

# Making New Laws for Wales – Legislation After the Government of Wales Act 2006

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## INTRODUCTION

1. This paper looks at how laws will be made for Wales under devolved powers following the implementation of the Government of Wales Act 2006<sup>2</sup>(“the 2006 Act”).
2. The 2006 Act completely repeals the provisions of the Government of Wales Act 1998<sup>3</sup>(“the 1998 Act”), insofar as the 1998 Act established the National Assembly for Wales<sup>4</sup> and gives effect to the UK Government’s response to the report of the Richard Commission on the powers and electoral arrangements of the National Assembly<sup>5</sup>, set out in the UK Government’s White Paper *Better Governance for Wales*.<sup>6</sup>
3. Under the 1998 Act the National Assembly was a unitary body corporate – a single legal entity. The Assembly carried out its functions through an executive committee, subsequently styled the “Welsh Assembly Government”<sup>7</sup>, which derived its authority by delegation from the National Assembly as a whole. The legislative competence of the National Assembly was restricted to the making of secondary legislation in the form of statutory

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<sup>2</sup> <http://www.opsi.gov.uk/acts/acts2006/20060032.htm>

<sup>3</sup> <http://www.opsi.gov.uk/acts/acts1998/19980038.htm>

<sup>4</sup> The provisions relating to the powers to reform certain Welsh public bodies and relating to the functions of other remain; see sections 28 (powers transfer functions of public bodies), 104 (HM Chief Inspector of Schools), 105 (Forestry Commissioners) and Part VI (WDA, Development Board for Rural Wales. Land Authority for Wales and Housing for Wales).

<sup>5</sup> <http://www.richardcommission.gov.uk/content/finalreport/report-e.pdf>

<sup>6</sup> [http://www.walesoffice.gov.uk/2005/better\\_governance\\_for\\_wales\\_report.pdf](http://www.walesoffice.gov.uk/2005/better_governance_for_wales_report.pdf)

<sup>7</sup> 1998 Act section 56.

- instruments through a legislative procedure that involved the membership of the Assembly as a whole.
4. In general terms, the 2006 Act creates a constitutional framework which is much more familiar to constitutional lawyers and commentators and which follows the fundamental principle of the separation of powers. The institutions created by the 2006 Act are: the National Assembly for Wales, the National Assembly Commission and the Welsh Assembly Government.

## **THE NEW INSTITUTIONS**

### **The National Assembly for Wales**

5. The National Assembly for Wales is a new elected legislative body.<sup>8</sup> It will serve for a four year term<sup>9</sup>, unless it votes by a two thirds majority for an early dissolution and the holding of an extraordinary general election<sup>10</sup>. If the Assembly votes to dissolve itself less than six months before an ordinary general election would have to be held then the extraordinary general election will take the place of the ordinary general election.
6. The National Assembly has sixty members, the same as the 1998 Act Assembly. Forty members are elected by the “first past the post” system for constituencies with the same boundaries as Westminster constituencies<sup>11</sup>. Twenty members are elected on a proportional regional list system to represent one of five electoral regions<sup>12</sup>. The electoral arrangements under the

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<sup>8</sup> 2006 Act, Part 1.

<sup>9</sup> Section 3

<sup>10</sup> Section 5

<sup>11</sup> For voting arrangements see section 6 of the 2006 Act

<sup>12</sup> Section 2 (2) and the Parliamentary Constituencies and Assembly Electoral Regions (Wales) Order 2006 (SI 2006/1041). The regions are North Wales, Mid and West Wales, South Wales West, South Wales Central and South Wales East. The electoral arrangements are set out in sections 8 and 9.

2006 Act differ from the provision in the 1998 Act in that a candidate may not stand at the same election for both a constituency and a regional list seat<sup>13</sup>.

### **The National Assembly Commission**

7. The National Assembly Commission is a body corporate chaired by the Presiding Officer and also comprising four other Assembly members appointed on a cross party basis, which will hold the assets and employ the staff of the National Assembly<sup>14</sup>.
8. The staff of the National Assembly will no longer be civil servants<sup>15</sup>. They will be lead by the Chief Executive, who will also hold the statutory office of Clerk to the Assembly<sup>16</sup>. The Clerk is the Accounting Officer for the National Assembly Commission and thus responsible for the legality, regularity and propriety of the Assembly Commission's expenditure.
9. The Commission is funded out of money voted annually by Parliament and provided to the Secretary of State for Wales through the Welsh Consolidated Fund<sup>17</sup>.

### **The Welsh Assembly Government**

10. The ministerial offices established by the 2006 Act are:
  - i. The First Minister appointed by the Queen from the members of the National Assembly and on the Assembly's nomination under section 46 of the 2006 Act.

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<sup>13</sup> Section 7

<sup>14</sup> Section 27

<sup>15</sup> Section 27(5)

<sup>16</sup> Section 26

<sup>17</sup> Sections 117, 118 and 120.

- ii. Welsh Ministers appointed by the First Minister from among members of the Assembly, with the approval of the Queen, under section 48 of the 2006 Act.
- iii. Deputy Welsh Ministers appointed by the First Minister from among members of the Assembly, with the approval of the Queen, under section 50 of the 2006 Act.
- iv. No more than twelve persons may be appointed Welsh Ministers or Deputy Welsh Ministers<sup>18</sup>. Ministerial titles and portfolios are not prescribed by statute and will, by convention, be determined by the First Minister.
- v. A law officer – the Counsel General to the Welsh Assembly Government - appointed by the Crown on the recommendation of the First Minister under section 49 of the 2006 Act. The Counsel General does not have to be a member of the Assembly. If the Counsel General is not an Assembly member he or she can attend the Assembly and speak at its proceedings but may not vote.

11. The Welsh Ministers and the Counsel General will comprise the Welsh Assembly Government<sup>19</sup>.<sup>20</sup> The Cabinet of the Welsh Assembly Government

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<sup>18</sup> Section 51

<sup>19</sup> Section 48(1)

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Details of the Welsh Assembly Government appointed following the 2007 general election are:

The Cabinet:

First Minister: Rt Hon *Rhodri Morgan*

Will lead on strategy, science, Europe and Wales in the World.

Minister for Health and Social Services: *Edwina Hart AM*

NHS, public health and social services.

Minister for Education, Culture and the Welsh Language: *Carwyn Jones AM*

Children and early years; schools; 14-19 year olds; skills; FE; HE; Welsh Language, sport and the arts.

Minister for the Economy and Transport: *Dr Brian Gibbons AM*

Economic development; transport and regeneration.

Minister for Sustainability and Rural Development: *Jane Davidson AM*

Climate change, sustainable development, environment, agriculture, energy and planning.

is not a statutory body and its composition will, by convention, be determined by the First Minister.

12. Members of the Welsh Assembly Government on appointment must now take the appropriate oath or affirmation of office before the Presiding Judge of the Wales Circuit<sup>21</sup>. Previously, Ministers only took the oath or affirmation as an Assembly member as they only exercised powers as delegates or sub delegates of the Assembly. The oath or affirmation of office, in addition to the requirement to take the oath or affirmation as Assembly members, therefore confirms the Welsh Ministers' separate status as Ministers of the Crown

13. The First Minister and the Welsh Ministers are to be collectively known as "the Welsh Ministers" and this will be the style used for most legal purposes, such as executing contracts and holding property and in any legal proceedings brought against the government<sup>22</sup>. There is a note at Annex 1 setting out the new arrangements for identifying the Welsh Ministers in legal instruments

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Minister for Social Justice and Public Service Delivery: Andrew Davies AM

Child poverty, housing, public service delivery, local government, the Spatial Plan and community safety.

Minister for Budget and Business: Jane Hutt AM

Budget, financial planning and control, Assembly business management including legislation.

In addition to the seven Cabinet posts above, the First Minister has appointed Carl Sargent AM as Chief Whip and Deputy Business Minister. He will attend all Cabinet meetings.

Counsel General to the Welsh Assembly Government: [to be appointed]

Four Deputy Welsh Ministers have been appointed:

Deputy Minister to the Minister for Health and Social Services with special responsibility for Social Services: *Gwenda Thomas AM*

Deputy Minister to the Minister for Economy and Transport with special responsibility for regeneration: *Huw Lewis. AM*

Deputy Minister for Social Justice and Public Service Delivery with special responsibility for housing: *Leighton Andrews AM*

Deputy Minister for Education, Culture and Welsh Language with special responsibility for skills: *John Griffiths AM*

<sup>21</sup> Section 55.

<sup>22</sup> Section 48(2).

and the style of attestation clauses to be used, pending the adoption of a new seal.

