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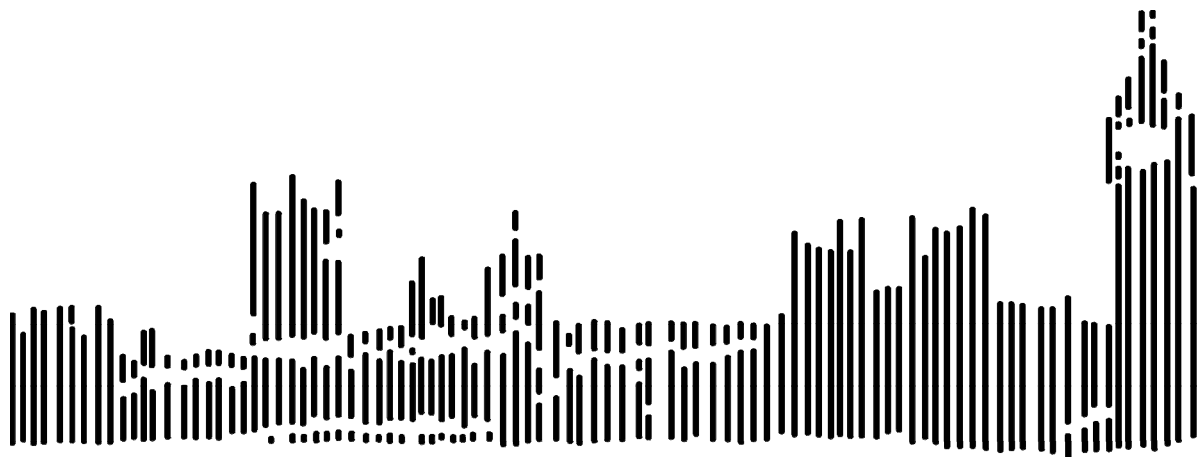
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# Law Making in Wales: A Measure of Devolution

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# Law Making in Wales: A Measure of Devolution

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## Law Making in Wales: A Measure of Devolution

*Measure: (OED): a quantity, a legislative instrument, and a test.*

### 1 Introduction

On 3 March 2011 a referendum was conducted in Wales under ss. 103(4) and (5) of the Government of Wales Act 2006 (GOWA 2006). Its purpose was to ask those eligible to vote whether they supported the implementation of Part 4 of that Act. This would, in short, enable the National Assembly for Wales to enact primary legislation on its own initiative within 20 subject areas listed in Schedule 7 to the Act. This would replace the state of affairs provided for in Part 3 and Schedule 5 under which the Assembly was given legislative competence only where that had been particularly authorised by the United Kingdom Parliament. By contrast, the referendum question was simple, admitting of no qualifications: 'Do you want the Assembly now to be able to make laws on **all** matters in the 20 subject areas it has powers for?'<sup>1</sup> This was followed by a statement which said that if most answers were 'yes', the Assembly would be able to make laws in all of these areas without recourse to Parliament; if most were 'no', 'what happens at the moment will continue'.

The referendum, and its affirmative result,<sup>2</sup> represent for those disappointed with the devolution settlement of 1998 and less so of 2006, a state of legislative independence from Westminster that conforms much more closely to the aspirations of the 1997 White Paper, *A Voice for Wales*.<sup>3</sup> These were to close the democratic deficit implicit in law making in London for interests and priorities that were local to Wales and to introduce accountability for those local decisions to an Assembly more closely elected by the people affected by them than by MPs.<sup>4</sup> The Government of Wales Act 1998 (GOWA 1998) established a National Assembly for Wales, a corporate body exercising particular executive functions, largely those formerly exercised by the Secretary of State. These functions included power to make subordinate legislation only, an inferiority that stood in stark contrast with the primary powers conferred under the Scotland Act 1998.

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<sup>1</sup> The National Assembly for Wales Referendum (Assembly Act Provisions) (Referendum Question, Date of Referendum Etc) Order 2010, SI 2010/2837; Article 4, original emphasis. The question was preceded by a preamble making reference to the Assembly's existing legislative powers.

<sup>2</sup> On a 36% turnout 63.5% voted 'yes' and 36.5% voted 'no'.

<sup>3</sup> Welsh Office, *A Voice for Wales* (1997), Cm 3718. Richard Rawlings' *Delineating Wales* (University of Wales Press, 2003) is the best introduction to the devolution story in Wales. See also J. Barry Jones and D. Balsom (eds), *The Road to the National Assembly for Wales* (University of Wales Press, 2000).

<sup>4</sup> This point assumes a greater significance following the reduction in the number of MPs representing Welsh constituencies from 40 to 30 provided for in Part 2 of the Parliamentary Voting System and Constituencies Act 2011. WASC, *The implications for Wales of the Government's proposals on constitutional reform* HC 729 (2010–11) paras. 22–29.

The operational, legal, political and constitutional difficulties to which this settlement gave rise are well documented in a substantial academic literature,<sup>5</sup> and in a number of parliamentary reports, notably by the Lords' Constitution Committee and the Commons' Welsh Affairs Select Committee (WASC).<sup>6</sup> Within Wales the corporate body's internal tensions were the focus of the *Assembly Review of Procedure* (2002) and the 2004 Report of *The Commission on the Powers and Electoral Arrangements of the National Assembly for Wales* (the Richard Commission).<sup>7</sup> Both recommended rejection of the Assembly's corporate status in favour of a formal separation of legislative and executive powers, a separation that the corporate body had *de facto* assumed on 1 March 2002. The parliamentary arm, which continued to be called the National Assembly, was located in Cardiff Bay while the Welsh Assembly Government was housed in the former Welsh Office building in Cathays Park.<sup>8</sup> Chief among its recommendations, the Richard Commission envisaged a stepped plan towards an Assembly having primary legislative powers. Its publication prompted a response from the Wales Office, which otherwise had little reason to take any initiative that would destabilise a settlement that was only four years old. *Better Governance for Wales* endorsed both recommendations, the *de jure* separation of the legislative and executive branches of government 'as a matter of priority'.<sup>9</sup> This was given effect in Parts 1 and 2 of GOWA 2006, establishing the National Assembly for Wales (NAW) and the Welsh Assembly Government (WAG) respectively.

To address the widespread discontent with the corporate body's limited executive and legislative powers, the White Paper proposed a three-stage process for the expansion of the Welsh institutions' competence. First, Whitehall departments should take a 'more liberal approach' to the devolution project, using Acts of Parliament more creatively to transfer

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<sup>5</sup> See in particular the chapters dealing with Wales in the excellent series produced by the Constitution Unit, *The State of the Nations*, edited alternately by Robert Hazell (Imprint-Academic, 2000 and 2003) and Alan Trench (Imprint-Academic, 2001, 2004, 2005 and 2008). See also R. Hazell and R. Rawlings (eds.), *Devolution, Law Making and the Constitution* (Imprint-Academic, 2005) and A. Trench (ed.), *Devolution and Power in the United Kingdom* (Manchester UP, 2007). Many of the chapters in these collections address wider questions concerning the impact of devolution generally on the unity of the United Kingdom; and see R. Hazell (ed.) *Constitutional Futures Revisited* (2008, Palgrave Macmillan). Also useful are two collections produced by the Institute of Welsh Affairs and the Wales Governance Centre at Cardiff University, *Building a Civic Culture* (2002) and *Birth of Welsh Democracy* (2003), both edited by J. Barry Jones and John Osmond.

<sup>6</sup> Constitution Committee, *Devolution: inter-institutional relations in the United Kingdom* HL 28 (2002–03). See also the earlier enquiries by the Commons Procedure Committee, *The Procedural Consequences of Devolution*, HC 185 (1998–99) and WASC, *The Work of the Committee Since Devolution*, HC 81 (2000–01).

<sup>7</sup> <http://www.richardcommission.gov.uk/content/template.asp?ID=/content/finalreport/index-e.asp>

<sup>8</sup> J. Osmond, 'Emergence of the Assembly Government' in J. B. Jones and J. Osmond (eds.), *Building a Civic Culture* (Institute of Welsh Affairs, 2002). This geographical separation of powers continues to be literally represented by the shuttle bus that plies daily between the two sites.

<sup>9</sup> Wales Office (2005) Cm 6582, para. 2.5. The Government rejected a third recommendation, an increase in the number of Assembly Members (to reflect their increasing work) from 60 to 80. The White Paper generated both parliamentary and academic comment. See WASC, First Report, *Government White Paper: Better Governance for Wales*, HC 551 (2005–06) and the Government Response, published as the Committee's Third Special Report, HC 839 (2005–06). The Constitution Committee addressed its proposals in its consideration of the ensuing Bill; *Government of Wales Bill*, HL 142 (2005–06). See also R. Rawlings, 'Hastening slowly: the next phase of Welsh devolution' (2005) *Public Law* 824, and A. Trench, *Better Governance for Wales: an Analysis of The White Paper on Devolution for Wales* (2005), ESRC Devolution and Constitutional Change Research Programme; The Devolution Policy Papers No 13.

executive functions to WAG.<sup>10</sup> Secondly, NAW would be given bounded competence to make legislation that, if not formally so, would be functionally equivalent to primary legislation.<sup>11</sup> This competence, contained within the framework established by Part 3 of and Schedule 5 to GOWA 2006, would be transferred from Westminster by what was then a novel and wholly untried experiment: Legislative Competence Orders (LCOs).<sup>12</sup> These would be formally initiated by NAW for approval in Westminster, their effect being to give it competence to make 'Measures' in respect of 'matters', being particular aspects of more broadly-stated policy areas ('Fields'). In addition, new matters could be inserted into Schedule 5 by 'framework powers' contained in an UK Bill.<sup>13</sup> Following the 'yes' vote this second stage will give way to the third, under which, by Part 4, NAW will be competent to make primary legislation in relation to 'subjects' set out under 20 subject headings without reference to Westminster: Acts of the National Assembly for Wales.

The purpose of this article is to evaluate the processes by which these unparalleled, unprecedented and short-lived arrangements for transferring competence from a superior to an inferior legislative body were constructed and managed.<sup>14</sup> Until the full implementation of Part 4, NAW of course retains its legislative competence under Part 3 of GOWA 2006; but in that respect this paper is written in the past tense.<sup>15</sup> On 29 March 2011, in a final act of the third Assembly, the Assembly Government laid the draft Order that, approved, brings the Assembly Act provisions into force on 5 May 2011, the day of the Assembly Elections.<sup>16</sup> This retrospective is undertaken in the context of four themes that pervade the academic, political and parliamentary evaluation of the 2006 settlement. These are:

- An imperfect information exchange between NAW, WAG, Whitehall and Westminster on the inclusion of 'Measure-making' provisions in UK Bills (an imperfection that continues to extend also to Bills transferring powers to Welsh Ministers)
- The legacy of a scrutiny (democratic) deficit in respect of the transfer of legislative competence to NAW where that competence was made by Act of Parliament, a deficit that stood in marked contrast to the additional (double) scrutiny conducted at Westminster of proposed LCOs generated under the special procedure contained in

<sup>10</sup> *Better Governance for Wales*, para. 3.9. Executive functions also continue to be transferred under Transfer of Functions Orders (TFO), and now under Assembly Measures; see p. 25 below.

<sup>11</sup> By GOWA 2006 s. 94(1) Assembly Measures may make 'any provision that could be made by an Act of Parliament'. Clause 28 of the Public Bodies Bill (HL) 2010 defines 'primary legislation' as including 'Measures and Acts of the National Assembly for Wales'.

<sup>12</sup> *Better Governance for Wales*, paras. 3.14–3.21.

<sup>13</sup> It may be noted that the phrase 'framework powers' was used ambiguously in the 2005 White Paper to mean both the transfer of broader executive powers to WAG under which Welsh Ministers could make subordinate legislation, and increases in NAW's primary legislative competence. For this reason proposals in Bills to increase NAW's competence are more accurately called 'Measure-making powers'.

<sup>14</sup> By GOWA 2006 s. 106, Part 3 ceases to have effect on the day on which the Assembly Act provisions come into force.

<sup>15</sup> Save for section 3, which deals with executive devolution to WAG, untouched by Part 4.

<sup>16</sup> Government of Wales Act 2006 (Commencement of Assembly Act Provisions, Transitional and Saving Provisions and Modifications) Order 2011. Article 4 makes transitional provision for Part 3 of the Act to continue to have effect in relation to proposed Assembly Measures which, on the coming into force of this Order, have been passed by the Assembly but have not been approved by Her Majesty in Council.

GOWA 2006 and that had themselves received a democratic mandate in the Assembly (a deficit that continues to apply equally to the transfer of executive functions to WAG)

- Whitehall's central and potentially veto role as the political authority for any accretion by the Welsh institutions of legislative (or executive) powers: the systemic requirement for 'Whitehall clearance'
- The fundamental and persistent conception of devolution to Wales as devolution by inclusion ('only these'), radically distinct from devolution by exclusion ('everything but') that characterises the settlements to Scotland and to Northern Ireland.

The article now falls into three parts. The first (section 2.2) deals with the scope of NAW's legislative competence under GOWA 2006 and the means by which it could be amended either by an LCO (section 2.3) or by an Act of Parliament (section 2.4.1). It considers the arrangements that were made for the pre-legislative scrutiny of LCOs, both in NAW and at Westminster (sections 2.3.3–2.3.4), and remarks on the scrutiny gap that accompanied the use of UK Bills to add matters (section 2.4.2); this part concludes with a short discussion of NAW's exercise and scrutiny of its legislative competence under Part 3 (section 2.5). The second part focuses on the continuing significance of direct transfers of executive functions to WAG and on a further scrutiny deficit (section 3). The article concludes with a short assessment of the changes to NAW's legislative competence consequent on the devolution of primary legislative powers under Part 4 (section 4.1), and remarks on one consequence of the current and potential divergence of the law relating to Wales in the devolved areas from that in England (section 4.2).

