



National Assembly for Wales – a guide

(updated January 2011)

**Introduction by –
The Most Reverend Dr Barry Morgan, Archbishop of Wales,
Chairman of Cymru Yfory/Tomorrow’s Wales**

There is no doubt in my mind that Welsh devolution has been a huge success; it has invigorated Welsh civil society, given it many new ways to influence law-making and public policy, improved democracy and brought politicians closer to the public. All recent polls demonstrate that the National Assembly for Wales has now been fully accepted by the people of Wales.



*Archbishop of Wales,
the Most Reverend Dr Barry Morgan*

However, the National Assembly’s institutional mechanisms since 1999 have been complex and hard to understand. Even specialists and professionals find them difficult to understand or explain. The Richard Commission offered a clear blueprint for how Welsh devolution should work, drawing on the expertise and knowledge of all the political parties and of civil society. The Commission led to the establishment of our organisation.

Cymru Yfory was set up in 2004 because of our concern about the lack of progress on that admirable report, and to campaign for its implementation as quickly as possible. Cymru Yfory’s members and executive reflect a wide spread of political and personal views, and a high level of experience, united in the belief that Welsh devolution can and should work even better than it does. We gained financial support from prestigious funders like the Joseph Rowntree Reform and Charitable Trusts, and the Esmee Fairbairn Foundation.

During the debate leading to the passing of the 2006 Government of Wales Act 2006, we lobbied for improvements, with some success – but not enough. Part 3 of the 2006 Act is a mess because of its design and no amount of explanation can make clear what is inherently unclear. The first version of this document aimed to explain its workings as simply as possible.

What Wales needs and deserves is a better constitutional settlement, clearer in its structure and more workable, which respects the authority of the National Assembly. Implementing Part 4 would represent a huge step on the road toward that settlement. These are still not the Richard recommendations, but at least a practical step toward them.

Foreword

Alan Trench, Constitutional adviser to Tomorrow's Wales

Tomorrow's Wales prepared the first edition of this 'Layman's Guide' in 2006, after the Government of Wales Act 2006 had been passed by Parliament but before it came into effect. We wanted to help civil society and the public at large understand the new arrangements that the Act was bringing into force, and the implications of having a devolved Welsh legislature for the first time. We were aware that having such a legislature was a huge and exciting opportunity, and wanted to encourage civil society in Wales to embrace that. At the same time, we were conscious that the process of making and enacting legislation would be complex and unfamiliar, even to well-organised and well-informed groups. We were also aware of the particular difficulties that would arise from the new arrangements, and particularly the way the National Assembly would acquire legislative powers. We thought a guide like this would help voluntary organisations and the wider public to understand how Welsh devolution was meant to work in this exciting new phase, even if much of what we said was prediction or extrapolation. The guide was the first work of its sort, and we know from responses we have had that it is still used as a first point of reference, even though it has become badly dated.

We think the time is now right to revisit this guide and prepare a new version of it. With three and a half years' experience, it is much clearer how the arrangements set out in the 2006 Act work in practice. We have tried to show how the various procedures actually work, based on real experience rather than our informed best guesses of what would happen. Much of this is complicated and obscure. That happens in all legislatures, everywhere, and to a large degree is unavoidable – what legislatures do, everywhere, is complicated. But the key thing for people outside the Assembly to remember is that a legislature belongs, above, all, to the people who elect it. If you don't understand something about how the Assembly works, that's not your fault. Ask, and carry on asking until you get an answer that makes sense to you.

Part of this version may quickly become out of date. A referendum on whether the National Assembly should have the primary legislative powers set out in Part 4 of the Act looms in March 2011, and if the people of Wales vote 'Yes' the Assembly elected in May 2011 will be able to exercise the much wider range of powers set out there. Tomorrow's Wales is a campaigning organisation, and we have long argued for Wales to enjoy a proper range of devolved legislative powers. The very complexity and uncertainty of the system that presently applies – and described in detail in the bulk of this Guide – are the key reasons for that. Even though there are serious shortcomings in the powers that the Assembly will have after a

referendum, and in other aspects of how Welsh devolution will work, that will be a major step forward. When it comes to a referendum, our position is 'Yes, and'.

However, much of this Guide will remain applicable, even if there is a 'Yes' vote. The Assembly's legislative procedures will remain unchanged. So will the relationship between the Assembly and the Welsh Assembly Government, the role of Assembly Committees, and the powers of back-bench Assembly Members. The parts of this Guide discussing these topics will remain applicable. What will change is the discussion of how the Assembly acquires legislative powers, whether by legislative competence order or by 'framework powers'. Given how complex that system has proved to be, and how unsatisfactory have been the results, no-one should lament their demise.

We should apologise for the use of some complicated terminology and strange abbreviations in this Guide. We take no responsibility for using it – this is the language of the system that has been put in place, and we are only too well aware how intimidating and confusing it can be. We have tried to keep the use of jargon and acronyms to a minimum, and in the hope of clarifying matters have tried to explain all the key terms – particularly ones that are likely to be unfamiliar – in the glossary at the beginning. That will be the best place to look if you get confused.

The original version of the Guide was prepared by Non Gwilym, with help from Alan Trench, David Lambert and Marie Navarro, and Emyr Lewis and Tessa Shellens of Morgan Cole,. This revised version has been revised by Alan Trench, with help from Ceri John. We are also grateful to Michelle Matheron and Pip Ford for helping 'test-drive' a draft before it was finalised.

This version of the Guide was finalised in November 2010. It does not take account of any changes that took place after 1 November 2010.



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Glossary of terms



Acts of Parliament – Legislation made by the UK Parliament.

Acts of the Assembly – When Part 4 of the Government of Wales Act 2006 comes fully into effect, legislation made by the Assembly will be called ‘Acts of the Assembly’.

Assembly, or National Assembly – The National Assembly for Wales as constituted by the Government of Wales Act 2006. (See below) In law, this is different to the National Assembly that existed between 1999 and 2007.

Assembly Members – The 60 elected representatives forming the National Assembly for Wales. Forty of them are elected to represent a geographical constituency. The other 20 are elected from ‘regional lists’.

Assembly Proceedings – A term used by the Assembly to describe any of its proceedings, including plenary sessions and meetings of committees and sub-committees.

Assembly Sponsored Public Bodies (ASPBs) – public bodies responsible for implementing policy or carrying out functions, set up under the authority of the National Assembly and accountable to it, but operating at arm’s length from both the Assembly and the Assembly Government. See also Quangos.

Assembly term – The Assembly is elected for 4 year terms of office. The First Assembly existed between 1999 and 2003; the Second Assembly between 2003 and 2007. The current (Third) Assembly’s term started in 2007 and will come to an end at the Assembly elections in May 2011.

Counsel General – The Welsh Assembly Government’s chief legal adviser, and one of the Welsh Ministers. The Counsel General is, in effect, the Assembly Government’s law officer, and as such has a similar role in relation to the Welsh Assembly Government as the Attorney General has to the UK Government.

Deputy Ministers – Junior ministers appointed by the First Minister from among the Assembly Members. Together with the Welsh Ministers, they form part of the Welsh Assembly Government, but they do not sit in the Cabinet and are not included in the formal definition of ‘Welsh Ministers’. Deputy Ministers usually have responsibility for a particular aspect of a department’s policy portfolio.

Fields – Broad areas of devolved policy, like Health or Education, within which the National Assembly for Wales is able to seek legislative powers. The 20 Fields are specified in Schedule 5 to the Government of Wales Act 2006 and can be added to by Legislative Competence Orders or Acts of Parliament.

First Minister – An Assembly Member appointed by the Queen to be First Minister, following nomination by the National Assembly for Wales. The First Minister appoints the other Welsh Ministers.

Framework Powers – Provision in a Westminster Act that confers legislative powers on the National Assembly for Wales by inserting Matters into Schedule 5, without the need for a Legislative Competence Order.

Legislative Competence – The legal power of the National Assembly for Wales' power to enact legislation, whether Measures or (after a Yes vote in the referendum) Assembly Acts.

Legislative Competence Order (LCO) – An Order in Council made under section 95 of the Government of Wales Act 2006, at the request of the Assembly and approved by the UK Parliament. An LCO amends Schedule 5 to the 2006 Act, to include new Matters set out in the order.

Matters – A specific policy area within which the Assembly has legislative powers, and forming part of a 'Field' of Schedule 5 to the Act.

Measures of the National Assembly for Wales – Laws made by the Assembly while Part 3 of the Government of Wales Act 2006 is in force. These may repeal or amend existing Acts of Parliament, or make entirely new provision.

National Assembly for Wales – The body of 60 elected Assembly Members. Since 2007, it constitutes a separate legislature with legislative and scrutinising powers.

National Assembly for Wales Commission (or Assembly Commission) – the legal corporate body established to provide support functions to the National Assembly for Wales. It employs staff, holds property, enters into contracts and ensures that support services are provided for Assembly Members. .

Plenary – the National Assembly sitting as a whole body, rather than in committee.

Pre-legislative Scrutiny – Consideration of proposed legislation before the formal process of approval is started. This enables elected members to seek information, take evidence and propose improvements to the draft before legislation is adopted.

Privy Council – in a Welsh context, the body which formally makes Legislative Competence Orders, the order calling a referendum on further legislative powers, and some other legal instruments. The Privy Council's origins lie in the mists of time; it gives formal advice the Sovereign on many matters, and its members include senior members of the UK Government and Parliament, and the devolved first ministers and presiding officers.

Quangos – ‘quasi autonomous non-governmental organisations’; public sector bodies which exercise functions given to them by the Welsh Assembly Government (or UK Government). Quangos accountable to the Assembly or Assembly Government are known as ASPBs.

Standing Orders – The detailed rules that regulate the Assembly proceedings and which set out its procedures for making legislation and conducting its business.¹

Subordinate legislation – a term covering a wide range of legislation made by Welsh Ministers or UK ministers, under authority of Assembly legislation, an Act of the UK Parliament or (in some circumstances, at UK level only) Royal prerogative powers. The best known form of subordinate legislation is published as statutory instruments.

UK Supreme Court – set up in 2009, and now, the highest court in the United Kingdom, and its court of final appeal. Challenges to devolved legislation can be ‘fast-tracked’ to the Supreme Court for determination there, without involving the lower courts.