14. The Welsh Ministers are thus similar to the office of Secretary of State, which is a single office but which is exercised for different purposes by more than one individual. Similarly, the execution of a document or the exercise of a function by a Welsh Minister is the exercise of that function or the execution of that document on behalf of the Welsh Ministers as whole. The only exception is the Counsel General whose functions may either be exercisable only by the Counsel General by name or by the Counsel General concurrently with the Welsh Ministers.
15. For example, the Counsel General may institute, defend or appear in proceedings in his own name, in respect of any of the functions of the Welsh Assembly Government where appropriate for the protection for the promotion or protection public interest.<sup>23</sup> This is a power conferred the Counsel General only and not concurrently on the Welsh Ministers.
16. A provision that may be of significance in transactions involving the Welsh Ministers and another United Kingdom Government department or devolved administration is section 89, which deals with the question of how the Crown acting through a UK Government Department can create legal relations with itself acting through the Welsh Assembly Government. Section 89 deals with this by providing that the United Kingdom Government and a devolved administration other than the Welsh Assembly Government can, as between themselves, contract or transfer property rights and liabilities or create, vary or extinguish any property, rights or liabilities in the same manner as subjects of the Crown may<sup>24</sup>. For example, the Crown, in right of the Welsh Assembly Government could contract to transfer property to the Crown in right of, say,

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<sup>23</sup> Section 67

<sup>24</sup> Section 89 (1) and (2)

the Secretary of State for Defence and the provisions of that contract would be enforceable by the Welsh Ministers and the Secretary of State against each other just as if they were persons (“subjects”) not acting on behalf of the Crown<sup>25</sup>. Similarly, in any proceedings the Crown can be represented in more than one capacity and can institute proceedings in one capacity against the Crown in another capacity<sup>26</sup>.

17. The staff of the Welsh Assembly Government remains part of the Home Civil Service<sup>27</sup>. The principal accounting officer for the Welsh Ministers is the Permanent Secretary of the Welsh Assembly Government, who may designate members of staff of the Welsh Assembly Government as additional accounting officers<sup>28</sup>.

#### **THE NEW DISTRIBUTION OF POWERS**

18. The functions of the 1998 National Assembly, derived from the functions of the Secretary of State for Wales transferred to the Assembly and functions conferred on the Assembly either by further Transfer of Functions Orders or by later primary legislation have transferred to the Welsh Ministers<sup>29</sup>.
19. In consequence of this and of the separation of powers already referred to, the legislative powers of the First and Second Assemblies, which were secondary legislative powers, have now also transferred to the Welsh Ministers. The consequence of this is that the Welsh Assembly Government will now make secondary legislation in much the same way as the Secretary of State for Wales was accustomed to do prior to 1998.

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<sup>25</sup> Section 89 (5)

<sup>26</sup> Section 89 (3)

<sup>27</sup> Section 52(2)

<sup>28</sup> Section 133

<sup>29</sup> Section 162 and Schedule 11 paragraphs 30 and 31.

20. This means that secondary legislation will simply be made by the Welsh Ministers, although some will require approval by resolution of the Assembly and others will be subject to annulment by the Assembly.<sup>30</sup> The commencement orders to bring new legislation into effect will now also be made by the Welsh Ministers. This contrasts with the procedure under the 1998 Act for the making of Assembly Orders which was regulated by both the 1998 Act and the National Assembly's own Standing Orders and required the approval of the Assembly as a whole in plenary session except in exceptional cases – a procedure once described by the previous Clerk to the Assembly as “overblown”.
21. In future, the Assembly's oversight of the Welsh Ministers' exercise of their secondary legislative powers will be conducted by the Subordinate Legislation Committee whose function will be to report on statutory instruments and any other subordinate legislation required to be laid before the Assembly and whether the Assembly should pay special attention to any instrument or draft on the grounds of drafting or procedural irregularities.<sup>31</sup> This arrangement will now mirror the arrangements at Westminster for the scrutiny of statutory instruments and other subordinate legislation.
22. The 1998 Act also required the National Assembly to prepare and maintain various schemes or to conduct its business with regard to certain specified considerations. These were:
- a. A scheme for the exercise of its functions to sustain and promote local government, including the establishment of a “Partnership Council” consisting of AMs and representatives of local government<sup>32</sup>.

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<sup>30</sup> Schedule 11 paragraph 35.

<sup>31</sup> SO15

<sup>32</sup> 1998 Act section 113

- b. A scheme setting out how it would exercise its functions to promote the interests of voluntary organizations<sup>33</sup>.
- c. An obligation to consult with business on the effect of the exercise of its functions on business<sup>34</sup>.
- d. An obligation to make arrangements to secure that functions are exercised with due regard to the principle of equality of opportunity<sup>35</sup>.
- e. A scheme setting out how the Assembly will exercise its functions to promote sustainable development<sup>36</sup>.

In addition, the Planning and Compulsory Purchase Act 2004 required the Assembly to prepare and adopt a Wales Spatial Plan<sup>37</sup>.

23. Under the 2006 Act, the requirement to observe and to prepare and keep under review schemes is maintained and gathered together in sections 72 to 79, collectively referred to as ““Inclusive” approach to exercise of functions”. These provisions retain the requirements for the various schemes, but adopts a consistent procedural approach, with the following features:

- a. The scheme is prepared and adopted by the Welsh Ministers, following consultation.
- b. The scheme or any revised or amended scheme must be laid before the Assembly.
- c. At the end of each financial year the Welsh Ministers must publish a report on the implementation of the scheme in the preceding year and lay a copy before the Assembly.

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<sup>33</sup> 1998 Act section 114

<sup>34</sup> 1998 Act section 115

<sup>35</sup> 1998 Act section 120

<sup>36</sup> 1998 Act section 121

<sup>37</sup> Section 60

In applying these principles, the obligations to consult business and the Welsh Ministers obligations in respect of the Welsh language have been strengthened.

In the case of the Welsh language the obligations more closely apply to the Welsh Ministers the same obligations as apply to other public bodies under the Welsh Language Act 1993.

The Partnership Council is retained but will now consist of members from the Welsh Ministers, the Deputy Welsh Ministers and members of local authorities in Wales.

24. Similarly, The Wales Spatial Plan will also now be prepared by the Welsh Ministers; however, it must still be approved by the Assembly in plenary session.

#### **THE INTERNAL ARCHITECTURE OF THE NATIONAL ASSEMBLY**

25. A feature of the 1998 settlement was the extent to which the internal architecture of the National Assembly was prescribed by the 1998 Act. The statutory committees required by the Act were an executive committee (subsequently the Assembly Government Cabinet), the subject committees (one for each assembly secretary/Minister's portfolio), a subordinate legislation scrutiny committee, an audit committee and regional committees. It should also be recalled that the subject committees exemplified the uneasy hybrid nature of the 1998 Assembly, having both a chair and the relevant Minister as a member to "lead" the work of the committee.

26. By contrast, the 2006 Act deals shortly with committees and sub-committees, allowing them to be specified in standing orders and requiring them to be politically balanced. Otherwise the only statutory committee is the Audit

- Committee<sup>38</sup>. The first Standing Orders of the Assembly<sup>39</sup>, having now been made by the Secretary of State and having been drafted by the Second Assembly, are under the control of the Assembly, which can in future determine its own internal arrangements with considerably more flexibility<sup>40</sup>.
27. In addition to the standing committees specifically identified in the Standing Orders, the legislative procedures for both proposed Legislative Competence Orders and draft Assembly Measures will require the appointment of ad hoc or select legislative committees to consider them.
28. Having set out the institutional framework, it is appropriate next to turn to the sources of Welsh law on the coming into force of the 2006 Act, before considering how new law is now to be made by the National Assembly.

## SOURCES OF LAWS IN WALES

29. Following the 1998 Act the sources of law in Wales were:
- a. Primary Legislation
    - i. Acts of the UK Parliament applying to England and Wales as a single jurisdiction.
    - ii. Provisions in Acts of the UK Parliament applying to only to Wales.
    - iii. Acts of the UK Parliament applying only to Wales.
  - b. Subordinate Legislation

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<sup>38</sup> Sections 28, 29 and 30

<sup>39</sup> [http://www.walesoffice.gov.uk/2007/leg\\_SO\\_March2007.pdf](http://www.walesoffice.gov.uk/2007/leg_SO_March2007.pdf)

<sup>40</sup> Initially the standing committees will comprise: Business Committee (Standing Order 11), Scrutiny Committees (whose remit shall be determined by the Business Committee) (SO 12), Audit Committee (SO 13), Finance Committee (SO 14), Subordinate Legislation Committee (SO 15), Committee on Standards of Conduct (SO 16), Equality of Opportunity Committee (SO 17), Committee on European and External Affairs (SO 18), Committee for the Scrutiny of the First Minister (SO 19) and Regional Committees (if the members of the region request such a committee and two thirds of the members of the Assembly agree)(SO 20).

