



# Time for a Proper Parliament?

Official submission from the Plaid Cymru  
Parliamentary Group to the All-Wales Convention

1. This submission will focus on two aspects of devolution to Wales:
  - i) the constitutional architecture of devolution, including a comparison of the situation between Scotland and Wales.
  - ii) public attitudes towards devolution.

The paper will then suggest a number of conclusions relevant to the work of the Convention chaired by Sir Emyr Jones Parry, along with other aspects of constitutional policy that require attention.

## **The Government of Wales Act 2006**

2. The first part of this submission will consider the constitutional architecture of Wales following the Government of Wales Act 2006 and compare Wales' position to the Scottish settlement following the Scotland Act of 1998.

3. There are four principal elements of the Government of Wales Act:
  - i) The separation between the executive and legislative functions exercised by the National Assembly for Wales and the Welsh (Assembly Government).
  - ii) The prohibition of dual candidature for constituency and regional elections
  - iii) A process by which 'matters' can be transferred to the National Assembly for Wales so that the Assembly may make 'Measures' in relation to these matters.
  - iv) Detail regarding the powers of the National Assembly if a successful referendum was held on creating a full law making parliament.

4. The Act gives powers to the Assembly to make measures on matters where Parliament has agreed that the Assembly should have competence. The fields (broad policy areas) and the matters (specific areas where the Assembly may legislate within a given field) are contained within Schedule 5, a schedule that is updated whenever the powers of the Assembly are changed.

5. These powers can be changed by either a Legislative Competence Order, initiated by the Assembly or by powers being transferred within Westminster legislation.

### **The Legislative Competence Order Process**

6. The process of making a legislative competence order is complex and includes several stages. Separating each individual element of the process Hywel Williams MP has identified 27 steps before an LCO is in force (Appendix A). A further innovation is the proposed veto for the Secretary of State for Wales in respect of the Housing LCO. The Lords Constitutional Committee has identified ten stages of development in the process (Appendix B). Marie Navarro and David Lambert of Cardiff Law School have identified six principal stages to the LCO process:

1. Agreeing Proposed Order with Whitehall
2. Pre-legislative scrutiny of the proposed order
3. UK and Welsh Government clearance of the order
4. Scrutiny of draft order and formal approval by the Assembly
5. Parliamentary approval (affirmative resolution)
6. Queen Makes Order

7. Thus far only three LCOs have cleared all the stages and are in force, the Additional Learning Needs LCO (9/4/08), the Domiciliary Care LCO (10/7/08) and the Vulnerable Children LCO (10/12/08).

**Table 1 - Proposed LCOs currently 'in progress'<sup>1</sup>**

LCO	Status	Proposal Announced	Latest Development
Environmental Protection and Waste Management	At pre-legislative scrutiny stage	6/6/07	LCO Committee report published 29/11/07
Welsh Language	Not published	In First Minister's programme 6/6/07	Not published*
Affordable Housing	Clearance by both governments	6/6/07	January 2009
Mental Health	At pre-legislative scrutiny stage	18/2/08 <sup>2</sup>	LCO Committee report published 20/6/08
Domestic Fire Safety	Withdrawn to return as Government LCO	20/2/08	Committee report 11/06/08
Bus and Coach Services	Being drafted	30/4/08	Consultation closed 09/08
Traffic Free Routes	Pre drafting consultation	3/7/08	
Red Meat Industry	Pre legislative scrutiny	22/9/08	LCO Committee report published 20/12/08
Flags and Motifs	Being drafted	1/10/08	
Carers	Pre legislative scrutiny	8/12/08	WAC consultation in progress

<sup>1</sup> Detail collated from the National Assembly web-site and analysis undertaken by Lambert and Navarro.

<sup>2</sup> Leave to introduce the LCO was granted on 17/10/07

8. Of the 10 LCOs currently in progress only two are now at an advanced stage of the process – the Vulnerable Children LCO and the Affordable Housing LCO. Of the 10, 8 of these bids for powers to make measures have been in progress for more than 6 months. Three have been in progress for more than 12 months, with the ‘Environmental Protection and Waste Management LCO’ vying with the ‘Welsh Language LCO’ for the proposal that has made least progress. The former was scrutinised in November 2007 and there has been no further progress since then. The latter has yet to be published, over 18 months after being announced in the Government’s programme. Both apparently are facing significant opposition from the Secretary of State for Wales and Welsh MPs. This opposition is based on their apparent disagreement with the **policy** proposal rather than the appropriateness of whether the Assembly should exercise power in these areas.