## **2 The National Assembly for Wales' Legislative Competence under Part 3 of GOWA 2006**

### **2.1 Introduction**

A fundamental initial point is that the structure of Part 3 gave effect to a policy with regard to the enhancement of NAW's legislative competence that was essentially similar to that adopted for the initial transfer of executive functions to the corporate body under GOWA 1998. This was to transfer *specific* functions ('only these') in areas in which the Secretary of State for Wales had pre-GOWA 1998 pursued distinct policies. The structure, contained in s. 22(2) of and Schedule 2 to GOWA 1998 comprised 18 Fields within which Whitehall was required to transfer such functions as were considered appropriate, for example in 'education and training' and 'health and health services'. But however many the transfers, they did not – nor were they intended to – confer on the corporate body any general competence within them.<sup>17</sup>

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<sup>17</sup> The National Assembly for Wales (Transfer of Functions) Order 1999 SI 1999/672 comprised a chronological list of some 5,000 individual functions under some 350 Acts of Parliament, to many of which specific exceptions and qualifications were made. See discussion in D. Miers and D. Lambert, 'Law making in Wales: Wales legislation online', [2002] *Public Law* 663. This settlement stood in contrast with Scottish Ministers' functions under the Scotland Act 1998, which extended 'over all aspects of Scottish life and society other than those reserved for the UK Parliament'. Justice Committee, *Devolution: A Decade On*, HC 529 (2008–09), para. 12.



Similarly, as *Better Governance for Wales* made clear, it would not be Part 3's purpose to transfer to NAW any *general* legislative competence. *Devolution Guidance Note 16 (Legislative Competence Orders)* was clear: the purpose of s. 95 was to deepen, not to broaden the settlement. To deepen the settlement meant that NAW's legislative competence could be enhanced, but only where it fell within one of the Schedule 5 Fields, being themselves policy areas corresponding to the executive powers WAG inherited or subsequently acquired under GOWA 2006.<sup>18</sup> This was not intended to imply that NAW's legislative competence 'must exactly match' Welsh Ministers' executive functions, but the Government's conception of a bounded legislative competence was clear enough. NAW could have no competence outside a Field, and no Field could be added to Schedule 5 unless WAG already had powers within that policy area.<sup>19</sup> That is, to be explicit, only once Whitehall had agreed at some earlier point to transfer such powers. Section 95 provided for the addition of a new Field, approved by Order in Council, which would, in the words of DGN 16 'be a significant broadening of the devolution settlement in Wales'.<sup>20</sup> By the referendum date WAG had made no overtures to add to the list and, it may be noted, had no legislative competence in six of the 20 Fields.<sup>21</sup>

## 2.2 The Assembly's Legislative Competence: Scope and Limits

Part 3 provided that NAW could make Measures where their provisions fell within its legislative competence, defined in s. 94 and authorised by a matter relating to one or more of the Schedule 5 Fields. But a provision that complied with these criteria would nevertheless be incompetent where it was incompatible with Convention rights or Community law, extended otherwise than only to England and Wales or breached Part 2 of Schedule 5. The first of these three exclusions requires no explanation. The second is necessary because although 'Wales' exists as a geographical territory, it has no existence as an independent jurisdiction.<sup>22</sup> Part 2 of Schedule 5 precluded NAW from certain Measure-making activity ('exceptions to matters and general restrictions') subject to some exceptions in Part 3. The general restrictions relate to the functions of Ministers of the Crown,<sup>23</sup> the creation of criminal offences,<sup>24</sup> and what might be regarded as five 'constitutional' statutes.<sup>25</sup> The

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<sup>18</sup> GOWA 2006 s. 162 and para. 30 of Schedule 11.

<sup>19</sup> For example, Field 7 of Schedule 5, 'fire and rescue services and the promotion of fire safety' was not one of the 18 Fields under GOWA 1998. But because executive functions under the Fire and Rescue Services Act 2004 had been transferred to the corporate body by s. 21 of GOWA 1998, a Field could be listed under GOWA 2006. Although by virtue of a transfer under primary legislation WAG now exercises executive functions in respect of human fertilisation and embryology, it would not have been possible to add a new Field in that name to Schedule 5 as it is a specific exception to the subject area 'health and health services' in Schedule 7.

<sup>20</sup> Ministry of Justice, *Devolution Guidance Note 16*, para 13; [www.justice.gov.uk/guidance/devolutionguidancenotes.htm](http://www.justice.gov.uk/guidance/devolutionguidancenotes.htm)

<sup>21</sup> Fields 4 (economic development), 7 (fire and rescue services and the promotion of fire safety), 8 (food), 14 (public administration), 17 (tourism) and 19 (water and flood defence).

<sup>22</sup> Section 5 of and Schedule 1 to the Interpretation Act 1978 and GOWA 2006 s. 158. Section 94(6) needed to spell out the limitation on the 'extent' of an Assembly Measure in order to bring the competence of the National Assembly within the jurisdiction of the courts of England and Wales, and to enable its Measures to be enforced in those courts.

<sup>23</sup> By Part 2, para. 1, a provision of an Assembly Measure could not, save with the consent of the Secretary of State, remove, modify, confer or impose any function that would be exercisable by a Minister of the Crown or confer power by subordinate legislation to do any of these things.

<sup>24</sup> Part 2, para. 2. Schedule 17 to the Local Government and Public Involvement in Health Act 2007 added new para 2A, prohibiting alterations to police areas.

revised 'exceptions to matters' were inserted in 2009, restricting what would otherwise be competence within a Field.<sup>26</sup> Whether a particular provision of an Assembly Measure related to a Schedule 5 matter was to be 'determined by reference to the purpose of the provision, having regard (amongst other things) to its effect in all the circumstances'.<sup>27</sup> A competent Measure could modify the effect of primary or secondary legislation made or enacted before or after GOWA 2006, or make entirely new provision for a matter stated in a Schedule 5 Field.<sup>28</sup> With appropriate amendment all of these limitations apply equally to NAW's legislative competence under Part 4.<sup>29</sup>

## 2.3 Enhancing the Assembly's Legislative Competence: the LCO Route

### 2.3.1 Introduction: Amending the Fields and the Matters in Schedule 5

The 20 Fields listed in Schedule 5 largely reflected the 18 Fields in Schedule 2 to GOWA 1998, with some re-allocation and four new Fields, including Field 13, 'National Assembly for Wales'.<sup>30</sup> As enacted, Schedule 5 inserted matters only in respect of Field 13,<sup>31</sup> which were necessarily related to NAW's internal workings. It should be noted at the outset that as well as addition, the s. 95 procedure provided for the variation or removal of a matter or any of the extant Fields. But it is in respect of the enhancement of NAW's legislative competence that the procedure was most commonly discussed and that is the perspective taken here.

The matters contained in Field 13 were, in addition to their primary purpose, intended to be a guide to the way in which further matters might be added. But whatever the form, the principle, reinforced by the Report of the Joint Committee on Statutory Instruments (JCSI) concerning the draft Housing LCO, was that Parliament would retain control over the

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<sup>25</sup> European Communities Act 1972, Data Protection Act 1998, GOWA 1998 (remaining sections), Human Rights Act 1998 and the Civil Contingencies Act 2004. Some of these are stated in the list of protected matters in Schedule 4 to the Scotland Act 1998. There is no need for an equivalent to Schedule 5 to that Act, as there is no general competence transferred to the Welsh institutions from which reservations have to be made, either under Schedule 5 or Schedule 7.

<sup>26</sup> See below, p. 11.

<sup>27</sup> GOWA 2006 s. 94(7). A provision that falls outside NAW's legislative competence is not law; GOWA 2006 s. 94(2). However, the whole Measure is not rendered invalid, provided that the incompetent provision can be severed from it. Invalidity or procedural irregularity in NAW proceedings leading to its passing does not render the Measure invalid; neither does the amendment of Schedule 5 affect the validity of a Measure made under the amended matter or of its previous or continuing operation; GOWA 2006 ss. 93(3) and 95(10).

<sup>28</sup> Parliament of course remained supreme; s. 93(5) provided that Part 3 'does not affect the power of the United Kingdom Parliament to make laws for Wales'.

<sup>29</sup> GOWA 2006 s. 108 and Schedule 7, Parts 2 and 3; and see below, p. 27.

<sup>30</sup> One of the 1998 Fields (transport (16)) was reallocated to Field 10 ('highways and transport'). In addition to the Assembly, the three others are 'fire and rescue services and the promotion of fire safety' (Field 7), 'food' (Field 8, de-coupled from 'agriculture, fisheries, forestry and rural development'), and 'public administration' (Field 14).

<sup>31</sup> In an unusual transfer of legislative as distinct from executive competence, the National Assembly for Wales (Legislative Competence) (Conversion of Framework Powers) Order 2007, SI 2007/910, added matters to Fields 5 (education and training) and 9 (health and health services). Its purpose was to reserve from WAG the power to make subordinate legislation under the NHS Redress Act 2006 and ss. 178 and 179 of the Education and Inspections Act 2006, which deal with the admission, behaviour, discipline and exclusion of pupils enrolled in schools maintained by local education authorities. These transfers were made to reflect the Government's intention that as the democratic body, NAW should have 'the maximum discretion' in respect of these socially significant policy areas; *Better Governance for Wales*, para. 1.24. They are set out in matters 5.1–5.9 in Field 5.

content of Part 1 of Schedule 5.<sup>32</sup> As noted in the Introduction, the LCO procedure was not the only means by which matters could be added to Schedule 5: ‘Measure-making powers’ in Acts of Parliament became as significant as LCOs as vehicles of change. Given the frequently protracted nature of the LCO process this development might have been thought inevitable; but as WASC and others observed, it raised some important questions concerning their scrutiny by the Assembly, considered below at pp. 20–22. Meanwhile, the following three sections first summarise the s. 95 procedure, consider secondly in some detail the arrangements in Cardiff and Westminster for the pre-legislative scrutiny of proposed LCOs, and thirdly provide an assessment of this novel procedure.

### 2.3.2 Engaging the section 95 procedure

The s. 95 procedure related entirely to the arrangements for making an Order in Council, which, of whatever kind under s. 95(1), must have first been approved in draft by the Assembly,<sup>33</sup> and by both Houses of Parliament. But the Act did not deal with the steps that would precede the laying of the draft Order, which were, in short, the UK Government’s agreement on the scope and content of the proposed LCO (‘Whitehall clearance’) and its pre-legislative scrutiny in the Assembly and at Westminster.

LCOs could be proposed by Welsh Ministers, backbench AMs, or by an Assembly Committee,<sup>34</sup> but *Better Governance for Wales* envisaged that WAG would be the primary mover, which proved to be the case. Excited by the prospect and encouraged by the Presiding Officer, supporters of this new procedure were quick to list numbers of potential LCOs. But the heady estimate of up to 30 in any one parliamentary session was always a non-starter. Given its limited capacity and the other demands on NAW’s time, four or five LCOs a year was a more manageable number.<sup>35</sup> To June 2010 25 LCOs had been proposed and 15 had completed pre-legislative scrutiny, which included all 13 of WAG’s LCOs, the scrutiny of which NAW had completed by December 2009. Of note is the high proportion of proposed backbench LCOs (10); whose success rate is similar to backbench balloted Bills at Westminster (2).<sup>36</sup> The discussion accordingly focuses on WAG’s proposed LCOs.

These typically formed part of its legislative programme, which would itself have been the subject of correspondence between the First Minister and the Secretary of State for Wales. Any proposal required early consultation with and the agreement of the relevant Whitehall Departments and the Wales Office, and a complete resolution of any outstanding issues, an

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<sup>32</sup> JCSI, *Seventh Report of Session 2008–09*, HL 51 (2008–09), para. 1.8; and see text below p. 14.

<sup>33</sup> The draft Order had to be accompanied by an Explanatory Memorandum, which must explain how any recommendations made during pre-legislative scrutiny had been taken up and the reasons for any significant differences between them; NAW, SO 22.33.

<sup>34</sup> NAW, SO 22.4–22.12.

<sup>35</sup> WASC, *Legislative Orders in Council*, HC 175 (2006–07), para. 44.

<sup>36</sup> One of the WAG LCOs was superseded by a second LCO and there was one Assembly Committee proposal. In the last Parliament there were 16 successful ballot Bills (1.6% of a possible 100 Bills); see *Legislation Series Factsheet L3, The Success of Private Members’ Bills* (June 2010); [www.parliament.uk](http://www.parliament.uk)

aspiration that remained unfulfilled.<sup>37</sup> The first of these, as noted, was that the proposed LCO did not broaden the settlement. Within the relevant Field there might well have been scope for divergent domestic policies and for widely drawn matters, but these could not have been coterminous with the Field into which they were to be inserted.<sup>38</sup> Secondly, as an LCO gave NAW the power to repeal or amend existing and future Acts of Parliament, which would unless revoked 'be a general and a continuing one',<sup>39</sup> its scope was to be clear, respectful of UK powers and interests, and coherent with the law of England and Wales.<sup>40</sup> In general terms the government's expectation was that draft LCOs which were 'appropriate, within scope, do not affect other Acts of Parliament [apart from any that necessarily do and that have been cleared] or go outside the devolution settlement' would, as a 'commonsense partnership', be made.<sup>41</sup> Obtaining Whitehall clearance was a *sine qua non* of a proposed LCO's progress, but precisely because this engaged a high degree of interaction between WAG, the Wales Office and the relevant Whitehall departments, no *draft* LCO was refused.<sup>42</sup> Informally, a number of *proposed* LCOs stalled in Whitehall for reasons that are explored below at p. 17.

These considerations apply with equal force to LCOs proposed by AMs, who were, because Whitehall only talks to other governments, wholly reliant on WAG for these purposes.<sup>43</sup> But whether WAG or AM proposed, an LCO could languish in Whitehall for months before being cleared and referred for parliamentary scrutiny. Three of WAG's early proposals took

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<sup>37</sup> These discussions were managed in WAG by its Constitutional Affairs and Legislation Management Team (CALM); later, WAG also provided officials to be part of the 'Bill team'. These arrangements were all mediated via the guiding principles set out in DGN 16. Paragraphs 30–61 describe these elements of the process, which WAG has supplemented with its own Guidance Notes; *Guidance to Welsh Assembly Government Departments on Liaison with the UK Government over Parliamentary Bills, Legislative Competence Orders and Assembly Measures*; <http://cymru.gov.uk/legislation/guidance>. See its Summary, Part 2, '[W]ithin agreed timescales, [WAG officials must] resolve any issues over scope or drafting and provide the Wales Office with the text of the proposed (and if altered, the final) draft order and explanatory memorandum on which the Wales Office is to seek the agreement of the Attorney General and collective clearance of the UK Cabinet'. Hereafter, WAG, *Guidance*.