- i. Made by Whitehall for England and Wales as a single jurisdiction.
  - ii. Made by Whitehall (including the old Welsh Office) specifically for Wales.
  - iii. Made by the National Assembly under powers from the UK Parliament (Assembly Orders).
  - iv. Made by the National Assembly under Whitehall subordinate legislation including EU Designation Orders appointing the National Assembly to implement EU Directives.
30. As already noted, under the 2006 Act the powers of the 1998 Assembly to make subordinate legislation will now transfer to the Welsh Ministers. The result of this is that the elected Assembly, on the 2006 Act coming into force, has only a limited range of powers. In order to understand how the Assembly will now acquire further powers it is necessary to consider Schedule 5 of the 2006 Act and how its provisions will evolve.

## **UNDERSTANDING SCHEDULE 5**

31. The starting point for understanding the additional sources of law going forward under the 2006 Act is the proposals contained in the White Paper “Better Governance for Wales”.
32. The White Paper proposed greater use of so called “framework powers”, so that new Acts of the UK Parliament concerned with devolved fields would “delegate to the Assembly the maximum discretion in making its own provisions using secondary legislative powers”<sup>41</sup> and confer powers drafted “in a way which gives the Assembly wider and more permissive powers to

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<sup>41</sup> Better Governance for Wales, paragraph 1.24

determine the detail of how the provisions should be implemented in Wales”<sup>42</sup>.

33. The capacity for framework powers to be used to build up the legislative capacity of the Assembly and the extent to which Whitehall and Cathays Park would seize upon them following their endorsement in the White Paper was missed by most commentators considering the White Paper, who assumed that the Order in Council procedure (to which I will refer below) for conferring legislative competence would be the main route for giving the Assembly new legislative powers. However, the speed with which the UK Government legislated to put the 2006 Act on the statute book resulted in what were initially seen as separate and sequential steps in building the legislative capacity of the National Assembly being used in parallel.
34. As a result, the Education and Inspections Act 2006<sup>43</sup>, the NHS Redress Act 2006<sup>44</sup> and the Local Government and Public Involvement in Health Bill<sup>45</sup> and the Further Education and Training Bill<sup>46</sup>, all confer extensive legislative competence on the National Assembly through framework powers.
35. Before looking at the framework powers in detail though, it is important to understand the way in which the 2006 Assembly’s legislative powers are to be set out. For this it is necessary to look at Schedule 5 of the 2006 Act, which is the key to the next stage of devolution.
36. Part 1 of the Schedule identifies twenty “Fields”, which largely reflects the fields in which powers were originally transferred from the Secretary of State for Wales to the 1998 Assembly. The Fields are:
  - a. Field 1: agriculture, fisheries, forestry and rural development

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<sup>42</sup> Better Governance for Wales paragraph 3.12

<sup>43</sup> Sections 178 and 179

<sup>44</sup> Section 17

<sup>45</sup> Clause 184 and Schedule 14

<sup>46</sup> Clause 25

- b. Field 2: ancient monuments and historic buildings
- c. Field 3; culture
- d. Field 4: economic development
- e. Field 5: education and training
- f. Field 6: environment
- g. Field 7: fire and rescue services and promotion of fire safety
- h. Field 8: food
- i. Field 9: health and health services
- j. Field 10: highways and transport
- k. Field 11; housing
- l. Field 12; local government
- m. Field 13: National Assembly for Wales
- n. Field 14: public administration
- o. Field 15:social welfare
- p. Field 16:sport and recreation
- q. Field 17: tourism
- r. Field 18:town and country planning
- s. Field 19: water and flood defence
- t. Field 20: Welsh language

37. When the 2006 Act was passed the detail of each of these fields was blank, with the exception of field 13, which concerns the National Assembly itself and its own procedures. The provisions of the Education and Inspections Act 2006 and the NHS Redress Act 2006 referred to above were converted into framework powers within Fields 5 and 9 respectively<sup>47</sup>; while Schedule 14 of the Local Government and Public Involvement in Health Bill will populate field 12 with extensive powers in respect of local government; and clause 25 of

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<sup>47</sup> See the National Assembly for Wales (Conversion of Framework Powers)(Legislative Competence Order) 2007 (SI 2007/ 910) <http://www.opsi.gov.uk/SI/si2007/20070910.htm>

- the Further Education and Training Bill, when enacted, will add a further six matters to Field 5 – Education of schedule 5, giving legislative powers in respect of further education and training.
38. Annexed to this paper at Annex 2 is a version of Schedule 5 Part 1 with the framework powers added. When reading the extremely detailed nature of the powers conferred it needs to be remembered that to confer powers over whole fields would be to anticipate the powers for the Assembly to pass its own Acts in the fields set out in Schedule 7 of the Act, which will not be implemented unless a referendum has voted in favour of their implementation<sup>48</sup>, thus bringing about the final stage of legislative devolution for Wales.
39. There are certain general restrictions on the exercise of legislative powers in respect of Schedule 5 matters. These include a restriction on the removal of the powers of a Minister of the Crown and on the criminal penalties that legislation can create<sup>49</sup>. Certain legislation of a fundamental constitutional nature cannot be amended under the Schedule 5 powers<sup>50</sup>.
40. Although Schedule 5 represents a significant development of the legislative powers of the National Assembly, the descriptions of matters on which the Assembly can legislate by measure are still prescribed in fine detail. By way of comparison there is attached at Annex 3 a copy of Schedule 7 of the 2006 Act which sets out the legislative powers that the Assembly may acquire following a future referendum. A comparison of the powers relating to education illustrates the point. The matters on which the Assembly can legislate under Schedule 5 Field 5 occupy some two and a half pages. Under Schedule 7

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<sup>48</sup> This is the combined effect of sections 94(4) and 95(1) and (2).

<sup>49</sup> Schedule 5 Part 2 paragraphs 1 and 2.

<sup>50</sup> These are the European Communities Act 1972, Data Protection Act 1998, the un-repealed sections of the Government of Wales Act 1998, the Human Rights Act 1998, the Civil Contingencies Act 2004 and the Re-Use of Public Sector Information regulations 2005 (SI 2005/1505)

paragraph 5 the legislative powers in respect of education and training take up three lines including the single exception.

#### **A WORD ON ORDERS IN COUNCIL**

41. The other method proposed in the White Paper by which legislative powers can be acquired by the Assembly is by means of an Order in Council conferring the legislative competence by making further amendments to the fields in Part 1 of Schedule 5.
42. Orders in Council are an obscure corner of the legislative forest and it is probably fair to say that they are not a frequent topic of discussion even among constitutional experts. They derive from the orders issued by the Sovereign's Privy Council in exercise of the Royal prerogative. Historically, one of their uses was to exercise control over subordinate and colonial legislatures. For example, "Poyning's Law" passed by the Irish parliament in 1494 ensured that for the next 300 years Acts of the Irish parliament required the approval of the Privy Council. Thus Order in Council have authoritarian overtones and, as such, they pre-date the modern concepts of constitutional monarchy. Nowadays, Orders in Council are only made on the advice of Ministers and, in the domestic UK context, usually under specific statutory powers requiring the Order to be approved by Parliament before a recommendation can be made to the Privy Council that an Order be approved by the Queen in Council. An Order in Council is thus a superior form of subordinate legislation, usually of constitutional significance.
43. Orders in Council are also used in the areas of present day government conducted under the Royal prerogative, such as foreign affairs, or the United

Kingdom's remaining dependent territories and as such are not subject to prior Parliamentary scrutiny.<sup>51</sup>

## LEGISLATIVE COMPETENCE ORDERS<sup>52</sup>

44. The process of obtaining a Legislative Competence Order in Council ("LCO") under the 2006 Act will involve a number of stages at both Cardiff Bay and at Westminster<sup>53</sup>.

45. The Welsh Affairs Committee in preparing its report on "Legislative Competence Orders in Council", published in June 2007, took evidence from the Parliamentary Under Secretary of State for Wales on the approach Westminster would take in considering requests for LCO's, who said:

we are looking for the development of a convention that, in principle, Orders in Council will be supported ... the thrust of the Government of Wales Act [is] that these powers, when requested, as long as they are appropriate, within scope and not *ultra vires* ... will be granted ... the principle will be that these requests will be supported as long as they are appropriate, within scope, do not affect other Acts of Parliament or go outside the devolution settlement.

