westminster to new power centres in Edinburgh, Cardiff and Belfast, England is still “the gaping hole in the devolution settlement.” (Hazell

2000, p 7) The English Question could be addressed in a number of ways. One potential answer is for the English to be given a measure of devolution to by setting up a system of elected regional assemblies (Johnson, 2004). At present the UK is one of the few large European states with no form of democratic regional government other than the Greater London Authority. However there is little popular support for the concept and the heavy defeat of the proposal to establish a directly elected regional assembly in the North East has put paid to the concept of devolution to the English regions for the time being (Knock 2006, Rallings & Thrasher 2005), a political reality now accepted by the present administration (HM Treasury 2007, Maer 2007).

Even if the West Lothian Question - that post devolution, Scottish MPs are able to vote on English domestic matters, whilst English MPs do not have the same rights in respect of Scottish domestic matters - is seen by Labour politicians as a non-problem (Falconer 2006), it still raises more questions than answers. The reduction in the number of Scottish MPs in the Westminster Parliament from 72 to 58 at the 2005 General Election will not answer the West Lothian Question the essence of which is, in reality, one of fairness for the English. Whilst there is not much support for the concept of an English Parliament, Conservative politicians support the idea of reforms to parliamentary procedure at Westminster to allow for "English votes on English laws." (Hadfield 2005).

Finally, in Wales, the Constitution Unit's prediction that "Executive devolution is unlikely to be stable or long lasting" has proved to be all too prophetic (Constitution Unit 1997). The Government of Wales Act 2006 re-balances the existing devolution settlement by introducing a "scheme of quasi-legislative devolution" (Rawlings 2005, p 852). "It is fair to say, however,

that Part III is cumbersome, complex and opaque.” (Wigley 2006). A great deal of power is still retained by Westminster and Whitehall and the role of the Secretary of State for Wales is extraordinary. Described as the “Guardian of the Devolution Settlement” (Devolution Guidance Note No 4 2005), the Secretary of State has a veto over Proposed LCOs. What would happen if we had an unreasonable or anti-devolutionist Secretary of State, a possibility which is enhanced now that the new Welsh Assembly Government is of a somewhat different political persuasion to that of the UK Government. The answer seems to be that such behaviour might trigger a demand for a referendum on the implementation of Part 4 powers. But then the very same Secretary of State would have a veto on whether there should be a referendum. This does not seem to be the right way to display trust and confidence in a democratically elected national assembly. Consequently Stage Two of Welsh devolution is still “a process not an event” (Davies 1999), with still little clarity still about the distribution of power between London and Cardiff, how long Stage Two will last and when, there will ever be a Stage Three.