9. This is explicitly against the proposals made in the ‘Better Governance for Wales’ White Paper which is quoted in the explanatory documents for Pre-Legislative Scrutiny of LCOs.

10. This guidance states that:

“consideration of these Orders in Council could be informed by understanding the use the Assembly might propose to make of these powers in the immediate future. However... the issue for the Parliamentary 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.”

11. We believe that the Welsh Affairs Select Committee (WAC) have gone further than the role intended for them in this process, as set out in the White Paper. Instead, they are acting as a second chamber for the National Assembly for Wales and taking upon themselves the role of a revising committee which scrutinises Welsh Assembly Government policy and objectives rather than discussing the constitutional appropriateness of a transfer of powers.

12. LCOs are not however the only way in which the Assembly can gain competence to legislate. Powers can also be transferred in UK parliamentary Acts, and since the passing of the Government of Wales Act 2006, 5 Acts have transferred powers to the National Assembly. Thus far therefore there have been considerably more instances of powers being transferred via UK parliamentary legislation than through the LCO process.

13. Two specific points should be considered in relation to transfer through UK acts.

14. Firstly, the transfer of functions through parliamentary acts is entirely dependent on the UK Government's legislative programme.

15. Secondly and more importantly, thus far the powers that have been transferred mimic the provisions made for UK ministers acting in relation to England. Therefore, while the Assembly Government may wish to see powers devolved in a different way, parliament at present is not agreeing to substantial deviation from the powers being provided for in the English context. This means that devolution is not taking place as intended, and is only providing the Assembly with a Welsh version of powers that are being created for England, i.e. substituting 'Wales' for 'England'.

16. Five Measures have been thus far considered by the National Assembly. There are four stages to the 'Measures' process:

- i) Consideration of General Principles
- ii) Detailed consideration of Measure by Committee
- iii) Consideration by plenary of Measure and any amendments
- iv) Passing the final text of measure

**Table 2 – National Assembly Measures**

Measure	Introduced	Progress?	Date
Healthy Eating	14/3/08	Stage Two	16/10/08
Learning and Skills	7/7/08	Stage Two	10/12/08
Playing Fields	18/7/08	Stage One	9/2/09
Local Government	22/9/08	Stage One	28/11/08
Waste Shipment	5/11/08	Stage One to comment	

17. Two Measures have been passed:

NHS Redress (Wales)

Learner Travel

18. The NHS Redress(Wales) measure is worthy of further comment, because as a measure its content is very limited. It provides the power to Ministers to draft and lay regulations in relation to redress, but contains no detail as to the likely nature of such regulations. As such constitutional experts are not persuaded of the quality of this measure.

19. We would argue that, therefore, only one fully-fledged Measure has been passed by the National Assembly for Wales since the system was introduced.

### **Scotland**

20. In comparing Scotland to Wales, the first point to note is that the structure of the Scotland Act 1998 is very different from the provisions of the Government of Wales Act 2006. The Scotland Act specifies a relatively small list of areas where the Scottish Parliament has no competence (reserved matters), such as Defence, Foreign Affairs, and Benefits. With the exception of these reserved matters all other matters fall within the competence of the Scottish Parliament. The establishment of competence in the Scottish context therefore is relatively straightforward, whereas the Welsh context is far from being so.

21. During the first term of legislation of the Scottish Parliament, three categories of Acts may be identified.

- i) Acts which could be passed by the Assembly (e.g. Standards in Scotland's Schools 2000);
- ii). Acts which could not be considered by the Assembly (principally criminal justice matters, e.g. Sexual Offences Act 2002), and
- iii). Acts requiring further investigation.

22. 37 of the 62 acts could be passed by the Assembly, 9 could not be considered by the Assembly under the terms of the devolution settlement for Wales, but the position regarding a further 16 (one-quarter of the Acts) is not entirely clear.

23. We draw the Commission's attention to the Census Amendment Act 2000, asp 3. This is a two clause Act which adds religion to the statutory census questions, and provides that no one shall be prosecuted for failing to answer that particular question.

24. The first step in considering whether the Assembly does have powers in relation to the census is to consult Schedule 5 of matters and fields. Here we find no mention of the census and therefore we might initially conclude that the Assembly does not have power in relation to the census.

25. However, in order to ensure the accuracy of such a conclusion it is necessary to consult the legislation governing the census for England and Wales. Here we find that while the Assembly does not have powers, it is the responsibility of Welsh Government Ministers to lay before the Assembly the Commencement order for the census in Wales.

26. Therefore the Assembly *could* stop this commencement order, but would it be possible for the Assembly to specify a question in a manner similar to the Scottish Act, on, say, ability to speak Welsh?