Wales Office – the department of the UK Government responsible for devolution to Wales and Welsh interests more generally. It has offices in London and Cardiff, and is headed by the Secretary of State for Wales.

¹ The Assembly's standing orders are at <http://www.assemblywales.org/bus-docs-third-standingorders.pdf>

Welsh Assembly Government – The legally separate corporate body with governmental/executive responsibilities established under the Government of Wales Act 2006, to develop policies and take decisions. The members of the Welsh Assembly Government are The First Minister, the Welsh Ministers, the Counsel General to the Welsh Assembly Government and the Deputy Welsh Ministers. There can be no more that 12 Ministers (including Deputy Ministers) at any one time.

Welsh Minister – An Assembly Member appointed as a Welsh Minister by the First Minister, with approval of Her Majesty, forming part of the Welsh Assembly Government. Ministers will usually have responsibility for a specific policy portfolio and oversee a department of the Welsh Assembly Government.

Welsh Ministers – The First Minister and the Welsh Ministers appointed by the First Minister. This does not include Deputy Welsh Ministers or the Counsel General. Westminster legislation conferring powers and responsibilities on the Welsh Assembly Government will formally provide that they are exercisable by the 'Welsh Ministers'.

Devolution post 1997 – a potted history



Proposals outlining a Welsh Assembly were part of Labour's election manifesto in 1997. They were outlined in the UK Government White Paper, **A Voice for Wales** in July 1997, and endorsed in a referendum held on 18th September 1997. Following the referendum, the **Government of Wales Act 1998**, established the National Assembly for Wales. The first elections to the National Assembly were held on 6 May 1999, and the Assembly was officially opened by Her Majesty the Queen on 26 May 1999.

The **Government of Wales Act 1998** transferred to the National Assembly for Wales most of the functions exercised by the Secretary of State for Wales before 1999, including control of Quangos that were accountable to him. It was responsible for administering public services like health, education or economic development, which accounted for just under half of all public spending in Wales. After 1999, a range of new functions were conferred on the National Assembly by Acts of the UK Parliament, which remained the only body with full legislative powers. The legislative powers of the National Assembly were very limited, however, and its powers in law remained similar to those of UK Ministers even though the Assembly was an elected body which could

collectively:

- determine its own policy priorities;
- make, scrutinise and approve subordinate legislation as defined in the Welsh provisions of UK Acts of Parliament;
- and decide how to spend the Wales budget as allocated by the UK Treasury.

Primary legislative powers and fiscal powers remained matters for the UK Parliament.

The Assembly was elected by a system called the 'additional member system'. It had 60 members, 40 to represent the constituencies used for UK Parliament elections, and 20 chosen from regional lists to bring a greater degree of proportionality to the composition of the Assembly. This means it is hard for any single party to win a majority of seats in the National Assembly.

The National Assembly created in 1999 was a 'single body corporate' in law, with no legal distinction between the elected and deliberative part of the National Assembly and the executive arm responsible for developing policy or running services. Even though there were people called 'ministers' and something called 'the Welsh Assembly Government' from 2002 onward, these were part of the single National Assembly. This was one of several features of the working of Welsh devolution that caused serious practical and constitutional problems. Another was the dependence of the National Assembly on legislation passed at Westminster

when it wanted to develop its own policy. Although Wales secured about one Wales-only bill a year, and could get many other provisions included in UK Government bills for England and Wales, this system was cumbersome to work and produced very variable results.

Wales only Bills passed between 1999 and 2007

- Government of Wales Act 1998
- Children's Commissioner for Wales Act 2001
- Health (Wales) Act 2003
- Public Audit (Wales) Act 2004
- Public Service Ombudsman (Wales) Act 2005
- Transport (Wales) Act 2006
- National Health Service (Wales) Act 2006
- Government of Wales Act 2006
- Commissioner for Older People (Wales) Act 2006

In April 2004, a commission set up by the Labour-Liberal Democrat coalition and chaired by Lord Richard of Ammanford published its final report. The Richard Commission's report considered these difficulties at length, and recommended that:

- there should be a legislative Assembly for Wales 'on the Scottish model', with powers to pass primary legislation for a wide range of functions based on the areas for which it took responsibility in 1999;
- the Assembly be restructured to separate the legislature from the executive; the Assembly's membership should be increased from 60 to 80 and elected by the Single Transferable Vote system;
- these changes should be in place by 2011 or sooner if practicable.

The UK Labour government responded in June 2005 by publishing a white paper called **Better Governance for Wales**, which formed the basis for the **Government of Wales Act 2006**.

The Government of Wales Act 2006



The **Government of Wales Act 2006** (the 2006 Act, for short) transformed arrangements for Welsh governance. The Act made three major sets of changes:

- It created a formal separation between the executive (now called the Welsh Assembly Government) and the legislature
- It provided for giving the Assembly greater legislative powers, in two stages. In the short term, specific legislative powers could be conferred on the Assembly. In the longer term, after a vote in favour at a referendum, the Assembly could acquire a much wider range of 'primary legislative powers' over most aspects of the 20 'fields' that are devolved to it on the executive level.
- It reforms the electoral arrangements of the 1998 Act by stopping the same person standing as a candidate both for a constituency and on a regional list.

The Act does not increase the size of the National Assembly to 80 members, as recommended by the Richard Commission, or alter the electoral system used. It only provided for legislative powers over specific functions, not the general sort of powers like the Scottish Parliament or Northern Ireland Assembly have. It did not provide a clear and quick timetable for extending the Assembly's legislative powers, and it set up cumbersome arrangements for calling a referendum. For these reasons, it is inaccurate to say that the 2006 Act implements the Richard Commission's recommendations. Even if the Assembly should acquire the 'primary legislative powers' set out in the Act, it will still fall a long way short of the recommendations of the Richard Commission.

The powers of the National Assembly and the Welsh Assembly Government are still largely limited to those set out in the 20 'fields' of devolved functions, set out in Schedule 5 to the 2006 Act. These are:

Field 1: agriculture, fisheries, forestry and rural development

Field 2: ancient monuments and historic buildings

Field 3: culture

Field 4: economic development

Field 5: education and training

Field 6: environment

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

Field 8: food

Field 9: health and health services

Field 10: highways and transport

Field 11: housing

Field 12: local government

Field 13: National Assembly for Wales

Field 14: public administration

Field 15: social welfare

Field 16: sport and recreation

Field 17: tourism

Field 18: town and country planning

Field 19: water and flood defence

Field 20: Welsh language

The current version of Schedule 5 can be found at

http://www.assemblywales.org/bus-home/bus-legislation/bus-legislation-guidance/bus-legislation-guidance-documents/legislation_fields/schedule-5.htm

1. Separation of the executive and the legislature

The new arrangements in the 2006 Act created a formal legal separation between the executive and the legislative functions of the devolved Welsh institutions. **The executive** - the Welsh Assembly Government, or WAG – comprises the First Minister, the other Welsh Ministers, Deputy Welsh Ministers and the Counsel General. The Counsel General is the legal adviser to WAG, and its representative in the courts if that should be needed. The term ‘Welsh Assembly Government’ had been used to describe the executive arm of the National Assembly from 2002 onward, but it was not legally distinct from the National Assembly.

The Welsh Assembly Government:

- develops and implements policies in relation to devolved functions;
- takes decisions about matters like planning issues
- decides how functions are exercised, through bodies like Quangos or local government
- makes subordinate legislation.

It can also

- propose the granting of legislative powers for the Assembly, by a Legislative Competence Order (LCO) or as ‘framework powers’ (see section *** below)
- propose laws (Measures) to be made by the Assembly.

The First Minister is a pivotal figure in how the devolved government works. He or she is appointed by the Queen, on the nomination of the Assembly as a whole. S/he then appoints Ministers, Deputy Ministers and the Counsel-General, and can also dismiss them. There can

be no more than 12 Ministers and Deputy Ministers at any time. Collectively, they form the Welsh Assembly Government. The First Minister and other members of the Assembly Government must hold the confidence of the Assembly; if there is a vote of no confidence in the Assembly Government, Ministers, Deputy Ministers and the Counsel General must resign. The First Minister, however, cannot be removed by a confidence vote (though s/he may wish to resign if s/he loses such a vote). Only if the Assembly nominates a new First Minister as part of the vote of no-confidence does the vote remove the First Minister from office straight away.

Powers and functions of the Executive Branch

Ministers have their own legal powers. They do not act as delegates of the Assembly, as was the case pre-2007. Those powers include almost all the executive functions that had previously been conferred on the National Assembly as a whole between 1999 and 2007 (including those exercised by the Welsh Office before devolution) as well as powers conferred since 2007 by Assembly Measures and Westminster Acts of Parliament. In some cases, Westminster legislation gives executive powers directly to the Welsh Ministers but does not give legislative powers to the National Assembly. Executive devolution therefore often does not mirror legislative devolution, and it would be wrong to assume that the Assembly Government's powers are exactly the same as those of the National Assembly. Often they are greater.

The Welsh Assembly Government has *powers* to promote the social, economic and environmental well-being of Wales, and to support culture and heritage in Wales. Welsh Ministers have *duties* to promote sustainable development, equality of opportunity for all people and the Welsh Language. They also have to work inclusively, through a 'partnership council' with local government', and have to issues 'schemes' to promote local government, the voluntary sector, and the interests of business. .

The political side of the Welsh Assembly Government is supported by a substantial number of permanent, politically-impartial officials. These civil servants work for the First Minister and other Welsh ministers, and are part of the Home Civil Service like civil servants working for the UK Government or Scottish Government.

The Legislature - the National Assembly for Wales - comprises the 60 Assembly Members, administered by a new body corporate called the Assembly Commission.

Assembly Commission

The Commission is responsible for providing the National Assembly with the property, staff and services that it requires. The Commission consists of the Presiding Officer and four Assembly Members nominated and approved by the National Assembly – one from each of the four main parties.

Powers and Functions of the Legislative Branch

The National Assembly for Wales:

- scrutinises Ministers' discharge of their functions;
- scrutinises certain subordinate legislation made by the Ministers and, in some cases, affirms (approves) or annuls (rejects) such legislation;
- scrutinises and approves the budget every years;
- makes laws within the legislative competences of the Assembly,.