<sup>38</sup> As the Government made clear in *Better Governance for Wales*, para. 3.18.

<sup>39</sup> *Better Governance for Wales*, para. 3.21.

<sup>40</sup> NAW SO 22.14 required the proposer to supply an Explanatory Memorandum with the proposed LCO. The Memorandum should state clearly that the proposal is competent within the areas laid out in the Act. See also WASC, *Legislative Orders in Council*, para. 9.

<sup>41</sup> WASC, *Legislative Orders in Council*, paras 34–35. This 'partnership' may assume the colour of a constitutional convention; see R. Rawlings, 'Concordats of the Constitution' (2000) 116 *L.Q.R.* 257–286. As noted at p. 14 below, draft Orders could fail the JCSI's scrutiny.

<sup>42</sup> By GOWA 2006 s. 95(5)–(7), the First Minister was required to notify the Secretary of State of NAW's approval of the draft Order who must, by the end of 60 days either have laid it before both Houses of Parliament or have given the First Minister written reasons for not being prepared to do so. The Wales Office formulated no guidance on when the Secretary of State might veto an LCO. The Justice Committee concluded that by comparison with the arrangements in Westminster, there was a lack of transparency about the exercise of the s. 95 powers. It recommended that the Secretary of State 'produce a protocol outlining the principles that would inform such a decision, and the maximum timescales within which a decision would be made'. Justice Committee, *Devolution: A Decade On*, para. 148. Such a protocol might allay speculation that an administration in London of a different political persuasion to that in Cardiff carries the potential for delay in the devolution project. To date there is no evidence that the Coalition Government has sought to obstruct any WAG proposal, but s. 95(7) is a powerful reminder of the gift relationship that underlies the devolution settlement in Wales.

<sup>43</sup> Both of the two AMs who were successful in the LCO ballot in October 2007 worked very closely with WAG officials and received substantial assistance from them (they also received assistance from NAW officials); WASC, *Review of the LCO Process*, HC 155 (2009–10), paras. 22–29.

more than a year to emerge, and the two AM proposed LCOs two years, delays of which WASC was highly critical.<sup>44</sup> It was also critical of the lack of transparency in Whitehall's handling of a proposed LCO. While it appeared to have disappeared into a 'black hole', those having a legitimate interest in its progress, including the third sector, were correspondingly uncertain as to how they might for the time being engage with WAG or prepare any further evidence for the parliamentary committees. The Wales Office subsequently agreed to provide the Committee with regular updates on an LCO's progress in Whitehall and on WAG's proposals for new LCOs,<sup>45</sup> but in the light of the referendum result this is a promise that is unlikely to be called in.

### 2.3.3 Pre-legislative scrutiny of proposed LCOs

The institutional arrangements in NAW and at Westminster for the pre-legislative scrutiny of a proposed LCO therefore stood outside the s. 95 procedure,<sup>46</sup> which, in terms of the laying of the *draft* Order, was not engaged until that scrutiny had been completed and any further Whitehall clearance obtained. The interaction of these various steps is helpfully set out in the diagram on the following page; it may be noted that the statutory procedure commenced only once what is numbered as box 6 in this diagram was engaged.<sup>47</sup> In this section we consider the institutional arrangements that were established in Cardiff and in Westminster.

#### (a) *Institutional Arrangements in Cardiff*

For the Assembly the issue was clear-cut: here was an obvious instance in which the new legislative body could perform a classic scrutiny function in respect of WAG's legislative proposals.<sup>48</sup> Its first inclination was to proceed by way of *ad hoc* committees, appointed for each LCO,<sup>49</sup> but this did not prove a success. AMs' initial approach was to welcome the competence, but with less concern about its boundaries or exceptions. In December 2008 NAW established a set of five permanent Legislation Committees to undertake the scrutiny of both LCOs and Measures, whose members would be appointed for each Assembly. Although there was a marked improvement in the level of LCO scrutiny, it did not prove easy, as this restructuring was designed to do, to establish any significant Committee

<sup>44</sup> WAG's proposed Environment LCO took 99 weeks to reach the Committee; its Welsh Language LCO took 88 and its Culture LCO 50 weeks. The backbench proposals were the Mental Health and the Housing (Fire Sprinklers) LCOs, which reached the Committee respectively 83 and 104 weeks after their announcement in the Assembly. The delay between the Wales Office's receipt of a proposed LCO and its referral to the Committee has ranged from one to 104 weeks, with an average of 45. 'For those LCOs which have taken the longest time to proceed from their announcement in the Assembly to approval by Parliament, the main factor by a significant margin is the time taken up by negotiations between the UK and Welsh Assembly Government to agree a text'. WASC, *Review of the LCO Process*, para. 74 and Table 1.

<sup>45</sup> WASC, *Wales and Whitehall*, HC 246 (2009–10), para. 154; *Wales and Whitehall: Government Response to the Committee's Eleventh Report of Session 2009–10*, HC 399 (2010–11), para. 23.

<sup>46</sup> As the Government intended, *Better Governance for Wales*, para. 3.21. And see P. Hain MP (Secretary of State for Wales) on the Second Reading Debate on the Bill; HC Debs, vol 441, cols. 36 and 49 (9 January 2006). Both Houses flatly rejected the White Paper's suggestion that a Joint Committee might undertake LCO scrutiny, *Better Governance for Wales*, para. 3.21.

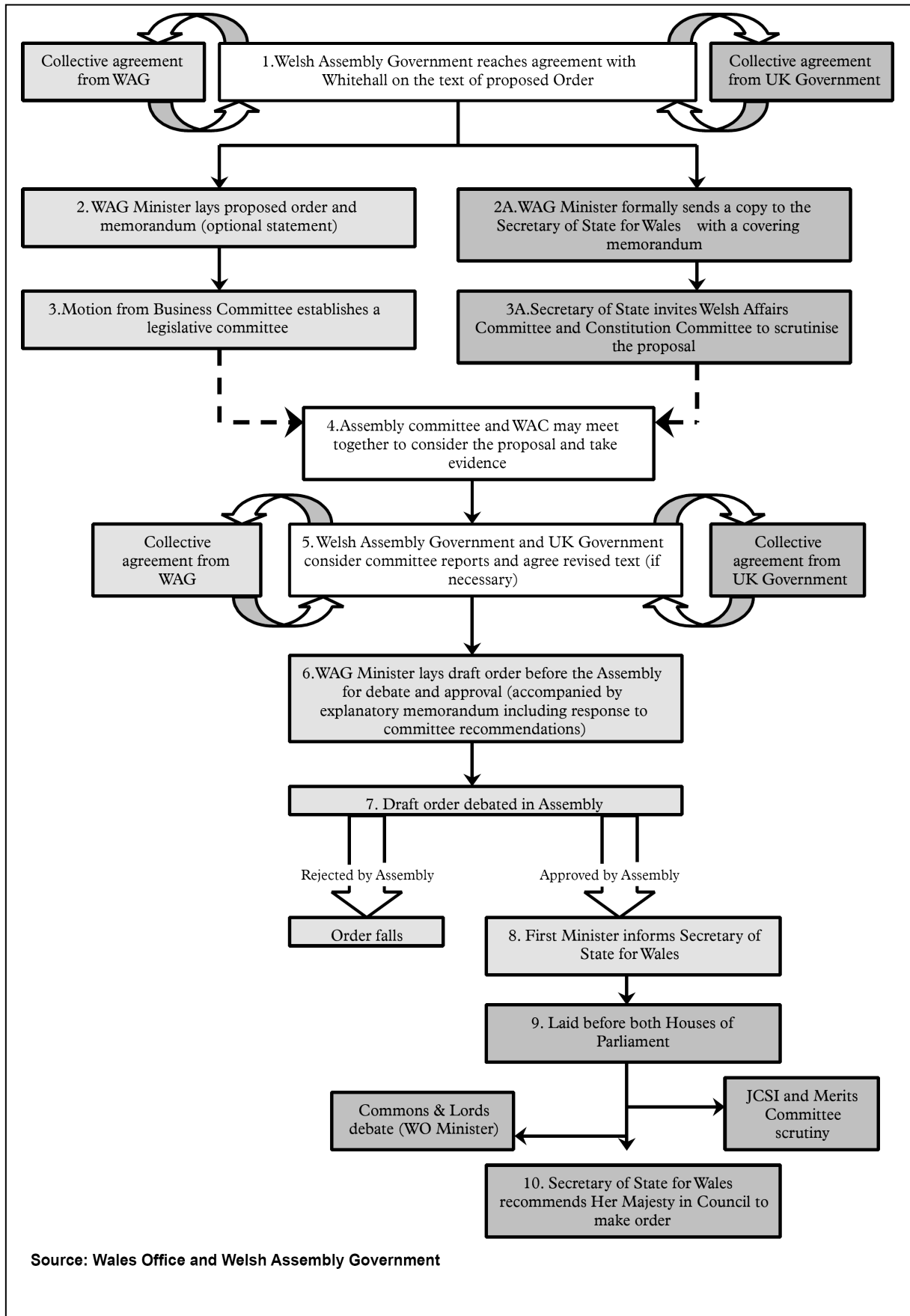
<sup>47</sup> Constitution Committee, *Scrutiny of Welsh Legislative Competence Orders*, HL 17 (2007–08), Appendix.

<sup>48</sup> For a broader consideration of NAW's conception of its role see A. Trench, 'Wales and the Westminster Model' (2010) *Parliamentary Affairs* 117.

<sup>49</sup> NAW SO 22.16 provided that its Business Committee must either refer a proposed LCO for detailed consideration by a Committee, or propose in plenary a motion that there be no such consideration; there have been no such motions.

**Pre-legislative and statutory procedures for scrutinising a legislative competence order**

*(Editor's note: light shading = activity in Wales; dark shading = activity in London)*



Source: Wales Office and Welsh Assembly Government

expertise either in LCO procedure or in the substantive Schedule 5 Fields, even if some LCO initiatives clustered around particular policy areas; notably education, health, housing, local government, and social welfare.<sup>50</sup> One reason for this was essentially practical: because the number of non-payroll AMs is around 45,<sup>51</sup> NAW's capacity to undertake the additional demands created by GOWA 2006 has always been stretched.

A more fundamental reason turns on the concept of a superior legislator transferring a bounded competence to a subordinate legislative body to make laws which are functionally equivalent to primary legislation, and which, once given, may be exercised without superior oversight.<sup>52</sup> There are two aspects to this point, the second of which I deal below at p. 15. The first aspect is that the distinction between *competence-giving* (an LCO) and *law-making* (a Measure) was not, at least at the outset, readily understood. As WASC put it, 'the Orders do not themselves change the general law for Wales – they pave the way to subsequent changes in the law applying to Wales within the devolved areas of legislative competence'.<sup>53</sup> This lack of understanding was particularly evident among the Legislation Committees' witnesses who, when invited to comment on a proposed LCO would want to know (understandably where they represented some sectional interest) *what* laws (Measures) WAG intended to promote. Conversely, pressure groups might know what they wanted but had trouble defining it in terms of competence. For AMs, too, an LCO did not readily lend itself to the kind of particular policy debate with which they were familiar, even if some did prompt considerable controversy as to their scope and definition.<sup>54</sup> As its proposal to extend competence often stemmed from its wish to implement a particular policy initiative it was inevitable that WAG's officials would give some indication of their planned legislation. But discussion of NAW's *capacity to make laws*, which may be illustrated by indicative examples, concerns the *scope of the power to act*, not its realisation in any particular case. It is not until that point that the question arises, is *this* proposed Measure within NAW's legislative competence?

### (b) *Institutional Arrangements in Westminster*

At Westminster the issue was perhaps not so straightforward. For those for whom GOWA 2006 was a disappointment, the scrutiny of proposed LCOs by Welsh MPs unanswerable to the Assembly or by unelected members of the House of Lords, either of whom could effectively veto the proposal, hardly squared with the rectification of the democratic deficit that was a central feature of the 1997 White Paper. But as the 2005 White Paper made clear, while the Assembly would be a democratically elected body so requiring some re-balancing of legislative authority in its favour, the overall constitutional supremacy of Parliament was to be unaffected by the competence-conferring procedure.<sup>55</sup> As an answer to the rhetorical

<sup>50</sup> Fields 5, 9, 11, 12 and 15; and in education (5), health (9) and local government (12) matters have also been added either by the 2007 Conversion Order or subsequent Act of Parliament.

<sup>51</sup> The statutory limit of 60 AMs has been a matter of critical comment since the Richard Commission, and goes beyond the scope of this article. See the comments in the *All Wales Convention* (Chair, Sir Emyr Parry Jones) 2009; [www.allwalesconvention.org](http://www.allwalesconvention.org), ch. 3.7.

<sup>52</sup> The competence could of course be revoked, and its exercise was subject to judicial review (a devolution issue, GOWA 2006 s. 149 and Schedule 9).

<sup>53</sup> WASC, *Work of the Committee in 2007*, HC 325 (2007–08), para. 8.

<sup>54</sup> See for example the Assembly proceedings concerning the National Assembly for Wales (Legislative Competence) (Welsh Language) Order 2009.

<sup>55</sup> *Better Governance for Wales*, para. 3.6.

question, ‘what’s the legislative competence of the National Assembly got to do with Westminster?’ the Constitution Committee was in no doubt. The s. 95 procedure necessarily raised issues having constitutional significance that were properly Westminster’s concern. An LCO amends GOWA 2006, which is, ‘to all intents and purposes, a written constitution for Wales’.<sup>56</sup> As in the case of a Bill, an LCO can raise questions that fall within the Committee’s ‘two Ps’ test; namely whether it generated ‘any issues of principle affecting a principal part of the constitution’.<sup>57</sup> Having asserted its competence,<sup>58</sup> the Committee devised some nine criteria by which to scrutinise a proposed LCO. Some of these tested its scope, legal effect and compliance with Schedule 5.<sup>59</sup> More broadly, the Committee would consider whether, when exercised, the proposed competence significantly affected the institutional structure of government in Wales or whether there were any other wider constitutional implications concerning the United Kingdom. The Committee’s concerns can be illustrated by reference to its consideration of the means by which exceptions to NAW’s legislative competence under Part 3 were constructed.