27. Though the census does not appear in the fields of Schedule 5, because Welsh Ministers have functions in regard to the census, the Assembly could propose an LCO to create a new field of 'The Census'. If such a bid were successful then it would be possible for the Assembly to pass a measure.

28. This analysis required research on several pieces of legislation and was rather complex – and this in relation to probably the most straightforward piece of legislation passed by the Scottish Parliament in its first term. The clear finding of this exercise is that:

- i) while the Assembly may be able to pass a range of measures on similar topics to the Scottish Parliament, the cumbersome process of LCOs and Measures is likely to provide a significant barrier to legislative progress
- ii) Furthermore, it is a time consuming and complex process to establish in a range of areas whether the Assembly has competence or not.

29. To conclude our consideration of the differing powers of the Scottish Parliament and the National Assembly we should also consider the legislative capacity of both institutions. In its first four year term the Scottish Parliament passed 62 Acts. Thus far, 18 months into the four year term the Assembly and Westminster have passed 2 Measures and 3 LCOs. Apparently the Assembly does not have the resources to provide adequate scrutiny of its own legislation and of legislation in Westminster that may devolve powers to the Assembly or Welsh Ministers, and this in a time frame where relatively few measures and LCOs have been discussed. The disparity in numbers of members between the Scottish Parliament and National Assembly (129-60), allied to the complexity of the process in Wales, are factors impacting the very different pace of legislation from the Assembly as compared to the Scottish Parliament.

## Public Attitudes Towards Devolution

30. There have been relatively few opinion polls and surveys of public attitudes to devolution. Most major surveys are by the Institute of Welsh Politics at Aberystwyth University.<sup>3</sup>

**TABLE 3 – CONSTITUTIONAL PREFERENCE 1997-2008**

Constitutional preference	1997	1999	2001	2003	2007	2008
Independence	13	10	12	13	12	10
<b>Parliament</b>	<b>18</b>	<b>28</b>	<b>37</b>	<b>36</b>	<b>42</b>	<b>39</b>
Assembly	25	33	25	25	26	31
<b>No devolution</b>	<b>37</b>	<b>24</b>	<b>23</b>	<b>20</b>	<b>16</b>	<b>15</b>
Don't Know/Refused	7	5	4	5	5	6
N	686	1256	1085	988	884	2538

31. The striking features of this table are the way in which views on devolution have undertaken a marked shift since 1997. In 1997 'No Devolution' was the most popular response amongst four constitutional options and outweighed those who favoured a 'Scottish style' parliament and independence combined. By 2008 the situation has completely changed with a 'Parliament' becoming the most favoured option, and the support for returning to a pre-devolution position falling to only 15%. It is clear then that devolution in concept rather than necessarily in any particular form is now the 'settled will' of the Welsh population.

32. The academic surveys also asked questions regarding voters' views on which level of government has the most influence over the way Wales is run, and which level of government ought to have the most influence.

33. What we find here is that while the majority of respondents identify the UK government as **having** the most influence, there is a clear and definitive majority of respondents that believe that the Welsh Assembly Government **ought** to have the most influence.

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<sup>3</sup> The 1999-2007 data presented in this paper comes from a range of publications and papers by Professors Roger Scully and Richard Wyn Jones. The 2008 data comes from the National Assembly Commission website report of their opinion poll.

**TABLE 4a – WHO INFLUENCES THE GOVERNMENT OF WALES**

	Does Influence		Ought to Influence	
	2003	2007	2003	2007
Welsh Government	22	36	56	74
UK Government	58	53	29	18
Local Councils	15	5	14	8
EU	5	6	1	*
N	917	831	917	854

34. The coherence of this desire to see the Welsh Assembly Government having the most influence over the way Wales is governed is reinforced by data on where decisions regarding particular policy areas should be taken.

**TABLE 4b – Where should decisions be taken (2007)**

	Benefits	NHS	Schools	Defence/Foreign
Welsh Government	60	62	57	22
UK Government	23	26	19	74
Local Councils	17	12	25	1
EU	1	*	*	3
N	859	867	866	852

35. The striking feature of this data is the consistency of support for decisions being taken at the national level or indeed the sub-national local council level. One may have expected such a finding in relation to the NHS and Schools, but rather more surprising is the finding that a clear majority would favour decisions about benefits being made by the Welsh Assembly Government. There are also a significant minority who would favour the Welsh Government making the primary decisions in relation to defence and foreign affairs.