The Government of Wales Act 2006 radically transformed the work of backbench Assembly Members as they adopted the more familiar Westminster job description of holding the Government to account and scrutinising legislation, as well as casework for people who elected them. But front-bench responsibilities for Ministers and party group leaders mean that only about 45 Assembly Members can undertake back-bench work.

Assembly scrutiny of the Welsh Assembly Government happens both in plenary session, by means of questions to Ministers or wider debates, and in the various committees established by the Assembly. The Assembly has three sorts of committees:

- *scrutiny* committees, for subjects like Health, Wellbeing and Local Government or Enterprise and Learning
- *legislation* committees, which consider LCOs and Assembly Measures
- *other* committees with a range of overarching responsibilities, for matters like Finance, Audit or Constitutional Affairs.

2. The Act reformed the electoral arrangements

The original electoral arrangements as noted in the 1998 Act provided for the election of 40 Assembly Members by the first past the post system; and an additional 20 Assembly members by the regional “top-up-list”, voted by the Additional Member System.

During the 1999 and 2003 National Assembly elections, some candidates put their names forward for both the constituency *and* regional lists, later to be referred to as ‘dual candidacy’. The 2006 Act banned the practice of dual candidacy with candidates having to choose between standing either as a constituency representative *or* on a regional list.

How does the Additional Member System work?

- *First*, it is necessary to calculate the number of constituency seats won by each party in a specified electoral region (adding one to each party to avoid dividing by zero)
- *Then*, divide the regional vote cast for each party using the allocated number of constituency seats won by each party
- The party with the highest number following division gets the first regional seat
- *After that*, Add that seat to the previous calculation, and allocate the remaining three regional seats by the same formula.
- This means that parties that didn’t win Assembly seats through the constituency vote, but which did well in the regional list vote, will get a number of Assembly Members. Parties which did win constituency seats and also did well in the regional list vote won’t get many list members, unless they won significantly fewer constituency seats than proportionally they should have.

3. The Act enhanced the legislative powers of the National Assembly

The increase in the legislative powers of the Assembly was proposed in two stages:

- **Stage one (Part 3 of the Act)** allows for the National Assembly to acquire legislative powers for specific matters, by means of a Legislative Competence Order’ or through framework powers. This is discussed in more detail in the next section.
- **Stage two (Part 4 of the Act)** provides – under specified conditions - for the National Assembly to acquire primary legislative powers to make Acts of the Assembly across all the 20 policy fields set out in Schedule 7 to the 2006 Act. This would mean that there would be no need for LCOs to confer the specific powers on the National Assembly, because they would already have been devolved.

Devolved and non-devolved matters: the continuing role of Westminster

Although the 2006 Act enables Wales to create its own body of legislation for devolved matters, there are many important areas which are not devolved. Westminster will remain the sole legislator for these.

Non-devolved matters include

- Defence,
- Economic and monetary policy.
- Broadcasting and the mass media
- Economic regulation like energy or competition and trading law;
- Employment law and labour relations
- Social security and other welfare benefits;
- Immigration and nationality;
- Policing, prisons, criminal law, the courts and the legal system
- Foreign affairs,
- Taxation of business and individuals

The National Assembly and Welsh Assembly Government can consider these matters and express their views about them to the UK Government and Parliament – but they have no control over them. These are matters for UK Government Ministers and Westminster.

Even when legislative powers are conferred on the National Assembly, the UK Parliament can still legislate for these matters in Wales. Legislative powers are not transferred exclusively to the National Assembly and even when it has the power to make laws, it shares that power with Westminster, so Wales has two legislatures for devolved matters, not one. Some of the practical implications of this are discussed below.

The second stage of enhancing the Assembly's legislative powers included in the 2006 Act would see the Assembly's competence extended to cover the twenty subjects of policy set out in Schedule 7 to the 2006 Act.² This is discussed further in Section 9.

The remainder of this guide focuses on this third aspect of the 2006 Act - the National Assembly's enhanced legislative powers post May 2007. It outlines the procedures in place to extend those powers through LCOs and Acts of Parliament as well as how the Assembly makes its own laws through Assembly Measures. Most importantly of all, it looks at how you as Welsh civil society and members of the Welsh public can influence the processes.

² Schedule 7 can be found at http://opsi.gov.uk/acts/acts2006/ukpga_20060032_en_19#sch7

Conferring Legislative Powers on the National Assembly for Wales



Since May 2007, the National Assembly has been able to make laws (called ‘Assembly Measures’) regarding devolved ‘matters’, when it has the legislative competence to do so. Those ‘matters’ are set out in Schedule 5 to the 2006 Act, which changes as new legislative powers are conferred on the Assembly. Schedule 5 is regularly updated and remains the definitive statement of the legislative powers devolved to the National Assembly. An updated record of the amended Schedule 5 is kept on the National Assembly’s website, so everybody can see at any time what the Assembly’s current legislative powers are.

The 2006 Act did not directly say what the legislative powers of the National Assembly would be. It just created a framework for conferring powers on the Assembly, and only Field 13 of Schedule 5 (which concerns the National Assembly itself) contained any ‘matters’. A considerable range of matters have been added since then, by two routes: by legislative competence orders, and by ‘framework powers’ in Acts of the UK Parliament. Whichever way powers are conferred, they are added to the definitive list in Schedule 5. Once legislative powers have been conferred on the Assembly, it can legislate freely on them, and does not need permission from the UK Parliament or anyone else to do so. But it has to get the legislative powers before it can use them. That, in practice, means there is a two-stage process for making devolved legislation. First, there is the *acquisition* of legislative powers. Then, there is the *making* of the devolved legislation. The rest of this section explains how this complex and cumbersome process works.

The remainder of this section is aimed at explaining the scope of the National Assembly’s powers and procedures for creating Legislative Competence Orders, Assembly Measures and scrutinising subordinate legislation made by the Welsh Assembly Government. It also outlines a mechanism which allows the Welsh general public to submit proposals for legislation *via* a public petition.



Legislative Competence Orders



A Legislative Competence Order (LCO) is an order made by the Secretary of State for Wales, and approved by both Houses of Parliament at Westminster, which confers legislative powers on the National Assembly. It is made at the request of the National Assembly, and provides a means for the National Assembly to seek legislative powers on its own initiative.

Who has the right to propose LCO / Orders in Council?

The Welsh Assembly Government, Assembly Members, and Assembly Committees can each propose to the National Assembly that it should seek legislative powers by an LCO. The general public and civil society can also propose an LCO through the Public Petition route for the consideration of the Assembly and Parliament.

Government proposed Orders	Brought forward by a member of the Welsh Assembly Government. A member of the Government cannot propose or draft any other type of Order.
Committee proposed Orders	Proposed or drafted by a committee Member as authorised by the Committee. Any Assembly Committee - with the exception of those established by the Business Committee with the specific remit of considering draft Orders/Measures – may lay a Committee proposed or draft Order related to its remit. A committee may only have one committee proposed Order or committee draft Order in progress at any one time.
Member proposed Order	An Order not proposed or drafted by any of the above, but by any other elected member of the Assembly.

In depth: procedure for member proposed orders

- From time to time, a ballot is held which is open to all AMs who are not ministers, junior ministers, the Presiding Officer or his deputy, giving back-bench AMs the chance to introduce an LCO.
- To be eligible, AMs must:
 - Indicate that they wish to be included,
 - have provided an outline of the proposed Order and an Explanatory Memorandum about it; and
 - not have won the ballot previously.
- If a Member successfully wins the ballot, he or she must table a motion within 25 working days seeking the Assembly's leave to introduce their Order. Standing orders provide that time must be made available for a motion of this kind to be debated within 35 working days of the ballot.
- If the motion falls, the proposed Order isn't considered further, and no Member may introduce a proposed Order which seeks to confer the same/substantially the same legislative competence as the fallen motion for the next 6 months.
- If the motion succeeds, the order is considered like any other LCO.

Procedure for proposing, drafting and considering LCOs

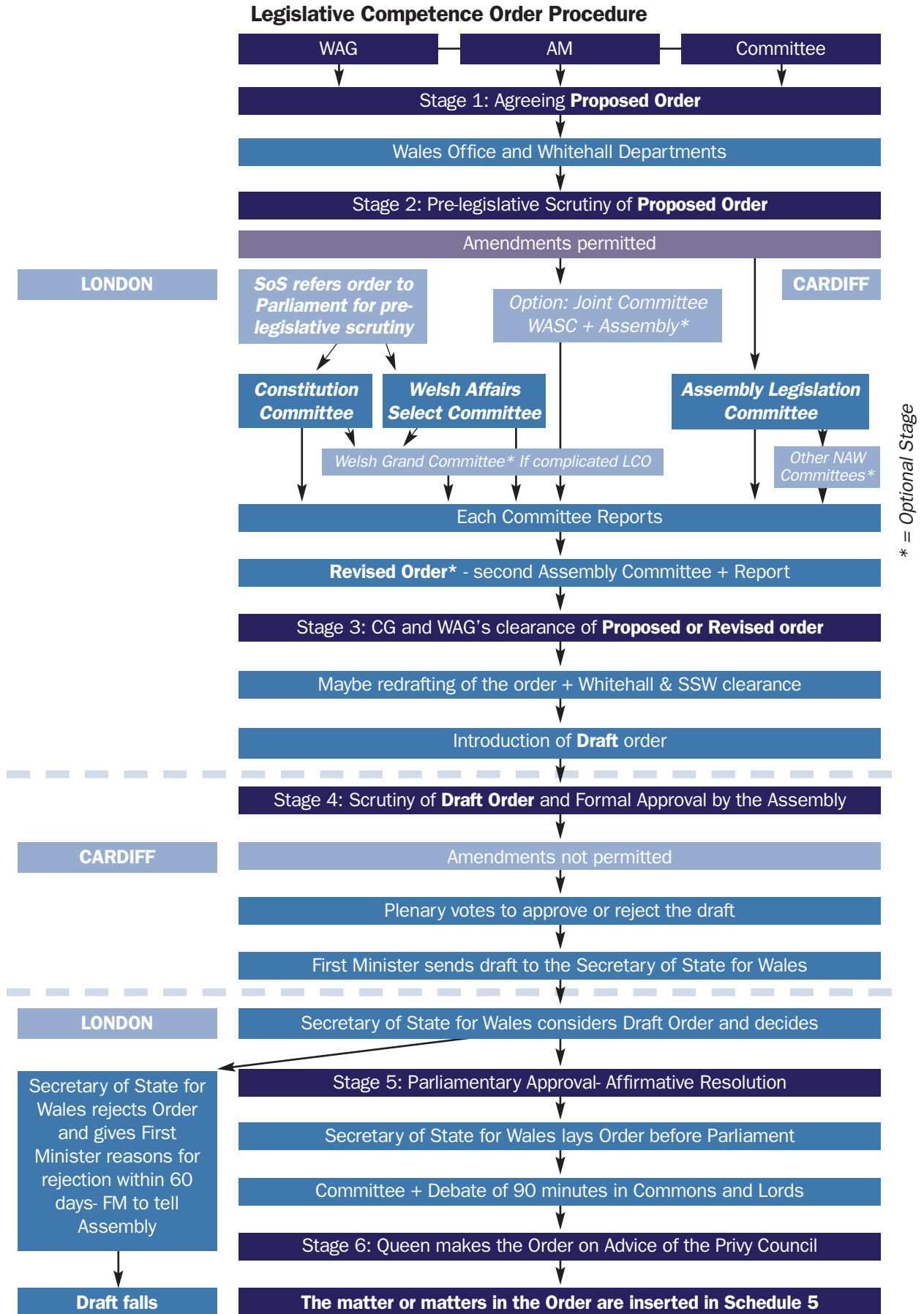
The procedures for proposing, drafting and considering LCOs involve not only the National Assembly and the Welsh Assembly Government, but the UK Parliament at Westminster too. The House of Commons Welsh Affairs Committee and the House of Lords Constitution Committee are involved in the pre-legislative scrutiny of LCOs. Civil society's involvement in this process is therefore required in London as well as Cardiff Bay.

