

Select Committee on the Constitution

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To examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution.

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Lord Rowlands
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Contact Details

All correspondence should be addressed to the Clerk of the Select Committee on the Constitution, Committee Office, House of Lords, London, SW1A 0PW.

The telephone number for general enquiries is 020 7219 1228/5960

The Committee’s email address is: constitution@parliament.uk

Scrutiny of Welsh Legislative Competence Orders

Introduction

1. In March 2007 Baroness Amos (then Leader of the House of Lords) wrote to this Committee requesting that we consider conducting pre-legislative scrutiny on proposed Legislative Competence Orders under section 95 of the Government of Wales Act 2006 (“the 2006 Act”), to complement the scrutiny role of the House of Commons Welsh Affairs Committee. This request was in line with our own report on the Government of Wales Bill published during the Bill’s passage through Parliament, in which we suggested that pre-legislative scrutiny in this House should be carried out by either the Delegated Powers and Regulatory Reform Committee or by our own Committee.¹ Accordingly, we agreed on 18 April 2007 to perform this pre-legislative scrutiny role for an initial 12-month trial period.
2. The purpose of this report is to remind members of this House (and other interested parties) what Legislative Competence Orders (LCOs) are and to explain how they are going to be scrutinised at the pre-legislative stage and subsequently in both Parliament and the National Assembly for Wales.

Legislative Competence Orders

3. Part 3 of the 2006 Act empowers the National Assembly to make laws known as “Measures of the National Assembly for Wales” (section 93). Within the legislative competence conferred, “an Assembly Measure may make any provision that could be made by an Act of Parliament” (section 94). Schedule 5 to the 2006 Act lists the “fields” in relation to which a Measure may be made. These include, for example, “Field 1: agriculture, fisheries, forestry and rural development”, “Field 3: culture” and “Field 9: health and health services”. Within each field, Schedule 5 may set out with more specificity the various matters which fall within that field.
4. Under Part 3 of the 2006 Act, Parliament, the National Assembly and the Secretary of State for Wales may agree to enlarge the National Assembly’s powers to make Measures and the powers of Welsh Ministers to make subordinate legislation by conferring law-making powers in an LCO. An LCO may:
 - add a matter to a field;
 - add a new field (if Welsh Ministers, the First Minister or the Counsel General already have functions conferred by other legislation in relation to that field); or
 - amend Parts 2 and 3 of Schedule 5, which define “general restrictions” on the National Assembly’s legislative competence.
5. Once the National Assembly possesses the necessary powers, it may proceed to make Measures and (if the Measure in question allows this) Welsh

¹ Constitution Committee, 8th Report (2005–06): *Government of Wales Bill* (HL Paper 142), paragraphs 23–24.

Ministers may make subordinate legislation on that subject matter. Parliament will have no role in relation to that legislation, and scrutiny will be carried out by the National Assembly.

6. When the 2006 Act received Royal Assent, Schedule 5 contained a list of 20 fields. Only one, “Field 13: National Assembly for Wales”, contained any matters. In March 2007—in consequential arrangements necessitated by the creation of the Welsh Assembly Government as a legally separate entity from the National Assembly—Schedule 5 was amended by order (not an LCO) to add matters to “Field 5: education and training” and “Field 9: health and health services”. As the new era of Welsh legislation by Measures begins, there are therefore three fields in which the National Assembly already has some legislative competence. Over the coming years, the process of seeking LCOs will allow the National Assembly to acquire law-making powers in the other fields and to gain additional powers in relation to fields 5, 9, and 13.