36. Given that the current constitutional status quo does not reflect the attitudes of the Welsh population, one might be tempted to conclude that there is prima facie a strong case for moving immediately to rectify this position. However a note of caution emerges when one considers levels of public knowledge about the current devolution settlement.

37. In 2008 the National Assembly Commission conducted an opinion poll to gauge levels of public knowledge and presented a number of statements asking respondents whether they were True/False or Did not know.

**TABLE 5 – KNOWLEDGE QUIZ**

	Right	Wrong	DK
Defence	71	14	15
Income Tax	57	32	11
Schools	89	4	7
Assembly has 100 members	16	49	35
Presiding Officer is Rhodri Morgan	14	70	15

38. The first three statements asked respondents to identify whether the National Assembly had powers in these fields. The last two statements asked respondents questions about the numbers of Assembly Members and Rhodri Morgan's title. The striking feature of these responses is how few people in Wales can identify the powers, numbers and titles of the Assembly correctly. Just over one half of respondents could correctly note that the Assembly has no income tax varying powers. By a majority of three-to-one amongst those giving an answer the people of Wales think that there are 100 Assembly Members.

39. The clear point made by these data is that the level of public knowledge about the detail of the responsibilities of the National Assembly is very low indeed.

40. Finally we relate these figures to voting intention figures in a referendum:

**TABLE 6 – Referendum Voting Intention (2008)**

Yes	46
No	32
Don't Know/Refused	22

41. When asked how they might vote in a referendum there is significant support for the establishment of a full law-making parliament. Based on small scale focus groups we have identified potential significant movement of opinion amongst electors once respondents become more familiar with the constitutional position and current powers of the Assembly. It is therefore clear that the Welsh public believe that many powers are already in the possession of the Welsh Assembly Government, and when familiarised with the actual powers and the possibilities of improving governance in Wales, they are more likely to vote in favour of a law-making parliament. We believe that it is a function of the All Wales Commission to raise awareness of the full nature of the current settlement. This will enable the Welsh public to come to a fully informed and considered view on which to make their decision.

42. Our view therefore is that the data presented here present a compelling case to have a wide ranging debate about the powers of the Assembly – principally so that electors may make an informed choice about the questions facing them. As that debate progresses our view is that based on the general attitudes towards devolution and where power should lie, the support for a Yes vote in a referendum will increase substantially.

## Conclusions

43. Having considered the constitutional position and the data regarding public attitudes a number of conclusions emerge.

1. The current LCO system is particularly cumbersome and time consuming, and even with Labour in power at Westminster and sharing powers in Cardiff there are significant difficulties which impact on the ability of the Welsh Government to move its agenda forward.
2. Defining where the Assembly has power, or may seek power is particularly complex in stark contrast to the relatively straightforward Scottish position.
3. In principle the data suggest that the people of Wales will strongly favour the establishment of a full law making parliament.
4. However, the level of public information about the current constitutional position is very limited indeed *and it is the role of the All-Wales Commission to substantially improve public awareness of this issue.*