Stage 1: Proposed Orders – pre-legislative scrutiny

- A proposed LCO can be laid on any working day when the Assembly is sitting. It must be accompanied by an Explanatory Memorandum. It can be withdrawn at any time by the Minister or Member in charge, except in the case of a Committee proposed Order when the permission of the committee must be obtained first.
- Once proposed, the Business Committee may either refer the proposed LCO for detailed consideration to a legislation committee. Sometimes, such detailed consideration is not deemed necessary, in which case the Business Committee proposes a motion in Plenary

that there should be no detailed consideration of the proposed Order.

- If such a motion is agreed in Plenary, the Member in charge of the proposed LCO may introduce a draft Order. If the motion is not agreed, the Business Committee must refer the proposed Order for detailed consideration to one of the Assembly's Legislation Committees.
- If the Business Committee does refer a proposed LCO for detailed consideration by a legislation committee, that committee must consider and report on the proposed Order. This will be subject to a timetable outlined by the Business Committee and will normally include a call for written evidence and a series of oral evidence-gathering sessions.
- Proposed LCO are also referred to Parliament for pre-legislative scrutiny. In the Commons, the Welsh Affairs Select Committee will call for written and oral evidence. . Sometimes joint meetings may be held between the Welsh Affairs Select Committee and the appropriate Assembly Legislation Committee. In the Lords, the proposed LCO will be considered by the Constitution Committee, which does not usually take evidence.
- The Member in charge of the proposed LCO must take into account the report of the various Parliamentary and Assembly Committees before laying the order as a draft before the Assembly. The reports may well question the appropriateness of the powers sought in the LCO, and the proposed order is likely to be revised before it is submitted as formal draft LCO.
- There is no explicit or binding timetable for dealing with proposed LCOs. The process can take as little as six months in simple cases, but as much as two and a half years in difficult ones.



Stage 2: Draft Orders – legislative scrutiny

The introduction of a draft LCO marks the beginning of the formal consideration of an LCO, with the procedures laid down in the 2006 Act and elaborated by the Assembly’s Standing Orders. Once introduced, a draft LCO cannot be amended.

In depth: Procedure for laying a draft LCO

- A draft Order can be laid on any working day when the Assembly is sitting. It must be accompanied by an Explanatory Memorandum, which includes:
 - an explanation of how account has been taken of any recommendation made by any of the committees involved in Stage 1
 - reasons for any significant differences between the draft Order and the proposed Order to which it relates.
- A draft Order can be withdrawn at any time by Member in charge, except in the case of a Committee draft Order when the permission of the committee must be obtained first.

The Assembly must consider whether to approve a draft LCO or not within 40 working days of its introduction. A draft Order falls if it is not approved by the Assembly or on dissolution of the Assembly.

Following approval by the National Assembly, a draft LCO must be formally submitted to the Secretary of State. This is done by the First Minister.

The Secretary of State can reject the Order. If not, s/he must lay the draft before each House of Parliament. There are 60 (calendar) days to decide whether to lay it, and if the Secretary of State rejects the draft Order, s/he or she give reasons in writing for his/her decision.

- The draft order will be considered by two Parliamentary Committees. In the Commons, this will be the Welsh Affairs Select Committee (again). The Lords Constitution Committee does not look at draft LCOs (only proposed ones), but the Joint Committee on Statutory Instruments does. This committee has members from both the Commons and Lords, which reports on whether it complies with the 2006 Act
- After the Committees have produced their reports, the draft LCO is considered in each House of Parliament. There can be a debate of up to 90 minutes in each House. At this stage, the order can only be approved or rejected – it cannot be amended.

If a draft LCO is rejected by either House of Parliament, it falls. There is no appeal.

If the Secretary of State rejects a draft LCO, it would be possible in principle for the National Assembly to apply for a judicial review of the Secretary of State's decision on the grounds that it was unreasonable or irrational. An application would have to be made to the Administrative Court, part of the High Court, within 3 months. It would also be possible for the National Assembly to submit a new draft LCO to the Secretary of State, revised to deal with any specific problems that had caused the earlier draft LCO to fall.

The housing LCO

The 'One Wales' coalition agreement of June 2007 between Labour and Plaid Cymru contained detailed commitments about a range of housing issues, including one to 'draw down legislative power to the Assembly in order to suspend the Right to Buy in areas of housing pressure'. This attracted considerable opposition, from the Conservative Party and (behind the scenes) a number of Labour politicians. The result has been a lengthy and practical saga, which has resulted in no tangible outcome even after 3½ years of work.

The Assembly Government published a proposed LCO in December 2007, which was considered by a committee during the spring of 2008. That draft was revised and a further proposal tabled in May 2008 and sent to the Secretary of State, who in turn sent it to Parliament. The Welsh Affairs Committee published its report in October 2008, saying that the power to suspend right to buy should be limited in time, subject to a periodic review, and limited only to areas of 'extreme housing pressure' with no scope for the Assembly to apply it to any other part of Wales.

More generally, it said that proposed Orders should be drafted so as to transfer only those powers which are required and for which a clear purpose had been established.

This led to substantial changes to the formal draft LCO, published in January 2009. This provided for the Secretary of State to give his consent to use of the proposed power to suspend right to buy. While that version was approved by the National Assembly, but a report from Parliament's Joint Committee on Statutory Instruments, state the Committee's view that the draft LCO was beyond the powers conferred in the 2006 Act as it gave a legislative function (control over suspension of right to buy) to a minister, rather than having it exercisable by Parliament. The order was withdrawn as a result.

The Assembly Government announced in July 2009 that it would bring forward a new LCO on housing, now known as the 'Sustainable Housing' LCO. That proposal was very different to the earlier one, reflecting a more thoroughly developed Assembly Government policy on housing generally and the role of the social housing sector in particular. That was laid before the Assembly in November 2009. Consultation with civil society then took place, and the Commons Welsh Affairs Committee published its report (which stated that the right-to-buy suspension powers were now appropriate) at the beginning of February 2010. A formal draft was published later that month, and the Assembly in plenary voted in favour of it quickly. However, the proposals still failed to attract enough support at Westminster. They were not voted through Parliament by the time it was dissolved for the UK general election in April 2010. As one of the commitments made by the Conservative-Liberal Democrat coalition at Westminster, the LCO was reintroduced in July 2010, shortly after the new Parliament started work, and approved by both Houses within 10 days.

This affair illustrates many of the problems Tomorrow's Wales finds in the present arrangements. First, it is very slow; more three and a half years passed from the statement of the Assembly Government's intention to legislate to the passing of the second proposed LCO. While Assembly and Assembly Government policy may have developed (and improved) a good deal in that time, no tangible action was possible during it at all. Second, it resulted in constitutional and policy issues becoming intimately entangled. The Welsh Affairs Committee investigated proposed Assembly Government policy in great detail, and was only willing to recommend devolution of legislative powers to the extent it considered Assembly Government policy 'appropriate'. This approach not only slowed down decision-making to a crawl, but

meant that the Committee assumed the right to second-guess the decisions of another Government and the elected Assembly. Third, the solutions that were used to resolve the political conundrum with the first version of the LCO simply did not work in legal terms. Bad constitution making led to worse law. That only fell apart when Parliament's constitutional watchdogs called 'foul'.

Tomorrow's Wales are not the only ones concerned by this episode. This is what Nick Bennett, Chief Executive of Community Housing Cymru and formerly a member of the executive of the All Wales Convention, has to say:

Quote

Where can I influence?

These processes are complex, but they provide many points at which civil society can seek to influence the powers being conferred on the National Assembly. One way is to lobby Welsh Ministers, Assembly Members or MPs, individually or privately. Another is to submit formal evidence to inquiries by National Assembly or Parliamentary Committees. Usually, it will be necessary to submit evidence in writing before being invited to give oral evidence. But bear in mind that it is worth getting involved early on, when the LCO is at the pre-legislative stage – when there is a formal draft LCO, there is no scope to amend it.

It is also worth remembering that an LCO only gives legislative powers to the National Assembly. Because these powers may last for a long time, it is advisable for them to be broader rather than narrower in scope. Questions about how the powers are used are matters for the National Assembly and should be dealt with when there is a draft Assembly Measure, not when the issue is what those powers should be.

CYCLE ROUTES

Sustrans Cymru was one of the first bodies to respond to the Presiding Officer's invitation to Welsh civil society to come forward with new ideas on how AMs could use their new powers. In October 2007 it assembled a coalition of organisations – including organisations such as BMA Cymru, the Royal Mail and WWF Cymru – to try to secure legislation requiring the Assembly Government to encourage more people to walk and cycle for local journeys, by developing and maintaining a network of shared use paths.