Pre-legislative Scrutiny

7. The process by which LCOs are passed is somewhat complex (see the Appendix to this report for a flowchart describing the process).
8. The first phase involves the Welsh Assembly Government and the Secretary of State agreeing on the scope of the powers sought and preparing the text of the proposed LCO.² An explanatory memorandum is also prepared by the Welsh Assembly Government.
9. The second phase is a period of pre-legislative scrutiny by an *ad hoc* committee in the National Assembly and, generally at the invitation of the Secretary of State, by the House of Commons Welsh Affairs Committee and the Constitution Committee.³ The *ad hoc* committee and the Welsh Affairs Committee may meet together to consider the proposal and take evidence. The Counsel General or the Attorney General also have a role in relation to proposed LCOs: under section 96 of the 2006 Act, they may refer to the Judicial Committee of the Privy Council (subsequently the Supreme Court of the United Kingdom when it begins to sit) “for decision the question whether a matter which a proposed Order in Council under section 95 proposes to add to Part 1 of Schedule 5 relates to a field listed in that Part”.
10. The three committees mentioned above will consider the proposed LCO simultaneously. It is for the other two committees to explain their criteria when undertaking such scrutiny, but the Constitution Committee will apply the usual yardstick of concerning itself with “matters of principle affecting a principal part of the constitution”.⁴ The overarching question will be whether, from a constitutional point of view, the request for legislative competence is within the overall letter and spirit of the devolution settlement.
11. In assessing proposed LCOs, the Constitution Committee will have regard to the terms of the proposed LCO in question, the explanatory memorandum

² During the pre-legislative phase, LCOs are referred to as “proposed orders”; in the legislative stage, when they have formally been laid before Parliament, they are “draft orders”.

³ Under the National Assembly’s Standing Order 22.16(ii), if the National Assembly approves a motion in plenary to bypass detailed scrutiny of the proposed order, then the Member in charge of the proposed order may proceed to introduce a draft order under Standing Order 22.31. This does not preclude the Welsh Affairs Committee and the Constitution Committee from conducting pre-legislative scrutiny.

⁴ See Constitution Committee, 1st Report (2001–02): *Reviewing the Constitution: Terms of Reference and Method of Working* (HL Paper 11), paragraph 22.

and the formal requirements of Part 3 of the 2006 Act (in particular sections 94 and 95) and Schedule 5 to the Act. In relation to scrutiny of proposed LCOs, it needs to be borne in mind that LCOs contain only enabling provisions. It is the manner in which the National Assembly subsequently chooses to use those enabling powers to make Measures that is more likely to give rise to questions relating to the legislative competence of the Assembly—but those questions will be for the courts rather than Parliament to determine, as Parliament’s formal role in the Welsh legislative process ceases at the point that an LCO is approved by both Houses.

12. The Constitution Committee’s consideration of proposed LCOs will include consideration of the following questions.⁵

- (a) Does the proposed LCO appear to confer legislative competence that risks falling foul of the “general restrictions” defined by Parts 2 and 3 of Schedule 5 to the 2006 Act? The restrictions relate to: (a) altering functions of Ministers of the Crown; (b) criminal offences punishable by fines over level 5 or more than two years imprisonment; and (c) amending certain Acts of Parliament.
- (b) Does the proposed LCO and any envisaged Measure described in the explanatory memorandum appear to apply beyond Wales or extend beyond England and Wales?⁶ In the 2006 Act, sections 94(4)(b) and (6)(b) impose territorial restrictions on the National Assembly’s legislative competence.
- (c) Does the “matter” set out in the proposed LCO properly fall within the “field” under which it is to be placed in Schedule 5? To take an example: should a request for legislative competence to require smoke detectors and fire alarms to be fitted in domestic dwellings fall under “Field 7: fire and rescue services and promotion of fire safety” or “Field 18: town and country planning”, both, or neither? The 2006 Act is, to all intents and purposes, a written constitution for Wales⁷ and it is therefore important that there be clarity about the legal base for any legislation.
- (d) Do the provisions of the Measure envisaged in the explanatory memorandum accompanying the proposed LCO properly “relate to” a “matter” set out in the proposed LCO or another matter specified in Schedule 5, as required by section 94(4)(a)?⁸ As indicated above, at the pre-legislative stage of proposed LCOs the Constitution Committee will not have before it the text of any Measure.