The constitutional status of Schedule 5 as a statement of NAW’s legislative competence was unique for the fact that it was dynamic. It was not like an Act of Parliament that may be amended from time to time (or not at all), but was in an almost constant state of flux as new matters and exceptions were added. These additions might be straightforward or complex, in particular where it was necessary to further qualify an exception. Within a short time the matters in Schedule 5 had begun to acquire lists of exceptions from NAW’s competence comprising a novel combination of ‘fixed’ and ‘floating’ exceptions, to which ‘carve outs’ might be added. In short, a fixed exception was specific to a particular matter and would appear in Part 1 of Schedule 5. Floating exceptions were not matter-specific but would appear in Part 2 as a restriction in respect of Fields other than that to which the proposed matter had been allocated.<sup>60</sup> The intended effect was that no Measure could be made in respect of matters falling within these Fields where the subject fell within one of these floating exceptions; and this was so even though the Measure was directly authorised by a matter in a Field to which no fixed exception applied. Finally, carve-outs restored what would otherwise be an exception to NAW’s legislative competence: they were exceptions to

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<sup>56</sup> Constitution Committee, *Scrutiny of Welsh Legislative Competence Orders*, para. 12(c). The Committee later called it ‘an evolving “written constitution” of one of the four countries of the Union’; *the proposed National Assembly for Wales (Legislative Competence) (Environment) Order 2009*, HL 159 (2008–09), para. 9 (the Environment Order).

<sup>57</sup> Constitution Committee, *Reviewing the Constitution: Terms of Reference and Method of Working*, HL 11 (2001–02), para 22. Though LCOs did not at first sight give executive powers to Ministers but only extended NAW’s legislature’s competence, their provisions nevertheless could, as the JCSI noted in respect of the Housing LCO, purport to authorise the executive to determine that competence. See p. 16 below.

<sup>58</sup> During GOWA 2006’s parliamentary stages the Constitution Committee suggested that it or the Delegated Powers and Regulatory Reform Committee (DPRR) might carry out pre-legislative scrutiny of LCOs, later agreeing that it would itself do so for an initial 12-month period (2006–07). This was extended year by year to the end of the 2005–10 Parliament; Constitution Committee, *Government of Wales Bill*, paras. 23–24; *Annual Report 2008–09*, HL 79 (2009–10), paras 34–38. The Committee has yet to decide whether it should continue this scrutiny; *Sessional Report 2009–10*, HL 26 (2010–11), paras. 24–27.

<sup>59</sup> Others included the appropriateness of the Field to which the matter was allocated and its compatibility with the ECHR and Community law.

<sup>60</sup> For example, in the Environment Order some exceptions were listed, not under Field 6 (environment), but under Fields 4 (economic development), 10 (highways and transport) and 19 (water and flood defence).



exceptions.<sup>61</sup> This method of defining exceptions to matters was first used in the Carers LCO, which, in addition to substantive changes to NAW's competence in the field of social welfare (field 15) included a list of exceptions to matters contained in field 10 (highways and transport). The Constitution Committee objected to what it clearly regarded as misleading advertising.<sup>62</sup> More seriously, the Committee considered that as used in the proposed Environment LCO (which also introduced exceptions to the unrelated fields of economic development and highways and transport), the practice was 'perilously close to the borderline of what is constitutionally acceptable'.<sup>63</sup>

This conclusion needs to be seen in the context of the *purpose* underlying the drafting of these exceptions. As noted earlier, the concept of NAW's legislative competence under Schedule 5 was predicated on the executive functions that had been transferred under GOWA 1998. But in drafting LCOs, WAG's 'preferred approach was to express competence within Schedule 5 as nearly as possible so as to reflect the competence ultimately envisaged for the Assembly by Parliament in Schedule 7'.<sup>64</sup> In other words, as the transition to Schedule 7 would necessarily involve its restatement so that it would on implementation incorporate the full extent of NAW's legislative competence at that date, it was more efficient and more in tune with the intended effect to draft prospectively. Thus it was that the wording of the two matters to be added under the Environment LCO, together with their exceptions, was drawn almost *verbatim* from Schedule 7. But the version of which the Committee was critical had been revised in discussions with Whitehall, which had prompted a more cautious approach. In the event, in its critique of the Carers LCO the Committee proposed what it regarded as a clearer exposition of these 'floating' exceptions. These took effect as new para. A1 of Part 2, which applies to NAW's competence by virtue of an amendment to s. 94.<sup>65</sup>

While it later downplayed the Secretary of State's suggestions that it was in 'pole position' to conduct pre-legislative scrutiny of every proposed LCO, WASC likewise had fully supported the view that 'the presumption should be that proposed LCOs should be subject to [its] pre-

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<sup>61</sup> Schedule 5 to GOWA 2006 itself provided the model. Part 2 states exceptions to NAW's legislative competence as constructed by Part 1: Part 3 states exceptions from Part 2.

<sup>62</sup> The changes to Field 10 were 'introduced under cover of an LCO that is, by its title, ostensibly about the field of social welfare', Constitution Committee, *The proposed National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2009 (relating to Carers)*, HL 105 (2008–09), para. 13 (the Carers Order). It added that 'omnibus LCOs', which cover a disparate range of subjects 'are less easily scrutinised by Parliament, the National Assembly, and the public; para. 15. This last point was strongly made in evidence to the NAW's Constitutional Affairs Committee, *Inquiry into the Developments in Schedule 5 to the Government of Wales Act 2006, including Exceptions to Matters*; Written Evidence of the Wales Governance Centre, Cardiff University, Paper S5 3 (25 February 2010). Hereafter, NAW, *Schedule 5 Inquiry*.

<sup>63</sup> Constitution Committee, Carers Order, para 9. Carve outs need not always be objectionable; see WASC, *The proposed Legislative Competence Order relating to Transport*, HC 273 (2009–10).

<sup>64</sup> NAW, *Schedule 5 Inquiry*, Written Evidence of the Office of Welsh Legislative Counsel, Welsh Assembly Government, CA(3)–04–10; Paper 1 (4 February 2010). See further below, p. 27.

<sup>65</sup> Constitution Committee, Carers Order, para. 22, Figures 1 and 2; National Assembly for Wales (Legislative Competence) Social Welfare and Other Fields 2008, SI 2008/3132. The changes to the manner in which exceptions to matters were to be made are stated in the National Assembly for Wales (Legislative Competence) (Exceptions to Matters) Order 2009, SI 2009/3006. Of the latter the Explanatory Memorandum comments that the JCSI may consider the Order to be 'an unusual use of the power to amend Schedule 5', para 3. The Wales Office considers that the new approach 'has certainly paid dividends in terms of the speed with which LCOs are agreed between the Welsh Assembly Government and the UK Government'; NAW, *Schedule 5 Inquiry, Written Evidence of the Wales Office* (31 March 2010).

legislative scrutiny'.<sup>66</sup> During the three parliamentary sessions 2007–08 to 2009–10 the Committee energetically exercised this presumption to great effect, even if it necessarily encountered some difficulties in the management of its business.<sup>67</sup> These arose in part because the House had given almost no thought to this aspect of the Committee's work before the first LCO was referred to it in July 2007.<sup>68</sup> So far as its relationship with NAW was concerned, the Committee initially took timetable effectiveness to mean concurrent rather than consecutive scrutiny, so that its work and, subject to its arrangements, the work of any Lords committees, would complement rather than duplicate each other.<sup>69</sup> In practice this proved unworkable. Joint scrutiny with NAW foundered on the lack of any co-ordination between the consideration of a proposed LCO in Cardiff and the Secretary of State's referral of it to the Committee,<sup>70</sup> a factor aggravated by the need for and delays in obtaining Whitehall clearance. Within a year WASC was dealing with proposed LCOs only after NAW completed its scrutiny and WAG had made any amendments that NAW had in its turn approved. This had the beneficial effect that 'Westminster scrutiny [is] related to the considered view of the Assembly,'<sup>71</sup> but it could be many months later before WASC received it. Duplication of evidence as between Cardiff and the Committee was reduced so far as possible by its reliance on transcripts from NAW's Legislation Committee;<sup>72</sup> more generally the Committee's oral evidence requirements varied according to the LCO's complexity, though it would normally call WAG and the Wales Office.<sup>73</sup> While the Committee concluded that the additional task of scrutinising LCOs had almost doubled its members' workload, the Secretary of State endorsed its 'strong conviction' that its central scrutiny role should be continued following the 2010 General Election.<sup>74</sup> This particular element of WASC's interpretation of its terms of appointment will lapse on the commencement of Part 4, but they do not preclude its continuing scrutiny of the 'policy of the Office of the Secretary of State for Wales (including relations with the National Assembly for Wales)'.

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<sup>66</sup> WASC, *Legislative Orders in Council*, para 33. The Presiding Officer questioned whether the Committee should have any role at all. Justice Committee, *Devolution: A Decade On*, para. 14.

<sup>67</sup> It is probable that constraints in the Parliamentary timetable may also have had an effect. WASC seems to have been concerned about its capacity to deal with numerous LCOs alongside the other (substantive policy) matters that it wished to consider. The Welsh Grand Committee might also be thought a suitable vehicle, but it was effectively sidelined; the Welsh Language LCO was the only LCO to have been debated there. The Secretary of State simply accepted WASC's recommendation that the only LCOs that might be referred to the Welsh Grand are those that raise complex legal issues, have wide implications or are politically controversial. WASC, *Review of the LCO Process*, para. 15 and *Government Reply*, HC 483 (2009–10) p. 2.

<sup>68</sup> WASC did conduct a preliminary enquiry that raised as concerns a number of the issues that have eventuated; *Legislative Orders in Council*; Summary.

<sup>69</sup> WASC, *Legislative Orders in Council*, para 26.

<sup>70</sup> See the Committee's consideration of the National Assembly for Wales (Legislative Competence) (Additional Learning Needs) Order 2007, WASC, *Work of the Committee in 2007*, paras 18–20. But joint working was possible in the case of the National Assembly for Wales (Legislative Competence) (Social Welfare) Order 2008, *Work of the Committee Session 2007–08*, HC 252 (2008–09), para 24.

<sup>71</sup> Justice Committee, *Devolution: A Decade On*, para. 138.

<sup>72</sup> WASC, *Review of the LCO Process*, paras 38–39.

<sup>73</sup> WASC, *Review of the LCO Process*, paras 32–37. The Committee's relations with WAG and NAW were good.

<sup>74</sup> WASC, *Review of the LCO Process*, paras 54–57 and *Government Reply*, p. 2.

### 2.3.4 LCO Pre-Legislative Scrutiny in Practice: An Assessment

#### (a) *Legislative Competence and Law Making*

As could have been and was predicted the LCO process was likely to run into difficulties where, broadly speaking, there were concerns about the clarity or extent of the proposed LCO's scope or its congruence with Whitehall priorities, or there were questions of *vires* or of its constitutional propriety. The following paragraphs address these concerns.<sup>75</sup>

Whitehall had, like NAW, experienced some initial difficulty with the concept of legislative competence. Officials' concern was not so much to do with the possible content of a draft Measure but with the fact that the competence was to be granted to a body which would subsequently be at liberty to exercise it unilaterally. Officials 'struggled with understanding the difference between the transfer of legislative competence and some kind of mechanism that might look like shared responsibility for legislation'.<sup>76</sup> The 2005 White Paper noted that the LCO's Explanatory Memorandum would serve 'only as an example of what could be done', but that was of course the nub of this concern. Assuming that it was *intra vires* (and assuming the non-commencement of Part 4) a Measure proposed in 10 years' time by a Welsh Assembly Government of a different political hue to the present and acting in changed circumstances might seek to achieve policy objectives within its competence but which were not considered at the LCO stage.<sup>77</sup> The White Paper's conclusion, that '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',<sup>78</sup> recalls DPRR's approach to the inclusion in any Bill of a delegated power. But the scope of the competence conferred by an LCO would typically be far more extensive than a Minister's power to make statutory instruments under primary legislation. And in any event, most Measures would themselves contain powers to make subordinate legislation.

Consider, for example, the scope of the Measure-making competence in matter 1.1 inserted in Field 1 (agriculture, etc) in relation to the 'the red meat industry'. Measures could relate to: '(a) increasing efficiency or productivity in the industry; (b) improving marketing in the industry; (c) improving or developing services that the industry provides or could provide to the community; and (d) improving the ways in which the industry contributes to sustainable development'. The LCO enabled the enactment of a Measure that conferred powers on Welsh Ministers equivalent to those exercisable under the Natural Environment and Rural Communities Act 2006 by Ministers in Scotland and in Northern Ireland, authorising the imposition of levies on different categories of persons engaged in aspects of the red meat

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<sup>75</sup> Space does not permit a detailed analysis of all these concerns. On scope, see further WASC, *The proposed draft National Assembly for Wales (Legislative Competence) (social welfare and other fields) Order 2008*, HC 576 (2007–08), and *The proposed draft National Assembly for Wales (Legislative Competence) (Welsh Language) Order 2009*, HC 348 (2008–09)). On congruence with Whitehall priorities see *The proposed draft National Assembly for Wales (Legislative Competence) (Housing) Order 2009 relating to Domestic Fire Safety*, HC 142 (2009–10). In theory a proposal objectionable to Whitehall departments would never have made it to pre-legislative scrutiny.

<sup>76</sup> WASC, *Wales and Whitehall*, Q 152 (Dr Jim Gallagher).

<sup>77</sup> 'Although a request for such powers may have been stimulated by a particular project of reform, use by the Assembly of the competence conferred to address that project will not preclude further Assembly Measures relating to that matter, again in the future, perhaps with some different policy objective in view'. Explanatory Notes to GOWA 2006, para 319.

<sup>78</sup> *Better Governance for Wales*, para. 3.21.

industry.<sup>79</sup> This was not just the stuff of subordinate legislation: the Measure's Explanatory Memorandum noted that its provisions are 'consistent with the wider legislative framework set out in the [2006] Act'.