46. The potential scope of LCO's remains to be established, however. In giving evidence to the Welsh Affairs Select Committee both the Parliamentary Under Secretary of State for Wales and the Chair of the Assembly Committee on Standing Orders envisaged LCO's being "quite focused" and "relatively specific". On the other hand the 2006 Act enables the Assembly Government

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<sup>51</sup> For recent judicial consideration of Orders in Council see the decision of the Court of Appeal in the Chagos Islanders' litigation; *Secretary of State for Foreign and Commonwealth Affairs v. The Queen (on the application of Bancoult & others)* [2007] EWCA Civ 498 especially paragraphs. 31 – 36.

<sup>52</sup> The Report of the House of Common Welsh Affairs "Legislative Orders in Council" contains at Annex 2 two useful flow charts of the Legislative Competence Order in Council and Assembly Measure making procedures. See <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmwelaf/175/17502.htm>

<sup>53</sup> Section 95

to seek more widely drawn powers and the White Paper *Better Governance for Wales* stated that the powers sought might be “something very specific”, “something rather wider”, or “something considerably wider”. The Welsh Affairs Committee noted:

It therefore appears possible, in principle, that the Assembly Government may propose Orders that contain quite extensive power, if those are considered necessary in order to enable wide-ranging policy objectives to be secured.

47. The process of obtaining legislative powers through LCO will begin with a process of pre-legislative scrutiny. This part of the process is not specifically referred to in either the 2006 Act or the National Assembly’s Standing Orders. Nevertheless, the National Assembly, the Welsh Assembly Government and the Wales Office all envisage that the process of pre-legislative scrutiny will determine decisively the prospects of an LCO passing through the formal stages at Westminster and this is also made clear in the House of Commons Welsh Affairs Committee’s report. The report highlights the following features of pre-legislative scrutiny:

- a. Consultations between the Assembly Government and Whitehall departments via the Wales Office.
- b. Pre – legislative scrutiny of proposed LCO’s by both Houses of Parliament.
- c. In the House of Commons scrutiny could be by the Welsh Affairs Select Committee, an *ad hoc* committee or, in the case of particularly complex or contentious LCO’s, the Welsh Grand Committee, on which all Welsh MP’s sit.
- d. Pre – legislative consideration by the House of Lords should be concurrent with that by the Commons.

- e. At the same time, the National Assembly will be giving its own pre-legislative scrutiny to the proposed LCO.
  - f. The result will be three separate pre legislative reports Commons', Lords and Assembly), which the Assembly Government, private Assembly member, or the Assembly committee originating the proposal, will need to take into account in deciding how or whether to take the LCO through its formal stages, or whether to submit an amended proposal for reconsideration.
  - g. Pre-legislative scrutiny was expected to take between three and six months, with six months as a maximum.
48. The Welsh Affairs Committee considered that Westminster would have the capacity to manage four or five LCO's a year evenly paced throughout the year.
49. Once pre-legislative scrutiny is complete, the formal process within the National Assembly is regulated by the Assembly's Standing Order<sup>54</sup>. There are two stages:
- a. At the first stage a member of the government, a committee or a private member<sup>55</sup> table the "Proposed Order".
  - b. The Business Committee determines whether to refer the proposed order to a committee for detailed examination or propose to the Assembly in plenary session that there should be no detailed examination. If there has been detailed pre-legislative scrutiny then it may be expected that the proposed order will be sent straight to plenary session.

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<sup>54</sup> SO 22

<sup>55</sup> SO 22.46 – 54 make provision for a ballot of private Assembly members seeking leave to lay a Proposed Order.

- c. Once the committee has reported, or detailed consideration is dispensed with, the Proposed Order becomes a Draft Order and can be presented for the second or final approval stage not later than 40 days after the Draft Order has been introduced. A Draft Order cannot be amended at this stage; it is either approved or it fails<sup>56</sup>.
50. Once the Assembly has approved a draft order the First Minister sends it to the Secretary of State, who must within 60 days either lay it before the each House of Parliament, or give written notice of his refusal and his reasons. The reasons for refusal must be laid before the Assembly which must publish them<sup>57</sup>.
51. The Counsel General and the Attorney General can refer to the Judicial Committee of the Privy Council (or the Supreme Court of the United Kingdom, in due course, when it take over the jurisdiction of the Judicial Committee and that of the Judicial Committee of the House of Lords under the Constitutional Reform Act 2005) the question of whether a matter to be added to Schedule 5 by a draft Order in Council properly relates to a field listed in Schedule 5<sup>58</sup>.
52. It is to be expected that in practice legal doubts about an LCO proposal or objections by the Secretary of State can be expected to have been resolved during pre-legislative scrutiny.
53. From a purely legal perspective, the extent to which the refusal of the Secretary of State to lay a draft Legislative Competence Order (“LCO”) before Parliament could be challenged by way of judicial review is uncertain. The Secretary of State is certainly subject to judicial review by the High Court and an unreasonable refusal to lay an Order might, in principle, be capable of successful challenge. However, the Secretary of State may for proper political

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<sup>56</sup> SO 22.34 - 36

<sup>57</sup> Section 95 (7) and (8)

<sup>58</sup> Section 96

reasons not wish to lay an Order that sought, for example, to undermine policies of the UK government in a non devolved area. Another example might be a proposal that had been repeatedly laid before Parliament and rejected. In such circumstances, the Courts may well defer to the Secretary of State's judgment and hold that to do so would cross the threshold of interfering with the political process. However, in practice, the Secretary of State may only refuse in cases where he is advised that there are legal doubts about whether the Order is within the powers of the 2006 Act and leave political arguments on the approval or rejection to Parliament, where the government of the day can expect to get its way and where the process is outside the jurisdiction of the Court.

54. Once an LCO is laid before each House by the Secretary of State it becomes subject to an affirmative resolution procedure on a motion to recommend Her Majesty in Council to make the LCO. The LCO cannot be amended at this stage; it can only be approved or rejected. The Welsh Affairs Select Committee when it reported on the original White Paper recommended that, in principle, all LCO's should be debated on the floor of the House. However, the UK Government response did not support a blanket principle and favoured business managers considering the right mechanism on a case by case basis, so the option of the affirmative resolution being debated in committee at Westminster remains open<sup>59</sup>.
55. It needs to be borne in mind that all this procedure must be followed before the Assembly is able to begin its own legislative procedures for matters within its fields of competence. It is to this I now turn.

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<sup>59</sup> The House of Commons Welsh Affairs Committee Report on Legislative Competence Orders in Council contains an example of an LCO will look at Annex 1.

## ASSEMBLY MEASURES

56. Laws passed by the National Assembly under the authority of the powers set out in Schedule 5 and derived from either framework legislation or LCO's will be known as "Assembly Measures". Subject to the restrictions imposed by the extent of the fields and matters set out in Schedule 5, a Measure may make any provision that could be made by Act of Parliament, subject to the restriction that its provisions must apply to Wales or to functions exercisable in relation to Wales<sup>60</sup>.

57. These will be the key features of the procedure for making a Measure:

- a. The proposed Measure can be introduced by the First Minister, a Welsh Minister, a Deputy Welsh Minister, the Counsel General or a private Member.
- b. On or before introduction of the proposed measure, the Presiding Officer must decide if the Measure is within the Assembly's legislative competence and must publish a statement to that effect<sup>61</sup>. In doing this the Presiding Officer will take advice from the Legal Adviser to the Assembly Commission, who is part of the staff of the Chief Executive and Clerk of the Assembly.
- c. The proposed Measure must, on introduction, be accompanied by an Explanatory Memorandum which will cover the legislative competence of the Assembly, the policy objectives of the proposed Measure, the consultations carried out, an objective summary of the purpose and effect of each provision, a best estimate of costs of implementation, the powers of subordinate legislation to be conferred and the procedure to

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<sup>60</sup> Section 94

<sup>61</sup> Section 97

be used for their making and a report of the Auditor General where there is a charge to the Welsh Consolidated Fund<sup>62</sup>.