⁵ Where necessary, we will consult with the advisers to the Joint Committee on Human Rights, the Joint Committee on Statutory Instruments and the Delegated Powers and Regulatory Reform Committee.

⁶ “England and Wales” is a single legal jurisdiction and the courts of England and Wales will therefore be able to adjudicate on disputes relating to Measures.

⁷ The Appellate Committee of the House of Lords has recognised that the Northern Ireland Act 1998 is “in effect” a written constitution for that part of the United Kingdom (*Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32).

⁸ The concept encapsulated by the phrase “relates to”, sometimes known as the “respection doctrine”, is a familiar one in written constitutions and devolved settlements (as under the Scotland Act 1998). There is a substantial body of case law on its meaning. Lord Atkin’s statement in *Gallagher v Lynn* [1937] AC 863 at 870 is widely regarded as capturing the gist of the approach that should be adopted: “It is well established that you ought to look at the true nature and character ... the pith and substance of the legislation. If, on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorised field”.

Therefore, it will only be possible to consider whether there are any obvious problems in respect of what is said about planned Measures in the explanatory memorandum.

- (e) Does what is proposed appear to be incompatible with the Convention rights set out in the Human Rights Act 1998, contrary to section 94(6)(c) of the 2006 Act? The proposed LCO itself—being merely enabling in character—is unlikely to affect Convention rights; but consideration may be given as to whether the manner in which the power may be exercised in making a Measure is likely to have any significant human rights implications that ought to be flagged up at the outset.
 - (f) Does what is proposed appear to breach European Community law, contrary to section 94(6)(c) of the 2006 Act? Similar constraints on the depth of scrutiny apply here as they do in relation to Convention rights.
 - (g) Have the necessary procedural requirements been followed in the making of the proposed LCO?
 - (h) Will Measures made under the proposed LCO significantly affect the institutional structure of government in Wales?
 - (i) Are there any other constitutional implications that ought to be drawn to the attention of the House and the Secretary of State?
13. Finally, because the Joint Committee on Statutory Instruments will not be involved at this pre-legislative stage, we shall attempt to bring any technical drafting points to the attention of the House and the Secretary of State.
14. At the time of making this report, we had considered one LCO: the National Assembly for Wales (Legislative Competence) Order 2007 (Additional Learning Needs). We concluded that this LCO did not raise any matters of constitutional principle.

