



House of Commons
Welsh Affairs Committee

**Legislative
Competence Orders in
Council: Government
Response to the
Committee's Second
Report of Session
2006–07**

**First Special Report of Session 2006–
07**

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The Welsh Affairs Committee

The Welsh Affairs Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Office of the Secretary of State for Wales (including relations with the National Assembly for Wales).

Current membership

Dr Hywel Francis MP (*Labour, Aberavon*) (Chairman)
Mr Stephen Crabb MP (*Conservative, Preseli Pembrokeshire*)
Mr Wayne David MP (*Labour, Caerphilly*)
Mr David T.C. Davies MP (*Conservative, Monmouth*)
Nia Griffith MP (*Labour, Llanelli*)
Mrs Siân C. James MP (*Labour, Swansea East*)
Mr David Jones MP (*Conservative, Clwyd West*)
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Mr Mark Williams MP (*Liberal Democrat, Ceredigion*)
Mr Hywel Williams MP (*Plaid Cymru, Caernarfon*)

Powers

The committee is one of the Departmental select committees, the powers of which are set out in House of Commons Standing Orders, principally in SO No 152. These are available on the Internet via www.parliament.uk.

Publications

The reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the internet at www.parliament.uk/parliamentary_committees/welsh_affairs_committee.cfm.

Committee staff

The current staff of the Committee is Nick Wright (Clerk), Llinos Madeley (Committee Specialist), Christine Randall (Committee Assistant), Annabel Goddard (Secretary), Jim Lawford (Chief Office Clerk) and Laura Kibby (Media Officer).

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First Special Report

The Committee published its Second Report of Session 2006–07, *Legislative Competence Orders in Council* on Tuesday 5 June 2007. The response from the Wales Office was received on 19 July 2007 and is published as the Appendix to this Report.

Appendix: Government Response

Government Response to Second Report of The Welsh Affairs Select Committee on Legislative Competence Orders in Council

This response lists the Report's conclusions and recommendations in bold, with the relevant Government response in normal font below each one.

1. We welcome the opportunities provided for working jointly with Assembly committees in the scrutiny of proposed LCOs, subject to the comments elsewhere in this Report concerning their anticipated number and timing, whilst of course we acknowledge the Welsh Affairs Committee's primary responsibility to inquire into Government policy as it affects Wales. We are keen to ensure that we retain flexibility in our own timetable of inquiries and we believe it is very appropriate that as elected representatives of the people of Wales we have this central role. (Paragraph 18)

The Government welcomes the Committee's willingness to work jointly with Assembly committees, and notes the Committee's comments in relation to the anticipated number and timing of the proposals. The Government welcomes the Committee's willingness to engage with and contribute to this important process for Wales.

2. While we welcome the opportunity for this Committee to scrutinise proposed LCOs, we agree with the Parliamentary Under Secretary of State for Wales' comment that there is a balance to be struck, and that this Committee needs to consider the effect it could have on its existing programme of inquiries. (Paragraph 19)

The Government notes and appreciates the Committee's need to balance the work entailed by undertaking pre-legislative scrutiny of all of the Order in Council proposals in the context of its wider programme of work. The appropriate level of pre-legislative scrutiny will be a matter for the Committee to determine. In the case of particularly complex or controversial proposed Orders, the Committee may decide that more intensive scrutiny is required. In the case of straightforward or technical proposed Orders, for example, a proposed Order purely intended to tidy up Schedule 5, the Committee may conclude that little or no pre-legislative scrutiny is required.

3. We also note that in conducting pre-legislative scrutiny of LCOs, we may need to draw on additional legal advice. (Paragraph 20)

The Government notes the views of the Committee and will look to the Committee to determine whether it needs to draw on additional legal advice as it sees fit.

4. We agree with the Parliamentary Under Secretary of State and with the Business Minister that, in cases where a proposed Order raises complex legal issues, has wide implications or is politically controversial, it may be appropriate for it also to be scrutinised by the Welsh Grand Committee, following its scrutiny by the Welsh Affairs Committee or by another committee of the House. (Paragraph 23)

The Government gave assurances about pre-legislative scrutiny for these proposed Orders in Council during the passage of the Government of Wales Act 2006, including the role of the Welsh Grand Committee where appropriate (Hansard, 24 January 2006, column 1329). The Welsh Affairs Committee will need to identify the circumstances in which it believes that it is more appropriate for the Welsh Grand Committee to undertake such scrutiny. The Committee could also consider inviting MPs with an interest to make representations during its own scrutiny of the proposals in order to ensure that any Member or Peer has an opportunity to comment as they could have done during a Bill's passage through Parliament.