This theme is further illustrated by the Westminster scrutiny of the 2008 Housing LCO. This LCO, which as proposed would have given NAW competence to suspend or to abolish 'the right to buy', first encountered difficulties in WASC. In addition to the LCO's policy implications, the Committee was concerned that it did not reflect the underlying policy intention and recommended that it be revised.<sup>80</sup> WAG's response was the 2009 Draft Order, which included what the Constitution Committee later described as 'a constitutionally significant change'.<sup>81</sup> This was a restriction in Part 2 of Schedule 5 to the effect that a Measure could not abolish the right to buy and, in Part 3, an exception that it could 'if both the Welsh Ministers and the Secretary of State consent'.<sup>82</sup> This, the JCSI concluded, constituted 'a remarkable proposition in the context of an Order setting out part of the constitutional arrangement between Parliament and the Assembly'. It made the decision whether NAW was competent to abolish the 'right to buy' depend on an exercise of ministerial discretion that was not expressly contained in GOWA 2006. Neither did it provide accountability to NAW in respect of the Secretary of State for Wales' future consent or, in the case of the Welsh Ministers', to Parliament.<sup>83</sup>

Unlike its *exercise*, the *scope* of NAW's legislative competence under Part 3 was a matter of domestic concern not only to NAW; hence the need for clearance both in Whitehall, and as its committees have unequivocally affirmed, in Westminster.

There would be detailed scrutiny in NAW when Measures were proposed; far more than in the case of a statutory instrument where there may be no Westminster scrutiny at all. But as was clear from the early parliamentary exchanges, 'future proofing' NAW's legislative competence in contexts such as those discussed was not a notion that came readily to discussions of proposed LCOs, either in Cardiff or Whitehall.

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<sup>79</sup> The Red Meat Industry (Wales) Measure 2010, 2010 nawm 3.

<sup>80</sup> The Committee's substantive concern related to the LCO's impact on the stock of social housing in Wales. WASC, *The proposed draft National Assembly for Wales (Legislative Competence) Housing) Order 2008*, HC 812 (2007–08), paras. 30–35. See also its comment in the case of the proposed LCO on Social Welfare (non-residential domiciliary care) that the Assembly had 'no current plans for legislation' in this area; *Work of the Committee Session 2007–08*, para. 25. WAG's assurances to the Committee that it had no plans to exercise the power conferred by the proposed LCO to require local authorities to charge for the domiciliary care of children could not of course bind its successors; para. 27.

<sup>81</sup> Constitution Committee, *The Carers Order*, para. 8.

<sup>82</sup> WASC, *Government Response to the Committee's Seventh Report of Session 2007–08*, HC 200 (2008–09).

<sup>83</sup> JCSI, *Seventh Report of Session 2008–09*, paras 1.8, 1.16–1.17. The Order was subsequently withdrawn and a further revision was successfully promoted during the 2009–10 session. WASC, *The proposed National Assembly for Wales (Legislative Competence) (Housing and Local Government) Order 2010, relating to Sustainable Housing*, HC 186 (2009–10); House of Commons, First Delegated Legislation Committee, *Draft National Assembly for Wales (Legislative Competence) (Housing and Local Government) Order 2010* (5 July 2010).

**(b) Preparation and Progress**

The LCO procedure was not at first well managed.<sup>84</sup> In its review, *Devolution: A Decade On*, the Justice Committee observed that the quantity of itself risked 'bringing the LCO process into disrepute'.<sup>85</sup> According to the critic's standpoint the reasons for the delays in obtaining Whitehall clearance lay with civil servants who did not consider the handling of a proposed LCO to be part of their normal day job,<sup>86</sup> poor planning or poor preparation by WAG.<sup>87</sup> 'Early LCOs lacked precision, and were not underpinned by a clear purpose. Consultation with Government departments before some LCOs were launched had been practically non-existent'.<sup>88</sup> There is substance in each claim; equally there has in the more recent past been a 'much more joined-up' LCO relationship between Welsh Ministers and Whitehall, reflected in the identification of a senior lead official in Whitehall, advance sharing of information and agreement on a timetable for each LCO.<sup>89</sup>

Opinions differ, however, as to the overall evaluation of the procedure. In its review, the *All Wales Convention* noted that its witnesses described the process as 'cumbersome and slow' and its Report compared it unfavourably with what it regarded as the speedier enactment of a Bill adding matters to Schedule 5.<sup>90</sup> In marked contrast, while recognising the initial problems, WASC was positive, describing the procedure as an effective way of responding to NAW's requests for additional legislative competence,<sup>91</sup> a view shared by Welsh Ministers.<sup>92</sup> Indeed, the Committee considered it 'regrettable that the All Wales Convention's report reflected some of the common misconceptions surrounding the LCO process without correcting them'.<sup>93</sup> One of these was what it regarded as a false comparison with the normal

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<sup>84</sup> See NAW's useful overview, *Pre-legislative Scrutiny of Legislative Competence Orders* (Members' Research Service, December 2009).

<sup>85</sup> Justice Committee, *Devolution: A Decade On*, para. 138.

<sup>86</sup> No individual official was tasked with any sense of focus, urgency or transparency in its handling. See the former First Minister's evidence, WASC, *Wales and Whitehall*, para. 159.

<sup>87</sup> 'We do not believe that the process for the scrutiny of this proposed Order has been satisfactory, or that it has worked as intended. We would again urge the Welsh Assembly Government to synchronise the publication and referral of a proposed Order to an Assembly committee with its referral to Parliament by the Secretary of State. Failure to do so represents the single biggest obstacle to the effective scrutiny of proposed Orders and, coming as it does at the very beginning of the process, it adversely affects all subsequent arrangements'. WASC, *The proposed draft National Assembly for Wales (Legislative Competence) (social welfare and other fields) Order 2008*, para. 9.

<sup>88</sup> WASC, *Wales and Whitehall: Recommendations and Conclusions*, para 27; *Government Response*, para. 22.

<sup>89</sup> WASC, *Wales and Whitehall*, para. 147.

<sup>90</sup> *All Wales Convention*, Chart 3.1.

<sup>91</sup> 'It is a matter of record' that on every occasion so far the observations of the Assembly committees, the Constitution Committee and ourselves 'have been constructive, complementary and consensual'; WASC, *Review of the LCO Process*, Summary.

<sup>92</sup> Jane Davidson AM (Minister for Housing and Regeneration), WASC, *Review of the LCO Process*, para 22; Jocelyn Davies AM (Deputy Minister for Housing and Regeneration), NAW, *Schedule 5 Inquiry* (17 March 2010).

<sup>93</sup> WASC, *Review of the LCO Process*, para 88.

process of primary legislation.<sup>94</sup> But these marked differences between the Committee and the *All Wales Convention* are perhaps better explained in part by their authors' different standpoints and in part by the different questions that proposed LCOs raised for determination.

Some critics of the procedures for pre-legislative scrutiny questioned why parliamentary select committees, whose function is to scrutinise Whitehall, have any role concerning WAG, whose proposed LCOs were subject to scrutiny by a democratically elected Assembly. There are a number of different issues here.<sup>95</sup> One concerns the political wisdom of or the policy need for the competence that WAG was seeking. Here it may be argued that what is of domestic concern to the people of Wales, for example in terms of the delivery of health services, is not a matter on which parliamentary committees should properly comment. But as was clear from the outset, and as WASC's inquiry into the Housing LCO showed,<sup>96</sup> it was not easy to distinguish a proper parliamentary concern for the terms in which the LCO's competence was drafted from a consideration of the policy for which it was intended to give competence. A second issue, amply illustrated by the Government's response to the proposed Environment LCO, was the LCO's impact on Whitehall's policy interests.<sup>97</sup> Underlying these is an issue that goes to the very basis of a continuing process that had fundamental effects for the UK constitution. These are (a) that the process required Parliament's consent to reductions in its own involvement in law-making for Wales, and (b) that the legal effect of an LCO was to enable NAW to amend or repeal UK primary legislation. As the Constitution Committee was entirely clear, authority for these effects is Parliament's business, at least until Part 4 is fully implemented.<sup>98</sup>

Those, such as the *All Wales Convention*, who were for the time being reconciled to the Part 3 procedures, nevertheless regarded 'three House scrutiny' as verging on the disproportionate, especially when contrasted with the absence of any Assembly scrutiny of Bills containing new matters.<sup>99</sup> The occasion of WASC's own positive self-evaluation lay in what it regarded as the value that its scrutiny brought to improving an LCO's clarity of policy purpose, together with the constructive engagement by all of the institutional players, in particular the

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<sup>94</sup> There are a number of points here. One concerns the selection of the starting and end points for such a comparative exercise. For the proposed LCO this could be its announcement in NAW and its formal approval at Westminster. A comparable exercise for a Bill containing Welsh Measure-making powers might start with the publication of the UK Government's Draft Legislative Programme and end with the Royal Assent. Secondly, how might we compare delays in obtaining Whitehall clearance (a clear problem with a number of LCOs) with defeats on clauses at the Committee stage or prolonged debate on amendments to the relevant clauses? And there are significant differences in the timing and duration of each session as between the two legislatures that may contribute to delays.

<sup>95</sup> See T. Jones and J. Williams, NAW, *Schedule 5 Inquiry, SLC(3)-02-10 (Paper 5)*.

<sup>96</sup> Above, p. 16.

<sup>97</sup> The LCO '... was far too broad in scope. ... It took a long time to agree the boundaries to the competence which, in places, related to sensitive and high profile areas of policy such as nuclear energy, defence establishments and energy exploration'. WASC, *Wales Office Annual Report, HC 1075-i (2008-09)* (oral evidence 27 October 2009, Q10 (Peter Hain MP)).

<sup>98</sup> The intensity of parliamentary scrutiny increased the salience of the LCO procedure within Whitehall, which no doubt contributed to the much closer and more focussed arrangements then agreed between London and Cardiff; *Wales and Whitehall*, para 148; Evidence of Dr Jim Gallagher.

<sup>99</sup> *All Wales Convention* ch. 3.6. But their reconciliation was substantially qualified by the delays caused by foot-dragging in Whitehall.

Wales Office, the Secretary of State and Welsh MPs that it enabled. It is probably an overstatement to say of WASC that it had become an ‘increasingly assertive veto player,’<sup>100</sup> but some of its closely argued and critical reports, notably those on the Welsh Language LCO and on the original Housing LCO led to definite policy revisions, even if they also led to considerable controversy in Wales about the proper boundaries of the Committee’s role.

As a pragmatic approach, rather than one of constitutional principle, it might be considered preferable that questions concerning the LCO’s scope, *vires* or clarity in drafting are raised when the LCO can be amended, rather than, as was the case with the 2009 Draft Housing LCO, only withdrawn. In this respect the reports of the Lords Constitution Committee and the JCSI generally evoked a more considered response.

But this did not satisfy those critics for whom the additional parliamentary scrutiny by persons unaccountable to the elected Assembly was objectionable precisely because it reinforced Wales’ inferior legislative status within the asymmetrical union.

## 2.4 Enhancing the Assembly’s Legislative Competence: Acts of Parliament

*Better Governance for Wales* envisaged that pending implementation of Part 4 the LCO procedure would give NAW the initiative for enhancing its competence under Part 3, but as it turned out, Acts of Parliament were as fruitful. Three years after GOWA 2006 came fully into force in May 2007, 13 LCOs had added some 29 matters; 23 had been added by Act of Parliament.<sup>101</sup> These (and similar comparisons) occasioned some comment. But as WASC observed, numbers alone are of limited significance; in particular they took no account of the scope of the legislative competence that the Act or LCO conferred.<sup>102</sup>

Even so, supporters of the Part 3 arrangements could argue that this was not a development that raised any major issues. If NAW’s legislative competence could be enhanced and thus WAG’s capacity for pursuing via its Measures policies that benefit those living in Wales, it would be churlish to complain about a multiplicity of means. In evidence to WASC the then First Minister commented that if after WAG had identified any Bills in the Queen’s Speech that could carry a Measure making power ‘there is a bus going in the right direction we will try to jump on that bus’.<sup>103</sup> And as the Presiding Officer said in evidence to the Justice Committee, ‘It does not make a difference how the powers come: the important thing is that they are here.’<sup>104</sup> But there were indeed a series of connected issues here. In short, these are:

- The coherence and effectiveness of the inter-governmental arrangements under which new matters could be added to Schedule 5 in a UK Bill, a concern that extended also to the addition of new executive powers for Welsh Ministers. Both were the products of negotiation between WAG and Whitehall to which NAW was not a party. AMs have no formal access to parliamentary proceedings;<sup>105</sup> they would learn of this new competence only when Welsh Ministers made statements in the

<sup>100</sup> R. Wyn Jones, *Monitor*, 41 (January 2009) p. 5 (Constitution Unit)

<sup>101</sup> 15 LCOs had been made by December 2010.

<sup>102</sup> WASC, *Review of the LCO Process*, para. 85. A further 20 matters were added by the 2007 Conversion Order.

<sup>103</sup> Rhodri Morgan AM, WASC, *Wales and Whitehall*, para. 150.

<sup>104</sup> Justice Committee, *Devolution: A Decade On*, para. 150.

<sup>105</sup> On earlier informal arrangements see WASC, *Legislative Orders in Council*, para. 17.

Senedd or in the case of executive devolution, published a draft or laid a statutory instrument under the new power.

- The limited opportunities for NAW to scrutinise either WAG's proposed legislative and executive additions to UK Bills or departmental Bills that had an impact on the devolved Fields. NAW may have been engaged as a legislature in the making of its Measures under Schedule 5 and in scrutinising and approving WAG's statutory instruments where the parent Act or Measure so required; but unlike Parliament it was not formally engaged in the initial transfer of competence. NAW's impotence where the transfer was effected by Act of Parliament stood in striking contrast with its engagement with the LCO procedure.