Formal Approval of the Order

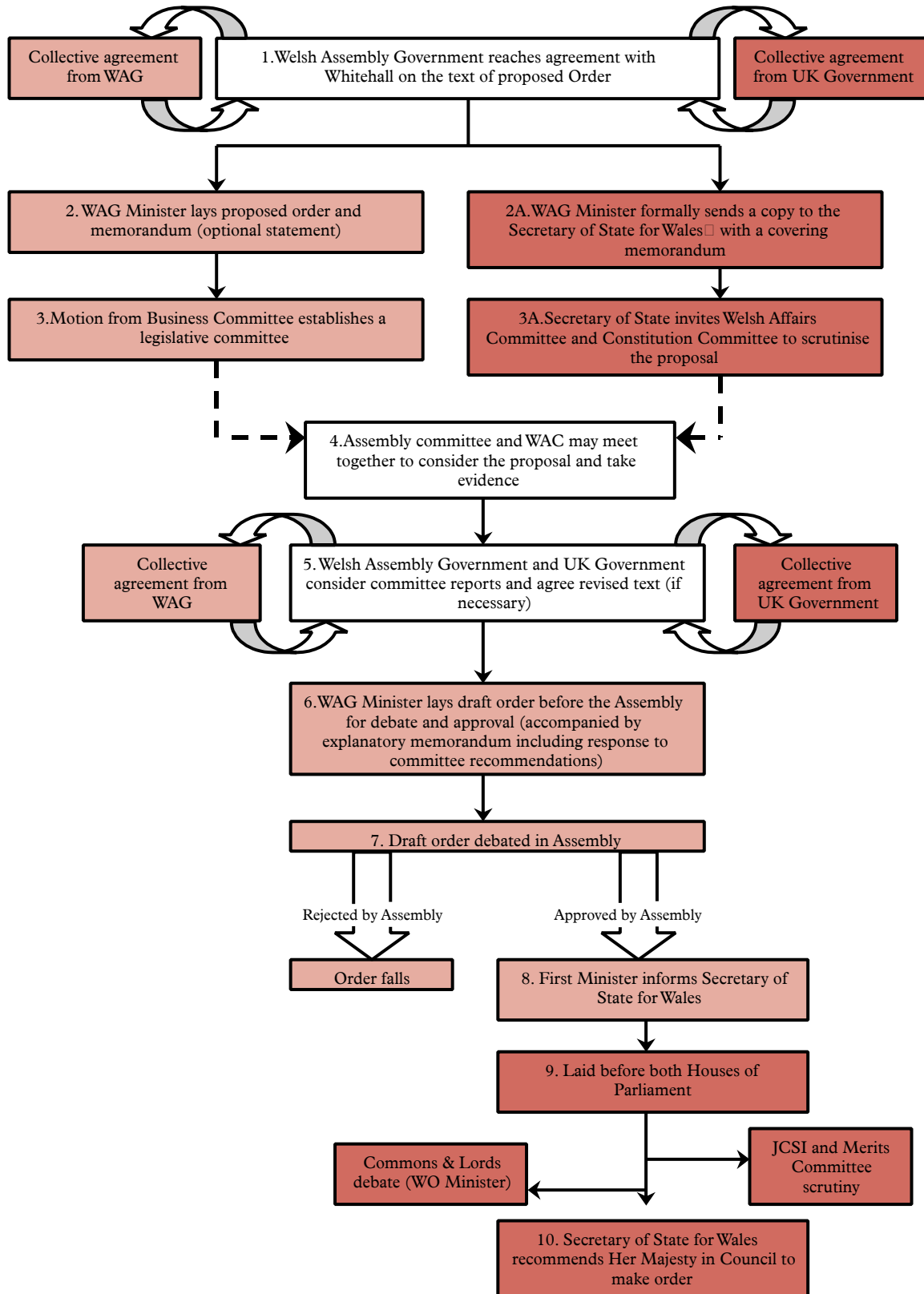
15. Following the period of pre-legislative scrutiny, the proposed LCO will be amended if this is thought to be necessary by the Secretary of State and the Welsh Assembly Government. A draft order will then formally be laid before the National Assembly for debate and approval. If it is approved, then the Secretary of State will (within 60 days of receiving notice of the Assembly resolution) lay the draft order before both Houses of Parliament, where it will face the normal scrutiny process involving the Joint Committee on Statutory Instruments and the Merits of Statutory Instruments Committee.
16. To complete its legislative passage, the draft order (which is not amendable) needs to be approved by both Houses of Parliament under the affirmative resolution procedure. Assuming this happens, the Secretary of State will then recommend to Her Majesty that the Order in Council be made. This is the end of the process.

Possible Next Steps in Devolution

17. The rather complex provisions for making LCOs and Measures set out in Part 3 of the 2006 Act are interim arrangements pending the coming into force of Part 4 of the Act. This will permit the National Assembly to make

“Acts of the Assembly” on any subject within its legislative competence. Part 4 may only be brought into force after a referendum in which the majority of the voters support the National Assembly acquiring such law-making powers. On 23 October 2007, Sir Emyr Jones Parry was appointed by the Welsh Assembly Government to chair the All-Wales Convention to promote the case for moving to the next stage of devolution.

APPENDIX: LEGISLATIVE COMPETENCE ORDERS



Source: Wales Office and Welsh Assembly Government