5. We recommend that the UK Government and the National Assembly give further consideration to the means by which the timetables of the National Assembly, the House of Commons and the House of Lords can be most effectively co-ordinated for the consideration of LCOs. We agree with the House of Lords Select Committee on the Constitution that pre-legislative scrutiny in the Commons and the Lords should be concurrent rather than consecutive, and that the work of one House should complement rather than duplicate the work of the other. (Paragraph 26)

The Government notes the Committee's views. We would welcome effective co-ordination and joint scrutiny with Assembly Committees to ensure that scrutiny is concurrent, so that the process can be dealt with expeditiously. Complementary rather than duplicative work would also aid effectiveness. We anticipate individual Assembly Committees will keep the Welsh Affairs Committee informed of their planned work on proposed Orders in Council to enable the Committee to plan its work programme.

Reconsideration

6. We note that it is a matter for the Assembly, and in particular for the originator of the proposed Order, how to take into account any differing and possibly competing recommendations contained in reports following the pre-legislative scrutiny of a proposed Order. (Paragraph 27)

The Government envisages that where proposed Orders in Council originate from the Welsh Assembly Government, they will decide, in agreement with the UK Government, what amendments are required in light of pre-legislative scrutiny. Where proposed Orders in Council originate from an Assembly backbencher or Assembly Committee, it will be for them to decide how to take recommendations into account, but the Welsh Assembly Government and the UK Government may provide technical assistance as appropriate. The finalised draft Order will then be tabled before the Assembly, and if approved, the First Minister will write formally to the Secretary of State requesting that it be laid in Parliament.

7. We fully support the view of the witnesses before this Committee that the presumption should be that proposed LCOs should be subject to pre-legislative scrutiny. (Paragraph 33)

The Government fully endorses the presumption that proposed Orders should normally receive pre-legislative scrutiny. The Government gave commitments in January in relation to pre-legislative scrutiny (Hansard, 24 January 2006, column 1329), and similar commitments were given when the Wales Office Parliamentary Under Secretary and Assembly Business Minister gave evidence during this inquiry. As noted in evidence to the Committee there may be special circumstances when a shortened or accelerated procedure may be appropriate, or indeed in rare circumstances where pre-legislative scrutiny is not possible.

8. If there have been substantive changes between the proposed Order and the draft Order laid before Parliament, we would expect the Government to allow sufficient time for further parliamentary scrutiny if this Committee or others wished to conduct it. (Paragraph 37)

The Government notes the Committee's comments, and has indicated its strong commitment to pre-legislative scrutiny.

9. We re-iterate our view that the debate of draft Orders should be undertaken on the floor of the House. (Paragraph 41)

The Government notes the Committee's view and it will be reflected in discussions by the usual channels as Orders come forward.

10. We recommend that the authorities of the National Assembly explore the possibility of making appropriate arrangements to represent the interests of the originator of a draft Order as it passes through its Parliamentary stages. (Paragraph 43)

The Government notes the Committee's comments. This will be a matter for the National Assembly for Wales and we understand that they are considering ways in which they may do this.

11. The Parliamentary Under Secretary of State estimated that there would be "four or five" LCOs annually "evenly paced throughout the year", which he described as "manageable". He also described as "unattainable" estimates he had seen of up to 30 LCOs a year. We agree with both these assessments, and would be very concerned if anything approaching the upper estimate was proposed. The Parliamentary Under Secretary also indicated that pre-legislative scrutiny was expected to take between three and six months; "certainly six months would be the maximum time". If there are to be four or five LCOs a year, this timeframe seems to us reasonable as far as Westminster is concerned. (Paragraph 44)

The Government welcomes the Committee's views. This process has been introduced to give the Assembly the legislative competence it needs to make Assembly Measures to enable the Welsh Assembly Government to implement its policies. The making of Assembly Measures will become a key component of the Assembly's workload, which it

will need to balance with the work which the proposed Orders will require from Assembly Members.