These are complex issues that NAW's Subordinate Legislation Committee examined at some length in 2008/09, and that resulted in changes to Assembly Standing Orders in February 2010. These included renaming the Committee as the Constitutional Affairs Committee to reflect the proposed widening of its remit.<sup>106</sup>

#### 2.4.1 Schedule 5, UK Bills and Inter-governmental relations

The Government talks to itself and only then to the other governments within the devolved union.<sup>107</sup> The coherence and effectiveness of intergovernmental relations between Cardiff and London have not enjoyed a trouble-free history.<sup>108</sup> While GOWA 2006 provided an alternative to UK Bills as a means of enhancing the devolution settlement, Whitehall's agreement to add a Schedule 5 matter via a departmental Bill offered every incentive for WAG to choose this option. But this choice, too, presented its own difficulties by virtue of the fact that there remained 'long-standing issues which have never been adequately addressed post devolution'.<sup>109</sup>

Viewed from Cardiff, there were two principal issues: how to identify and to influence clauses in departmental Bills that would affect NAW's legislative competence (or Welsh Ministers' functions), and how to introduce such clauses. DGN 9, *Post-Devolution Primary Legislation Affecting Wales*, provided that departments should consult NAW or WAG as appropriate on any proposals that touched on their responsibilities.<sup>110</sup> This captured both the possible enhancement of NAW's legislative competence and of executive functions that might appropriately be exercised by Welsh Ministers, rather than Ministers of the Crown. So far as they contained 'Measure-making' powers WAG's requests represented, like its

<sup>106</sup> *Inquiry into the Scrutiny of Subordinate Legislation and Delegated Powers* (May 2009); hereafter, NAW, *Subordinate Legislation Inquiry*. In May 2010 NAW's Business Committee commenced a review of the revised Orders, and in July 2010 NAW conducted a public consultation to test whether its ways of working are 'innovative, effective and accessible'.

<sup>107</sup> I do not deal here with the broader question concerning Whitehall's 'missing centre' in relation to devolution in the UK, see WASC, *Wales and Whitehall*, paras. 24, 31 and 77.

<sup>108</sup> The Constitution Committee commented in 2001 that liaison over legislation was '... unstructured, almost random [and] highly opaque.' *Devolution: inter-institutional relations in the United Kingdom*, paras. 123 and 124 (d).

<sup>109</sup> NAW, *Subordinate Legislation Inquiry*, para. 6.8.

<sup>110</sup> Revised in 2007; <http://www.justice.gov.uk/guidance/devolutionguidancenotes.htm>. Via the Wales Office, the Secretary of State was required to be engaged in all stages of the legislation; all devolution issues to have been resolved before the Cabinet's Legislation Committee is to agree to the Bill's inclusion in the legislative programme.



proposed LCOs, elements of its legislative programme. Their preparation similarly required agreement with the Wales Office and relevant Whitehall Departments, again mediated via the guiding principles set out in DGN 16.<sup>111</sup> These arrangements largely met the two governments' concerns; the question that the *Subordinate Legislation Inquiry* addressed was whether they met NAW's.

#### 2.4.2 The 'scrutiny gap'

Governments talk to legislatures only when they have a settled view on at least some of the major elements of their legislative programme.<sup>112</sup> This is as true of WAG's relationship with NAW as it is of Her Majesty's Government's. The formal position is set out in s. 33 GOWA 2006 (as was the case under s. 31 GOWA 1998), that 'as soon as is reasonably practicable after the beginning of each session of Parliament the Secretary of State is required to consult the Assembly about the Government's legislative programme'.<sup>113</sup> For NAW's *Subordinate Legislation Inquiry*, the reality was less than perfect. The evidence it received suggested that liaison between the Wales Office and WAG was in some instances unclear or dilatory, with the result that the insertion of last-minute clauses was necessary to ensure a Bill's application to Wales.<sup>114</sup> These imperfections were an aspect of the lack of transparency that WASC identified with regard to the two governments' handling of proposed LCOs. It was not appropriate, the Committee concluded, that the two legislatures should 'be entirely beholden to their executives in order to converse formally', but it was not obvious what steps Parliament might agree that would have enabled NAW to comment formally on legislative proposals at Westminster.<sup>115</sup> But this remains a live issue following the commencement of Part 4, as, like the Scottish Government, WAG may seek legislative authority within the 20 subject fields via an Act of Parliament.<sup>116</sup>

The second issue that concerned the *Subordinate Legislation Inquiry* therefore largely followed from the factors identified in the preceding section. In short, the opportunities for NAW to scrutinise the transfer in a UK Bill of legislative competence were limited: a 'scrutiny gap' that posed a significant constitutional challenge to the manner in which the devolution settlement operates.<sup>117</sup> Where WAG (or any other proposer) sought to add to NAW's legislative competence via a proposed LCO, NAW would have been substantially engaged in its scrutiny. But it had had no say whatsoever in WAG's request to the Wales Office that a clause concerning its own legislative competence should be introduced in a convenient government Bill.

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<sup>111</sup> WAG, *Guidance* Part Two, para. 2.4.

<sup>112</sup> Until 2007, when the government introduced the practice of publishing a Draft Legislative Programme, its contents remained confidential until the Queen's Speech.

<sup>113</sup> The Wales Office's overall objective is to ensure 'that the new constitutional settlement for Wales operated smoothly and effectively' ([www.walesoffice.gov.uk](http://www.walesoffice.gov.uk)). One of the Secretary of State's responsibilities is to maintain effective working relationships with NAW and with WAG, but she is not their advocate in Cabinet. On the role of the Secretary of State generally see DGN 4.

<sup>114</sup> NAW, *Subordinate Legislation Inquiry*, paras. 6.49–6.62 and Annex 7 on the application of the Planning Bill 2007 to Wales; and Justice Committee, *Devolution: A Decade On*, para. 37.

<sup>115</sup> WASC, *Wales and Whitehall*, para. 166 and Government Response, para. 26.

<sup>116</sup> See further below p. 32.

<sup>117</sup> This applies equally to the transfer of executive functions discussed below at p. 25, as the case of the Marine and Coastal Access Bill, which transferred both types of function, demonstrates. See *Review of the LCO Process*, para 82.

Clauses containing ‘Measure-making’ powers formally fall for debate and might, subject to the parliamentary timetable, be debated, but they generally received very limited consideration. This was, in part, because they often appeared in those technical parts of large Bills that customarily receive limited attention, and in part because they did not deal with the substantive policy issues on which parliamentary debate tends to focus. In practice they escaped the detailed arrangements for pre-legislative scrutiny put in place for LCOs. WASC was also concerned that the addition of matters by primary legislation could be a device for a general, rather than a specific extension of NAW’s legislative powers, ‘even where no particular Assembly Measure is in immediate contemplation’.<sup>118</sup> This recalls its criticism of the proposed Housing LCO and its more recent observation that an LCO’s intentions should reflect ‘what it says on the tin’.<sup>119</sup> But a key difference is that debate on a Bill does not normally present, as it did with the LCO, a formal obstacle to the proposed extension of competence. The potential for matters to be added by virtue of clauses inserted in primary legislation that were never scrutinised was the more disturbing where the competence that was added was wide.<sup>120</sup> NAW’s *Subordinate Legislation Inquiry* was equally concerned, recommending that WAG or the Wales Office should provide a detailed statement of the powers that WAG wished to seek via the UK Government’s legislative programme.<sup>121</sup> Using SO 15.6 NAW’s Constitutional Affairs Committee has since then taken the initiative, reporting on powers to be devolved in UK Bills. But here, too, it is unclear what steps Parliament might agree that would give effect to WASC’s proposal that it should ‘provide more parliamentary oversight’ over proposed Measure-making powers.<sup>122</sup>

## 2.5 The Exercise and Scrutiny of the Assembly’s Legislative Competence

NAW’s legislative competence under Part 3 was therefore the sum total of the matters listed in Part 1 of Schedule 5 to date, read with the restrictions and exceptions to those restrictions specified in Parts 2 and 3.<sup>123</sup> This competence had been substantially expanded during Part 3’s short life. At its commencement in May 2007 GOWA 2006 contained six matters within one Field (National Assembly for Wales). Three years later (June 2010) there were 77 Matters in 14 Fields. In some cases they were widely drawn and many were subject to a number of exceptions; in either case considerable care was needed to identify the derivation and the full scope of the competence that NAW had been given.<sup>124</sup> These changes could be tracked on

<sup>118</sup> *Legislative Competence Orders in Council*, paras 46 and 49.

<sup>119</sup> WASC, *Review of the LCO Process*, Summary, p. 5.

<sup>120</sup> For example, Matter 12.1 inserted by the Local Government and Public Involvement in Health Act 2007 makes ‘provision for and in connection with: (a) the establishment of new principal areas and the abolition or alteration of existing principal areas; and (b) the establishment of councils for new principal areas and the abolition of existing principal councils’.

<sup>121</sup> NAW, *Subordinate Legislation Inquiry*, paras. 6.34–6.48, Recommendation 6.

<sup>122</sup> *Wales and Whitehall*, para 166; Government Response, para. 26.

<sup>123</sup> See the useful summary in WASC, *The proposed amendment of Schedule 7 to the Government of Wales Act 2006*, HC 603 (2010–11), paras. 9–13.

<sup>124</sup> Some were straightforward. In Field 16 (sport and recreation) matter 16.1 (recreational facilities for children and young persons) was added by an LCO; matter 16.2 (creating routes to the coast to enable the public to make recreational journeys) was added by an Act. Others were more complex. In Field 5 (education and training) matter 5.2 (establishment and discontinuance of local authority schools) was added by the 2007 Conversion Order; matters 5.2A–C were added by an LCO. Matter 5.10 (arrangements for travel to and from school) was amended by two LCOs in 2008 and again by an Act in 2008, adding matter 5.10A. These examples could be multiplied many times.

NAW's very useful dynamic site,<sup>125</sup> but as WASC noted, 'as matters are added in a fragmented way, it is important that the coherence of Schedule 5 is maintained'.<sup>126</sup>

Sections 97–102 of GOWA 2006 and NAW SO 23 dealt with the procedures for the introduction, scrutiny and approval of proposed Assembly Measures. They could be proposed by a Welsh Minister, a backbench AM, a NAW Committee or the Assembly Commission;<sup>127</sup> in any case accompanied by a statement as to its competence, confirmed or otherwise by the Presiding Officer.<sup>128</sup> Welsh Ministers required WAG Cabinet approval, and must have cleared with Whitehall any aspect that touched HMG responsibilities; a final draft was copied to the Wales Office.<sup>129</sup> By October 2010 there were 27 proposed Measures. Eight of the 15 WAG Measures had been completed, with one awaiting Her Majesty's approval;<sup>130</sup> the other six were at various stages of NAW consideration. One of the 10 AM proposed Measures had been completed with one awaiting Her Majesty's approval; two were in debate, two yet to be introduced, and NAW had refused four. Both the Committee and the Assembly Commission Measures had been completed.<sup>131</sup>

The consensus is that the Standing Orders (revised in November 2010) proved robust and in general effective in facilitating the scrutiny of proposed Measures;<sup>132</sup> timetabling was relatively trouble-free. In giving effect to s. 98(1) of GOWA 2006, to provide for 'a general debate' on principle, a consideration of detail, and a 'final stage at which the proposal is passed or rejected', SO 23 provided for a four-stage scrutiny, along the lines of the Scottish

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<sup>125</sup> [www.assemblywales.org/bus.home/bus-legislation-progress-lcos-measures.htm](http://www.assemblywales.org/bus.home/bus-legislation-progress-lcos-measures.htm).

<sup>126</sup> WASC, *Legislative Competence Orders in Council*, para. 54. This was another reason why the Committee was critical of the use of fixed and floating exceptions. Taken as a whole, this practice added complexity to the legislation, such that 'their exact effect on the law in Wales is not easy to explain', and risked 'making the Government of Wales Act 2006 unwieldy and incomprehensible'. WASC, *The proposed National Assembly for Wales (Legislative Competence) (Environment) Order 2009*, HC 678 (2008–09), paras. 41 and 48; endorsed by the Constitution Committee, the Environment Order, para. 8.

<sup>127</sup> By GOWA 2006 s. 27 the Assembly Commission is a body corporate having responsibility for the provision of the property, staff and services required for NAW's purposes.

<sup>128</sup> GOWA 2006 ss. 97(2) and (3). By s. 98(5) the text must be in both English and Welsh; once enacted the two texts are 'of equal standing' (s. 156).

<sup>129</sup> See WAG, *Guidance*, Part 3.

<sup>130</sup> By s. 94(2) 'A proposed Measure is enacted by being passed by the Assembly and approved by Her Majesty in Council'.

<sup>131</sup> Once approved GOWA 2006 s. 102(1) and (2) provided a four-week delay before the Assembly Clerk could submit the Measure to Her Majesty in Council for approval. The purpose was, first, to enable the Counsel General or the Attorney General to refer the Measure to the Supreme Court should they be in doubt about its *vires*; GOWA 2006 s. 99. The second enabled the Secretary of State to intervene where the Measure conflicted with the UK's international obligations or its national security, or would adversely affect the supply of water or the operation of the law in England; GOWA 2006 s. 101. In both instances s. 98(6) permitted NAW to reconsider the Measure following those decisions. The provisions relating to water supply mirror those in s 152, which applies to the exercise of any function by WAG or NAW.

<sup>132</sup> Evidence to NAW's Constitutional Affairs Committee's *Consultation on Drafting Welsh Government Measures: lessons from the first three years* sought to show that its scrutiny of draft Measures was hindered by an overall lack of sufficient information from WAG about their nature and effect. See *Written Evidence of Daniel Greenberg*, CA DM1 (August 2010). Hereafter, NAW, *Drafting Measures Inquiry*, These comments echo the evidence that its predecessor Committee heard in its enquiry into the scrutiny of WAG's proposed subordinate legislation; above p. 22.

model.<sup>133</sup> This entailed a consideration of general principles in plenary, a detailed scrutiny in Committee followed by (stage 3) a detailed consideration in plenary, and a fourth plenary stage. As was the case with proposed LCOs the Permanent Legislation Committee to which the Measure was committed could take evidence.

As in other legislatures, time pressure and WAG's desire to 'look again' at a proposed Measure's provisions meant that scrutiny might be interrupted as amendments were moved to meet undertakings given in debate; well over 100 for example in the case of the Welsh Language Measure. But a tendency that appeared to be particular to NAW as a legislature is what some regard as the excessive grant of subordinate powers to Welsh Ministers. Bearing in mind that they are functionally equivalent to primary legislation, a number of Measures that profoundly affected the health and well-being of persons living in Wales arguably failed to state clearly on their face those persons' rights and duties. The NHS Redress Measure for example largely comprised delegated powers.