- d. The timetable for the consideration of the proposed Measure is under the control of the Business Committee<sup>63</sup>.
- e. The proposed Measure then proceeds to Stage 1, which is consideration of the general principles of the Measure. This may involve a reference of the general principles to a committee, which will be followed by a debate in plenary. Alternatively the Business Committee may decide not to refer consideration to a committee and the Member in charge of the proposed measure may propose that the Assembly agrees the general principles. When the general principles are approved or rejected Stage 1 is complete.
- f. Stage 2 is a committee stage. Consideration by committee cannot begin until 15 working days after the start of Stage 2, which begins the day after the completion of Stage 1<sup>64</sup>. The proposed Measure can be amended in committee and if it is amended a revised Explanatory Memorandum may be requested and this must be available five working days before the plenary meeting of the Assembly that takes Stage 3 of the proceedings.
- g. Stage 3<sup>65</sup> is the detailed consideration stage. This stage contains many familiar features common to Parliamentary procedure, such as the selection and grouping of amendments by the Presiding Officer and the ability for a Minister in charge of the Measure or the Business Committee to propose time table (“guillotine”) motions.

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<sup>62</sup> SO 23.18

<sup>63</sup> SO 23.19 and 23.20

<sup>64</sup> SO 23.29 – 23.41

<sup>65</sup> So 23.42 – 23.57

- h. The Final Stage – Stage 4 is a motion that the measure be passed. Such a motion can be proposed immediately on completion of Stage 3 or at a subsequent plenary session determined by the Business Committee. The motion to pass the Measure cannot be amended.
- i. After a Measure is passed there is a period of four weeks during which the Counsel General or the Attorney General can refer the Measure to the Supreme Court to determine if the Measure is within the legislative competence of the Assembly<sup>66</sup>. This can be shortened if the law officers' confirm that they do not intend to make a reference.
- j. During the same period of four weeks, the Secretary of State for Wales may intervene under section 101 and make an order to prohibit the measure proceeding for final approval by the Queen in Council, if there are reasonable grounds for believing the Measure:
  - i. would have an adverse effect on a matter that is not a matter specified in Schedule 5;
  - ii. might have a serious adverse effect on water resources, supply or quality in England;
  - iii. there would have an adverse effect on the operation of the law as it applies in England, or
  - iv. would be incompatible with international obligations, the interests of defence or those of national security.

In principle, such an intervention would be subject to the jurisdiction of the Court on judicial review, especially as the Secretary of State must give reasons for making the order. A challenge might succeed if it could be shown that the Secretary of State had acted irrationally or unreasonably or had misdirected himself in failing to take into account

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<sup>66</sup> Section 99

all material considerations or had taken into account irrelevant considerations in deciding to issue the prohibition.

- k. If a Measure is successfully challenged before the Supreme Court or is subject to a prohibition order by the Secretary of State, the Assembly Standing Orders provide for a Reconsideration Stage to be taken in plenary session for the purpose of resolving issues arising from a decision of the Supreme Court or a prohibition order made by the Secretary of State<sup>67</sup>.
- l. If a Measure survives reference to the Supreme Court and is not subject to the intervention of the Secretary of State, the Clerk of the Assembly will submit the Measure for approval by the Queen in Council and such approval is signified by an Order in Council<sup>68</sup>.

58. Assembly Standing Orders contemplate that Measures may be proposed as “Member Proposed Measures”<sup>69</sup> or that they may be proposed on the initiative of a committee<sup>70</sup>. Assistance in the drafting of such Measures will be available from the Legal Adviser to the Assembly Commission in a similar way to the assistance provided by Speaker’s Counsel at Westminster. If such a proposed Measure makes progress then it is possible, also on the basis of Westminster practice that technical drafting advice may also be offered by the government’s Legislative Counsel.

## **FRAMEWORK POWERS OR LCO’s**

59. So will the National Assembly be more likely to acquire legislative powers through the grant of framework power in Westminster primary legislation or by LCO? There are some early indications to be found in the report of the

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<sup>67</sup> SO 23.63 – 23.67

<sup>68</sup> Section 102

<sup>69</sup> SO 2.97 – 23.106

<sup>70</sup> SO 23.90 – 23.95

Welsh Affairs Committee and in the legislative programme announced to the Third National Assembly by the First Minister on 6<sup>th</sup> June 2007.

60. The Welsh Affairs Committee noted the Bills already before Parliament – the Local Government and Public Involvement in Health Bill and the Further Education and Training Bill – that add Matters to Fields in Schedule 5 by primary legislation. The Committee also reported the intention of the UK Government to continue to add Matters by “framework powers” and noted that this may be the usual way in which the Assembly acquires significant powers. The Committee went on to observe that a single clause in primary legislation adding Matters to Schedule 5, would be unlikely to receive the detailed pre – legislative security put in place for LCO’s and concern was expressed at the lack of formal channels for the National Assembly to communicate its views to members at Westminster.
61. The use of framework powers may also result in general, rather than specific powers, being conferred on the National Assembly and negating the detailed scrutiny envisaged for the more specific LCO’s.
62. The National Assembly legislative programme announced on 6<sup>th</sup> June 2007 proposed six LCO’s – thus at the upper end of the Welsh Affairs Committee’s assessment of “manageability” and three Measures under the legislative powers already available to the National Assembly and conferred by the NHS Redress Bill and the Education and Inspections Act 2006.
63. The six LCOs will focus on:
  - Tackling child poverty and assisting vulnerable children. The LCO will include placing a duty on all public bodies to demonstrate their commitment to tackling child poverty.

- Environmental protection and waste management, to link long-standing public concern over litter and other environmental matters with sustainable waste management.
- Gaining enhanced legislative powers in relation to additional learning needs to enable a substantial restructuring of the statementing system in special education.
- Seeking powers to legislate in the field of charges for home care and other non-residential social services.
- Affordable housing.
- The Welsh language.

In addition, the First Minister set out three proposed Assembly Measures using existing powers already devolved which would:

- Give greater rights to patients through an NHS Redress Measure. This will simplify ways that the public can seek redress from the NHS if things go wrong, establishing new rights, new processes and new outcomes for patients.
- Reform the 14-19 curriculum, producing greater learning opportunities and diversity to prepare young people for their working lives.
- Deal with school transport, to include integrated systems, the creation of a green public transport system and the expansion of the Safer Routes to Schools scheme.

## **PETITIONS**

64. Finally, reference should be made to Assembly Standing Order 28, which sets out the procedure for public petition. The arrangements are straightforward. The Presiding Officer must be satisfied that the petition contains at least 10 signatures or is presented by a corporate body or an unincorporated

association; that it is not couched in offensive terms and that it relates to a matter within the Assembly's legislative competence. Repetitive petitions can be rejected.

65. If accepted, the petition will be referred to a committee who may refer it to the government, report to the Assembly or take any other appropriate action. A committee may close consideration of a petition at any time and notify the petitioner accordingly.
66. Petitions can be used as a means of presenting legislative proposals to the Assembly with at least the prospect of the proposal being aired before a committee. A sympathetic committee may even be willing to hold hearings for petitioners to present their case further.

## **REFLECTIONS**

67. In conclusion, I would offer the following reflections on how the next stage of devolved Welsh legislation could develop:
  - a. As recently noted by the Welsh Affairs Committee, the convenience for the UK Government to continue to confer legislative powers on the Assembly by adding new framework powers to Schedule 5 should not be underestimated, as the Westminster legislative programme regularly contains Bills dealing with subjects that are devolved in Wales. To that extent the development of Welsh legislative competence will still involve the Assembly Government in seizing the opportunities offered by the Westminster legislative programme. The existence of minority Labour administration at Cardiff Bay will, I suggest, result in this route being used more extensively due to its convenience when compared with the process of securing the passage of a Legislative Competence Order in Cardiff Bay by a minority Assembly Government.

- b. The continuing capacity of the constitution to develop new conventions should not be ignored. Westminster still legislates for Scotland from time to time on subjects that are devolved but where any Scottish legislation would be virtually identical to that for England and Wales (for example, some legislation implementing international agreements falls into this category). In such cases the Scottish Parliament formally resolves to consent to Westminster legislating for Scotland in a devolved field – the so-called “Sewel Convention”. Standing Order 26 of the National Assembly’s Standing Orders provides for a legislative consent procedure in respect of UK Government Bills that make provision within the Assembly’s legislative competence or has a negative consequence on the Assembly’s legislative competence. The strictly limited legislative capacity of an Assembly still consisting of only 60 Members must always be borne in mind in this regard.
- c. The success or otherwise of this stage of legislative devolution will be judged by the quality of the legislation made in Wales rather than its quantity. The Assembly is not an experienced legislative corps and the civil service needs to gain experience in managing a Welsh legislative programme rather than one almost entirely driven by the legislative priorities of Westminster.
- d. The government should also take its time to establish the style of legislative drafting that best reflects the requirement for bilingual legislation<sup>71</sup>. The inclusion of only three Measures in the legislative programme may be a reflection of this.
- e. Assembly legislation will be unicameral legislation and there is no equivalent to the revising role that House of Lords currently plays at

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<sup>71</sup> Section 156(2) of the 2006 Act enables the Welsh Ministers by order to specify the meanings of Welsh and English words when used in Assembly legislation, including secondary legislation.