(Heading) **Annexe 1 -**

SCHEDULE 5

Section 94

ASSEMBLY MEASURES

PART 1

MATTERS

*Field 1: agriculture, fisheries, forestry and rural development*

*Field 2: ancient monuments and historic buildings*

*Field 3: culture*

*Field 4: economic development*

*Field 5: education and training*

*Field 6: environment*

*Field 7: fire and rescue services and promotion of fire safety*

*Field 8: food*

*Field 9: health and health services*

*Field 10: highways and transport*

*Field 11: housing*

*Field 12: local government*

*Field 13: National Assembly for Wales*

*Field 14: public administration*

*Field 15: social welfare*

*Field 16: sport and recreation*

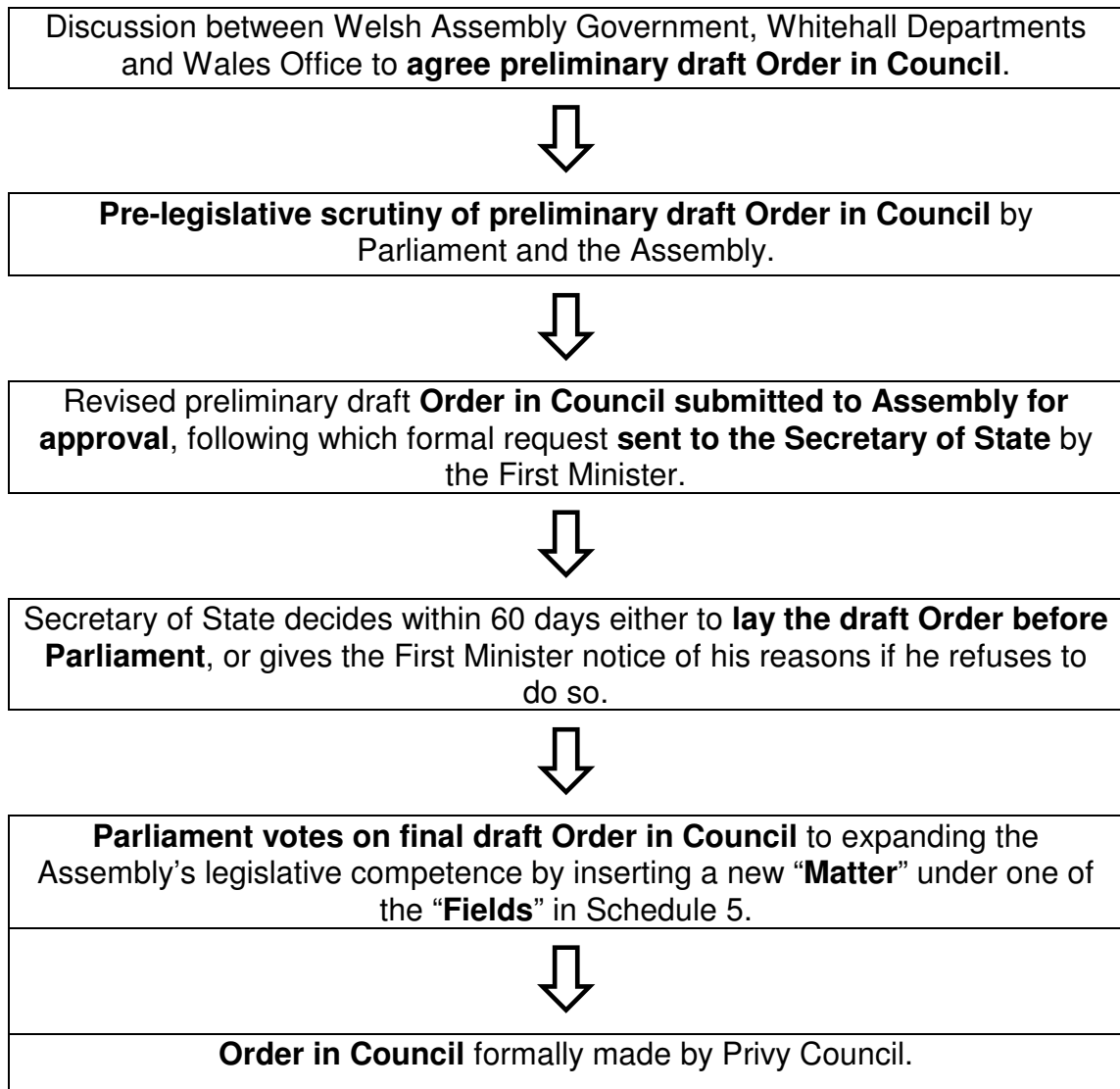
*Field 17: tourism*

*Field 18: town and country planning*

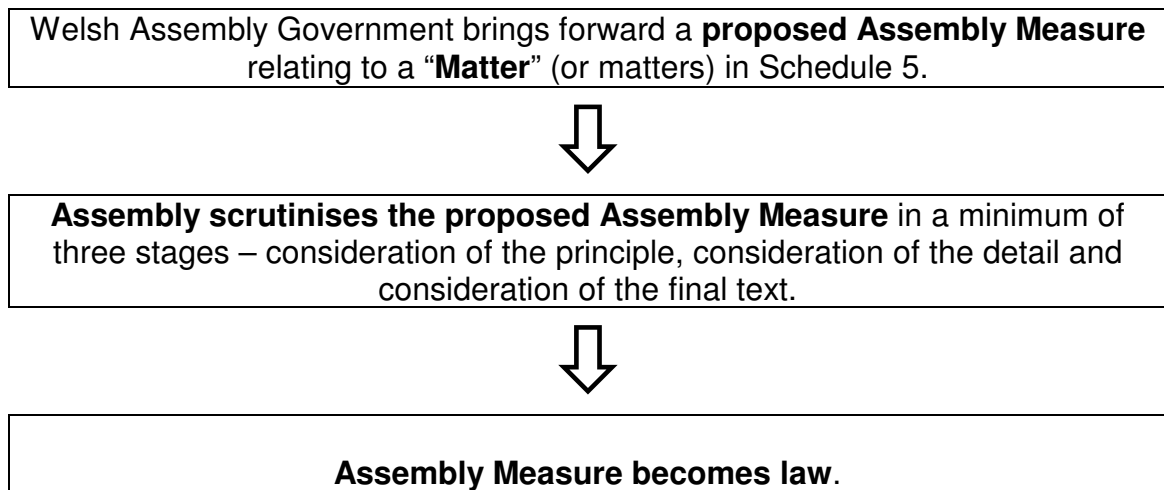
*Field 19: water and flood defence*

*Field 20: Welsh language*

(Heading) **Annexe 2 - Process for an Order in Council**



**Process for an Assembly Measure**





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