This issue was the subject of a consultation conducted by the Constitutional Affairs Committee that commenced in September 2010. Drawing on its experience with both the Welsh Language and the NHS Redress Measures, the Law Society, for example, questioned whether WAG had achieved the correct balance between what are in effect the 'primary' statements of law and the subordinate law-making powers delegated to Welsh Ministers.<sup>134</sup> WAG's lengthy response acknowledged this, noting that it has been a perennial concern since the Donoughmore Report.<sup>135</sup> The response also rehearsed the standard reasons for delegation: the need for prompt and possibly repeated adjustment of the Measure's provisions in the light of experience and the need to deal with technical and transitional matters. More generally, it noted that as the world becomes more complex so does its regulation, and 'the less suited that regulation becomes to primary legislation and the more necessary it becomes to confer and exercise enabling powers'.<sup>136</sup> The question is whether this approach will be pursued when WAG is promoting its Bills under Part 4. Both its choice of delegated powers in any case and NAW's scrutiny of their drafting might be better informed should WAG develop a set of principles similar to those issued by the Cabinet Office, as was suggested to the Committee's inquiry.<sup>137</sup> As NAW is a unicameral legislature that has only of late been able to 'make any provision that could be made by an Act of Parliament' there may be also have been some nervousness about getting the law wrong on the face of the Measure.

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<sup>133</sup> By GOWA 2006 ss. 96(2) and (3) standing orders may allow a different procedure in the case of proposed Measures to restate the law, repeal or revoke spent enactments, and 'private' proposed Assembly Measures. In the case of the first two, standing orders permitted a streamlined procedure, whilst in the case of 'private' proposed Measures procedures they included an opportunity for individuals affected to make representations to the Assembly, as in the case of private parliamentary Bills.

<sup>134</sup> NAW, *Drafting Measures Inquiry*, The Law Society, CA DM 7 (September 2010). Evidence from the Wales Governance Centre at Cardiff University similarly commented that the main issue of general significance is that 'there is a tendency in Wales to leave the substance of policies to be included in regulations rather than on the face of the Measures'; *Written Evidence from Cardiff Law School, Wales Governance Centre*, CA DM 5 (undated, 2010)

<sup>135</sup> Report of the *Committee on Ministers' Powers*, (1932), Cmd 4060.

<sup>136</sup> NAW, *Drafting Measures Inquiry*, Response from the Counsel General and the Leader of the Legislative Programme, CA DM 8 (undated 2010).

<sup>137</sup> Cabinet Office, *Guide to Making Legislation*, section B9.26–9.50 (September 2010); [www.cabinetoffice.gov.uk](http://www.cabinetoffice.gov.uk). See NAW, *Drafting Measures Inquiry*, *Written Evidence from Cardiff Law School, Wales Governance Centre*, CA DM5.

The use of the affirmative resolution procedure for the exercise of these powers provided NAW with a further chance to correct any error; to date there has been no judicial challenge.

### 3 The Welsh Assembly Government's Executive Competence

However significant was Part 3 to NAW's political legitimacy as a legislative body, the expansion of WAG's executive competence remains a central feature of the GOWA 2006 devolution settlement and remains untouched by Part 4; for this reason this section is written in the present tense. Much of the power to make law relating to Wales is exercised by Welsh Ministers under GOWA 1998 functions transferred to them on the commencement of the 2006 Act or in Acts of Parliament enacted and TFOs made since then.<sup>138</sup> The majority of Welsh legislation 'is still in the form of Statutory Instruments made by Welsh Ministers',<sup>139</sup> and it should also be recognised that even within the devolved Fields Ministers of the Crown continue to make subordinate legislation relating to Wales. Two matters merit brief attention, which reflect and underline the scrutiny gap that attended NAW's consideration of WAG's proposals for additions to its competence.

#### 3.1 The Transfer and Scrutiny of Executive Functions Relating to Wales

The model of executive devolution conceived for and established by the 1998 settlement comprised the transfer of specific executive functions to the corporate body. As was the case under GOWA 1998 the functions transferred, conferred or imposed under GOWA 2006 have for the most part fallen within the policy areas defined by the 20 Schedule 5 Fields. But that is purely a matter of choice and is not required by the Act: like ss. 21–22 of GOWA 1998, ss. 56–58 of GOWA 2006 do not limit these transfers. Primary legislation has transferred functions to WAG in a wide range of policy matters, such as banking, criminal law and evidence, and human fertilisation and embryology, none of which was a Schedule 5 Field,<sup>140</sup> as have TFOs.<sup>141</sup>

These transfers, conferrals or impositions are formally at least subject to parliamentary scrutiny, but they need not necessarily come before NAW prior to the enactment of the Bill or the TFO that contains them. Whether or not they do appears to be a matter of judgment by Welsh Ministers, according to the rigours of the parliamentary timetable and their dealings with Whitehall, as the Counsel General made clear in evidence to NAW's Subordinate Legislation Committee.<sup>142</sup> His view was that NAW's interests were sufficiently and properly met by its ability to scrutinise the instruments made under the devolved power; whether the

<sup>138</sup> In their analysis of the 2007–08 parliamentary session Navarro and Lambert noted that 21 Acts conferred or imposed executive functions on Welsh Ministers, together with a further use of TFOs. M. Navarro and D. Lambert, 'Bypassing the Assembly', *Agenda*, n 27, *Institute of Welsh Affairs*, Spring 2009, pp. 34–6.

<sup>139</sup> NAW, *Subordinate Legislation Inquiry*, paras. 4.32–4.40.

<sup>140</sup> For example, Dormant Banking and Building Society Accounts Act 2008, Serious Crime Act 2007, Criminal Evidence (Witness Anonymity) Act 2008, Human Fertilisation and Embryology Act 2008. See the list of Acts in WASC, *Review of the LCO Process*, Table 2.

<sup>141</sup> There are too many to list. One example is the Welsh Ministers (Transfer of Functions) (No 2) Order 2008, SI 2008/1786, which transfers functions under s. 47 of the Prison Act 1952 (education, training and libraries in prisons).

<sup>142</sup> Carwyn Jones AM (now First Minister), NAW, *Subordinate Legislation Inquiry, Consultation Responses*, Oral Evidence, 11 November 2008. UK Bills that add to Welsh Ministers' powers may 'mirror' those applicable in England, but within some procedural variations for Welsh Ministers (for example as to commencement), make different provision or 'save' existing provisions for Wales.

power should have been devolved at all was a matter for Parliament. The Secretary of State was more direct: ‘it is for Parliament to scrutinise Welsh provisions, including framework powers in Bills, and if necessary bring forward amendments in the same manner as for other provisions in primary legislation’.<sup>143</sup> This remarkable statement wholly fails to address a glaring democratic deficit in the present arrangements; it conceives devolution, in this instance of executive powers but it applied equally in the case of Measure-making clauses in Bills, as an essentially inter-governmental matter. If NAW could exert scrutiny over proposed LCOs (including exercising a veto), what justification is there for its formal exclusion from the scrutiny of these additions to WAG’s and its own powers? The Committee’s strong recommendation was that NAW should be more active in the scrutiny, as SO 15.6(ii) provides, of ‘the appropriateness of provisions in Bills and Acts of the United Kingdom Parliament that grant powers to [the executive] to make subordinate legislation’;<sup>144</sup> as noted earlier, one consequence of the *Subordinate Legislation Inquiry* was to spur the Committee to action.<sup>145</sup> But the efficacy of this scrutiny requires the Committee to be informed well in advance about such clauses and to be able formally to voice its representations. Here, the absence of a channel of communication between the legislatures remains a substantial obstacle.

### 3.2 The Making and Scrutiny of Subordinate Legislation relating to Wales

Like any other, a Welsh statutory instrument must comply with the scrutiny requirement in the parent Act or Measure, and like Westminster there may be no procedure beyond laying the instrument.<sup>146</sup> In this respect NAW faces the same question that has for years confronted Westminster: by what criteria should instruments be selected for scrutiny? There are of course far fewer Welsh instruments than the annual 3,500 at Westminster, but as NAW’s *Subordinate Legislation Inquiry* confirmed, to consider all Welsh SIs would have severe resource implications for its members and officials.<sup>147</sup> Given the limitations on NAW’s opportunities to scrutinise the initial conferral of the power, the scrutiny of Ministers’ exercise of it assumes greater significance. Where it is itself responsible for the parent legislation, as has been the case with Measures and will be with Acts of the National Assembly, NAW may impose such requirements as it thinks fit.<sup>148</sup> The *Subordinate Legislation Inquiry* concluded that its successor Committee should consider all draft and laid instruments for technical compliance, and it should consider the merits of all SIs that are subject to the affirmative resolution procedure, which are currently always debated in

<sup>143</sup> NAW, *Subordinate Legislation Inquiry*, para. 6.18. In accordance with DGN 9 those amendments would be agreed with WAG.

<sup>144</sup> NAW, *Subordinate Legislation Inquiry*, paras. 6.27–6.31. The power in NAW SO 15 does not extend to the scrutiny of draft TFOs, a matter solely for Parliament; SO 15.7.

<sup>145</sup> Above, p. 22. This is a power that it appears not previously to have exercised. Between March 2009 and February 2010 the Constitutional Affairs Committee examined six UK Bills containing clauses extending Welsh Ministers’ powers.

<sup>146</sup> NAW SO 24 requires that a draft of the Order be accompanied by an Explanatory Memorandum, which must include a Regulatory Impact Assessment.

<sup>147</sup> Similar considerations apply to the scrutiny of EU transposition instruments, in respect of which the *Subordinate Legislation Inquiry* concluded that timelier and more accessible information from WAG would be helpful; para 5. I have not taken any account of such other subordinate legislation as circulars, guidance notes and the like.

<sup>148</sup> Following debate the draft NHS Redress Measure was amended to require instruments made under it to be subject to affirmative rather than negative resolution procedure.

plenary. This second conclusion it considered to be an optimal use of its time in terms of informing AMs for the purpose of debate.<sup>149</sup>

However significant was Part 3 and is the exercise of WAG's executive functions, it remains the case that much of the law directly applicable in Wales in the devolved areas is made by Ministers of the Crown. This is obviously so in the case of primary legislation, but of much greater practical significance is the continuing flow of statutory instruments within the devolved fields. Between May 2007 and the end of 2009, central government had made 490 instruments relating to Wales,<sup>150</sup> and a further 112 jointly with WAG; 540 were made solely by WAG. For example, prior to GOWA 1998, education and health were areas where central government was to a degree content to let the Secretary of State for Wales make secondary legislation in response to local concerns; the advancement of Welsh language education and the restructuring of the NHS in Wales being significant priorities. 'Education and training' was the fifth, and 'health and health services' the seventh field listed in Schedule 2 of GOWA 1998 (Fields 5 and 9 under GOWA 2006). But the transfers made under Schedule 2 were, as noted earlier, never intended to cover either of those (or any) entire policy fields, upon which, along with many other non-transferred functions, subordinate legislation continued, and continues to be exercised in Whitehall. Executive devolution under GOWA 2006 remains as it was under GOWA 1998: partial and selective. And by definition NAW can exercise no scrutiny of these instruments.

## 4 The Transition to Part 4

### 4.1 The Scope of the Assembly's Legislative Competence

The commencement of the Assembly Act provisions will answer some but not all of Part 3's critics.<sup>151</sup> Inasmuch as NAW will be able to make Acts of the National Assembly for Wales without reference to Parliament it is clear that Part 4 establishes a qualitatively different constitutional settlement for Wales than was created by GOWA 1998 or by Part 3 of GOWA

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<sup>149</sup> NAW, *Subordinate Legislation Inquiry*, paras. 4.1–4.31. Under GOWA 1998 the Committee's terms of reference included both technical (mandatory) and merits (discretionary) scrutiny; see SO 15.2 and 15.3. See its successor's *Review of Statutory Instruments: Technical Reporting Points* (Constitutional Affairs Committee, December 2010). Of 62 reporting points on 31 instruments, 40 concerned what appeared to be defective drafting and 16 inconsistencies between the two languages; WAG accepted all but four.

<sup>150</sup> It is not possible to be exact about those that apply only to Wales; many of these, notably those giving effect to EU obligations, will apply to both England and Wales – but the crude figures give a sense of the volume of statutory instruments made in London within the devolved fields.

<sup>151</sup> Energised by the prospect of the General Election in May 2010 WAG proposed a number of LCOs in the run-up to the dissolution. The references are abbreviated here, the second HC reference being the Government response: *Culture and other Fields Order 2009*, HC 40, HC 420; *Housing, relating to Domestic Fire Safety Order 2009*, HC 142, HC 305; *Local Government Order 2009*, HC 36, HC 411; *Housing and Local Government, relating to Sustainable Housing Order 2010*, HC 186, HC 437; *relating to School Governance*, HC 274, HC 419; *relating to Transport*, HC 273, HC 436 (all of Session 2009–10). In the light of the confirmation of the Coalition Government's support for the referendum and its confidence in a 'yes' vote, WAG may have concluded that the LCO process was already redundant; no further proposals were made in 2010. On 18th January 2011 WASC announced and on its inquiry into WAG's proposed LCO on Health and Health Services; see Wales Office, Cm 7992 (January 2011). This controversial LCO would enable NAW to pass a Measure concerning presumed consent to organ donation on death.

2006.<sup>152</sup> Gone are LCOs and the business of adding matters to Schedule 5, but many aspects of the current arrangements will remain. GOWA 2006 s. 107(5) preserves Parliament's authority to make laws for Wales, which may touch upon a 'Welsh devolved function'.<sup>153</sup> In these cases NAW SO 26 requires WAG to propose a 'legislative consent motion' in respect of UK Bills that make provision for any purpose within NAW's legislative competence, but this does not extend to executive functions.<sup>154</sup> As Westminster continues to be 'Wales' other Parliament',<sup>155</sup> this semi-Sewel equivalent will assume increasing importance. Equally it is surely inevitable that WAG will seek to acquire new executive functions under Acts of Parliament as well as under Acts of the Assembly; the concerns noted on p. 25 above concerning NAW's scrutiny of those powers where they are contained in an Act of Parliament will remain.