The petition was referred to the Enterprise and Learning Committee which heard evidence from the petitioners and agreed to work towards an LCO. The proposal faced the opposition of the Assembly Government during this stage, with Economy and Transport Minister Ieuan Wyn Jones stating that the proposed changes were already within the scope of the Assembly's powers, that the proposal would place undue pressure on the Government's own legislative programme, and that the proposal would require additional funds to be set aside. The proposals were also opposed by Guide Dogs for the Blind, who argued against shared use paths for pedestrians (including disabled people) and cyclists.

Despite this opposition, the proposed Order was laid in June 2009. By agreement, scrutiny by a legislation committee was dispensed with. Five months later the Deputy First Minister and Minister for the Economy and Transport Ieuan Wyn Jones confirmed that the Government would support the introduction of the proposed LCO and facilitate its passage through Westminster, but on the understanding that negotiations would not begin until March 2010 so as not to hamper the Welsh Government's legislative programme.

The Sustrans LCO clearly illustrates the flaws inherent in the current system, even when a broad coalition has the support of AMs to use the new system in an imaginative way to achieve something widely regarded as a good idea. In over two years after the introduction of the petition, no proposed LCO had been prepared or sent to London for scrutiny by the Wales Office or Commons Welsh Affairs Committee. And it's impossible to tell when any Assembly Measure in this area might be introduced.

Lee Waters, Director of Sustrans Cymru says:

The Assembly is a more open institution to influence than Westminster and Whitehall, but the LCO system creates a slow and complex barrier to bringing about change. We formally submitted our widely supported proposal at the end of 2007, and two and a half years later there has still not been a vote on it. WAG have committed to get it through by May 2011 but who can say with any certainty how events will develop? It is entirely possible that there'll be a referendum and the LCO system will be dismantled before our proposal has cleared all the hurdles. And then we'll have to start all over again.



Framework powers



Framework powers are the other means by which the National Assembly can acquire legislative competence. Like LCOs, framework powers add ‘matters’ to the Fields set out in Schedule 5 to the 2006 Act. The difference is in how the powers are obtained rather than how the powers are expressed.

The main ‘framework’ legislative powers conferred on the National Assembly by Westminster Act of Parliament

Matters added	Act	Legislation made using these powers
<i>Field 5 – Education</i>		
Matter 5.4A (Regulation of non-maintained schools)	Education and Skills Act 2008	Learning and Skills (Wales) Measure 2009 (in part)
Matters 5.11-5.14 (Relating to post-16 education and training, and institutions providing such education and training)	Further Education and Training Act 2007	
Matters 5.15-5.16 (Inspection of schools and colleges, and advice to teachers)	Further Education and Training Act 2007 as amended by Education and Skills Act 2008	
<i>Field 10 (Transport)</i>		
Matter 10.1 (Power to charge for use of trunk roads)	Local Transport Act 2008	
<i>Field 12 (Local government)</i>		
Matters 12.1 – 12.5 (Powers relating to the areas, functions, members, strategies and of local authorities; co-operation between local authorities; byelaws)	Local Government and Public Involvement in Health Act 2007 (amended by the National Assembly for Wales (Legislative Competence) (Local Government) Order 2010)	Local Government (Wales) Measure 2009
Matters 12.6-12.7 (powers regarding how local authorities discharge their functions and their committees)	Local Democracy, Economic Development and Construction Act 2009 (amended by the National Assembly for Wales (Legislative Competence) (Local Government) Order 2010)	
<i>Field 13 (National Assembly for Wales)</i>		
Matters 13.1-13.6 (The Assembly itself, including the role of the Assembly Commission, members’ conduct and remuneration, use of the Welsh language in Assembly proceedings, and private Measures)	Government of Wales Act 2006	National Assembly for Wales Commissioner for Standards Measure 2009 National Assembly for Wales (Remuneration) Measure 2010

Matters added	Act	Legislation made using these powers
<i>Field 16 (Sport and recreation)</i>		
Matters 16-2-16.3 (Coastal footpath)	Marine and Coastal Access Act 2009	
<i>Field 18 (Town and country planning)</i>		
Matters 18.1-18.3 (Powers of Welsh Ministers and local authorities regarding planning approvals and making of development plans)	Planning Act 2008	

Framework powers are set out in Acts of Parliament made at Westminster. They therefore result from the legislative agenda at Westminster, rather than the priorities of the National Assembly or Welsh Assembly Government. UK Government guidance says that Whitehall departments should consider whether and how legislation for England should apply to Wales at an early stage, and that there should be consultation with the Assembly Government about how to implement that policy by way of framework powers and other means. This process takes place in private, between the two governments. The first the wider public will know about them is when a bill or draft bill is published.

Because these are provisions contained in an Act of Parliament, the scope for civil society to influence them is more limited. There is no requirement for the National Assembly to debate or approve the conferral of legislative powers. There is also no consideration of them by the Welsh Affairs Committee in the Commons or Constitution Committee in the Lords. Explanatory memorandums published with bills are inconsistent in how much they tell readers about these sorts of powers too, though the ‘framework tracking notes’ on the Assembly’s website There is detailed consideration at Committee and Report stages, but it is harder for outside groups to engage with the process at these points as there is no inquiry that seeks evidence from the outside. If you are interested in powers that are or might be devolved in this way, you should make contact with an MP at an early stage.



Assembly Measures



Definition of powers

Once “Matters” are devolved to the Assembly and included in an amended Schedule 5, *via* either an LCO or by the provisions of an Act of Parliament, the Assembly is able to draft Measures in relation to the scope of the defined Matters. In effect, within the matters included in Schedule 5 the Assembly has the legislative power to draft and pass the equivalent of an Act of Parliament called an Assembly Measure. The Assembly creates Measures without any input from Westminster, however Assembly Measures could be challenged in the law courts, as explained below.

Q: If there should be a clash between a Measure and an Act of Parliament, which applies?

A: That’s a difficult question. If a later Act of Parliament were explicitly to over-rule a Measure, the Act would be supreme. Otherwise, as a Measure can do anything an Act of Parliament can, and given the rules of interpreting statutes the Measure will be the valid law, provided it is within the Assembly’s legislative competence.

All Measures have to undergo a process of scrutiny by the Assembly, providing an opportunity for civil society to influence the proposed legislation before it becomes law.

Limits on the Assembly’s legislative competence

All Measures must be within the Assembly’s legislative competence. This means that they must be within the scope of the powers set out in Schedule 5 to the 2006 Act. Various exceptions and restrictions on the Assembly’s legislative powers are set out in Schedule 5. These are not the only requirements for a Measure to be valid, however. In addition, a Measure must do the following:

- It must **comply with the Convention rights** set out in the European Convention on Human Rights and protected under the UK’s Human Rights Act 1998. Any provision that breaches those human rights will be invalid.
- It must comply with the requirements of **European Union law**. Any provision that breaches EU law is similarly invalid.
- It must not interfere with the UK’s **international obligations** or the UK’s **defence and national security**, or it will be invalid.
- It must not have a **serious adverse effect on water supplies or resources in England**
- It must apply **only to Wales**. The Assembly has no power to legislate for anything extending beyond the borders of Wales.

Explanatory Memorandum

All Measures must be introduced in both Welsh and English, though there can be certain exceptions in the case of Government Measures. All Measures must be accompanied by an Explanatory Memorandum including:

- a declaration by the AM proposing the Measure that its provisions are within the legislative competence of the Assembly;
- the policy objectives of the proposed Measure;
- discussion of whether alternative ways of achieving the policy objectives were considered and, if so, why the approach taken in the proposed Measure was adopted;
- the consultation undertaken on the policy objectives and details of the proposed Measure and the process's outcomes;
- best estimates and timescales of the costs of the provisions of the proposed Measure;
- an explanation of why, if the proposed Measure contains provisions for conferring power to make subordinate legislation on Welsh Ministers, delegating the powers is appropriate, and if so, to whom.

Who can propose an Assembly Measure?

Assembly Measures can be proposed by:

- the Welsh Assembly Government;
- Assembly Committees;
- Assembly Members,
- the Assembly Commission.

Government Proposed Measures

proposed by a member of the Government. A member of the Government cannot propose any other type of Measure (which means that members of the Government cannot enter into the private members ballot). The Government may also propose Emergency Measures which do not require Explanatory Memorandums.

Committee Proposed Measures

proposed by a committee Member authorised by the Committee. Committees may only propose one Measure at a time, and the Measure must be within the scope of that committee's responsibilities.

Commission proposed Measure	proposed by a member of the Commission authorised by the Commission. Such Measures will relate to the Commission’s functions.
Member proposed Measure	Proposed by any other elected member of the Assembly, though the members’ ballot which is held roughly 3-4 times a year, in the first three years of the Assembly. The member has to bid successfully in the ballot, AND then get the Assembly’s permission to introduce a draft Measure. Members can only introduce one Measure in each Assembly term.

Procedure for considering Assembly Measures

The Business Committee is responsible for establishing and publishing a timetable for considering Measures, except for their consideration in Plenary session.

Assembly Business
The Government timetables Government Business in plenary, the Business Committee determines the timetable for non-government business in plenary. Time is allocated between government and non-government business in Plenary roughly in the proportion of 3:2.

Stage One – introduction of a Measure and consideration of its general principles

- A proposed Measure can be introduced on any working Assembly day. On introduction, it must be accompanied by a bilingual statement by the Presiding Officer which indicates whether he or she believes it to be within the legislative competencies of the National Assembly. The person introducing the proposed Measure must also make a statement that s/he believes it is within the Assembly’s legislative competence.
- Once a proposed Measure has been introduced, the Business Committee must decide whether or not to refer consideration of the general principles to a committee of the National Assembly.

- If the Business Committee decides that the general principles of a Measure ought to be referred to a committee, it will be transferred to one of the five Legislation Committees. This committee will then consider and report on the general principles of the proposed Measure. Once the Legislation Committee has reported, the Assembly in plenary will consider the general principles of the proposed Measure.
- If the Business Committee decides that the general principles of the proposed Measure do need not to be referred to a Legislation Committee, the Member in charge of the proposed Measure may immediately propose that the Assembly consider its general principles.
- If the Assembly agrees to the general principles of the proposed Measure, it proceeds to Stage 2. If the general principles of the Measure are not approved,, the Measure falls.
- If the Measure falls or is rejected at this stage, no further proceedings may be taken on that proposed Measure. If another Measure of a similar nature is introduced within six months, the Presiding Officer may reject it.