Westminster. It remains to be seen whether this will be perceived as a weakness threatening the quality of Welsh legislation.

- f. The opportunity to consolidate existing legislation relating to Wales should not be ignored by the Assembly. The diverse sources of legislation for Wales have already been noted. Future legislative activity would be facilitated if the Assembly were to adopt a programme of consolidation for the major devolved areas such as the NHS, education, local government and housing. Assistance from the Law Commission could be called upon to assist in this work, which is a specialized area of legislative drafting.
- g. The powers of the Secretary of State to block the presentation of LCO's and to prohibit Measures going forward for approval are potentially very significant in a "co-habitation" situation and the extent to which those powers would be subjected to judicial control remains an open question. The availability of these powers "in reserve" will also be a potent factor in influencing the course of pre – legislative scrutiny of LCO's
- h. The tracking of the amendments to Schedule 5 will be crucial in aiding the public understanding of the National Assembly's legislative powers. Assurances were given to the Welsh Affairs Committee that a constantly updated version would be available on the National Assembly's website. It is also hoped that shortly the newly launched UK Statute Law Database maintained by the Ministry of Justice will also update Schedule 5 within two weeks of amendments passing into law<sup>72</sup>.

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<sup>72</sup> <http://www.statutelaw.gov.uk/>

**“RWY’N GWELD O BELL Y DYDD YN DOD.....”<sup>73</sup>**

68. This paper has not considered in any detail the provisions of Part 4 of the 2006 Act, which will finally confer on the Assembly – following a further referendum - the power to pass its own Acts. When this occurs the complexities of Schedule 5 will cease to apply and the subjects that the Assembly can legislate upon will be those set out in Schedule 7, subject to the exceptions also there specified. As already noted the relative simplicity and breadth of powers within the twenty defined subjects in Schedule 7 is a striking contrast to the sprawling complexity of the model enshrined in Schedule 5 and to operate within which will be the task of the Third National Assembly for Wales.

## **ANNEX 1**

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<sup>73</sup> Translated: “I see from afar the day is coming...” (from a missionary hymn by Watcyn Wyn 1844-1905)

## LEGAL SERVICES GUIDANCE

### EXECUTING INSTRUMENTS AS DEEDS UNDER AUTHORITY OF THE WELSH MINISTERS - FORM OF WORDS TO USE UNTIL THEIR SEAL IS AVAILABLE

1. This note sets out the form of words to be used for executing deeds under the authority of the Welsh Ministers until their seal is available for use.
2. The Royal Mint say that they will not be able to let us have the new seal until 1 June 2007 at the earliest, and it could be several days later than that.
3. Until the seal becomes available, it will be necessary for the Welsh Ministers to rely on section 1(2) and (3) Law of Property (Miscellaneous Provisions) Act 1989 and section 90(1) GOWA 2006.
4. The form of words set out below should be used when a Welsh Minister, or anyone acting under the authority of the Welsh Ministers, executes an instrument as a deed. It is based on the wording adopted in Legal Services GOWA 2006 Desk Instruction No 2<sup>74</sup>, but with additional wording at the beginning and an attestation clause at the end to meet the requirements of section 1(3)(a)(i) of the 1989 Act.

**EXECUTED AS A DEED by *[Director of Legal Services] [or Insert name and job title of person authorised by Director of Legal Services - authorisation will be restricted in the same way as applies to persons authorised to authenticate sealed instruments]* under the authority of the Minister for *[complete title of Minister in question, which may, if applicable, be the First Minister]* as one of the Welsh Ministers.”**

In the presence of : ***[ Insert name, job title and an address for the witness ]***

5. As soon as the seal becomes available this note will cease to apply. Instead, the seal will need to be authenticated in accordance with section 90(2) GOWA 2006. An LS Desk Instruction setting out the form of words to be used then will be issued shortly.

<sup>74</sup> Dated 4 May 2007

JEFF GODFREY

25 May 2007

**ANNEX 2**

**Schedule 5 Government of Wales Act 2006**

**Sowing Matters Added Within Fields by:**  
**NHS Redress Act 2006**  
**Education and Inspections Act 2006**  
**Local Government and Public Involvement in Health Bill 2006-07**  
**And**  
**Further Education and Training Bill 2006-07**

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SCHEDULE 5

Section 94

ASSEMBLY MEASURES

**PART 1**

MATTERS

*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*

*Matter 5.1*

Provision about the categories of school that may be maintained by local education authorities.

*Matter 5.2*

Provision about the establishment and discontinuance of schools maintained by local education authorities, their change from one category to another and their alteration in other respects.

*Matter 5.3*

Provision about the admission of pupils to schools maintained by local education authorities.

*Matter 5.4*

Provision about the curriculum in schools maintained by local education authorities.

*Matter 5.5*

Provision about school attendance, the behaviour of pupils at school, school discipline and the exclusion of pupils from school (including the duties of parents in connection with those matters).

*Matter 5.6*

Provision about the making of arrangements for the provision of education for persons of compulsory school age who have been excluded from schools or who for any other reason would not otherwise receive suitable education.

*Matter 5.7*

Provision about entitlement to primary, secondary and further education and to training.

*Matter 5.8*

Provision about the provision of services that are intended to encourage, enable or assist people—

- (a) to participate effectively in education or training,
- (b) to take advantage of opportunities for employment, or
- (c) to participate effectively in the life of their communities.

*Matter 5.9*

Provision about food and drink provided on school premises or provided for children at a place where they receive education or childcare.

*Matter 5.10*

Provision about the travel of persons receiving primary, secondary or further education or training to and from the schools or other places where they receive it.

*Matter 5.11*

Provision for and in connection with securing the provision of facilities for post-16 education or training.

*Matter 5.12*

Provision for and in connection with the establishment and dissolution of—

- (a) institutions concerned with the provision of further education, and
- (b) bodies that conduct such institutions, including the circumstances in which an educational institution becomes or ceases to be an institution concerned with the provision of further education.

Provision about—

- (a) the conduct and functions of such institutions and bodies that conduct such institutions;
- (b) the property, rights and liabilities of such institutions the property, rights and liabilities of such institutions and bodies that conduct such institutions;
- (c) property held by any person for the purposes of such an institution;
- (d) the governance and staff of such institutions.

*Matter 5.13*

Provision for and in connection with securing collaboration—

- (a) between bodies that conduct institutions concerned with the provision of further education, or
- (b) between one or more such bodies and other persons or bodies that have functions relating to education or training in Wales, including, in particular, provision for and in connection with the establishment of bodies for the purpose of discharging functions on behalf of one or more persons or bodies that are party to arrangements for collaboration.

*Matter 5.14*

The provision of financial resources for and in connection with—

- (a) education or training provided by institutions concerned with the provision of further education;
- (b) post-16 education or training provided otherwise than by such institutions;
- (c) the carrying out of research relating to education or training falling within paragraph (a) or (b).

*Matter 5.15*

The inspection of—

- (a) education or training provided by institutions concerned with the provision of further education;
- (b) post-16 education or training provided otherwise than by such institutions;
- (c) the training of teachers and specialist teaching assistants for schools;
- (d) services of the kinds mentioned in matter 5.8.

*Matter 5.16*

The provision of advice and information in connection with, and the carrying out of studies in relation to, any of the kinds of education, training or services mentioned in matter 5.15.

### *Exceptions*

This does not include provision about any of the following—

- (a) the regulation of the use of motor vehicles on roads, their construction and equipment and conditions under which they may be so used;
- (b) road traffic offences;
- (c) driver licensing;
- (d) driving instruction;
- (e) insurance of motor vehicles;
- (f) drivers' hours;
- (g) traffic regulation on special roads, pedestrian crossings, traffic signs and speed limits;
- (h) public service vehicle operator licensing;
  - (i) the provision and regulation of railway services, apart from financial assistance which—
    - (i) does not relate to the carriage of goods,
    - (ii) is not made in connection with a railway administration order, and
    - (iii) is not made in connection with Council Regulation (EEC) 1191/69 as amended by Council Regulation (EEC) No. 1893/91 on public service obligations in transport;
- (j) transport security;
- (k) shipping, apart from financial assistance for shipping services to, from or within Wales;
- (l) navigational rights and freedoms, apart from regulation of works which may obstruct or endanger navigation;
- (m) technical and safety standards of vessels;
- (n) harbours, docks, piers and boatslips, apart from those used or required wholly or mainly for communications between places in Wales;
- (o) registration of local bus services, and the application and enforcement of traffic regulation conditions in relation to those services.