However, there are significant changes in the manner in which the scope of NAW's legislative competence is constructed. 'At the heart of the new constitutional settlement [Schedule 7] would define the boundaries of the devolution settlement between Wales and the UK'.<sup>156</sup> It mirrors Schedule 5 in that it lists in Part 1 the subjects in respect of which NAW may enact legislation under 20 subject headings (not Fields), and in Parts 2 and 3 the general restrictions and their exceptions; but they cannot be directly compared.<sup>157</sup> This is so for three reasons. First, whereas an Assembly Measure is competent only if 'it relates to one or more of the matters specified in Schedule 5'; an Act of the Assembly can be made in respect of *any* of the subject areas. No Measure would have been competent that purported to make law in Field 4 (economic development), as no matters had been added to it (nor for the same reason Fields 7, 8, 14, 17 or 19); but as each of the equivalent headings in Schedule 7 lists a number of subjects NAW would now be competent to legislate upon them. Secondly, unlike the effect of the exceptions in Schedule 5, which were, when 'fixed', specific to their related matters,

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<sup>152</sup> By GOWA 2006 s. 107(2) 'Proposed Acts of the Assembly are to be known as Bills; and a Bill becomes an Act of the Assembly when it has been passed by the Assembly and has received Royal Assent'. NAW's legislative competence is stated in GOWA 2006 s. 108 in terms very similar to those that applied to its Measures, for example concerning any impact on the law in England or incompatibility with the ECHR or Community law. Sections 112–114 make similar provision for the scrutiny of Bills by the Supreme Court, ECJ references, and intervention by the Secretary of State. Intervention under s. 114 is however virtually the extent of the Secretary of State's formal role in Part 4.

<sup>153</sup> The Public Bodies Bill (HL) 2010 cl. 13(8) provides that a 'Welsh devolved function' means

- (a) a function transferred under a Measure or Act of the National Assembly for Wales,
- (b) a function which is exercisable as regards Wales and relates to matters within the legislative competence of the National Assembly for Wales, or
- (c) a function in relation to which
  - (i) a function is exercisable by the Welsh Ministers, the First Minister or the Counsel General to the Welsh Assembly Government, and
  - (ii) no function (other than a function of being consulted) is exercisable by a Minister' (of the Crown).

<sup>154</sup> Paragraph 14 of the Cabinet Office's *Memorandum of Understanding and Supplementary Agreement* (March 2010), [www.cabinetoffice.gov.uk](http://www.cabinetoffice.gov.uk), provides that 'the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature'.

<sup>155</sup> See A. Page and A. Batey, 'Scotland's Other Parliament: Westminster Legislation on Devolved Matters since Devolution' [2002] *Public Law* 501.

<sup>156</sup> WASC, *The proposed amendment of Schedule 7 to the Government of Wales Act 2006*, HC 603 (2010–11), Summary.

<sup>157</sup> NAW, *Drafting Measures Inquiry*, Additional Evidence from the Welsh Assembly Government: Legislative competence under Schedule 5 not contained in Schedule 7, CA(3)–08–10; Paper 13 (undated 2010).



the exceptions stated in Schedule 7 are of general application across all subject areas. This general application is achieved on the face of the Act, rather than by means of 'floating' exceptions, each of which had to be added to Schedule 5.<sup>158</sup>

Thirdly, and most significantly, although the Schedule 7 subject areas are subject to exceptions, NAW's competence is stated at a much higher level of generality than was the case with Schedule 2 of GOWA 1998 and, generally speaking, with the matters inserted into Schedule 5. Space does not permit a recital of all of the subjects listed under the 20 headings, but two may serve as examples. In the first, 'Housing' (heading 11) the exception is cast as a limitation in the terms of the subject description:

Housing and housing finance. Encouragement of home energy efficiency and conservation, otherwise than by prohibition or regulation. Regulation of rent. Homelessness. Residential caravans and mobile homes.

In the second, 'Education and training' (heading 5) the exception is explicitly stated following the subject description:

Education, vocational, social and physical training and the careers service. Promotion of advancement and application of knowledge. *Exception* – Research Councils.

These and the other 18 subject descriptions are still not equivalent to Schedule 5 to the Scotland Act 1998 ('everything but these reservations'): Schedule 7 does not construct NAW's legislative competence entirely by what is excluded from it, but by a combination of inclusion and exclusion. The purpose of Part 4 is to extend primary legislative powers to NAW in those subject areas in which WAG inherited executive functions from the corporate body or has acquired them under GOWA 2006, and in which NAW acquired legislative competence under Schedule 5. For this purpose the Act makes provision for Schedule 7 to be amended so that it reflects, at the date of the commencement of Part 4, all of that executive and legislative competence then in force. This is to a degree achieved by the National Assembly for Wales (Legislative Competence) (Amendment of Schedule 7 to the Government of Wales 2006) Order 2010.<sup>159</sup>

## 4.2 The Law in Wales

A final comment merits note. Over the past decade the law applicable in Wales within the devolved areas has gradually diverged from that in England. This presents a challenge for practitioners (both in Wales and in England) seeking to advise their clients, and more broadly to those living in Wales who seek a clear understanding of their rights and duties

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<sup>158</sup> On 'fixed' and 'floating' exceptions, see above, p. 12.

<sup>159</sup> GOWA 2006 s. 109. See the National Assembly for Wales (Legislative Competence) (Amendment of Schedule 7 to the Government of Wales 2006) Order 2007, SI 2007/214 and the National Assembly for Wales (Legislative Competence) (Amendment of Schedule 7 to the Government of Wales Act 2006) Order 2010, SI 2010/2968. The 2010 Order was described by the Government as a 'tidying up exercise', but WASC received evidence suggesting that Schedule 7 was in some respects narrower in scope than the equivalent matters in Schedule 5. The Secretary of State's response was that in no case were the powers under Schedule 7 narrower than those under Schedule 5, but the Committee noted that the Wales Office was not able to provide a complete statement; WASC, *The proposed amendment of Schedule 7 to the Government of Wales Act 2006*, paras 20, 31 and Conclusions and recommendations, para 3.

and to those individuals who may speak for them.<sup>160</sup> The challenge is more acute when one considers the variety of the sources of law relating to Wales. Leaving aside the law that falls outside the devolved areas and thus in respect of which the Welsh institutions have no competence, the applicable law in the devolved areas in essence comprises:

- Primary legislation made in Westminster pre- and post- both devolution settlements
- Primary legislation made by the Assembly (Measures) under Part 3 of GOWA 2006
- Subordinate legislation made by the Secretary of State pre-GOWA 1998
- Subordinate legislation made by the corporate body under GOWA 1998 and by Welsh Ministers under GOWA 2006 (Welsh statutory instruments)
- Subordinate legislation made by Ministers of the Crown pre- and post- both devolution settlements
- Subordinate legislation made by Ministers of the Crown jointly with Welsh Ministers post devolution
- Statutory instruments made by Welsh Ministers as designated authorities under the European Communities Act 1972.<sup>161</sup>

Following the commencement of Part 4 will be added, along with the continuation of subordinate legislation made in Whitehall and Cardiff,

- Primary legislation made by the Assembly (Acts of the National Assembly)
- Subordinate legislation made under Assembly Acts

For at least the past five years, committees of the UK Parliament, of the Assembly, the UK Government and other *ad hoc* enquiries have all remarked on this 'plethora of sources of law'.<sup>162</sup> They have all equally remarked on the desirability of there being a single accessible record of all law applicable in Wales, a matter on which the Coalition Government agrees.<sup>163</sup> Quite what is entailed in the notion of a 'Welsh statute book' and how it would be funded are questions as yet unanswered,<sup>164</sup> but the imminent prospect of the transition to Part 4 might serve to focus minds.

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<sup>160</sup> Justice Committee, *Devolution: A Decade On*, para 150. In addition to legal practitioners these include officials within trades unions, professional and statutory bodies, charities and others working in the third sector.

<sup>161</sup> GOWA 2006, s. 59. The designation is of particular significance in devolved Field 1 (agriculture, fisheries, forestry and rural development).

<sup>162</sup> John Osmond, Director of the Institute of Welsh Affairs, Justice Committee, *Devolution: A Decade On*, para. 149. See generally *All Wales Convention*, ch. 3.9.

<sup>163</sup> WASC, *Wales and Whitehall*, para 32: 'The accessibility of the law in relation to Wales and the creation of a single comprehensive reference of legislation impacting on Wales is important. We encourage the Government to support WAG to achieve this objective'. And see the *Government Response*, para. 27, 'the coalition Government agrees that the public should be able to access clear and simple information as to what powers are held by the Assembly and the Welsh Assembly'.

<sup>164</sup> Cardiff Law School has since 1999 hosted a website, Wales Legislation Online ([www.wales-legislation.org.uk](http://www.wales-legislation.org.uk)), of which the author was manager until October 2010, currently funded by the Assembly Commission and the Welsh Assembly Government.

## 5 Conclusions

Few will mourn the passing of the LCO procedure. Having agreed in *Better Governance for Wales* to the separation of legislative and executive powers and then to some rebalancing of the legislative authority between Westminster and the newly created legislature, the UK Government was faced with a question of constitutional significance: how to extend the devolution settlement to Wales while retaining central control over that extension. This task was met, as described here, by an incremental approach to the concept of devolution by inclusion. The chosen device, the LCO procedure, generated two broad problems.

The first was largely of a technical nature (but this is not to minimise the problems raised) comprising elements both of legislative and of legal process: how to manage inter-governmental relations as LCOs took shape in Cardiff and London; how to progress them through pre-legislative scrutiny in both legislatures in the absence of any precedents for this form of transferring legislative competence; and how to manage the legitimate expectations of a democratically elected legislature in Cardiff and of Westminster's obligations under s. 95. None of these politically sensitive processes was made the easier by the device, developed from the 1998 settlement, of conferring competence in the form of particularised matters qualified in turn by exceptions and carve outs to exceptions. There was always the potential for future trouble in the need to determine whether NAW had a specific legislative power by virtue of an exception to an exception to a wider specific competence.

The second set of problems touched on constitutional principle and on the UK Government's conception of devolution to Wales. The requirement of Whitehall clearance, with the possible veto over a proposed LCO, is seen most clearly in the Government's response to the Environment LCO, but constituted a systemic aspect of the relationship between the centre and Cardiff. At Westminster WASC's concerns about the policy implications of a proposed LCO, notably in the case of the first Housing LCO, became the focus of resentment in Cardiff, as this 'second chamber for Wales' was seen as interfering in policy decisions that NAW had democratically reached. Reflecting its terms of reference, the Lords Constitution Committee focussed primarily on the implications for the UK constitution of an LCO's amendment to an Act of Parliament that it regarded as an element in a constitutional document for Wales. Unlike Scotland's equivalent, the scope of NAW's legislative competence was, by means of s. 95 and Schedule 5, quite deliberately constituted so as to require Westminster's consent to every accretion in competence. In these circumstances it was inevitable that Welsh Ministers and Welsh civil society would become frustrated by what they perceived an often dilatory and at worst an indifferent response to Welsh concerns.

But these were not the only focus of concern for those who wished to see greater formal opportunities in NAW for the scrutiny of the accretion of legislative and of executive competence for the Welsh institutions. Over the lifetime of the LCO procedure, the total number of new matters added to Schedule 5 was divided broadly equally between those derived from LCOs and those contained in Measure-making clauses in Acts of Parliament. These clauses were the product of agreement between WAG and Whitehall in respect of which NAW had no formal input. And as NAW's Constitutional Committee noted, neither has formal scrutiny routinely accompanied the inclusion in Bills of new executive powers for WAG. In short, even under *Better Government for Wales'* conception of the devolution

settlement, the democratic deficit identified a decade earlier was in these respects unchanged.

The additional purpose of the December 2010 amendments of Schedule 7 was to enable voters in the referendum 'to know precisely what powers are proposed to be devolved'.<sup>165</sup> They would have seen that while this is unquestionably a broader settlement than under Part 3, the nature of the Welsh devolution settlement remains 'quite different from those relating to Scotland and Northern Ireland'.<sup>166</sup> Part 4 is a marked improvement on the LCO procedure in terms of NAW's direct autonomy to enact Bills relating to one or more of the subjects listed in Part 1 of Schedule 7. But its legislative competence remains bounded and the underlying conception of devolution by inclusion surely implies the continuation of the inter-governmental negotiations and possible Whitehall veto that characterised the LCO process.<sup>167</sup> There remain questions about the further expansion by Order of either the Schedule 7 subject headings or of their contents,<sup>168</sup> or, indeed of new exceptions. Suppose the Organ Donation LCO proved so objectionable to the Department of Health that it fell at one of the pre-legislative hurdles or indeed under s. 95,<sup>169</sup> it would equally be open to the Government to preclude NAW enacting legislation by amending Schedule 7 to add a further exception under heading 9 (Health and health services), 'Organ Donation'. To paraphrase the Referendum Order, the 'yes' vote does not lead entirely a continuation of what happens at the moment, but it is unlikely that the amended state of affairs will answer all critics of the Part 3 arrangements, or indeed those who voted 'no' in the referendum.

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<sup>165</sup> David Jones MP, Parliamentary Under Secretary of the Wales Office, Evidence, WASC, *The proposed amendment of Schedule 7 to the Government of Wales Act 2006*, para 20.

<sup>166</sup> WASC, *The proposed amendment of Schedule 7 to the Government of Wales Act 2006*, Summary.

<sup>167</sup> For example, teachers' pay and conditions is a policy area that was never exercised by the Welsh Office, nor devolved under either GOWA 1998 or GOWA 2006, and is not mentioned in Schedule 7 under heading 5 ('education and training'). The Secretary of State has indicated that this will remain a non-devolved subject; WASC, *The proposed amendment of Schedule 7 to the Government of Wales Act 2006*, para. 25.

<sup>168</sup> And of the use of Acts of Parliament for this purpose. The Government has indicated that the Devolution Guidance Notes will be amended should the referendum be carried, and that there will need to be consultation between it, NAW and WAG about future changes to Schedule 7, which can include additional subjects. WASC, *The proposed amendment of Schedule 7 to the Government of Wales Act 2006*, paras 41–45.

<sup>169</sup> The Health and Health Services LCO; above n 151.