At this stage, if the proposed Measure would involve spending money from the Welsh Consolidated Fund, there must also be a Financial Resolution attached to the proposed Measure. This can only be moved by a member of the Assembly Government. If a motion is required and is not tabled within 6 months of the completion of Stage 1, the Measure falls.

The Member in charge of the Measure is free to withdraw the proposed Measure at any point during Stage 1. Once Stage 1 is complete however, the Member in charge of the Measure cannot withdraw the proposal without the agreement of the Assembly.

Stage Two – Detailed Consideration by Committee

- Stage 2 begins on the first working day following the completion of Stage 1.

The Business Committee must decide which of the Legislation Committee undertakes Stage 2 proceedings. This may not be the same as the Legislation Committee that considered the proposed Measure at Stage 1. Alternatively, the Business Committee may propose to Plenary that a Committee of the Whole Assembly undertake the detailed consideration of Stage 2.

This is a rare occurrence.

- At least 15 working days must elapse between the start of Stage 2 and the date of the first meeting of the nominated Legislation Committee. This should mean that there is time to prepare for the detailed examination of the proposed Measure that ought to take place at this Committee stage.
- Amendments can be tabled to the proposed Measure by any Assembly Member, regardless of whether they are a member of the committee undertaking Stage 2 consideration of the proposed Measure. However, only an AM who is a member of the

committee considering Stage 2 proceedings may vote on amendments.

- Stage 2 is completed when either the last tabled amendment has been disposed of, or the last section/schedule is deemed agreed. There are no guillotines (timetables) set out in the Standing Orders for this stage.

If a proposed Measure is significantly amended in Stage 2, the legislation committee may request that the Member responsible for the Measure prepare a revised Explanatory Memorandum. Such a Memorandum would have to be laid at least 5 working days before the date of the first meeting of Stage 3.

Stage Three– Detailed Consideration by the Assembly in plenary

- Stage 3 begins on the first working day following the completion of Stage 2.
- At least 15 working days must elapse between the start of Stage 3 and the first meeting of the Assembly that considers Stage 3 proceedings. Once more, this should mean that there is time to prepare for the discussion surrounding the proposed Measure that ought to take place at this stage. Once 15 days or more have passed, Plenary considers the proposed Measure as amended in Stage 2.
- At Stage, 3 amendments to the proposed Measure can be tabled by any Assembly Member however they must be selected for consideration by the Presiding Officer. The Assembly can agree to the application of time limits to debates on amendments if a motion to do so is put forward by the Minister with responsibility for government business or the Business Committee.
- When consideration of all selected amendments close, the proposing Member or any member of the Government can move that the Assembly considers further amendments. If agreed, the proposing member or any member of the Government may table amendments to be moved. Such amendments are only admissible if they are for the purpose of clarifying a provision of a proposed Measure.
- Stage 3 is completed when either the last tabled amendment has been disposed of, or the last section/schedule is deemed agreed.

Stage Four

- At the immediate close of Stage 3, *any* Member may move that the proposed Measure be passed provided its text is available in both English and Welsh. If that does not happen, the Business Committee or Government will determine a timetable for plenary to finally consider the motion for the Measure to be passed.

Once these stages are complete, the proposed Measure has to be approved by the Privy Council. Only when it has been approved by the Privy Council does it become law.

Measures made by the National Assembly

As of November 2010, the Assembly had made 9 Measures:

NHS Redress (Wales) Measure 2008

Learner Travel (Wales) Measure 2008

Learning and Skills (Wales) Measure 2009

Local Government (Wales) Measure 2009

Healthy Eating in Schools (Wales) Measure 2009

Commissioner for Standards (Wales) Measure 2009

Education (Wales) Measure 2009

Children and families (Wales) Measure 2010

Social care charges (Wales) Measure 2010

Red Meat Industry (Wales) Measure 2010
National Assembly for Wales
(Remuneration) Measure 2010

MENTAL HEALTH

The proposed mental health LCO was laid by backbench Conservative AM Jonathan Morgan back in February 2008, intended to enshrine in law patient rights to assessment, treatment and advocacy. The process itself was a lengthy one: the LCO was only finally made in February 2010. This included a gap of nearly a year between the end of the Assembly Committee's consideration of it, and its reappearance before the Commons Welsh Affairs Committee. As the LCO that had the backing of all parties and all major stakeholders, those involved find it was very difficult to understand why it took so long.

The Welsh Assembly Government began consulting with stakeholders about contents for a Measure well before approval of the LCO was received. The Measure applies not just to health authorities, but also local authorities, and has four main objectives:

- To provide primary mental health support at an earlier stage;

- To ensure all individuals receiving secondary mental health services have a dedicated care coordinator and a care and treatment plan;
- To ensure that people discharged from secondary services can have access back to those services if they feel they are becoming unwell again; and
- To extend statutory mental health advocacy.

Alexandra McMillan from mental health organisation Gofal says about the whole process:

‘Inevitably, there are aspects of the Measure we would like to go further. But we do broadly support the proposed Measure and have been impressed with its breadth. It would have been easy for the Government to introduce a narrow Measure. By including primary care within its scope it has the potential to make a real difference to the lives of a much larger number of people.’

It’s undoubtedly the case that this process would have been much easier if all the powers in Schedule 7 of the Government of Wales Act had already been devolved. Seeking legislative competence over mental health was part of the One Wales agreement made in 2007, and it’s something that is backed by all four political parties, and yet we had to wait until March 2010 for a Measure to be laid. The two years that politicians and officials in both Cardiff and London, and the many organisations that have engaged in the process, have spent getting the LCO through is a poor use of time and resources, given how consensual this issue was. More importantly, that is two more years that people experiencing mental ill health have had to wait for the promised improvements in mental health services.’

Legal challenges to Assembly Measures

As noted above, all Assembly Measures must be within the Assembly’s legislative competence. There are various checks to ensure that this happens, including:

- The statements by the person introducing the proposed Measure and the Presiding Officer that they consider that the Measure is within legislative competence
- A power for the Counsel General or the UK Attorney General to refer a proposed Measure to the UK Supreme Court to determine whether it is within legislative competence. This can happen at any time up to four weeks after the end of Stage 4 of its consideration by the Assembly.

- In certain circumstances, the Secretary of State can make an order stopping the submission of a Measure for approval by the Privy Council. This can also happen up to four weeks after the end of Stage 4 of the Measure’s consideration. This can only happen if the Measure affects matters that are not specified in Schedule 5, would affect UK international obligations, defence or national security, or water supplies or the operation of the law in England.

Despite these checks, it is still possible that a Measure could be passed by the Assembly and approved by the Privy Council but still be beyond the Assembly’s legislative competence. If that were to happen, the Measure’s validity could still be challenged in the courts by anyone affected by it. In that eventuality, there are special procedures to take the case directly to the UK Supreme Court, and for the Counsel General and other law officers like the Scottish Lord Advocate or UK Attorney General to take part in the legal proceedings involved.

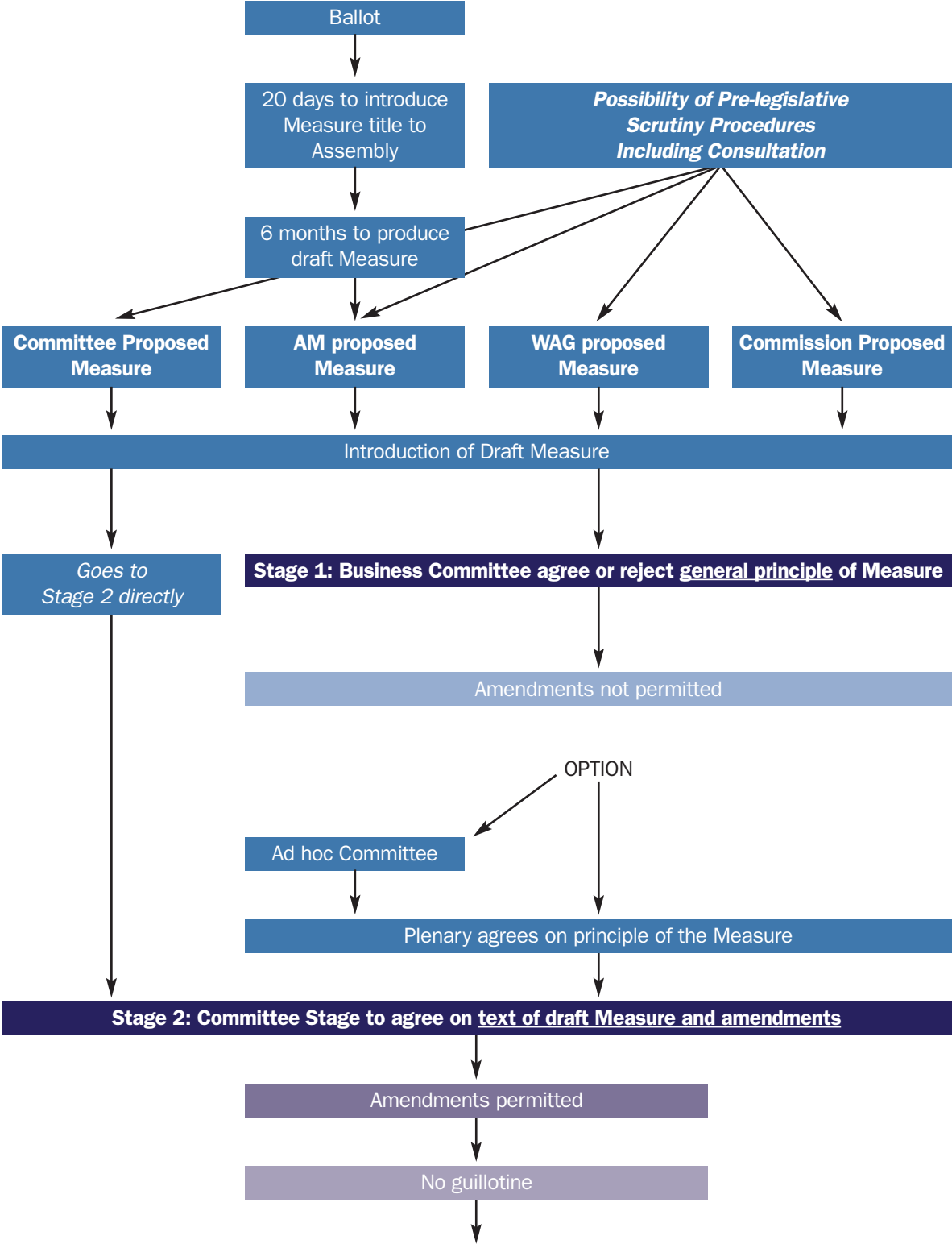
Legislative relations between Westminster and the National Assembly