### *Interpretation of this field*

In this field—

“post-16 education” means—

- (a) education (other than higher education) suitable to the requirements of persons who are above compulsory school age, and
- (b) organised leisure-time occupation connected with such education;

“post-16 training” means—

- (a) training suitable to the requirements of persons who are above compulsory school age, and
- (b) organised leisure-time occupation connected with such training.

References in this field to an institution concerned with the provision of further education are references to an educational institution, other than a school or an institution within the higher education sector (within the meaning of the Further and Higher Education Act 1992), that is conducted (whether or not exclusively) for the purpose of providing further education.

Expressions used in this field and in the Education Act 1996 have the same meaning in this field as in that Act.

*Field 6: environment*

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

*Field 8: food*

*Field 9: health and health services*

*Matter 9.1*

Provision for and in connection with the provision of redress without recourse to civil proceedings in circumstances in which, under the law of England and Wales, qualifying liability in tort arises in connection with the provision of services (in Wales or elsewhere) as part of the health service in Wales.

*Interpretation of this field*

In this field—

“the health service in Wales” means the health service continued under section 1(1) of the National Health Service (Wales) Act 2006;

“illness” has the same meaning as in that Act;

“patient” has the same meaning as in that Act;

“personal injury” includes any disease and any impairment of a person's physical or mental health;

“qualifying liability in tort” means liability in tort owed in respect of or consequent upon personal injury or loss arising out of or in connection with breach of a duty of care owed to any person in connection with the diagnosis of illness or the care or treatment of any patient.”.

*Field 10: highways and transport*

*Field 11: housing*

*Field 12: local government*

*Matter 12.1*

Provision for and in connection with—

- (a) the constitution of new principal areas and the abolition or alteration of existing principal areas, and
- (b) the establishment of councils for new principal areas and the abolition of existing principal councils.

“Principal area” means a county borough or a county in Wales and “principal council” means a council for a principal area.

*Matter 12.2*

Provision for and in connection with—

- (a) the procedure for the making and coming into force of byelaws, and
- (b) the enforcement of byelaws.

“Byelaws” means those of a class which may be confirmed by the Welsh Ministers (but the provision which may be made includes provision to remove a requirement of confirmation).

*Matter 12.3*

Any of the following—

- (a) the principles which are to govern the conduct of members of relevant authorities,
- (b) codes of conduct for such members,
- (c) the conferral on any person of functions relating to the promotion or maintenance of high standards of conduct of such members (including the establishment of bodies to have such functions),
- (d) the making or handling of allegations that members (or former members) of relevant authorities have breached standards of conduct, including in particular—

- (i) the investigation and adjudication of such allegations and reports on the outcome of investigations,
- (ii) the action that may be taken where breaches are found to have occurred,
- (c) codes of conduct for employees of relevant authorities.

For the purposes of this matter—

“relevant authority” has the same meaning as in Part 3 of the Local Government Act 2000, except that other than in paragraph (d) it does not include a police authority,

“member” includes a co-opted member within the meaning of that Part.

#### *Matter 12.4*

Provision for and in connection with strategies of county councils and county borough councils for promoting or improving the economic, social or environmental well-being of their areas or contributing to the achievement of sustainable development in the United Kingdom, including provision imposing requirements in connection with such strategies on other persons with functions of a public nature.

#### *Matter 12.5*

Provision for and in connection with—

- (a) the making of arrangements by relevant Welsh authorities to secure improvement in the way in which their functions are exercised,
- (b) the making of arrangements by relevant Welsh authorities for the involvement in the exercise of their functions of people who are likely to be affected by, or interested in, the exercise of the functions, and
- (c) the assessment and inspection of the performance of relevant Welsh authorities in exercising their functions.

The following are “relevant Welsh authorities”—

- (a) a county council, county borough council or community council in Wales,
- (b) a National Park authority for a National Park in Wales,
- (c) a fire and rescue authority in Wales constituted by a scheme under section 2 of the Fire and Rescue Services Act 2004 or a scheme to which section 4 of that Act applies,

- (d) a levying body within the meaning of section 74(1) of the Local Government Finance Act 1988 in respect of which the county council or charging authority referred to in section 74(1)(b) of that Act was a council or authority for an area in Wales,
- (e) a body to which section 75 of that Act applies (special levies) and which as regards the financial year beginning in 1989 had power to levy a rate by reference to property in Wales

*Field 13: National Assembly for Wales*

*Matter 13.1*

Creation of, and conferral of functions on, an office or body for and in connection with investigating complaints about the conduct of Assembly members and reporting on the outcome of such investigations to the Assembly.

*Matter 13.2*

Conferral of functions on the Assembly Commission for and in connection with facilitating the exercise by the Assembly of its functions (including the provision to the Assembly of the property, staff and services required for the Assembly's purposes).

*Matter 13.3*

Provision for and in connection with the payment of salaries, allowances, pensions and gratuities to or in respect of Assembly members, the First Minister, any Welsh Minister appointed under section 48, the Counsel General and any Deputy Welsh Minister.

*Matter 13.4*

Provision for and in connection with the creation and maintenance of a register of interests of Assembly members and the Counsel General.

*Matter 13.5*

Provision about the meaning of Welsh words and phrases in—

- (a) Assembly Measures,
- (b) subordinate legislation made under Assembly Measures, and
- (c) subordinate legislation not so made but made by the Welsh Ministers, the First Minister or the Counsel General.

*Matter 13.6*

Provision for and in connection with the procedures for dealing with proposed private Assembly Measures, including, in particular—

- (a) procedures for hearing the promoters of, and objectors, to proposed private Assembly Measures,
- (b) the persons who may represent such promoters and objectors, and the qualifications that such persons must possess,
- (c) the imposition of fees for and in connection with the promotion of proposed private Assembly Measures, and
- (d) the assessment of costs incurred in connection with proposed private Assembly Measures.

*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*

**ANNEX 3**

**Schedule 7 Government of Wales Act 2006**

**Legislative Subjects for Acts of the National Assembly for Wales**  
**(Post referendum)**

**PART 1**

SUBJECTS

*Agriculture, fisheries, forestry and rural development*

**1** Agriculture, including animal health and welfare. Plant health. Plant varieties and seeds.

Horticulture. Fisheries. Fish health. Forestry. Rural development.

*Exceptions—*

Hunting with dogs.

Regulation of scientific or other experimental procedures on animals.

Import and export control, and regulation of movement, of animals, plants and other things, apart from (but subject to provision made by or by virtue of any Act of Parliament relating to the control of imports or exports)—

(a) the movement into and out of, and within, Wales of animals, animal products, plants, plant products and other things related to them for the purposes of protecting human, animal or plant health, animal welfare or the environment or observing or implementing obligations under the Common Agricultural Policy, and

(b) the movement into and out of, and within, Wales of animal feedstuff, fertilisers and pesticides (or things treated by virtue of any enactment as pesticides) for the purposes of protecting human, animal or plant health or the environment.

Authorisations of veterinary medicines and medicinal products.

*Ancient monuments and historic buildings*

**2** Archaeological remains. Ancient monuments. Buildings and places of historical or architectural interest. Historic wrecks.

*Culture*

**3** Arts and crafts. Museums and galleries. Libraries. Archives and historical records. Cultural activities and projects.

*Exceptions—*

Public lending right.

Broadcasting.

Classification of films, and video recordings.

Government indemnities for objects on loan.

Payments to Her Majesty's Revenue and Customs in respect of property accepted in satisfaction of tax, apart from property in which there is a Welsh national interest.

*Economic development*

**4** Economic regeneration and development, including social development of communities, reclamation of derelict land and improvement of the environment. Promotion of business and competitiveness.

*Exceptions—*

Fiscal, economic and monetary policy and regulation of international trade.

Regulation of anti-competitive practices and agreements, abuse of dominant position and monopolies and mergers.

Intellectual property, apart from plant varieties.

Creation, operation, regulation and dissolution of types of business association.

Insolvency.

Product standards, safety and liability, apart from in relation to food (including packaging and other materials which come into contact with food), agricultural and horticultural products, fish and fish products, seeds, fertilisers and pesticides (and things treated by virtue of any enactment as pesticides).

Consumer protection, including the sale and supply of goods to consumers, consumer guarantees, hire purchase, trade descriptions, advertising and price indications, apart from in relation to food (including packaging and other materials which come into contact with food), agricultural and horticultural products, fish and fish products, seeds, fertilisers and pesticides (and things treated by virtue of any enactment as pesticides).

Financial services, including investment business, banking and deposit-taking, collective investment schemes and insurance.