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## **APPENDIX A**

### **HOW TO MAKE AN LCO**

A minimum of 27 different actions occur in creating an LCO

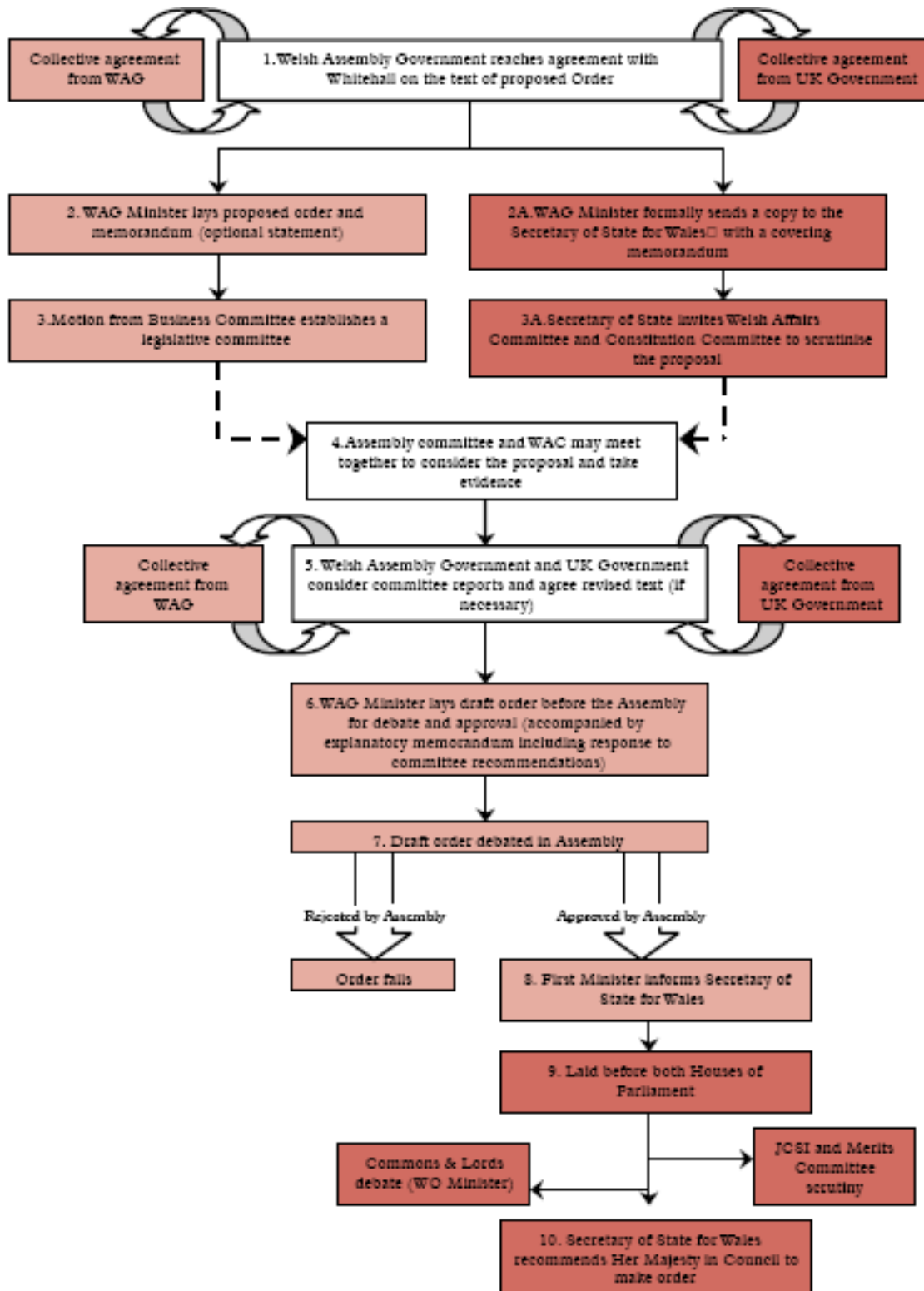
1. Announcement of LCO or ballot made (there could be other pre-LCO stages in the case of a ballot where it must be submitted or by an Assembly committee as the result of a petition)
2. Negotiation between Cardiff Bay & Whitehall on LCO text
3. Agreement of Cardiff Bay & Whitehall on LCO text ('Whitehall clearance')
4. WAG Minister lays proposed order in Plenary and accepted by vote
5. WAG Minister sends copy to Sec of State
6. Business Committee starts legislative committee in Assembly
7. Assembly Committee opens consultation
8. Sec of State publishes draft for pre-legislative scrutiny and invites Welsh Affairs Committee to scrutinise LCO
9. Sec of State invites Constitution Committee to scrutinise LCO
10. Welsh Affairs Committee asks for submissions
11. Assembly committee and WAC meet jointly or consecutively to take evidence – this has usually been consecutively and therefore could conceivably be 2 stages in the process
12. Constitution Committee scrutinises LCO
13. Assembly committee write report
14. Welsh Affairs committee write report
15. Westminster Government responds to WAC report
16. WAG & London Govt agree text after committee recommendations
17. WAG Minister lays draft order before Assembly
18. Assembly discuss and vote on LCO in plenary
19. First Minister informs Sec of State that LCO has passed or that the draft order was rejected by the Assembly, in which case it would fall
20. LCO is laid before both Houses of Parliament
21. Joint Committee of Statutory Instruments Scrutiny
22. Merits of Statutory Instruments Committee Scrutiny
23. House of Lords debates draft Order
24. Delegated Legislation Committee to discuss LCO
25. House of Commons passes draft Order without debate
26. Sec of State for Wales recommends Her Majesty in Council to make order.
27. Her Majesty makes the order

The Welsh Assembly now has the Measure making powers applied for in the Legislative Competence Order and may choose to make a Measure within these powers.

**Hywel Williams MP, 19/11/2008**

## APPENDIX B LEGISLATIVE COMPETENCE ORDERS

A description of the anticipated stages of a Legislative Competence Order.



As printed on page 8 of the 'Scrutiny of Welsh Legislative Competence Orders Report' by the House of Lords Select Committee on the Constitution (HL Paper 17, published 4<sup>th</sup> December 2007)