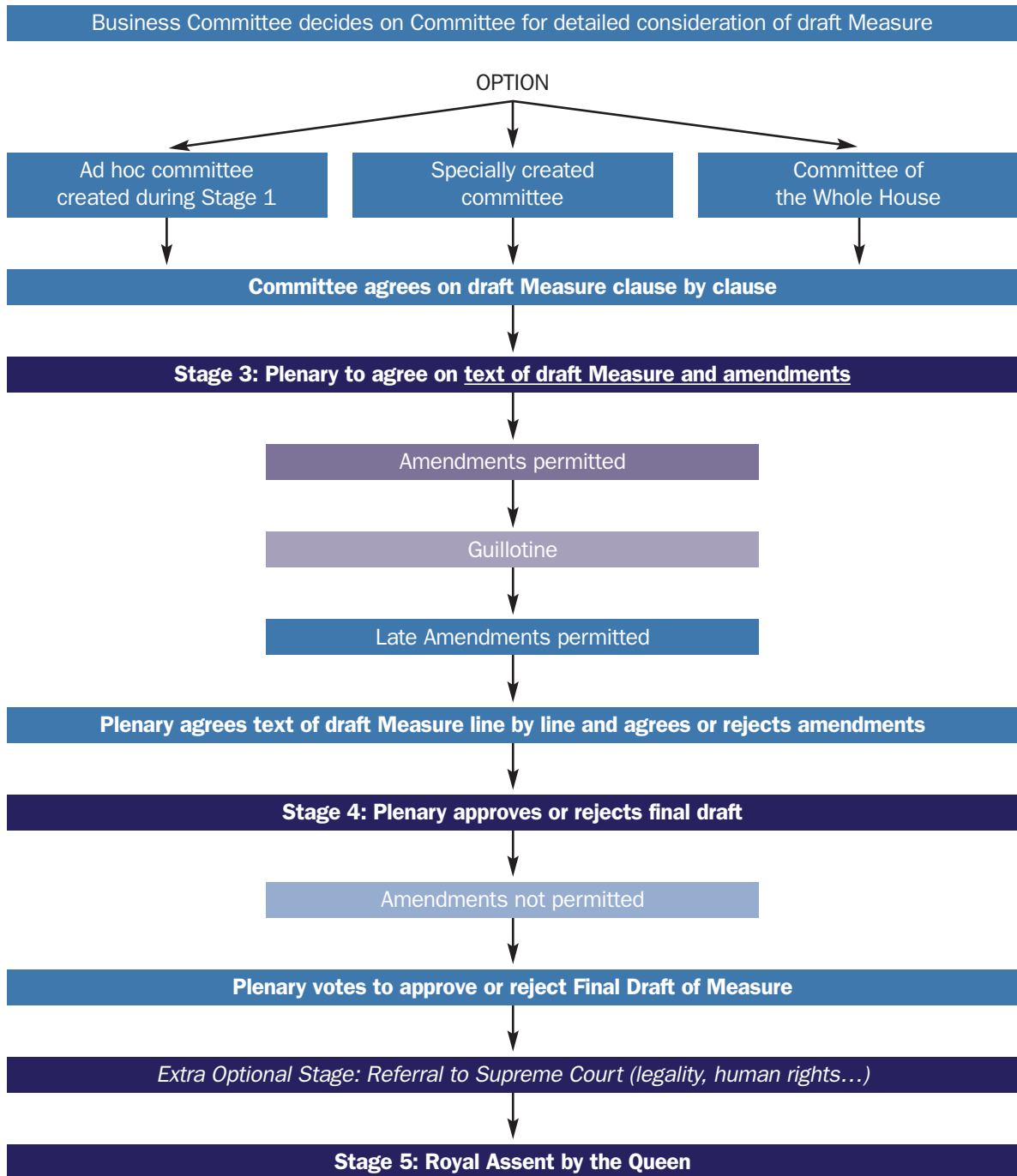
There are also occasions where Westminster proposes to legislate for matters that have already been devolved to the National Assembly. In these cases, it may be desirable for the Westminster legislation to apply in Wales as well as in England (and other parts of the UK) – practical reasons like organisational convenience, or having the same rules applying in both England and Wales, for example. In these cases, what happens is regulated by something called the ‘Sewel convention’. (The convention is named after Lord Sewel, a Scottish Office minister in 1998 who stated the principles of the convention during Parliamentary debates on the Scotland Act 1998.) This provides that, where Westminster proposes to legislate for a devolved matter, it only does so with the consent of the devolved legislature involved.

Between May 2007 and April 2010, there have been five such motions. This means that the National Assembly has to pass a motion – called a legislative consent motion – approving the Westminster legislation. As the Westminster legislation relates to a devolved matter, if the National Assembly wishes later on to repeal, amend or replace the Westminster legislation, it can do so.

In Scotland, legislative consent motions are also needed if a Westminster bill confers extra executive functions on Scottish Ministers or gives further legislative powers to the Scottish Parliament. That is not presently the case in Wales.

Assembly Measure Procedure





Marie Navarro, Legal Consultant

Where can I influence?

Influencing Measures can begin early on. Even before LCOs are sought, outside interests can try to persuade the Assembly and WAG that legislation is needed, and that powers to deal with the issue need to be devolved. Keeping an eye on what LCOs are sought will give a good idea of the kind of Measures the Assembly Government (and Assembly Members) want to introduce.

The Assembly's Standing Orders enable the influencing of WAG, Member and Committee proposals for Measures at a pre-legislative consultation stage. Indeed, in the case of Measures proposed by back-bench Assembly Members, members must show the support of society before Measures proceed. Evidence of dialogue between AMs and interested parties outside the Assembly is a pre-requisite for the progression of such Measures.

At the Committee stage, any Assembly Member can suggest amendments or additions to the draft law. This gives an added opportunity for civil society to influence the contents of the draft laws.

The political parties have their ideas about the sort of legislation that is needed for Wales – but so do many people outside the parties. Coming up with ideas about what government should do and how it should do it is something anyone can do. You don't have to belong to a political party, or even a large organised group, to do it.



The Constitutional Affairs Committee and Subordinate Legislation



Subordinate legislation is a collective term for statutory rules, regulations, orders, byelaws and rules. These are now a widely-used tool of government, and affect every aspect of our daily lives. Such legislation can be made by parts of the UK Government, or by the Welsh Assembly Government. In each case, there has to be a clear legal authority to make the subordinate legislation. This is usually statutory in nature; an Act of Parliament, when it is made by the UK Government, and an Act of Parliament or Assembly Measure when it is made by the Assembly Government.

Legislatures play only a limited role in the making of subordinate legislation. It is first and foremost an activity of the executive arm of government. The procedures applied vary from case to case. Sometimes, the legislature has to vote in favour of an instrument before it can come into force (this is known as 'affirmative procedure'). In other cases, the legislature can consider a motion to annul or reject an instrument after it has been made, within a short period of time, typically 40 days. This is known as 'negative procedure'. Such motions are rarely successful, however. Much other subordinate legislation is 'laid' before the Assembly, but is not subject to either affirmative or negative procedures. Laying the legislation is simply a way of formally notifying the Assembly of what the executive has done.

Within the National Assembly, the Constitutional Affairs Committee plays a key role. It considers subordinate legislation made by the Assembly Government to ensure it is properly made procedurally, confers only appropriate powers on the Assembly Government, and is within the powers conferred on the Assembly Government by Act or Measure. It will also consider issues of legal policy in relation to such subordinate legislation. The Committee is increasingly taken on a broader role as well, regarding powers being conferred on the Assembly and Assembly Government by Westminster legislation. But it will not consider draft or proposed LCOs, or subordinate legislation that needs to be laid before the UK Parliament.

Where can I influence?

The process of making most subordinate legislation will be under the control of the Welsh Assembly Government - influence can thus be exercised by working closely with Minister and officials of the Government. There are many ways of doing so, from semi-formal groups that the Assembly Government may run for particular areas of policy, to lobbying a minister directly – in person, or by writing a letter or email.

It might also be worthwhile trying to influence Assembly Members. They can help change the minds of ministers, and in extreme cases might be willing to help block subordinate legislation that needs a vote of approval by the Assembly, or which can be annulled by it.

Civic society, acting through AMs, can also seek to influence the process by following the Constitutional Affairs Committee's proceedings and considerations.

Crucial to all of this is keeping abreast of all legislation being proposed and enacted, and all general SIs coming before the National Assembly will be listed on its website. With the proliferation of legislative mechanisms post May 2007, tracking the development stages of legislation has arguably proved to be one of the greatest challenges. While there are various online sources for this, including the websites of both the Assembly Government and the National Assembly, the best way is to be in touch with Ministers and their officials, so they can tell you what they have in mind and you can try to persuade them of your case. The earlier the contact, the more likely it is to succeed!

Public Petitions



Definition of powers

As the sections on LCOs and Assembly Measures above suggest, the Standing Orders for the Third Assembly contain provisions enabling the Welsh public to petition the National Assembly on any matter which appears to be within the powers of the Assembly or Assembly Government. A petition could be

- a request to the Assembly to consider making an LCO;
- a draft proposal for an Assembly Measure relating to a matter that is already devolved
- A request to repeal provisions of Acts of Parliament applying in Wales, where the matter is already devolved
- A request regarding the use of devolved executive powers by the Assembly Government

Similar procedures are used in other countries, but the Welsh public petition has been tailor made for Wales, and the Assembly is keen to publicise, and keen for the Welsh public and civil society to use this provision.