12. We are concerned that to continue to add Matters by primary legislation could therefore be a device for a general, rather than a specific, extension of Assembly powers, which at the same time negates the opportunity for specific and detailed pre-legislative scrutiny either by a committee of the National Assembly or by the Welsh Affairs Committee. (Paragraph 49)

The Government notes the Committee's views. Government policy on this matter remains as set out in the *'Better Governance for Wales'* White Paper. That said "...the Government intends for the future to draft Parliamentary Bills in a way which gives the Assembly wider and more permissive powers to determine the detail of how the provisions should be implemented in Wales."

The Order in Council mechanism has been introduced because previously there was an important limitation on the Welsh Assembly Government's ability to implement its policies, and especially to take prompt action in an area of policy where the public might expect it to be able to do so. The limitation was that its opportunities to promote any changes to legislation were constrained by the legislative priorities of the UK Government.

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

Both Orders in Council and Framework Powers are therefore appropriate vehicles to modify the Assembly's legislative competence. And as the *"Better Governance for Wales"* White Paper makes clear, "the decision as to how wide a policy area such a power would cover on any particular occasion would be a matter for Parliament". Whichever route is used, the Government is committed to ensuring that Parliament has the information it requires to make a judgement about the appropriateness of conferring particular powers.

Where framework powers are sought, just as with Orders in Council, an explanatory memorandum will therefore be produced and used as part of the scrutiny arrangements. That explanatory memorandum will provide a clear justification as to why the proposed powers are being sought and why they have been framed in a particular way, whether broadly or narrowly. The UK Government will on introduction in either House place copies of the explanatory memorandums in the Library of both Houses, at the same time it will make copies available to Welsh MPs and Peers and also provide Opposition spokespeople with a copy. Where substantial Government amendments are made to Clauses containing framework powers – for example, if new Matters are added – the Government will issue a supplementary explanatory memorandum setting out the intended purpose of the change.

Framework Powers will have the same level of detailed scrutiny and testing by amendment as any other proposed provision in a Bill, and will be subject to amendment during the passage of the Bill to take account of points raised during the debate.

As the Committee points out in its Report, the recent changes to Bill Committee consideration will also provide additional opportunities for scrutiny. Committees will begin with an evidence session, which will help them to programme their subsequent consideration. Any members or other individuals or organisations with an interest in a particular provision will be able to take this opportunity to make submissions relating to the Framework Power to the Bill Committee for consideration. If the Welsh Affairs Committee saw fit, it could flag a framework power for Wales as meriting closer attention and examination.

The Government has undertaken to issue a Written Ministerial Statement to Parliament following the Queen's Speech setting out the provisions within the programme affecting Wales. The Government would seek to draw to Parliament's attention the inclusion of any framework powers in Bills at this point.

How these matters are scrutinised within the National Assembly for Wales is a matter for that body. The Secretary of State for Wales makes an annual statement to the National Assembly for Wales on the content of the UK Government's legislative programme. The Assembly can refer to its committees consideration of Welsh aspects of UK Bills. Committees conduct evidence sessions and Wales Office Ministers attend Committee hearings to give evidence. We will continue to do so if invited.

13. We are pleased to note the Presiding Officer's comment that a consolidated list of Fields will be published on the Assembly's website and will be updated regularly. (Paragraph 53)

Schedule 5 will at all times stand as the definitive list of the current matters within each field, within which the National Assembly will have legislative competence. The definitive list will also be made available on the Wales Office website, www.walesoffice.gov.uk and the Welsh Assembly Government website, new.wales.gov.uk and updated where necessary.

14. We agree with the Presiding Officer's comment that the process by which the legislative powers of the National Assembly are enhanced should be as open and transparent as possible, and that this should be borne in mind as practice and procedure develops. (Paragraph 54)

The Government notes the Committee's comments, and pre-legislative scrutiny will play a vital role in bringing transparency to the process whereby Parliament will confer legislative competence on the Assembly. Where Parliament is asked to consider a proposed draft order, it will be accompanied by an explanatory memorandum providing a description of the purpose for which the power is being sought and specifying the areas where legislation is required.