Financial markets, including listing and public offers of securities and investments, transfers of securities, insider dealing and money laundering.

Telecommunications, wireless telegraphy (including electromagnetic disturbance), internet services and electronic encryption.

Postal services, post offices and the Post Office, apart from financial assistance for the provision of services (other than postal services and services relating to money or postal orders) to be provided from public post offices.

Generation, transmission and supply of electricity, apart from pollution.

Energy conservation, apart from the encouragement of energy efficiency otherwise than by prohibition or regulation.

Coal, including mining and subsidence, apart from land restoration and other environmental matters.

Oil and gas, apart from pollution.

Units and standards of weights and measurement and the regulation of trade so far as involving weighing, measuring and quantities.

Industrial Development Advisory Board.

*Education and training*

**5** Education, vocational, social and physical training and the careers service. Promotion of advancement and application of knowledge.

*Exception—*

Research Councils.

*Environment*

**6** Environmental protection, including pollution, nuisances and hazardous substances. Collection, management and disposal of waste. Land drainage and land improvement. Countryside and open spaces (including the designation and regulation of national parks and areas of outstanding natural beauty). Nature conservation and sites of special scientific interest. Protection of natural habitats, coast and marine environment (including seabed). Biodiversity. Genetically modified organisms. Smallholdings and allotments. Common land. Town and village greens. Burial and cremation.

*Fire and rescue services and promotion of fire safety*

**7** Fire and rescue services. Promotion of fire safety otherwise than by prohibition or regulation.

*Food*

**8** Food and food products. Food safety (including packaging and other materials which come into contact with food). Protection of interests of consumers in relation to food.

“Food” includes drink.

*Health and health services*

**9** Promotion of health. Prevention, treatment and alleviation of disease, illness, injury, disability and mental disorder. Control of disease. Family planning. Provision of health services, including medical, dental, ophthalmic, pharmaceutical and ancillary services and facilities. Clinical governance and standards of health care. Organisation and funding of national health service.

*Exceptions—*

Abortion.

Human genetics, human fertilisation, human embryology, surrogacy arrangements.

Xenotransplantation.

Regulation of health professionals (including persons dispensing hearing aids).

Poisons.

Misuse of and dealing in drugs.

Human medicines and medicinal products, including authorisations for use and regulation of prices.

Standards for, and testing of, biological substances (that is, substances the purity or potency of which cannot be adequately tested by chemical means).

Vaccine damage payments.

Welfare foods.

Health and Safety Commission, Health and Safety Executive and Employment Medical Advisory Service and provision made by health and safety regulations.

*Highways and transport*

**10** Highways, including bridges and tunnels. Streetworks. Traffic management and regulation.

Transport facilities and services.

*Exceptions—*

Road freight transport services, including goods vehicles operating licensing.

Regulation of use of motor vehicles and trailers on roads, their construction and equipment and conditions under which they may be so used, apart from regulation of use of vehicles carrying animals for purpose of protecting human, animal or plant health, animal welfare or the environment.

Road traffic offences.

Driver licensing.

Driving instruction.

Insurance of motor vehicles.

Drivers' hours.

Traffic regulation on special roads, pedestrian crossings, traffic signs and speed limits.

International road transport services for passengers.

Public service vehicle operator licensing.

Documents relating to vehicles and drivers for purposes of travel abroad and vehicles brought temporarily into Wales by persons resident outside the United Kingdom.

Vehicle excise duty and vehicle registration.

Provision and regulation of railway services, apart from financial assistance which—

- (a) does not relate to the carriage of goods,
- (b) is not made in connection with a railway administration order, and
- (c) is not made in connection with Council Regulation (EEC) No. 1893/91 on public service obligations in transport.

Rail transport security.

Railway heritage.

Aviation, air transport, airports and aerodromes, apart from—

- (a) financial assistance to providers or proposed providers of air transport services or airport facilities or services,
- (b) strategies by the Welsh Ministers or local or other public authorities about provision of air services, and
- (c) regulation of use of aircraft carrying animals for purpose of protecting human, animal or plant health, animal welfare or the environment.

Shipping, apart from—

- (a) financial assistance for shipping services to, from or within Wales, and
- (b) regulation of use of vessels carrying animals for purpose of protecting human, animal or plant health, animal welfare or the environment.

Navigational rights and freedoms, apart from regulation of works which may obstruct or endanger navigation.

Technical and safety standards of vessels.

Harbours, docks, piers and boatslips, apart from those used or required wholly or mainly for the fishing or agricultural industries, for recreation or for communications between places in Wales.

Carriage of dangerous goods (including transport of radioactive material).

### *Housing*

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

### *Local government*

**12** Constitution, structure and areas of local authorities. Electoral arrangements for local authorities. Powers and duties of local authorities and their members and officers. Local government finance.

“Local authorities” does not include police authorities.

### *Exceptions—*

Local government franchise.

Electoral registration and administration.

Registration of births, marriages, civil partnerships and deaths.

Licensing of sale and supply of alcohol, provision of entertainment and late night refreshment.

Anti-social behaviour orders.

Local land charges, apart from fees.

Sunday trading.

Provision of advice and assistance overseas by local authorities in connection with carrying on there of local government activities.

### *National Assembly for Wales*

**13** Complaints about Assembly members (including provision for and about an office or body for investigating such complaints and reporting outcome of investigations). Assembly Commission. Salaries, allowances, pensions and gratuities for and in respect of Assembly members, the First Minister, Welsh Ministers appointed under section 48, the Counsel General and Deputy Welsh Ministers. Register of interests of Assembly members and the Counsel General. Meaning of Welsh words and phrases in Assembly Measures and Acts of the Assembly, in subordinate legislation made under Assembly Measures and Acts of the Assembly and in other subordinate legislation if made by the Welsh Ministers, the First Minister or the Counsel General. Private legislation in the Assembly. Financial assistance for political groups to which Assembly members belong. The Welsh Seal. Arrangements for the printing of Acts of the Assembly, of subordinate legislation made under Assembly Measures and Acts of the Assembly and of other subordinate legislation if made by the Welsh Ministers, the First Minister or the Counsel General.

*Public administration*

**14** Public Services Ombudsman for Wales. Audit, examination, regulation and inspection of auditable public authorities. Inquiries. Equal opportunities in relation to equal opportunity public authorities. Access to information held by open access public authorities. The following are “auditable public authorities” and “equal opportunity public authorities”—

- (a) the Assembly,
- (b) the Assembly Commission,
- (c) the Welsh Assembly Government,
- (d) persons who exercise functions of a public nature and in respect of whom the Welsh Ministers exercise functions,
- (e) persons who exercise functions of a public nature and at least half of the cost of whose functions in relation to Wales are funded (directly or indirectly) by the Welsh Ministers, and
- (f) persons established by enactment and having power to issue a precept or levy.

The following are “open access public authorities”—

- (a) the Assembly,
- (b) the Assembly Commission,

(c) the Welsh Assembly Government, and

(d) authorities which are Welsh public authorities, within the meaning of the Freedom of Information Act 2000 (c. 36).

*Exception—*

Regulation of the profession of auditor.

*Social welfare*

**15** Social welfare including social services. Protection and well-being of children (including adoption and fostering). Care of young adults, vulnerable persons and older persons, including care standards. Badges for display on motor vehicles used by disabled persons.

*Exceptions—*

Child support.

Child trust funds.

Tax credits.

Child benefit and guardian's allowance.

Social security.

Intercountry adoption, apart from adoption agencies and their functions, and functions of “the Central Authority” under the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption.

The Children's Commissioner (established under the Children Act 2004 (c. 31)).

Family law and proceedings, apart from—

(a) welfare, advice to courts, representation and provision of information, advice and other support to children ordinarily resident in Wales and their families, and

(b) Welsh family proceedings officers.

*Sport and recreation*

**16** Sport and recreational activities.

*Exception—*

Betting, gaming and lotteries.

*Tourism*

**17** Tourism.

*Town and country planning*

**18** Town and country planning, including listed buildings, conservation areas, hazardous substances. Caravan sites. Spatial planning. Mineral workings. Urban development. New towns. Protection of visual amenity.

*Water and flood defence*

**19** Water supply and sewerage, including abstraction and impounding of water, water resources management, water quality, water industry, water charges and representation of consumers of water. Safety of reservoirs and other inland water. Management and protection of watercourses and flood prevention.*Exceptions—*

Appointment of water undertakers or sewerage undertakers for any area most of which is in England.

Licensing of water suppliers.

*Welsh language*

**20** Welsh language

*Exception—*

Use of the Welsh language in courts.