1000th public petition in Scotland: Alcopops

The 1000th public petition to be presented to the Scottish Parliament was presented on the 4th October 2006. The petition, presented by a group of school pupils from Glasgow, called on the Parliament to urge the Scottish Executive to investigate the public health impact of cheaply available alcohol

Procedures

The Welsh public are now able to call for draft LCOs and Measures to be considered by the National Assembly. The following conditions are attached to the presenting a petition:

- 10 signatures are necessary if the petitioner is not a body corporate;
- the request cannot be offensive;
- the petition has to be within the scope of the functions of the National Assembly or Assembly Government;
- it should not relate to a subject already considered less than a year earlier;
- it cannot be the same as a petition which has been presented by (or on behalf of) the same person or body corporate during the same Assembly.

This procedure will enable the Welsh public to suggest laws which the Presiding Officer can forward to the Assembly's Petitions Committee for discussion if he or she deems the petition admissible. Once the Petitions Committee has discussed it, called petitioners and witnesses for evidence, and reported on the petition, the committee can close the petition and no

further action will be taken, or it will then forward the petition to one of the following:

- the Assembly Government;
- an individual AM;
- the National Assembly as a whole;
- “any other person” such as the Children’s Commissioner for Wales.

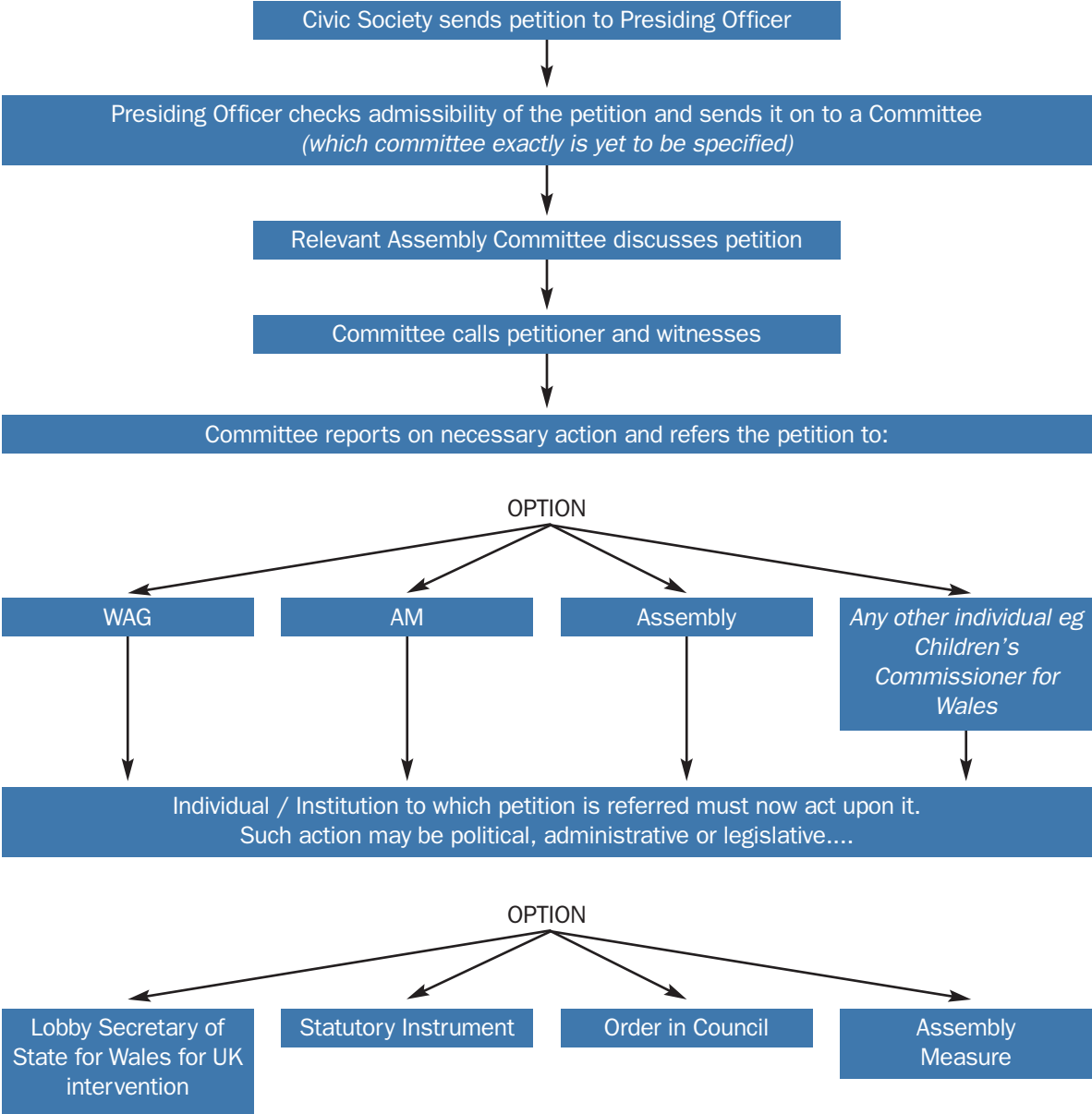
This individual or institution will then be responsible for acting upon the petition. Such action may be political, administrative or legislative in nature, with lobbying the Secretary of State for Wales for UK intervention, creating subordinate legislation, drafting and Order in Council or Measure all being possible outcomes.

Where can I influence?

The public petition provides a significant opportunity for civil society to exert real influence on the Welsh legislative process by presenting proposals for Welsh law, if it abides to certain conditions. A petition will have a better chance of being considered favourably if it is accompanied by an explanation of the defects in the current laws it seeks to modify, amend or repeal, and contains a summary of the contents of any proposed laws.

Similar petitioning arrangements apply in Scotland, but this is the first opportunity in Wales for proposals to be considered without depending on their adoption at an early stage by the party of Government, or supportive politician. The main difference between the Scottish and Welsh public petitions system is that *all* petitions must be considered by the National Assembly in Wales; consideration is *optional* in Scotland.

Public Petition Procedure



Marie Navarro, Legal Consultant



Primary Law-Making Powers



Part 4 of the 2006 Act includes provision for a primary law-making Assembly. If that happens, the National Assembly would acquire a much wider range of legislative powers over 20 Subjects, set out in Schedule 7 to the 2006 Act.³ All earlier Assembly Measures would remain in force, but any new legislation would be called an 'Assembly Act'.

There would have to be a referendum for these powers to be brought into effect. To call a referendum would require:

- a proposal from the Assembly Government
- the approval of two thirds of the Assembly;
- the approval of the Secretary of State for Wales, who will have to submit a request for a referendum to the UK Parliament
- approval (by a majority vote) by both Houses of Parliament; and
- a simple majority yes vote in a public referendum.

The 'One Wales' Agreement establishing the Labour-Plaid Cymru coalition government in 2007 contained a commitment to hold such a referendum before the next Assembly elections in 2007. In February 2010 the National Assembly resolved to call such a referendum, with support from all the party groups in the Assembly. After the UK General Election, the new Secretary of State, Cheryl Gillan, started work on calling the referendum, which is expected to take place on 3 March 2011.

Even this change would not deliver the recommendations of the Richard Commission. For instance, Part 4 of the Government of Wales Act 2006 does not address the Commission's views regarding:

- the number of Assembly Members such an Assembly would require;
- the method by which Assembly Members are elected;
- whether the Assembly should have tax-varying powers.

³ Schedule 7, as originally passed, is at http://opsi.gov.uk/acts/acts2006/ukpga_20060032_en_19#sch7



Conclusion



Conclusion

Undoubtedly, the new arrangements for Welsh governance redress some of the fundamental constitutional problems encountered during the first two terms of the Assembly.

The new arrangements introduce a multitude of unique and established mechanisms which enable citizen participation and a passage to Welsh political discourse that is not commonplace in recognised democracies. Wales' new powers and procedures facilitate influencing the passage of Welsh legislation in both Cardiff and London, and grant the Welsh public with the power to propose ideas for Welsh law.

We must herald these powers.

However, the Act also presents new and different challenges to civil society. Accessing information and delivering effective engagement in the context of cross-border procedures will test some of our organisations to their resourceful limit. Tomorrow's Wales will work with Welsh civil society towards eliminating potential obstacles. We have developed a Legislation Bank on our website www.tomorrow-wales.org to provide a forum within which Welsh civil and civil society can suggest and discuss their own priorities and proposals for legislation within the parameters of GOWA 2006.

The resource implication will also be great for Assembly Members and the Assembly Commission. With a significant increase in the workload of the Assembly expected, we will continue to monitor issues relating to extended hours, the progress of the process, and the adequacy of the current number of AMs to fulfil the job. We forecast that an increase in the number of our AMs may be necessary.

In the interest of Welsh democracy, Tomorrow's Wales will continue to work towards establishing a sustainable, participatory National Assembly for Wales which delivers good legislation for its citizens.

Sources of further information

Further information is available from many sources. We particularly recommend the following:

- from the National Assembly's website
 - the *Guide to the Legislative Process*:
<http://www.assemblywales.org/bus-home/bus-legislation/bus-legislation-guidance.htm>
 - details of the progress of LCOs and Assembly Measures on the National Assembly's website: <http://www.assemblywales.org/bus-home/bus-legislation/bus-legislation-progress-lcos-measures.htm>
 - an updated version of Schedule 5: http://www.assemblywales.org/bus-home/bus-legislation/bus-legislation-guidance/bus-legislation-guidance-documents/legislation_fields/schedule-5.htm
- Wales Legislation On-line, hosted by Cardiff University:
<http://www.wales-legislation.org.uk/>
- Enacted legislation is available from the Office for Public Sector Information website:
 - General Westminster legislation is at <http://opsi.gov.uk/acts.htm>
 - Westminster legislation affecting Wales only is at
<http://opsi.gov.uk/legislation/wales/w-act-si.htm>

National Assembly legislation is at <http://opsi.gov.uk/legislation/wales/w-measures.htm>

The Wales Council for Voluntary Action's website has information for the voluntary sector:

http://www.wcva.org.uk/policy/index.cfm?display_sitedeptid=9&display_sitetextid=179

Cymru Yfory contact details

Cymru Yfory - Tomorrow's Wales is an all-party and non-partisan group established following the publication of the Richard Commission's report in 2004. It is chaired by the Archbishop of Wales.

If you require any further information on Cymru Yfory Tomorrow Wales' work, please contact us *via* the following details:

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